Date and Time: Wednesday, October 25, 2023 7:17:00 PM CST

Job Number: 208893463

Documents (100)

1. [Facebook, Inc. v. BrandTotal Ltd., 2021 U.S. Dist. LEXIS 165209]

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

2. [Torrey v. Infectious Diseases Soc'y of Am., 2021 U.S. Dist. LEXIS 252509]

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

   Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

3. [Rex - Real Estate Exch., Inc. v. Zillow Inc., 2021 U.S. Dist. LEXIS 167281]

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

   Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

4. [Snack Joint LLC v. OCM Grp. USA, NJ, Inc., 2021 U.S. Dist. LEXIS 169923]

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

   Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

5. [Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898]

   Client/Matter: -None-

   Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

6. *Mears v. Cal. W. Sch. of Law E-File, 2021 Cal. Super. LEXIS 56277*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

7. *Anesthesia Assocs. of Ann Arbor, PLLC v. Blue Cross Blue Shield of Mich., 2021 U.S. Dist. LEXIS 174021*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

8. *Dichello Distribs., Inc. v. Anheuser-Busch, LLC, 2021 U.S. Dist. LEXIS 174001*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

9. *To v. Jbs USA Food Co. Holdings (In re Cattle Antitrust Litig.), 2021 U.S. Dist. LEXIS 255869*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

10. *Twin Bridges Waste & Recycling, LLC v. County Waste & Recycling Serv., 2021 U.S. Dist. LEXIS 175158*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

11. *Wisk Aero LLC v. Archer Aviation Inc., 2021 U.S. Dist. LEXIS 205669*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

12. *Truck-Lite Co. v. Grote Indus., 2021 U.S. Dist. LEXIS 177769*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

13. *TCS John Huxley Am., Inc. v. Sci. Games Corp., 2021 U.S. Dist. LEXIS 178014*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

14. *Somers v. QVC, Inc., 2021 U.S. Dist. LEXIS 181757*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

15. *Best Carpet Values, Inc. v. Google LLC, 2021 U.S. Dist. LEXIS 183693*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

16. [BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr., 563 F. Supp. 3d 578]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

17. [Ddmb, Inc. v. Visa, Inc., 2021 U.S. Dist. LEXIS 249783]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

18. [Intel Corp. v. Seven Networks, 562 F. Supp. 3d 454]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

19. [Simons v. Signature, 2021 Cal. Super. LEXIS 41886]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

20. [Stromberg v. Qualcomm Inc., 14 F.4th 1059]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

21. [Blenheim Capital Holdings v. Lockheed Martin Corp., 2021 U.S. Dist. LEXIS 198334]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

22. Four In One Co. v. SK Foods, L.P., 2021 U.S. Dist. LEXIS 189606

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

23. Fund Liquidation Holdings LLC v. UBS AG, 2021 U.S. Dist. LEXIS 189499

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

24. Lucasys Inc. v. Powerplan, Inc., 576 F. Supp. 3d 1331

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

25. Sky Federal Credit Union v. Fair Isaac Corp. (In re FICO Antitrust Litig.), 2021 U.S. Dist. LEXIS 189371

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

26. Vention, Inc. v. JB Hamlet, LLC, 2021 NCBC LEXIS 86

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

27. [Maralago Cay Homeowners Ass'n v. MHC Operating Ltd. P'ship, 2021 U.S. Dist. LEXIS 196385]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

28. [IIT, Inc. v. Commc'ns Distribs., LLC, 2021 U.S. Dist. LEXIS 221265]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

29. [Tithonus Partners II, LP v. Chi. Title Ins. Co., 566 F. Supp. 3d 314]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

30. [Ikspan, Inc. v. Ruben, 2021 Cal. Super. LEXIS 114505]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

31. [Ikspan, Inc. v. Ruben, 2021 Cal. Super. LEXIS 114641]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

32. Mobile Emergency Hous. Corp. v. HP, Inc., 2021 U.S. Dist. LEXIS 263433

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

33. Wyndham Vacation Ownership v. Montgomery, 2021 U.S. Dist. LEXIS 207860

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

34. Roohipour v. Blue Cross Blue Shield of Ill., 2021 U.S. Dist. LEXIS 211272

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

35. Litovich v. Bank of Am. Corp., 568 F. Supp. 3d 398

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

36. Nat'l Prods. v. Innovative Intelligent Prods., LLC, 2021 U.S. Dist. LEXIS 206081

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

37. *Agency Y LLC v. DFO Global Performance Commerce Ltd., 2021 U.S. Dist. LEXIS 250331*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

38. *In re Farm-Raised Salmon & Salmon Prods. Antitrust Litig., 2021 U.S. Dist. LEXIS 232374*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

39. *In re Zetia Ezetimibe Antitrust Litig., 2021 U.S. Dist. LEXIS 252117*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

40. *Nimbus Therapeutics, LLC v. Celgene Corp., 570 F. Supp. 3d 100*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

41. *Prevent USA Corp. v. Volkswagen AG, 17 F.4th 653*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

42. *Teradata Corp. v. SAP SE, 570 F. Supp. 3d 810*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

43. *In re Tank Antitrust Litigation, 2021 U.S. Dist. LEXIS 232424*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

44. *Oj Commerce LLC v. Kidcraft, Inc., 2021 U.S. Dist. LEXIS 220356*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

45. *In re January 2021 Short Squeeze Trading Litig., 2021 U.S. Dist. LEXIS 221509*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

46. *Lifewatch Servs. v. Highmark, Inc., 2021 U.S. App. LEXIS 35044*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

47. *Neurelis, Inc. v. Aquestive Therapeutics, Inc., 71 Cal. App. 5th 769*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

48. Casey v. General Motors, LLC, 2021 U.S. Dist. LEXIS 224078

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

49. In re Ranbaxy Generic Drug Application Antitrust Litig., 573 F. Supp. 3d 459

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

50. Rite Aid Corp. v. Am. Express Travel Related Servs. Co. (In re Am. Express Anti-Steering Rules Antitrust Litig.), 19 F.4th 127

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

51. Abuelhawa v. Santa Clara Univ., 2021 U.S. Dist. LEXIS 229335

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

52. United States v. Jindal, 2021 U.S. Dist. LEXIS 227474

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

53. *Coronavirus Reporter v. Apple Inc., 2021 U.S. Dist. LEXIS 249564*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

54. *In re Broiler Chicken Antitrust Litig., 2021 U.S. Dist. LEXIS 228367*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

55. *Prevent DEV GmbH v. Adient PLC, 2021 U.S. Dist. LEXIS 229553*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

56. *Veritext Corp. v. Bonin, 2021 U.S. Dist. LEXIS 229661*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

57. *In re Broiler Chicken Antitrust Litig., 2021 U.S. Dist. LEXIS 229895*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**

Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

58. [City of Oakland v. Oakland Raiders, 20 F.4th 441]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

59. [Romoff v. GM LLC, 574 F. Supp. 3d 782]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

60. [Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., 20 F.4th 466]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

61. [Ass'n for Accessible Meds. v. Bonta, 562 F. Supp. 3d 973]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

62. [Cisco Sys. v. Dexon Computer, Inc., 2021 U.S. Dist. LEXIS 236322]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

63. *REX-Real Estate Exch., Inc. v. Brown, 2021 U.S. Dist. LEXIS 235892*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

64. *Netafim Irrigation, Inc. v. Jain Irrigation, Inc., 562 F. Supp. 3d 1073*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

65. *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig., 2021 U.S. Dist. LEXIS 239220*

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

66. *In re Turk. Antitrust Litig. v. Agri Stats, Inc., 2021 U.S. Dist. LEXIS 250390*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

67. *In re Insulin Pricing Litig., 2021 U.S. Dist. LEXIS 241582*

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

68. *In re Mallinckrodt PLC, 638 B.R. 57*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

69. *Hurley v. Nat'l Basketball Players Ass'n, 2021 U.S. Dist. LEXIS 244270*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

70. *In re Oncology & Hematology Specialists, P.A., 2021 N.J. Super. Unpub. LEXIS 3144*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

71. *Int'l Constr. Prods. LLC v. Ring Power Corp., 2021 U.S. Dist. LEXIS 252480*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

72. *McCarthy v. Intercontinental Exch., Inc., 2021 U.S. Dist. LEXIS 245093*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

73. *Singh v. Am. Racing-Tioga Downs Inc., 2021 U.S. Dist. LEXIS 246306*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

74. Value Drug Co. v. Takeda Pharm., U.S.A., Inc., 2021 U.S. Dist. LEXIS 246364

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

75. Value Drug Co. v. Takeda Pharms., U.S.A., Inc., 2021 U.S. Dist. LEXIS 247162

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

76. Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC, 22 F.4th 103

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

77. Josephs v. Marzan, 2022 U.S. Dist. LEXIS 2035

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

78. Khan v. Presence Chi. Hosps. Network, 2022 U.S. App. LEXIS 294

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

79. [Reilly v. Apple Inc., 578 F. Supp. 3d 1098]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

80. [FTC v. Facebook, Inc., 581 F. Supp. 3d 34]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

81. [AMC Entm't Holdings, Inc. v. iPic-Gold Class Entm't, LLC, 638 S.W.3d 198]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

82. [FTC v. Shkreli, 581 F. Supp. 3d 579]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

83. [Klein v. Facebook, Inc., 580 F. Supp. 3d 743]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

84. *Molina Healthcare, Inc. v. Celgene Corp., 2022 U.S. Dist. LEXIS 9022*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

85. *City of Miami v. Eli Lilly & Co., 2022 U.S. Dist. LEXIS 11696*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

86. *In re Dealer Mgmt. Sys. Antitrust Litig., 581 F. Supp. 3d 1029*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

87. *George & Co. LLC v. Target Corp., 2022 U.S. Dist. LEXIS 16090*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

88. *Hill v. AQ Textiles LLC, 582 F. Supp. 3d 297*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

89. *Witches Brew Tours LLC v. New Orleans Archdiocesan Cemeteries, 2022 U.S. Dist. LEXIS 14763*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

90. *United States v. DaVita Inc., 2022 U.S. Dist. LEXIS 16188*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

91. *Novartis Pharma AG v. Regeneron Pharms., Inc., 582 F. Supp. 3d 26*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

92. *In re Foreign Exch. Benchmark Rates Antitrust Litig., 2022 U.S. Dist. LEXIS 18083*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

93. *In re Bystolic Antitrust Litig., 583 F. Supp. 3d 455*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

94. *Peterson v. Sutter Med. Found., 2022 U.S. Dist. LEXIS 19241*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

95. Affiliated Foods, Inc. v. TriUnion Seafoods LLC (In re Packaged Seafood Prods. Antitrust Litig.), 2022 U.S. Dist. LEXIS 61593

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

96. Venture Inv. Group Vig v. V., 2022 Cal. Super. LEXIS 4021

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

97. Harris Cnty. v. Eli Lilly & Co., 2022 U.S. Dist. LEXIS 27715

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

98. In re Broiler Chicken Antitrust Litig., 2022 U.S. Dist. LEXIS 27824

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

99. Snow v. Align Tech., Inc., 586 F. Supp. 3d 972

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

100. *JSW Steel (USA) Inc. v. Nucor Corp., 586 F. Supp. 3d 585*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

Facebook, Inc. v. BrandTotal Ltd.

United States District Court for the Northern District of California

August 31, 2021, Decided; August 31, 2021, Filed

Case No. 20-cv-07182-JCS

Reporter
2021 U.S. Dist. LEXIS 165209 *; 2021 WL 3885981

FACEBOOK, INC., Plaintiff, v. BRANDTOTAL LTD., et al., Defendants.

Prior History: Facebook, Inc. v. BrandTotal Ltd., 2020 U.S. Dist. LEXIS 204564 (N.D. Cal., Nov. 2, 2020)

Core Terms

advertising, counterclaim, unfair, anti trust law, defamation, prong, motion to dismiss, networking, diligence, amend, allegations, competitors, collected, user, deadline, leave to amend, market power, Third-Party, antitrust, violates, scheduling order, analytics, privacy, courts, media, relevant market, market share, implicated, permission, platforms

Counsel: **[*1]** For Facebook, Inc., a Delaware corporation, Plaintiff: Allison Schultz, Ari Holtzblatt, Robin C. Burrell, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Jason Jonathan Kim, Jeff R. R. Nelson, Ann Marie Mortimer, Hunton Andrews Kurth LLP, Los Angeles, CA; Joseph Michael Levy, Wilmer Cutler Pickering Hale and Dorr LLP, Palo Alto, CA; Sonal N. Mehta, Thomas G. Sprankling, Wilmer Cutler Pickering Hale and Dorr LLP, Palo Alto, CA.

For BrandTotal Ltd., an Israeli corporation, Unimania, Inc., a Delaware corporation, Defendants, Counter-claimants: Rudolph A. Telscher, LEAD ATTORNEY, Husch Blackwell LLP, St. Louis, MO; David Matthew Stauss, Husch Blackwell LLP, United Sta, Denver, CO; Dustin L. Taylor, PRO HAC VICE, Husch Blackwell LLP, Denver, CO; Jeffrey Michael Rosenfeld, Karl Stephen Kronenberger, Kronenberger Rosenfeld, LLP, San Francisco, CA; Kara Renee Fussner, Husch Blackwell, St. Louis, MO; Ryan B Hauer, Husch Blackwell LLP, United Sta, Chicago, IL.

For Facebook, Inc., a Delaware corporation, Counter-defendant: Sonal N. Mehta, LEAD ATTORNEY, Wilmer Cutler Pickering Hale and Dorr LLP, Palo Alto, CA; Jason Jonathan Kim, Jeff R. R. Nelson, Ann Marie Mortimer, Hunton Andrews Kurth **[*2]** LLP, Los Angeles, CA.

Judges: JOSEPH C. SPERO, Chief Magistrate Judge.

Opinion by: JOSEPH C. SPERO

Opinion

ORDER REGARDING MOTION FOR LEAVE TO AMEND AND MOTION TO DISMISS SECOND AMENDED COUNTERCLAIMS

Re: Dkt. Nos. 161, 169

I. INTRODUCTION

Plaintiff Facebook, Inc. brought this action asserting that Defendants BrandTotal Ltd. and Unimania, Inc. (collectively, "BrandTotal") improperly collected data from Facebook's social networks. BrandTotal, which is in the business of analyzing advertising data collected from social media websites, asserts counterclaims based on Facebook's efforts to block its collection of data. The Court previously dismissed some of BrandTotal's counterclaims, including a counterclaim under the "unfair" prong of California's Unfair Competition Law (the "UCL"), which the Court dismissed with leave to amend. BrandTotal has amended that counterclaim and seeks leave to assert a new counterclaim for defamation. Facebook opposes adding the new defamation counterclaim and moves again to dismiss the amended UCL "unfairness" counterclaim. The Court held a hearing on August 27, 2021. For the reasons discussed below, BrandTotal's motion for leave to add a defamation counterclaim is DENIED, and Facebook's motion **[*3]** to dismiss the "unfairness" counterclaim is GRANTED. Facebook shall answer the surviving counterclaims, which are not affected by this order, no later than September 14, 2021.[1]

II. BACKGROUND

This order assumes the parties' familiarity with the background of the case, which is set forth at greater length in the Court's previous orders denying BrandTotal's motion for a temporary restraining order, Order Denying TRO (dkt. 63),[2] granting Facebook's motion to dismiss BrandTotal's original counterclaims with leave to amend, Order re 1st MTD (dkt. 108),[3] and granting in part Facebook's motion to dismiss BrandTotal's first amended counterclaims, Order re 2d MTD (dkt. 158).[4] The factual allegations summarized here are drawn from BrandTotal's counterclaims, which are taken as true for the purpose of Facebook's motion to dismiss. Nothing in this order should be construed as resolving any issue of fact that might be disputed at a later stage of the case.

A. BrandTotal's Allegations

In brief, and as is relevant to the present motions, Facebook operates social networks with billions of users, including the eponymous Facebook network and Instagram. BrandTotal collects advertising data from various social **[*4]** networks, including Facebook's, to prepare analysis that it sells to corporate advertisers. One of the means that BrandTotal has used to collect such data is a program called UpVoice, where users whom BrandTotal calls "panelists" voluntarily install a browser extension that tracks and records the advertisements displayed to those users through social media, and in return, BrandTotal provides those panelists gift cards as compensation. The version of UpVoice in use before commencement of this litigation automatically recorded not only data about the ads that users saw, but also users' demographic information, which the browser extension collected from Facebook.

On September 21, 2020, Facebook wrote to Google that UpVoice was "improperly scraping user PII (e.g., gender, relationship status, ad interests, etc.) without proper disclosure." 2d Am. Counterclaim ("SACC," dkt. 161-2) ¶ 69. Google removed UpVoice from its Chrome web store, significantly limiting UpVoice's availability and effectiveness, which in turn limited BrandTotal's ability to gather data for its corporate customers. *Id.* ¶ 72. Facebook has also removed BrandTotal's accounts from Facebook's networks. *Id.* ¶ 68.

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[1] The parties have consented to the jurisdiction of a magistrate judge for all purposes pursuant to *28 U.S.C. § 636(c)*.

[2] *Facebook, Inc. v. BrandTotal Ltd., 499 F. Supp. 3d 720 (N.D. Cal. 2020)*. Citations herein to previous orders in this case refer to page numbers of the versions filed in the Court's ECF docket.

[3] *Facebook, Inc. v. BrandTotal Ltd., No. 20-cv-07182-JCS, 2021 U.S. Dist. LEXIS 31558, 2021 WL 662168 (N.D. Cal. Feb. 19, 2021)*.

[4] *Facebook, Inc. v. BrandTotal Ltd., No. 20-cv-07182-JCS, 2021 U.S. Dist. LEXIS 108137, 2021 WL 2354751 (N.D. Cal. June 3, 2021)*.

During this **[*5]** litigation, BrandTotal modified UpVoice to automatically collect only data about ads and to rely on panelists self-reporting their demographic information, and Facebook has agreed not take action against that modified version of UpVoice pending the outcome of this case without providing advance notice to BrandTotal. *See* Order Denying as Moot Mot. for Prelim. Inj. (dkt. 160).

B. Previous Orders and Relevant Procedural History

The Court previously dismissed BrandTotal's claim for violation of the "unfair" prong of the UCL, with leave to amend, for failure to allege at least a threatened violation of the antitrust laws, or some special circumstances that would allow that a claim to proceed without a clear connection to the antitrust laws. Order re 1st MTD at 16-17; Order re 2d MTD at 24-28. The Court noted that BrandTotal had not alleged either a coherent and plausible product market or an exception to the general rule that a market participant may permissibly refuse to deal with a rival. Order re 2d MTD at 26-28.

At a case management conference on February 19, 2021, the Court set a deadline of March 22, 2021 for the parties to seek leave to amend their pleadings, adopting the date jointly **[*6]** proposed in the parties' case management statement. Civil Minute Order (dkt. 106); *see* Case Mgmt. Statement (dkt. 99) at 12. On March 18, 2021, the Court granted the parties' stipulation to extend the deadline to amend pleadings from March 22, 2021 to May 21, 2021 to accommodate the time needed for BrandTotal to produce discovery that might be relevant to Facebook amending its complaint. *See* dkt. 130. As an exception to that deadline, the Court's June 3, 2021 order on Facebook's second motion to dismiss allowed BrandTotal to amend certain claims the Court dismissed without prejudice—for interference with BrandTotal's contracts with investors, for interference with BrandTotal's prospective economic advantage with respect to potential customers, and for violation of the "unfair" prong of the UCL—no later than June 25, 2021. Order re 2d MTD at 30.

C. Counterclaims at Issue

BrandTotal's second amended counterclaims include counterclaims the Court previously allowed to proceed (which are not at issue in the present motion), as well as a new counterclaim for defamation, SACC ¶¶ 140-51, and an amended counterclaim for violation of the UCL's "unfair" prong, *see id.* ¶¶ 152-77. The latter now **[*7]** rests on an alleged "market for Third-Party Commercial Advertising Information on personal social networking services in the United States," or in the alternative, such information pertaining to advertising "on the Facebook.com site and Instagram platform." *Id.* ¶¶ 155-59. "Third-Party Commercial Advertising Information" is defined as "analytics about non-SIEP advertisements run by third-party business[es]." *Id.* ¶ 15.[5]

D. The Parties' Arguments

BrandTotal moves for leave to add the new defamation counterclaim, arguing there is good cause to modify the scheduling order under *Rule 16(b)(4) of the Federal Rules of Civil Procedure* because "facts of this case are unusual and identifying the cause of action that fits and redresses the full harm of this situation, complex." Defs.' Mot. (dkt. 161) at 6. BrandTotal also argues that amendment should be allowed under the liberal standard of *Rule 15(a)(2)*. *Id.* at 6-7. Facebook contends that BrandTotal learned of the relevant facts underlying its defamation counterclaim months before it filed its first amended counterclaims in March of 2021, and thus was not diligent in waiting until well after the May 2021 deadline for amendment to seek to add this new counterclaim. Pl.'s Mot. & Opp'n (dkt. 169) at 5-7. Facebook **[*8]** also argues that leave to amend would be futile because its statement to

[5] "SIEP" refers to "social issues, elections or politics." Facebook provides more public information about SIEP advertisements than it provides about to other ads. *See* SACC ¶ 22. SIEP ads are not directly at issue in this case and are generally not relevant to BrandTotal's clients.

Google about BrandTotal's failure to provide sufficient disclosures was true, citing a potential issue with shared computers. *Id.* at 7-8.

Facebook moves to dismiss once again BrandTotal's counterclaim under the UCL's "unfair" prong for failure to allege a plausible relevant market, *id.* at 9-12, failure to allege monopoly power, *id.* at 12-13, and failure to allege an exception to the rule allowing refusal to deal, *id.* at 13-17.[6] BrandTotal argues that it has alleged a violation of the spirit of the antitrust laws because Facebook is unfairly relying on an order the Federal Trade Commission ("FTC") to exclude competitors from the market for advertising data. Defs.' Opp'n & Reply (dkt. 170) at 8-10. BrandTotal also contends that it has sufficiently alleged a product market (or more specifically, two potential product markets in the alternative) and monopoly power. *Id.* at 10-14. As for refusal to deal, BrandTotal argues that it "is not asking Facebook to authorize BrandTotal's access" to advertising data, but instead seeking to bar Facebook from using third parties like Google and the FTC to interference with BrandTotal's **[*9]** business, and challenging Facebook's removal of BrandTotal's accounts on Facebook, which eliminated BrandTotal's ability to advertise its own services on Facebook. *Id.* at 14-16. BrandTotal contends that Facebook's reports to Google and the FTC do not implicate the refusal-to-deal rule, and that BrandTotal's accounts and past course of dealing in advertising on Facebook fall within the exception recognized by *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*. Defs.' Opp'n & Reply at 10-14.

In a "Notice of Supplemental Event" filed after briefing on the present motions had closed, BrandTotal submitted: (1) an August 3, 2021 press release by Facebook indicating that it had disabled access by certain New York University researchers who had been collecting advertising data in a manner at least arguably similar to BrandTotal, with Facebook having acted purportedly to protect user privacy and comply with an order by the FTC; and (2) an August 5, 2021 letter from an FTC official to Facebook's CEO asserting that the FTC's order did not prohibit Facebook allowing the sort of research at issue, that Facebook had failed to comply with a commitment to update the FTC about significant events, and that Facebook's press release was misleading. **[*10]** *See* dkt. 173. These developments are not relevant to the Court's analysis of the present motions.

III. ANALYSIS

A. Motion for Leave to Amend

1. Legal Standard

Deviations from scheduling orders, including with respect to amendment of pleadings, are governed by *Rule 16 of the Federal Rules of Civil Procedure*, which provides that such orders "may be modified only for good cause and with the judge's consent." *Fed. R. Civ. P. 16(b)(4)*. BrandTotal concedes that *Rule 16(b)(4)* governs its motion in this case. *See* Defs.' Opp'n & Reply at 3-4.

The Ninth Circuit has established a standard for such modification that focuses on the diligence of the party seeking relief from a deadline:

> Unlike *Rule 15(a)*'s liberal amendment policy . . . , *Rule 16(b)*'s "good cause" standard primarily considers the diligence of the party seeking the amendment. The district court may modify the pretrial schedule "if it cannot reasonably be met despite the diligence of the party seeking the extension." *Fed. R. Civ. P. 16* advisory committee's notes (1983 amendment). Moreover, carelessness is not compatible with a finding of diligence and

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[6] Facebook also moves to dismiss BrandTotal's counterclaim under the "unlawful" prong of the UCL to the extent that it rests on the new defamation counterclaim. The parties agree that to the extent that counterclaim is based on the defamation counterclaim (as opposed to the tortious interference counterclaims the Court previously allowed to proceed) they rise or fall together. *See* Defs.' Opp'n & Reply at 17.

> offers no reason for a grant of relief. Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon **[*11]** the moving party's reasons for seeking modification. If that party was not diligent, the inquiry should end.

Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992) (citations omitted). Courts look to a party's diligence not only in complying with the scheduling order after it has been issued, but also "in creating a workable *Rule 16* scheduling order," as well as "in seeking amendment of the *Rule 16* order, once it became apparent that [the party] could not comply with the order." *Jackson v. Laureate, Inc., 186 F.R.D. 605, 607 (E.D. Cal. 1999)*.

2. BrandTotal Has Not Shown Diligence

"BrandTotal does not dispute that it learned of Facebook's false statement to Google through discovery in the December 2020-January 2021 timeframe and then sought to amend in June 2021," but argues that the complexity of factual and legal issues in this case, and its good faith attempt to assert a related claim under the "fraudulent" prong of the UCL in the first instance, demonstrate good cause for delay. Defs.' Opp'n & Reply at 4-5.

While this case contains a number of complex issues, the question of whether a purportedly false statement about BrandTotal that harmed BrandTotal's business interests might support a defamation claim is not among them. BrandTotal has identified no complexity with respect to that counterclaim that would have **[*12]** prevented BrandTotal from including it in BrandTotal's March 5, 2021 first amended counterclaims (which included all of the factual allegations on which BrandTotal now rests its defamation counterclaim)—much less anything that prevented BrandTotal from at least raising the possibility of amendment and seeking an extension of the amendment deadline before it expired on May 21, 2021, several months after BrandTotal discovered the facts at issue.

District courts have rejected motions to amend a scheduling order to permit amendment based on facts previously alleged:

> In sum, the allegations Plaintiff seeks to add to the complaint are not comprised of newly discovered facts, but facts that have already been known and pled by Plaintiff in the FAC or facts that Plaintiff has known, or should have known since the inception of the lawsuit or at the time he amended his complaint in 2012, but failed to raise. Thus, the basis for amendment does not establish Plaintiff's diligence in seeking to amend the complaint to include these allegations.

*Bever v. CitiMortgage, Inc., No. 1:11-cv-01584-AWI, 2014 U.S. Dist. LEXIS 54390, 2014 WL 1577250, at *9 (E.D. Cal. Apr. 18, 2014)*, *aff'd on other grounds*, *708 F. App'x 341 (9th Cir. 2017)*. BrandTotal identifies no case holding a party's failure to recognize a legal **[*13]** theory implicated by the facts it has already alleged to be consistent with diligence under *Rule 16(b)(4)*. Instead, the cases BrandTotal cites that permitted comparable amendments were decided under *Rule 15*'s liberal standard for amendment, not the more stringent standard applicable to modifying a scheduling order. *See* Defs.' Opp'n & Reply at 5-6 (citing *Eminence Cap., LLC v. Aspeon, Inc., 316 F.3d 1048, 1053 (9th Cir. 2003)*; *Ill. Tool Works, Inc. v. MOC Prod. Co., No. 09CV1887 JLS (AJB), 2010 U.S. Dist. LEXIS 113702, 2010 WL 4314296 (S.D. Cal. Oct. 26, 2010)*).

In the first amended counterclaims that BrandTotal filed before the amendment deadline, it chose to pursue a relatively complex claim under the "fraudulent" prong of the UCL based on Facebook's purported misrepresentation to Google. It is not clear why BrandTotal chose that claim over a relatively more straightforward defamation claim, or why it did not bring both claims—BrandTotal states only that it "admittedly struggled to identify the right cause of action (almost all of which pre-date the Internet age)." Defs.' Opp'n & Reply at 4. If BrandTotal made a tactical choice to pursue only the UCL claim in the first instance, it did so knowing the risk that the amendment deadline would expire before the Court assessed that claim's viability. If BrandTotal merely overlooked its potential defamation claim, "carelessness is not compatible with a finding **[*14]** of diligence and offers no reason for a grant of relief." *Johnson, 975 F.2d at 609*.

Because BrandTotal has not shown diligence in seeking to comply with the scheduling order, the motion for leave to amend to add a defamation counterclaim, and to expand BrandTotal's counterclaim under the "unlawful" prong of the UCL to encompass defamation as a predicate, is DENIED. The Court does not reach the parties' arguments as to whether amendment would be futile.

B. Motion to Dismiss

1. Legal Standard

A complaint may be dismissed for failure to state a claim on which relief can be granted under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. "The purpose of a motion to dismiss under *Rule 12(b)(6)* is to test the legal sufficiency of the complaint." *N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983)*. Generally, a claimant's burden at the pleading stage is relatively light. *Rule 8(a) of the Federal Rules of Civil Procedure* states that a "pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)*.

In ruling on a motion to dismiss under *Rule 12(b)(6)*, the court takes "all allegations of material fact as true and construe[s] them in the light most favorable to the non-moving party." *Parks Sch. of Bus. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995)*. Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that would support **[*15]** a valid theory. *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. A pleading must "contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citing *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984)*). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 555*). "[C]ourts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Twombly, 550 U.S. at 555* (quoting *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 557*). Rather, the claim must be "'plausible on its face,'" meaning that the claimant must plead sufficient factual allegations to "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly, 550 U.S. at 570*).

2. The UCL

California's UCL broadly prohibits unlawful, unfair, and fraudulent business acts. *Korea Supply Co., 29 Cal. 4th at 1143*. "Unlawful acts are anything that can properly be called a business practice and that at the same time is forbidden by law . . . be it civil, criminal, federal, state, or municipal, statutory, regulatory, or court-made, where court-made law is, for example a violation of a prior court order." **[*16]** *Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1151 (9th Cir. 2008)* (ellipsis in original) (citations and internal quotation marks omitted). "Unfair acts among competitors means 'conduct that threatens an incipient violation of an ***antitrust law***, or violates the spirit or policy of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.'" *Id. at 1152* (quoting *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*). "Finally, fraudulent acts are ones where members of the public are likely to be deceived." *Id.*

An "unfair" claim by a competitor under the UCL generally must implicate the antitrust laws. *See Sybersound, 517 F.3d at 1152*. "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech, 20 Cal. 4th at 187*.

Courts have dismissed competitors' claims under this prong of the statute where plaintiffs fail to identify "any 'unusual' aspect of the alleged conduct that would make that conduct something that violates the 'policy **[*17]** and spirit' of the antitrust laws without violating the actual laws themselves," comparable to the *Cel-Tech* defendant's "'privileged status as one of two holders of a lucrative government-licensed duopoly.'" *Synopsys, Inc. v. ATopTech, Inc., No. C 13-2965 MMC, 2015 U.S. Dist. LEXIS 104763, 2015 WL 4719048, at *10 (N.D. Cal. Aug. 7, 2015)* (quoting *Cel-Tech, 20 Cal. 4th at 190*); *see also* *Creative Mobile Techs., LLC v. Flywheel Software, Inc., No. 16-cv-02560-SI, 2017 U.S. Dist. LEXIS 24173, 2017 WL 679496, at *6 (N.D. Cal. Feb. 21, 2017)*.

3. BrandTotal's Theories of Unfair Competition

BrandTotal primarily pursues three theories of unfair competition: (1) the theory that "Facebook's failure to give permission to any entities to collect Third-Party Commercial Advertising Information . . . allows Facebook to shirk its legal obligations under the FTC Order by failing to establish a Privacy Program," violating the spirit of the antitrust laws, *see* SACC ¶ 155;[7] (2) the theory that Facebook has "has refused to deal with [BrandTotal] by terminating both the business and personal Facebook accounts of [BrandTotal] and [its] principals and by refusing to accept advertising from [BrandTotal]," *id.* ¶ 168; and (3) the theory that "Facebook interjects itself into the marketplace and takes active steps to destroy competitors" by, for example, having "contacted Google and made false and misleading statements about the operation of UpVoice and another of [BrandTotal's] applications, knowing that Google would **[*18]** remove those applications from the Google Chrome Store," *id.* ¶ 163.

a. Failure to Grant Permission

BrandTotal contends that Facebook's refusal to grant BrandTotal and others permission to access advertising data violates the *spirit* of the antitrust laws, such that BrandTotal need to track the precise contours of a Sherman Act claim to pursue a claim under the "unfair" prong of the *Sherman Act*. Defs.' Opp'n & Reply at 8-9. As described in a decision from this district, the California Supreme Court has recognized "that it is not just conduct that threatens a violation of an actual ***antitrust law*** that supports a UCL unfairness claim," but also "conduct that 'violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.'" *Diva Limousine, Ltd. v. Uber Techs., Inc., 392 F. Supp. 3d 1074, 1090-91 (N.D. Cal. 2019)* (quoting *Cel-Tech, 20 Cal. 4th at 187*). Such a violation must be "be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Cel-Tech, 20 Cal. 4th at 186-87*.

As a starting point, the U.S. Supreme Court has recognized that a market participant's right to refuse to deal with competitors generally serves procompetitive purposes, and **[*19]** that restricting that right can have anticompetitive effects:

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of ***antitrust law***, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited.

[7] The extent to which BrandTotal intends to pursue a theory based on Facebook's refusal to provide permission to access data is unclear. *Compare* Defs.' Opp'n & Reply at 8 (asserting that Facebook violates the spirit of the antitrust laws by "using the FTC Order to gain a competitive advantage by intentionally refusing to provide permission to any entity that seeks to collect Third-Party Commercial Advertising Information from Facebook's sites"); *with id.* at 14 ("BrandTotal's SAC presents two theories under which Facebook's behavior violates the unfair prong of the UCL. First, BrandTotal alleges Facebook interjects itself into the marketplace by petitioning Google to remove applications and extensions that compete with Facebook's advertising services. . . . Second, BrandTotal alleges Facebook stifles competition by punishing entities by removing the business and personal account pages of its competition and their principals and employees."). Despite BrandTotal's assertion that it "is not asking Facebook to authorize BrandTotal's access," *id.* at 14, the Court addresses in an abundance of caution BrandTotal's allegation that failure to authorize such access is anticompetitive, *see id.* at 8; SACC ¶ 155.

> Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*.

Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407-08, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004) (alteration in original). That general rule is subject to "one, limited exception" involving termination of a course of past dealing, which is not applicable to advertising data that Facebook has never authorized anyone **[*20]** to access. *See* *Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 994-95 (9th Cir. 2020)* (citing *Aspen Skiing, 472 U.S. 585*). In light of Supreme Court precedent treating the right to refuse to deal as generally procompetitive, BrandTotal faces an uphill battle to show that Facebook's refusal to grant permission to access advertising data violates the spirit of the antitrust laws.

The only case BrandTotal cites allowing a UCL unfairness claim to proceed based on the spirit of the antitrust laws is *Diva Limousine, 392 F. Supp. 3d 1074*, which involved allegations that Uber had misclassified its drivers as independent contractors rather than employees. In holding that the plaintiff stated a claim under the "unfair" prong, Judge Chen cited the California Labor Code's statement of "'the policy of this state to vigorously enforce minimum labor standards in order . . . to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards,'" and the California Supreme Court's recognition of "'the unfair competitive advantage the business may obtain over competitors that properly classify similar workers as employees.'" *Id. at 1091* (quoting *Cal. Lab. Code § 90.5(a)*; *Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 913, 232 Cal. Rptr. 3d 1, 416 P.3d 1 (2018)*) (emphasis omitted).

Here, BrandTotal has not identified any legislatively declared **[*21]** policy *related to competition* implicated by Facebook's alleged conduct. In a footnote, BrandTotal cites a provision of the *California Consumer Privacy Act ("CCPA")* defining "personal information" as including "'information regarding a consumer's interaction with an internet website, application, or advertisement.'" Defs.' Opp'n & Reply at 8 n.4 (quoting *Cal. Civ. Code § 1798.140(o)(1)(F)*) (emphasis omitted). The Court has previously rejected BrandTotal's scattershot citations to the CCPA that failed to tie that law's actual requirements to the conduct at issue in this case. *See* Order Denying TRO at 22 n.11. So too here. The fact that information about advertising interactions falls within the statute's definition of "personal information" does not, in itself, say anything about whether Facebook must provide BrandTotal access to such information, nor whether the legislature has identified restrictions of such access as implicating competition.

BrandTotal also relies heavily on the FTC's April 27, 2020 order requiring Facebook to take certain steps to protect user privacy. *See* SACC Ex. C. Nothing on the face of the FTC's order requires Facebook to allow BrandTotal the sort of access it seeks. BrandTotal cites the order's requirement that Facebook create a "Privacy **[*22]** Program," which it argues Facebook breached by failing to grant any third parties permission to collect advertising data. Defs.' Opp'n & Reply at 8-9; SACC ¶¶ 40-43, 155. While BrandTotal is correct that the FTC's order "does *not* direct Facebook to ban *all* automated collection of data from its platforms," SACC ¶ 42, it also does not *require* Facebook to authorize any such collection. The FTC issued its order to protect user privacy, *see* SACC ¶ 37, not to facilitate competition, and denying third parties access to user data is consistent with the mandate in section VII of that order (which calls for the establishment of a "Privacy Program") to "protects the privacy, confidentiality, and Integrity of the Covered Information collected, used, or shared by [Facebook]," SACC Ex. C at 8, § VII. BrandTotal has raised colorable arguments that the order may not have required Facebook to block its access, *see* Order re 2d MTD at 12-14, but it has not shown that the order required Facebook to provide access, or that it was in any way motivated by protecting competition in the market for advertising analytics.

Neither the FTC's order nor the CCPA resembles the sort of policy specifically linked to **[*23]** competition that supported the decision in *Diva Limousines*. Even if they did, BrandTotal has not shown a violation of either of those authorities. Having failed to identify any legislatively declared policy related to competition implicated by Facebook's failure to grant BrandTotal permission to access advertising data, BrandTotal cannot proceed on its counterclaim for a violation of the "spirit" of the antitrust laws. Facebook's motion to dismiss BrandTotal's unfairness counterclaim is GRANTED to the extent it rests on that theory.

b. Deactivation of Accounts and Advertising; Interference with Google

As for BrandTotal's theories based on Facebook's deactivation of its accounts, refusal to allow it to advertise on Facebook,[8] and successfully petitioning for Google to remove UpVoice from its store, BrandTotal asserts that even if it cannot proceed on a violation of the "spirit" of the antitrust laws, it has sufficiently alleged a product market and market power to proceed on a more conventional claim for actual or threatened violation of the antitrust laws.

As the Court noted previous in dismissing this claim with leave to amend, an antitrust plaintiff generally must identify **[*24]** a plausible product market. Order re 2d MTD at 26.

> Plaintiffs must plead a relevant market to state an antitrust claim under the Sherman Act, unless they assert a per se claim. While plaintiffs need not plead a relevant market with specificity, there are some legal principles that govern the definition of an antitrust "relevant market," and a complaint may be dismissed under *Rule 12(b)(6)* if the complaint's 'relevant market' definition is facially unsustainable.
> The relevant market must include both a geographic market and a product market. The latter . . . must encompass the product at issue as well as all economic substitutes for the product. Economic substitutes have a reasonable interchangeability of use or sufficient cross-elasticity of demand with the relevant product. Including economic substitutes ensures that the relevant product market encompasses the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business.

Hicks v. PGA Tour, Inc., 897 F.3d 1109, 1120-21 (9th Cir. 2018) (cleaned up). "[O]ne method of determining whether a proposed market is viable is assessing 'whether a monopolist in the proposed market could profitably impose a small but significant and nontransitory price **[*25]** increase." *Id. at 1122-23* (quoting *Theme Promotions, Inc. v. News Am. Mktg. FSI, 546 F.3d 991, 1002 (9th Cir. 2018)*). A complaint that "merely restate[s] a test for market definition without any factual elaboration" is not sufficient. *Id. at 1122*. That said, "[t]here is no requirement that these elements of the antitrust claim be pled with specificity," and an "antitrust complaint therefore survives a *Rule 12(b)(6)* motion unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect." *Newcal Indus., Inc. v. Ikon Off. Sol., 513 F.3d 1038, 1045 (9th Cir. 2008)*.

BrandTotal's alleges a market for "Third-Party Commercial Advertising Information," defined as "analytics about non-SIEP advertisements run by third-party business," either "on personal social networking services in the United States," or in the alternative, "on the Facebook.com site and Instagram platform." SACC ¶¶ 15, 155; *see also id.* ¶¶ 158-59. The second amended counterclaims include few if any factual allegations to support the conclusion that such a market definition meets the criteria for a viable product market in the antitrust context, and the markets proposed in an FTC enforcement action and congressional report that BrandTotal cites are of little value, because both concerned markets for social networking rather than for advertising analytics. *Cf.* SACC ¶¶ 156-57. **[*26]**

Nevertheless, there is some logic to this market, and Facebook's arguments for dismissal generally miss the mark. Facebook contends that courts have generally been skeptical of markets based on a single form of advertising that fail to treat other forms of advertising as potential substitutes. Pl.'s Mot. & Opp'n at 10-11 (citing *Hicks, 897 F.3d at*

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[8] BrandTotal argues that its claims based on deactivation of accounts and refusal to permit advertising fall within the *Aspen Skiing* exception to the refusal-to-deal doctrine, which requires three elements: (1) unilateral termination of a voluntary and profitable course of dealing; (2) that could only be intended to sacrifice short-term benefits for long-term monopolist profits; (3) involving products already sold to other similarly situated customers. *See Qualcomm, 969 F.3d at 994-95*. Here, Facebook purportedly terminated BrandTotal's accounts and advertising based on BrandTotal's violation of Facebook's terms of service, including a prohibition of automated data collection without Facebook's permission. Given a party's general right to refuse to deal from the outset, it seems likely that a party may set conditions on such dealing and enforce those conditions if violated by terminating the relationship. The parties have not addressed that question in detail, however, and the Court need not resolve that issue in light of the separate basis for dismissal discussed below. Regardless, the refusal-to-deal doctrine does not apply to the extent BrandTotal's claim is based on Facebook's communication with Google.

1123). Here, however, BrandTotal's proposed market is not for advertising, but instead for analysis of advertising. A company that has chosen to advertise on social media would presumably not consider analysis of, say, billboard advertising to be a substitute for analysis of the advertising it has already placed on Facebook or other social networks. And while single-brand markets are also disfavored, *see* *Apple, Inc. v. Psystar Corp., 586 F. Supp. 2d 1190, 1198 (N.D. Cal. 2008)*, the market for analysis of advertising on Facebook and Instagram bears at least some resemblance to the sort of "derivative aftermarket" that courts have recognized as an exception to that rule, because a company that has purchased advertising on Facebook might have little to gain from analysis of other platforms where its ads do not appear, *see* *id. at 1196-97* (citing *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*; *Newcal Indus., 513 F.3d at 1049*). Neither party's arguments on this point—BrandTotal's incomplete sentence that advertising on Facebook **[*27]** "is not interchangeable with Third-Party Commercial Advertising Information on other sites (e.g., YouTube, Twitter, etc.) because," Defs.' Opp'n & Reply at 12, or Facebook's conclusory assertion that "this Facebook-only 'market' has none of the features that could even conceivably make it a derivative market," Pl.'s Reply at 3—are particularly helpful. BrandTotal's failure to address potential substitutes and to define the market clearly, including its failure to allege any particular definition of "personal social networking services" that would help the parties and the Court determine which platforms fall within the alleged market, raise concerns. The Court nevertheless assumes for the sake of argument that BrandTotal's alleged markets are sufficiently plausible to survive the limited scrutiny of *Rule 12(b)(6)*.

The next issue is market power, which "the Supreme Court has defined . . . as the power to 'control prices or exclude competition.'" *Cost Mgmt. Servs. v. Washington Natural Gas Co., 99 F.3d at 950* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*). "Whether monopoly power exists depends on a variety of factors," with market share relevant to that analysis but not the only factor; depending on market conditions, courts have found both market power and a lack of market power when a defendant's **[*28]** market share is in the sixty to seventy percent range. *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 924 (9th Cir. 1980)*. The typical way in which an incomplete monopolist—a defendant with less than full control of the market—can nevertheless exert monopoly power is when that party controls enough of the market that "by restricting its own output, it can restrict marketwide output and, hence, increase marketwide prices." *Rebel Oil v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995)*; *see also* *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2288, 201 L. Ed. 2d 678 (2018)* ("'Market power is the ability to raise price profitably by *restricting output*.'" (quoting a treatise; emphasis added in *Am. Express*)). "Prices increase marketwide in response to the reduced output because consumers bid more in competing against one another to obtain the smaller quantity available." *Rebel Oil, 51 F.3d at 1434*.

Here, BrandTotal alleges that a Congressional subcommittee reported that Facebook has claimed to control ninety-five percent of the market for social media. SACC ¶ 157. While market share alone does not determine market power, a share that high could likely support a plausible inference of market power sufficient to survive dismissal under *Rule 12(b)(6)*, although BrandTotal's failure to allege clearly that Facebook actually *has* that market share or to define how it is measured does not help its cause. *Cf.* *FTC v. Facebook, Inc., ___ F. Supp. 3d ___, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *12-13* ("Even accepting that merely **[*29]** alleging market share 'in excess of 60%' might sometimes be acceptable, it cannot suffice in this context, where Plaintiff does not even allege what it is measuring."). The larger problem is that this case is not about the market for social media—a market in which BrandTotal does not participate. This case concerns advertising analytics, and BrandTotal's allegation that by virtue of "[p]ossessing a monopoly in the market of personal social networking services . . . Facebook also necessarily possesses a monopoly market [sic] in Third-Party Commercial Advertising Information on personal social networking services," *id.* ¶ 158, is wholly conclusory, and undermined by the fact that BrandTotal holds at least some share of the market for social media advertising analytics without participating in the market for social media. Even to the extent Facebook can regulate control of automated data collection on its platforms, an advertising consulting company could presumably produce at least some degree of analysis of advertising on Facebook based on other methods like surveys and focus groups. BrandTotal has wholly failed to address the degree of competition in the market it has alleged—including **[*30]** the market share Facebook controls, whether there are other competitors besides BrandTotal and Facebook, and whether Facebook has the power to unilaterally restrict marketwide output of the analytical services at issue.[9] Facebook's motion to dismiss BrandTotal's unfairness claim under the UCL is therefore GRANTED for failure to present plausible allegations of market power.

It is at least conceivable that this defect could cured by further amendment. In considering whether to grant leave to amend, the Supreme Court has identified as an incomplete list of relevant factors "'undue delay, bad faith or dilatory motive on the part of the [party seeking to amend], repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment, etc.'" *Eminence Cap., 316 F.3d at 1051-52* (quoting *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*). Multiple attempts at amendment do not always support a conclusion to deny further leave, and "it is the consideration of prejudice to the opposing party that carries the greatest weight." *Id. at 1052*.

Here, BrandTotal has made three unsuccessful attempts to state a UCL unfairness claim. *See* Order re 1st MTD at 16-17; Order re 2d MTD at 24-28. **[*31]** Unlike *Eminence Capital*, this *is* " a case where plaintiffs took 'three bites at the apple' by alleging and re-alleging the same theories in an attempt to cure pre-existing deficiencies." *316 F.3d at 1053* (reversing a district court's decision to dismiss with prejudice and deny leave to amend, based on the Ninth Circuit's conclusion that it was not such a case, and the plaintiff had instead sought to present new legal theories). BrandTotal's repeated failure to state a viable claim, as well as its failure to identify at the hearing specific allegations it could add to cure the defects addressed in this order, suggests that further leave to amend is likely to be futile. Moreover, continuing to litigate the pleadings would require at least a narrow exception to the scheduling order's deadline for amendment (which, as discussed above, expired months ago), and would require extending fact discovery—currently scheduled to close in November of this year—by many months if not much longer. Such delay would prejudice Facebook not only in delaying a resolution of BrandTotal's counterclaims against it, but also in delaying resolution of Facebook's affirmative claims against BrandTotal. The Court therefore denies **[*32]** leave to amend further, and dismisses BrandTotal's counterclaim under the "unfair" prong of the UCL with prejudice.

IV. CONCLUSION

For the reasons discussed above, BrandTotal's motion for leave to amend to add a defamation counterclaim (and to expand its counterclaim under the "unlawful" prong of the UCL to encompass defamation) is DENIED, and Facebook's motion to dismiss BrandTotal's counterclaim under the "unfair" prong of the UCL with prejudice is GRANTED.

For convenience and clarity, BrandTotal is instructed to file its second amended counterclaims as a separate docket entry no later than September 7, 2021. Facebook shall file its answer to the surviving counterclaims no later than September 14, 2021.

IT IS SO ORDERED.

Dated: August 31, 2021

/s/ Joseph C. Spero

JOSEPH C. SPERO

Chief Magistrate Judge

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[9] At the hearing, BrandTotal cited its allegation that Facebook has taken similar actions against at least six other entities. *See* SACC ¶ 164. That allegations says nothing about Facebook's position in the market for the advertising information at issue, or whether other competitors exist that have not been subject to any such action by Facebook, or whether other competitors have been able to compete successfully despite Facebook taking similar action.

Torrey v. Infectious Diseases Soc'y of Am.

United States District Court for the Eastern District of Texas, Texarkana Division

September 1, 2021, Decided; September 1, 2021, Filed

CIVIL ACTION NO. 5:17-CV-00190-RWS

Reporter

2021 U.S. Dist. LEXIS 252509 *; 2021 WL 6773094

LISA TORREY, et al., Plaintiffs, v. INFECTIOUS DISEASES SOCIETY OF AMERICA, et al., Defendants.

Prior History: *Torrey v. Infectious Diseases Soc'y of Am., 2018 U.S. Dist. LEXIS 231522, 2018 WL 10124894 (E.D. Tex., Sept. 27, 2018)*

Core Terms

Lyme, disease, guidelines, IDSA, asserts, argues, antitrust, insurance company, antitrust claim, conspiracy, no evidence, summary judgment, antibiotic, patients, genuine, coverage, health insurance company, monopolization, long-term, contends, nonmovant, discovery, panelists, replies, summary judgment motion, alleged conspiracy, present evidence, relevant market, material fact, allegations

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For Randy Sykes, Kathryn Kocurek, Individually and on behalf of the Estate of J. David Kocurek PH.D, Jessica McKinnie, Plaintiffs: Daniel Raymond Dutko, Rusty Hardin & Associates LLP, Houston, TX; Lance Lee, Lance Lee, Texarkana, TX.

For Steve Hepler, Intervenor Plaintiff: Daniel Raymond Dutko, Rusty Hardin & Associates LLP, Houston, TX; Jeffrey E. Gewirtz, **[*7]** Jeffrey Scott LLP, Atlanta, GA.

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For Blue Cross and Blue Shield Association, Defendant: Sarah J. Donnell, Kirkland & Ellis LLP - Chicago, Chicago, IL.

For Caitlin McGrory, Amber Boyles, Intervenor Plaintiffs: Jeffrey E. Gewirtz, Jeffrey Scott LLP, Atlanta, GA.

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For United HealthCare Services Inc., Defendant: Earl Glenn Thames Jr, Potter Minton a Professional Corporation, Tyler, TX.

For Aetna Inc., Defendant: Jeffrey Randall Roeser, Haltom & Doan, Texarkana, TX; Earl B Austin, LEAD ATTORNEY, Baker Botts, New York, NY.

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Judges: ROBERT W. SCHROEDER III, UNITED STATES DISTRICT JUDGE.

Opinion by: ROBERT W. SCHROEDER III

Opinion

ORDER

Before the Court is Defendant Infectious Diseases Society of America's ("IDSA") Motion for Summary Judgment on Plaintiffs' RICO and Antitrust Claims.[1] ,[2] Docket No. 357. The Court heard argument on the motion on April 23, 2021. Docket No. 397. For the reasons set forth below, Defendant's motion is **GRANTED**.

BACKGROUND

Plaintiffs sued Defendant in November 2017, alleging that the Defendant, Doctors and Insurance Defendants have engaged in a decades-long conspiracy to deny the existence of and to prevent treatment of chronic Lyme disease. Docket No. 1. Plaintiffs alleged that doctors have known for a long time that while many patients who contract Lyme disease may be cured with short-term antibiotics, up to 40 percent of patients do not respond to short-term antibiotic treatment. *Id.* ¶ 45. These patients require long-term antibiotic treatment until the symptoms are resolved. *Id.* Though the Insurance **[*10]** Defendants initially provided coverage for long-term antibiotic treatment of Lyme disease, the health insurance industry made a concerted effort in the 1990's to deny coverage because long-term treatment was too expensive. *Id.* ¶¶ 47-48. The Insurance Defendants enlisted the help of doctors who were researching Lyme disease—the IDSA panelists—and paid them large fees to develop arbitrary guidelines for testing Lyme disease. *Id.* ¶ 48. Once these guidelines were established, the Insurance Defendants denied coverage for patients who did not meet the new stringent Lyme disease testing protocols and prevented Plaintiffs from obtaining the antibiotics needed to treat their disease. *Id.* ¶ 49.

Plaintiffs' Third Amended Complaint alleges four counts of Racketeer Influenced and Corrupt Organization ("RICO") violations (Docket No. 361 at 45-49), one count of antitrust violations (*id.* at 49-52) and two counts of misrepresentation (*id.* at 52-60). Plaintiffs have since filed a stipulation dismissing their RICO allegations. Docket No. 396. Defendant now moves for summary judgment on Plaintiffs' antitrust claim.

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[1] At the time the motion was filed, several individual doctors were also defendants in the case and signed onto the motion, including Dr. Gary P. Wormser, Dr. Allen Steere, Dr. Raymond J. Dattwyler, Dr. John J. Halperin, Dr. Eugene Shapiro and Dr. Leonard Sigal (collectively, the "Doctors"). They have since been dismissed from the case. Docket No. 396.

[2] Plaintiffs also sued the insurance providers Anthem, Inc., Blue Cross and Blue Shield of Texas, Aetna, Inc., Cigna Health and Life Insurance Company (sued as Cigna Corporation), Kaiser Foundation Health Plan, Inc. (sued as Kaiser Permanente, Inc.), United Healthcare Services, Inc., Unitedhealth Group Inc. and Blue Cross and Blue Shield Association (collectively, the "Insurance Defendants"). At this time, the suit against these parties has either been stayed for notice of settlement or dismissed.

LEGAL STANDARD

The purpose of summary judgment is to isolate and dispose of factually unsupported **[*11]** claims or defenses. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* ("The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact."). Summary judgment is proper if the pleadings, the discovery and disclosure materials on file and any affidavits "[show] that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. The trial court must resolve all reasonable doubts in favor of the party opposing the motion for summary judgment. *Casey Enters. Inc. v. Am. Hardware Mut. Ins. Co., 655 F.2d 598, 602 (5th Cir. 1981)*. The substantive law identifies which facts are material. *Anderson, 477 U.S. at 248*.

The party moving for summary judgment has the burden to show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id. at 256*. Where the nonmovant bears the burden of proof, the movant may discharge its burden by showing that there is an absence of evidence to support the nonmovant's case. *Celotex, 477 U.S. at 325*; *Byers v. Dall. Morning News, Inc., 209 F.3d 419, 424 (5th Cir. 2000)*. Once the movant has carried its burden, the nonmovant must "respond to the motion for summary **[*12]** judgment by setting forth particular facts indicating there is a genuine issue for trial." *Byers, 209 F.3d at 424* (citing *Anderson, 477 U.S. at 248-49*). The nonmovant must adduce affirmative evidence. *Anderson, 477 U.S. at 256-57*. No "mere denial of material facts nor . . . unsworn allegations [nor] arguments and assertions in briefs or legal memoranda" will suffice to carry this burden. *Moayedi v. Compaq Computer Corp., 98 F. App'x 335, 338 (5th Cir. 2004)*. The Court must consider all the evidence, but must refrain from making any credibility determinations or weighing the evidence. *See* *Turner v. Baylor Richardson Med. Ctr., 476 F.3d 337, 343 (5th Cir. 2007)*.

DISCUSSION

Defendant contends that (1) Plaintiffs cannot present significant probative evidence of payments or communications linking it to the Insurance Defendants' alleged antitrust conspiracy; (2) Plaintiffs lack significant probative evidence to support their antitrust claims against it; (3) Plaintiffs' damages are derivative of their personal injuries and are not recoverable under ***antitrust law***; and (4) Plaintiffs' claim is barred by the statute of limitations. Because the Court finds that there is no genuine issue of material fact on Defendant's first and second contentions regarding probative evidence, it does not reach the issue of whether Plaintiffs' damages are proper or Plaintiff's claims are barred by the statute of limitations.

I. [*13] Lack of Evidence Linking Defendant to the Insurance Defendants

Defendant asserts that Plaintiffs brought this case against the Insurance Defendants, alleging that one aspect of their longstanding and open business activities is a fraudulent criminal conspiracy in violation of ***antitrust law*** designed to save themselves millions of dollars by denying coverage for chronic Lyme disease; Plaintiffs joined Defendant to the case by asserting that the Insurance Defendants brought it into their criminal conspiracy through long-term, ongoing payments related to Lyme disease. Docket No. 357 at 13. Defendant argues that Plaintiffs must produce significant probative evidence showing it participated in the alleged conspiracy by receiving payments from the Insurance Defendants—otherwise, it cannot be liable for a criminal conspiracy that it did not conceive, that it never even discussed with any Insurance Defendant and that was not designed to benefit it. *Id.* at 14. Defendant argues that Plaintiffs cannot reach this burden because there is no evidence that it ever received any payments from any Insurance Defendant related to Lyme disease.

Defendant also preemptively argues that Plaintiffs may not rely **[*14]** on a press release from the Connecticut Attorney General or testimony before Congress from Dr. Joseph Burrascano. *Id.* Defendant asserts that these statements do not identify a single doctor, Insurance Defendant or consulting arrangement or payment, and thus do not create a genuine factual dispute. *Id.* And, Defendant argues, the press release and Congressional testimony are both inadmissible hearsay that cannot be considered in ruling on summary judgment. *Id.* at 14-15 (citing *Fed. R. Civ. P. 56(c)(2)*; *Cruz v. Aramark Servs., 213 Fed. App'x 329, 332 (5th Cir. 2007)*; *In re Oil Spill by the Oil Rig Deepwater Horizon, MDL No. 2179, 2012 U.S. Dist. LEXIS 15905, 12 WL 425164, at *2 (E.D. La. Feb. 9, 2012)*; *Fat Butter, Ltd. v. BBVA USA Bancshares, Inc., No. 4:09-cv-3053, 2010 U.S. Dist. LEXIS 144558, 2010 WL 11646900, at *8 (S.D. Tex. Apr. 13, 2010)*).

Plaintiffs first respond that, due to the destruction of evidence in this case (*see* Docket No. 373 at 5-9), Plaintiffs are relying on circumstantial evidence to support the conspiracy between Defendant and health insurance companies. *Id.* at 12. As part of its circumstantial case, Plaintiffs assert that health insurance companies paid for long term antibiotics for Lyme disease until they determined it cut into profits in the mid-1990's. *Id.* at 13 (citing Docket No. 373-1 at 90:8-93:14). Plaintiffs assert that Empire Blue Cross/Blue Shield created an arbitrary policy of only covering short-term antibiotic treatment that had no medical or scientific justification, and other medical companies shortly followed **[*15]** suit. *Id.* (citing Docket No. 373-1 at 114:3-9; PAMELA WEINTRAUB, CURE UNKNOWN, INSIDE THE LYME EPIDEMIC 306-31 (2008)). Plaintiffs also assert that from the mid-1990's until enactment of the 2000 IDSA Guidelines, health insurance companies began denying insurance coverage for antibiotics after short-term treatment. *Id.* Plaintiffs further assert that at the same time health insurance companies created arbitrary guidelines for Lyme disease, they began paying large consulting fees to some of the most influential Lyme disease experts. *Id.*

Plaintiffs then allege that three doctors involved in the IDSA Guidelines received payments from insurance companies. One, Plaintiffs allege that Dr. Sigal—who was hired by Defendant to review the Lyme disease guidelines before they were published—was an "active expert witness for insurance companies." *Id.* (citing Docket No. 373-2 at 44:7-19, 59:9-24). Two, Plaintiffs allege that Dr. Shapiro—who was hired by Defendant to author the 2000 and 2006 IDSA Guidelines—testified that he provided expert testimony in around 75 to 80 cases, offered testimony in court more than a "dozen" times and twice testified in front of medical boards. *Id.* at 13-14 (citing Docket **[*16]** No. 373-4 at 6:3-24). Three, Plaintiffs allege that Dr. Dattwyler—who was also one of the guideline authors retained by Defendant—testified that he was hired by insurance companies to testify as an expert witness in Lyme cases, to consult and to review medical records for Lyme patients. *Id.* at 14 (citing Docket No. 373-5 at 13:1-4, 13:7-16, 189:19-190:6).

Plaintiffs then rely on a 2006 Investigation by then Connecticut Attorney General Richard Blumenthal. *Id.* Plaintiffs assert that Blumenthal investigated the IDSA Guidelines and served Civil Investigative Demands ("CIDs") on many of the IDSA panelists and health insurance companies. *Id.* (citing Docket No. 373-6). Plaintiffs then point to a press release from Blumenthal that concluded several of the most powerful IDSA panelists had undisclosed financial interests in insurance companies including consulting arrangements with insurance companies. *Id.* (citing http://www.empirestatelymediseaseassociation.org/Archives/CTAGPressReleaseIDSAResponse.htm).

Plaintiffs assert that after receiving the large consulting fees from insurance companies, the IDSA panelists put the same arbitrary guidelines into the IDSA Guidelines that the insurance companies **[*17]** created in the 1990's. *Id.* Plaintiffs argue that insurance companies have since used the IDSA Guidelines to justify restricting coverage of long-term antibiotic treatment of Lyme disease. *Id.* at 15 (citing https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2435453/).

Plaintiffs then rely on the fact that several states passed or proposed legislation that requires insurers to pay for long-term antibiotic treatment for Lyme disease patients who experience treatment failure. *Id.* Plaintiffs assert that Defendant criticized legislation "[r]equiring health insurers to cover Lyme disease treatments that are not supported by scientific evidence, including long-term antibiotic use." *Id.* (citing https://www.idsociety.org/globalassets/idsa/topics-of-interest/lyme/lyme-state-policy-primer-update-2016-final.pdf). Plaintiffs posit that an independent organization with no connection to insurance companies would not publish such a statement. *Id.*

Plaintiffs conclude that this circumstantial evidence supports an inference of conspiracy between Defendant and health insurance companies and establishes that the only reason the IDSA panelists created guidelines claiming there is no treatment failure in Lyme disease **[*18]** is because they engaged in a conspiracy with health insurance companies. *Id.* at 16 (citing *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321, 331-32 (5th Cir. 2015)*; *Viazis v. Am. Ass'n of Orthodontists, 314 F.3d 758, 763 (5th Cir. 2002)*).

Plaintiffs next respond that the circumstantial evidence tends to exclude independent conduct. *Id.* Plaintiffs assert that the IDSA panelists involved with the IDSA Guidelines agree that there is treatment failure in Lyme disease but allowed the IDSA Guidelines to publish with the statement: "[t]here is no convincing biologic evidence for the existence of symptomatic chronic *B. burgdorferi* infection among patients after receipt of recommended treatment regimens for Lyme disease." *Id.* (citing Docket No. 373-8 at 36:11-13; Docket No. 373-2 at 42:4-19, 58:12-59:24; Docket No. 357-2). Plaintiffs posit that the only reason the IDSA panelists would allow this to occur is due to large payments made by the health insurance companies in their conspiracy to restrain competition. *Id.*

Defendant first replies that no evidence was destroyed or not produced in this matter. Docket No. 386 at 3. Defendant asserts that Plaintiffs have always contended that this case is about alleged large consulting fees the Insurance Defendants paid to the Doctors to write false Lyme disease guidelines. *Id.* at 4 (citing Docket **[*19]** No. 1 ¶¶ 54, 76; Docket No. 377 ¶¶ 38-49; Docket No. 373 at 1). Defendant asserts that discovery in this matter has at all times been limited to finding consulting payments from the Insurance Defendants to the Doctors or Defendant related to Lyme disease: Plaintiffs' written discovery requests focused on payments from the Insurance Defendants to the Doctors; Plaintiffs never challenged Defendant's objections regarding payments by "insurance companies" that were not limited to the Insurance Defendants; and Plaintiffs never asked Defendant or the Doctors to produce documents regarding payments to the Doctors from disability or medical malpractice insurance companies. *Id.* Defendant further argues that the scope of discovery has already been litigated in this Court and that the scope of the subject matter searched for would be limited to Defendant and the Doctors searching and producing documents sufficient to show any consulting payments by the Insurance Defendants. *Id.* at 5 (citing Docket No. 181 ¶ I.2).

Defendant argues that Plaintiffs cannot complain now, well after the close of fact discovery and in response to Defendant's summary judgment motion, that it and the Doctors "destroyed **[*20]** or failed to produce relevant documents." *Id.* at 5. Defendant asserts that there is no evidence of such alleged destruction or failure to produce, and Plaintiffs never raised these allegations with Defendant or the Doctors; never asked for a meet-and-confer; and never filed a motion to compel.[3]*Id.* Concerning Dr. Sigal, Defendant asserts that he served as an expert for Standard Insurance Company, a disability carrier, and he testified that he and his wife destroyed hard-copy documents that had been stored in their garage just before they moved in 2014 or 2015—well before Plaintiffs filed this case. *Id.* at 6 (citing *Schwob v. Standard Insurance Co., 248 Fed. App'x 22, 23, 26 (10th Cir. 2007)*; *Dutkewych v. Standard Insurance Co., 781 F.3d 623, 625, 629 (1st Cir. 2015)*; Docket No. 386-1 at 20:18-21:16). Concerning

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[3] Discovery closed in this matter on January 15, 2021. Docket No. 376. The instant motion for summary judgment motion was filed on February 3, 2021. Docket No. 357. In response to summary judgment, for the first time, Plaintiffs allege that evidence was destroyed; they did not, however, file a motion to compel at that point. Defendant raised this in its reply on March 16, and at oral argument on April 23, the Court questioned Plaintiffs about their failure to move on the alleged discovery dispute. Docket No. 405 at 34:5-14. Only after that, on May 3, did Plaintiffs file a motion to compel. Docket No. 402. That is too late. *See*, *Lectec Corp. v. Chattem, Inc., No. 5:08-CV-130, 2011 U.S. Dist. LEXIS 156898, 2011 WL 13085199, at *2 (E.D. Tex. January 4, 2011)* (Folsom, J.) ("Plaintiff has not shown that it moved to compel production from [Defendant], however, so Plaintiff cannot now rely on any purported discovery misconduct to compensate for a deficiency in Plaintiff's evidence.").

Moreover, Plaintiffs provide no evidence to support their allegation that Defendant has not met its discovery obligations in this case. The parties *agreed* on the scope of the subject matter that would be searched for—and relevant to this issue—and that scope was limited to evidence of payments from the Insurance Defendants. *See* Docket No. 181 ¶ I.2 ("For all Defendants, copies of payments, checks, wire transfers, or other documents sufficient to show any consulting payments by the insurance defendants to the doctor defendants and/or Infectious Diseases Society of America (IDSA[]) related to Lyme disease. These documents would not include payments made for claims for the provision of medical services to patients by the doctor defendants."). Work that a doctor has done with other disability or medical malpractice insurance companies is irrelevant to the Plaintiffs' allegations in this suit and does not support Plaintiffs' speculation that documents were not produced.

Dr. Shapiro, Defendant asserts that he testified that he never served as an expert witness for an Insurance Defendant or any health insurance company—which Plaintiffs themselves recognize, referring to Dr. Shapiro's work "related to the disability claims he worked on for insurance companies" and "in malpractice cases involving Lyme disease." *Id.* at 7 (citing Docket No. 373 at 6). Concerning Dr. Dattwyler, Defendant asserts that he did not work for any Insurance Defendant or any other health insurance company, only having engagements **[*21]** with medical malpractice carriers and disability carriers. *Id.* at 8 (citing Docket No. 386-5 at 13:1-16). Concerning Defendant, it asserts that it preserved documents at the beginning of this case, including the materials submitted to the Connecticut Attorney General from more than ten years before Plaintiffs filed this case. *Id.* at 9 (citing Docket No. 386-6 at 77:23-78:16, 82:3-83:7). Defendant asserts that it searched its records and provided to Plaintiffs all relevant documents in accordance with limits on discovery agreed to by the parties or as ordered by the Court. *Id.* (citing Docket No. 357-5 ¶ 9).

Defendant next replies that its lobbying efforts cannot support Plaintiffs' antitrust claims. *Id.* at 11. Defendant asserts that the *Noerr-Pennington* doctrine, which holds that petitioning the government in an effort to influence public policy cannot constitute evidence in support of an antitrust claim, is well established. *Id.* (citing *E. R. R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 135, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670-71, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; *see also* *Gibbes v. Ameristar Casino Vicksburg Inc., 137 F. App'x 673, 674 (5th Cir. 2005)*; *Bayou Fleet, Inc. v. Alexander, 234 F.3d 852, 854 (5th Cir. 2000)*).

II. Lack Evidence to Support Antitrust Claims

Defendant contends that Plaintiffs bear a heavy burden that they cannot meet in pursuing an antitrust claim. Docket No. 357 at 22 (citing *Matsushita Elec. Indus. Co, Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*). Defendant **[*22]** argues that the entirety of the evidence produced in this matter supports that it and the Doctors acted independently from the Insurance Defendants to write the IDSA Guidelines—which dooms Plaintiffs' antitrust claims. *Id.* at 22-23 (citing *Stewart Glass & Mirror, Inc. v. USA Glas, Inc., 17 F.Supp.2d 649, 657 (5th Cir. 1998)*). Defendant contends that Plaintiffs cannot meet their burden to produce probative evidence that it agreed with the Insurance Defendants to restrain trade, as there is no evidence of an agreement, much less one to restrain trade. *Id. at 23* (citing *Marucci Sports LLC v. Nat'l Collegiate Athletic Ass'n, 751 F.3d 368, 374 (5th Cir. 2014)*; *Golden Bridge Tech., Inc. v. Motorola, Inc., 547 F.3d 266, 272 (5th Cir. 2008)*; *Spectators' Commun. Network, Inc. v. Colonial Country Club, 253 F.3d 215, 222 (5th Cir. 2001)*).

Defendant further contends that Plaintiffs have no evidence to show that the alleged markets are relevant antitrust product markets, which are defined based on the interchangeability of products and competition amongst brands. *Id.* at 22-23 (citing *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc., 300 F.3d 620, 626 (5th Cir. 2002)*). Defendant states that Plaintiffs asserted relevant antitrust markets are the market for the "treatment of chronic Lyme disease" and the market for insurers to provide "coverage for such treatment." *Id.* at 23. But, Defendant contends, the IDSA Guidelines are not a product because they are available for free, and the proliferation of other guidelines for the treatment of Lyme disease illustrates that the existence of the IDSA Guidelines does not prevent any other **[*23]** organization from issuing its own guidelines. *Id.* at 24 (citing *Kinderstart.com LLC v. Google, Inc., No. C 06-2057, 2007 U.S. Dist. LEXIS 22648, 2007 WL 831806, *5 (N.D. Cal. Mar. 16, 2007)*; Docket No. 357-3 at 2). And although Plaintiffs allege that Defendant conspired to monopolize the markets for "treatment of chronic Lyme disease" and for the insurance coverage for Lyme disease, Defendant points out that it is not an insurance company and does not compete in the insurance coverage market. *Id.*

Moreover, to the extent the IDSA Guidelines recommend to doctors certain treatments for Lyme disease, Defendant argues that Plaintiffs cannot present evidence that the IDSA Guidelines function as a "monopoly" as required under the *Sherman Act*. *Id.* Defendant asserts that a monopolization claim fails at summary judgment if Plaintiffs cannot allege a market share of "at least fifty percent," and "it is doubtful whether 60 or 64 percent would be enough." *Id.* (citing *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 489 (5th Cir. 1984)*). Defendant contends Plaintiffs cannot meet that threshold here. *Id.* at 25 (citing Docket No. 357-3 at 2).

Finally, Defendant contends that for Plaintiffs' _Section 2_ monopolization claims, they must prove that it engaged in "predatory" or "exclusionary" conduct, and for their _Section 1_ conspiracy claims, they must prove that it engaged in an "unreasonable restraint" on competition. ***[*24]*** *Id.* Defendant argues that it is well settled that setting forth professional guidance that is voluntary on its face is not an unreasonable restraint of trade. *Id.* (citing _Consol. Metal Prod., Inc. v. Am. Petrol. Inst., 846 F.2d 284, 296 (5th Cir. 1988)_). Defendant asserts that the Fifth Circuit discourages treble damages actions that are nothing more than disagreements with the recommendations set forth in voluntary guidelines, regardless whether most doctors rely on the IDSA Guidelines. _Id. at 25-26_ (citing _Golden Bridge, 547 F.3d at 273_; _DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 57 (1st Cir. 1999)_; _Schachar v. Am. Acad. Of Ophthalmology, Inc., 870 F.2d 397, 398 (7th Cir. 1989)_).

Plaintiffs respond that the relevant antitrust market is the Lyme disease treatment market in the United States, which is relevant and proper for an antitrust case. Docket No. 373 at 18 (citing *Wilk v. Am. Med. Ass'n, 671 F. Supp. 1465, 1478 (N.D. Ill. 1987)*, *aff'd*, _895 F.2d 352 (7th Cir. 1990)_; _Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1447 (9th Cir. 1988)_; _Weiss v. York Hosp., 745 F.2d 786, 827 (3d Cir. 1984)_; _Bio-Med. Applications Mgmt. Co., Inc v. Dallas Nephrology Assoc., No. 4:94CV37, 1995 U.S. Dist. LEXIS 20179, 1995 WL 215302, at *2 (E.D. Tex. Feb. 6, 1995)_; *Leyba v. Renger, 874 F. Supp. 1229, 1238 (D.N.M. 1994)*).

Plaintiffs next responds that Defendant dominates and controls a monopoly share of the Lyme disease treatment market, as it represents to the country that it is the leading authority in the treatment of Lyme disease and continually pushes for its guidelines to be the only thing doctors need to follow when treating Lyme disease. *Id.* at 20 (citing Docket No. 373-10). Plaintiffs contend that to protect its monopoly in the Lyme treatment market, Defendant tries to influence state legislators and Congress. *Id.* at 20-21. Plaintiffs also argue that it is impossible **[*25]** for doctors to rely on other guidelines because of Defendant's dominance in the Lyme disease treatment market. *Id.* at 22 (citing https://www.hhs.gov/sites/default/files/tbdwg-2020-reportto-ongress-final.pdf). Plaintiffs argue that Defendant works to perpetuate its dominance. *Id.*

Plaintiffs also respond that voluntary guidelines can be an unreasonable restraint on competition. *Id.* at 23 (citing _Am. Soc. of Mech. Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 558, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982)_). Plaintiffs argue that a standard-setting organization can obtain monopoly power by allowing members with an economic interest in restraining competition to bias its standard-setting process. *Id.* at 17 (citing _Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)_).[4]

Defendant replies that all of Plaintiffs' antitrust claims allege that it conspired with the Insurance Defendants and the Doctors to restrain competition, yet Plaintiffs have no evidence of an actual agreement and no evidence of the large consulting fees. Docket No. 386 at 12. Defendant asserts that in the absence of proof, Plaintiffs instead recycle 2008 statements from the Connecticut Attorney General and Burrascano's 1993 Congressional testimony. *Id.* at (citing Docket No. 373 at 8-10). But, Defendant argues, it demonstrated in its motion—and Plaintiffs did not refute—that these **[*26]** statements do not identify a single communication between an Insurance Defendant and a Doctor or Defendant regarding Lyme disease and do not identify a single payment from an Insurance Defendant to a Doctor or Defendant for a consulting arrangement related to Lyme disease. *Id.* Defendant argues that these statements are thus irrelevant, as well as inadmissible. *Id.* With no evidence of large consulting fees paid by the Insurance Defendants to the Doctors, Defendant asserts that Plaintiffs stretch to assert that its lobbying efforts regarding Lyme disease and alleged false statements in the Lyme disease guidelines make sense only if the Insurance Defendants have paid substantial sums to it and the Doctors. *Id.* at 14. But not only can lobbying efforts not be used to support a conspiracy per the *Noerr-Pennington* doctrine, Defendant argues that there "is a persuasive, rational and non-conspiratorial explanation for its lobbying efforts": it believes that Lyme disease diagnosis and treatment should be based on scientific evidence. *Id.* (citing Docket No. 373-10 at 1 ("IDSA must oppose H.R. 4701, as we believe it will inappropriately bias federal activities that must remain science-based in **[*27]** order to ensure optimal patient care and protect the public's health and safety.")).

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[4] Plaintiffs further assert that Defendant said nothing about Plaintiffs' _Section 2_ antitrust claim. *Id.* at 24.

Defendant argues that Plaintiffs have also not contested the sworn declarations from it and the Doctors that they did not communicate with or interact with the Insurance Defendants in developing the IDSA Guidelines. *Id.* at 15. Defendant argues that there can be no "meeting of the minds" without any "meeting." *Id.* (citing *H & B Equip. Co. v. Int'l Harvester Co., 577 F.2d 239, 245 (5th Cir. 1978)*; *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 654 (7th Cir. 2002)*).

Defendant then replies that Plaintiffs present no evidence to support their alleged antitrust market. *Id.* at 16. Defendant asserts that the Fifth Circuit recently held that an antitrust plaintiff must "meet his burden of presenting evidence" to establish an antitrust market, such as setting forth the potential competitors in the alleged market or presenting evidence of "all interchangeable substitute products." *Id.* (citing *Shah v. VHS San Antonio Partners LLC, 985 F.3d 450, 455, 452 (5th Cir. 2021)*). But Plaintiffs only cite the Center for Disease Control's statement regarding the scope of Lyme disease in the United States and the fact that the IDSA Guidelines state that they seek to assist clinicians who diagnose and treat Lyme disease. *Id.* (citing Docket No. 373 at 19).

Defendant further replies that Plaintiffs do not provide any evidence that it competes **[*28]** in the alleged market for the treatment of Lyme disease—or evidence of how it would benefit economically if it limited competition in that market. *Id.* at 17 (citing *United Farmers Agents Ass'n v. Farmers Ins. Exch., 89 F.3d 233, 236 (5th Cir. 1996)*; *Kinderstart.com, 2007 U.S. Dist. LEXIS 22648, 2007 WL 831806, at *5*). And, Defendant argues, the case law Plaintiffs rely on is inapposite, as the cases cited address medical services markets involving actual medical professionals who were competitors in the proposed market. *Id.* (citing *Oltz, 861 F.2d at 1447* (finding medical doctor anesthesiologists and nurse anesthesiologists competed in the market for anesthesia care); *Weiss, 745 F.2d at 826* (finding medical doctors and osteopathic doctors competed in market for inpatient hospital care)).

Defendant also replies that there is no evidence it possesses a monopoly market share. *Id.* First, Defendant argues that Plaintiffs are attempting to revise their original, joint monopolization claim to allege that Defendant alone monopolizes the market for Lyme disease treatment. *Id.* at 17-18. But even with recasting the monopolization claims as Plaintiffs do, there is no support for the proposition that Defendant's claim to be a premier authority is evidence that it participates in the actual market for the treatment and diagnosis of Lyme disease. *Id.* at 19 (citing *Retractable Tech., Inc. v. Becton Dickinson & Co., 842 F.3d 883, 894-95 (5th Cir. 2016)*). Defendant asserts that **[*29]** there is still no evidence that it treats Lyme disease patients. *Id.* Defendant further argues that Plaintiffs passing mention of an antitrust market for "Lyme treatment guidelines" has no more viability, as Defendant publishes Lyme disease guidelines for free, as do numerous other organizations—at least six other sets of guidelines are in the record here. *Id.* at 18 (citing Docket No. 373 at 22), 19 n.6. Defendant argues that monopoly power would be nonsensical in this context, as a monopolist has the "power to control prices or exclude competition." *Id.* at 19 (citing *United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*). But there are no prices for treatment guidelines and no barriers to others issuing guidelines. *Id.* As to the one document Plaintiffs cite, Defendant argues that it does nothing to support Plaintiffs' claims, as the report states that "for patients with persistent symptoms associated with Lyme disease, almost all . . . select practitioners who follow the guidelines of ILADS. Very few (6%) of these same patients report being treated by infectious disease physicians who follow only the IDSA guidelines." *Id.* (citing Docket No. 386-8 at 70).

Defendant finally replies that Plaintiffs have no evidence that the IDSA Guidelines **[*30]** actually are unreasonable restraints. *Id.* (citing Docket No. 373 at 23). Defendant further contends that Plaintiffs rely on inapposite cases where actual market participants orchestrated conspiracies to secretly infiltrate the standard-setting organization in order to draft guidelines designed to prevent new competitors from entering the market. *Id.* (citing *Am. Soc. of Mech. Eng'rs, 456 U.S. at 560-61* (finding a company's VP secretly ghostwrote the document and got an unaffiliated ASME official to sign it); *Allied Tube, 486 U.S. at 496* (finding a company recruited hundreds of new members to rig the vote on a new guideline)). In fact, Defendant argues, Plaintiffs admit that the Insurance Defendants began denying long-term treatment in the mid-1990's, yet present no evidence that the publication of the IDSA Guidelines actually had any effect on this pre-existing practice. *Id.* at 21 (citing *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*). Indeed, the only evidence Plaintiffs proffer of the IDSA Guidelines impact is a letter to the editor making the uncorroborated statement that "[unnamed] insurance companies have used these guidelines to justify their restrictive coverage of long-term antibiotic treatment." *Id.* (citing Docket No. 373 at 15). Defendant contends that this is inadmissible. *Id.*

III. Analysis [*31]

To survive summary judgment after a movant "identif[ies] those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact," *Celotex, 477 U.S. at 323*, the nonmovant must bear the burden of establishing otherwise by supporting its contentions with some evidence. *Geiserman, 1990 U.S. App. LEXIS 1483, 893 F.2d at 793* (citing *id. at 324*); *Anderson, 477 U.S. at 248* (holding that the non-moving party cannot "rest upon mere allegations or denials of [the] pleading but must set forth specific facts showing there is a genuine issue for trial"). But Plaintiffs fail to produce any summary judgment evidence to support their antitrust claims.

After almost three years of discovery, Plaintiffs do not point to a single communication between Defendant and the Insurance Defendants—let alone any large fees—to support Plaintiffs' allegations of a conspiracy. Even assuming that the two pieces of evidence Plaintiffs have relied on from the start of this case are admissible summary judgment evidence—Burrascano's testimony from 1993, seven years prior to the first set of IDSA Guidelines issuing, and the Connecticut Attorney General's press release—neither identifies a single **[*32]** agreement or payment between the Insurance Defendants, the Doctors and Defendant. Thus, viewing the evidence in the light most favorable to them as the nonmovant, Plaintiffs have not adduced any affirmative evidence in response to Defendant's motion for summary judgment to support their allegations of a conspiracy to deny the existence of chronic Lyme disease in exchange for payment.

Further, to survive summary judgment in an antitrust case[5] when relying on circumstantial evidence, Plaintiffs bear the burden of "present[ing] evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently . . . [and] must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents." *Matsushita, 475 U.S. at 588*; *see also* *Golden Bridge Tech., 547 F.3d at 273* ("It is not sufficient under *Matsushita* for [Plaintiff] to simply propose conceivable motives for conspiratorial conduct; [Plaintiff's] evidence must tend to show that the possibility of independent conduct is excluded."). An antitrust claim must also show "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Marucci, 751 F.3d at 374* (quoting *Monsanto Co. v. Spray—Rite Serv. Corp., 465 U.S. 752, 764 (1984)*); *see also* *H & B Equip., 577 F.2d at 245* ("To establish **[*33]** [a party's] complicity, the evidence must warrant a finding that [the conspiring parties] had a 'meeting of minds in an unlawful arrangement.'"). And "if there is not sufficient evidence of a conspiracy to support a *Section 1* claim, then there is not sufficient evidence of a conspiracy to support a *Section 2* claim [under a theory of joint monopolization]." *Stewart Glass, 17 F.Supp.2d at 657*.

An antitrust plaintiff must also present evidence to establish an antitrust market. *See* *Shah, 985 F.3d at 454* ("Whether a relevant market has been identified is usually a question of fact; however, in some circumstances, the issue may be determined as a matter of law. If [Plaintiff] fails to define his proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in [his] favor, the relevant market is legally insufficient. That is, in order for [Plaintiff's] definition to be legally sufficient, it must include all commodities reasonably interchangeable by consumers for the same purposes." (citation omitted)). In a relevant market, a monopolist has "the power to **[*34]** control prices or exclude competition." *Grinnell, 384 U.S. at 571*. And "[t]he offense of monopolization requires that the defendant dominate

[5] The Fifth Circuit has held that in antitrust cases "[w]e no longer maintain that summary judgment is especially disfavored in categories of cases. Stearns' attempt to invoke earlier cases in which we suggested that summary judgment should be shunned when complex antitrust claims are involved thus fails." *Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 521 (5th Cir. 1999)* (citation omitted).

the relevant market," meaning that—absent special circumstances—"a defendant must have a market share of at least fifty percent before he can be guilty of monopolization." *Domed Stadium Hotel, 732 F.2d at 489*.

Assuming *arguendo* that Plaintiffs here have properly identified and supported the market for the treatment of Lyme disease as an antitrust market, they cannot meet their burden to survive summary judgment on their antitrust claims. As discussed above, Plaintiffs do not present evidence that gives rise to a genuine issue of fact of an agreement between the alleged conspirators. *See* *Marucci, 751 F.3d at 374*. Nor do they present evidence that tends to exclude the possibility of independent conduct on the part of Defendant; instead, they offer merely speculation, conclusory assertions and attorney argument. *See* *Golden Bridge Tech., 547 F.3d at 273*; see *also* *Sojitz Energy Venture, Inc. v. Union Oil Co. of California, 394 F. Supp. 3d 687, 714 (S.D. Tex. 2019)* (citing *Velasco v. Cameron Cty., 721 F. App'x 387, 388-89 (5th Cir. 2018)*; *Blue Spike, LLC v. Audible Magic Corp., No. 6:15-CV-584, 2016 U.S. Dist. LEXIS 130890, 2016 WL 3653516, at *4 (E.D. Tex. May 31, 2016)* ("Conclusory assertions and attorney argument are insufficient to defeat summary judgment.")). Further, there is no evidence that Defendant actually participates in the market for the treatment of Lyme disease as a monopolist—let alone controls fifty percent of that market. *See* *United Farmers Agents, 89 F.3d at 236* (finding that a proposed **[*35]** market fails because defendant did not sell services in that market but provided a free product); *Domed Stadium Hotel, 732 F.2d at 489*. Defendant promulgates free guidelines for doctors about treating Lyme diseases and is one of many groups to do so. *See* Docket No. 357-3 at 2. Defendant does not treat patients for Lyme disease and is not an insurance company that pays for those treatments. Under these circumstances, it is implausible that Defendant controls fifty percent of the Lyme disease treatment market. Plaintiffs' antitrust claims thus fail. *See* *Stewart Glass, 17 F.Supp.2d at 657*.

The time for speculation on what may have occurred has passed. Because Plaintiffs cannot provide evidence that Defendant formed an agreement with the Doctors and the Insurance Defendants to create and enforce arbitrary guidelines for the treatment of Lyme disease, that Defendant received money from the Insurance Defendants in furtherance on the alleged conspiracy, or that Defendant participates in or controls fifty percent of the proposed antitrust market, there is no genuine issue of fact remaining for trial on Plaintiffs' antitrust violations allegation. Defendant IDSA's Motion for Summary Judgment on Plaintiffs' RICO and Antitrust Claims (Docket No. 357) is thus **GRANTED** **[*36]** . It is

ORDERED that Plaintiffs' antitrust claims (Docket No. 361 at 49-52) are **DISMISSED WITH PREJUDICE**.

So ORDERED and SIGNED this 1st day of September, 2021.

/s/ Robert W. Schroeder III

ROBERT W. SCHROEDER III

UNITED STATES DISTRICT JUDGE

Rex - Real Estate Exch., Inc. v. Zillow Inc.

United States District Court for the Western District of Washington

September 2, 2021, Decided; September 2, 2021, Filed

C21-312 TSZ

Reporter
2021 U.S. Dist. LEXIS 167281 *; 2021 WL 3930694

REX - REAL ESTATE EXCHANGE INC., Plaintiff, v. ZILLOW INC.; ZILLOW GROUP INC.; ZILLOW HOMES INC.; ZILLOW LISTING SERVICES INC.; TRULIA LLC; and THE NATIONAL ASSOCIATION OF REALTORS, Defendants.

Prior History: *REX - Real Estate Exch. Inc. v. Zillow Inc., 2021 U.S. Dist. LEXIS 108155, 2021 WL 2352043 (W.D. Wash., June 9, 2021)*

Core Terms

allegations, listings, websites, Buyer, display, motion to dismiss, Lanham Act, consumers, misleading, real estate, antitrust, tab, relevant market, anticompetitive, licensed, complaint alleges, customers, labeling, harmed, Agent Commission Rule, Segregation, commissions, Offers, courts, false advertising, asserted claim, deceptive act, market power, implemented, conspiracy

LexisNexis® Headnotes

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN1[] **Standing, Elements**

Lack of U.S. Const. art. III standing requires dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by U.S. Const. art. III by alleging an actual case or controversy. To satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an injury in fact; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. For purposes of ruling on a motion to dismiss for want of standing, courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party. On a motion to dismiss, courts presume that general allegations embrace those specific facts that are necessary to support the claim.

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

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN2[] Motions to Dismiss, Failure to State Claim

Although a complaint challenged by a Fed. R. Civ. P. 12(b)(6) motion to dismiss need not provide detailed factual allegations, it must offer more than labels and conclusions and contain more than a formulaic recitation of the elements of a cause of action. In ruling on a motion to dismiss, the court must assume the truth of the plaintiff's allegations and draw all reasonable inferences in the plaintiff's favor. The question for the court is whether the facts in the complaint sufficiently state a plausible ground for relief. If the court dismisses the complaint or portions thereof, it must consider whether to grant leave to amend.

Antitrust & Trade Law > Sherman Act > Claims

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

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

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN3[] Sherman Act, Claims

To state a 15 U.S.C.S. § 1 claim under the rule of reason, a plaintiff must plead facts which, if true, will prove: (1) a contract, combination or conspiracy among defendants; (2) by which the defendants intended to harm or restrain trade or commerce among several States; (3) which actually injures competition; and (4) plaintiff is the proper party to bring the antitrust action because it was harmed by defendants' contract, combination, or conspiracy, and the harm it suffered was caused by the anticompetitive aspect of defendants' conduct.

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

HN4[] Regulated Practices, Price Fixing & Restraints of Trade

Concerted efforts to enforce (rather than just agree upon) private product standards face more rigorous antitrust scrutiny.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

HN5[] Higher Education & Professional Associations, Professional Associations

The interpretation and promotion of a trade association's so-called voluntary standards by the association's agents and members can be deemed to be repugnant to the antitrust laws, and the association should be encouraged to eliminate the anticompetitive practices of all its agents acting with apparent authority.

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

Evidence > Burdens of Proof > Allocation

HN6[] Per Se Rule & Rule of Reason, Sherman Act

The rule of reason requires courts to conduct a fact-specific assessment of the market power and market structure to assess the restraint's actual effect on competition. The plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. A threshold step in any antitrust case is to accurately define the relevant market, which refers to the area of effective competition.

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

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

Evidence > Burdens of Proof > Allocation

HN7[] **Per Se Rule & Rule of Reason, Sherman Act**

The U.S. Court of Appeals for the Ninth Circuit has adopted a three-part, burden-shifting test, under which a plaintiff must meet its initial burden to prove that a challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market and only then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate the procompetitive efficiencies could reasonably be achieved through less anticompetitive means. In ruling on a Fed. R. Civ. P. 12(b)(6) motion, the court exclusively focuses on whether plaintiff has sufficiently pleaded the first element. At the motion to dismiss stage, the court's job is not to balance the anticompetitive effects of the challenged restraints against procompetitive justifications, but instead to evaluate whether the complaint presents facts, which show the challenged conduct plausibly exerts an unreasonable restraint on trade.

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

HN8[] **Market Definition, Relevant Market**

Regardless of whether a defendant's practices are interrelated, actual or alleged harms to customers and consumers outside the relevant markets are beyond the scope of ***antitrust law***.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

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

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Elements of False Advertising

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

HN9[] **False Advertising, Lanham Act**

The majority of district courts within the Ninth Circuit have applied Fed. R. Civ. P. 9(b)'s pleading standards to false advertising claims under the Lanham Act, particularly when the claim relies on factual allegations that necessarily constitute fraud. The better reasoned authority is that, where a Lanham Act claim is predicated on the theory that the defendant engaged in a knowing and intentional misrepresentation, then Rule 9(b) is applicable. The U.S. District court for the Western District of Washington has also applied Rule 9(b)'s pleading requirements to Washington Consumer Protection Act claims.

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

HN10[] Heightened Pleading Requirements, Fraud Claims

For purposes of Fed. R. Civ. P. 9(b), in the event a plaintiff alleges a unified course of fraudulent conduct, the claim is said to be grounded in fraud or to sound in fraud.

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

HN11[] Heightened Pleading Requirements, Fraud Claims

Fed. R. Civ. P. 9(b)'s heightened pleading requirements apply only to averments of fraud supporting a claim rather than to the claim as a whole, and fraud can be averred by specifically alleging fraud, or by alleging facts that necessarily constitute fraud (even if the word fraud is not used). Allegations of fraud must be accompanied by the who, the what, when, where and how of the misconduct charged.

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

HN12[] Heightened Pleading Requirements, Fraud Claims

Fed. R. Civ. P. 9(b) can apply where plaintiffs allege some fraudulent and some non-fraudulent conduct.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Elements of False Advertising

Constitutional Law > ... > Freedom of Speech > Commercial Speech > Misleading Speech

HN13[] False Advertising, Lanham Act

The Lanham Act creates a private cause of action for any person who believes that he or she is or is likely to be damaged by a person who uses false or misleading representation of fact, which, in commercial advertising or promotion, misrepresents the nature, characteristics, or qualities of another person's goods, services, or commercial activities. 15 U.S.C.S. § 1125(a)(1)(B). The Act itself does not define advertising or promotion, but the U.S. Court of Appeals for the Ninth Circuit has adopted the following definition: (1) commercial speech, (2) by a defendant who is in commercial competition with plaintiff, (3) for the purpose of influencing consumers to buy defendant's goods or services, and (4) that is sufficiently disseminated to the relevant purchasing public. Although jurists debate whether the second element is still valid in light of the U.S. Supreme Court's decision in Lexmark Int'l, Inc. v. Static Control Components, there is no question that the third element flows from the statutory language and remains valid after Lexmark. The representations need not be made in a classic advertising campaign, but may instead consist of more informal types of promotion.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN14[] Amendment of Pleadings, Leave of Court

Leave to amend a complaint should be freely given, Fed. R. Civ. P. 15(a)(2).

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

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

HN15[] **Trade Practices & Unfair Competition, State Regulation**

To state a claim under Wash. Rev. Code § 19.86.020, a plaintiff must plausibly allege (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation.

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For Zillow Inc, a Washington corporation, Zillow Group Inc, a Washington corporation, Zillow Homes Inc, a Delaware corporation, Zillow Listing Services Inc, a Washington corporation, Trulia LLC, a Delaware limited liability company, Defendants: John A Jurata, Jr, LEAD ATTORNEY, PRO HAC VICE, ORRICK HERRINGTON & SUTCLIFFE (DC), WASHINGTON, DC; Naomi J Scotten, LEAD ATTORNEY, PRO HAC VICE, ORRICK HERRINGTON & SUTCLIFFE (NY), NEW YORK, NY; Russell P Cohen, LEAD ATTORNEY, PRO HAC VICE, ORRICK HERRINGTON & SUTCLIFFE (SF), SAN FRANCISCO, CA; Aravind Swaminathan, Nicole M. Tadano, ORRICK HERRINGTON & SUTCLIFFE LLP (SEA), SEATTLE, WA.

For The National Association of Realtors, an Illinois trade association, Defendant: Ethan Glass, LEAD ATTORNEY, PRO HAC VICE, QUINN EMANUEL URQUHART & SULLIVAN LLP (DC), WASHINGTON, DC; Thomas C Rubin, QUINN EMANUEL URQUHART & SULLIVAN LLP (WA), SEATTLE, WA.

Judges: Thomas S. Zilly, United States District Judge.

Opinion by: Thomas S. **[*2]** Zilly

Opinion

ORDER

THIS MATTER comes before the Court on the motion to dismiss filed by Defendants Zillow Inc., Zillow Group Inc., Zillow Homes Inc., Zillow Listing Services Inc., and Trulia LLC ("Zillow"), docket no. 83, and the motion to dismiss filed by the National Association of REALTORS® ("NAR"), docket no. 84. Having reviewed all papers filed in support of, and in opposition to, the motions, the Court enters the following Order.

Background

NAR is the nation's largest trade association for real estate professionals, consisting of multiple listings services ("MLSs"), more than a thousand local associations, and around 1.45 million real estate agents. Compl. at ¶ 24 (docket no. 1). NAR promulgates rules governing how its members operate their businesses, which have allegedly become ubiquitous within the marketplace. *Id.* at ¶ 29. For example, NAR has adopted an optional rule, known as the Segregation Rule,[1] which requires members' listings that are obtained through MLSs' internet data exchange

[1] The complaint refers to the "segregation rule" or "IDX segregation rule," *e.g.*, Compl. at ¶¶ 85 & 93, but the parties, and the Court's prior order (docket no. 80), have also referred to this rule as the No-Commingling Rule. This order will refer to the rule as the Segregation Rule.

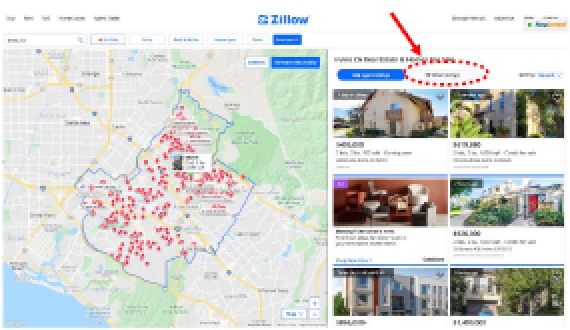
("IDX") feeds to be "displayed separately from listings obtained from other sources." *Id.* at ¶¶ 83 & 85. NAR has also adopted a mandatory rule, known as the Buyer Agent Commission Rule, which requires **[*3]** a seller's agent to include in any MLS listing a predetermined offer of commission to a buyer's agent, thereby prohibiting any party from later modifying that commission. *Id.* at ¶¶ 31 & 33. NAR's members allegedly encourage their customers to offer high commissions for buyers' agents, resulting in historically high, static commissions throughout the United States, with total commissions averaging about 5.5 percent of a home's sale price. *See id.* at ¶¶ 34 & 42.

Established in 2015, Plaintiff REX — Real Estate Exchange Inc. is a licensed broker that employs licensed real estate agents across the nation, including in Washington. Compl. at ¶¶ 40, 44, & 47. Plaintiff is not a member of NAR or any MLS and thus has not agreed to comply with any of NAR's rules. *Id.* at ¶ 35. Home sellers who choose Plaintiff's services are able to avoid paying a predetermined buyer agent commission and can instead negotiate that fee—as a result, Plaintiff's clients pay a total average commission of 3.3 percent of a home's sale price. *Id.* at ¶ 42.

Plaintiff has developed proprietary digital technology to market its customers' homes, allegedly saving customers more than $29 million in commissions over the past **[*4]** five years. Compl. at ¶¶ 40-43. Plaintiff lists its customers' homes on various real estate aggregator websites, including two of Zillow's websites, Zillow.com and Trulia.com, which are the first and fourth most visited real estate aggregator sites in the United States. *Id.* at ¶ 54. Zillow's websites are alleged to be a "dominant doorway into the residential real estate market." *Id.* Plaintiff's listings were historically displayed on Zillow's primary search page alongside the listings of MLS participants. *Id.* at ¶ 63.

In 2018, Zillow launched its "Zillow Offers" business, allowing Zillow to "transact[] thousands of homes annually" as an "ibuyer" of homes. Compl. at ¶ 58. Based on Plaintiff's information and belief, "the growth and substantial inventory of Zillow-owned homes placed Zillow in a new position: Instead of focusing on being an open access point for consumers to display and access residential real estate listings, Zillow's interests turned to its own substantial home inventory." *Id.* In late 2020, Zillow announced that it would join forces with NAR and several MLSs, publicly committing that "all Zillow-owned homes will be listed on the MLSs with commissions paid to agents representing **[*5]** buyers." *Id.* at ¶ 59. Plaintiff alleges that NAR's Buyer Agent Commission Rule, which is "now adopted by Zillow, is the paramount reason that real estate commissions are two to three times higher in the United States than in comparable international markets." *Id.* Zillow also announced that it would begin to use MLS data feeds to populate its websites. *Id.* at ¶ 60.

In January 2021, Zillow unveiled its newly designed website display to be implemented nationwide on its websites to comply with the NAR and MLS "guidelines" or "rules." Compl. at ¶¶ 64 & 70-71. The new display created a separate page or tab, called "Other listings," that is concealed behind the primary results page or tab, called "Agent listings," as depicted below:



Id. at ¶ 64. As a result of this new display, consumers see only a portion of the homes at one time, based on whether they are viewing the primary "Agents listings" tab or the secondary "Other listings" tab; and they must now move back and forth between these two tabs. *Id.* at ¶ 66. Although Plaintiff's customers' homes are all listed by licensed real estate agents, its listings are now being displayed in the "Other listings" category to comply with NAR and MLS rules, **[*6]** rather than in the "Agent listings" category. *Id.* at ¶¶ 67-68 & 71. Zillow allegedly knows that Plaintiff is a licensed broker with licensed agents, as Plaintiff pays Zillow to be a part of Zillow's Premier Agent Program. *Id.* at ¶ 69. Plaintiff alleges that this new display and labeling system "is not only inaccurate and nonsensical, it is misleading and deceptive," as it "degrades non-MLS listings" by placing them on the "Other listings" tab. *Id.* at ¶¶ 67 & 71.

After Zillow redesigned its websites, views of Plaintiff's listings "plummeted" on Zillow's websites, causing "a corresponding drop in sales and . . . lost brokerage service revenues to" Plaintiff. Compl. at ¶¶ 73-74 & 88. For example, views of one of Plaintiff's listings on Zillow.com dropped dramatically after January 2021, when Zillow added the "Other listings" tab to the website, as depicted below:

Id. at ¶ 74. Zillow's and NAR's actions are also allegedly harming other non-MLS agents, *see id.* at ¶ 71, as well as the sellers of the homes that are listed on Zillow's "Other listings" tab, "causing them to list the home for more days on market and accept lower sales prices." *Id.* at ¶ 73.

In March 2021, Plaintiff brought this **[*7]** action against Zillow and NAR, asserting four claims: (1) an unreasonable restraint of trade in violation of *Section 1 of the Sherman Act, 15 U.S.C. § 1*; (2) false advertising in violation of the *Lanham Act, 15 U.S.C. § 1125*; (3) an unfair or deceptive act or practice in violation of the *Washington Consumer Protection Act ("CPA"), RCW 19.86.020*; and (4) conspiracy to restrain trade in violation of the CPA, *RCW 19.86.030*. Compl. at ¶¶ 114-64. Plaintiff simultaneously filed a motion for a preliminary injunction, docket no. 5, seeking to enjoin Defendants from implementing any rule requiring the segregation of Plaintiff's listings from MLS listings, excluding Plaintiff's listings from the "Agent listings" tab, and categorizing Plaintiff's listings as "Other listings" on Zillow's websites. The Court denied that motion, concluding that Plaintiff failed to satisfy its burden to show a likelihood of prevailing on its federal and state law claims, or a likelihood of suffering irreparable harm in the absence of an injunction. Order (docket no. 80 at 23).

Defendants now move to dismiss the claims asserted against them, *see* docket nos. 83 & 84. NAR also requests that the Court take judicial notice of certain documents, docket no. 85. Plaintiff partially opposes the request, docket no. 91, with respect **[*8]** to two of the documents, a complaint filed in a civil case, *see* Ex. C to request (docket no. 85-3), and the final judgment entered in that case, including a 2008 consent decree between NAR and the United States, *see* Ex. D to request (docket no. 85-4). The United States also filed a statement of interest, docket no. 95, asking this Court to decline to draw any inference in NAR's favor from the 2008 consent decree, which is now expired. *See id.* at 2. The Court previously noted the existence of that consent decree in ruling on the motion for a preliminary injunction, *see* docket no. 80 at 13. Because no one disputes the authenticity of these court records, the Court GRANTS NAR's request to take judicial notice of them (docket nos. 85-3 & 85-4), as well as the unopposed documents (docket nos. 85-1 & 85-2), in ruling on the instant motions.

Discussion

1. Article III Standing

NAR argues that Plaintiff fails to plausibly allege that its injury is traceable to NAR or that such injury is redressable. ***HN1***[] "[L]ack of Article III standing requires dismissal for lack of subject matter jurisdiction under *Federal Rule of*

Civil Procedure 12(b)(1)." *Maya v. Centex Corp., 658 F.3d 1060, 1067 (9th Cir. 2011)*. "[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement **[*9]** imposed by Article III of the Constitution by alleging an actual case or controversy." *Id.* (quoting *City of Los Angeles v. Lyons, 461 U.S. 95, 101, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)*). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' . . . ; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc., 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)*). "For purposes of ruling on a motion to dismiss for want of standing, . . . courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." *Id.* (quoting *Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*). On a motion to dismiss, courts "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (citation omitted).

The Court first considers whether Plaintiff's allegations are sufficient to show that its alleged injuries are traceable to NAR. In arguing that Plaintiff has failed to plead causation, NAR points to the complaint's allegations that the Segregation Rule applies only to MLSs (and not Zillow, who is merely an "MLS participant"), it is "optional" and has not been adopted by all MLSs, and it was implemented by Zillow alone. **[*10]** *See* NAR Mot. (docket no. 84 at 9-11). NAR also relies on allegations purportedly showing that Zillow's selection of a new website design was done independently of NAR. *See id.* at 10. According to NAR, such allegations are "breaks in the chain of causation," demonstrating that "the specific website changes made by Zillow that allegedly harmed REX were the product of Zillow's independent actions," and *not* NAR's actions. *Id.*

NAR's argument fails for the simple reason that it ignores the other allegations that NAR is a direct participant in the challenged conduct. The complaint challenges not only the Segregation Rule but also the Buyer Agent Commission Rule, both of which were "written by NAR and enforced by its member MLSs"; moreover, the Buyer Agent Commission Rule allegedly "*mandate*[*s*] offers of commissions to buyer agents." *See* Compl. at ¶¶ 7 & 59. The complaint also alleges that NAR "coopt[ed] Zillow" and that Zillow's "[t]op sites . . . now all have restrictions based on NAR and MLS guidelines." *Id.* at ¶¶ 61 & 71. In addition, one Zillow representative allegedly stated that they changed the websites as "a result of [Zillow] joining the MLS" and "to comply with MLS rules." *Id.* at **[*11]** ¶ 88. The complaint plausibly alleges that, absent NAR's actions in drafting the rules and effectively forcing Zillow and other MLS participants to comply with them, Zillow would not have changed its websites. Plaintiff's alleged injuries are thus fairly traceable to NAR's actions.

As to whether Plaintiff's alleged injuries are redressable, Plaintiff seeks not just injunctive relief, it also seeks statutory damages under *15 U.S.C. §§ 15* and *1117*, other "damages and statutory damages to be proven at trial," and "attorneys' fees and costs." *See* Compl. at ¶¶ D-G. Plaintiff has standing to bring these claims against NAR.

2. *Rule 12(b)(6)* Standard

HN2[] Although a complaint challenged by a *Rule 12(b)(6)* motion to dismiss need not provide detailed factual allegations, it must offer "more than labels and conclusions" and contain more than a "formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In ruling on a motion to dismiss, the Court must assume the truth of the plaintiff's allegations and draw all reasonable inferences in the plaintiff's favor. *See* *Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)*. The question for the Court is whether the facts in the complaint sufficiently state a "plausible" ground for relief. *Twombly, 550 U.S. at 570*. If the Court dismisses the complaint or portions thereof, it must **[*12]** consider whether to grant leave to amend. *See* *Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)*.

3. Antitrust Violations

Defendants argue that Plaintiff's complaint fails to state an antitrust claim, both under *Section 1* of the Sherman Act and under Washington law,[2] regardless of whether the Court applies the *per se* analysis or the "rule of reason" analysis. Plaintiff responds that "[t]he Court is not required to decide which rule applies in [ruling on] a motion to dismiss." Resp. (docket no. 90 at 14). The Court has already ruled that Plaintiff's challenge to a less-than-obvious restraint,[3] as well as the complicated nature of the parties' business relationships, do not lend themselves to *per se* analysis. *See* Order (docket no. 80 at 13). The Court therefore analyzes the complaint under the rule of reason to determine whether Plaintiff has sufficiently pleaded antitrust claims.

HN3[] To state a *Section 1* claim under the rule of reason, Plaintiff "must plead facts which, if true, will prove: (1) a contract, combination or conspiracy among [Defendants]; (2) by which the [Defendants] intended to harm or restrain trade or commerce among several States . . . ; (3) which actually injures competition"; and "(4) [Plaintiff **[*13]** is] the proper part[y] to bring the antitrust action because [it was] harmed by [Defendants'] contract, combination, or conspiracy, and the harm [it] suffered was caused by the anticompetitive aspect of [Defendants'] conduct."[4] *In Re Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1150 (9th Cir. 2019)* (quoting *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir. 2012)*).

A. Anticompetitive Agreement

Defendants contend that Plaintiff has failed to plead the first two elements of a *Section 1* violation, namely that they entered an anticompetitive agreement or conspiracy. According to Zillow, the complaint fails to allege a "conscious commitment to a common scheme designed to achieve an unlawful objective." Zillow Mot. (docket no. 83 at 14) (quoting *Toscano v. Prof. Golfers Assoc., 258 F.3d 978, 984 (9th Cir. 2001)*). Although the complaint alleges that Zillow implemented the new website display as "a result of joining the MLS and changing over to IDX feeds" and to "comply with MLS rules," Compl. at ¶ 88, the complaint also alleges that it was "*Zillow's* decision to conceal non-MLS listings under the misleading and inferior 'other' category," causing "listings from non-MLS brokers such as [Plaintiff] [to] be far less competitive." *Id.* at ¶ 90; *see id.* at ¶ 108 (alleging that Zillow is "using" the MLS rules "to implement a change in" its website designs). The complaint **[*14]** further alleges that "Zillow signaled its dedication to . . . inflated commissions—by committing that 'all Zillow-owned homes will be listed on the MLSs with commissions paid to agents representing buyers.'" *Id.* at ¶ 59. ***HN4***[] As the Supreme Court has held, "[c]oncerted efforts to *enforce* (rather than just agree upon) private product standards face more rigorous antitrust scrutiny." *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 n.6, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)* (emphasis in original). At times, the complaint appears to allege that Zillow's mere act of entering

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[2] The parties do not separately brief Plaintiff's state law claim for conspiracy to restrain trade under the CPA, *RCW 19.86.030*, and Zillow argues that this claim should be dismissed on the same basis that the *Section 1* claim should be dismissed. *See* Zillow Mot. (docket no. 83 at 20-21). The Court recognizes that the state and federal standards are essentially the same and thus analyzes both claims under the federal standards. *See State v. LG Elecs., Inc., 186 Wn.2d 169, 186 n.3, 375 P.3d 1035 (2016)* (concurring, McCloud, J.).

[3] Although the complaint alleges a "group boycott," it is clear from the face of the complaint that Defendants are not alleged to be competitors who *refuse to do business* with Plaintiff—but rather, they are alleged to have "segregate[d]" Plaintiff's listings, "denying them *effective*" or "*equal*" access to Zillow's websites. Compl. at ¶¶ 101, 109, 118 & 122. *See Boycott*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "group boycott" as "[a] type of secondary boycott by two or more competitors who refuse to do business with one firm unless it refrains from doing business with an actual or potential competitor of the boycotters," and noting that such claims are "analyzed under either the per se rule or the rule of reason, depending on the nature of the boycott").

[4] Neither Defendant appears to challenge Plaintiff's alleged harm or so-called antitrust standing to bring this action. Although NAR argues (unsuccessfully) that Plaintiff lacks constitutional standing, *see supra*, Section 1 of this Order, and suggests that Plaintiff also lacks standing to bring an antitrust action, NAR confines its argument to the complaint's purported failure to plead harm to *competition*—rather than any failure to plead harm to Plaintiff as a result of Defendants' anticompetitive conduct. *See* NAR Mot. (docket no. 84 at 13-15). The Court concludes that Plaintiff has adequately pleaded that it has suffered harm as a result of the anticompetitive aspects of Defendants' actions. *See* Compl. at ¶¶ 73 & 111.

agreements with MLSs constitutes "horizontal agreements between competitors." Compl. at ¶¶ 93 & 97; *see also* Resp. (docket no. 90 at 20). Such acts, standing alone, would be insufficient to plead an anticompetitive agreement or conspiracy. *See* *Toscano, 258 F.3d at 984* (finding no evidence of concerted action to restrain trade where a third party "independently set the terms of the contracts, and [defendants] merely accepted them"). Because the complaint also alleges that Zillow went a step further—e.g., by affirmatively redesigning its websites to enforce an allegedly misleading labeling system—Plaintiff has plausibly alleged that Zillow agreed to use the MLS rules to restrain trade. *See id.*

For its part, NAR argues that Plaintiff cannot **[*15]** plausibly allege the existence of an unlawful agreement because NAR's challenged rules are "optional." *See* NAR Reply (docket no. 93 at 7-8). This argument is unavailing for two reasons. First, Plaintiff challenges not just the optional Segregation Rule, but also the mandatory Buyer Agent Commission Rule. *See* Compl. at ¶¶ 29, 34, & 59. Second, the Supreme Court has concluded that ***HN5***[] the interpretation and promotion of a trade association's "so-called voluntary standards" by the association's agents and members could be deemed to be "repugnant to the antitrust laws," and the association "should be encouraged to eliminate the anticompetitive practices of all its agents acting with apparent authority." *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 561-62, 570 & 574, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982)*. The complaint alleges that the challenged rules were "written" by NAR and are being "promulgated" or "enforced" by its members, namely the MLSs and their members (including Zillow), and that these "combined" actions constitute illegal restraints on trade. *See* Compl. at ¶¶ 7, 86, & 120-21. The complaint further alleges that "NAR is the rare trade association that sets the rules of competition among its members," promulgating "mandates governing [IDX feeds] and the structure of compensation **[*16]** offers." *Id.* at ¶ 29. Allegedly, "[b]ecause of the size and scope of NAR and MLSs, these rules have become ubiquitous within the marketplace—essentially making consumers subject to them." *Id.* In other words, brokerages, agents, and even customers allegedly have *no choice* but to comply with NAR's so-called optional rules. *See* *Hydrolevel, 456 U.S. at 570* (emphasizing that the trade association was "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce"); *see also* *Top Agent Network, Inc. v. Nat'l Assoc. of Realtors, No. 20-cv-3198, 2021 U.S. Dist. LEXIS 154201, 2021 WL 3616480, at *6 (N.D. Cal. Aug. 16, 2021)* ("That NAR exercises control over the operating rules of the market for home sales in most major markets across the country is not, in and of itself, good for competition."). The complaint plausibly alleges NAR's involvement in an anticompetitive agreement or conspiracy.

B. Harm to Competition

HN6[] "The rule of reason requires courts to conduct a fact-specific assessment of the 'market power and market structure . . . to assess the [restraint's] *actual* effect' on competition." *FTC v. Qualcomm Inc., 969 F.3d 974, 989 (9th Cir. 2020)* (citation omitted) (emphasis in original). "[T]he plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market."[5] *Id.* (citation **[*17]** omitted). "A threshold step in any antitrust case is to accurately define the relevant market, which refers to 'the area of effective competition.'" *Id.* (quoting *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285, 201 L. Ed. 2d 678 (2018)*).

i. Relevant Market

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[5] ***HN7***[] This circuit has adopted a three-part, burden-shifting test, under which a plaintiff must meet this initial burden and only "then the burden shifts to the defendant to show a procompetitive rationale for the restraint." *Qualcomm, 969 F.3d at 991*. "If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate the procompetitive efficiencies could reasonably be achieved through less anticompetitive means." *Id.* In ruling on a *12(b)(6)* motion, the Court exclusively focuses on whether Plaintiff has sufficiently pleaded the first element. *See* *Sitzer v. Nat'l Assoc. of Realtors, 420 F. Supp. 3d 903, 915 (W.D. Mo. 2019)* (concluding that at the motion to dismiss stage, "the [c]ourt's job is not to balance the anticompetitive effects of [the challenged restraints] against procompetitive justifications," but instead to "evaluate whether [the complaint] presents facts, which . . . show the challenged conduct plausibly exerts an unreasonable restraint on trade").

Plaintiff alleges that the relevant market is the "market for the provision of real estate brokerage services to sellers and buyers of residential real estate in local markets throughout the country where REX operates." Compl. at ¶ 102; *see id.* at ¶ 44 & n.9. Zillow contends that the only harm to competition that is alleged in the complaint has been suffered by consumers *outside* of the relevant market. *See Qualcomm, 969 F.3d at 993* (holding that **HN8**[] regardless of whether a defendant's "practices are interrelated, actual or alleged harms to customers and consumers outside the relevant markets are beyond the scope of **antitrust law**"). Zillow, like Qualcomm, "is no one-trick pony." *Id. at 983*. According to the complaint, Zillow has traditionally operated aggregator websites that display and market homes for sale, as well as its related "Premier Agent" program, through which Zillow charges a fee to promote brokers and agents on its websites. Compl. at ¶¶ 47-48 & 69. In 2018, Zillow also started "transacting thousands of homes annually" as **[*18]** an "ibuyer" through its Zillow Offers business. *Id.* at ¶ 58. Zillow then joined NAR as an "MLS participant." *Id.* at ¶ 59.

Zillow argues that because the Segregation Rule was implemented in Zillow's capacity as a *data aggregator* (and not in connection with providing *real estate brokerage* services), Plaintiff cannot plausibly allege that the restraint occurred within the relevant market. Zillow Mot. (docket no. 83 at 20). Even assuming that Zillow's implementation of a new website design, which displays real estate listings nationwide, can be deemed as occurring "outside" the market for real estate brokerage services, Zillow does not address the other restraint at issue: the Buyer Agent Commission Rule, which was allegedly implemented in Zillow's capacity as a real estate broker and MLS participant. *See* Compl. at ¶¶ 34 & 59 (alleging that "all Zillow-owned homes will be listed on the MLSs with commissions paid to agents representing buyers," thereby "preserv[ing] sky-high real estate fees across the United States"). As other courts have concluded, NAR's Buyer Agent Commission Rule, which mandates a "blanket offer of some compensation to the buyer-broker, . . . *by itself*, raises antitrust **[*19]** concerns given that the offer is the same regardless of the buyer-broker's experience or the value of services provided by the buyer-broker." *Moehrl v. Nat'l Assoc. of Realtors, 492 F. Supp. 3d 768, 784 (N.D. Ill. 2020)* (emphasis added); *see also Sitzer v. Nat'l Assoc. of Realtors, 420 F. Supp. 3d 903, 915 (W.D. Mo. 2019)*. The court in *Moehrl* also noted that the anticompetitive aspects of this NAR rule are exacerbated by the fact that "many prospective homebuyers [now] use online websites like Zillow to find homes," and that Zillow and other websites "have agreed not to compete with the MLSs by becoming licensed brokerages or offering compensation or cooperation." *492 F. Supp. 3d at 784*. The Court rejects Zillow's argument that *Qualcomm* precludes relief in this case.

NAR likewise contends that the complaint fails to allege sufficiently specific geographic markets, or that NAR has market power within those markets. The complaint identifies twenty states in which Plaintiff employs or will employ licensed real estate agents, *see* Compl. at ¶ 44 & n.9, and alleges that at least 70 percent of licensed agents are NAR members, *id.* at ¶ 26 & n.3. Although NAR members might make up more or less than 70 percent of the active licenses in a given state or local market, the complaint sufficiently alleges that NAR enjoys substantial market power within the market for real **[*20]** estate brokerage services in the states that Plaintiff operates. *See Moehrl, 492 F. Supp. 3d at 782* (noting that NAR and the other defendants did not "deny that they have market power" in the relevant market and that "the Seventh Circuit and several other courts have recognized that MLSs have market power"); *see also Sitzer, 420 F. Supp. 3d at 915* (concluding "[g]iven the sheer market power possessed by the . . . MLS," NAR and the other defendants have "significant influence" in the relevant market).[6]

ii. Substantial Anticompetitive Effect

Defendants also argue that the complaint lacks sufficient allegations to plead harm to competition, principally arguing that Plaintiff merely assumes that harm to itself is harm to competition. *See* Zillow Reply (docket no. 92 at

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[6] NAR also argues that the relevant market alleged in the complaint is "implausible" because it fails to include individuals who "provide real estate brokerage services to themselves," or other reasonable substitutes. *See* NAR Mot. (docket no. 84 at 17). The complaint alleges that "Zillow and NAR are . . . harming the sellers of the[] homes" that are listed on the "Other listings" tab, including "For Sale by Owner" listings. *Id.* at ¶¶ 73 & 77. The complaint clearly alleges harm to individuals who sell their homes *themselves*, as well as those who use non-MLS brokers like Plaintiff.

10); NAR Mot. (docket no. 84 at 13-14). The Court disagrees, as the complaint is replete with allegations of harm to competition. Specifically, the complaint alleges that "Zillow and NAR are . . . harming the sellers of the[] homes" that are listed on the "Other listings" tab, "causing them to maintain the home for more days on the market and accept lower sales prices" because "[i]interested buyers are likely to continue avoiding or missing 'Other listings' altogether." **[*21]** Compl. at ¶¶ 73 & 77. Home listings on the "Other listings" tab include, in addition to Plaintiff's listings, "For Sale by Owner (FSBO)" and "foreclosure" listings. *Id.* at ¶ 77. Plaintiff plausibly alleges that Defendants' actions have a substantial anticompetitive effect that harms consumers in the relevant market. *See id.* at ¶¶ 8, 59, 61, 65, 71, 80 & 106 (collectively, alleging that the enforcement of NAR's rules have harmed non-MLS agents and sellers, as well as buyers); *see* *Moehrl, 492 F. Supp. 3d at 785* (concluding the "Buyer-Broker Commission Rules have caused an artificial inflation of commission rate"); *Sitzer, 420 F. Supp. 3d at 915* (same).

The Court therefore DENIES Defendants' motions to dismiss, docket nos. 83 & 84, the antitrust claims brought under *Section 1* of the Sherman Act and under the CPA, *RCW 19.86.030*.

4. False Advertising or Other Deceptive Acts

A. Pleading Standard

Zillow argues that Plaintiff's claims for false advertisement or other deceptive acts under the Lanham Act and Washington's CPA, *RCW 19.86.020*, "sound in fraud" and that Plaintiff must therefore satisfy *Rule 9(b)*'s heightened pleading standards. Zillow further argues that Plaintiff "does not meaningfully contest that *Rule 9(b)* governs." Zillow Reply (docket no. 92 at 13). The Court concludes that Plaintiff sufficiently **[*22]** contests the rule's applicability. *See* Resp. (docket no. 90 at 30 n.9).

Rule 9(b) provides that "in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*. "[T]he Ninth Circuit has not definitively spoken as to whether *Rule 9(b)* applies to Lanham Act claims," *Clorox Co. v. Reckitt Benckiser Grp. PLC, 398 F. Supp. 3d 623, 634 (N.D. Cal. 2019)*, or to claims brought under the CPA, *see* *Vernon v. Quest Commc'ns Int'l, Inc., 643 F. Supp. 2d 1256, 1264-65 (W.D. Wash. 2009)*. ***HN9***[] "[T]he majority of district courts within the Ninth Circuit" have applied "*Rule 9(b)*'s pleading standards . . . to false advertising claims under the Lanham Act," particularly "when the claim relies on factual allegations that necessarily constitute fraud." *A.H. Lundberg Assocs., Inc. v. TSI, Inc.*, No. C14-1160, 2014 U.S. Dist. LEXIS 149603, 2014 WL 5365514, at *7 (W.D. Wash. Oct. 21, 2014) (listing cases); *see also* *23andMe, Inc. v. Ancestry.com DNA, LLC, 356 F. Supp. 3d 889, 908 (N.D. Cal. 2018)* (concluding that the "better reasoned authority is that, where a Lanham Act claim is predicated on the theory that the defendant engaged in a knowing and intentional misrepresentation, then *Rule 9(b)* is applicable"). This District has also applied *Rule 9(b)*'s pleading requirements to CPA claims. *See, e.g.,* *Fidelity Mortg. Corp. v. Seattle Times Co., 213 F.R.D. 573, 575 (W.D. Wash. 2003)*; *but see* *Vernon, 643 F. Supp. 2d at 1265*.[7] These cases principally rely on the Ninth Circuit's application of *Rule 9(b)* to other types of claims involving false or misleading conduct. *See, e.g.,* *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1100 & 1106-08 (9th Cir. 2003)* (applying *Rule 9(b)* to claims brought under *California's Consumer Legal Remedies Act*); *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125-27 (9th Cir. 2009)* (concluding that ***HN10***[] in the event a plaintiff alleges "a unified course of fraudulent conduct," **[*23]** "the claim is said to be 'grounded in fraud' or to 'sound in fraud'").

HN11[] In *Vess*, the Ninth Circuit held that "*Rule 9(b)*'s heightened pleading requirements [apply] only to 'averments' of fraud supporting a claim rather than to the claim as a whole," and clarified that "[f]raud can be averred by specifically alleging fraud, or by alleging facts that necessarily constitute fraud (even if the word 'fraud' is

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[7] In *Vernon*, this Court did not apply *Rule 9(b)* to the plaintiffs' CPA claim because the plaintiffs did "not allege[] facts that constitute fraud and the gravamen of the complaint [was] not fraud." *643 F. Supp. 2d at 1265*. That case is distinguishable from the instant case for the reasons explained in this Section.

not used)." *317 F.3d at 1104-05*. Allegations "of fraud must be accompanied by 'the who, the what, when, where and how' of the misconduct charged." *Id. at 1106* (quoting *Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)*).

The Court acknowledges that the complaint never uses the words "fraud" or "intent" in support of Plaintiff's Lanham Act or CPA claims. Those omissions, however, are not dispositive because the complaint also alleges facts that necessarily constitute fraud. In support of the Lanham Act claim, for example, the complaint alleges that "Zillow and NAR *knowingly* adopted this labeling system for all [nationwide] listings on Zillow as part of a *common plan or scheme* to confuse, mislead, *and deceive* consumers" and that such actions were "*deliberately calculated* to confuse and/or *deceive*." Compl. at ¶¶ 132 & 134 (emphasis added). Likewise, in support of Plaintiff's **[*24]** CPA claim, the complaint alleges that "Zillow changed its display *so that* the first page of results is presented under a *deceptive* and misleading heading, . . . while hiding [Plaintiff's] listings" and that "Zillow's *deceptive* search listing practice" has injured Plaintiff and others. *See id.* at ¶¶ 141 & 145-46 (emphasis added). In contrast, the complaint also alleges, at times, that Zillow's websites have the "tendency" or the "capacity to deceive consumers." Compl. at ¶¶ 130-31 & 143. Although Plaintiff has alleged some fraudulent and some non-fraudulent conduct, the Court concludes that Plaintiff has alleged "a unified fraudulent course of conduct" in support of the Lanham Act claims asserted against both Defendants and the CPA claim asserted against Zillow. *See Vess, 317 F.3d at 1105*; *see also Vernon, 643 F. Supp. 2d at 1265* (***HN12***[] "*Rule 9(b)* can also apply where . . . [p]laintiffs allege some fraudulent and some non-fraudulent conduct."). Because these claims are "grounded in fraud," the Court applies *Rule 9(b)*'s heightened pleading requirements the claims.

Plaintiff also asserts a CPA claim against NAR, but it does not implicate NAR in any of the fraud-based allegations supporting that claim. *See* Compl. at ¶¶ 136-51. The Court therefore does not apply **[*25]** *Rule 9(b)* to the CPA claim asserted against NAR.[8]

B. Lanham Act Violation

Defendants contend that Plaintiff has failed to sufficiently plead a Lanham Act claim for false advertising. ***HN13***[] The Lanham Act creates a private cause of action for "any person who believes that he or she is or is likely to be damaged by" a "person who" uses "false or misleading representation of fact," which, "in commercial advertising or promotion, misrepresents the nature, characteristics, [or] qualities" of "another person's goods, services, or commercial activities." *15 U.S.C. § 1125(a)(1)(B)*. "The Act itself does not define 'advertising' or 'promotion,' but [the Ninth Circuit] has adopted the following definition: (1) commercial speech, (2) by a defendant who is in commercial competition with plaintiff, (3) for the purpose of influencing consumers to buy defendant's goods or services, and (4) that is sufficiently disseminated to the relevant purchasing public." *Ariix, LLC v. NutriSearch Corp., 985 F.3d 1107, 1115 (9th Cir. 2021)* (quoting *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 735 (9th Cir. 1999)*).[9] "[T]he representations need not be made in a 'classic advertising campaign,' but may instead consist of more informal types of 'promotion.'" *Coastal Abstract Serv., 173 F.3d at 735* (citation omitted).

Zillow does not dispute that the complaint plausibly alleges that Zillow's commercial speech—adopting **[*26]** a new labeling system for its website displays—misrepresents the nature of Plaintiff's services and was sufficiently disseminated to the public. Zillow Mot. (docket no. 83 at 21-24). Zillow instead relies on the complaint's purported failure to allege that Zillow made the misleading statements *to influence consumers to purchase Zillow's products or services. See id.* at 22-23. The complaint alleges, however, that in late 2020, Zillow joined the NAR and MLSs to promote its "Zillow Offers" business. Compl. at ¶¶ 58-59. According to the complaint, the "growth and substantial

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[8] The Court nevertheless concludes that Plaintiff has failed to state a Lanham Act claim against NAR under the less demanding pleading requirements. *See infra*, Section 4(C).

[9] Although jurists debate whether the second element is still valid in light of the Supreme Court's decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)*, there is no question that the third element, the only element at issue in this case, "flows from the statutory language and remains valid after *Lexmark*." *Ariix, 985 F.3d at 1124* (Collins, J., dissenting).

inventory of Zillow-owned homes placed Zillow in a new position: Instead of focusing on being an open access point for consumers to display and access residential real estate listings, Zillow's interests turned to its own substantial home inventory." *Id.* The complaint further alleges that Zillow changed its websites "to comply with the new MLS rules" and that the "new web display includes several features that . . . *insulate MLS brokers from competition*." *Id.* at ¶¶ 65 & 88 (emphasis added).

The complaint alleges that Zillow adopted the misleading labeling system for the purpose of influencing its customers to use the **[*27]** Zillow Offers business, as well as the services of other MLS agents, by concealing or discouraging the services of non-MLS agents like Plaintiff. *See* *Ariix, 985 F.3d at 1120 n.10* (noting that to satisfy this element, "it might be useful" to explore defendants' relationships with third parties). The Court concludes that these allegations are sufficient to state a Lanham Act claim. *Cf.* *Alfasigma USA, Inc. v. First Databank, Inc., 398 F. Supp. 3d 578, 591 (N.D. Cal. 2019)* (concluding plaintiff's allegations that the representations influenced consumers' decisions to buy plaintiff's goods, but not defendant's own goods, were insufficient to state a claim).[10] The Court further concludes that the fraud-based allegations implicating Zillow also satisfy *Rule 9(b)*'s heightened pleading standard, as such allegations specify "what is false or misleading" about Zillow's websites, "why it is false," and how Zillow knew it was false. *See* Compl. at ¶¶ 128-34; *see* *Vess, 317 F.3d at 1106*.

Although the Court concludes that Plaintiff has plausibly stated a Lanham Act claim against Zillow in accordance with *Rule 9(b)*'s pleading requirements, its allegations fall short of stating such a claim against NAR. The complaint alleges, in a conclusory fashion, that "Zillow and NAR knowingly adopted this labeling system for all [nationwide] listings on Zillow as part **[*28]** of a common plan or scheme to confuse, mislead, and deceive consumers." Compl. at ¶ 132; *see id.* at ¶ 134. There are no other allegations explaining what NAR did to design or encourage this particular labeling system on Zillow's websites, let alone when, where, and how NAR did it. *See* *Fed. R. Civ. P. 9(b)*, *12(b)(6)*; *see also A.H. Lundberg Assocs.*, 2014 U.S. Dist. LEXIS 149603, 2014 WL 5365514, at *8 (dismissing a Lanham Act claim where the plaintiff failed to satisfy, "at a minimum," the "what" and the "how" aspects of *Rule 9(b)*). Plaintiff has failed to plausibly state a Lanham Act claim against NAR.

Accordingly, the Court DENIES Zillow's motion to dismiss the Lanham Act claim, docket no. 83, but GRANTS NAR's motion to dismiss this claim, docket no. 84, and hereby DISMISSES, without prejudice, the Lanham Act claim against NAR.[11]

C. CPA Violation - *RCW 19.86.020*

Defendants also assert that Plaintiff fails to state a claim for unfair or deceptive acts under the CPA, *RCW 19.86.020*. ***HN15***[] To state a claim under *RCW 19.86.020*, a plaintiff must plausibly allege "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation." *Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 37, 204 P.3d 885 (2009)*.

Zillow does not argue that the complaint fails to sufficiently plead the elements of a CPA claim. **[*29]** *See* Zillow Mot. (docket no. 83 at 24-25). Instead, Zillow invokes the so-called "business purposes defense," citing the complaint's allegations that Zillow changed its websites merely to comply with NAR's Segregation Rule. Zillow argues that the complaint shows that Zillow's conduct was "reasonable in relation to the development and

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[10] Zillow also points to contradictory allegations contained in the complaint, namely that Zillow's decision to join NAR and MLSs, and requiring Zillow to change its websites, increased its own costs and negatively impacted its data-aggregation business. Zillow Mot. (docket no. 83 at 23) (citing Compl. at ¶¶ 54 & 65). The Court perceives no contradiction: Zillow could plausibly be motivated to join NAR and MLSs to boost its Zillow Offers business (and other MLS members' services) irrespective of whether that change was costly to implement or ultimately hurt Zillow's data-aggregation business.

[11] ***HN14***[] Leave to amend a complaint should be freely given, *see* *Fed. R. Civ. P. 15(a)(2)*, and at this stage, it is not clear to the Court that an amendment would be futile. *See* *Lopez, 203 F.3d at 1130*.

preservation of [its] business." *Id.* at 24; *see* Zillow Reply (docket no. 92 at 15). Regardless of whether Zillow may rely on the business purposes defense in this case, Zillow's argument is premature at this stage in the proceedings.[12] The complaint emphasizes only the harmful effects of Zillow's actions, including that "Zillow's new search listing practice has the capacity to deceive its more than 240 million annual unique users," e.g., "by concealing from them the opportunity to list or buy a home from a licensed real estate agent who may charge significantly lower commissions than" an MLS agent. *See* Compl. at ¶¶ 147-48. The complaint says nothing about whether Zillow's allegedly deceptive practices were *reasonable* in relation to the development or preservation of its business. Because the Court concludes that the fraud-based allegations in support of this **[*30]** claim also satisfy *Rule 9(b)*'s heightened pleading standards, Plaintiff has plausibly alleged a CPA claim against Zillow.

With respect to NAR, however, the allegations are insufficient. The allegations made in support of the CPA claim do not once mention NAR. *See* Compl. at ¶¶ 136-51. Even if the Court considers the complaint's other factual allegations, including those made in support of the other claims (*see id.* at ¶¶ 132 & 134), such allegations are simply too conclusory to plausibly allege that NAR had any involvement in designing or encouraging Zillow's misleading website display. *See supra*, Section 4(B). In light of these deficiencies, Plaintiff has not stated a CPA claim against NAR under the less demanding pleading requirements. *See* *Fed. R. Civ. P. 8(a)(2)*, *12(b)(6)*.

The Court DENIES Zillow's motion to dismiss the CPA claim under *RCW 19.86.020*, docket no. 83; but the Court GRANTS NAR's motion to dismiss this claim, docket no. 84, and hereby DISMISSES, without prejudice, the CPA claim asserted against NAR. *See supra*, n.11.

Conclusion

For the foregoing reasons, the Court ORDERS:

(1) Zillow's motion to dismiss, docket no. 83, the claims asserted against Zillow (Counts I, II, III, & IV) is DENIED;

(2) NAR's motion to dismiss, docket **[*31]** no. 84, is DENIED in part as to the antitrust claims brought under *Section 1* of the Sherman Act and the CPA, *RCW 19.86.030* (Counts I & IV); the motion is GRANTED in part as to the claims for false advertising or deceptive acts brought under the Lanham Act and the CPA, *RCW 19.86.020* (Counts II & III), and these claims are DISMISSED without prejudice and with leave to amend. Plaintiff may file any amended complaint on or before September 30, 2021. Any answer or response is due on or before October 14, 2021. *See* *Fed. R. Civ. P. 15(a)(3)*; and

(3) The Clerk is directed to send a copy of this Order to all counsel of record.

IT IS SO ORDERED.

Dated this 2nd day of September, 2021.

/s/ Thomas S. Zilly

Thomas S. Zilly

United States District Judge

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[12] The Court expressly does not decide whether Zillow could later prevail on a business purposes defense. *See* Order (docket no. 80 at 21). That determination must await discovery and any further motion practice.

[Snack Joint LLC v. OCM Grp. USA, NJ, Inc.]

United States District Court for the District of New Jersey

September 8, 2021, Decided; September 8, 2021, Filed

Case No. 2:21-cv-00818 (BRM) (JSA)

Reporter
2021 U.S. Dist. LEXIS 169923 *; 2021 WL 4077583

THE SNACK JOINT LLC, Plaintiff, v. OCM GROUP USA, NJ, INC., OCM GLOBE INC., OCM GROUP USA INC., GANG WANG, YAOTIAN LI and XIAOHUI CHAI, "JOHN DOES" 1-5, Defendants.

Notice: NOT FOR PUBLICATION

Core Terms

Products, venue, Defendants', sales, witnesses, give rise, infringing, trademark infringement, motion to dismiss, proper venue, parties, reside, personal jurisdiction, improper venue, passing off, convenience, factors, unfair competition, common law claim, Lanham Act, deference, distributed, Coconut, occurs, importation, favors, weigh, lack of personal jurisdiction, choice of forum, inconvenient

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Venue > Federal Venue Transfers > Improper Venue Transfers

Civil Procedure > Preliminary Considerations > Venue > Individual Defendants

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

HN1[] **Judges, Discretionary Powers**

Fed. R. Civ. P. 12(b)(3) permits a court to dismiss a matter that is filed in an improper venue. When confronted with a motion to dismiss for improper venue, the court may consider both the complaint and evidence outside the complaint. The court accepts the allegations in the complaint as true unless they are contradicted by the defendant's affidavits. The defendant bears the burden of showing improper venue. The proper venue for a civil action is: (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action. 28 U.S.C.S. § 1391(b). A district court has broad discretion when it comes to deciding whether to transfer or dismiss a case for improper venue.

Bankruptcy Law > ... > Venue > Challenges to Venue > Transfers

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Venue > Motions to Transfer > Interests of Justice

Civil Procedure > ... > Venue > Motions to Transfer > Convenience of Parties

HN2[] **Challenges to Venue, Transfers**

A federal district court may transfer a civil action to a different venue under 28 U.S.C.S. § 1406(a) or 28 U.S.C.S. § 1404(a). To determine which provision applies, the court first ascertains whether venue is proper in the original forum. Section 1404(a) provides for the transfer of a case where both the original and the requested venue are proper. Section 1406, on the other hand, applies where the original venue is improper and provides for either transfer or dismissal of the case. When a plaintiff has laid a proper venue, the decision whether to transfer falls in the sound discretion of the trial court. The burden of establishing the need for transfer rests with the movant.

Bankruptcy Law > ... > Venue > Challenges to Venue > Transfers

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Civil Procedure > ... > Venue > Motions to Transfer > Convenience of Witnesses

Civil Procedure > ... > Venue > Motions to Transfer > Interests of Justice

Civil Procedure > ... > Venue > Motions to Transfer > Convenience of Parties

HN3[] **Challenges to Venue, Transfers**

The court must consider three factors when determining whether to grant a transfer under 28 U.S.C.S. § 1404(a): (1) the convenience of the parties; (2) the convenience of the witnesses; and (3) the interests of justice. These factors are not exclusive and must be applied through a flexible and individualized analysis made on the unique facts presented in each case. The first two factors have been refined into a non-exhaustive list of private and public interests that courts should consider. The private interests a court should consider include: (1) plaintiff's forum preference as manifested in the original choice; (2) the defendant's preference; (3) whether the claim arose elsewhere; (4) the convenience of the parties as indicated by their relative physical and financial condition; (5) the convenience of the witnesses; and (6) the location of books and records. The public interests a court should consider include: (1) the enforceability of the judgment; (2) practical considerations that could make the trial easy, expeditious, or inexpensive; (3) the relative administrative difficulty in the two fora resulting from court congestion; (4) the local interest in deciding local controversies at home; (5) the public policies of the fora; and (6) the familiarity of the trial judge with the applicable state law in diversity cases.

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Civil Procedure > Preliminary Considerations > Venue > Individual Defendants

HN4[] **Infringement Actions, Determinations**

Intellectual property infringement occurs, among other places, where any allegedly infringing articles are sold. In the context of trademark infringement cases, courts focus their venue inquiry on the location where the unauthorized passing off takes place—whether that occurs solely within one district or in many. As to claims of trademark infringement and unfair competition, the cause of action occurs where the passing off occurs. Passing off occurs where the deceived customer buys defendant's product in the belief that he is buying plaintiff's product.

Civil Procedure > Preliminary Considerations > Venue > Individual Defendants

Constitutional Law > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Jurisdiction

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

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Same Case & Controversy

HN5[] **Venue, Individual Defendants**

Although venue must generally be established for each cause of action asserted in the complaint, there is an exception where claims arise out of the same operative facts. This doctrine, known as pendent venue, allows venue to be sustained over a federal claim even if venue over pendent state law claims would not be proper. When venue is proper on federal claims, it is also proper on pendent state claims. The doctrine of pendent venue borrows largely from the principles of supplemental jurisdiction.

Civil Procedure > Preliminary Considerations > Venue > Individual Defendants

HN6[] **Venue, Individual Defendants**

28 U.S.C.S. § 1391(b)(2) does not require that a majority of the events take place in the chosen venue. Section 1391(b) does not require the court to determine the best forum, or the forum with the most substantial events. If the infringement occurred in other districts as well, then venue could be proper in more than one district. More than one federal district may be the site of substantial events or omissions and therefore more than one federal district may be a proper venue in a given case.

Civil Procedure > Preliminary Considerations > Venue > Corporations

Civil Procedure > Preliminary Considerations > Venue > Individual Defendants

HN7[] **Venue, Corporations**

In the venue analysis, an entity with the capacity to sue and be sued shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question. 28 U.S.C.S. § 1391(c)(2). Personal jurisdiction is waivable.

Civil Procedure > Preliminary Considerations > Venue > Corporations

HN8[] **Venue, Corporations**

For venue purposes, a corporation may reside in more than one state.

Civil Procedure > ... > Venue > Motions to Transfer > Choice of Forum

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

HN9[] **Motions to Transfer, Choice of Forum**

In the Third Circuit, a plaintiff's choice of forum is a paramount concern in deciding a motion to transfer venue. The choice is entitled to greater deference when a plaintiff chooses its home forum. In contrast, a plaintiff's choice of forum is afforded less deference when the plaintiff has chosen a foreign forum. One situation where deference to the plaintiff's forum preference is curbed is where the plaintiff has not chosen his or her home forum. The issue of how much deference should be afforded a foreign plaintiff in her choice of forum is simply a matter of convenience. In other words, if the plaintiff demonstrates that her choice of a foreign forum as based on convenience, the reluctance to grant full deference to plaintiff's choice may be overcome.

Civil Procedure > ... > Venue > Motions to Transfer > Choice of Forum

HN10[] **Motions to Transfer, Choice of Forum**

For venue purposes, less deference is afforded to plaintiff's choice of forum.

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Civil Procedure > ... > Venue > Motions to Transfer > Interests of Justice

HN11[] **Federal Venue Transfers, Convenience Transfers**

The third factor, where the claims arose, is the most critical to the court's venue analysis. Its inquiry involves a consideration of which forum constitutes the center of gravity of the dispute, its events, and transactions. The third factor weighs in favor of transfer to the forum where the majority part of events and omissions from which plaintiff's claims arise, took place. Typically the most appropriate venue is where a majority of events giving rise to the claim arose. Under 28 U.S.C.S. § 1404(a), courts must select the most appropriate venue, which is where a majority of events giving rise to the claim arose and where the center of gravity is.

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

HN12[] **Federal Venue Transfers, Convenience Transfers**

For venue purposes, the fourth factor requires the court to examine the convenience of the parties as indicated by their relative physical and financial condition. While courts in the United States District Court for the District of New Jersey have found that a large financial disparity between parties will sometimes sway this factor either in favor of transfer or against it, that typically occurs in scenarios where one party is a large company or conglomerate, the other is an individual or a small business, and the financial disparity is extreme. If the transfer would merely switch the inconvenience from the defendant to plaintiff, the transfer should not be allowed.

Civil Procedure > ... > Venue > Motions to Transfer > Convenience of Witnesses

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

HN13[] Motions to Transfer, Convenience of Witnesses

For venue purposes, the fifth factor must be considered only to the extent that the witnesses may actually be unavailable for trial in one of the fora. The burden is on the defendant to identify specific nonparty witnesses who may be unavailable for trial, and to demonstrate why those witnesses would find it more convenient to testify in another forum. The only relevant witnesses for this fifth factor analysis are non-party witnesses outside the court's subpoena power. The convenience of witnesses who are employees of a party carries no weight because the parties are obligated to procure their attendance at trial.

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Evidence > Types of Evidence > Testimony > Presentation of Evidence

HN14[] Federal Venue Transfers, Convenience Transfers

When arguing for transfer on the basis of witness availability at trial and witness convenience, movant has the responsibility to specify clearly the key witnesses to be called.

Civil Procedure > Preliminary Considerations > Venue > Individual Defendants

HN15[] Venue, Individual Defendants

For venue purposes, the sixth factor is only relevant to the extent that the files could not be produced in the alternative forum. When documents can be transported and/or easily photocopied, their location is entitled to little weight. The technological advances of recent years have significantly reduced the weight of this factor in the balance of convenience analysis.

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

HN16[] Federal Venue Transfers, Convenience Transfers

For venue purposes, potential delays caused by witnesses needing to travel may be considered for the practice consideration inquiry. The likelihood that parties, documents, and witnesses will have to be transported from one forum to another regardless of where the case is litigated means that practical considerations that could make the trial easy, expeditious, or inexpensive do not favor either forum. Practical considerations do not favor either forum because both parties have witnesses and records located in their home states.

Civil Procedure > ... > Venue > Federal Venue Transfers > Jurisdictional Transfers

Governments > Courts > Authority to Adjudicate

HN17[] Federal Venue Transfers, Jurisdictional Transfers

For venue purposes, regarding the administrative difficulties associated with proceeding in either district, the court is required to evaluate this factor in light of the relative docket congestion of the fora.

Civil Procedure > ... > Venue > Federal Venue Transfers > Jurisdictional Transfers

Governments > Courts > Authority to Adjudicate

HN18[] Federal Venue Transfers, Jurisdictional Transfers

Transfer is favored when the transferee court experiences a lower level of judicial emergency.

Civil Procedure > ... > Venue > Federal Venue Transfers > Jurisdictional Transfers

HN19[] Federal Venue Transfers, Jurisdictional Transfers

The focus of the venue factor of the judge's familiarity with applicable state laws is whether judges in one of the districts would have greater familiarity with the applicable state law, particularly in diversity cases.

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > Trademark Infringement

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Scope

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Elements of False Advertising

Business & Corporate Compliance > ... > Unfair Competition > Federal Unfair Competition Law > Lanham Act

HN20[] Likelihood of Confusion, Trademark Infringement

The elements for a claim for trademark infringement under the Lanham Act are the same as the elements for a claim of unfair competition under the Lanham Act and for claims of trademark infringement and unfair competition under New Jersey statutory and common law. The elements of a claim of unfair competition under the Lanham Act are the same as for claims of unfair competition and trademark infringement under New Jersey statutory and common law. As a result, the court need not conduct any separate inquiry into the state and/or common law requirements, and the court's Lanham Act analysis extends the analog state and common law claims. Analysis under New Jersey common law for trademark infringement is the same as under § 43(a) of the Lanham Act. Hence, violation of the act leads to a finding of common law infringement. It is well established that the test for a common law unfair competition claim under New Jersey law is essentially the same as under the federal Lanham Act. Accordingly, a separate analysis of plaintiff's common law claims is not required.

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Civil Procedure > ... > Venue > Federal Venue Transfers > Improper Venue Transfers

Civil Procedure > ... > Venue > Motions to Transfer > Interests of Justice

Civil Procedure > ... > Venue > Motions to Transfer > Convenience of Parties

HN21[] **Federal Venue Transfers, Convenience Transfers**

Transfer under 28 U.S.C.S. § 1404(a) or 28 U.S.C.S. § 1406(a) is permitted despite lack of personal jurisdiction over defendants. The Third Circuit has held that § 1404(a) is an appropriate authority for discretionary transfer where venue is proper, even if the forum court lacks personal jurisdiction.

Counsel: [*1] For THE SNACK JOINT LLC, Plaintiff: GE LI, KEVIN KERVENG TUNG, P.C., FLUSHING, NY; KEVIN KERVENG TUNG, FLUSHING, NY.

For OCM GROUP USA, NJ, INC., OCM GLOBE INC., OCM GROUP USA INC., GANG WANG, YAOTIAN LI, XIAOHUI CHAI, Defendants: DARREN M. GELIEBTER, LEAD ATTORNEY, LOMBARD & GELIEBTER LLP, NEW YORK, NY.

Judges: HON. BRIAN R. MARTINOTTI, UNITED STATES DISTRICT JUDGE.

Opinion by: BRIAN R. MARTINOTTI

Opinion

MARTINOTTI, DISTRICT JUDGE

Before this Court is: (1) a Motion to Dismiss filed by Defendants OCM Group USA, NJ, Inc. ("OCM NJ"), OCM Globe Inc. ("OCM Globe"), OCM Group USA Inc. ("OCM USA"), Gang Wang ("Wang"), Yaotian Li ("Li"), and Xiaohui Chai ("Chai") (collectively, "Defendants") seeking to dismiss Plaintiff The Snack Joint LLC's ("Snack") Complaint for lack of personal jurisdiction as to Li pursuant to *Federal Rule of Civil Procedure 12(b)(2)*; (2) Defendants' Motion to Dismiss for improper venue pursuant to *Federal Rule of Civil Procedure 12(b)(3)*; and (3) Defendants' Motion to Transfer Venue to the United States District Court for the Central District of California (the "Central District of California") pursuant to *28 U.S.C. § 1404(a)*. (ECF No. 33.) Snack opposed Defendants' motions. (ECF No. 34.) Defendants filed a reply in support of their motions. (ECF No. 35.) Also before this Court is Snack's Motion **[*2]** for Preliminary Injunction. (ECF No. 36.) Defendants opposed Snack's motion. (ECF No. 37.) Snack filed a reply in support of its motion. (ECF No. 38.) Having reviewed the submissions filed in connection with the motions and having declined to hold oral argument pursuant to *Federal Rule of Civil Procedure 78(b)*, for the reasons set forth below and for good cause appearing, Defendants' Motion to Dismiss for improper venue is **DENIED**, Defendants' Motion to Transfer Venue is **GRANTED**, and Defendants' Motion to Dismiss for lack of personal jurisdiction and Snack's Motion for Preliminary Injunction are **DENIED as moot**.

I. BACKGROUND

Snack is in the food, beverage importation and wholesale business, selling beverages, condiments, and oil products across the U.S. (ECF No. 36-1 at 5.) One of Snack's products is a coconut juice product distributed under the trademark of YeShu federally registered in the U.S. (the "Asserted Mark"). (*Id.* at 5-6.) The Asserted Mark is owned by a Chinese company named Coconut Palm Group Limited ("Coconut Palm Group"). (*Id.* at 6.) Snack claims to have authorization from Coconut Palm Group to use the Asserted Mark exclusively and enforce it in the U.S. (*Id.*) Snack is incorporated and has its principal place **[*3]** of business in Brooklyn, New York. (ECF No. 1 ¶ 5.)

OCM Globe and OCM USA are in the food and beverage importation and distribution business. (ECF No. 33-1 at 5; ECF No. 37 at 7.) They imported from China and distributed in the U.S. certain coconut juice products (the "Accused Products"), which were manufactured by a Chinese company named Yeshu Group Co. Ltd. ("YeShu Group"). (ECF No. 37 at 7.) Defendants claim YeShu Group has authorized OCM Globe and OCM USA to sell and distribute the Accused Products in the U.S. (*Id.*) The Accused Products were sold under several trademarks that are owned by YeShu Group and officially registered in China (the "Accused Marks").[1] (*Id.* at 8.) OCM Globe and OCM USA are based in City of Industry, California (near Los Angeles). (ECF No. 33-1 at 5.) Their related company OCM NJ is based in New Jersey.[2] (*Id.*; ECF No. 33-4 ¶ 2.) Wang, the chief executive officer of OCM Globe and OCM USA, is an individual residing in Orange County, California (near Los Angeles). (ECF No. 33-1 at 6.) Li, an employee of OCM USA, is an individual residing in Chino, California (near Los Angeles). (*Id.*) Chai, the chief executive officer of OCM NJ, is an individual residing in Los Angeles **[*4]** County, California. (*Id.* at 7.)

Snack argues the Accused Marks are identical or closely similar to the Asserted Mark. (ECF No. 36-1 at 6.) Snack alleges Defendants have no association with Snack or Coconut Palm Group, and have no authorization from Snack or Coconut Palm Group to use the Accused Marks in the U.S. (*Id.*) Snack contends Defendants have infringed upon Snack and Coconut Palm Group's trademark rights. (*Id.* at 7.) On January 15, 2021, Snack filed a Complaint in this Court against Defendants for importing and distributing the Accused Products in the U.S. under the Accused Marks, asserting claims for: (1) trademark infringement under *Section 32 of the Lanham Act, 15 U.S.C. § 1114* (Count 1); (2) unfair competition, false designation of origin and false description under *Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)* (Count 2); (3) trademark infringement under New Jersey common law (Count 3); and (4) unfair competition under New Jersey common law (Count 4). (ECF No. 1.)

On June 1, 2021, Defendants filed: (1) a Motion to Dismiss for lack of personal jurisdiction as to Li pursuant to *Federal Rule of Civil Procedure 12(b)(2)*; (2) a Motion to Dismiss for improper venue pursuant to *Federal Rule of Civil Procedure 12(b)(3)*; and (3) a Motion to Transfer Venue to the Central District of California pursuant to *28 U.S.C. § 1404(a)*. **[*5]** (ECF No. 33.) On June 2, 2021, Snack opposed Defendants' motions. (ECF No. 34.) On June 2, 2021, Defendants filed a reply in support of their motions. (ECF No. 35.) On June 14, 2021, Snack filed a Motion for Preliminary Injunction to enjoin Defendants' allegedly infringing activities. (ECF No. 36.) On June 15, 2021, Defendants opposed Snack's motion. (ECF No. 37.) On June 15, 2021, Snack filed a reply in support of its motion. (ECF No. 38.)

II. LEGAL STANDARD

A. Motion to Dismiss for Improper Venue

"*Federal Civil Rule of Procedure 12(b)(3)* ***HN1***[] permits a court to dismiss a matter that is filed in an improper venue." *Wilson v. JPMorgan Chase, Civ. A. No. 18-13789, 2020 U.S. Dist. LEXIS 103695, at *3 (D.N.J. June 15, 2020)*. "[W]hen confronted with a motion to dismiss for improper venue, the [c]ourt may consider both the complaint and evidence outside the complaint." *Boston Sci. Corp. v. Cook Grp., Inc., 269 F. Supp. 3d 229, 234 (D. Del. 2017)* (citing 14D Wright & Miller, Federal Practice & Procedure § 3826 (4th ed. 2017)). "[T]he court accepts the allegations in the complaint as true unless they are contradicted by the defendant's affidavits." *Adams, Nash & Haskell, Inc. v. United States, Civ. A. No. 19-3529, 2020 U.S. Dist. LEXIS 47471, at *3 (D.N.J. Mar. 19, 2020)* (citing *Bockman v. First Am. Mktg. Corp., 459 F. App'x 157, 158 n.1 (3d Cir. 2012)*). The defendant "bear[s] the burden of showing improper venue." *Wilson, 2020 U.S. Dist. LEXIS 103695, at *4* (quoting *Myers v. Am. Dental Ass'n, 695 F.2d 716, 724-25, 19 V.I. 642 (3d Cir. 1982)*). The proper venue for a civil action is:

> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
>
> (2) a judicial **[*6]** district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

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[1] The Chinese characters for YeShu (*i.e.*, 椰 树)—which appear on Snack's coconut juice products, the Accused Product, and the Accused Mark-mean coconut palm. (ECF No. 1-2 Ex. B; ECF No. 37 at 7.)

[2] Hereinafter, OCM Globe, OCM USA, and OCM NJ are collectively termed the "OCM Parties."

(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. § 1391(b). "A district court has broad discretion when it comes to deciding whether to transfer or dismiss a case for . . . improper venue." *Konica Minolta, Inc. v. ICR Co., Civ. A. No. 15-1446, 2015 U.S. Dist. LEXIS 171277, at *13 (D.N.J. Dec. 22, 2015)* (citing *Cote v. Wadel, 796 F.2d 981, 985 (7th Cir. 1986)*).

B. Motion to Transfer Venue

HN2[] "A federal district court may transfer a civil action to a different venue under 28 U.S.C. § 1406(a) ('Section 1406') or 28 U.S.C. § 1404(a) ('Section 1404')." *Bonavito v. President & Fellows of Harvard Coll., Civ. A. No. 20-14657, 2021 U.S. Dist. LEXIS 123146, at *11-12 (D.N.J. June 30, 2021)*. "To determine which provision applies, the court first ascertains whether venue is proper in the original forum." *Adams, 2020 U.S. Dist. LEXIS 47471, at *3* (citing *Lafferty v. St. Riel, 495 F.3d 72, 78 (3d Cir. 2007)*). "Section 1404(a) provides for the transfer of a case where both the original and the requested venue are proper." *Jumara v. State Farm Ins. Co., 55 F.3d 873, 878 (3d Cir. 1995)*. "Section 1406, on the other hand, applies where the original venue is improper and provides for either transfer or dismissal of the case." *Id.*

Section 1404(a) states: "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division **[*7]** where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a). When a plaintiff has laid a proper venue, "[t]he decision whether to transfer falls in the sound discretion of the trial court." *Park Inn Int'l, L.L.C. v. Mody Enters., Inc., 105 F. Supp. 2d 370, 377 (D.N.J. 2000)*. "[T]he burden of establishing the need for transfer . . . rests with the movant." *Jumara, 55 F.3d at 879*.

HN3[] The Court must consider three factors when determining whether to grant a transfer under § 1404(a): (1) the convenience of the parties; (2) the convenience of the witnesses; and (3) the interests of justice. *Liggett Grp., Inc. v. R.J. Reynolds Tobacco Co., 102 F. Supp. 2d 518, 526 (D.N.J. 2000)* (citing 28 U.S.C. § 1404(a)). These factors are not exclusive and must be applied through a "flexible and individualized analysis . . . made on the unique facts presented in each case." *Id. at 527* (citations omitted). The first two factors have been refined into a non-exhaustive list of private and public interests that courts should consider. *See Jumara, 55 F.3d at 879-80*.

The private interests a court should consider include: (1) plaintiff's forum preference as manifested in the original choice; (2) the defendant's preference; (3) whether the claim arose elsewhere; (4) the convenience of the parties as indicated by their relative physical and financial condition; (5) the convenience of the witnesses; and (6) the location of books **[*8]** and records. *Danka Funding, L.L.C. v. Page, Scrantom, Sprouse, Tucker & Ford, P.C., 21 F. Supp. 2d 465, 474 (D.N.J. 1998)* (citing *Jumara, 55 F.3d at 879*). The public interests a court should consider include: (1) the enforceability of the judgment; (2) practical considerations that could make the trial easy, expeditious, or inexpensive; (3) the relative administrative difficulty in the two fora resulting from court congestion; (4) the local interest in deciding local controversies at home; (5) the public policies of the fora; and (6) the familiarity of the trial judge with the applicable state law in diversity cases. *Id.* (citing *Jumara, 55 F.3d at 879-80*).

III. DECISION

A. The District of New Jersey Is a Proper Venue

The parties agree § 1391(b)(2) governs the venue inquiry with respect to the District of New Jersey; that is, in which judicial district did a substantial part of the events or omissions giving rise to Snack's claims occur? (ECF No. 34 at 12; ECF No. 35 at 10.) Defendants argue the District of New Jersey is not a proper venue under § 1391(b)(2), because a substantial part of the events or omissions giving rise to Snack's claims occurred in California's Los

Angeles area, not New Jersey. (ECF No. 33-1 at 11.) Defendants present Wang's declaration that only about 4% of the U.S. sales of the Accused Products occurred in New Jersey, whereas about a half **[*9]** in California. (*Id.*) Defendants further indicate they all operated from the Los Angeles area: the management of the importation and distribution of the Accused Products was conducted in the Los Angeles area; the related documents and information pertaining to the Accused Products were maintained in the Los Angeles area; the communication with the OCM Parties' other U.S. locations was done from their Los Angeles area headquarters; and the importation of Accused Products was not handled by OCM NJ, but the Los Angeles area headquarters. (*Id.* at 12.) Defendants maintain, in cases involving trademark infringement, the events giving rise to the claim occur where the allegedly infringing sales occur, not where the injury is felt. (ECF No. 35 at 10.) Defendants state Snack provides no admissible evidence to show OCM NJ is the nerve center of Defendants' accused activities on the East Coast. (*Id.* at 12.)

Snack contends the District of New Jersey is a proper venue for its New Jersey common law claims, which are based on Defendants' accused activities conducted through OCM NJ within New Jersey. (ECF No. 34 at 13.) Snack maintains its Lanham Act claims also focus on Defendants' New Jersey activities, **[*10]** because Defendants use OCM NJ as a hub to distribute the Accused Products from California to the East Coast states, including but not limited to, New Jersey, New York, Connecticut, Massachusetts, Pennsylvania, and Florida. (*Id.* at 13-14.) Snack explains, because it is a New York company, the main events giving rise to its claims are related to Defendants' accused activities conducted through OCM NJ, not those committed by OCM Globe and OCM USA in California without the help of OCM NJ. (*Id.* at 14.) Snack also argues Wang's declaration that the sales of the Accused Products into New Jersey accounted for 4% of the overall U.S. sales is misleading and immaterial, because the real question is how much of the sales were initiated by or conducted through OCM NJ, which is the main focus and nerve center of Defendants' accused activities. (*Id.*)

HN4[] "Intellectual property infringement occurs, among other places, where any allegedly infringing articles are sold." *Master Cutlery, Inc. v. Panther Trading Co., Civ. A. No. 12-4493, 2012 U.S. Dist. LEXIS 178639, at *9-10 (D.N.J. Dec. 17, 2012)*. "In the context of trademark infringement cases, courts focus their venue inquiry on 'the location where the unauthorized passing off takes place—whether that occurs solely within one district or in many.'" *Vision Wine & Spirits, LLC v. Winery Exch., Inc., Civ. A. No. 12-6677, 2013 U.S. Dist. LEXIS 56942, at *10-11 (D.N.J. Apr. 22, 2013)* (quoting *Cottman Transmission Sys., Inc. v. Martino, 36 F.3d 291, 295 (3d Cir. 1994)*). "As to claims of **[*11]** trademark infringement and unfair competition, the cause of action occurs where the passing off occurs." *Allied Old English, Inc. v. Uwajimaya, Inc., Civ. A. No. 11-1239, 2012 U.S. Dist. LEXIS 116261, at *15 (D.N.J. Aug. 16, 2012)* (quoting *Elite Sports Enters., Inc. v. Lococo, Civ. A. No. 07-4947, 2008 U.S. Dist. LEXIS 67472, at *13 (D.N.J. Sept. 5, 2008)*) (internal quotation marks omitted); *see also* *Ceramica Falcinelli, S.p.A. v. Am. Marazzi Tile, Inc., Civ. A. No. 99-1223, 1999 U.S. Dist. LEXIS 15526, at *12 (D.N.J. Sept. 29, 1999)* ("In cases of trademark infringement and unfair competition, the wrong takes place where the 'passing off' occurs." (citations omitted)). "Passing off occurs where the deceived customer buys defendant's product in the belief that he is buying plaintiff's [product]." *Vision Wine, 2013 U.S. Dist. LEXIS 56942, at *11* (quoting *Taylor & Francis Grp., PLC v. McCue, 145 F. Supp. 2d 627, 630 (E.D. Pa. 2001)*); *see also* *Ezaki Glico Kabushiki Kaisha v. Lotte Int'l Am. Corp., Civ. A. No. 15-5477, 2017 U.S. Dist. LEXIS 12246, at *10 (D.N.J. Jan. 30, 2017)* ("Trademark infringement claims are deemed to arise where the 'passing off' occurs, or where the allegedly infringing products are sold to consumers who may become confused." (citing *Cottman, 36 F.3d at 294*)).[3]

Here, as to customer confusion, Snack contends: (1) Defendants intended to "confuse consumers in order to profit from the goodwill associated with [the Asserted Marks];" (2) "Defendants' use of the Accused Mark in connection with the [Accused Products] have caused and will continue to cause consumers' confusion between the [Asserted

[3] In addition to trademark infringement and unfair competition, Snack alleges under Count 2 that Defendants made false designation of origin and false description regarding the Accused Products by using the Accused Marks, thereby misrepresenting the Accused Products' association with Snack or Coconut Palm Group, so that consumers were confused as to the source of the Accused Products. (ECF No. 1 ¶ 54.) In other words, Snack's allegations of false designation of origin and false description are also directed to the potential passing off with the Accused Products. Such false designation of origin and false description also occur when passing off occurs.

Mark] and the Accused Mark;" and (3) "consumers would be confused by Defendants' use of the Accused Mark and would believe Defendants to be associated with [Snack or the Asserted Mark]." (ECF No. 38 at 13-14.) In other words, **[*12]** the passing off, if any, occurred when an Accused Product was sold to a consumer, who may be confused as to the origin or other characters of the Accused Product. In this regard, Defendants present Wang's declaration that the sales of the Accused Products into New Jersey constituted about 4% of the overall sales in the U.S. from August 2019 to April 2021, while those for California took up about 50%. (ECF No. 33-2 ¶ 9.) Therefore, Defendants have presented evidence that suggests a substantial portion of the alleged passing off, *i.e.*, events giving rise to Snack's claims, occurred in California.

Snack's refuting of Defendants' position is unavailing. First, Snack's focus on OCM NJ as an alleged distribution hub of the Accused Products is of no moment. How the Accused Products are distributed says nothing about the place of potential passing off, which does not occur in a product's distribution process before it is sold. Second, the Court rejects Snack's argument on Wang's declaration regarding the U.S. sales of the Accused Products. Snack argues Wang's declaration, when referring to "the sales into New Jersey," fails to clarify whether it means the Accused Products were sold to New Jersey **[*13]** customers or, alternatively, the Accused Products were sent from California to New Jersey. (ECF No. 34 at 14.) The Court disagrees. Wang's declaration unambiguously refers to the percentage of the U.S. sales of the Accused Products that were made to New Jersey customers. After all, Wang's declaration never mentions the distribution process of the Accused Products in the U.S. or admits OCM NJ is a distribution hub. As a result, there is no context to alternatively interpret the plain language—"the sales into New Jersey"—as referring to the distribution of the Accused Products into New Jersey before they could be sold elsewhere. Even if this alternative interpretation is correct, it would only suggest less than 4% of the Accused Products were sold to New Jersey customers, which could only weaken Snack's position that a substantial portion of the events giving rise to its claims occurred in New Jersey. Third, the Court need not entertain Snack's argument that its New Jersey common law claims focus on Defendants' accused activities in New Jersey. In the Complaint, Snack "realleges and incorporates by reference all prior allegations as though fully set forth herein" for its two common law **[*14]** claims under Counts 3 and 4, without presenting any factual allegations specific to the two claims. (ECF No. 1 ¶¶ 57-60.) In other words, Snack's common law claims arose out of the same operative facts with those for its Lanham Act claims under Counts 1 and 2. Therefore, under the doctrine of pendent venue,[4] any court with proper venue over Snack's federal Lanham Act claims may exercise pendent venue over its common law claims.

Nevertheless, the Court finds the District of New Jersey is a proper venue here. In *Tefal*,[5] the court found New Jersey to be a proper venue in a trademark infringement case, based on a reasonable inference that the defendants, who were California entities, had "sold substantial dollar amounts of the allegedly infringing products in New Jersey," when "New Jersey sales by [the defendants] under the contested trademark accounted for about 5

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[4] ***HN5***[↑] "Although venue must generally be established for each cause of action asserted in the complaint, there is an exception 'where claims arise out of the same operative facts.'" *Neopart Transit, LLC v. Mgmt. Consulting, Inc., Civ. A. No. 16-3103, 2017 U.S. Dist. LEXIS 25255, at *20-21 (E.D. Pa. Feb. 23, 2017)* (quoting *Phila. Musical Soc., Loc. 77 v. Am. Fed'n of Musicians of U.S. & Canada, 812 F. Supp. 509, 517 n.3 (E.D. Pa. 1992)*). "This doctrine, known as pendent venue, allows venue to be sustained over a federal claim even if venue over pendent state law claims would not be proper." *Id. at *21* (citing *High River Ltd. P'ship v. Mylan Labs., Inc., 353 F. Supp. 2d 487, 493 (M.D. Pa. 2005)*); *see also* *CIBC World Mkts., Inc. v. Deutsche Bank Sec., Inc., 309 F. Supp. 2d 637, 649 (D.N.J. 2004)* ("[W]hen venue is proper on federal claims, it is also proper on pendent state claims." (citing *Travis v. Anthes Imperial Ltd., 473 F.2d 515, 529 (8th Cir. 1973)*)). "The doctrine of pendent venue borrows largely from the principles of supplemental jurisdiction." *High River, 353 F. Supp. 2d at 493* (citations omitted). Because all of Snack's claims arose out of the same operative facts, the pendent venue doctrine is triggered.

[5] "Although *Tefal* was decided under an earlier version of *28 U.S.C. § 1391(b)(2)* which provided that venue was proper in 'the judicial district . . . in which the claim arose,' instead of the current version, which analyzes where 'a substantial part of the events . . . occurred,' the *Tefal* court analyzed where the claim arose by determining whether the defendant did 'substantial business in products which allegedly infringe plaintiff's products' in that district." *Spectathlete P'ship v. Rhubarb Sports, Civ. A. No. 93-4294, 1993 U.S. Dist. LEXIS 19191, at *7 n.3 (E.D. Pa. Dec. 14, 1993)* (quoting *Tefal, 529 F.2d at 497*). Therefore, *Tefal* "remains valid precedent even after the 1990 amendments to the statute." *Id.*

per cent of [the defendants'] total national sales." 529 F.2d at 496. Even though the *Tefal* defendants "emphasize[d] that a far greater percentage of [their] business in the relevant articles was conducted in California than in New Jersey during the pertinent period," the court found "it not unreasonable to infer that [the defendants] **[*15]** sold substantial dollar amounts of the allegedly infringing products in New Jersey." *Id.* The *Tefal* court explained this was because, "[w]hile the value of sales of the critical products in New Jersey and California [wa]s given by defendants in relative terms as a percentage of national sales, there [wa]s no evidence of the actual dollar value of the sales in each state." *Id.* The factual situation here is analogous to *Tefal*: Defendants, mostly California companies and individuals, admit 4% of the total U.S. sales of the Accused Products occurred in New Jersey, without providing the actual dollar amounts of the sales in any state. As a result, the Court finds it reasonable to infer a substantial dollar amount of the Accused Products was sold in New Jersey, which allegedly led to passing off and gave rise to Snack's claims. Therefore, the District of New Jersey is a proper venue.

Even if the sales of the Accused Products in California were greater than those in New Jersey, it does not automatically make this District an improper venue. *See* *Ezaki, 2017 U.S. Dist. LEXIS 12246, at *11* ("[The defendant] certainly does not state that [its allegedly infringing] sales in New Jersey are *de minimis*—just that more product **[*16]** is sold in California. Because sales of [the defendant's] allegedly infringing product are admittedly made in New Jersey, the trademark claims, in part, arose here as well as in California." (citations omitted)). ***HN6***[] The District of New Jersey will be a proper venue as long as "a substantial part of the events or omissions giving rise to the claim" occurred in New Jersey. *28 U.S.C. § 1391(b)(2)*. "The statute does not require that a majority of the events take place in the chosen venue." *Omega Fin. Servs. v. Innovia Estates & Mortg. Corp., Civ. A. No. 07-1470, 2007 U.S. Dist. LEXIS 90125, at *10 (D.N.J. Dec. 6, 2007)* (citing *Park Inn Int'l, 105 F. Supp. 2d at 376*); *see also* *Lannett Co., Inc. v. Asherman, Civ. A. No. 13-2006, 2014 U.S. Dist. LEXIS 23501, at *12 (E.D. Pa. Feb. 24, 2014)* ("*Section 1391(b)* does not require this [c]ourt to determine the 'best' forum, or 'the forum with the most substantial events.'" (citations omitted)). "[I]f the infringement occurred in other districts as well, then venue could be proper in more than one district." *Cottman, 36 F.3d at 294* (citing *Tefal, 529 F.2d at 497*); *see also* *Superior Precast, Inc. v. Safeco Ins. Co. of Am., 71 F. Supp. 2d 438, 444 (E.D. Pa. 1999)* ("[M]ore than one federal district may be the site of substantial events or omissions and therefore more than one federal district may be a proper venue in a given case." (citations omitted)).

Accordingly, Defendants' Motion to Dismiss for improper venue is **DENIED**. Because the District of New Jersey is a proper venue, Defendants may request transfer under *§ 1404(a)*.

B. The Court Will Transfer this Action to the Central District of California

1. The [*17] Central District of California Is a Proper Transferee Venue

Defendants maintain the Central District of California is a proper transferee venue, where all Defendants are subject to personal jurisdiction: OCM Globe, OCM USA, Wang, Li, and Chai all reside in the Central District of California, and OCM NJ consents to personal jurisdiction and venue there. (ECF No. 33-1 at 13.) Defendants argue, even without OCM NJ's consent, California may exercise personal jurisdiction and venue over OCM NJ, which has purposefully directed its activities there by maintaining operations in the Los Angeles area, where a substantial part of the events giving rise to Snack's claims occurred. (ECF No. 35 at 13.) Snack insists the Central District of California is not a proper venue, because OCM NJ is a New Jersey company and its consent is irrelevant. (ECF No. 34 at 17.) The Court disagrees.

OCM Globe, OCM USA, Li, Wang, and Chai all reside in California. To determine whether this action could have been brought in the Central District of California pursuant to *§ 1391(b)(1)*, the only venue question is whether OCM

NJ also resides in California.[6] HN7[] In the venue analysis, "an entity with the capacity to sue and be sued . . . **[*18]** shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question." 28 U.S.C. § 1391(c)(2). Because "personal jurisdiction is waivable, and based on Defendants' motion . . . to transfer this action, ... it is apparent that [OCM NJ] consents to the exercise of personal jurisdiction over [it] in" the Central District of California. *Real Estate Sols. Today LLC v. Scifo, Civ. A. No. 20-4512, 2021 U.S. Dist. LEXIS 25328, at *20 n.6 (D.N.J. Feb. 10, 2021)*. Therefore, OCM NJ's consent makes it subject to personal jurisdiction in the Central District of California, where it is deemed to reside for venue purposes. Consequently, the Central District of California is a proper venue for OCM NJ under § 1391(b)(1). *See* *Toll Glob. Forwarding Scs United States v. Curtis Int'l, Civ. A. No. 20-5753, 2021 U.S. Dist. LEXIS 86410, at *4 (D.N.J. Jan. 5, 2021)* ("Defendant . . . consented to this [c]ourt's jurisdiction. Venue in New Jersey is thus proper under 28 U.S.C. § 1391(b)(1)." (citations omitted)); *see also* *Hamm v. Wyndham Resort Dev. Corp., Civ. A. No. 19-426, 2020 U.S. Dist. LEXIS 188027, at *18 (M.D. Tenn. Oct. 9, 2020)* ("Section 1391(c)(2) means that [the defendant], by failing to object to personal jurisdiction and thus consenting to this court's exercise of personal jurisdiction, is deemed to 'reside' in this district for purposes of § 1391(b)(1). As a result, venue in this district is proper under the statute."); *Discovery Pier Land Holdings, LLC v. Visioneering Envision.Design.Build, Inc., Civ. A. No. 14-2073, 2015 U.S. Dist. LEXIS 43497, at *3 (E.D. Mo. Apr. 2, 2015)* ("[T]he action could have been brought in the Central District of California, because the parties consented **[*19]** to jurisdiction there and venue is proper there." (citing 28 U.S.C. § 1391(b)(1))).

Accordingly, the Central District of California is a proper transferee venue. The next question is whether the private and public interest factors as set forth in *Jumara* favor transfer.

2. Private Interest Factors Favor Transfer

a. Plaintiff's Forum Preference

Defendants maintain New Jersey is a foreign forum to Snack, whose choice of forum is therefore entitled to less deference. (ECF No. 33-1 at 15.) Snack counters it is not a foreign company here, because it is in the same NY-NJ-PA metropolitan area with this Court and OCM NJ, which is a New Jersey company it competes with. (ECF No. 34 at 17.) Snack explains it filed the action in this District because: (1) most of its business is generated from the NY-NJ-PA metropolitan area; and (2) its claims mainly arose from Defendants' sales of the Accused Products on the East Coast conducted through OCM NJ. (*Id.*) The Court disagrees.

HN9[] "In the Third Circuit, a plaintiff's choice of forum is a 'paramount concern' in deciding a motion to transfer venue." *Wm. H. McGee & Co. v. United Arab Shipping Co., 6 F. Supp. 2d 283, 289 (D.N.J. 1997)*. "The choice is 'entitled to greater deference' when a plaintiff chooses its home forum." *Id.* (citations omitted). In contrast, "a plaintiff's **[*20]** choice of forum is afforded less deference . . . when the plaintiff has chosen a foreign forum." *Id. at 290* (citations omitted); *see also Tischio v. Bontex, Inc., 16 F. Supp. 2d 511, 521 (D.N.J. 1998)* ("One situation where deference [to the plaintiff's forum preference] is curbed is where the plaintiff has not chosen his or her home forum." (citations omitted)). "[T]he issue of how much deference should be afforded a foreign plaintiff in her choice of forum is simply a matter of convenience." *Nieminen v. Breeze-Eastern, Div. of Transtechnology Corp., 736 F. Supp. 580, 583-84 (D.N.J. 1990)*. "In other words, if the plaintiff demonstrates that her choice of a foreign forum as based on convenience, the reluctance to grant full deference to plaintiff's choice may be overcome." *Id. at 584* (citing *Lony v. E.I. DuPont de Nemours & Co., 886 F.2d 628, 634 (3d Cir. 1989)*); *see also* *Windt v. Qwest Communs. Int'l, Inc., 529 F.3d 183, 190 (3d Cir. 2008)* ("Foreign plaintiffs . . . may bolster the amount of deference due their choice by making a strong showing of convenience." (citing *Lony, 886 F.2d at 634*)).

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[6] HN8[] OCM may reside in both New Jersey and California, because "a corporation may 'reside' in more than one state." *Great W. Mining & Mineral Co. v. ADR Options, Inc., 434 F. App'x 83, 87 (3d Cir. 2011)* (citing 28 U.S.C. § 1404(a)).

Snack, which is incorporated and has its principal place of business in New York, is a foreign company here. Snack cites no legal authority supporting its argument that a company, which is based outside New Jersey, is not a foreign company in this District due to its geographical proximity with New Jersey. Snack's argument is therefore not entitled to the Court's consideration. *See* *Hilburn v. State Dep't of Corr., Civ. A. No. 07-6064, 2012 U.S. Dist. LEXIS 106536, at *91 (D.N.J. July 31, 2012)* ("The absence of authority is fatal to [d]efendant's **[*21]** argument."). As a result, Snack's forum preference is entitled to less deference.

In addition, Snack fails to show its choice of filing this action in New Jersey, as opposed to New York, was based on convenience considerations. First, even though Snack operates in the same NY-NJ-PA metropolitan area with this Court and OCM NJ, it does not suggest New Jersey is a more convenient forum than New York. After all, Snack resides in New York and is not shown to have more competition or business in New Jersey than New York. Second, as explained in Part III.A, *supra*, Snack's claims did not arise from OCM NJ's alleged role as a distribution hub for the Accused Products on the East Coast, which should not represent a significant convenience consideration for Snack. Instead, Snack's claims arose from the alleged passing off when the Accused Products were sold across the U.S., a major portion of which occurred in California. Third, even if Snack intends to obtain evidence from OCM NJ, Snack does not show it would be inconvenient to do so if this action is filed in its home forum in New York.

Accordingly, the first factor only slightly disfavors transfer.

b. Defendant's Forum Preference

The factor for **[*22]** the defendant's preference favors transfer, because Defendants seek to transfer this case to the Central District of California. Here, this factor should be given more weight, because less deference is afforded to Snack's choice of forum. *Virag, S.R.L. v. Sony Comput. Entm't Am. LLC, Civ. A. No. 14-4786, 2015 U.S. Dist. LEXIS 39910, at *16 (D.N.J. Mar. 30, 2015)* ("[B]ecause ***HN10***[] less deference is afforded to [p]laintiff's choice of forum, [d]efendant's choice of forum should be given more weight." (quoting *N. Am. Dental Wholesalers, Inc. v. Danaher Corp., Civ. A. No. 11-247, 2011 U.S. Dist. LEXIS 91140, at *12 (E.D. Pa. Aug. 15, 2011)*)).

c. Whether the Claim Arose Elsewhere

Snack maintains its New Jersey common law claims arose from New Jersey, because they focus on Defendants' accused activities within this District and conducted through OCM NJ. (ECF No. 34 at 18.) Snack asserts its Lanham Act claims also primarily arose from New Jersey, because: (1) Defendants used OCM NJ as an infringement focal point to distribute the Accused Products on the East Coast; and (2) Snack's main concern is Defendants' accused activities conducted through OCM NJ, as its sales on the East Coast account for more than 80% of its total sales. (*Id.*) Defendants contend California is the locus of their accused activities, because: (1) the Accused Products were manufactured in China and imported to California, and then distributed throughout the U.S. from California; **[*23]** (2) only a fraction of products distributed throughout the U.S. ended up in New Jersey, whereas about a half in California; and (3) the sales and distribution decisions regarding the Accused Products were made in California. (ECF No. 33-1 at 17-18.) The Court agrees.

HN11[] "The third factor, where the claims arose, is the most critical to the Court's analysis." *Metro. Life Ins. Co. v. Bank One, N.A., Civ. A. Nos. 03-1882, 03-2784, 2012 U.S. Dist. LEXIS 137119, at *16 (D.N.J. Sept. 25, 2012)*. Its inquiry "involves a consideration of which forum constitutes the center of gravity of the dispute, its events, and transactions." *Rosen v. Lieberman, Civ. A. No. 16-7341, 2018 U.S. Dist. LEXIS 181005, at *12 (D.N.J. Oct. 18, 2018)* (citations and internal quotation marks omitted). The third factor "weighs in favor of transfer to the [forum] where the majority part of events and omissions from which [p]laintiff's claims arise, took place." *Hassett v. Beam Suntory, Inc., Civ. A. No. 19-8364, 2019 U.S. Dist. LEXIS 217406, at *11 (D.N.J. Dec. 18, 2019)*; *see also* *In re Amkor Tech., Inc. Sec. Litig., Civ. A. No. 06-298, 2006 U.S. Dist. LEXIS 93931, at *15 (E.D. Pa. Dec. 28, 2006)* ("Typically the most appropriate venue is where a majority of events giving rise to the claim arose." (citing *Siegel v. Homestore, Inc., 255 F. Supp. 2d 451, 456 (E.D. Pa. 2003)*)). "[U]nder *§ 1404(a)*, courts must select 'the most appropriate venue,' which 'is where a majority of events giving rise to the claim arose' and where the 'center of gravity' is." *Tang v. Eastman Kodak Co., Civ. A. No. 20-10462, 2021 U.S. Dist. LEXIS 100395, at *17 n.8 (D.N.J. May 27, 2021)* (citations omitted).

As discussed in Part III.A, *supra*, the events giving rise to Snack's claims are the passing off that may have occurred when the Accused Products were sold. Because nearly half of the **[*24]** U.S. sales of the Accused Products occurred in California, while only 4% occurred in New Jersey, the majority (or close to majority) of the events giving rise to Snack's claims arose from California. Transfer is therefore favored. *C.f.* *Ezaki, 2017 U.S. Dist. LEXIS 12246, at *11-13* (finding that the third factor was neutral in a trademark infringement case where the defendant sought to transfer the case from New Jersey to California, in part because the defendant only stated it "s[old] hundreds of thousands more [allegedly infringing] products in California than in New Jersey" and "provide[d] no overall sales figures that might put [the defendant's] statement into context").

Moreover, the parties' locations suggest transfer is favored. The only party that is based in New Jersey is OCM NJ, whose alleged role as a distribution hub does not indicate where Snack's claims arose. All the other Defendants are based in California, and Snack is based in New York. Therefore, even if New Jersey has any meaningful connection to this action other than being one of many states in which the alleged infringement occurs, such a connection is much weaker than that for California. *C.f. Ezaki, 2017 U.S. Dist. LEXIS 12246, at *12* (finding that the third factor was neutral, though both parties' **[*25]** "headquarters [we]re located" in the proposed transferee forum of California, because "both parties also ha[d] significant connections to" New Jersey, where the plaintiff "maintain[ed] an office and employees" and where the defendant "[wa]s incorporated . . . and ha[d] at least one employee," so that the case "d[id] not present a situation in which the forum state ha[d] no meaningful connection to the litigation other than being one of many states in which the alleged infringement occur[red]" (citations omitted)).

Finally, the Court need not entertain Snack's argument that its New Jersey common law claims focus on Defendants' accused activities in New Jersey. As discussed in Part III.A, *supra*, Snack's claims all arise from the operative facts. As a result, no separate transfer analysis for Snack's common law claims is needed. *See* *Cigna Corp. v. Celgene Corp., Civ. A. No. 21-90, 2021 U.S. Dist. LEXIS 97590, at *14-15 (E.D. Pa. May 24, 2021)* (finding that the court's "analysis of the public and private *Jumara* factors for the federal antitrust claims [wa]s also applicable for the state claims and weigh[ed] in favor of transfer," when "all the federal ***antitrust law*** claims against [defendants] [we]re properly venued in both [transferor and transferee districts], and the remaining state law claims **[*26]** . . . all ar[o]se out of the same operative facts"); *McKinney v. Pinter, Civ. A. No. 18-4185, 2019 U.S. Dist. LEXIS 30715, at *11, 15 (E.D. Pa. Feb. 26, 2019)* (finding that "the third private interest factor[] strongly favor[ed] transfer because the claims arose primarily in Alabama," when the plaintiff asserted a federal law claim and several "appended [Pennsylvania] state law claims" that "ar[o]se out of the same operative facts," without considering whether the events giving rise to the plaintiff's state law claims primarily occurred in Pennsylvania).

Accordingly, the third factor favors transfer.

d. Convenience of the Parties

Defendants state it would be inconvenient for them to keep the case in this District, because all Defendants except OCM NJ reside in California. (ECF No. 33-1 at 15-18.) Snack counters it is equally inconvenient, if not more inconvenient, for Snack to litigate this case in California, where Snack has little business with the coconut juice products and no witness or documents on its side. (ECF No. 34 at 18.) Snack suggests New Jersey is not a rather inconvenient forum for Defendants, who voluntarily choose to do business in New Jersey by setting up OCM NJ as a distribution hub. (*Id.*)

HN12[] The fourth factor requires the court to examine "the convenience of the parties as **[*27]** indicated by their relative physical and financial condition." *Partners of Mass., LLC v. Fantasia, Civ. A. No. 15-7960, 2016 U.S. Dist. LEXIS 179898, at *22 (D.N.J. Dec. 28, 2016)* (citing *Jumara, 55 F.3d at 879*); *see also* *Gourmet Video, Inc. v. Alpha Blue Archives, Inc., Civ. A. No. 08-2158, 2008 U.S. Dist. LEXIS 87645, at *22 (D.N.J. Oct. 29, 2008)* (finding that "convenience of the parties d[id] not strongly favor transfer to a California forum," when "defendants ha[d] not shown any physical or financial limitations to their ability to litigate the action in New Jersey" (citations omitted)).

> While courts in this District have found that a large financial disparity between parties will sometimes sway this factor either in favor of transfer or against it, that typically occurs in scenarios where one party is a large company or conglomerate, the other is an individual or a small business, and the financial disparity is extreme.

*Hytera Communs. Corp. v. Motorola Sols., Inc., Civ. A. No. 17-12445, 2018 U.S. Dist. LEXIS 207162, at *25-26 (D.N.J. Dec. 6, 2018)* (citing *Goldstein v. MGM Grand Hotel & Casino, Civ. A. No. 15-4173, 2015 U.S. Dist. LEXIS 150982, 2015 WL 9918414, at *3 (D.N.J. Nov. 5, 2015)*). "If the transfer would merely switch the inconvenience from the defendant to plaintiff, the transfer should not be allowed." *NPR, Inc. v. Am. Int'l Ins. Co., Civ. A. No. 00-242, 2001 U.S. Dist. LEXIS 3463, at *14-15 (D.N.J. Mar. 28, 2001)* (citations omitted).

Here, all Defendants except OCM NJ are based in California. For them, traveling to New Jersey to litigate is just as inconvenient as requiring Snack, a New York company, to litigate in California. Also, neither party points to any physical or financial difficulties that may limit its ability to sue in a distant forum. Instead, the parties both represent companies that **[*28]** conduct businesses across the U.S. This is not a case between an individual and a large company where the financial disparity is evident. Accordingly, the fourth factor is neutral.

e. Convenience of the Witnesses

Defendants assert the management of all the OCM Parties is done from the Los Angeles area headquarters. (ECF No. 33-1 at 16.) Defendants indicate the witnesses with knowledge about Defendants' accused activities, if further identified, are likely to be in the Los Angeles area and can be compelled to attend trials in the Central District of California. (*Id.* at 16, 19.) In particular, Defendants state Li, who handles the communication with the Chinese supplier of the Accused Products and could provide relevant evidence, resides in the Los Angeles area, where Li would be available to attend trials. (*Id.*) Snack maintains OCM NJ must have employees in New Jersey, and these employees can testify in this District about OCM NJ's allegedly infringing activities. (ECF No. 34 at 19.)

HN13[] The fifth factor must be considered "only to the extent that the witnesses may actually be unavailable for trial in one of the fora." *Danka, 21 F. Supp. 2d at 474* (citing *Jumara, 55 F.3d at 879*). Here, neither party has identified any witness that would actually **[*29]** be unavailable for trials in either forum.

First, it is irrelevant that Defendants identify Li as a witness that may be out of this Court's subpoena power. Li is a party here and therefore should not be considered for the fifth factor analysis, whose "focus should be on non-party witnesses and their relative importance." *Navetta v. KIS Career Sch., Inc., Civ. A. No. 14-5724, 2016 U.S. Dist. LEXIS 59113, at *11 (E.D. Pa. May 4, 2016)* (citations omitted); *see also* *Morrison v. Lindsey Lawn & Garden, Inc., Civ. A. No. 13-1467, 2014 U.S. Dist. LEXIS 27150, at *13 (E.D. Pa. Mar. 4, 2014)* ("The burden is on the defendant to identify specific nonparty witnesses who may be unavailable for trial, and to demonstrate why those witnesses would find it more convenient to testify in another forum." (citations omitted)); *Tessera, Inc. v. Sony Elecs. Inc., Civ. A. No. 10-838, 2012 U.S. Dist. LEXIS 46324, at *23 n.7 (D. Del. Mar. 30, 2012)* ("[T]he only relevant witnesses for this [fifth factor] analysis are non-party witnesses outside the [c]ourt's subpoena power.").

Second, the Court should not consider the convenience of Li, an employee of OCM USA, and the employees of OCM NJ (if any) that Snack intends to call. After all, "the convenience of witnesses [who] are employees of a party carries no weight because the parties are obligated to procure their attendance at trial." *Liggett, 102 F. Supp. 2d at 534 n.19* (quoting *Mentor Graphics Corp. v. Quickturn Design Sys., 77 F. Supp. 2d 505, 510 (D. Del. 1999)*). "In any event, these employee witnesses are already taken into account in an analysis of the 'convenience of the parties' private interest *Jumara* factor." *Papst Licensing GmbH & CO. KG v. Lattice Semiconductor Corp., 126 F. Supp. 3d 430, 442 n.6 (D. Del. 2015)*.

Third, **[*30]** the parties do not provide any specific information on the identity and the potential testimonies of the non-party witnesses that they intend to call. This is insufficient to argue for or against transfer under the fifth factor. *See* *Szabo v. CSX Transp., Inc., Civ. A. No. 05-4390, 2006 U.S. Dist. LEXIS 3862, at *5 (E.D. Pa. Feb. 1, 2006)*

("HN14[] When arguing for transfer on the basis of witness availability at trial and witness convenience, movant has the responsibility to specify clearly the key witnesses to be called." (quoting Coble v. Conrail, Civ. A. No. 92-2386, 1992 U.S. Dist. LEXIS 12761, at *5-6 (E.D. Pa. Aug. 24, 1992))); Affymetrix, Inc. v. Synteni, Inc., 28 F. Supp. 2d 192, 205 (D. Del. 1998) ("Given the complete lack of specificity with which these witnesses were identified and the absence of 'adequate information with respect to the content and materiality' of their testimony, the [c]ourt has no other choice but to discount them in its weighing test [for the fifth factor]." (citations omitted)); Lucent Techs. v. Aspect Telcoms. Corp., Civ. A. No. 97-1618, 1997 U.S. Dist. LEXIS 12811, at *18 (E.D. Pa. Aug. 20, 1997) (finding that the fifth factor was neutral, because the defendant "fail[ed] to meet its heightened burden under § 1404 by not identifying with particularity the unavailability and materiality of specific witnesses," and the plaintiff's "assertions concerning the relevance of [its] witnesses fail[ed] in the same respects as [the defendant's]").

Because "neither party is able to identify any witness who would be unavailable for trial in either district, the court **[*31]** must find that this factor is neutral." Navetta, 2016 U.S. Dist. LEXIS 59113, at *11; *see also* Dynamic Data Techs., LLC v. Amlogic Holdings, Ltd., Civ. A. No. 19-1239, 2020 U.S. Dist. LEXIS 68756, at *7 (D. Del. Apr. 20, 2020) ("Because no record evidence demonstrates that necessary witnesses will refuse to appear in [the transferor forum] for trial without a subpoena, the convenience of the witnesses factor is neutral."); Morrison, 2014 U.S. Dist. LEXIS 27150, at *14 ("Because neither party has identified any nonparty witnesses who would be unavailable for trial in either forum, this factor does not weigh in favor of transfer.").

f. Locations of Relevant Books and Records

Defendants argue the records related to the importation of the Accused Products from China to the U.S. and Defendants' first sale doctrine defense are in the Central District of California, where OCM Globe and OCM USA are headquartered. (ECF No. 33-1 at 16, 19.) Snack counters the relevant records can be easily moved electronically to different venues, and Defendants fail to give any reason why these records cannot be produced in New Jersey. (ECF No. 34 at 19.) The Court agrees.

HN15[] The sixth factor is only relevant "to the extent that the files could not be produced in the alternative forum." Danka, 21 F. Supp. 2d at 474 (citing Jumara, 55 F.3d at 879). "[W]hen documents can be transported and/or easily photocopied, their location is entitled to little weight." Santi v. Nat'l Bus. Records Mgmt., LLC, 722 F. Supp. 2d 602, 608 (D.N.J. 2010) (quoting Clark v. Burger King Corp., 255 F. Supp. 2d 334, 339 (D.N.J. 2003)). "[T]he technological **[*32]** advances of recent years have significantly reduced the weight of [this factor] in the balance of convenience analysis." Fantasia, 2016 U.S. Dist. LEXIS 179898, at *24 (quoting Lomanno v. Black, 285 F. Supp. 2d 637, 647 (E.D. Pa. 2003)). Here, neither party has "indicated that relevant books and records will not be available in New Jersey," id. at *23 (finding the sixth factor neutral), or "suggested that the transportation, if necessary, of the relevant documents to either forum would be unduly burdensome or expensive." Uwajimaya, 2012 U.S. Dist. LEXIS 116261, at *19 (finding the sixth factor neutral). Therefore, this factor is neutral.

Accordingly, among the six private interest factors, the first factor slightly disfavors transfer, the second and the third factors favor transfer, and the other three factors are neutral. As a result, the private interest factors weigh in favor of transfer.

3. Public Interest Factors Favor Transfer

a. Enforceability of the Judgment

Snack maintains the enforceability of the judgment factor is neutral, because the judgment rendered here in one forum would be enforceable in the other. (ECF No. 34 at 19.) The Court does not discern, and Defendants do not provide, any reason why a judgment of this case may be unenforceable in New Jersey or California. This factor is therefore neutral.

b. Practical Considerations

Snack **[*33]** contends the practical considerations regarding coordinating schedule and traveling arrangements for the witnesses weigh against transfer, because many non-party witnesses are located in the NY-NJ metropolitan area. (ECF No. 34 at 20.) The Court disagrees.

HN16[] "[P]otential delays caused by witnesses needing to travel may be considered" for the practice consideration inquiry. *Kane v. Ollie's Bargain Outlet Holdings, Inc., Civ. A. No. 18-3475, 2018 U.S. Dist. LEXIS 199168, at *14 (D.N.J. Nov. 26, 2018)*. "[T]he likelihood that parties, documents, and witnesses will have to be transported from one forum to another regardless of where this case is litigated means that 'practical considerations that could make the trial easy, expeditious, or inexpensive' do not favor either forum." *Yocham v. Novartis Pharms. Corp., 565 F. Supp. 2d 554, 559 (D.N.J. 2008)* (citing *Jumara, 55 F.3d at 879*); *see also* *Gourmet, 2008 U.S. Dist. LEXIS 87645, at *24* ("Practical considerations . . . do not favor either forum because both parties have witnesses and records located in their home states."). Here, the parties, the potential witnesses, and the relevant documents are located in New Jersey, New York, and California. There is a likelihood that the parties, witnesses, and documents will need to be transferred from one forum to another regardless of where this case is litigated. Therefore, this factor is neutral.

c. Court Congestion and Administrative Difficulty

Neither party **[*34]** has addressed this factor. However, "***HN17***[] [r]egarding the administrative difficulties associated with proceeding in either District, the Court is required to evaluate this factor in light of the relative docket congestion of the fora." *Hytera Communs. Corp. v. Motorola Sols., Inc., Civ. A. No. 17-12445, 2018 U.S. Dist. LEXIS 207162, at *33 (D.N.J. Dec. 6, 2018)*. The most recent federal court management statistics shows the civil cases in the District New Jersey have a longer median time (10.1 months) from filing to disposition than those in the Central District of California (4.8 months).[7] This suggests the District of New Jersey is experiencing a higher level of court congestion, which favors transfer.

HN18[] On the other hand, transfer is favored when the transferee court experiences a lower level of judicial emergency. *See* *Mehta v. Angell Energy, Civ. A. No. 18-2319, 2019 U.S. Dist. LEXIS 171612, at *23-24 (D.N.J. Sept. 30, 2019)* (finding that the analysis of "the relative administrative difficulty weigh[ed] heavily in favor of transfer," because "the District of New Jersey [wa]s . . . experiencing a judicial emergency and lack[ed] six District Judges," while "[t]he District of Minnesota, on the other hand, ha[d] a full complement of District Judges"). The most recent federal court management statistics shows: the District of New Jersey lacks four District Judges, and nominations have been made for two of the four **[*35]** vacancies; the Central District of California lacks six District Judges, and no nomination has been made for any vacancy.[8] Therefore, the Central District of California is experiencing a greater level of judicial emergency, which disfavors transfer.

On balance, the third factor is neutral.

d. Local Interest in Deciding Local Controversies

Defendants argue, because the locus of their accused conducts is in California, it is in the local interest of the California public, not the New Jersey public, to have such matters decided in California. (ECF No. 33-1 at 19-20.)

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[7] National Judicial Caseload Profile, United States Courts, (Mar. 2021), *available at*: https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0331.2020.pdf.

[8] Current Judicial Vacancies, United States Courts, (Aug. 3, 2021), *available at* https://www.uscourts.gov/judges-judicial-vacancies/current-judicial-vacancies.

Snack maintains the District of New Jersey has an interest in deciding this case, which involves a New Jersey company OCM NJ used as a focal point for the alleged trademark infringement activities. (ECF No. 34 at 20.) The Court disagrees.

As discussed in Parts III.A and Part III.B.2.c, *supra*, a much greater proportion of the events giving rise to Snack's claims occurred in California than New Jersey. Therefore, California has a stronger local interest in adjudicating this case. *See DGVault, LLC v. Dunne, Civ. A. No. 18-14152, 2020 U.S. Dist. LEXIS 1320, at *18 (D.N.J. Jan. 6, 2020)* ("[T]he majority of the events and omissions giving rise to the claims at issue occurred in Florida, not New Jersey. Accordingly, Florida **[*36]** has a stronger local interest than New Jersey in adjudicating this matter." (citing *Hoffer v. Infospace.com, Inc., 102 F. Supp. 2d 556, 576 (D.N.J. 2000)*)); *Jackson v. Equifax Info. Servs., LLC, No. 14-15, 2014 U.S. Dist. LEXIS 25877, at *11 (M.D. Pa. Feb. 28, 2014)* ("[T]he local interest factor weighs in favor of transfer to the Northern District of Georgia because . . . most of the conduct giving rise to [the plaintiff's] claim occurred in that district."). Accordingly, the fourth factor favors transfer.

e. Public Policies of the Fora

The Court does not discern, and the parties do not assert, any differences in the applicable public policies regarding trademark infringement or unfair competition between New Jersey and California. Therefore, this factor is neutral.

f. Trial Judge's Familiarity with Applicable State Laws

Snack argues two of its claims are based on New Jersey common law, with which New Jersey judges would have better familiarity. (ECF No. 34 at 20.) The Court finds Snack's argument irrelevant.

HN19[] "The focus of this factor is whether judges in one of the districts would have greater familiarity with the applicable state law, particularly in diversity cases." *Rosen, 2018 U.S. Dist. LEXIS 181005, at *26* (citing *Jumara, 55 F.3d at 879*). Here, a judge's familiarity with the applicable state laws is irrelevant, because Snack's state law claims need no separate analysis on the merits. ***HN20***[] "[T]he elements for a claim for trademark **[*37]** infringement under the Lanham Act are the same as the elements for a claim of unfair competition under the Lanham Act and for claims of trademark infringement and unfair competition under New Jersey statutory and common law." *J&J Snack Foods Corp. v. The Earthgrains Co., 220 F. Supp. 2d 358, 374 (D.N.J. 2002)*; *see also Buying for the Home, LLC v. Humble Abode, LLC, 459 F. Supp. 2d 310, 317 (D.N.J. 2006)* ("[T]he elements of a claim of unfair competition under the Lanham Act are the same as for claims of unfair competition and trademark infringement under New Jersey statutory and common law." (citations omitted)). "As a result, the [c]ourt need not conduct any separate inquiry into the state and/or common law requirements, and the [c]ourt's Lanham Act analysis extends . . . the analog state and common law claims." *Smart Vent Prods. v. Crawl Space Door Sys., Civ. A. No. 13-5691, 2016 U.S. Dist. LEXIS 108052, at *18 n.10 (D.N.J. Aug. 15, 2016)* (citing *Smart Vent, Inc. v. USA Floodair Vents, Ltd., 193 F. Supp. 3d 395, 424 n.43 (D.N.J. 2016)*); *see also Smith v. Ames Dep't Stores, 988 F. Supp. 827, 833 n.5 (D.N.J. 1997)* ("Analysis under New Jersey common law for trademark infringement is the same as under *Section 43(a)* of the Lanham Act. Hence, violation of the act leads to a finding of common law infringement." (citing *FM 103.1 v. Universal Broad. of New York, 929 F. Supp. 187 (D.N.J. 1996)*)); *Birthright v. Birthright, Inc., 827 F. Supp. 1114, 1140-41 (D.N.J. 1993)* ("It is well established that the test for a common law unfair competition claim under New Jersey law is essentially the same as under the federal Lanham Act. Accordingly, a separate analysis of plaintiff's common law claims is not required." (citations omitted)). Therefore, the sixth factor is neutral.

Accordingly, among the **[*38]** six public interest factors, the fourth factor favors transfer and the other five factors are neutral, which means the public interest factors favor transfer. Because the private interest factors also favor transfer, Defendants' Motion to Transfer Venue pursuant to *28 U.S.C § 1404(a)* is **GRANTED**.

The Court need not determine whether it has personal jurisdiction over Li in reaching this decision. *Harris v. City of Wilmington, Civ. A. No. 10-1899, 2011 U.S. Dist. LEXIS 2135, at *15 (D.N.J. Jan. 7, 2011)* (***HN21***[] "[T]ransfer under *Section 1404(a)* or *1406(a)* is permitted despite lack of personal jurisdiction over defendants." (citing

Lomanno, 285 F. Supp. 2d at 640)); *Allegheny Techs., Inc. v. Strecker, Civ. A. No. 06-666, 2007 U.S. Dist. LEXIS 98674, at *16 (E.D. Pa. Feb. 12, 2007)* ("The Third Circuit has held that *§ 1404(a)* is an appropriate authority for discretionary transfer where venue is proper, even if the forum [c]ourt lacks personal jurisdiction." (citing *United States v. Berkowitz, 328 F.2d 358 (3d Cir. 1964)*)). "To the extent that there are any doubts about whether the Court lacks personal jurisdiction" over Li, "transfer under *§ 1404(a)* fairly resolves the issue and avoids needless and costly expenditures on what is, after all, a non-merits issue." *Baby Merlin Co. v. Cribculture, LLC, Civ. A. 18-3288, 2018 U.S. Dist. LEXIS 241241, at *6 n.1 (E.D. Pa. Dec. 17, 2018)*.

IV. CONCLUSION

For the reasons set forth above, Defendants' Motion to Dismiss for improper venue is **DENIED**, Defendants' Motion to Transfer Venue is **GRANTED**, and Defendants' Motion to Dismiss for lack of personal jurisdiction and Snack's Motion for Preliminary Injunction are **DENIED as moot**. An appropriate **[*39]** order follows.

Date: September 8, 2021

/s/ Brian R. Martinotti

HON. BRIAN R. MARTINOTTI

UNITED STATES DISTRICT JUDGE

ORDER

THIS MATTER is opened to this Court by (1) a Motion to Dismiss filed by Defendants OCM Group USA, NJ, Inc. ("OCM NJ"), OCM Globe Inc. ("OCM Globe"), OCM Group USA Inc. ("OCM USA"), Gang Wang ("Wang"), Yaotian Li ("Li"), and Xiaohui Chai ("Chai") (collectively, "Defendants") seeking to dismiss Plaintiff The Snack Joint LLC's ("Snack") Complaint for lack of personal jurisdiction as to Li pursuant to *Federal Rule of Civil Procedure 12(b)(2)*; (2) Defendants' Motion to Dismiss for improper venue pursuant to *Federal Rule of Civil Procedure 12(b)(3)*; (3) Defendants' Motion to Transfer Venue to the United States District Court for the Central District of California pursuant to *28 U.S.C. § 1404(a)* (ECF No. 33); and (4) Snack's Motion for Preliminary Injunction (ECF No. 36). Having reviewed the submissions filed in connection with the motions and having declined to hold oral argument pursuant to *Federal Rule of Civil Procedure 78(b)*, for the reasons set forth in the accompanying Opinion and for good cause shown,

IT IS on this 8th day of September 2021,

ORDERED that Defendants' Motion to Dismiss for improper venue (ECF No. 33) is **DENIED**; and it is further

ORDERED that Defendants' Motion to Transfer Venue (ECF No. **[*40]** 33) is **GRANTED**; and it is further

ORDERED that Defendants' Motion to Dismiss for lack of personal jurisdiction as to Li (ECF No. 33) is **DENIED as moot**; and it is further

ORDERED that Snack's Motion for Preliminary Injunction (ECF No. 36) is **DENIED as moot**; and it is further

ORDERED that the Clerk of the Court shall mark this case **CLOSED**.

/s/ Brian R. Martinotti

HON. BRIAN R. MARTINOTTI

UNITED STATES DISTRICT JUDGE

Epic Games, Inc. v. Apple Inc.

United States District Court for the Northern District of California

September 10, 2021, Decided; September 10, 2021, Filed

Case No. 4:20-cv-05640-YGR

Reporter
559 F. Supp. 3d 898 *; 2021 U.S. Dist. LEXIS 172303 **

EPIC GAMES, INC., Plaintiff, v. APPLE INC., Defendant.APPLE INC., Counterclaimant, v. EPIC GAMES, INC., Counter-Defendant.

Subsequent History: Reversed by, in part, Affirmed by, in part, Remanded by, in part *Epic Games, Inc. v. Apple, Inc., 2023 U.S. App. LEXIS 9775 (9th Cir. Cal., Apr. 24, 2023)*

Prior History: *In re Apple iPhone Antitrust Litig., 874 F. Supp. 2d 889, 2012 U.S. Dist. LEXIS 97105 (N.D. Cal., July 11, 2012)*

Core Terms

Games, developers, platforms, consumers, users, mobile, transactions, in-app, purchases, Switch, restrictions, prices, effects, customers, console, market power, players, digital, costs, streaming, market share, provisions, features, markets, anticompetitive, products, substitution, aftermarket, download, intellectual property

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN1[] **Standing, Requirements**

Antitrust law protects competition and not competitors. Competition results in innovation and consumer satisfaction and is essential to the effective operation of a free market system. Antitrust jurisprudence also evaluates both market structure and behavior to determine whether an actor is using its place in the market to artificially restrain competition.

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

HN2[] **Relevant Market, Product Market Definition**

Central to antitrust cases is the appropriate determination of the relevant market.

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

HN3[] **Scope, Monopolization Offenses**

To determine the relevant market in an antitrust case, the Court must first understand the industry and the markets in that industry. This is a heavily factual inquiry.

Civil Procedure > Pleading & Practice > Motion Practice > Content & Form

HN4[] **Motion Practice, Content & Form**

Courts prefer to rule on the merits of claims rather than disregard on procedural grounds.

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

HN5[] **Per Se Rule & Rule of Reason, Sherman Act**

In an antitrust case, whether the conduct is procompetitive depends on other factors, including timing and whether the stickiness is at least partly tied to product attractiveness which can then decrease if the products become less attractive (for instance, through higher game prices).

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN6[] **Expert Witnesses, Daubert Standard**

Fed. R. Evid. 702(b) asks whether the expert considered enough information to make the proffered opinion reliable, while Fed. R. Evid. 703 asks whether the data considered itself is of a type that is reliable.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

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

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

HN7[] **Attempts to Monopolize, Elements**

A threshold step in any antitrust case is to accurately define the relevant market, which refers to the area of effective competition. Monopoly power under the first element can be defined as the power to control prices or exclude competition and may be inferred from the defendant's predominant market share in the relevant market. In addition, courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market. Without a relevant market definition, there is no way to measure the defendant's ability to lessen or destroy competition.

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN8[] **Relevant Market, Geographic Market Definition**

In an antitrust case, the relevant market must include both a geographic market and a product market. The latter must encompass the product at issue as well as all economic substitutes for the product. Economic substitutes have a reasonable interchangeability of use or sufficient cross-elasticity of demand with the relevant product. Including economic substitutes ensures that the relevant product market encompasses the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business.

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

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

HN9[] **Relevant Market, Geographic Market Definition**

Interchangeability implies that one product is roughly equivalent to another for the use to which it is put: while there may be some degree of preference for the one over the other, either would work effectively.

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

HN10[] **Relevant Market, Product Market Definition**

A plaintiff cannot ignore economic reality and arbitrarily choose the product market relevant to its claims; rather, the plaintiff must justify any proposed market by defining it with reference to the rule of reasonable interchangeability and cross-elasticity of demand. The proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers.

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

Evidence > Burdens of Proof > Allocation

HN11[] **Relevant Market, Product Market Definition**

In an antitrust case, it is the plaintiff's burden to establish the relevant product and geographic markets. To meet that burden, a plaintiff must produce specific evidence supporting the proposed market definition that is relevant to the particular legal issue being litigated.

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

HN12[] **Relevant Market, Product Market Definition**

The relevant product market in an antitrust case must encompass the product at issue as well as all economic substitutes for the product. Economic substitutes have a reasonable interchangeability of use or sufficient cross-elasticity of demand with the relevant product.

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

HN13[] Relevant Market, Product Market Definition

In limited settings the relevant product market may be narrowed beyond the boundaries of physical interchangeability and cross-price elasticity to account for identifiable submarkets or product clusters. A submarket is a small part of the general market of substitutable products and is economically distinct from the general product market. Although there are several practical indicia of an economically distinct submarket, including industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors,, they are practical aids for identifying the areas of actual or potential competition and their presence or absence does not decide automatically the submarket issue.

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

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

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

Determining whether a single-brand market is proper requires a factual inquiry into the commercial realities' faced by consumers. Single-brand markets are, at a minimum, extremely rare and courts have rejected such market definitions even where brand loyalty is intense. Antitrust markets consisting of just a single brand, however, are not per se prohibited.

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

HN15[] Relevant Market, Product Market Definition

In an antitrust case, in some instances one brand of a product can constitute a separate market.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

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

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

HN16[] Actual Monopolization, Claims

The first indicator of an aftermarket is that the market is wholly derivative from and dependent on the primary market. The second indicator is that the illegal restraints of trade and illegal monopolization relate only to the aftermarket, not to the initial market. The third indicator is that the defendant's market power "flows from its relationship with its consumers" and the defendant did "not achieve market power in the aftermarket through contractual provisions that it obtains in the initial market. The fourth indicator is that competition in the initial market does not necessarily suffice to discipline anticompetitive practices in the aftermarket.

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

Evidence > Inferences & Presumptions > Presumptions > Creation

HN17[] **Relevant Market, Product Market Definition**

To establish a single-brand aftermarket under Kodak and Newcal, the restriction in the aftermarket not have been sufficiently disclosed to consumers in advance to enable them to bind themselves to the restriction knowingly and voluntarily. Indeed, market imperfections may prevent consumers from discovering that purchasing a product in the initial market could restrict their freedom to shop in the aftermarket. In other words, a plaintiff must show evidence to rebut the economic presumption that defendant's consumers make a knowing choice to restrict their aftermarket options when they decide in the initial (competitive) market to purchase in the foremarket.

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

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

HN18[] **Relevant Market, Geographic Market Definition**

The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market. A geographic market is an area of effective competition where buyers can turn for alternate sources of supply.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN19[] **Sherman Act, Claims**

As Qualcomm instructs, the similarity of the burden-shifting tests under §§ 1 and 2 of the Sherman Act means that courts often review claims under each section simultaneously. Indeed, if, in reviewing an alleged Sherman Act violation, a court finds that the conduct in question is not anticompetitive under § 1, the court need not separately analyze the conduct under § 2. That result is logical as proving an antitrust violation under § 2 of the Sherman Act is more exacting than proving a § 1 violation.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

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

HN20[] Sherman Act, Claims

Although the tests are largely similar, a plaintiff may not use indirect evidence to prove unlawful monopoly maintenance via anticompetitive conduct under § 2 of the Sherman Act.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

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

HN21[] Attempts to Monopolize, Elements

Market power and monopoly power are related but distinct concepts. As the U.S. Supreme Court has stated: market power is the ability to raise prices above those that would be charged in a competitive market. Monopoly power is the power to control prices or exclude competition.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN22[] Scope, Monopolization Offenses

Monopoly power under § 2 of the Sherman Act requires, of course, something greater than market power under § 1 of the Sherman Act. Courts have described the distinction as substantial market power or an extreme degree of market power. Courts have also required that the monopoly power be beyond fleeting or ephemeral which the Court understands to be durable and sustaining.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

HN23[] Attempts to Monopolize, Elements

Market share is just the starting point for assessing market power. It should not be equated with monopoly power but instead is evidence from which the existence of monopoly power may be inferred. Indeed, as the Ninth Circuit has cautioned, blind reliance upon market share, divorced from commercial reality, could give a misleading picture of a firm's actual ability to control prices or exclude competition. In other words, market share, while being perhaps the most important factor, does not alone determine the presence or absence of monopoly power.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN24[] Attempts to Monopolize, Elements

The threshold of market share for finding a prima facie case of monopoly power is generally no less than 65% market share.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

HN25[] Sherman Act, Claims

Numerous cases hold that a market share of less than 50 percent is presumptively insufficient to establish the requisite level of market power under a § 2 of the Sherman Act claim.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

HN26[] Sherman Act, Claims

Section 1 of the Sherman Act claims can be satisfied with less market power.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

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

HN27[] Per Se Rule Tests, Manifestly Anticompetitive Effects

Direct evidence is evidence of the injurious exercise of market power such as evidence of restricted output and supracompetitive prices. This kind of evidence is direct proof of the injury to competition which a competitor with market power may inflict, and thus, direct proof of the actual exercise of market power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Evidence > Types of Evidence > Circumstantial Evidence

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

HN28[] Actual Monopolization, Monopoly Power

The second and more common type of proof is circumstantial evidence pertaining to the structure of the market. To demonstrate market power indirectly, a plaintiff must: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run.

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN29[] Scope, Monopolization Offenses

Because a mere showing of substantial or even dominant market share alone cannot establish market power sufficient to carry out a predatory scheme, a plaintiff must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge the predator's high price. Entry barriers are market characteristics that prevent new rivals from timely responding to an increase in price above the competitive level. They include additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants, or factors in the market that deter entry while permitting incumbent firms to earn monopoly returns.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

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

HN30[] Attempts to Monopolize, Elements

Supracompetitive pricing, on its own, is not direct evidence of monopoly power. Indeed, to prove monopoly power directly, supracompetitive pricing must be accompanied by restricted output. In other words, both are required to prove monopoly power directly.

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN31[] Scope, Monopolization Offenses

A share between 52 and 57 percent is not high enough to sustain a prima facia case of a monopoly, but is enough to permit the Court to evaluate the state and durability of the market. This evaluation includes whether (i) new rivals are barred from entering the market (i.e., the degree of entry barriers) and (ii) whether existing competitors lack the capacity to expand their output to challenge the predator's high price. In general, entry barriers are additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants or factors in the market that deter entry while permitting incumbent firms to earn monopoly returns. Such barriers include (1) legal license requirements, (2) control of an essential or superior resource, (3) entrenched buyer preferences for established brands; (4) capital market evaluations imposing higher capital costs on new entrants; and, in some situations, (5) economies of scale.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

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

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

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

HN32[] **Sherman Act, Claims**

Section 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. 15 U.S.C.S. § 1. Section 1 is understood to outlaw only unreasonable restraints. To establish liability under § 1, a plaintiff must prove (1) the existence of an agreement, and (2) that the agreement was in unreasonable restraint of trade.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

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

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

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

HN33[] **Sherman Act, Claims**

Despite the broad language of the statute, ***antitrust law*** has developed to find that the essence of a Section 1 of the Sherman Act claim is concerted action. Express agreements' are direct evidence of concerted activity. A plaintiff need not prove intent to control prices or destroy competition to demonstrate the element of an agreement among two or more entities. Unilateral conduct by a single firm, even if it appears to restrain trade unreasonably, is not unlawful under Section 1 of the Sherman Act. Thus, in evaluating the first element, the Sherman Act distinguishes between concerted conduct and unilateral conduct and treats concerted behavior more strictly than unilateral behavior.

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

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

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

HN34[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

With respect to the second element of § 1 of the Sherman Act, some restraints are per se unreasonable. Where they are not, they are judged under the rule of reason. The rule of reason requires courts to conduct a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition. Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Appropriate factors to consider include specific information about the relevant business and the restraint's history, nature, and effect.

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

HN35[] **Per Se Rule & Rule of Reason, Sherman Act**

Whether the businesses involved have market power is a further, significant consideration. In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

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

Evidence > Burdens of Proof > Allocation

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN36[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

To determine whether a restraint violates the rule of reason, a three-step, burden shifting framework applies. Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. The three steps do not represent a rote checklist and are not an inflexible substitute for careful analysis. Rather, their purpose is to furnish an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.

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

Evidence > Types of Evidence > Circumstantial Evidence

HN37[] **Conspiracy to Monopolize, Elements**

Express agreements provide direct evidence of concerted activity.

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

HN38[] Scope, Monopolization Offenses

The Sherman Act distinguishes between unilateral and concerted activity. Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2 because it deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. It thus warrants scrutiny even in the absence of incipient monopoly. Unilateral conduct, by contrast, may simply represent robust competition. Thus, even unreasonable unilateral restraints are not subject to antitrust scrutiny unless they pose a danger of monopolization.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN39[] Remedies, Damages

A business may set conditions for dealing unilaterally and refuse to deal with anyone who does not meet those conditions. However, where the conduct extends beyond announcing a policy and refusing to deal with non-compliant partners to coercing an agreement, the conduct falls under Section 1 of the Sherman Act.

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

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

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

HN40[] Per Se Rule Tests, Manifestly Anticompetitive Effects

As the Court described in Amex:The rule of reason requires courts to conduct a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition. The goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest. Recognizing that the rule of reason is not a rote checklist, the Court examines the app distribution restrictions and considers their anticompetitive effects, procompetitive rationales, and less restrictive alternatives.

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

Evidence > Inferences & Presumptions > Presumptions > Creation

HN41[] Attempts to Monopolize, Elements

Novel business practices—especially in technology markets—should not be conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

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

HN42[] Deceptive & Unfair Trade Practices, State Regulation

A procompetitive rationale is a nonpretextual claim that defendant's conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal. It is not enough that conduct has the effect of reducing consumers' choices or increasing prices to consumers.

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

HN43[] Per Se Rule Tests, Manifestly Anticompetitive Effects

In a two-sided transaction market, a court must consider procompetitive effects on both sides of the market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

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

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

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN44[] Exclusive & Reciprocal Dealing, Exclusive Dealing

The U.S. Supreme Court has recognized that limiting intrabrand competition can promote interbrand competition. It is this interbrand competition that the antitrust laws are designed primarily to protect.

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

Governments > Courts > Authority to Adjudicate

HN45[] Trade Practices & Unfair Competition, State Regulation

Generally, ***antitrust law*** does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess degrees of reasonable necessity so that the lawfulness of conduct turns upon judgments of degrees of efficiency.

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

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

HN46[] Per Se Rule Tests, Manifestly Anticompetitive Effects

An alternative must be a significantly (not marginally) less restrictive means for achieving the same procompetitive benefits. It must be virtually as effective in serving the procompetitive purposes as current rules without significantly increased cost. Where a restraint is patently and inexplicably stricter than is necessary to accomplish the proffered procompetitive objective, an antitrust court can and should invalidate it and order it replaced with a viable less restrictive alternative.

Governments > Courts > Authority to Adjudicate

HN47[] **Courts, Authority to Adjudicate**

In evaluating remedies, no court should impose a duty that it cannot explain or adequately and reasonably supervise.

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

Governments > Courts > Authority to Adjudicate

HN48[] **Private Actions, Remedies**

Antitrust courts must give wide berth to business judgments before finding liability.

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

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

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

Antitrust & Trade Law > Sherman Act > Claims

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

HN49[] **Actual Monopolization, Claims**

Section 2 of the Sherman Act prohibits persons from monopolizing, or attempting to monopolize, or combining or conspiring with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations. 15 U.S.C.S. § 2. A claim for unlawful monopolization under Section 2 of the Sherman Act requires that a plaintiff show: (a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

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

HN50[] **Attempts to Monopolize, Elements**

Monopoly power is the power to control prices or exclude competition. A firm is a monopolist if it can profitably raise prices substantially above the competitive level, without inducing so rapid and great an expansion of output from competing firms as to make the supracompetitive price untenable.

Antitrust & Trade Law > Sherman Act > Claims

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

HN51[] **Sherman Act, Claims**

Section 2 of the Sherman Act monopolization claims must be judged on a market-by-market basis.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN52[] **Sherman Act, Claims**

Because the three-part burden-shifting test under the rule of reason is essentially the same under §§ 1 and 2 of the Sherman Act, and proving an antitrust violation under § 2 of the Sherman Act is more exacting than proving a § 1 violation, the analysis applies to the monopolization claims if required and fails for the same reasons.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN53[] **Tying Arrangements, Per Se Rule**

Tying involves the linking of two separate products from two separate product markets. The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN54[] **Per Se Rule & Rule of Reason, Per Se Violations**

Tying arrangements may be evaluated under § 1 of the Sherman Act under either per se or rule of reason analysis. The per se rule applies only after considerable experience with certain business relationships, shows that a restraint always or almost always tend to restrict competition and decrease output.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

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

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

HN55[] **Tying Arrangements, Per Se Rule**

For a tying claim to suffer per se condemnation, a plaintiff must prove: (1) that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product; and (3) that the tying arrangement affects a not insubstantial volume of commerce in the tied product market.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Tying Arrangements

Evidence > Burdens of Proof > Allocation

HN56[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The first element of a tying claim requires that the plaintiff must prove that the alleged tying product and the alleged tied product are separate and distinct products.

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

HN57[] **Relevant Market, Product Market Definition**

The answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items. There must be sufficient demand for the purchase of the tied product separate from the tying product to identify a distinct product market in which it is efficient to offer the tied product separately from the tying product.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN58[] **Actual Monopolization, Monopoly Power**

The purchaser demand test of Jefferson Parish examines direct and indirect evidence of consumer demand for the tied product separate from the tying product. Direct evidence addresses the question whether, when given a choice, consumers purchase the tied good from the tying good maker, or from other firms. Indirect evidence includes the behavior of firms without market power in the tying good market, presumably on the notion that (competitive) supply follows demand.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN59[] **Tying Arrangements, Per Se Rule**

With respect to the second element, a tie exists where sale of the desired (tying) product is conditioned on purchase of another (tied) product. The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. A plaintiff must present evidence that the defendant went beyond persuasion and coerced or forced its customer to buy the tied product in order to obtain the tying product.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

HN60[] **Actual Monopolization, Monopoly Power**

The Supreme Court has condemned tying arrangements when the seller has the market power to force a purchaser to do something that he would not do in a competitive market. In all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Tying Arrangements

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

HN61[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Because a tying claim cannot be sustained where the alleged good is not a separate and distinct product.

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

HN62[] **Market Definition, Relevant Market**

Integration is common among technological products and services.

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

HN63[] **Trade Practices & Unfair Competition, State Regulation**

The Cartwright Act makes unlawful, against public policy and void every trust, which is defined as a combination of capital, skill, or acts by two or more persons to create or carry out restrictions in trade or commerce. Cal. Bus. & Prof. Code §§ 16720(a), 16726.

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

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

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

HN64[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

As in the context of claims under Section 1 of the Sherman Act, California courts employ the rule of reason to determine whether a restraint of trade that is not subject to per se treatment is unreasonable and, therefore, unlawful under the Cartwright Act. The rule of reason inquiry in the context of the Cartwright Act, as in the federal context, looks to whether the challenged conduct promotes or suppresses competition, based on the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN65[] **Sherman Act, Claims**

As is the case with a tying claim in violation of the Sherman Act, a tying claim under the Cartwright Act requires the existence of two separate products.

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

Evidence > Burdens of Proof > Allocation

HN66[] **Actual Monopolization, Claims**

To establish an essential facility claim, a plaintiff must show that (i) the defendant is a monopolist in control of an essential facility; (ii) the plaintiff is unable reasonably or practically to duplicate the facility; (iii) the defendant has refused to provide the plaintiff access to the facility; and (iv) it is feasible for the defendant to provide such access.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN67[] **Standing, Requirements**

The term "essential facility" is a term of art under the antitrust laws. Caselaw describes essential facilities as those that are not capable of being replicated by competitors and serve as a conduit for the distribution of another product. While prior cases have focused only on physical infrastructures of a finite availability (such as a bridge or a power network), an essential facility can exist even in the absence of such traditional physical attributes.

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

HN68[] **Actual Monopolization, Claims**

To constitute an essential facility, access to the facility or resource must be truly essential in the sense that competitors cannot simply duplicate it or find suitable alternatives, and that absent access, competitors' ability to compete will be substantially constricted.

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

HN69[] **Actual Monopolization, Claims**

The essential facility doctrine does not demand an ideal or preferred standard.

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

HN70[] **Trade Practices & Unfair Competition, State Regulation**

States have regulated against monopolies and unfair competition for longer than federal government, and federal law is intended only to supplement, not to displace, state antitrust remedies.

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

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

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

HN71[] **Trade Practices & Unfair Competition, State Regulation**

California's Unfair Competition Law (UCL) prohibits business practices that constitute unfair competition, which is defined, in relevant part, as any unlawful, unfair or fraudulent business act or practice. Cal. Bus. & Prof. Code § 17200. Each of these descriptions provides a separate "variety" of unfair competition. Thus, a practice may be deemed unfair even if not specially proscribed by some other law and even if not violating an antitrust statute.

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

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

HN72[] **Trade Practices & Unfair Competition, State Regulation**

California's Unfair Competition Law (UCL) permits claims to be brought by any person, which includes natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons. Cal. Bus. & Prof. Code §§ 17201, 17204. To bring a claim under the UCL, a plaintiff must (1) establish a loss or deprivation of money or property sufficient to quantify as injury in fact, i.e., economic injury, and (2) show that the economic injury was the result of, i.e., caused by, the unfair business practice. Cal. Bus. & Prof. Code § 17204.

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

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN73[] **Deceptive & Unfair Trade Practices, State Regulation**

The injury-in-fact requirement of California's Unfair Competition Law (UCL) incorporates standing under Article III of the United States Constitution. Accordingly, the injury in fact must be concrete and particularized and actual or imminent, not conjectural or hypothetical. In addition, the UCL requires an economic injury. For example, a plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary. Last, a plaintiff must show a causal connection between the defendant's conduct and the alleged injury.

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

HN74[] **Deceptive & Unfair Trade Practices, State Regulation**

Generally, California's Unfair Competition Law makes a distinction between consumer and competitor suits. There is no specific third category for non-competitor business.

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

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

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

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

HN75[] **State Regulation, Claims**

Under the unlawful prong of California's Unfair Competition Law, a plaintiff must show that the defendant's conduct can properly be called a business practice and that at the same time is forbidden by law. Virtually any law can serve as a predicate for an action under Cal. Bus. & Prof. Code § 17200.

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

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

HN76[] **Trade Practices & Unfair Competition, State Regulation**

The unfair prong of California's Unfair Competition Law may differ for consumer and competitor suits. As a competitor who claims to have suffered injury from the defendant's unfair practices, the plaintiff must show that the defendant's conduct (1) threatens an incipient violation of an ***antitrust law***, (2) violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or (3) otherwise significantly threatens or harms competition. These findings must be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.

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

HN77[] **Deceptive & Unfair Trade Practices, State Regulation**

The balancing test under California's Unfair Competition Law involves an examination of that practice's impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer.

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

HN78[] **Trade Practices & Unfair Competition, State Regulation**

Under the tethering test, California courts require a close nexus between the challenged act and the legislative policy. That is because courts may not apply purely subjective notions of fairness or determine the wisdom of any economic policy, which rests solely with the legislature. However, unfair practices under this test are not limited to violations of existing laws. Instead, California courts distinguish between conduct made lawful (or for which relief is barred) by a statute and conduct not prohibited by any statute. The latter may be actionable under the unfair prong.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN79[] **Conspiracy to Monopolize, State Regulation**

Cel-Tech expressly recognizes that incipient violations of antitrust laws and violations of the policy or spirit of those laws with comparable effects are prohibited.

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

HN80[] **Trade Practices & Unfair Competition, State Regulation**

California's Unfair Competition Law has broad, sweeping language precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of one's invention would contrive.

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

Torts > Business Torts > Unfair Business Practices > Remedies

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

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

HN81[] **Trade Practices & Unfair Competition, State Regulation**

A California's Unfair Competition Law action is equitable in nature. Courts have broad discretion to fashion equitable remedies to serve the needs of justice. The statute reinforces that discretion by permitting courts to make such orders or judgments as may be necessary to prevent the use or employ by any person of any practice which constitutes unfair competition. Cal. Bus. & Prof. Code § 17203.

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

Constitutional Law > ... > Freedom of Speech > Commercial Speech > Misleading Speech

HN82[] **Vertical Restraints, Price Fixing**

Courts have long recognized that commercial speech, which includes price advertising, performs an indispensable role in the allocation of resources in a free enterprise system.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN83[] **Regulated Practices, Trade Practices & Unfair Competition**

Under the balancing test, the Court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim. Under this test the focus is on the injury to consumers.

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

Civil Procedure > Preliminary Considerations > Equity > Relief

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

HN84[] **Trade Practices & Unfair Competition, State Regulation**

The primary form of relief available under California's Unfair Competition Law (UCL) to protect consumers from unfair business practices is an injunction. A private party seeking injunctive relief under the UCL may request public injunctive relief, which is relief that by and large benefits the general public and that benefits the plaintiff, if at all, only incidentally and/or as a member of the general public. Federal courts must apply equitable principles derived from federal common law to claims for equitable relief under California's Unfair Competition Law. This means that, even if a state authorizes its courts to provide equitable relief when an adequate legal remedy exists, such relief may be unavailable in federal court because equitable remedies are subject to traditional equitable principles unaffected by state law.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

Trademark Law > ... > Equitable Relief > Injunctions > Permanent Injunctions

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

HN85[] **Grounds for Injunctions, Balance of Hardships**

Accordingly, under Sonner, a plaintiff seeking equitable relief under the UCL in federal court must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Severability Clauses

Contracts Law > Defenses > Illegal Bargains

Contracts Law > Contract Interpretation > Severability

Contracts Law > Defenses > Public Policy Violations

HN86[] **Contract Conditions & Provisions, Severability Clauses**

The general rule is that the courts will deny relief to either party who has entered into an illegal contract or bargain which is against public policy. Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest. Cal. Civ. Code § 1599. Thus, if the alleged illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate. The burden ordinarily rests upon the party asserting the invalidity of the contract to show how and why it is unlawful.

Contracts Law > Defenses > Public Policy Violations

HN87[] **Defenses, Public Policy Violations**

In general, a contract contrary to public policy will not be enforced. A contract need not be contrary to a statute for it to be deemed contrary to public policy.

Contracts Law > Defenses > Public Policy Violations

HN88[] **Defenses, Public Policy Violations**

The authorities all agree that a contract is not void as against public policy unless it is injurious to the interests of the public as a whole or contravenes some established interest of society. California has a settled public policy in favor of open competition. It also has a public policy of protecting consumers of goods and services. Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest. Cal. Civ. Code § 1599.

Commercial Law (UCC) > ... > Contract Provisions > Contract Terms > Unconscionable Terms

Contracts Law > Defenses > Unconscionability

HN89[] **Contract Terms, Unconscionable Terms**

A contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or unconscionable. Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Phrased another way, unconscionability has both a procedural and a substantive element. Both the procedural and substantive elements must be met before a contract or term will be deemed unconscionable. Both, however, need not be present to the same degree. A sliding scale is applied so that the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Adhesion Contracts

Contracts Law > Defenses > Unconscionability > Adhesion Contracts

HN90[] **Types of Contracts, Adhesion Contracts**

Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion. The term contract of adhesion signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. The procedural element of the unconscionability analysis concerns the manner in which the contract was negotiated and the circumstances of the parties at that time.

Contracts Law > Defenses > Unconscionability > Adhesion Contracts

HN91[] **Unconscionability, Adhesion Contracts**

Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise is defined as the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms.

Contracts Law > Defenses > Unconscionability

HN92[] **Defenses, Unconscionability**

The substantive element of the unconscionability analysis focuses on overly harsh or one-sided results, or whether a contractual provision reallocates risks in an objectively unreasonable or unexpected manner, Substantive unconscionability traditionally involves contract terms that are so one-sided as to shock the conscience, or that impose harsh or oppressive terms.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Severability Clauses

Contracts Law > Contract Interpretation > Severability

HN93[] **Contract Conditions & Provisions, Severability Clauses**

In California, where a single contract provision is invalid, but the balance of the contract is lawful, the invalid provision is severed, and the balance of the contract is enforced. For example, when a contract is held to be unconscionable, the strong legislative and judicial preference is to sever the offending term and enforce the balance of the agreement. Cal. Civ. Code § 1670.5.

Contracts Law > Defenses > Unconscionability

HN94[] **Defenses, Unconscionability**

A contractual term is not unconscionable unless it is found to be both procedurally and substantively unconscionable.

Contracts Law > Defenses > Unconscionability

HN95[] Defenses, Unconscionability

A contractual term is not substantively unconscionable unless it so one-sided so as to shock the conscience.

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

HN96[] Breach of Contract Actions, Elements of Contract Claims

Under California law, the elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiffs performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. To prove causation, a plaintiff must show the breach was a substantial factor in causing the damages.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN97[] Contract Interpretation, Good Faith & Fair Dealing

The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. While a breach of the implied covenant of good faith is a breach of the contract, breach of a specific provision of the contract is not necessary to a claim for breach of the implied covenant of good faith and fair dealing.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN98[] Contract Interpretation, Good Faith & Fair Dealing

In California, the factual elements necessary to establish a breach of the covenant of good faith and fair dealing are: (1) the parties entered into a contract; (2) the plaintiff fulfilled his obligations under the contract; (3) any conditions precedent to the defendant's performance occurred; (4) the defendant unfairly interfered with the plaintiff's rights to receive the benefits of the contract; and (5) the plaintiff was harmed by the defendant's conduct.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

HN99[] Types of Contracts, Covenants

In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract. It exists to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

HN100[] Types of Contracts, Covenants

It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement. If there exists a contractual relationship between the parties, the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN101[] Types of Contracts, Quasi Contracts

The elements for a claim of unjust enrichment are 1 receipt of a benefit and 2 unjust retention of the benefit at the expense of another. Under California law, unjust enrichment is an action in quasi-contract, and is not cognizable when there is a valid and enforceable contract between the parties. The doctrine applies where plaintiffs, while having no enforceable contract, nonetheless have conferred a benefit on defendant which defendant has knowingly accepted under circumstances that make it inequitable for the defendant to retain the benefit without paying for its value.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Indemnity Clauses

HN102[] Contract Conditions & Provisions, Indemnity Clauses

Under California law, an indemnity agreement is to be interpreted according to the language and contents of the contract as well as the intention of the parties as indicated by the contract. Such agreements are construed under the same rules that govern the interpretation of other contracts.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Indemnity Clauses

Torts > ... > Multiple Defendants > Indemnity > Contractual Indemnity

Torts > ... > Settlements > Multiple Party Settlements > Indemnity

HN103[] Contract Conditions & Provisions, Indemnity Clauses

Generally, an indemnification provision allows one party to recover costs incurred defending actions by third parties, not attorney fees incurred in an action between the parties to the contract. Courts look to several indicators to distinguish third party indemnification provisions from provisions for the award of attorney fees incurred in litigation between the parties to the contract. The key indicator is an express reference to indemnification. A clause that contains the words indemnify and hold harmless' generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons—that is, it relates to third party claims, not attorney fees incurred in a breach of contract action between the parties to the indemnity agreement itself. Courts also examine the context in which the language appears. Generally, if the surrounding provisions describe third party liability, the clause will be construed as a standard third party indemnification provision. The court will not infer that the parties intended an indemnification provision to cover attorney fees between the parties if the provision does not specifically provide for attorney's fees in an action on the contract.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Indemnity Clauses

Torts > ... > Multiple Defendants > Indemnity > Contractual Indemnity

HN104[] **Contract Conditions & Provisions, Indemnity Clauses**

For an indemnification provision to be interpreted as covering attorneys' fees and costs in an action on a contract between the parties, there must be language in the contract that reasonably can be interpreted as addressing the issue of an action between the parties on the contract. For example, attorneys' fees and costs are recoverable in an action between the parties where the indemnity provision includes express language for attorney's fees incurred in enforcing the indemnity agreement.

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

Governments > Courts > Judicial Comity

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Scope of Declaratory Judgments

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

HN105[] **Discretionary Jurisdiction, Factors**

Courts have substantial discretion in deciding whether to declare the rights of litigants under the Declaratory Judgment Act. This substantial discretion permits the Court to consider equitable, prudential, and policy arguments for or against the declaratory relief sought. A district court should avoid needless determination of state law issues, should discourage litigants from filing declaratory actions as a means of forum shopping, and should avoid duplicative litigation. Courts also consider whether the declaratory action will settle all aspects of the controversy; whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue; whether the declaratory action is being sought merely for the purposes of procedural fencing or to obtain a res judicata advantage; or whether the use of a declaratory action will result in entanglement between the federal and state court systems. Essentially, the district court must balance concerns of judicial administration, comity, and fairness to the litigants.

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Judges: YVONNE GONZALEZ ROGERS, UNITED STATES DISTRICT COURT JUDGE.

Opinion by: YVONNE GONZALEZ ROGERS

Opinion

[*921] ***RULE 52*** **ORDER AFTER TRIAL ON THE MERITS**

Plaintiff Epic Games, Inc. sued Apple, Inc. alleging violations of federal and state antitrust laws and California's unfair competition law based upon Apple's operation of its App Store. Broadly speaking, Epic Games claimed that Apple is an antitrust monopolist over (i) Apple's *own system* of distributing apps on Apple's *own devices* in the App Store and (ii) Apple's *own system* of collecting payments and commissions of purchases made on Apple's *own devices* in the App Store. Said differently, plaintiff alleged an antitrust market of one, that is, Apple's "monopolistic" control over its own systems relative to the App Store. Apple obviously disputed the allegations.

Antitrust law protects competition and not competitors. Competition results in innovation and consumer satisfaction and is essential to the effective operation of **[**11]** a free market system. ***HN1***[] Antitrust jurisprudence also evaluates both market structure and behavior to determine whether an actor is using its place in the market to artificially restrain competition.

HN2[] Central to antitrust cases is the appropriate determination of the "relevant market." Epic Games structured its lawsuit to argue that Apple does not compete with anyone; it is a monopoly of one. Apple, by contrast, argues that the effective area of competition is the market for all digital video games in which it and Epic Games compete heavily. In the digital video game market, Apple argues that it does not enjoy monopoly power, and therefore does not violate federal and state law.

The Court disagrees with both parties' definition of the relevant market.

Ultimately, after evaluating the trial evidence, the Court finds that the relevant market here is ***digital mobile gaming transactions***, not gaming generally and not Apple's own internal operating systems related to the App Store. The mobile gaming market itself is a *$100 billion industry*. The size of this market explains Epic Games' motive in bringing this action. Having penetrated all other video game markets, the mobile gaming market was Epic **[**12]** Games' next target and it views Apple as an impediment.

Further, the evidence demonstrates that most App Store revenue is generated by mobile gaming apps, not all apps. Thus, defining the market to focus on gaming apps is appropriate. Generally speaking, on a *revenue basis*, gaming apps account for approximately 70% of all App Store revenues. This 70% of revenue is generated by less than 10% of all App Store consumers. These gaming-app consumers are primarily making in-app purchases which is the focus of Epic Games' claims. By contrast, over 80% of all consumer **[*922]** accounts generate virtually no revenue, as 80% of all apps on the App Store are free.

Having defined the relevant market as digital mobile gaming transactions, the Court next evaluated Apple's conduct in that market. Given the trial record, the Court cannot ultimately conclude that Apple is a monopolist under either federal or state antitrust laws. While the Court finds that Apple enjoys considerable market share of over 55% and extraordinarily high profit margins, these factors alone do not show antitrust conduct. Success is not illegal. The final trial record did not include evidence of other critical factors, such as barriers **[**13]** to entry and conduct decreasing output or decreasing innovation in the relevant market. The Court does not find that it is impossible; only that Epic Games failed in its burden to demonstrate Apple is an illegal monopolist.

Nonetheless, the trial did show that Apple is engaging in anticompetitive conduct under California's competition laws. The Court concludes that Apple's anti-steering provisions hide critical information from consumers and illegally stifle consumer choice. When coupled with Apple's incipient antitrust violations, these anti-steering provisions are anticompetitive and a nationwide remedy to eliminate those provisions is warranted.

The Court provides its findings of facts and conclusions of law below.[1]

PART I

FINDINGS OF FACT

HN3[] To determine the relevant market, the Court must first understand the industry and the markets in that industry. This is a heavily *factual* inquiry. Thus, in this Order, the Court explains in detail, the facts underpinning each parties' theory and other relevant facts uncovered during the trial. These details include the background of the parties, their products, the industry, and the markets in which they compete.[2] To assist the reader, **[**14]** given the length of this Order, an outline is included in an Appendix hereto.

I. THE PARTIES

A. Overview

Some basic background information may be helpful. Epic Games is a multi-billion dollar video game company. It defines the relevant market by way of Apple's own internal operating system. Apple has maintained control of its

[1] The Court notes several pending administrative motions to seal relating to the parties' proposed findings of facts and conclusions of law, pending motions, and submitted and docketed materials. *See* Dkt. Nos. 517, 650, 656, 696, 702, 707, 777, 778, 810. These motions are **GRANTED** to the extent that they remain sealed and are not referenced in this Order. Otherwise, to the extent the information is referenced and included in this Order, the motions are **DENIED**. Previously sealed documents remain sealed unless otherwise noted in this Order.

[2] In considering these issues, the Court conducted a sixteen-day bench trial, admitted over 900 exhibits, and, to expedite the in-court proceedings, considered pre-trial submissions including written testimony of the experts and designations of deposition transcripts. The Court in this Order refers to the findings of facts ("FOF") and conclusions of law ("COL") for the parties' arguments as these documents effectively served as the parties' post-trial briefs. *See* Dkt. Nos. 777-4 (Epic Games' filing), 778-4 (Apple's filing).

own operating system for mobile devices, called iOS, since its inception in 2007. Apple's creation and cultivation of the iOS device (and its ecosystem) has been described as a walled garden. Said differently, it is a closed platform whereby Apple controls and supervises access to any software which accesses the iOS devices (defined as iPhones and iPads; also referred to collectively as iOS devices). Apple justifies this control primarily in the name of consumer privacy, security, **[*923]** as well as monetization of its intellectual property. Evidence supports the argument that consumers value these attributes. Due in part to this business model, Apple has been enormously successful and its devices are now ubiquitous.

Both Apple and third-party developers like Epic Games have symbiotically benefited from the ever-increasing innovation and growth in the iOS ecosystem. There **[**15]** is no dispute in the record that developers like Epic Games have benefited from Apple's development and cultivation of the iOS ecosystem, including its devices and underlying software. Nor is there any dispute that developers like Epic Games have enhanced the experience for iOS devices and their consumers by offering a diverse assortment of applications beyond that which Apple can or has provided.

Until this lawsuit, Epic Games' flagship video game product, *Fortnite*, could be played on iOS devices. The product generated an immensely profitable revenue stream for Epic Games. However, Epic Games was also required by contract to pay Apple a 30% commission on every purchase made through the App Store, whether an initial download or an in-app purchase. Consequently, *Fortnite* generated a profitable revenue stream for Apple as well. Epic Games tried to use *Fortnite* as leverage to force Apple to reduce its commission fee and to open its closed platform. When Apple refused, Epic Games breached its contract, which it concedes, and filed this lawsuit. Apple countersued for breach of contract.

Plaintiff focuses its challenge on Apple's control over the distribution of apps to its users and the requirement **[**16]** that developers of apps use Apple's in-app purchases or in-app payments ("IAP") system[3] if purchases are offered in the app. Under this IAP system and under its agreements with app developers, Apple collects payments made to developers, remits 70% to the developers, and keeps a 30% commission. This rate has largely remained unchanged since the inception. The trial also contained evidence of Apple's use of anti-steering provisions to limit information flow to consumers on the payment structure related to in-app purchases.

Once acceptable, Apple's commission rate is now questioned by some consumers and some developers, like Epic Games, as being overly burdensome and violative of competition laws. Indeed, two related lawsuits were already pending before the Court well before the commencement of this action. The first, *In Re Apple iPhone Antitrust Litigation*, 4:11-cv-6714-YGR (*Pepper*), was filed in 2011 on behalf of a class of iOS device consumers alleging harm from the commission rate. The second, filed in 2019 after *Pepper* returned from the Supreme Court of the United States, *Donald Cameron v. Apple Inc.*, 4:19-cv-3074-YGR (*Cameron*), on behalf of a class of iOS app developers also **[**17]** alleging violations of antitrust and competitions laws.

The Court begins the analysis with Epic Games.

B. Plaintiff Epic Games

Epic Games is a video game developer founded in 1991 by Tim Sweeney.[4] It is headquartered in Cary, North Carolina, **[*924]** has more than 3,200 employees in offices around the world, and was recently valued at $28.7 billion. Mr. Sweeney serves as the controlling shareholder and chairman of the Board of Directors.[5] Other notable

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[3] The Court notes that it uses the term IAP in this Order to refer exclusively to Apple's IAP systems, as described and discussed later herein. *See supra* Facts § II.C. The Court clarifies, however, that certain witnesses use the term IAP to refer generically to any app purchases or payments made in games and apps. The Court notes that the underlying transcripts and cited materials in which IAP is being referenced clarifies which of the two is being discussed.

[4] Trial Tr. (Sweeney) 89:19, 112:18-25.

shareholders include: (1) Tencent Holdings, Ltd., a Chinese video game company and one of the largest gaming companies in the world, which owns about thirty-seven percent of Epic Games, with two board seats; and (2) Sony Corporation, a major player in the console gaming market, which also owns about 1 to 2 percent of Epic Games.[6]

Epic Games first began publishing games for other developers when the company started.[7] Around 1998, it moved away from publishing other companies' products to developing its own product.[8] During the mid-2000's, the company, which had been focused on personal computers ("PC") games up to that point, shifted to developing for game consoles.[9]

In addition to game development, Epic Games offers software development tools **[**18]** and distributes apps.[10] Epic Games now touts a number of different lines of business, much of which occurred during the pendency of this lawsuit and on the eve of trial, such as distribution of non-game apps.

The Court summarizes each of the three significant areas of its business: (1) gaming software development (*e.g., Unreal Engine*, Epic Online Services); (2) game developer (*e.g., Fortnite* and other video games); and (3) gaming distributor (*e.g.*, the Epic Games Store). The Court thereafter summarizes the prior relationship between Epic Games and Apple.

1. *Gaming Software Developer: Unreal Engine and Epic Online Services*

As a gaming software developer, Epic Games licenses two notable products to other developers: *Unreal Engine* and Epic Online Services.[11]

The first, *Unreal Engine*, is a software suite that allows developers to create three-dimensional and immersive digital content.[12] It is not used by *consumers* and is not an app on the App Store.[13] Developers wishing to use *Unreal Engine* must be licensed by nonparty Epic S.A.R.L. ("Epic International"), an Epic Games Swiss subsidiary.[14] Epic International licenses *Unreal Engine* because it sought to protect their intellectual property rights.[15] Licensed **[**19]** developers are governed by the End User License Agreement.[16]

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[5] *Id.* 112:18-113:14, 165:17-166:1, 179:7-8.

[6] *Id.* 178:24-179:6, 179:21-180:3.

[7] *Id.* 172:6-8.

[8] *Id.* 172:21-173:3.

[9] DX-3710.005-.006.

[10] Trial Tr. (Sweeney) 93:22-94:17 ("Epic is in a variety of businesses all tied to the common theme of building and supporting real-time 3D content, both through consumer products and to developers, and . . . other services that socially connect users together."), 166:6-12.

[11] *Id.* 94:5-7; Trial Tr. (Grant) 662:8-13.

[12] *Id.* 116:17-22 ("The *Unreal Engine* is a development tool aimed at content creators rather than consumers. It contains content creation tools, real-time 3D graphics, capabilities, and real-time physics and simulation technology that is used by a wide variety of industries to make a variety of 3D content.").

[13] *Id.* 162:19-163:14.

[14] *Id.* 162:5-12; Trial Tr. (Grant) 724:11-16.

[15] Trial Tr. (Grant) 754:13-19.

[16] DX-4022; Trial Tr. (Grant) 667:3-11, 753:19-754:7.

Epic Games profits from *Unreal Engine* by charging fees for paid content.[17] Separately, Epic International charges a royalty **[*925]** on products that use any version of the *Unreal Engine* (typically 5% of gross revenue).[18] In the past, developers were required to pay royalties after a product exceeded $3,000 in revenue per quarter. After a change in policy in 2020, Epic International is now owed royalties after a product earns $1,000,000 through the product's life.[19]

Epic International therefore profits in perpetuity from any success a developer enjoys using the *Unreal Engine*.[20] As Epic Games' former chief financial officer stated, this model ensures that if developers succeed, Epic Games "can participate in that success."[21] For instance, in 2019, *Unreal Engine* generated about $97 million in revenue for Epic International,[22] which enjoys a 100 percent gross margin on its "engine business."[23]

Although *Unreal Engine* itself is not available on the App Store, Epic Games develops apps that work in conjunction with *Unreal Engine*, including *Unreal Remote* and *Live Link Face*, and distributes on iOS. These apps "provide[] a means for people **[**20]** who work in the movie or TV industry to capture performances and view them on *Unreal Engine*."[24] They do not include competitive game play.[25] Separate and apart from the App Store, Epic Games also provides *Unreal Marketplace*, a store for pre-created two-dimensional and three-dimensional assets for purchase by *Unreal* developers.[26]

Second, in addition to *Unreal Engine*, Epic Games offers third-party developers a suite of back-end online gaming services through Epic Online Services. These services include matchmaking, Epic Games' friends system, and voice system.[27]

2. *Game Developer: Fortnite*

With respect to Epic Games' primary business of development and release of its own video games including its flagship video game, *Fortnite*, Epic Games develops and owns through its subsidiary, other apps, such as *Houseparty*, which incorporates some optional gaming elements into its video chat application.[28]

a. *Fortnite*'s Game Modes

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[17] DX-4022.006-.007 (§ 4).

[18] DX-4022.007-.008 (§ 5).

[19] Trial Tr. (Grant) 681:4-7, 754:20-755:4.

[20] DX-4022.008 ("The royalty will be payable under this Agreement with respect to each Product for as long as any Engine Code or Content (including as modified by you under the License) incorporated in or used to make the Product are protected under copyright or other intellectual property law."); Ex. Depo. (Penwarden) 30:7-8.

[21] Ex. Depo. (Babcock) 180:5-9.

[22] DX-3795.009.

[23] DX-3359.003.

[24] Trial Tr. (Grant) 664:21-665:17.

[25] Trial Tr. (Sweeney) 304:25-305:2 (noting there is no competitive game play associated with *Unreal Engine*).

[26] Trial Tr. (Ko) 799:18-21.

[27] Trial Tr. (Sweeney) 120:7-14 ("Epic Online Services . . . provides many of the social features that we built for *Fortnite* and makes them available to other companies, such as Epic's account system, Epic's matchmaking system, to put players together into a shared game session. It includes Epic's friends system. And we're soon to release the Epic Games voice system for voice chat.").

[28] *Id.* 161:10-112 ("[W]e make *Houseparty*, which is a social video application, sort of like a version of Zoom that's for friends."), 117:8-12, 305:14-21. The record does not contain any information, financial or otherwise, with respect to these other games.

Fortnite is Epic Games' most popular game and app, with over 400 hundred million registered players worldwide.[29] Originally **[*926]** a cooperative shooter game consisting of player-versus-environment ("PVE") mechanics, *Fortnite* now has four main game modes: (i) ***[**21]*** *Save the World*, (ii) *Battle Royale*, (iii) *Creative*, and (iv) *Party Royale*.[30] Of these four game modes, "nearly half of the players coming into [*Fortnite*] on a daily basis," around 15 million users, "are playing Creative and Party Royale Modes."[31]

Save the World launched in July 2017 as the original game mode. It is a cooperative campaign consisting of PVE mechanics. Squads of up to four players team up to build forts and fight non-playable, computer monsters.[32]*Save the World* is *not available* on mobile platforms, including the iOS platform, or on the Nintendo Switch.[33]

Battle Royale is a player-versus-player ("PVP") elimination and survival match involving up to 100 players.[34] It is the most popular *Fortnite* game play mode with storylines and game play that evolve over time, as new chapters and seasons are released.[35] A season typically lasts around ten weeks and is a subset of a larger chapter.[36] This mode also offers a "sit out" feature, permitting players to observe *Battle Royale* matches instead of competing.[37] Importantly, and as discussed below, although the *Battle Royale* game play mode is available to download and play free of charge, **[**22]** [38] players can make in-app purchases for digital content, including digital avatars, costumes, dance moves, and other cosmetic items.[39]

Creative mode allows players to create their own content in *Fortnite*.[40] According to Epic Games' website: "Included free with Battle Royale, Fortnite Creative puts you in charge of your own Island . . . . Creative is also a great place for just creating your own scenery. . . ."[41] Content generated in *Creative* mode can be more broadly shared by other *Fortnite* players.[42] With the aid of avatar Agent Peely, an anthropomorphic banana man,[43] and Mr. Weissinger's testimony, the Court was walked through different gaming and experiences islands within the *Creative* mode hub,

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[29] Trial Tr. (Sweeney) 99:5-6, 100:5-7. Epic Games also owns and/or develops other games, including *Rocket League, Fall Guys, Battle Breakers, Spyjinx*, and the *Infinity Blade* series. Trial Tr. (Sweeney) 89:22-90:5, 116:8-12; Trial Tr. (Grant) 664:13-14.

[30] DX-5536; Trial Tr. (Sweeney) 99:5-10, 328:4-8; Trial Tr. (Weissinger) 1354:23-24.

[31] Trial Tr. (Weissinger) 1296:5-8.

[32] DX-5536.004.

[33] Trial Tr. (Weissinger) 1354:18, 1354:21.

[34] DX-5536.001-002.

[35] Trial Tr. (Sweeney) 99:5-10, 105:21.

[36] Trial Tr. (Weissinger) 1393:14-19.

[37] *Id.* 1296:14-1297:5.

[38] Trial Tr. (Sweeney) 108:15-16.

[39] *Id.* 108:23-109:3.

[40] *Id.* 328:4-8.

[41] DX-5536.003.

[42] DX-5539.

[43] With respect to the appropriateness of Peely's "dress," the Court understood Apple merely to be "dressing" Peely in a tuxedo for federal court, as jest to reflect the general solemnity of a federal court proceeding. As Mr. Weissinger later remarked, and with which the Court agrees, Peely is "just a banana man," additional attire was not necessary but informative. Trial Tr. (Weissinger) 1443:17.

including "Prison Breakout," "Rockets vs. Cars," "Cars Now With Snipers," and "Creative Mayhem Regional Qualifier."[44]

The final mode, *Party Royale*, is described as "an experimental and evolving space that focuses on no sweat, all chill fun. Attractions include aerial obstacle **[*927]** courses, boat races, movies, and even live concerts from top artists[.]"[45]

In 2017, *Fortnite* debuted on a number of platforms—including Windows, Mac, Xbox One, and PlayStation 4—with only the *Save the World* game **[**23]** mode. Later that year, Epic Games released *Battle Royale*—a free-to-play game mode with features available for in-app purchase. With *Battle Royale*'s success, *Fortnite* quickly "became more about Battle Royale" and, thus, a primarily "free-to-play game." The success of *Fortnite* has been profitable for both Epic Games and its partners. For instance, the Epic Games-Microsoft partnership generates hundreds of millions of dollars for both parties.[46]

b. Key Features of *Fortnite*

Fortnite has many distinct features. First, most of its game play is multiplayer and requires an Internet connection. Users can play *Fortnite* online with friends and family, with teams, or with other gamers of similar skill levels with whom they are matched.[47] Second, in order to play together online, users must have the same "version" of *Fortnite* software installed on their device or platform.[48] Third, *Fortnite* releases new content and updates, including major changes to the map and game play, on a regular basis. These updates ensure that users can enjoy new and surprising in-game experiences each time they open the app. Having a purely static environment without these updates would materially degrade the player experience. **[**24]** [49]

Fourth, *Fortnite* features cross-play, allowing players on different platforms to play with one another.[50] Since September 2018, cross-platform play for *Fortnite* has been available on Sony's PlayStation, Microsoft's Xbox, the Nintendo Switch, Windows PCs, Mac computers, certain Android devices, and (until recently) certain iOS mobile devices.[51] In fact, Epic Games pioneered cross-platform play for the gaming industry. It persuaded both Sony and Microsoft to erase the artificial barriers between players on their console platforms, making *Fortnite* the first game to achieve full cross-play functionality across those devices, as well as PCs and mobile devices.[52] Epic Games believed so strongly in cross-platform play that it threatened litigation against Sony for using policies and practices to restrict the same.[53]

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[44] Matthew Weissinger is Vice President of Marketing at Epic Games. Trial Tr. (Weissinger) 1365:16-1366:1, 1367:25-1368:10, 1368:12-1371:20, 1373:22-1374:12, 1374:13-1376:6 (testimony agreeing that *Creative* mode includes game play and game mechanics).

[45] DX-5536.002; *see also* Trial Tr. (Allison) 1246:20-1247:7. The Court viewed a portion of this mode whereby Peely participated in a game called "Skydive Glide Drop," before engaging in dance to celebrate a B rank finish. Trial Tr. (Weissinger) 1363:13-1364:12.

[46] Trial Tr. (Wright) 590:5-9, 592:12-17.

[47] Trial Tr. (Sweeney) 107:12-18.

[48] *Id.* 158:17-19.

[49] *Id.* 105:21-106:14.

[50] *Id.* 106:18-24, 196:8-22. Cross-platform scenarios also occur when games on one platform access "content, subscriptions, or features" acquired on other platforms or on a developer's website. PX-2790.011 (§ 313(b)).

[51] Trial Tr. (Sweeney) 107:2-10, 237:15-18.

[52] *Id.* 106:23-107:10, 196:18-22, 198:22-199:6.

[53] DX-3125.007; Trial Tr. (Sweeney) 107:2-10, 234:3-238:12, 252:22-255:16.

Other cross-platform innovations featured on *Fortnite* include cross-progression and cross-purchase or cross-wallet. Cross-progression allows users to access the same account and maintain their progress, regardless of the platform on which they play. Thus, for users who play *Fortnite* on multiple platforms, cross-progression is an important feature.[54] Nevertheless, **[*928]** most *Fortnite* ***[**25]*** users play on a single platform.[55] Cross-purchases allows *Fortnite* users to buy V-Bucks, or virtual currency, on one platform and spend them on another platform. Cross-purchases are not available on Sony or Nintendo platforms.[56]

Fifth and finally, as evidenced above, *Fortnite* features gaming and non-gaming experiences.[57] For instance, *Party Royale* allows players to watch movies or TV shows, attend concerts, and participate in global cultural events within the app itself.[58]*Fortnite*'s capacity to bring people together has been particularly important during the COVID-19 pandemic.[59] Notable events include:

• Travis Scott's in-game concert in April 2020, viewed by 12.3 million concurrent users, including two million iOS users;[60]

• Three of Christopher Nolan's feature-length films—*The Dark Knight, Inception*, and *The Prestige*—virtually screened in June 2020;[61]

• Exclusive episodes of ESPN's *The Ocho*, viewed by more than two million users, and the Discovery Channel's *Tiger Shark King*, viewed by more than 900,000 users;[62]

• *We the People*, a series of discussions on racial equality and voter suppression in the United States, viewed by 1.5 million users;[63] and

• DJ Kaskade hosted a virtual concert in March 2021. **[**26]** [64]

Based on these in-game experiences, Epic Games considers *Fortnite* to compete not only with gaming companies but also with other social media companies such as Facebook and Netflix.[65]

c. <u>*Fortnite*'s Business Model: In-App Purchases and V-Bucks</u>

Fortnite uses the "freemium" game model, under which a game is largely free to download and play but certain additional in-game features can be purchased.[66] Epic Games primarily generates revenue by selling V-Bucks,

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[54] Trial Tr. (Sweeney) 108:3-11 ("Cross-progression refers to . . . a user who owns multi devices to connect with *Fortnite* on . . . different platforms, and to have the same . . . state [of] ownership of virtual items on all different platforms . . . .").

[55] PX-1054.

[56] Trial Tr. (Sweeney) 197:1-5, 198:1-3, 239:3-14.

[57] *Id.* 98:6-8.

[58] *Id.* 98:12-99:3.

[59] *Id.* 107:14-18; Trial Tr. (Weissinger) 1295:8-16.

[60] Trial Tr. (Weissinger) 1294:10-22.

[61] Trial Tr. (Sweeney) 103:12-16; Trial Tr. (Weissinger) 1289:8-25.

[62] Trial Tr. (Sweeney) 104:16-24; Trial Tr. (Weissinger) 1290:5-7, 1290:16-23.

[63] Trial Tr. (Sweeney) 105:5-7; Trial Tr. (Weissinger) 1291:5-11.

[64] Trial Tr. (Weissinger) 1293:25-1294:1.

[65] Trial Tr. (Sweeney) 94:4-7, 98:16-99:3.

[66] *Id.* 187:15-188:3, 226:18-19.

which can be used to obtain items in *Fortnite*.[67] V-Bucks can be purchased in-app or directly from Epic Games' website.[68] Players can use VBucks to purchase digital content within the app, including a "Battle Pass" (a feature that provides access to challenges and otherwise locked content) or cosmetic upgrades.[69] Unlike other games employing the freemium model, in-app purchases do not buy game play advantages in *Battle Royale*.[70] Instead, players can make in-app purchases of different items that function as forms of self-expression, including cosmetic **[*929]** enhancements or "skins" (*i.e.*, in-game costumes), dance moves known as "emotes," and more.[71] As of December 2020, players can also subscribe to *Fortnite Group*, which provides users with the Battle **[**27]** Pass for each new *Battle Royale* season, a monthly allotment of 1,000 V-Bucks and exclusive cosmetics.[72]

Epic Games sells V-Bucks to consumers in various bundles and packages at increasing prices: 1,000 V-Bucks for $9.99; 2,800 V-Bucks for $24.99 and so on—all the way to 13,500 V-Bucks for $99.99. After Epic Games implemented its hotfix on iOS (discussed at length below), Epic Games dropped V-Bucks pricing by 20% for purchases made through Epic Games' direct payment option on iOS and Google Play, as well as for purchases on every other platform through which *Fortnite* was offered.[73] Notably, there is "no cost to [Epic Games for] V-Buck . . . V-Bucks themselves don't have a marginal cost."[74]

Although Epic Games claims that it would not have a viable way of monetizing *Fortnite* without being able to sell in-app content,[75] the record shows it monetizes *Fortnite* in nine other ways:[76]

Two are internal to the game. First, since December 2020, users "can subscribe to *Fortnite Crew*, a subscription" service offered by Epic Games.[77] Second, users can pay an up-front fee to gain access to one of *Fortnite*'s game modes, *Save the World*, that also has in-app content for purchase.[78]

The remaining seven **[**28]** are external. One, Epic Games "generates revenue . . . typically in the form of redeemable codes sold through traditional retail and online stores."[79] Two, Epic Games generates revenue through in-game advertising or cross-promotions.[80] Three, it "has received revenue for providing third-parties with promotional codes redeemable for *Fortnite* content."[81] Four, "Epic has in the past entered into hardware bundle agreements with console makers," through which "the console makers offered for sale a bundle containing their game consoles along with exclusive *Fortnite* cosmetics and V-Bucks . . . ."[82] Five, "Epic has provided other

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[67] *Id.* 189:9-11.

[68] *Id.* 188:13-21, 298:21-23.

[69] *Id.* 108:17-109:3, 188:13-189:11; Trial Tr. (Weissinger) 1300:3-7.

[70] Trial Tr. (Sweeney) 110:5-10.

[71] *Id.* 108:23-109:3; Trial Tr. (Weissinger) 1299:6-8.

[72] Trial Tr. (Weissinger) 1301:15-21.

[73] DX-3774.009; Trial Tr. (Sweeney) 190:6-9, 14-16.

[74] Trial Tr. (Sweeney) 190:14-16.

[75] Trial Tr. (Weissinger) 1303:18-1306:7.

[76] DX-3691.008-.010.

[77] Trial Tr. (Weissinger) 1357:17-25; DX-3691.009.

[78] DX-3691.009.

[79] *Id.*

[80] DX-3691.010; *see also* Trial Tr. (Weissinger) 1306:19-1307:7, 1311:7-1312:1.

[81] DX-3691.010.

partners with redeemable codes for exclusive *Fortnite* cosmetics and V-Bucks, and Epic was paid by the partner on a per redemption basis."[83] Next, it "has entered into licensing agreements with brands through which it received the revenue from sales of in-game cosmetics featuring the licensed content as well as a small portion of the brand's sales generated from *Fortnite*."[84] Finally, it "licenses *Fortnite* intellectual property to third parties to use in physical merchandise, such as toys, apparel, accessories and home goods. In some circumstances, such physical merchandise **[*930]** also **[**29]** may include a code that can be redeemed for *Fortnite* in-game content."[85]

Based on the freemium model which relies upon in-app purchases, as well as these alternative ways of monetization, *Fortnite* is quite lucrative and integral to Epic Games' overall business operations.[86] Given that *Fortnite* utilizes cross-platform technology to capture a larger audience and appears on several different platforms, Epic Games faces commission rates on its in-app purchases. Generally, plaintiff must pay 30% across most platforms. Indeed, for example, Epic Games has agreed to such a rate on all *Fortnite* transactions via the Microsoft (Xbox) Store, the PlayStation Store, the Nintendo eShop, and Google Play.[87] Epic Games has also agreed to extra payments for certain platform holders above and beyond the standard 30% commission rate. For example, for all *Fortnite* transactions via the PlayStation Store, Epic Games agreed to make additional payments to Sony *above* this commission rate based on the amount of time that PlayStation users play *Fortnite* cross-platform.[88]

d. <u>*Fortnite* on the iOS Platform</u>

In 2018, *Fortnite* debuted on the iOS platform. Epic Games followed its prior business model and distributed **[**30]** *Fortnite* using a "freemium" model, in which a user can download the application for free but has the opportunity to purchase certain in-app content. Mr. Sweeney "attribute[s] a lot of [Epic Games'] success" to this business model. This kind of business model is facilitated by the App Store, including IAP.[89]

Although Epic Games has had disputes and discussions with other platform owners as to cross-play policies (including cross-platform, cross-progression, and cross-wallet), originally it did not encounter any such difficulty with Apple. Prior to *Fortnite*'s launch on iOS devices, Epic Games sought to leverage Apple's significant interest in "the mobile version of [*Fortnite Battle Royale*]" to obtain Apple's support in operationalizing cross-play capabilities and to secure marketing support from Apple. Apple cooperated: before *Fortnite*'s debut on the iPhone, Apple operationalized cross-platform play. This included changing its guidelines to expressly permit cross-platform functionalities that were similar to what Epic Games sought, and Apple continued to permit such cross-functionality on *Fortnite* while the game remained on the App Store.[90] In addition to cross-platform play, Apple also facilitated **[**31]** cross-progression (game progress synced across platforms), and cross-wallet functionality (allowing purchases from one platform to be used on others).[91] Epic Games has acknowledged that Apple's permissive cross-platform policies contributed to *Fortnite*'s success as a cross-platform game and benefited Epic Games' business.[92]

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82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 Trial Tr. (Sweeney) 289:21-290:25.

87 DX-3582.004-.005; DX-3464.012, .027, .031; Trial Tr. (Sweeney) 142:19-143:1, 161:13-15; Trial Tr. (Weissinger) 1349:14-23.

88 Ex. Depo. (Kreiner) 52:13-19; DX-4519.003-.004; Trial Tr. (Sweeney) 198:10-21, 238:1-238:5, 308:14-23.

89 Trial Tr. (Sweeney) 187:15-188:7; Trial Tr. (Schiller) 2791:11-18; Ex. Expert 8 (Schmalensee) ¶ 134.

90 DX-3448.001; Trial Tr. (Sweeney) 232:18-25; PX-2619.010-.012 (§§ 3.1.1, 3.1.3).

91 Trial Tr. (Sweeney) 108:2-13, 197:1-14, 245:16-246:4.

92 Trial Tr. (Sweeney) 196:15-25.

Once *Fortnite* itself was introduced, revenues from in-app purchase on Epic Games apps through the App Store roughly **[*931]** doubled. Indeed, Epic Games saw iOS and other mobile platforms as key to increasing *Fortnite*'s player base, as plaintiff had already reached "a point of basically full penetration on console," making acquisition of mobile customers "hugely important."[93] Before *Fortnite* was removed from the iOS platform, more than 115 million registered players had accessed *Fortnite* on an iOS device.[94] Of this amount, 64% of *Fortnite* for iOS players—approximately 73 million in total—had only ever played *Fortnite* on iOS devices.[95]

That said, despite this staggering number of iOS *Fortnite* players, the vast majority of Epic Games' *Fortnite* revenue (93%) is generated on non-iOS platforms. Of the users who made a purchase between March 2018 and July 2020, *only 13.2% made a purchase* ***[**32]*** *on an iOS device—meaning that Epic Games was able to transact with 86.8% of paying Fortnite users without paying any commissions to Apple*.[96] Still, in only two short years, and with access to the iOS platform and Apple's support, *Fortnite* on iOS earned Epic Games more than $700 million across over 100 million iOS user accounts.[97]

3. *Game Publisher and Distributor: Epic Games Store*

a. Characteristics of the Epic Games Store

As noted above, Epic Games is involved in both game publishing and game distribution through its online store, the Epic Games Store, which launched in December 2018.[98] By way of background, a publisher "typically funds most or all of the expenses associated with [an] entire product, including development and marketing; whereas, a distributor typically only pays the cost associated with direct distribution, such as in the digital . . . bandwidth and payment with processing fees."[99] Where Epic Games serves as a publisher, its agreements provide that it first recovers all of its costs and then splits remaining revenues 60/40 with the 40% share to the developer, or 50/50.[100] In terms of distribution, the Epic Games Store serves as a platform to sell gaming apps which operated on **[**33]** PC and Mac computers.[101] The store carries hundreds of games, including its own and many third-party titles.[102]

Messrs. Sweeney and Steve Allison, Vice President and General Manager of the Epic Games Store, testified that Epic Games always had an original intent to include non-gaming apps within the Epic Games Store citing to the inclusion of *Unreal Engine* on the store page, and conversations with several other non-gaming app companies including Twitch and Discord in 2018.[103] The claim is suspect. First, the Epic Games Store only made significant moves during the pendency of this litigation and on the eve of this bench trial by including non-game apps including: the Spotify music app (December 2020), the **[*932]** Brave web browser, the KenShape creation tool for artists, and Itch.io, a third-party store (April 22, 2021).[104] Indeed, while Epic Games urges in this lawsuit that Apple must allow

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93 DX-3233.003; Trial Tr. (Hitt) 2111:22-2112:15; Ex. Expert 6 (Hitt) ¶ 175 & Fig. 42; Trial Tr. (Weissinger) 1346:3-17.

94 Ex. Expert 6 (Hitt) ¶¶ 62, 71, & Fig. 13.

95 *Id.*

96 *Id.* ¶ 69 & Fig. 14.

97 DX-4763.

98 Trial Tr. (Sweeney) 124:2-5; Trial Tr. (Allison) 1198:19-20, 1218:22-1219:10.

99 Trial Tr. (Sweeney) 96:24-97:4.

100 Trial Tr. (Sweeney) 306:6-307:11; *see also* Trial Tr. (Allison) 1263:3-15; DX-3993.025.

101 Trial Tr. (Sweeney) 94:7-9, 123:10-13; Trial Tr. (Allison) 1198:19-20, 1199:17.

102 Trial Tr. 261:24-25 (Sweeney); Trial Tr. (Allison) 1210:20-23.

103 Trial Tr. (Sweeney) 123:15-124:5, 262:19-24; Trial Tr. (Allison) 1199:15-1200:1.

104 Trial Tr. (Sweeney) 124:22-125:8; Trial Tr. (Allison) 1199:13-14; *see also* Trial Tr. (Sweeney) 117:19-25, 121:19-25, 123:10-13, 124:15-24, 262:19-263:11, 265:7-11; Trial Tr. (Allison) 1243:3-11.

third-party app stores in the App Store, the Epic Games Store did not itself distribute any third-party app stores until a few days before trial (approximately April 22, 2021).[105] Second, neither Discord nor Twitch have submitted their own apps for inclusion on the Epic Games Store.[106] Finally, with respect to *Unreal* ***[**34]*** *Engine*, although the Epic Games Store links to it, the *Unreal Engine* has its own website with its own domain name and appears separate and apart from the Epic Games Store.[107]

This conclusion is also supported by the design of the Epic Games Store's website itself which markets "games" specifically. The navigation tabs on the homepage—"games on sale," "free games," "new and trending," "new releases," "top sellers," "[t]op 20," and "coming soon"—lead to compilations consisting entirely of games. The "top news items" tab offers only news about games. The search bar prompts the user to "search all games" (and not to "search all apps"). The "help" tab describes Epic Games Store's consumers as "players." Finally, the Epic Games Store's "FAQ" describes the Epic Games Store as a "curated digital storefront for PC and Mac" that is "designed with both players and creators in mind" and is "focused on providing great games for gamers and a fair deal for game developers."[108]

Like other platforms, the Epic Games Store uses a commission model and markets an 88/12 split of all revenues to developers from the sale of their games. The evidence is also undisputed that this 88/12 commission is **[**35]** a below-cost price and the **[*933]** store is expected to operate at a loss for many years at this rate.[109]

From Epic Games Store's launch to December 2019, Epic Games collected its commission through its own payment mechanism, which it required developers to use for all game purchases and in-game purchases.[110] Epic Games no longer requires any developer to use its payment processing system, called Epic direct payment, for in-app purchases.[111] Developers who do not use Epic direct payment do not pay Epic Games anything for in-app

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[105] Trial Tr. (Sweeney) 263:22-265:4.

[106] The Court further understands that both Twitch (an app primarily used for game streaming) and Discord (an app primarily used for voice chat in video games) operate apps that are, to use Mr. Allison's words, "game adjacent." Trial Tr. (Allison) 1119:24-25.

[107] *Id.* 1239:8-13.

[108] *Id.* 1236:5-1238:10, 1238:11-19, 1238:21-1239:5, 1239:15-1240:7. The Court is not persuaded that the Epic Games Store is anything but a game store. Indeed, the Court emphasizes that its addition of non-gaming apps during the pendency of this litigation (Spotify) and on the eve of trial (the remaining apps and software) do not demonstrate that Epic Games Store is a general app store, especially for purposes of this litigation.

First, at the time of the filing of the complaint in this action, the Epic Games Store was undisputedly a game store, and the pleadings only confirm that Epic Games sought to open Epic Games Store in its then current iteration on the iOS platform. *See* Compl. (Dkt. No. 1) ¶ 27 ("Epic also built and runs the Epic Games Store, a digital video game storefront through which gamers can download various games, some developed by Epic, and many offered by third-party game developers." (emphasis supplied)), ¶ 81 ("Epic approached Apple to request that Apple allow Epic to offer its Epic Games Store to Apple's iOS users through the App Store and direct installation."), ¶ 90 ("The Epic Games Store offers personalized features such as friends list management and game matchmaking services. Absent Apple's anticompetitive conduct, Epic would also create an app store for iOS.").

Second, the Court heard no specific evidence on these newly added apps, beyond brief descriptions of these apps and software, including on Epic Games' monetization and revenues from such apps, or even user statistics with respect to such apps, including total and relative downloads as compared to other products in the Epic Games Store.

[109] Trial Tr. (Sweeney) 125:9-12, 126:1-3; Trial Tr. (Cragg) 2326:25-2327:5.

[110] Trial Tr. (Allison) 1221:11-1222:16.

[111] Trial Tr. (Sweeney) 125:23-25; Trial Tr. (Ko) 800:4-14; Trial Tr. (Allison) 1221:21-1222:12; *see also* Trial Tr. (Sweeney) 126:1-8; 307:15-17.

purchases.[112] Because of this open policy, several app developers have elected to use their own payment and purchase functionality for in-app purchases, such as Ubisoft and Wizards of the Coast.[113]

Epic Games acknowledges that its commission is not merely a "payment processing" fee. The 12 percent fee is principally for access to Epic Games' customers, but also is intended to cover all of Epic Games' variable operating costs associated with selling incremental games to customers. It covers various services to game developers, including "hosting, player support, marketing of their games, and handling of refunds," "a supporter/creator marketing program," and "social media for **[**36]** game launches, video promotions[,] . . . featuring at physical events, such as E3[,] [a]nd sponsorships of the video games." The commission is thus "tied into these broader ecosystem benefits that [Epic Games] provide[s] to [its] developers," and is intended to cover the full "cost of operating the service," "the actual distribution cost, the internet bandwidth cost, [and] the . . . cost of maintaining it."[114]

Today, Epic Games Store has over 180 million registered accounts and more than 50 million monthly active users.[115] It supports more than 100 third-party app developers and publishes over 400 of their apps.[116] Epic Games Store operates a single storefront across multiple geographies.[117]

Epic Games is a would-be and self-avowed competitor of Apple in the distribution of apps.[118] Absent the restrictions imposed by Apple, Epic Games would operate a mobile version of the Epic Games Store on iOS that would compete with Apple's App Store.[119]

b. Finances of the Epic Games Store

As referenced, the Epic Games Store is not yet profitable due to Epic Games' strategic plan to grow the consumer base at the expense of near-term profits and revenue.

By charging 12% commission, the Epic Games **[**37]** Store will not be profitable for at least several years. Current estimates indicate negative overall earnings in the hundreds of millions of dollars through at least 2027. The anticipated loss is driven by **[*934]** hundreds of millions of minimum guarantees that Epic Games made to developers to entice them to distribute exclusively through Epic Games Store.[120] In short, the Epic Games Store has front-loaded its marketing and user-acquisition costs to gain market share.[121] Whether this gambit will ultimately work remains to be seen; Epic Games is currently outperforming its projected business plan by "about 15 percent," and its first-party and third-party businesses are up 113% and 100%, respectively.[122] While Epic Games

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[112] Trial Tr. (Sweeney) 125:23-25.

[113] Trial Tr. (Allison) 1223:8-20.

[114] Trial Tr. (Allison) 1271:21-24; Trial Tr. (Sweeney) 126:9-11; Ex. Depo. (Kreiner) 242:9-243:13, 243:19-22; Ex. Depo. (Rein) 110:4-25; *see also* Trial Tr. (Allison) 1224:4-1225:7, 1232:5-13.

[115] Trial Tr. (Allison) 1220:21-25.

[116] *Id.* 1220:8-10, 18-20.

[117] Trial Tr. (Sweeney) 129:8-13.

[118] Trial Tr. (Sweeney) 95:16-20; *see also* Trial Tr. (Allison) 1233:8-17.

[119] Trial Tr. (Sweeney) 97:24-98:4; *see also* Trial Tr. (Allison) 1233:8-17.

[120] Trial Tr. (Sweeney) 126:12-127:6, 276:8-277:9; Trial Tr. (Allison) 1230:3-4, 1260:22-1262:8; Ex. Depo. (Kreiner) 244:2-5, 256:12-16; Trial Tr. (Cragg) 2327:3-5; DX-3712.017; DX-4638; PX-2469.007; *see also* Trial Tr. (Allison) 1232:14-22.

[121] Trial Tr. (Sweeney) 126:19-23; Trial Tr. (Allison) 1214:1-1215:6, 1230:5-10; *see also* Trial Tr. (Allison) 1214:1-8 (explaining minimum guarantees), 1223:8-13 (noting that some developers have chosen not to use Epic Games' payment processor).

[122] Trial Tr. (Allison) 1233:2-7.

now says it expects the Epic Games Store to become profitable by 2023, the store's projected revenue from prior years has proven overly optimistic.[123]

4. *Prior Relationship Between Apple and Epic Games*

The relationship between Apple and Epic Games dates back to at least 2010.

In 2010, Epic Games agreed to and signed a Developer Product Licensing Agreement ("DPLA") with Apple. Epic International subsequently signed a Developer Agreement and DPLA (for the account associated **[**38]** with *Unreal Engine*). At the time of the signing of these contracts, Mr. Sweeney understood and agreed to key contractual terms including, that Epic Games (i) was required to pay a commission on in-app purchases; (ii) was prohibited from putting a store within the App Store; (iii) was prohibited from sideloading apps on to iOS devices; and (iv) was required to use Apple's commerce technology for any payments. Knowing the terms, Epic Games chose to enter into those contracts. According to Mr. Sweeney, Epic Games did not have a formal business dispute with Apple or raise major objections or have existential-level concerns about the App Store's contract terms at the time. Since 2010, there has been no material change in the terms of Epic Games' agreements with Apple, nor in Apple's business design.[124]

Epic Games released three iOS games before *Fortnite*, and Apple featured each of them at major events allowing Epic Games to make use of Apple's brand.[125] This began with Epic Games' first iOS game, *Infinity Blade*, in 2010, which it released for iOS because of the "amazing 3D capabilities" on mobile platforms and the large number of iOS users.[126]

These collaborations notwithstanding, Epic Games and **[**39]** Mr. Sweeney began voicing discontent around the mid-2010s. In June 2015, Mr. Sweeney emailed Apple **[*935]** chief executive office Tim Cook urging Apple to consider "separating iOS App Store curation from compliance review and app distribution," and noting that "it doesn't seem tenable for Apple to be the sole arbiter of expression and commerce over an app platform approaching a billion users."[127] A few years later, in January 2018, Mr. Sweeney sought a meeting with Apple through Mark Rein, Epic Games' Vice President, "to talk about the potential for iOS and future Apple things to operate as open platforms" and discuss how Epic Games has "a PC and Mac software store and would love to eventually support it on iOS." He added: "If the App Store we[re] merely the premier way for consumers to install software, and not the sole way, then Apple could curate higher quality software overall, without acting as a censor on free expression and commerce on the platform . . . ."[128]

Despite these disagreements, Epic Games proceeded to more closely intertwine itself with the iOS platform. In early 2018, Epic Games and Apple arranged for the release of *Fortnite*. By that time, *Fortnite* was "doing incredible" and was **[**40]** "basically a cultural phenomenon."[129]

5. *Project Liberty*

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[123] *Id.* 1262:4-12 ("Q. And [this] also reflects that Epic expected to lose 330 to 440 million in unrecouped minimum guarantees is that right? A. We expect to invest 330 to 440 million in partnership deals, yes. . . . We don't use the word 'lose.'"); Trial Tr. (Sweeney) 266:1-19, 273:9-16, 276:17-277:4; DX-3818.001; DX-3993.004; Trial Tr. (Allison) 1217:25-1218:5, 1232:18-22, 1262:13-20; DX-4361.020; PX-2463.002; PX-2469.006; DX-3467.005; DX-4361.020; PX-2455.004.

[124] Trial Tr. (Sweeney) 166:16-170:9; Trial Tr. (Grant) 723:23-725:21. "Sideloading" is "the process of putting an application on the device that bypasses the store" or bypasses the "official platform means" of installing an application. *Id.* 733:17-22.

[125] Trial Tr. (Fischer) 937:12-20; Ex. Depo. (Malik) 117:7-24.

[126] DX-3710.006; Trial Tr. (Sweeney) 89:22-90:5, 90:24-91:3.

[127] PX-2374.001.

[128] PX-2421.001.

[129] Trial Tr. (Fischer) 937:23-938:10; Trial Tr. (Weissinger) 1337:19-21.

At the end of 2019 Tim Sweeney conceived of a plan called "Project Liberty"[130] which was a highly choreographed attack on Apple and Google, Inc. The record reveals two primary reasons motivating the action. First and foremost, Epic Games seeks a systematic change which would result in tremendous monetary gain and wealth. Second, Project Liberty is a mechanism to challenge the policies and practices of Apple and Google which are an impediment to Mr. Sweeney's vision of the oncoming metaverse.

The Court understands that, based on the record, the concept of a metaverse is a digital virtual world where individuals can create character avatars and play them through interactive programed and created experiences. In Mr. Sweeney's own words, a metaverse is "a realistic 3D world in which participants have both social experiences, like sitting in a bar and talking, and also game experiences . . . ."[131] In short, a metaverse both mimics the real world by providing virtual social possibilities, while simultaneously incorporating some gaming or simulation type of experiences for players to enjoy. These experiences can be created by developers such as **[**41]** is the case with the *Battle Royale* and *Save the World* modes in *Fortnite*. In other instances, these experiences can be user-created, such as is the case with the *Creative* and *Party Royale* modes in *Fortnite*, or general experiences in the video game *Roblox*.[132] Epic Games' and Mr. **[*936]** Sweeney's plans for *Fortnite* and its metaverse involved shifting the video game from primarily relying on the former modes (*i.e.*, developer designed, traditionally gaming, and competitive modes) to the latter modes (*i.e.*, social and creative modes), where users-becoming-creators would themselves be rewarded and enriched. The Court generally finds Mr. Sweeney's personal beliefs about the future of the metaverse are sincerely held.

To Mr. Sweeney and Epic Games, the metaverse is the future of both gaming and entertainment, and Apple's policies and practices are a hurdle which pose a problem. **[**42]** Indeed, for Mr. Sweeney, "reaching the entire base of Apple is 1 billion iPhone consumers is a paramount goal for our company, as *Fortnite* expands beyond being a game into this larger world of the metaverse."[133] Both Mr. Sweeney and Epic Games' employees and officers generally testified that "iOS is a vital platform for a business" and that it is "the only way we can access a hundred percent of [a platform's] users or at least have the option of accessing a hundred percent of that market."[134]

Project Liberty planning began in earnest in the first quarter of 2020.[135] The plan was to attack Apple's (and Google's) software distribution and payment apparatuses[136] which Epic Games described as "an attempt to provide

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[130] DX-3774 (board presentation); DX-4419.001 (Mr. Sweeney requested to be "in the loop on this topic 100%"); Trial Tr. (Sweeney) 88:6-7, 170:10-171:9, 280:7-10, 283:6-15 (approving the strategic decisions for Project Liberty); DX-4072 (developing a project "War Room"); DX-4561 (outlining detailed timelines).

[131] Trial Tr. (Sweeney) 325:14-17. Mr. Sweeney acknowledged that the film *Ready Player One* contains a recent portrayal of an imagined and futuristic, albeit dystopian, metaverse. *Id.* 325:10. Mr. Sweeney also cited the book *Snow Crash* as an example of the depicted metaverse, which he remarked "describes this emerging social entertainment medium that transcends gaming." *Id.* 325:24-326:1.

[132] For instance, Mr. Sweeney described an experience in one of these latter modes in *Fortnite*, involving utilizing player character avatars watching a Netflix show:

> All in the virtual 3D world. You can stand there and watch Netflix with your friends, and it's different than watching it in front of the TV. You can talk to your friends and you can emote and throw tomatoes at the screen. And so it is a very different experience than either a game or Netflix.

Id. 326:6-11.

[133] *Id.* 112:13-17.

[134] *Id.* 112:3; Trial Tr. (Grant) 671:13-20.

[135] Trial Tr. (Sweeney) 152:24-153:4. Notably, Epic Games decided to target *only* Apple and Google in its crusade even though it generally faced similar 30% rates on every platform where it sold products, except a computer platform.

developer choices for payment solutions and bring that benefit to the customers in a platform where [that] choice is not available."[137] Said differently, the "platform fees" posed "an existential issue" to both the company's business plans and Mr. Sweeney's personal ambitions for *Fortnite*, its digital gaming and retail store, and the evolving metaverse.[138] Internally, Epic Games also hoped to revive and reinvigorate *Fortnite* by pivoting its business whereby player-developers could create **[**43]** new content and plaintiff could "shar[e] [a] majority of profit with [those] creators."[139]

Key to Project Liberty's deployment, Epic Games engineered a "hotfix" to covertly introduce code that would enable additional payment methods for the iOS and Android versions of *Fortnite*.[140] Hotfixes function by coding an app to check for new content that is available on the developer's server or by introducing new instructions on how to configure settings in the app.[141] In general, a developer can use hotfixes to activate content or features in an app that are in the code but are not initially available to users. The content or feature is accessible only after the app checks the developer's server and is "notified" by the server to display the new content or feature.[142] Across all platforms where *Fortnite* is available, including iOS, Epic Games has used hotfixes to enable hundreds of new features and content elements **[*937]** and to correct configuration issues since *Fortnite* was first added to the App Store.[143] By contrast, the Project Liberty hotfix has no analogue as it clandestinely enabled substantive features in willful violation of the contractual obligations and guidelines.

By May 11, 2020, the key **[**44]** components of Epic Games' strategy were in place: "We submit a build to Google and Apple with the ability to hotfix on our payment method . . . . We flip the switch when we know we can get by without having to update the client for 3 weeks or so. Our messaging is about passing on price savings to players."[144] In parallel, Epic Games developed "Epic Mega Drop," its simultaneous plan to lower the price of *Fortnite* items by an average of 20 percent on certain platforms.[145] " Epic Mega Drop" would reduce pricing on platforms other than Apple's and Google's, even though Epic Games was still paying 30% commissions to the console makers.[146] Epic Games also planned to assure its console partners that the reduction in price for V-Bucks could be recouped through the sales of more expensive bundles or items with "mythic" rarity.[147]

Project Liberty included a public narrative and marketing plan. Epic Games recognized that it was "not sympathetic"[148] and that if Apple and Google blocked consumers from accessing the app, "[s]entiment will trend

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[136] Trial Tr. (Sweeney) 152:9-53:4; DX-3774.002.

[137] Trial Tr. (Ko) 804:12-17.

[138] DX-3774.004.

[139] DX-3774.002-.004.

[140] Trial Tr. (Sweeney) 153:14-15, 154:25; Trial Tr. (Grant) 736:11-15.

[141] Trial Tr. (Grant) 734:10-13.

[142] *Id.* 734:22-735:9.

[143] *Id.* 735:15-19 ("It would be like a weekly occasion. We would rotate different types of game notes in and out. If there was a big event . . . taking place during the season, that would be hotfixed on at the appropriate time so users could experience it.").

[144] DX-4419.002; Trial Tr. (Grant) 767:15-18.

[145] Trial Tr. (Sweeney) 156:3-16.

[146] DX-4561.006; Trial Tr. (Weissinger) 1431:1-5.

[147] Trial Tr. (Weissinger) 1436:9-19; DX-4652.003.

[148] DX-4177.001; Trial Tr. (Weissinger) 1414:2-15.

negative towards Epic."[149] "[T]he critical dependency on going live with our VBUCKS price reduction efforts is finding the most effective way to get Apple and Google to reconsider **[**45]** without us looking like the baddies."[150]

To these ends, Epic Games wanted to "[g]et players, media, and industry on 'Epic's side,'" by "[c]reat[ing] a narrative that we are benevolent," and at the same time make Apple out to be the "bad guys."[151] Epic Games retained a public relations firm and devised, in effect, a two-phase communications plan.[152] The first phase consisted of actions before the activation of the plan such as creating an affiliated advocacy group, and a second phase that would galvanize public sentiment through social media outreach and videos.[153]

With regard to the first phase, Epic Games implemented its plan throughout the summer of 2020 by creating the Coalition for App Fairness, and "charged [it] with generating continuous media and campaign tactic pressure" on Apple and Google. Epic Games hired a consultant to "help to establish a reason for [the Coalition] to exist (either organic or manufactured)." Epic Games then concealed the **[*938]** Coalition's existence until after the hotfix was triggered on August 13, 2020.[154]

Epic Games assumed its breach would result in the removal of *Fortnite* from the iOS and Android platforms. In fact, Mark Rein, Epic Games' co-founder, predicted "there's a **[**46]** better than 50% chance Apple and Google will immediately remove the games from their stores the minute we do this" and Daniel Vogel, the Chief Operating Officer, predicted Google and Apple will immediately pull the build for new players." "They may also sue us to make an example," he added.[155]

While Epic Games was willing to wage war against Apple and Google, it was not so inclined to crusade against the console platform owners: namely, Nintendo (Switch), Microsoft (Xbox), and Sony (PlayStation). Epic Games therefore planned to warn these console partners in advance about an upcoming pricing change for V-Bucks and to reassure them that they were not "next on [Epic Games'] list." As explained in an email to Microsoft on August 5, 2020, Mr. Sweeney alluded to Project Liberty which he boasted would "highlight the value proposition of consoles and PCs, in contrast to mobile platforms." Two days later he wrote, "you'll enjoy the upcoming fireworks show."[156]

Project Liberty required extensive planning and testing. Specialized engineers and an in-house information security team attempted to hack the code to ensure that Apple could not "reveal the intent" of the hotfix when it was **[**47]** submitted.[157] Epic Games also used analytics to determine the number of players that would receive the hotfix once triggered.[158]

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149 DX-4018.054.

150 DX-4419.002.

151 DX-4561.020; DX-3641.001.

152 DX-4561.020; DX-3641.001; DX-3681.012; DX-4185.001; DX-4561.037-.038; Trial Tr. (Weissinger) 1413:9-12, 1417:19-1418:7. Epic Games paid it $300,000 in connection with Project Liberty.

153 DX-4561.037-.038

154 DX-3774.003; DX-3297.002; Trial Tr. (Weissinger) 1418:17-1420:5-8. One of the members of the Coalition for App Fairness is Eristica, a company that developed an app rejected by App Review that "paid folks to participate in a dare challenge" and when it was rejected "one of the dares was daring someone to jump off a bridge and video it" and other challenges "could also risk some pretty serious harm." Trial Tr. (Kosmynka) 1087:9-1088:18.

155 DX-4419.001-.002; *see also* Ex. Depo. (Shobin) 59:24-60:5 (Epic Games understood that Project Liberty "jeopardize[d] *Fortnite*'s availability on the App Store").

156 DX-4561.005, .024; DX-4652.001, .010; Trial Tr. (Weissinger) 1431:6-15; DX-4579.001; DX-3478.001; Trial Tr. (Sweeney) 292:14-293:8, 294:2-10.

157 Trial Tr. (Grant) 765:11-766:2.

By the end of June 2020, Epic Games had no interest in the parallel litigation which was pursuing similar ends. Nor did it intend to wait for the resolution of the ongoing *Pepper* and *Cameron* cases. Epic Games merely "ignored" them and "went forward on [its] own."[159] In other words, Epic Games decided it would rush to court with its own plan to protect its self-avowed interests in the "metaverse" and had established a rough timeline, to which it generally adhered: first communicating with Apple in June/July and then implementing the hotfix and marketing blitz in August.[160]

Thus, on June 30, 2020, Epic Games renewed the DPLAs for its account, the Epic International account, and a related entity (KA-RA S.a.r.l.) account by the payment of separate consideration.[161] With this backdrop, Epic Games sought a "side letter" or other special deal from Apple that would provide plaintiff with unique, preferable terms.[162] Mr. Sweeney sent an **[*939]** email to Apple executives, including Mr. Cook, requesting the ability to offer iOS consumers with: (i) competing payment processing options, **[**48]** "other than Apple payments, without Apple's fees, in *Fortnite* and other Epic Games software distributed through the iOS App Store"; and (ii) a competing Epic Games Store app "available through the iOS App Store and through direct installation that has equal access to underlying operating system features for software installation and update as the iOS App Store itself has, including the ability to install and update software as seamlessly as the iOS App Store experience."[163] Mr. Sweeney highlights that these two offerings would allow consumers to pay less for digital products and allow developers to earn more money. Although Mr. Sweeney wrote that he "hope[d] that Apple w[ould] also make these options equally available to all iOS developers in order to make software sales and distribution on the iOS platform as open and competitive as it is on personal computers,"[164] Mr. Sweeney admitted while testifying under oath that he "would have" accepted a deal "for [Epic Games] and no other developers."[165] In his email, Mr. Sweeney did not offer to pay Apple any portion of the 30 percent it charges on either app distribution or for in-app purchases.

On July 10, 2020, Apple Vice President and Associate **[**49]** General Counsel Douglas G. Vetter responded to Mr. Sweeney's email with a formal letter communicating, in essence: No. As relevant here, Mr. Vetter wrote:

> Apple has never allowed this. Not when we launched the App Store in 2008. Not now. We understand this might be in Epic's financial interests, but Apple strongly believes these rules are vital to the health of the Apple platform and carry enormous benefits for both consumers and developers. The guiding principle of the App Store is to provide a safe, secure and reliable experience for users and a great opportunity for all developers to be successful but, to be clear, when it comes to striking the balance, Apple errs on the side of the consumer.

Mr. Vetter also reiterated that Epic Games' request to establish a separate payment processor would interfere with Apple's own IAP system, which has been used in the App Store since its inception.[166]

On July 17, 2020, Mr. Sweeney responded to what he described as a "self-righteous and self-serving screed," writing that he hoped "Apple someday chooses to return to its roots building open platforms in which consumers have freedom to install software from sources of their choosing, and developers can **[**50]** reach consumers and do business directly without intermediation." He stated that Epic Games "is in a state of substantial disagreement

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158 Apple Ex. Depo. (Shobin) 239:9-25; DX-3083; *see also* Trial Tr. (Schmid) 3241:20-24 (explaining that Epic Games used TestFlight and App Analytics).

159 Trial Tr. (Sweeney) 155:13-25.

160 DX-4561.005.

161 Trial Tr. (Sweeney) 283:16-284:1.

162 *Id.* 149:4-7, 285:7-22.

163 DX-4477.

164 *Id.*

165 Trial Tr. (Sweeney) 337:13-338.2.

166 DX-4140.

with Apple's policy and practices," and promised that it would "continue to pursue this, as [it] ha[s] done in the past to address other injustices in [the] industry." Epic Games did not reveal its plans to enable an alternate payment system through a hotfix.[167]

Next, in fulfilling Mr. Sweeney's promise, Epic Games covertly introduced a "hotfix" into the *Fortnite* version 13.40 update on August 3, 2020. Epic Games did not disclose that this hotfix would enable a significant and substantive feature to *Fortnite* permitting a direct pay option to Epic Games that would be activated when signaled by Epic Games' servers. Until this **[*940]** signal was sent out, this direct pay option would remain dormant. When activated, however, this direct pay option would allow iOS *Fortnite* players to choose a direct pay option that would circumvent Apple's IAP system. Relying on the representations that intentionally omitted the full extent and disclosure of this hotfix, Apple approved *Fortnite* version 13.40 to the App Store.[168]

The hotfix remained inactive until the early morning of August **[**51]** 13, 2020, when Epic Games activated the undisclosed code in *Fortnite*, allowing Epic Games to collect in-app purchases directly.[169] *Fortnite* remained on the App Store until later that morning, when Apple removed *Fortnite* from the App Store and it remains unavailable to this day. Epic Games timed the hotfix to go live two weeks before the launch of *Fortnite*'s Season 14.

Later that same day, the second phase came into full effect. Epic Games had prepared several videos, communications, and other media to blitz Apple. Epic Games filed this action and unleashed a pre-planned, and blistering, marketing campaign against Apple both on Twitter and with the release of a parody video of the iconic Apple 1984 commercial. The video called "*1980 Fortnite*" used the game-mode style of *Fortnite* and presented an in-brand explanation of what Epic Games had done, namely a *Fortnite* character destroying an "Apple overlord." On its website, the Coalition proclaimed that: "For most purchases made within the App Store, Apple takes 30% off the purchase price. No other transaction fee—in any industry—comes close."[170] The Coalition did not announce that Epic Games faced similar 30% rates from console platform owners. **[**52]** Epic Games also announced a *Fortnite* tournament in support of its lawsuit with in-game prizes and it released a limited time skin in *Fortnite* called the Tart Tycoon,[171] among other actions.[172]

The following day, on August 14, 2020, Apple responded sternly. It informed Epic Games that, based on its breaches of the App Store guidelines, and the DPLA, it would be revoking all developer tools, which would preclude updates for its programs and software. Apple gave Epic Games two weeks to cure its breaches and to comply with the App Store guidelines and the agreements. Apple also identified general consequences for any failure to comply, but specifically cited *Unreal Engine* as potentially being subject to its decision should Epic Games fail to comply within the two-week period.[173]

Thereafter, on August 17, 2020, Epic Games filed the request for a temporary restraining order, requesting the reinstatement of *Fortnite* with its activated hotfix onto the App Store, and enjoining Apple from revoking the developer tools belonging to the Epic Games and its affiliates. The Court declined to reinstate *Fortnite* onto the App

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[167] DX-4480.001.

[168] Trial Tr. (Grant) 736:1-15, 763:10-15; Trial Tr. (Sweeney) 170:16-171:9; DX-4138.002; Trial Tr. (Kosmynka) 1089:3-9.

[169] Trial Tr. (Sweeney) 153:21-25, 294:11-16, 128:14-15, 154:6-10, 170:12-15; Trial Tr. (Grant) 736:6-15; Trial Tr. (Weissinger) 1426:20-1428:16.

[170] Trial Tr. (Sweeney) 295:14-17; DX-4167.002.

[171] Modeled presumably on Mr. Cook's likeness.

[172] DX-3724.001-.002; Trial Tr. (Sweeney) 295:2-17, 297:2-24.

[173] DX-3460.

Store, but temporarily restrained Apple from taking any action with respect to the plaintiff's **[**53]** affiliates' developer tools and accounts.[174]

[*941] On August 28, 2020, on the expiration of the two-week deadline, Apple terminated Epic Games' developer program account, referenced as Team ID '84.[175] Apple subsequently, and repeatedly, offered to allow Epic Games to return *Fortnite* to the App Store, so long as Epic Games agreed to comply with its contractual commitments. Epic Games has consistently declined.[176]

On October 9, 2020, the Court issued an Order Granting in Part and Denying in Part the motion for preliminary injunction.[177] Given the issuance of the injunction, and that discovery from the other two class action lawsuits could be leveraged in this action, the Court granted Epic Games' request to conduct a bench trial on an expedited basis. Apple objected requesting, at a minimum, three additional months.

C. Apple: Relevant History of the iOS and iOS Devices

1. *The Early Years*

In 2007, Apple developed the iPhone creating a new and innovative ecosystem to break into the cellular device market with established competitors such as Samsung, Nokia, LG, Sony, Blackberry, Motorola, Windows Mobile, and Palm. No one disputes that the iPhone was revolutionary and fundamentally changed **[**54]** the cellular device market. Given the years that have passed, one may forget how fundamentally different the iPhone was to the alternatives. After 30 months of development, Apple offered consumers a new design, with a multi-touch interface powered by advanced hardware and software architecture. The device offered users the ability to access email, browse the web, and perform certain software applications by simply tapping a square-ish icon on the screen called an "app," short for a software application. These apps operate from a foundational layer of software called an operating system which, in the iPhone ecosystem, is called the iOS.

Initially, when the iPhone was first launched, Apple developed and preinstalled the device with a few "native" apps. "Native" apps are those apps which are developed for a particular mobile device as opposed to "web" apps which are Internet-based and allow applications to be accessed and enabled on a mobile device by using a web browser on the device. Initially, Apple prohibited downloads of native apps from any third party.

Shortly after launch, Apple executives hotly debated whether to open development of native apps to third-party developers. As history **[**55]** knows, those in favor succeeded. The gamble literally paid off. Since 2007, the industry has continued to evolve and transform rapidly.

2. *Role of App Developers Generally and Epic Games*

The 2007 iPhone pales in comparison to today's version. With 20-20 hindsight, we can conclude that Apple's gamble to save a languishing company paid off.[178] The lens with which to evaluate those early seminal years matters. Apple was not the monolith it is today. It is easy, but not fair, to twist words today for self-serving reasons and forget the landscape in which they were made.

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[174] *See generally* Dkt. No. 48 (Order Granting in Part and Denying in Part Motion for Temporary Restraining Order). Meanwhile, discovery in the parallel cases was contentious, yet ongoing.

[175] Trial Tr. (Sweeney) 171:10-172:2; Dkt. 428 ¶ 34.

[176] Trial Tr. (Cook) 3918:18-3919:6.

[177] *See generally* Dkt. No. 118.

[178] Trial Tr. (Schiller) 2715:17-25.

As innovators in the early days, Apple executives were navigating trying to determine what would work and what would not. A few key principles guided decision-making, at least initially. First and foremost, the iPhone was a cellphone. If the **[*942]** cellphone did not work or crashed, the product would not be successful regardless of all the bells and whistles. Second, given the introduction of apps, securing the device from malicious software was paramount.

Many developers responded to the iPhone launch by "jailbreaking phones and writing native applications." Jailbreaking occurs when a developer modifies Apple's iOS to enable the installation **[**56]** of unauthorized software, including applications from other interfaces. Jailbreaking can create severe security risks regarding installation of malicious apps and data exposure. Despite warnings regarding the risks, developers continued the practice which precipitated renewed discussions within Apple to permit authorized native apps to be developed by third-party developers.[179]

As the discussions ensued, the core principles remained: reliability of the device as a cellphone and device security. With these objectives in mind, on October 17, 2007, Apple announced that it would allow third-party developers to create iOS apps by licensing them with the interfaces and technology to do so. Apple then dedicated resources to create, and then release on March 6, 2008, a software development kit or SDK as well as information for a series of application programming interfaces or APIs to allow developers to create apps which would work on Apple's proprietary operating system. The APIs unlocked features such as location awareness functionality, media applications, video playback, and numerous other tools to enhance the developer's ultimate product.

The creation, constant update, and modernization of **[**57]** the SDKs and APIs was not insignificant. To protect its system, Apple built tools, kits, and interfaces that would allow other developers to build native apps. Epic Games did not introduce any evidence to rebut Apple's claim that in those initial years, the engineering work was novel, sophisticated, time-consuming and expensive. These tools simplified and accelerated the development process of native apps. Today, years later, as with many industries, it is not surprising that the more sophisticated, better financed, and larger-scale developers, such as Epic Games, may find less value in today's SDKs and APIs. That does not necessarily apply across the board to all developers, nor does it eliminate value in its entirety.

3. *Apple's Contractual Agreements with Developers*

Apple distributes its basic developer tools for free but charges an annual fee for membership in its developer program to distribute apps and which allows access to, for instance, more advanced APIs (many of which are protected by patents, copyrights, and trademarks) and beta software.[180] Through the DPLA, Apple licenses, wholesale, its intellectual property.

To join the "Developer Program," one must execute the DPLA, pay **[**58]** a fee of $99.00[181] and provide some basic information such as a valid debit/credit card; a valid name, address and telephone number; and sometimes, a government-issued photo identification. In the case of an entity, Apple also requires the entity's legal name, D-U-N-S number, as well as other information.

In the beginning, the App Store's U.S. storefront offered 452 third-party apps (including 131 game apps) by 312 distinct developers. In fiscal year 2019, there were over 300,000 game apps available on the **[*943]** App Store.[182] With over 30 million registered iOS developers,[183] it is not particularly surprising, or necessarily nefarious, that Apple does not negotiate terms generally. With few exceptions, Apple maintains the same relationships with

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[179] Ex. Depo. (Forstall) 86:1-5; Ex. Expert 11 (Rubin) ¶ 76; Trial Tr. (Schiller) 2729:11-2730:17.

[180] Trial Tr. (Schiller) 2758:3-8, 2758:17-24.

[181] This fee also includes the ability to consult twice with the Apple technical services team. Each additional incident requires paying a $99 "per incident" payment.

[182] Ex. Expert 6 (Hitt) ¶ 169.

[183] Trial Tr. (Schiller) 2759:9-17.

developers whether big or small. This decision, too, is controversial as the impact varies between small and large developers.

a. Key Terms of the DPLA and App Guidelines

Relevant here, the DPLA details programming requirements, which the Court outlines first, and establishes payment terms, which the Court discusses second. While reduced here to bullet points and footnotes, the DPLA is a portfolio licensing agreement with complex and comprehensive provisions **[**59]** addressing not only intellectual property rights, but those relating to marketing, agency, indemnity, and myriad other considerations. Moreover, the DPLA changed over the last decade. Unless otherwise stated, the Court focuses on the 79-page version (excluding schedules) governing Apple's relationship with Epic Games in August 2020.[184]

Thus, with respect to programing, developers are required to:

- Certify that they will comply with the terms of the agreement (Section 3.1)[185];
- Use the software in a manner consistent with Apple's legal rights (Section 3.2)[186];
- Create apps for Apple products which could only be distributed through the App Store (Section 3.2)[187];
- Submit proposed apps for review to ensure they were properly documented and did not contravene the program requirements (Section 3.3.2[188] and 3.3.3[189]);

[*944] • Configure apps to use IAP when the purchases are subject to the commission (Section 3.2.(f)[190]); and

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184 *Id.* 2759:22-2760:9, 2761:21-25; PX-2619; Trial Tr. (Malackowski) 3701:1-14, 3642:10-15.

185 Developers "certify to Apple and agree that," among other things, they "will comply with the terms of and fulfill [their] obligations under this Agreement, including obtaining any required consents for [their] Authorized Developers' use of the Apple Software and Services, and [developers] agree to monitor and be fully responsible for all such use by [their] Authorized Developers and their compliance with the terms of this Agreement." PX-2619.015.

186 "Applications for iOS Products, AppleWatch, or Apple TV developed using the Apple Software may be distributed only if selected by Apple (in its sole discretion) for distribution via the App Store, Custom App Distribution, for beta distribution through TestFlight, or through Ad Hoc distribution as contemplated in this Agreement." PX-2619.016.

187 *Id.*

188 "Except as set forth in the next paragraph, an Application may not download or install executable code. Interpreted code may be downloaded to an Application but only so long as such code: (a) does not change the primary purpose of the Application by providing features or functionality that are inconsistent with the intended and advertised purpose of the Application as submitted to the App Store, (b) *does not create a store or storefront for other code or applications*, and (c) does not bypass signing, sandbox, or other security features of the OS.

An Application that is a programming environment intended for use in learning how to program may download and run executable code so long as the following requirements are met: (i) no more than 80 percent of the Application's viewing area or screen may be taken over with executable code, except as otherwise permitted in the Documentation, (ii) the Application must present a reasonably conspicuous indicator to the user within the Application to indicate that the user is in a programming environment, (iii) *the Application must not create a store or storefront for other code or applications*, and (iv) the source code provided by the Application must be completely viewable and editable by the user (e.g., no pre-compiled libraries or frameworks may be included with the code downloaded)." (Emphasis supplied.)

189 "Without Apple's prior written approval or as permitted under Section 3.3.25 (In-App Purchase API), an Application may not provide, unlock or enable additional features or functionality through distribution mechanisms other than the App Store, Custom App Distribution or TestFlight."

190 "You will not, directly or indirectly, commit any act intended to interfere with . . . Apple's business practices including, but not limited to, taking actions that may hinder the performance or intended use of the App Store, ... Further, You will not engage, or encourage others to engage, in any unlawful, unfair, misleading, fraudulent, improper, or dishonest acts or business practices relating to Your Covered Products (e.g., engaging in bait and-switch pricing, consumer misrepresentation, deceptive business practices, or unfair competition against other developers)."

• Agree not to "attempt to hide, misrepresent or obscure any features, content, services or functionality" (Section 6.1)[191].

In 2010, Apple also created the App Guidelines which are more fully discussed below.[192] As a corollary to Section 3.3.3 of the DPLA, Section 3.1.1 of the App Guidelines was the clearest articulation of the anti-steering provision with respect to in-app purchases. It reads:

> If you want to unlock features or functionality within your app, (by way of example: subscriptions, in-game currencies, game levels, access to premium content, or unlocking a full version), you must use in-app purchase. Apps may not use their own mechanisms to unlock content or functionality, such as license keys, augmented reality markers, QR codes, etc. *Apps and their metadata may not include buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase*.[193]

Section 2.3.10 of the Guidelines reads: ". . . don't include names, icons, or imagery of other mobile platforms in your app or metadata, unless there is a specific, approved **[**61]** interactive functionality" and Section 3.1.3 Other Purchase Methods states: "The following apps may use purchase methods **[*945]** other than in-app purchase. Apps in this section cannot, either within the app or through communications sent to points of contact obtained from account registration within the app (like email or text) encourage users to use a purchasing method other than in-app purchase."[194]

In terms of payment, Apple knew from the outset that developers would either distribute their apps for "free" or by selling them. The DPLA contained Schedules 1 and 2 to address each category, respectively.

"Free" as used here specifically means an app for which a consumer does not pay to download, and which does not sell any digital goods or subscriptions. Thus, free apps do not generate any revenue for Apple. However, some developers monetize their free app with advertising.[195] In fiscal year 2019, 83% of apps with at least one download on the App Store were free to consumers, including 76% of game apps of which there are over 300,000.[196]

On the other hand, the "freemium model" (used by *Fortnite*) is one where the initial download is "free", but revenue comes from in-app purchases or payments for upgrades. **[**62]** Apps which do charge for downloads or digital goods bought within an app fall under the purview of Schedule 2.

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[191] "You may submit Your Application for consideration by Apple for distribution via the App Store or Custom App Distribution once You decide that Your Application has been adequately tested and is complete. By submitting Your Application, You represent and warrant that Your Application complies with the Documentation and Program Requirements then in effect as well as with any additional guidelines that Apple may post on the Program web portal or in App Store Connect. *You further agree* ***[**60]*** *that You will not attempt to hide, misrepresent or obscure any features, content, services or functionality in Your submitted Applications from Apple's review or otherwise hinder Apple from being able to fully review such Applications*. . . . You agree to cooperate with Apple in this submission process and to answer questions and provide information and materials reasonably requested by Apple regarding Your submitted Application, including insurance information You may have relating to Your Application, the operation of Your business, or Your obligations under this Agreement. . . . If You make any changes to an Application (including to any functionality made available through use of the In-App Purchase API) after submission to Apple, You must resubmit the Application to Apple. Similarly all bug fixes, updates, upgrades, modifications, enhancements, supplements to, revisions, new releases and new versions of Your Application must be submitted to Apple for review in order for them to be considered for distribution via the App Store or Custom App Distribution, except as otherwise permitted by Apple. (Emphasis supplied.)

[192] All developers agree to abide by the App Guidelines, among others. PX-2619.070.

[193] PX-2790 (emphasis supplied).

[194] Apple's anti-steering provision as it relates to subscriptions is found in Section 3.11 of the DPLA. However, as shown herein, subscriptions are not part of the action. Other related provisions in the Guidelines include 3.1.3(a) and 3.1.3(b).

[195] Ex. Expert 6 (Hitt) ¶¶ 134, 206.

[196] Trial Tr. (Hitt) 2094:13-23; Ex. Expert 6 (Hitt) ¶¶ 156, 169.

Section 3.4 of Schedule 2 provides the basic 30 percent rate and reads:[197]

> Apple shall be entitled to the following commissions in consideration for its services as Your agent and/or commissionaire under this Schedule 2:
>
> (a) For sales of Licensed Applications to End-Users located in those countries listed in Exhibit B, Section 1 of this Schedule 2 as updated from time to time via the App Store Connect site, Apple shall be entitled to a commission equal to thirty percent (30%) of all prices payable by each End-User.[198]

Under the terms of the DPLA, "the Licensed Applications" cannot be activated until approved by Apple. For all digital purchases, Apple charges a 30% commission and only recently instituted some exceptions. Purchases which are not digitally confirmed, such as those related to physical goods, such as take-out food or Amazon purchases, do not result in a commission to Apple.

Apple does not dictate to developers how or what to price an app or how to monetize their product. However, it did impose certain parameters, namely the prices of apps need to end in $0.99 and must appear **[**63]** within predesignated bands. There is no evidence that this has impacted Epic Games at all or that it has created any widespread problems. Rather, plaintiff cites only to testimony of Matthew Fischer, Apple's Vice President of App Review, that developers have asked "from time to time" for more flexibility. With respect to international pricing, Apple has a single "tier" but evidence was not admitted to show any problems with the tiered system.[199]

[*946] At best, the evidence on this issue is scant and not fully developed. Mr. Fischer testified that developers have at times asked for "more flexibility to charge different prices for in-app purchases," and Apple has consistently declined.[200] Whether this is a significant issue is unknown. Certainly, Epic Games, the plaintiff here, never asked to change the pricing. The Court suspects that it is because of the common marketing view that ending a price in $0.99 conveys a bargain price to the consumer. That said, Apple did little to justify the restriction.[201] On balance, the Court finds nothing anticompetitive with these two requirements based on this record.

b. <u>Apple's App Store as an App Transaction Platform</u>

Having made the decision to allow third-party **[**64]** developers to license the tools to make "apps" for the iPhone, Apple also needed to develop a place or manner in which the developers and the users could connect. Apple wrote a series of applications, combined them all, and called it the App Store. Apple designed the App Store not only to allow third-party developers to reach consumers with their apps, but to notify customers when updates were available: "tap the Update button and [the] app will be replaced by the updated version . . . over the air, all automatically." The App Store functionality and access thereto is at the heart of the action.

Apple's late Chief Executive Order ("CEO"), Mr. Steve Jobs, recognized that the "purpose in the App Store is to add value to the iPhone" and ultimately "sell more iPhones." Apple's current Vice President of Developer Relations, Mr.

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[197] PX-2621. Section 3.4 is preceded by sections outlining the marketing and hosting agreements between Apple and the developers, albeit Apple did not guarantee any quantifiable services.

[198] PX-2621. Subsection 3.4(a) proscribes a 15% rate for subscriptions which are not part of this case.

[199] Ex. Depo. 9 (Fischer) 266:16-24. Thus, Schedule 2 to the DPLA states that Apple markets third-party apps "at prices identified by [the developer] . . . from the pricing schedule attached . . . as Exhibit C." Any price changes must be "in accordance with the pricing schedule." The tiers generally require the same price across all countries; for example, a $ 0.99 tier requires the equivalent of $ 0.99 in local currency in India. PX-2621 § 3.1, Ex. C; PX-2202; Ex. Depo 12 (Gray) 26:3-5, 195:15-196:14, 206:13-207:18, 208:6-9.

[200] Ex. Depo. 9 (Fischer) 266:12-19.

[201] Apple does not directly respond but argues that currency conversion is a benefit of IAP. *See* Apple FOF ¶ 692. To the extent this true, Apple has not explained why it cannot afford more flexibility in unique circumstances. Mr. Gray testified that Apple selected 99 cent tiers based on its prior experience without apparently consulting developers. Ex. Depo. 12 (Gray) 195:24-196:14.

Ron Okamoto, similarly acknowledged that well-known developers make Apple's platforms more attractive to users and lead them to buy Apple devices.[202] Thus, the symbiotic relationship was created.

Apple's intellectual property as it relates to the iOS ecosystem generally are significant. The record is undisputed that Apple holds approximately 1,237 U.S. patents with 559 patent applications **[**65]** pending. With respect to the App Store itself, Apple holds an additional 165 U.S. patents with 91 more U.S. patent applications pending. Other than these patents, Apple does not identify specifically how the rest of its intellectual property portfolio impacts the technology at issue in this case nor does it specifically justify its 30% commission based on the value of the intellectual property. It only assumes it justifies the rate.[203]

Over recent years, the evidence established that a significant portion of the App Store revenue is built upon long-term relationships between developers and consumers **[*947]** independent of Apple. Indeed, during a 2019-2020 presentation, Apple recognized this transition, noting that the "top monetizing game are services that entertain customers for years." Specifically, "[i]n any given month, 41% of [Apple's] monthly billings are generated from apps that were downloaded more than 180 days prior," as contrasted to 31% for apps downloaded between 30 and 180 days prior and to 28% for apps downloaded less than 30 days prior. "As a result, a significant share of our billings are generated not from apps that were just downloaded, but from apps that customers **[**66]** re-engage with long after the first download." Even Apple concedes that "this engagement is almost completely driven by [App Store] developers, and the App Store does not participate in a meaningful way."[204]

c. <u>Apple's Commissions Rates: 30 percent; 15 percent; recent changes</u>

Apple's establishment of a 30% commission rate has remained static since the onset. Mr. Philip Schiller, who was there at the beginning, testified that the App Store charged the same percentage as other gaming stores, like Steam and Handango. Mr. Eddy Cue, another Apple executive, who made the pricing decision with Mr. Jobs, recognized that "[t]here wasn't really any kind of App Store" when it first launched, so Apple looked at distribution of hard goods and software instead. Because distributing hard versions of software cost 40% to 50%, lowering the commission to 30% was considered a "huge decrease" intended to "get developer really excited about participating in the platform." Importantly, and undisputed, Apple chose the 30% commission without regard to or analysis of the costs to run the App Store.[205]

Prior to 2011, users could read content from subscriptions made outside iOS, but were limited to a one-time subscription, **[**67]** not recurring subscriptions. In 2011, Apple expanded its functionality to allow for the sales of recurring subscriptions when purchased in the app store but required a 30 percent commission.[206] Finally, in late 2020, Apple introduced the Small Business Program. That program reduced Apple's commission to 15% for developers making less than one million dollars.[207]

Apple's implementation of the Small Business Program was spurred, in part, by the COVID-19 pandemic. However, Mr. Cook also admitted that "lawsuits and all the rest of the stuff" was "in the back of [his] head." Mr. Schiller similarly testified that the Small Developer Program began with a lot of "commentary" about "App Store's commission level," but was pushed over the edge by the pandemic. He too expressly acknowledged that the current lawsuit helped "get it done" along with "scrutiny and criticism . . . from around the world."[208]

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[202] PX-2060.018-.019; Ex. Depo. (Okamoto) 324:04-325:10; Ex. Expert 1 (Evans) ¶ 19; Ex. Expert 8 (Schmalensee) ¶ 44.

[203] *See generally* Ex. Expert 12 (Malackowski) (noting that the intellectual property has value, but not providing any numerical value).

[204] PX-608.028.

[205] Trial Tr. (Schiller) 2725:23-2726:9, 2740:8-15; Ex. Depo. 8 (Cue) 135:08-136:14, 141:13-142:09.

[206] Trial Tr. (Schiller) 3183:9-3184:25.

[207] *Id.* 2810:16-2811:5.

[208] Trial Tr. (Cook) 3992:4-3993:1; Trial Tr. (Schiller) 2812:1-2813:10, 3070:13-25.

Over time, and given Apple's success, some developers have actively complained about the 30% commission. The Court recognizes that developers have sued Apple on behalf of a class arguing that the rate is too high. Unlike those developers, Epic Games challenges the levy of *any* commission and did not offer **[**68]** a survey showing developers agreed with this position; only the anecdotal evidence of a couple.[209] It is **[*948]** logical that no developer would want to pay prices higher than is competitive or necessary. However, it is also true that, with few exceptions, not every business is entitled to have access to what is effectively shelf space if they cannot afford to pay a commission to the platform host.

While Apple's 30 percent commission began as a corollary to the 30 percent rate being charged in the gaming industry, the evidence is substantial that the economic factors driving that rate do not apply equally to Apple. Other gaming industry participants operate under a distinctly different economic model, facing different levels of competitive pressure. *See infra* Facts § II.D.2-4. For example, unlike those in the computer gaming market, nothing other than legal action seems to motivate Apple to reconsider pricing and reduce rates.[210]

4. *Apple's Management of Apps — App Guidelines*

Initially, Apple envisioned the App Store as a highly curated selection of apps. With only 500, then 25,000, apps in its initial collection, the vision was achievable.[211] As the number of apps skyrockets, Apple strains in its **[**69]** claim that the current version of the App Store promises the same curated product. Though Apple has removed over 2 million outdated apps, and rejected those not meeting the Guidelines, the App Store still another contains 2 million apps of which over 300,000 are games.[212]

Curation in the current era merely means that an app must comply with the App Guidelines, first published in 2010. Some of the Guidelines are not reasonably controversial.[213] For instance, Apple will not authorize certain apps such as porn, malicious apps, 'unforeseen' apps, apps that invaded one's privacy, illegal apps, and even bandwidth hog[s].[214] Epic Games claims that Apple's efforts in this regard are substandard, raising concerns regarding the effectiveness and quality of the current review process. Unfortunately, Epic Games only scratched the surface and did not provide particularly compelling evidence of its perspective.[215]

Missing from the record is any normative measure of what standard guidelines should be. Perfection is not practical nor the business norm. Internal documents show that Apple responded to developers who were complaining of the time for reviewing of apps and updates. Apple promises in its Service Level **[**70]** Agreement to complete a review of an app quickly: 50 percent within 24 hours and 90 percent within 48 hours. Apple claims that it is completing 96 percent of the reviews within 24 hours.[216] Anecdotal evidence from Mr. Benjamin Simon, President and CEO of Down Dog, suggests that those statistics **[*949]** are skewed but there was no further exploration on the topic.

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[209] The Court also makes a distinction with respect to the testimony of Ms. Wright who explicitly was *not* testifying on behalf of Microsoft. Had Microsoft wanted to weigh in; it could have.

[210] The Court is aware of the additional, and unchallenged, concerns relating to money laundering, fraud, and other risks that Apple debated in terms of changing the commission. Trial Tr. (Schiller) 2813:11-2814:7; PX-2390.200. While valid, at least with respect to money laundering, the reference point was 15% which is half the static 30% commission rate.

[211] PX-0880.020; Trial Tr. (Schiller) 2754:7-8; 2785:15-25.

[212] Trial Tr. (Schiller) 2833:25-2834:2; 2846:11-2847:24.

[213] PX-0056A; Trial Tr. (Schiller) 2833:25-2834:2.

[214] PX-2619, § 3.3.20, 3.3.21, 3.3.26, 3.3.29.

[215] For instance, Epic Games spent considerable time arguing that numerous apps were, in fact, porn. Upon further review, while salacious, the proffer was devoid of merit and merely emphasized the lack of evidence on this point.

[216] Trial Tr. (Kosmynka) 1110:10-1111:2; Trial Tr. (Federighi) 3467:11-24, 3502:23-3504:15.

The App Guidelines address issues of safety, privacy, performance, and reliability. The fact that the Guidelines are not static does not raise per se concerns because the issues are similarly non-static.[217] Evidence exists to show that the Guidelines are used in appropriate ways for appropriate purposes. *See infra* Facts § V.A.2.a.ii. For instance, Apple proactively requires, much to some developers' chagrin, measures to protect data security,[218] privacy, data collection and storage.[219] The **[*950]** data collection and disclosure requirements are not

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[217] PX-0056A.100 ("This is a living document, and . . . may result in new rules at any time."); PX-0056; PX-2790; Trial Tr. (Fischer) 947:6-14 ("We do change the guidelines."); Trial Tr. (Kosmynka) 984:14-16; Trial Tr. (Schiller) 2833:15-21 ("They are modified at least yearly, sometimes more than once in a year.").

[218] Section 1.6 states that "[a]pps should implement appropriate security measures to ensure proper handling of user information collected pursuant to the Apple [DPLA] and these Guidelines (see Guideline 5.1 for more information) and prevent its unauthorized use, disclosure, or access by third parties." PX-2790.005.

[219] 5.1.1 Data Collection and Storage:

(i) Privacy Policies: All apps must include a link to their privacy policy in the App Store Connect metadata field and within the app in an easily accessible manner. The privacy policy must clearly and explicitly:

- Identify what data, if any, the app/service collects, how it collects that data, and all uses of that data.
- Confirm that any third party with whom an app shares user data (in compliance with these Guidelines) — such as analytics tools, advertising networks and third-party SDKs, as well as any parent, subsidiary or other related entities that will have access to user data — will provide the same or equal protection of user data as stated in the app's privacy policy and required by these Guidelines.
- Explain its data retention/deletion policies and describe how a user can revoke consent and/or request deletion of the user's data.

(ii) Permission Apps that collect user or usage data must secure user consent for the collection, even if such data is considered to be anonymous at the time of or immediately following collection. Paid functionality must not be dependent on or require a user to grant access to this data. Apps must also provide the customer with an easily accessible and understandable way to withdraw consent. Ensure your purpose strings clearly and completely describe your use of the data. Apps that collect data for a legitimate interest without consent by relying on the terms of the European Union's General Data Protection Regulation ("GDPR") or similar statute must comply with all terms of that law. Learn more about Requesting Permission.

(iii) Data Minimization: Apps should only request access to data relevant to the core functionality of the app and should only collect and use data that is required to accomplish the relevant task. Where possible, use the out-of process picker or a share sheet rather than requesting full access to protected resources like Photos or Contacts.

(iv) Access: Apps must respect the user's permission settings and not attempt to manipulate, trick, or force people to consent to unnecessary data access. For example, apps that include the ability to post photos to a social network must not also require microphone access before allowing the user to upload photos. Where possible, provide alternative solutions for users who don't grant consent. For example, if a user declines to share Location, offer the ability to manually enter an address.

(v) Account Sign-In: If your app doesn't include significant account-based features, let people use it without a log-in. Apps may not require users to enter personal information to function, except when directly relevant to the core functionality of the app or required by law. If your core app functionality is not related to a specific social network (e.g. Facebook, via another mechanism. Pulling basic profile information, sharing to the social network, or inviting friends to use the app are not considered core app functionality. The app must also include a mechanism to revoke social network credentials and disable data access between the app and social network from within the app. An app may not store credentials or tokens to social networks off of the device and may only use such credentials or tokens to directly connect to the social network from the app itself while the app is in use.

(vi) Developers that use their apps to surreptitiously discover passwords or other private data will be removed from the Developer Program.

(vii) SafariViewController must be used to visibly present information to users; the controller may not be hidden or obscured by other views or layers. Additionally, an app may not use SafariViewController to track users without their knowledge and consent.

(viii) Apps that compile personal information from any source that is not directly from the user or without the user's explicit consent, even public databases, are not permitted on the App Store.

insignificant. They require user consent, minimization, and affirmative permissions. These specifications place the customer's concerns ahead of the developers and are on the forefront of protecting user data; measures not all developers embrace, especially where they want to monetize that data. Epic Games **[**71]** claims that these restrictions inhibit their ability to service customer needs. Both perspectives contain a measure of truth. However, the latter is less persuasive because the servicing is an option **after** the customer consents, while the alternative would mean that data is collected and used without the customer knowing.

Tangentially related is the App Guidelines' approach to cloud-based game streaming which is discussed below with respect to market definition. *See infra* Facts § II.D.3.d. The evidence on this front post-dated the filing of this lawsuit. Thus: **[**72]** in September 2020, Apple modified the Guidelines to allow for the inclusion of game streaming apps, but only if each streamed app is made available as a separate app on the App Store.[220] Nvidia, Microsoft, and Google sought to launch their game streaming services as native iOS apps before Apple modified its Guidelines, but all three were rejected by Apple.[221] None of these services chose to subsequently launch separate iOS apps—one per streamed game—as required by the new App Guidelines.[222] Craig Federighi, Apple's Senior Vice President of Software Engineering, testified that there are currently **[*951]** no streaming apps for game apps on the App Store.[223] Apple allows entertainment apps such as video and music apps to stream. The restriction only applies to gaming.

Epic Games raises legitimate concerns regarding some of the consequences of Apple's App Guidelines and its refusal to share control of data absent customer agreement.

First, Apple does a poor job of mediating disputes between a developer and its customer. Consumers do not understand that developers have effectively no control over payment issues and or even access to consumers' information. Consequently, it can be frustrating for both sides when **[**73]** issues arise relating to the inability to issue and manage the legitimacy of requests for refunds.[224]

With respect to refunds, the DPLA gives Apple "sole discretion" to refund a full or partial amount of user purchases. When developers want to refund a customer purchase, they must contact Apple or tell the customer to contact

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(ix) Apps that provide services in highly-regulated fields (such as banking and financial services, healthcare, gambling, and air travel) or that require sensitive user information should be submitted by a legal entity that provides the services, and not by an individual developer.

5.1.2 Data Use and Sharing

(i) Unless otherwise permitted by law, you may not use, transmit, or share someone's personal data without first obtaining their permission. You must provide access to information about how and where the data will be used. Data collected from apps may only be shared with third parties to improve the app or serve advertising (in compliance with the Apple Developer Program License Agreement.). Apps that share user data without user consent or otherwise complying with data privacy laws may be removed from sale and may result in your removal from the Apple Developer Program.

(ii) Data collected for one purpose may not be repurposed without further consent unless otherwise explicitly permitted by law.

(iii) Apps should not attempt to surreptitiously build a user profile based on collected data and may not attempt, facilitate, or encourage others to identify anonymous users or reconstruct user profiles based on data collected from Apple-provided APIs or any data that you say has been collected in an "anonymized," "aggregated," or otherwise non-identifiable way.

[220] PX-0056.180 ("Each streaming game must be submitted to the App Store as an individual app so that it has an App Store product page, appears in charts and search, has user rating and review, can be managed with ScreenTime and other parental control apps, appears on the user's device, etc.").

[221] Trial Tr. (Patel) 438:24-439:15; Trial Tr. (Wright) 534:18-535:8; PX-2048.100 ("Stadia by Google has been rejected by ERB"); PX-2109.100 ("NVIDIA GeForce NOW has been rejected by ERB").

[222] Trial Tr. (Patel) 440:25-441:4; Trial Tr. (Wright) 650:15-651:6.

[223] Trial Tr. (Federighi) 3490:4-6.

[224] Trial Tr. (Simon) 369:23-373:3.

Apple, which independently "evaluate[s] that situation."[225] Thus, developers lack the ability to provide refunds and have worse customer service as the result. For example, Match Group's Operations Vice-President testified that Apple prevents Match Group from implementing its preferred refund policy or tailoring refunds to users' history, which leads to poor experiences with its products and hurts its brand.[226]

Moreover, because Apple lacks visibility into the transaction, it has created overly simplistic rules to issue refunds which can also increase fraud.[227] For example, apps have suffered from return fraud, where the customer enjoys or resells content and then obtains a refund by providing false information. Prior to 2020, Apple did not even provide developers with information that a refund had been issued, and they had no ability to remove the refunded feature to prevent **[**74]** its further use. Mr. Schiller explains that Apple has this requirement because customers "want to reach out to us when they have a problem with the developer and want a refund."[228] That explanation is plausible if the developer caused the issue that requires a refund. However, if the refund arises from a general customer service issue, the developer is likely better suited to address the issue. Although Apple introduced new tools to address this issue in 2020, it did so only after years of complaints.[229]

Apple argues that its policies protect consumers against fraudulent attacks. The data is far from clear. What is certain is Apple's decision prohibits information from flowing directly to the customer so that customers can make these choices themselves.

[*952] Second, Epic Games argues that the lack of direct connection to consumers impacts a developer's ability to obtain key analytics, such as "real-time reporting about its customers' spending behavior." While Epic Games may profit from having "real-time reporting" about an individual spending behavior, ample evidence shows that Epic Games already reaps immense profits from impulse purchasing. Little societal value exists in allowing plaintiff to **[**75]** capitalize on more customer data to exploit customer habits.

Other examples, however, seem more legitimate such as Match Group's desire to obtain the information to run registered sex offender checks and age verification. Mr. Ong attributes this fact to a "one-size-fits-all" approach that prevents it from building safety features "that are relevant to [its] users." In truth, the evidence is more mixed with a split among developers regarding the amount and usefulness of certain information with respect to analytics.[230] As noted, the issue is double-edged as it impacts user privacy.

5. *App Store Operating Margins*

Plaintiff's expert, Ned Barnes, through both reverse engineering and review of documents from Tim Cook's files, calculated operating margins to be over 75% for both fiscal years 2018 and 2019.[231] Mr. Barnes explained:

> Operating margin measures the profitability of a business or business segment by calculating the excess of revenue over costs. It is defined as net revenue (or sales) minus both (i) costs of goods sold ("COGS") and (ii) operating expenses ("OPEX") such as selling, general and administrative expenses, and research and

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[225] PX-2621.600; Ex. Depo. 12 (Gray) 126:6-127:5, 128:2-25.

[226] Ex. Depo. (Ong) 34:10-36:23, 48:17-51:06, 162:03-22; Trial Tr. (Sweeney) 91:24-92:7; Trial Tr. (Simon) 372:9-373:3; Ex. Depo. 12 (Gray) 128:8-25. Mr. Simon provides another example: Down Dog has a generally lenient refund policy that provides frequent exceptions, such as for health workers and users who liked a feature that was deprecated. Apple's approach is stricter and more uniform, which prevents Down Dog from implementing its preferred policy. Trial Tr. (Simon) 370:2-373:17.

[227] Apple employees have acknowledged that this "causes some customers to be treated unfairly while also allowing for fraudulent claims to be refunded." PX-2189.100.

[228] Trial Tr. (Schiller) 2798:24-2799:11.

[229] Ex. Depo. 12 (Gray) 146:8-147:20, 150:15-151:05; Trial Tr. (Schiller) 2799:17-2800:11; PX-2062 (complaints in 2018).

[230] Ex. Depo. (Ong) 169:24-173:19; Trial Tr. (Sweeney) 128:22-24; PX-2362.300; Ex. Expert 8 (Schmalensee) ¶ 150; Ex. Expert 11 (Rubin) ¶ 127; DX-3922.106.

[231] Ex. Expert 2 (Barnes) ¶¶ 2, 4, 5.

> development ("R&D") expenses. Operating margin percentage **[**76]** is calculated by dividing the nominal amount of operating margin dollars by the nominal amount of net revenue.[232]

In addition, Mr. Barnes reviewed internal documents reflecting profit and loss ("P&L") statements specific to the App Store and presented to Apple executives. These documents support Mr. Barnes' independent conclusions.[233] Other documents indicate that at least by fiscal year 2013, the margin percentages exceeded 72%.[234]

Apple counters that it does not maintain profit and loss statements for individual divisions and that Mr. Barnes' analysis is inaccurate. The Court disagrees with the latter. Mr. Barnes made appropriate adjustments based on sound economic principles to reach his conclusions. Apple's protestations to the contrary, notwithstanding the evidence, shows that Apple has calculated a fully burdened operating margin for the App Store as part of their normal business operations. Apple's financial planning and analysis team are tracking revenues, fixed and variable operating costs, and allocation of IT, Research & Development, and corporate overheads to an App Store P&L statement. The team's calculation was largely consistent with that of Mr. Barnes. Although there **[**77]** are multiple ways to account for shared costs in a business unit, the consistency between Mr. Barnes' analysis and Apple's own internal documents suggest that Mr. Barnes' analysis is a reasonable assessment of the App Store's operating margin.

However, when Mr. Barnes extended the analysis to compare his findings to other online stores, he chose poorly. Mr. **[*953]** Barnes analyzed the operating margins for the following online stores for the years spanning 2013 to 2019, finding operating margin percentages ranging approximately as follows: eBay (20-30 percent), Etsy (-3.2 to 12 percent), Alibaba (29-50 percent), MercardoLibre (-6.7 to 32 percent), and Rakuten (8-17 percent).[235] All of these pale in comparison to Apple, but none are driven by the same digital transactions as exist here.

While Mr. Barnes' choice is understandable,[236] he did not compare Apple with the Google Play app store, Sony PlayStation Store, Microsoft Store, Samsung Galaxy Store, and Nintendo eShop.[237] Mr. Barnes notes that these entities claim, like Apple, that they do not report sufficiently separate financial results for their app store activities. It is not clear whether sufficient public information exists to reverse engineer **[**78]** for these companies in the same way he reverse-engineered for Apple.

Notwithstanding Mr. Barnes' choice to compare the App Store's operating margins to those other online stores, under any normative measure, the record supports a finding that Apple's operating margins tied to the App Store are extraordinarily high. Apple did nothing to suggest operating margins over 70% would not be viewed as such. As discussed below, the record also shows that the bulk of the revenues generating those margins come from in-app purchases in gaming apps.

6. *App Store Revenues From Mobile Gaming*

As highlighted at the outset of this Order, pivotal evidence in this case reveals that gaming transactions are driving the App Store. Given the critical nature of this evidence, the Court unseals the following evidence from 2017 and

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[232] *Id.*

[233] *Id.*

[234] *Id.* ¶ 9.

[235] *Id.* ¶ 22.

[236] Mr. Barnes used the following "criteria" to choose the comparators: "online marketplace firms" that "(i) primarily generate online marketplace revenues from commissions and fees earned from transactions involving third-party merchants rather than as a direct seller of goods; (ii) publicly reported financial statements; (iii) at least five years of available financial statements; (iv) marketplace activities sufficiently distinguishable in operating results; and (v) profitable marketplace operations in at least one year of the last five years." *Id.* ¶ 23.

[237] *Id.* ¶ 24.

sufficient evidence from the following years to make key findings. The specifics are referenced in the footnotes below and sealed to the general public. Suffice it to say, the trends increase in an upwards trajectory.

Games have played an integral part of the App Store since at least 2016. In 2016 for instance, despite game apps only accounting for approximately 33% of all app downloads, **[**79] game apps nonetheless accounted for 81% of all app store billings that year**.[238] Further, based on Apple's internal records, 2017 gaming revenues overall accounted for 76% of Apple's App Store revenues. These commissions are substantially higher than average due to the prevalent and lucrative business model employed by most game developers. Specifically, game apps are disproportionately likely to use in-app purchases for monetization.[239]

Importantly, spending on the consumer side is also primarily concentrated on a narrow subset of consumers: namely, exorbitantly high spending gamers.[240] In the **[*954]** third quarter of 2017, high spenders, accounting for less than half a percent of all Apple accounts, spent a "vast majority of their spend[] in games via IAP" and generated 53.7% of all App Store billings for the quarter, paying in excess of $450 each. In that same quarter, medium spenders ($15-$450/quarter) and low spenders (<$15/quarter), constituting 7.4% and 10.8% of all Apple accounts, accounted for 41.5% and 4.9% of all App Store billing, respectively. The remaining 81.4% of all Apple accounts spent nothing and account for zero percent of the App Store billings for the quarter.[241] The trend has largely **[**80]** continued to the present.[242]

This trend is also mirrored within the App Store's games billings. Indeed, Apple has recognized that "[g]ame spend is highly concentrated" among certain gaming consumers. Similar to the above statistics, 6% of App Store gaming customers in 2017 accounted for 88% of all App Store game billings and were gamers who spent in excess of $750 annually. Breaking down this 6% population:

- High spenders, accounting for 1% of iOS gamers, generated 64% of game billings in the App Store, spending on average $2,694 annually;
- Medium-high spenders, accounting for 3% of iOS gamers, generated 20% of game billings in the App Store, spending on average $373 annually; and
- Medium spenders, accounting for 2% of iOS gamers, generated 4% of game billings in the App Store, spending on average $104 annually.

Indeed, in strategizing on the development of the App Store and Apple's gaming business, Apple noted that it "need[s] to primarily consider how [its] service[s] would impact engagement and spend of this 6%."[243] Thus, in most economic ways, and in particular with respect to the challenged conduct, the App Store is primarily a *game* store and secondarily an "every other" app store. **[**81]**

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[238] DX-4399.008.

[239] Ex. Expert 6 (Hitt) ¶¶ 117, 120-124; DX-4178.006; PX-0059.007; DX-0608.012 (2019); Trial Tr. (Schmid) 3226:8. The actual numbers can be found in the sealed exhibits and need not be repeated in this Order.

[240] From what little evidence there is in the record, these consumers frankly appear to be engaging in impulse purchasing and both parties' profits from this sector are significant. This specific conduct is outside the scope of this antitrust action, but the Court nonetheless notes it as an area worthy of attention.

[241] *See* DX-4399.019-.020. Even within this general spend data, Apple's presentation suggests slides later that the high level of spend derives primarily from gaming apps. Indeed, a few pages later, Apple notes the top grossing apps for 2016, and states: "Not only are these all games, but they're freemium games, meaning they're free to download, and you spend money using In-App Purchases to get more features or levels." DX-4399.024.

[242] *See* PX-2302.046-.047. Coincidentally, the percentage of consumers that pay nothing almost mirrors the same percentage of free apps available in the App Store.

[243] *See* PX-2176.176. The Court notes that the limited evidence in the record as to Google Play show that it too is similarly built on gaming transactions and a narrow subset of high spending gaming consumers and game developers. *See* DX-3913.004-.013.

II. REVIEW OF PARTIES' PROPOSED PRODUCT MARKET AND FINDING

The Court reviews the factual basis for each of the three proffered product markets. Epic Games offers two aftermarkets, namely (i) an aftermarket for the distribution of iOS apps and (ii) an aftermarket for payment processing for iOS apps. The foremarket for each hinges on the existence of a market for operating systems for smartphones.[244] Apple proposes a market for digital games transactions. The Court outlines the evidence for each in turn.

[*955] A. Epic Games: Facts Relevant to Foremarket for Apple's Own iOS

Before reviewing each of the proposed markets, the Court considers whether Apple's operating system should be viewed as a foremarket. The Court finds that it should not.

As a threshold matter, Apple urges the Court to disregard Epic Games' market definition on pleading grounds. Said differently, Epic Games did not explicitly use the terms "foremarket" and "aftermarket" in its complaint to outline its market theories. The Court agrees that Epic Games could have been more clear. Ultimately though, Apple's argument elevates form over substance. Apple was on notice and litigated the matter.[245] ***HN4***[] Courts prefer to rule on the merits **[**82]** of claims rather than disregard on procedural grounds.

In terms of substance, the Court agrees with Dr. Schmalensee that plaintiff's identification of a "foremarket" for Apple's own operating system is "artificial." The proposed foremarket is entirely litigation driven, misconceived, and bears little relationship to the reality of the marketplace.[246] Quite simply, it is illogical to argue that there is a market for something that is not licensed or sold to anyone.[247] Competition exists for smartphones which are more than just the operating system.[248] Features such as battery life, durability, ease of use, cameras, and performance factor into the market.[249] Consumers should be able to choose between the type of ecosystems and ***antitrust law*** should not artificially eliminate them.[250] In essence, Epic Games ignores these marketplace realities because, as it presumably knows, Apple does not have market power in the smartphone market. Rather Apple only has 15 percent of global market share in 2020.[251]

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[244] A "foremarket" is "a market in which there is competition for a long-lasting product" from which "demand for a second product" derives. An "aftermarket" is the "market for the second product." Ex. Expert 1 (Evans) ¶ 40. As an example, razors are the foremarket for disposable razor blades which is the aftermarket. *Id.*

[245] *See* Compl. ¶¶ 156-183. The Court also addressed this issue in its preliminary injunction opinion, *Epic Games, Inc. v. Apple Inc., 493 F. Supp. 3d 817, 835-38 (N.D. Cal. 2020)*.

[246] Ex. Expert 8 (Schmalensee) ¶¶ 6, 61.

[247] Trial Tr. (Schiller) 2723:18-2725:2.

[248] *Id.* 2725:9-21.

[249] DX-4089.010, .035, .037.

[250] *See, e.g.*, Trial Tr. (Cook) 3932:21-3933:6, 3937:12-20, 3987:18-25; Trial Tr. (Federighi) 3363:17-20, 3392:12-20. Mr. Sweeney, an iPhone user himself, admitted that he found Apple's approach to privacy and customer data security superior to Google's approach to customer privacy and customer data. Trial Tr. (Sweeney) 302:22-303:4. Mr. Sweeney further agreed that "if Apple were to compromise those fundamental differentiators,"—which the Court notes are more than the operating system—Apple may lose a competitive advantage over Android, depending on those changes. *Id.* 303:11-16; Trial Tr. (Athey) 1823:2-9 (agreeing that "privacy and security are competitive differentiators for Apple").

[251] Ex. Expert 8 (Schmalensee) ¶ 64.

B. Epic Games: iOS App Distribution Aftermarket

Given the Court's rejection of the foremarket theory, the aftermarket theory fails as it is tethered to the foremarket. Although the Court rejects **[**83]** plaintiff's foremarket construct, it nonetheless discusses additional factual problems with the aftermarket theory given plaintiff's focus on those issues. In effect, plaintiff really urges a single-brand analysis because Apple's exclusionary conduct impacts Epic Games' ability to compete in that space, both with respect to gaming and non-gaming apps.

Plaintiff claims that an aftermarket exists for four reasons. Each reason is tied to the known legal framework in which antitrust cases are litigated and which is discussed in the legal section below. That said, the four reasons are: One, the foremarket **[*956]** and aftermarket are related but two separate markets. Two, there are restraints in the aftermarket which are not in the foremarket. Three, the source of Apple's market power stems from its walled garden; not because of separate contractual agreements with consumers. Four, competition in the initial market does not discipline Apple's market in the proposed aftermarket.[252]

In terms of the trial record, the factual disputes reside in plaintiff's fourth reason which the Court addresses in this part of the Order. More specifically, the Court addresses Epic Games' evidence of (1) switching costs **[**84]** and alleged lock-in and (2) substitution.[253] The Court also considers Epic Games' argument as to whether the Court should consider all apps or only gaming apps.

1. *Evidence of Switching Costs and Alleged "Lock-in"*

Beginning with the switching costs[254] and alleged "lock-in," the Court considers Epic Games' proffer based on Apple's internal documents, expert testimony, and consumer knowledge, as well as Apple's rebuttal evidence.[255]

a. <u>Apple Documents</u>

Starting with Apple documents, Epic Games cites emails showing that Apple executives were aware of the impact of switching costs from iOS to Android. For instance, a 2013 email from Eddy Cue to Tim Cook and Phil Schiller recommends using iTunes discounts (as opposed to device discounts) because "[g]etting customers using our stores . . . is one of the best things we can do to get people hooked to the ecosystem." The email asks: "Who's going to buy a Samsung phone if they have apps movies, etc. already purchased? They now need to spend hundreds more to get where they are today."[256]

Next, is an email chain from March 2016 illustrating the debate around iMessage.[257] In the email, a customer describes his experience between Google and Apple devices and provides **[**85]** a laundry list to both Google and Apple of the pros and the cons of each device. In advising Google of his decision to remain with Apple, he concluded with the note that "the #1 most difficult [reason] to leave the Apple universe app is iMessage" which led him to use a combination of Facebook, WeChat, WhatsApp and Slack. For him, "iMessage amounts to serious lock-in." In forwarding the email to Apple executives, they were internally advised "FYI — we hear this a lot." Phil Schiller then advised Tim Cook that "moving iMessage to Android will hurt us more than help us . . . ."[258] Later, in October

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[252] Epic Games COL ¶¶ 84-93.

[253] Epic Games FOF ¶ 218; Trial Tr. (Evans) 1507:10-1510-11, 1512:3-22.

[254] Switching costs are "obstacles of moving from one product to another product." Trial Tr. (Evans) 1494:23-24. In other words, it is the costs born by leaving one platform to go to a different platform.

[255] Apple FOF ¶ 399; *see* Trial Tr. (Schmalensee) 1930:3-14; Ex. Expert 6 (Hitt) ¶ 211.

[256] PX-0404.

[257] iMessage is Apple's text messaging service that shows a blue bubble for texts sent from iOS devices (and allows for additional functionality) while displaying a green bubble for non-iOS devices without the same functionality.

[258] PX-0416.

2016, Mr. Schiller circulated to other Apple executives a Verge article entitled "iMessage is the glue that keeps me stuck to the iPhone."[259] Despite hours on the stand, **[*957]** plaintiff never explored this topic with Mr. Schiller other than to confirm receipt of the third-party emails.[260]

On balance, the Court reads the emails to suggest that Apple sought to compete by distinguishing their product, and in the process, making its platforms "stickier." That, however, is not necessarily nefarious. Every business seeks to decrease switching away from its products. Epic Games' executives, for instance, **[**86]** used the word "lock-in" to refer to price cuts that make it easier for users to play *Fortnite* in a hard economy. Here, the features that create lock-in also make Apple's products more attractive. ***HN5***[] Whether the conduct is procompetitive depends on other factors, including timing and whether the stickiness is at least partly tied to product attractiveness which can then decrease if the products become less attractive (for instance, through higher game prices).[261] This evidence is not persuasive of switching costs on its own.

b. Dr. Susan Athey

Next, Epic Games relies on expert testimony by Dr. Susan Athey who provides high-level, and largely theoretical, testimony about various costs incurred during switching from iOS to Android devices.[262] Unfortunately, Dr. Athey makes no effort to determine from consumers themselves whether they are motivated by loyalty and product satisfaction or because of switching costs. She conducted no original surveys. Nor does she attempt to measure the switching costs and analyze literature about their magnitude. Indeed, Dr. Athey does not cite *any evidence* beyond a news article, a European journal, and a biography of Steve Jobs. Nor did she analyze additional **[**87]** evidence or perform original analysis when forming her opinion. As such, the Court is left entirely in the dark about the *magnitude* of the switching costs and whether they present a meaningful barrier to switching *in practice*. There is simply no independent data to show that switching costs create meaningful lock-in.[263]

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[259] Again, the statements themselves are hearsay and are considered for a limited purpose of state of mind and not for whether iMessage actually creates lock-in for the customer base as text messages can be shared between iOS devices and Android. *See* PX-0079 (third-party Goldman Sachs Group, Inc. analysis); PX-2356; Trial Tr. (Schiller) 2981:6-2982:25.

Epic Games also cites other documents, but the import of those documents is far less clear. For instance, a 2019 email from Mr. Federighi discusses eliminating user-entered passwords in favor of Sign in with Apple, which would make the platform more "sticky." PX-0842. However, the context of the email concerns protecting users from spam, and it immediately notes factors that undermine that stickiness, such as "heavy" use of Chrome. *Id.*; *see also* Trial Tr. (Schiller) 3169:7-22 (explaining desire to protect users from spam). Another document shows Steve Jobs discussing tying different products together to "lock" customers into the ecosystem. PX-0892. Again, that is indistinguishable from simply making the ecosystem more attractive. *See* Trial Tr. (Schiller) 2864:7-15.

[260] PX-0416; Trial Tr. (Schiller) 3173:11-16, 3174:4-16.

[261] Trial Tr. (Weissinger) 1433:19-1434:16; *see, e.g.*, Trial Tr. (Cook) 3870:16-21; Trial Tr. (Schiller) 2864:16-19. Evidence shows that switching costs have decreased since the early 2010's through increased cross-platform functionality and "middleware," a term which does not exist in economic literature and which Dr. Athey created. Trial Tr. (Athey) 1782:7-1783:1, 1805:5-1806:22, 1809:17-1810:11.

[262] *See generally* Ex. Expert 4 (Athey); Ex. Expert 1 (Evans).

[263] Trial Tr. (Athey) 1777:18-24, 1794:12-1795:3, 1813:22-1814:11, 1815:11-1816:2, 1870:10-15.

Apple moves to strike Dr. Athey's opinions under *Federal Rule of Evidence 702(b)*. Dkt. No. 721. Epic Games responds that Apple waived its objections by stipulating to the admission of expert "written direct testimony" (Dkt. No. 510) and "unadmitted materials within the scope of *Rule 703*" relied on by the experts (Dkt. No. 635). Epic Games further contends that Dr. Athey disclosed her opinions in her report and that she may testify "solely or primarily on experience" if she "explain[s] how that experience leads to the conclusions reached, why that experience is a sufficient basis for the opinion, and how that experience is reliable applied to the facts." *Fed. R. Evid. 702* advisory committee note to 2000 Amendments ("Adv. Committee Note").

[*958] While the Court finds Dr. Athey well-intentioned, the lack of data upon which she bases her opinion leaves the Court with little objective reason to accept her theory.[264] Moreover, the market is responding, *i.e.*, both Google and Apple are creating easier paths to convert customers from the other and deal with the switching costs.[265] The Court can agree that it takes time to find and reinstall apps or find substitute apps; to learn a new operating system; and to reconfigure app settings. It is further apparent that one may need to repurchase phone accessories. That said, by ignoring the issue of customer satisfaction, Epic Games has failed to convince. The Court warned the parties in advance that actual data was an important consideration.

Accordingly, the expert testimony from Dr. Athey is wholly lacking in an evidentiary **[**88]** basis and does not show *substantial* switching costs enough to create user lock-in for iOS devices.

c. Consumer Knowledge and Post Purchase Policy Changes

From a broad perspective, Epic Games did not conduct any analysis of whether consumers know that they are buying into a walled garden. Apple argues that its business is successful precisely because of the reliability and security creating the walled garden on the iOS devices and on which it competes (discussed below). Without a consumer survey, there is no evidence that consumers are *un*aware of walled garden before purchasing the smartphone. Thus, there is no "bait-and-switch."

[*959] Plaintiff strains on the policy-change argument. Here Epic Games argues that Apple has changed its stated policy with respect to the commissions and thereby "lock-in" consumers and developers. The assertion is based upon two comments. The first occurred in 2008 by Steve Jobs when the App Store was launched by stating that the 30% commission was intended to "pay for running the App Store" and that Apple would be "giving all the money to the developers." The second occurred in 2011 when Phil Schiller noted in an internal email that "once we are making over $1B a **[**89]** year in profit from the App Store, is that enough to then think about a model where we ratchet down from 70/30 to 75/25 or even 80/20 if we can maintain a $1B a year run rate?"[266] Plaintiff claims the 30% commission rate constitutes a change in policy as compared against those two comments.

While the Court does not strike the opinion, the Court agrees with Apple that the opinion's basis is weak. Epic Games conflates the requirements of *Rule 703*, *Rule 702*, and discovery. ***HN6***[] *Rule 702(b)* asks "whether the expert considered enough information to make the proffered opinion reliable," while *Rule 703* asks whether the data considered itself is "of a type that is reliable." *See* 29 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 6268 (2d ed.). ***Federal Rule of Civil Procedure 26(a)(2)(B)(ii)*** further requires that an expert set forth "the facts or data considered by the [expert] in forming" the opinions in her report.

Here, Dr. Athey does not explain how her experience provides a *sufficient* basis for her sweeping conclusions. This is not a handwriting case where an expert opines that two writings are the same based on experience. It is a complex antitrust case that requires consideration of economic data. Unexplained academic and industry experience simply does not provide sufficient basis to draw reliable conclusions. Moreover, to the extent that Epic Games asks the Court to rely on Dr. Athey's general research, such research should have been disclosed in the report so that the Court and opposing party could evaluate it.

Nevertheless, the Court recognizes that the procedural posture of this case was unique. The Court ordered that no *Daubert* motions be made in advance of the bench trial given the expedited schedule and the fact that the Court had to read and review the submission in any event. Context was helpful. That said, many issues were litigated during the course of the bench trial and Apple did stipulate to the admission of Dr. Athey's testimony. Dr. Athey apparently relied on additional sources in her expert report (which she did not cite in her written direct testimony). The Court considers her opinions, but as discussed, given the lack of data, the Court does not give those opinions much weight.

[264] Last, Dr. Athey describes "mixing-and-matching" costs that users incur when trying to use devices from different ecosystems together. Dr. Evans reiterates some of this analysis in his testimony, but again, the data is weak. Ex. Expert 4 (Athey) ¶¶ 20-23; Ex. Expert 1 (Evans) ¶¶ 83-88; Trial Tr. (Evans) 1495:5-1497:3; Trial Tr. (Athey) 1755:6-1763:24.

[265] DX-3084A.022; Trial Tr. (Cook) 3867:12-3870:1, 3886:19-3887:5; DX-5573.

[266] PX-0880.021, .027; PX-0417.001.

Plaintiff's argument is not grounded in legal principles. The two noted informal statements do not create a policy, especially in light of a written contract, much less one which shows the 30% is a change. However, the Court does agree that the comments confirm that the 30% is not tied to anything in particular and can be changed. Moreover, it shows that Apple used other provisions to hide information on those commission rates from the consumers, presumably to hide the profitability of the transactions, namely the use of anti-steering provisions. Without information, consumers cannot have a full understanding of costs.[267]

d. Apple's Rebuttal Evidence

Apple introduces rebuttal evidence that low switching stems from satisfaction with Apple devices and services.

First, Apple emphasizes that consumers do switch from iOS to Android. Although the timeline for switching smartphones is longer than a few years, **[**90]** as many as 26% of smartphone users, including 7% of iPhone users, purchase a cellphone with a different operating system each cycle. Industry surveys suggest that iOS users are not per se "closed off" to considering Android when making decisions.[268]

Second, Apple cites consumer surveys that the lack of switching is due to consumer satisfaction with iOS. A Google survey shows that 64% of iOS users would not switch to Android simply because they "prefer iOS," which is the number one reason for not switching. Another survey shows that users who *do* switch from Android to iOS do so because they liked the speed and reliability provided by iPhones. Other surveys show high rates of satisfaction with iOS devices.[269] This evidence is significant not only because it was not litigation driven, but because Epic Games does not provide its own consumers surveys **[*960]** to show that users fail to switch even when they are dissatisfied with app price, quality, or availability. Thus, Apple's evidence strongly suggests that low switching between operating systems stems from overall satisfaction with existing devices, rather any "lock-in."

Comparing and weighing the parties' proffers, the Court finds that Epic **[**91]** Games failed to prove that users are "locked-in" or would not switch to Android devices in response to a significant change in game app prices, availability, or quality.[270]

2. *Substitutes*

In terms of substitutes given the business realities of the market, the parties' arguments hinge on their own respective definitions of the market. Epic Games spends little time on this issue with respect to its definition. For Epic Games, there is an aftermarket for iOS app distribution for which there is no substitute as it occupies the entire field.[271]

Given Apple's proposed market of all digital game transactions, Apple argues that all the other game transaction platforms are substitute platforms for the App Store. Those platforms include ones accessed through all devices: mobile, tablets, consoles, and PCs. Epic Games rebuts this claim. It makes two arguments. One, because developers create apps for more than one platform, they do not view them as substitutes to reach the same

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[267] Trial. Tr. (Evans) 1509:11-17; Ex. Expert 1 (Evans) ¶ 118.iv. The Court rejects the notion that Apple must affirmatively give consumers an estimate of the "amount of money a consumer spends on apps over the lifecycle of an iPhone," especially given that consumers appear to be in different categories of spending. *See* Epic Games FOF ¶ 221.a. That is different from enforcing silence regarding commission costs.

[268] DX-4310.012; Ex. Expert 6 (Hitt) ¶ 209; DX-3598.027.

[269] DX-3598.027; DX-3441.006-.007. Of course, the Apple survey cuts both ways. Consumers who switched from Android to iOS did so for hardware reasons, such "speed," "quality device construction," and "battery"—not app quality, price, or availability. This reinforces Dr. Evans' point that apps are a secondary consideration when purchasing a smartphone and would not lead to switching by themselves. *See also* DX-4312.043; DX-4495.044.

[270] As a corollary, without proof of customers lock-in, the notion that developers would not switch to maintain that customer base is by definition also not proved.

[271] Epic Games FOF ¶¶ 179-180.

consumers. Two, economic and survey evidence show a lack of substitution. The Court begins with Epic Games' arguments.

a. Single Homing and Fortnite Data

No one disputes that when developers create an app for Android versus iOS, they **[**92]** use a different SDK but much of the code can be ported across platforms. Using technical language, users may "single home" at a single platform while developers "multi home" across platforms. As the result, developers compete for single-homing users in a winner-take-all market and cannot afford to forego particular platforms without losing those other customers. The Court agrees that in the smartphone context, consumers typically "single home."[272]

In terms of user options on smartphones, gaming transactions on Android appear similar if not identical to gaming transactions on iOS. Most popular mobile games are available on both Android and iOS, with similar functionality. Developer support services are also similar.[273] Further, a significant difference in game transaction price or availability does not exist between iOS and Android. The evidence shows that very few consumers own both Android and iOS devices, and that currently, very low switching rates exist, with only about 2% of iPhone users switching to Android each year.[274] These results are not particularly surprising if those devices provide essentially the same experience.

Whether that extends beyond the smartphone context is debatable. **[**93]** Thus, to establish this extension, Epic Games relies on **[*961]** the "natural experiment" provided by *Fortnite*'s removal in the wake of the Project Liberty.

The experts do not appear to disagree that the removal of *Fortnite* is a "degradation in quality" of the App Store and iOS devices in general.[275] Dr. Evans thus opines that *Fortnite's* removal provides an empirical study of user substitution in response to changes in quality in iOS and analyzed the data for ten weeks after its removal. Given the loyal *Fortnite* following, Dr. Evans evaluated iOS-only users. For this group, he found they only shifted 16.7% of game play minutes to other platforms and 30.7% of spending to other platforms. Applying this substitution rate to Epic Games' profit margins, Dr. Evans concludes that similar developers would not find it profitable to abandon the iOS platform because they could not make up the spending on other platforms, even if Apple raised its commission.[276]

First, Dr. Evans' decision to limit his analysis to iOS-only *Fortnite* players is questionable because it ignores other market evidence that iOS players engaged in substitution before and after the hotfix. Dr. Evans cites evidence that **[**94]** 90.9% of iOS *Fortnite* players play only on iOS. This is consistent with general statistics that 82.7% of *Fortnite* players play on a single platform. That said, Dr. Hitt's data shows that 35.9% of iOS *Fortnite* players multi-home. This is consistent with evidence that between 32% and 52% of all *Fortnite* players multi-home. Moreover, Dr.

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[272] Ex. Expert 1 (Evans) ¶¶ 48, 89.

[273] *Id.* ¶¶ 74; Ex. Expert 6 (Hitt) ¶¶ 28; DX-4759.001; Trial Tr. (Simon) 390:5-19; Trial Tr. (Grant) 669:22-24, 733:7-13; Trial Tr. (Fischer) 873:3-8.

[274] Dr. Hitt testified that up to 26% of iOS users switch to Android at the end of each upgrade cycle. Ex. Expert 6 (Hitt) ¶ 209. He agreed, however, that this creates no more than three to four percent change in the installed base each year. Trial Tr. (Hitt) 2162:12-2163:15.

[275] Ex. Expert 1 (Evans) ¶ 127. As such, Dr. Evans opines that it supports use of a "SSNIP" test commonly used to test monopoly power. *Id.* ¶ 133; Trial Tr. (Evans) 1528:12-1530:1, 1533:1-1534:8. The Court discusses the SSNIP test and its applicability below.

[276] *See* Ex. Expert 1(Evans) ¶¶ 124-134; PX-1080; Trial Tr. (Evans) 1521:2-1535:7. Dr. Evans opines that this is an "upper bound" of substitution because most other mobile games, unlike *Fortnite*, lack cross-wallet, cross-play, and other features that make it easy for *Fortnite* players to switch devices. Dr. Evans further lowers the substitution estimate after accounting for the "natural cross-progression" from iOS to "more serious" gaming on PCs and consoles. However, as Dr. Hitt correctly notes, this constitutes substitution even if it is not directly responsive to the quality decrease. Ex. Expert 1 (Evans) ¶ 129; Trial Tr. (Evans) 1527:10-14; Ex. Expert 6 (Hitt) ¶ 252.

Hitt cites evidence that the iOS *multi-homers* account for 85% of *Fortnite* revenue from iOS in the first half of 2020, which makes them particularly important.

Dr. Evans' focus, however, ignores this important group which reveals important insight: players who access *Fortnite* on iOS still spend the overwhelming majority of their *Fortnite* time and money on non-iOS platforms.[277] By limiting his analysis to players who use iOS as the *primary Fortnite* platform (*i.e.*, the platform where they spend most of their playtime and spending), the Court finds Dr. Evans likely underestimates overall substitution.[278]

Second, and ironically, the *Fortnite* data *does* show substitution. Dr. Hitt, analyzing the same data, found that 22% to 38% of strict iOS-only—users who never accessed **[*962]** *Fortnite* on a non-iOS platform before—shifted their game time and spending to other **[**95]** platforms after the iOS hotfix. Significantly, after accounting for iOS users who already played on other platforms (of whom up to half increased their spending on other platforms), Dr. Hitt shows that Epic Games retained 81% to 88% of its iOS player revenue after Project Liberty. Dr. Evans criticizes this conclusion, arguing that it does not show substitution but rather shows that non-iOS spenders continue to spend outside iOS. The experts agree that Epic Games retained up to half of its iOS-only user revenue.[279]

In conclusion, the *Fortnite* data is basically mixed. Up to a third of iOS *Fortnite* users already play on other devices, which makes their ability to substitute a given. Another 20% undertook at least some substitution after *Fortnite* removal, including by accessing devices on which they previously played *Fortnite*. Although this was not enough to make up Epic Games' losses, the Court finds the time period of substitution significant: Dr. Evans analyzed substitution for only the ten weeks following *Fortnite's* removal. The Court finds it likely that a longer analysis would show greater substitution both because of the typical upgrade cycle for expensive devices (longer than ten weeks) **[**96]** and because of the timing of this Court's preliminary injunction order (immediately after the ten-week period). In particular, users may have waited to see whether this Court would reinstate *Fortnite* to the App Store before making a different purchasing decision or waited for Season 15 for which we have no data. Moreover, because *Fortnite* was removed simultaneously from Google Play and the iOS App Store, the experiment does not account for substitution between iOS and Android.

For all of these reasons, the *Fortnite* data does not reliably show lack of user substitution among game transactions on different devices.

b. <u>Dr. Rossi and Dr. Evans</u>

Last, Epic Games proffers a survey performed by Dr. Rossi and Dr. Evans' use thereof.

Beginning with the survey, Dr. Rossi asked iPhone and iPad users whether they would change their spending if iOS in-app purchases were slightly more expensive. Specifically, Dr. Rossi asked respondents to think about their in-app purchases from the App Store in the last thirty days and imagine that the spending was five percent higher. 81% of the respondents giving definite answers indicated that they would not have changed their purchases. The remainder indicated opposite **[**97]** with only 1.3% switching to non-iOS phones or tablets. Dr. Rossi and Dr. Evans use this data to conclude that consumer demand for iOS app transactions is relatively inelastic.[280]

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[277] Specifically, *Fortnite* players with iOS accounts spend almost 90% of their play time and 87% of their spending outside of iOS. Ex. Expert 6 (Hitt) ¶ 73. Another explanation for the different conclusions rests on Dr. Evans' use of sampling: Dr. Hitt testified that Dr. Evans' confidence intervals are well in line with his own estimates. Trial Tr. (Hitt) 2145:10-22.

[278] Ex. Expert 1 (Evans) ¶ 126; PX-1054; Ex. Expert 6 (Hitt) ¶¶ 68-75, 94, 249-50; DX-4767. Of course, the existence of iOS-only players who do not substitute may suggest a subset of the market for whom iOS *Fortnite* play is key. Trial Tr. (Evans) 2371:1-14. However, Epic Games did not define a market with respect to these users but for all iOS game transaction users.

[279] Trial Tr. (Hitt) 2142:24-2145:5; Ex. Expert 6 (Hitt) ¶¶ 97, 251; DX-4824; Trial Tr. (Evans) 2371:22-2376:6; Ex. Expert 16 (Evans) ¶¶ 26, 29-31.

[280] "Relatively inelastic" is not formally inelastic (which requires an elasticity less than - 1), but it is less elastic than comparable markets. Trial Tr. (Evans) 1650:8-1651:15; Ex. Expert 3 (Rossi) ¶¶ 4-14; PX-1089; Ex. Expert 1 (Evans) ¶¶ 136-138.

Dr. Rossi's survey suffers from several methodological flaws, including the language and timing of the survey. First, the formulation of the questions was confusing. The questions did not convey that the price changes were intended to be both in future and permanent (or nontransient). Instead, his approach was explicitly backward looking. He failed to use simple phrases like "in the future" which had been considered. He claims his final, and untested language, was intended to be more clear.[281] A comparison of the language **[*963]** demonstrates otherwise. By failing to make the distinction with the future, Dr. Rossi also injected the notion of customer satisfaction into the survey which likely impacted the result.[282] His justification that he conducted "structured pretests" is manufactured and not recognized in the industry.[283]

Further, given that the survey was conducted on January 20, 2021 and asked about spending in the "last 30 days," Dr. Rossi failed to account for holiday spending which is likely to be idiosyncratic. **[**98]** Holiday spending includes sales and price changes before, during, and after the holidays, and Dr. Rossi admitted that the results may vary for "for some products."

Next, the survey concerned all app purchases, not just game transactions, and ignored plaintiff's key demographic. Dr. Evans expressly testified that in-app transactions are not part of his proposed product markets. Yet those are the only purchases which Dr. Rossi tested.[284] Dr. Rossi also claims he did not want to include minors because he would have to obtain parental approval, but that proved not to be a problem for Dr. Hanssens, Apple's expert, who did survey minors.[285] Given the magnitude of the issues before the Court, Dr. Rossi choices did not ultimately assist in determining how a key demographic would make substitution decisions in the relevant market.

Dr. Rossi's trial testimony revealed that he was more interested in a result which would assist his client's case than in providing any objective ground to assist the Court in its decision making. Given Dr. Rossi's lack of credibility, the Court strains to adopt his findings. Although the survey is far from perfect for the reasons stated above, the Court finds it weakly probative, **[**99]** at most, that increases in in-app purchase content prices would not lead to significant substitution to other devices.[286]

Dr. Evans uses Dr. Rossi's survey to conduct a "SSNIP" test to confirm that iOS app distribution is a relevant aftermarket.[287] The Department of Justice developed the test in 1982 to analyze mergers and determine what is the smallest market in which a hypothetical monopolist could impose a "*S*mall but *S*ignificant and *N*on-transitory *I*ncrease in *P*rice," usually 5 percent over the course of 12 months. Not only is this not a merger context, but as noted, the survey did not test anywhere close to an appropriate period.[288] Despite the Court's misgiving of the accuracy of any opinion stemming from this survey, it **[*964]** reviews Dr. Evans' reliance thereon to perform a SSNIP analysis.

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[281] Compare versions in PX-1920; Trial Tr. (Rossi) 2512:15-2513:13, 2526:5-10, 2532:13-21, 2528:12-2529:2; Ex. Expert 7 (Lafontaine) ¶¶ 76-79; Trial Tr. (Evans) 1649:9-23. Dr. Rossi conducted pre-testing and interviews on the initial survey design, which asked about spending in a "similar 30-day period in the future." It is not clear whether the pre-test adequately asked about the transience issue for either past or future spending. *See* PX-1920.3; Trial Tr. (Rossi) 2521:23-2544:11.

[282] Trial Tr. (Hanssens) 3541:23-3543:3.

[283] Trial Tr. (Rossi) 2523:8-2, 2525:23-2527:16, 2529:20-23; *see also* Trial Tr. (Hanssens) 3539:10-13 (explaining that the terminology of "structured and "unstructured pretests" is not standard).

[284] Of course, these first two issues may cancel each other out: since games are disproportionately likely to use in-app purchases, an increase in in-app purchases is effectively an increase in iOS game (and subscription) prices.

[285] Trial Tr. (Rossi) 2534:24-2536:19, 2545:9-22.

[286] *See id.* 2509:16-2510:25. Apple also faults Dr. Rossi for the low levels of respondent spending on in-app content. However, those rates appear to be in line with the App Store median. *See* Ex. Expert 3 (Rossi) ¶ 49.

[287] Ex. Expert 1 (Evans) ¶ 139.

[288] *Id.* ¶¶ 35, 136, 254.

As an overview, Dr. Evans first calculates an "effective" commission rate of 27.7%, and then determines that a 5% increase to consumers would correspond to a 30% increase in developer commissions. Because even this large increase in commissions would be profitable for Apple due to the lack of consumer switching, Dr. Evans concludes that iOS distribution is its own market.[289] Dr. Evans confirmed that **[**100]** consumer response to long-run price changes may be substantially different than for short-run ones.[290] This feature is important to Dr. Evans' analysis. As discussed above, Dr. Rossi's failure to survey properly and confirm respondents' understanding of a non-transient price increases leaves the adequacy of the survey for a SSNIP analysis in question.

Economists lack consensus about how to design hypothetical monopoly tests properly to account for indirect network effects. While Dr. Evans has proposed one approach, another preeminent economist, Dr. Schmalensee, believes it is conceptually flawed. Even Dr. Evans himself has previously written that "even if it is technically possible to extend the hypothetical monopoly test to two-sided platforms, the challenges of implementing the SSNIP test empirically in two-sided markets are likely to be overwhelming in practice."[291]

Despite this self-acknowledged difficulty, Dr. Evans uses the SSNIP test anyway. The Court finds Dr. Evans' SSNIP analysis fatally flawed by several standards, including his own. Dr. Evans has acknowledged that a double-sided SSNIP test should include simultaneous testing of both sides of the market using at least 14 inputs. **[**101]** He has not followed that methodology here. Nor did Dr. Evans take into account indirect network effects in his SSNIP analysis.[292]

Indeed, Dr. Evans conducts his foremarket and aftermarket SSNIP tests on the consumer side and on the developer side separately. Then, he effectively dismisses indirect network effects by claiming that SSNIP on both developers and consumers would be profitable, because neither side would respond to the one-sided price increases he tested. As Professor Schmalensee explained, this is implausible: a price increase would reduce consumer demand for apps, which in turn would make app sales less profitable for developers, and developers may in turn react by reallocating engineering or marketing resources even if they do not leave the platform entirely. Notably, Dr. Evans does not perform *any* actual SSNIP calculations testing both sides of the market simultaneously, as required by his own research.[293]

Dr. Evans' SSNIP analysis is further based on flawed survey data from Dr. Rossi, which affects the validity of any conclusions derived therefrom. Dr. Rossi's survey and the resulting data suffer from several critical flaws.[294] The Court will not rehash the entirety of these flaws **[**102]** here. **[*965]** Suffice it to say, three errors are particularly notable:

First, the survey focuses entirely on the price of in-app purchases—which, as noted above, are *not* even within the alleged relevant market advanced by Dr. Evans—while ignoring other transactions, like initial downloads and updates, that are in the alleged relevant market advanced by Dr. Evans. As a result, Dr. Evans's analysis is unreliable and provides no insight into substitution in any alleged iOS app distribution market.[295]

Second, the price increases discussed in the survey—when confined to just 30 days—also were far from significant, ranging from less than $0.25 to $1.50. And the significance of the price increases were dampened even further by

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289 *Id.* ¶¶ 136-144; PX-1050; Ex. Expert 6 (Hitt) ¶ 179.

290 Trial Tr. (Evans) 1652:23-1653:02.

291 Trial Tr. (Evans) 1668:5-1669:2, 1667:16-23; Trial Tr. (Cragg) 2302:7-16; Ex. Expert 8 (Schmalensee) ¶¶ 63, 81-82.

292 Ex. Expert 8 (Schmalensee) ¶¶ 84, 88; Trial Tr. (Schmalensee) 1897:5-1899:8.

293 Ex. Expert 1 (Evans) ¶¶ 133, 138-139, 141, 262, 68; Trial Tr. (Schmalensee) 1898:10-14.

294 Trial Tr. (Schmalensee) 1897:20-23 (Dr. Evans relies on Professor Rossi's survey, which is "far from perfect"); Ex. Expert 7 (Lafontaine) ¶ 74.

295 Trial Tr. (Rossi) 2549:13-2550:1; Trial Tr. (Evans) 1646:16-1647:5; Ex. Expert 7 (Lafontaine) ¶ 75.

the survey's discussion of switching costs.[296] This is despite the fact that the App Store is highly dependent on a narrow subset of high earning gaming apps and an equally narrow subset of high and medium consumer spenders. In other words, these consumers and developers were not adequately captured by Dr. Rossi's survey, which reflected only small increases in price.

Finally, the survey was limited to the United States, not the global market that Dr. Evans posits.[297]

Given **[**103]** the flaws in both the underlying survey and Dr. Evans' calculations thereon, the Court finds this evidence wholly unpersuasive of substitution.

c. Mobile Devices (Tablets and the Switch)

As outlined above, Apple's product market is all digital gaming transactions. It therefore focuses on platform substitutes for those transactions. Apple suggests two categories of platforms: (1) mobile devices (tablets and the Switch) and (2) non-mobile devices.

iPads are indisputably part of the Apple ecosystem. Evidence shows that 60% of iPhone users also use an iPad (tablet), so they have access to both devices. Documents also show that Apple seeks to decrease switching costs from iPhones and iPads to "lock customers into [its] ecosystem." Thus, tablet transactions are substitutes for those on smartphones because they are part of the same ecosystem and users have access and easy switching ability between the devices.[298]

[*966] In evaluating Apple's market definition, Dr. Evans excludes tablets on the sole ground that they lack certain hardware features, like a cellular connection. This is not persuasive: as Dr. Hitt notes, tablets possess most of the unique hardware features Dr. Evans assigns to smartphones. **[**104]** Epic Games has not demonstrated that the slight remaining hardware differences are sufficient to prevent substitution for smartphone and tablet game transactions. Accordingly, tablet game transactions are substitutes for smartphone game transactions and part of the same market.[299]

d. Non-Mobile Devices (Consoles and PCs)

Consumers frequently own multiple devices and could in theory substitute across them for game transactions. Surveys conducted by Apple show that gamers are especially likely to use several devices, with 56% playing on both mobile and non-mobile platforms.[300]

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[296] Trial Tr. (Rossi) 2539:13-2540:16, 2543:12-2544:25. The Court further notes that Dr. Rossi's survey appears have been inappropriately based on an increase in the total cost of the in-app purchases and subscriptions, instead of based on an increase in the amount of Apple's commission rate. The Department of Justice website, which Dr. Evans approvingly cites in his report, notes that in cases involving an analogous transaction in oil pipelines, the appropriate SSNIP analysis is based on the cost of transporting the oil (amount from the commission rate), not on the cost of the oil at the terminal end point (total cost of the in-app-purchases). *See* Ex. Expert 1 (Evans) ¶ 253, n. 113; *see also* U.S. Department of Justice and the Federal Trade Commission, "Horizontal Merger Guidelines," August 19, 2010, at § 4.1.2, https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

[297] Trial Tr. (Evans) 1653:3-16.

[298] Ex. Expert 1 (Evans) ¶¶ 43-44, 75; Ex. Expert 6 (Hitt) ¶ 189; Trial Tr. (Federighi) 3357:15-18; Trial Tr. (Fischer) 874:24-875:11; PX-0416; DX-3174.003; PX-0892. Moreover, Epic Games' arguments to the contrary contradict its own theory that users and developers select "ecosystems" rather than devices. As Dr. Evans explains, "Apple and Google have created highly differentiated ecosystems around their respective operating systems," and developers and consumers select devices based on the ecosystem.

[299] Ex. Expert 6 (Hitt) ¶¶ 230-233; Ex. Expert 1 (Evans) ¶ 43 n.3.

[300] Ex. Expert 6 (Hitt) ¶¶ 57, 61; DX-3174; Trial Tr. (Wright) 550:3-10, 631:19-22.

However, there are two issues with this data. First, it inappropriately uses statistics about gamers as a whole to draw conclusions about iOS gamers.[301] Apple has not shown that gamers as a whole are representative of iOS gamers. It may well be that 55-60% of U.S. gamers play on more than one device, but that *iOS* gamers switch considerably less often. This outcome is plausible: Apple's evidence shows that large portions of the population—including young children, older adults, and most teenage girls—play predominantly on mobile. Multi-platform play, on the other hand, is driven by different segments. Thus, Apple's own evidence **[**105]** shows that mobile gamers are *not necessarily* like other gamers.[302]

Recognizing this issue, Apple offers evidence by Dr. Hanssens, who conducted two surveys on iOS App Store users and *Fortnite* players, respectively. The first survey shows that 99% of App Store consumers use or could use at least one other non-iOS device. The second survey shows that 99% of iOS *Fortnite* players use or could use non-iOS devices. Moreover, 94% of iOS *Fortnite* players played games on non-iOS devices in the last 12 months.[303]

While Dr. Hanssen is considerably more credible and independent that Dr. Rossi, Dr. Hanssen's survey is also severely flawed and ultimately unreliable.[304] First, he reports that 30-43% of respondents "regularly" use a Microsoft Windows phone even though Microsoft had 0% market share in smartphones in 2018 and no longer sells phones. This data point alone calls into question the reliability of the survey overall.[305] Second, Dr. Hanssen's surveys do not address substitution because **[*967]** he only measures access. Dr. Hanssen acknowledges this: the surveys "did not address substitution at all" because doing so would require questions about willingness and ability to switch, as well as actual **[**106]** behavior in different circumstances. Thus, the ultimate value of Dr. Hanssens's survey is limited.

With respect to actual substitution, Apple relies solely on three "natural experiments" examined by Dr. Hitt.[306]

First, Dr. Hitt considers users who downloaded a console or PC game "companion" app, such as the Xbox companion app as a proxy for those who own or play games on a console or a PC. Dr. Hitt finds that users who download the console or PC companion app increase their iOS game spending at a slightly lower rate—19% as opposed to 24% growth in iOS game spending as compared to a control group who did not have the companion app. Because V-Bucks are the same on both platforms, Dr. Hitt concludes that the use of both devices shows substitution. That said, the group that downloaded the companion app spent *more* on iOS games than the group that did not. This is consistent with complementary gaming if spending increases.[307] Both conclusions are logical.

Second, Dr. Hitt considers the natural experiment provided by the entry of *Fortnite* on the Nintendo Switch. Dr. Hitt finds that when *Fortnite* launched on Switch, iOS *Fortnite* spending and playtime decreased. Dr. Hitt acknowledges that *Fortnite* ***[**107]*** spending across *all* platforms decreased during that time by 33%. Thus, to control for the general decrease, he compares iOS spending for users who played and did not play *Fortnite* on Switch. Dr. Hitt

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[301] As explained below, Apple also uses statistics about *Fortnite* to draw conclusions about the gaming industry. That suffers from a similar problem: no evidence in the record shows that *Fortnite* is representative of other games.

[302] DX-4170.008, .024.

[303] DX-4663.001; DX-4754.001; Ex. Expert 6 (Hitt) ¶ 58.

[304] Notably, Dr. Hanssens was the only expert to explain that his work was not directed by attorneys; nor was he aware of how his work fit into Apple's strategy thus, demonstrating independence. For this reason, the Court finds Dr. Hanssens quite credible.

[305] To Dr. Hanssens' credit, he readily acknowledges these issues and eventually removed the respondents who reported Windows phone use. However, this amounts to 30-43% of an already small survey pool rendering the exercise unreliable. Trial Tr. (Hanssens) 3580:15-3581:14; 3568:12-17, 3570:3-14, 3574:2-8, 3576:11-3578:17, 3551:18-3552:18; DX-4312.178; Ex. Report 6 (Hitt) ¶ 71.

[306] Trial Tr. (Hanssens) 3551:22-3554:6, 3557:11-13; Ex. Expert 6 (Hitt) ¶¶ 82-99; *see also* Ex. Expert 13 (Cragg) ¶¶ 43-48.

[307] Ex. Expert 6 (Hitt) ¶¶ 69-72, 82-87; DX-4792; Ex. Expert 13 (Cragg) ¶ 56.

then concludes that iOS *Fortnite* players who played on Switch played and spent relatively less time on iOS. Again, the evidence is consistent with substitution but does not establish it.[308]

Next, Dr. Hitt's data also shows that players who used both iOS and Switch increased their *overall* spending and playtime in *Fortnite*. The absolute numbers for iOS *Fortnite* revenue actually increased after the introduction of Switch. Dr. Cragg converts this data to plausibly opine that this shows complementary playing—users who acquired a second device became more engaged in the game—rather than substitution. Using this lens, the evidence is as consistent with complementary playing as with substitution.[309]

Third, Dr. Hitt analyzes *Fortnite* data following its removal from iOS. As described above for Dr. Evans, this evidence is mixed at best: while some iOS-only *Fortnite* players switched, that number was not significant enough to recoup losses and represented only 16% of playtime minutes and at most half of Epic **[**108]** Games' revenue from these users. Thus, the Court does not consider it persuasive either way.[310]

Accordingly, Dr. Hitt's and Dr. Cragg's analyses show evidence of both substitution and complementary playing without a definitive answer either way.[311] Ultimately, **[*968]** the Court proceeds without resolving the issue on this record.

3. *Gaming v. Non-Gaming and Apple's App Store*

As explained above, Epic Games argues that its aftermarket should be defined to include all apps not just gaming apps as the distribution on the App Store is not limited.

The evidence demonstrates that the App Store, in its current form, generates virtually all its revenue upon a business model now rooted in the gaming market: both on game developers and gaming consumers. This is proved by both financial considerations and other notable distinctions between gaming and non-gaming apps. The Court notes eight other significant differences which exist between game apps and non-game apps as the Court considers the relevant product market.

First, in recent years, game app revenues constitute between 60-75 percent of all app transactions for Apple's App Store. Indeed, game app transactions are responsible for a significant majority of the **[**109]** revenue generated in the App Store.[312]

Second, there is industry and public recognition of a distinct market for digital game app transactions as opposed to non-gaming apps. Indeed, many general app stores on mobile and tablet devices, including the App Store, Google Play app store, and the Amazon App Store, distinguish between game transactions and non-game transaction by categorizing game apps into a separate tab of apps entirely. This distinction reflects the recognition by the platforms that consumers distinguish between these types of apps, and that both consumers and platform owners would benefit from having games apps separately gathered in one place.[313]

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308 Ex. Expert 6 (Hitt) ¶¶ 73-86; DX-4822; DX-4823; Trial Tr. (Schmalensee) 1935:22-1936:4.

309 Ex. Expert 13 (Cragg) ¶¶ 50-64; PX-1023; PX-1022; Trial Tr. (Schmalensee) 1935:22-1936:16; Trial Tr. (Cragg) 2280:15-23.

310 Dr. Hitt also relies on evidence from Spotify and Netflix subscription option removals from iOS apps. As this evidence concerns subscriptions, not games, the Court does not consider it for the reasons stated above.

311 Ex. Expert 6 (Hitt) ¶¶ 94-105.

312 The precise numbers are found in sealed documents. *See* Ex. Expert 6 (Hitt) ¶ 117 (62.9% in 2018); Trial Tr. (Hitt) 2126:16-19 (same); DX-4178.006 (76% in 2017); PX-0059.007 (68% in 2019). As previously discussed, *supra* n.243, the Google Play app store appears to be similarly built and reliant upon revenues generated from gaming apps and transactions. *See also* DX-3913.004-.013.

313 Trial Tr. (Schmid) 3205:4-11; Ex. Expert 6 (Hitt) ¶ 126, Fig. 35; Ex. Expert 7 (Lafontaine) ¶ 26; DX-5552.

Both Apple's App Store and internal business structure support and reflect this division. On the App Store, editors consider a different set of factors when curating games for spotlight marketing (*i.e.* the "Today" page) than they do when curating other non-gaming apps. Moreover, Apple internally tracks the categories differently, as Apple routinely tracked "Games" billings separately from other parts of the App Store business. Further, there are two heads of business development for the division spearheading the App **[**110]** Store: one division head specifically for games and another division head for all non-gaming categories.[314]

Third, game app transactions are a distinct product because they exhibit peculiar characteristics and uses. Game apps and their transactions are not substitutes for non-game apps, which include a diversity of categories and purposes. Indeed, Dr. Evans conceded and confirmed in a lengthy exchange that game transactions are *not* substitutes for non-game transactions on the App Store. Epic Games' other expert witness, Dr. Cragg, contradicted Dr. Evans on this point by asserting the opposite—that non-game transactions are substitutes for game transactions.[315] The **[*969]** Court finds Dr. Evans more credible on this point.[316]

Fourth, game developers often use specialized technology to create their game apps. For example, specialized middleware tools like the Unity engine and Epic Games' *Unreal Engine* are primarily used by game developers. Using these specialized tools and graphics engines, game developers tend to "really push the limits of what graphics processing can do" to the extent that they are "in a different category" from other developers as a result.[317]

Fifth, game apps have **[**111]** distinct consumers and producers: gamers and game developers. Gamers are recognized as a discrete, albeit diverse, subset of app consumers. Moreover, game developers, including Epic Games, tend to specialize in the development of game apps and related gaming software. For instance, among the set of developers who had sold at least one game or item of in-app content in 2019, 88% of their App Store revenue was derived from game apps. Indeed, as Michael Schmid, Head of Game Business Development at Apple, remarked:

> So game developers are quite separate from app developers in many circumstances. There are exceptions like big organizations like Microsoft that, you know, have Microsoft Office as well as, you know, Minecraft and other - other games.
>
> But generally speaking, game developers are focused on just developing games, and app developers are often focused on a single app or a suite of apps.[318]

Sixth, game app transactions differ in pricing structure, including in monetization models and effective prices, from non-gaming app transactions. In general, games monetize in different ways than do non-gaming apps. For example, game apps make nearly all of their revenue from in-app purchases (non-subscriptions). **[**112]** This differs from other major categories of apps, where music, fitness, and other apps make virtually all of their revenue from subscriptions. Indeed, there were no game apps among the top subscription apps for fiscal year 2019.[319]

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[314] Trial Tr. (Fischer) 933:12-20; Trial Tr. (Schmid) 3205:4-11, 3226:8-12; Ex. Expert 6 (Hitt) ¶ 127; Ex. Expert 7 (Lafontaine) ¶ 26; DX-4178.006; DX-4399.008.

[315] Ex. Expert 6 (Hitt) ¶ 117, Fig. 30; Ex. Expert 7 (Lafontaine) ¶ 26; Trial Tr. (Evans) 1641:7-1642:24; Trial Tr. (Cragg) 2301:19-2302:1.

[316] Apple demonstrated on cross examination that Mr. Cragg was willing to stretch the truth in support of desired outcome for his client. By contrast, Dr. Evans was willing to concede points contrary to the position of his client. The Court finds this difference significant in weighing the credibility of each.

[317] Trial Tr. (Schmid) 3226:23-3227:13; Ex. Expert 6 (Hitt) ¶ 265. The Court notes, however, that, at least with respect to *Unreal Engine*, there is also evidence that it has some application beyond the game creation. *See supra* Facts § I.B.1.

[318] Trial Tr. (Schmid) 3226:13-22, 3350:5-3352:3; Ex. Expert 6 (Hitt) ¶ 125, Fig. 34; DX-3248.019-.020.

[319] Trial Tr. (Lafontaine) 2045:3-9; Trial Tr. (Hitt) 2188:18-2189:8; Trial Tr. (Schmid) 3227:14-24 ("[M]any app developers now are really focused on subscription revenue and growing a subscription business, whereas game developers not as much."), 3230:1-20; Ex. Expert 6 (Hitt) ¶¶ 121-23, Figs. 30-32; PX-0608.016.

Moreover, the pricing and effective commission paid on each transaction differs significantly between game apps and non-game apps. Specifically, there is considerable variation in the average transaction price between app genres, including game apps and other apps. For example, the average transaction price for game apps is $ 9.65, while the averages for other app genres range between $ 7.11 for photo and video apps and $ 14.10 for health and fitness apps. Similar variation between game apps and non-game apps is found in the average download price for apps and the **[*970]** effective commission paid on each transaction.[320]

Seventh, game apps are distributed by specialized vendors. The availability of game apps versus non-game apps in the wider market different significantly. Indeed, game apps have multiple avenues for distribution through various transaction platforms and devices, which differs in both kind and degree from those available to non-gaming apps. Some of these **[**113]** devices and platforms available to gaming apps are specifically designed for such games—and not non-gaming apps. For example, game consoles (PlayStation, Xbox, Switch) are designed with gaming as their primary purpose with other limited related entertainment functionality (*e.g.*, film, music, and television streaming). Similarly, the game transaction platforms available on these devices focus almost exclusively on game transactions, including the PlayStation Store, Xbox Game Store, and Nintendo eShop.[321]

Eighth and finally, platforms providing game app transactions are subject to unique and emerging competitive pressures. The rise of hybrid console platforms along with cross-platform games and cross-platform gaming services (*e.g.*, cloud-based streaming services) reflect the ongoing dynamic nature of the wider gaming market. For instance, Nvidia's GeForce Now game streaming platform (available via web browsers or the GeForce Now client) only became available in February 2020 and has a library of 850 games (including *Fortnite*, though planned to be released in October 2021 on GeForce's iOS game streaming service), with 2,500 games to be added. Microsoft similarly is in development of its own **[**114]** cloud gaming service, internally named xCloud, that will be added to its Game Pass Ultimate Subscription.[322] With these numerous alternative distribution options, developers are having to determine in the initial planning which platforms to utilize in creating game apps. This compares to non-game app developers who generally distribute on more limited devices and platforms. As an example: Mr. Schmid credibly remarked on the state of the market for developers:

> On the game side it's very common. Some of our biggest game developers will have games on many different platforms. Sometimes those games are cross-platformed. Sometimes they are specific to mobile or even exclusive to a console in certain cases.
>
> On the app side, same thing except it's more typical that an app, for instance, like Yelp would be -- the entity itself, the company, and the app would only be, you know, one app as opposed to a game developer that would have many games.[323]

Accordingly, in light of the foregoing, the Court finds that there is a substantial **[*971]** distinction between the transactions for gaming apps and non-gaming apps.

C. Epic Games: Facts Relevant to iOS In-App Payment Processing Aftermarket

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[320] Ex. Expert 6 (Hitt) ¶¶ 123, 124, Figs. 32-33.

[321] Ex. Expert 6 (Hitt) ¶ 117; Ex. Expert 7 (Lafontaine) ¶ 34; Ex. Expert 8 (Schmalensee) ¶ 104; Trial Tr. (Wright) 555:13-556:5, 583:8-18; Trial Tr. (Grant) 697:14-20.

[322] Ex. Expert 8 (Schmalensee) ¶¶ 104, 107; Trial Tr. (Wright) 565:20-566:1; Trial Tr. (Patel) 422:12-15, 427:4-17, 429:11-14, 461:13-462:5, 477:7-15, 526:15-18; Trial Tr. (Sweeney) 176:22-177:12. *See also infra* Facts § II.D.3.d. Indeed, the Court notes that the only third-party app stores that Epic Games identified during the course of the bench trial as having sought to be offered through the App Store are "gaming app stores," and not "any other kind of store." *See* Trial Tr. (Evans) 1552:22-1553:8. This suggests that there are indeed competitive pressures and consumer demands for games apps that are incentivizing and encouraging game developers to reach consumers through multiple platforms.

[323] Trial Tr. (Schmid) 3207:10-18.

Epic Games' **[**115]** assertion that the iOS in-app payment processing aftermarket is a relevant antitrust market relies on the assumption that Apple maintains a "lawful monopoly in the iOS app distribution market."[324] Because Epic Games cannot show such a market even exists, the argument fails at the outset.

Nevertheless, the Court addresses the argument because another fundamental problem exists. As discussed below, one must define an antitrust market in terms of the relevant product. If there is no product, such as with the mobile operating systems discussed above, there can be no market based thereon. Plaintiff's proposal begs the question of whether IAP is a product.

Apple's IAP or "in-app purchasing" system is a collection of software programs working together to perform several functions at once in the specific context of a transaction on a digital device. Apple uses the system to manage transactions, payments, and commissions within the App Store, but it also uses the system in other "stores" on iOS devices, such as "the iTunes Store on iOS, Apple Music, iCloud or Cloud services" and "physical retail stores".[325] The system is not something that is bought or sold.

IAP is not integrated into the App Store **[**116]** itself, even though it is integrated into an iOS device.[326] By "integrated," the Court only means that the application has been engineered specifically to work seamlessly on the device. Neither side focused on the engineering to find otherwise.

More specifically, Apple's IAP, as used here, is a secured system which tracks and verifies digital purchases, then determines and collects the appropriate commission on those transactions. In this regard, the system records all digital sales by identifying the customer and their payment methods, tracking and accumulating transactions; and conducts fraud-related checks. IAP simultaneously provides information to consumers so that they can view their purchase history, share subscriptions with family members and across devices, manage spending by implementing parental controls, and challenge and restore purchases.

Apple also intends the system to provide the customer with a single interface which can be used, and trusted, with respect to all purchases regardless of the developer. Importantly, the system has become more sophisticated over time, but the record does not detail the various versions.[327] Notably the IAP system requires developers to **[**117]** independently verify delivery of inapp purchasing content; it cannot verify that kind of delivery itself.[328]

With respect to the commission and the transfer of money between a developer and both Apple and the consumer, Apple engages third-party payment processors.[329] **[*972]** Given the volume of transactions at issue, Apple pays those processors somewhere in the range of one to two percent.[330]

The Court agrees that simple payment processing can occur outside of IAP and plaintiff points to examples of this happening in 2009.[331] However, those examples only concern simple payment processing, *not* all the functionality

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[324] Ex. Expert 1 (Evans) ¶ 220.

[325] Ex. Depo. 12 (Gray) 65:17-22, 66:23-67:2, 110:2-7, 110:9-15; PX-0523; PX-0526.

[326] *See, e.g.*, PX-0526.

[327] PX-0526; Ex. Depo. (Forstall) 252:06-252:13, 252:16-254:10; Trial Tr. (Schiller) 2796:4-2799:11.

[328] Ex. Depo. 12 (Gray) 112:18-114:10.

[329] Trial Tr. (Schiller) 2796:4-2799:11; Ex. Expert 8 (Schmalensee) ¶¶ 136, 161-62; Trial Tr. (Evans) 1565:3-6; 1664:16-18 (Q: ". . . I'm asking you if in your relevant market, Apple is a competing payment processor? A. Largely no.").

[330] Ex. Depo. 12 (Gray) 78:10-79:8.

[331] *See* Ex. Depo. (Forstall) 230:05-231:02; PX-0888; PX-1701.002; PX-1813; PX-1818.001; PX-1703.001-.002; PX-1709.001. Mr. Forstall testified that he generally remembered that developers were trying to collect payment directly through apps prior to 2009, but Epic Games introduced only stray emails to show this took place. Regardless, Epic Games does not claim that Apple had market power in 2009, so this theory of purported price increase has little relevance. Ex. Depo. (Forstall) 230:05, 230:16-

outlined in the preceding paragraph, including the functionality to ensure Apple received its commission. Nor do the examples show that Apple was waiving its commission for those developers. Rather, in December 2008, the product was new, so, by definition, in flux.

Epic Games ignores this other functionality to argue that Apple merely "matches" developers to consumers; a "matching" service.[332] This statement is partially true, but Apple has never argued that it levies a commission merely because it matches the developers with the customers. Apple argues that it uses this model to monetize its **[**118]** intellectual property against the entire suite of functions as well as to pay for the 80% of all apps which are free and generate no direct revenue stream from the developers other than the annual $ 99.00 developer fee.

Creating a seamless system to manage all its e-commerce was not an insignificant feat. Further, expanding it to address the scale of the growth required a substantial investment, not to mention the constant upgrading of the cellphones to allow for more sophisticated apps.[333] Under current e-commerce models, even plaintiff's expert conceded that similar functionalities for other digital companies were not separate products.[334] Under all models, Apple would be entitled to a commission or licensing fee, even if IAP was optional.[335] Payment processors have the ability to provide only one piece of the functionality. There is no evidence that they can provide the balance. Thus, the Court finds Epic Games has not shown that IAP is a separate and distinct product.[336]

D. Apple: Digital Video Game Market

Apple proposes that the wider global digital video gaming market is the relevant product market. Epic Games opposes this product market. The Court summarizes the evidence with respect to **[**119]** global digital **[*973]** video gaming. Given how the cases was litigated, much of the evidence relates to plaintiff specifically.

1. *Defining a Video Game*

The Court begins with a definition of "video game." Unfortunately, no one agrees and neither side introduced evidence of any commonly accepted industry definition. The evidence included one witness, Mr. Weissinger, who acknowledged that, even with his deep background in the gaming industry, he was not familiar with any industry standard definition of a video game.[337] Mr. Sweeney, for instance, defined a game as follows:

> I think game involves some sort of win or loss or a score progression, on whether it is an individual or social group of competitors. With a game you're trying to build up to some outcome that you achieve, as opposed to an open-ended experience like building a *Fortnite Creative* island or writing a Microsoft Word document. There is no score keeping mechanic and you are never done or you never win.[338]

230:18, 230:20-230:22; Trial Tr. (Evans) 1670:24-1671:2; *e.g.*, PX-1709. Moreover, it merely shows that the nascent business was in flux.

[332] As noted above, this aftermarket relies on the distribution market where the "match" is made. Payment is necessarily rendered thereafter. *See* Trial Tr. (Evans) 1596:8-1597:1.

[333] Trial Tr. (Malackowski) 3619:2-14; Trial Tr. (Fischer) 933:20-934:16 (describing Apple's investment in the 2017 redesign); Trial Tr. (Schiller) 2877:2-20.

[334] Trial Tr. (Evans) 1654:17-1655:22, 1657:8-22, 1659:25-1660:16 (agreeing that similar functionalities at Uber, Lyft, Grubhub, Wish, StubHub, DoorDash, Instcart, Postmates, Amazon Shopping, Wal-Mart, and eBay are not separate products).

[335] Ex. Expert 8 (Schmalensee) ¶ 157.

[336] Epic Games also relies on Section II.F. of its Findings of Fact which relates to iOS App Store Profitability. In evaluating IAP, the Court has focused on functionality.

[337] Trial Tr. (Weissinger) 1297:25-1298:2 ("Q. In your view, is there an industry standard definition of what could be called a game? A. I don't think so, no.").

[338] Trial Tr. (Sweeney) 328:13-19.

Mr. Trystan Kosmynka, Apple's current Head of App Review, admittedly "not an expert in gaming,"[339] noted that "games are incredibly dynamic," that "[g]ames have a beginning, [and] an end," and that "[t]here's challenges in place."[340]

At a bare **[**120]** minimum, video games appear to require some level of interactivity or involvement between the player and the medium. In other words, a game requires that a player be able to input some level of a command or choice which is then reflected in the game itself.[341] This gaming definition contrasts to other forms of entertainment, which are often passive forms enjoyed by consumers (*e.g.*, films, television, music). Video games are also generally graphically rendered or animated, as opposed to being recorded live or via motion capture as in films and television.[342]

Beyond this minimum, the video gaming market appears highly eclectic and diverse. Indeed, neither Mr. Sweeney's nor Mr. Kosmynka's descriptions, which focus on linear narratives and competitive modes, captures the diversity of gaming that appears to exist in the gaming industry today. Mr. Allison acknowledges that while some games are competitive, and are appropriately labeled as such on the Epic Games Store's website, other games are not necessarily competitive.[343] Given the **[*974]** genre of simulation games like *The Sims* or *SimCity*, or open-ended sandbox games like *Minecraft*, the Court cannot conclude that any linear **[**121]** narrative is required to qualify as a video game.[344] Thus, the Court concludes that video games include a diverse and eclectic genre of games, that are tied together at minimum through varying degrees of interactivity and involvement from a game player.[345]

Some of Epic Games' fact witnesses suggested in their testimony that *Fortnite* was much more than a video game: it is a metaverse. The Court previously discussed Mr. Sweeney's sincere beliefs as to *Fortnite* and the metaverse. A metaverse is a virtual world in which a user can experience many different things—consume content, transact, interact with friends and family, as well as play.[346] According to Mr. Sweeney, game play need not be a part of a user's metaverse experience, which is more to mimic the reality of life than to present game play.[347]

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[339] *Id.* 1190:10.

[340] Trial Tr. (Kosmynka) 1015:23-25.

[341] For instance, the Court is generally aware that one of the first commercially successful games, *Pong*, consisted of minimal input from the player of moving a paddle up or down. Of course, modern console, computer, and mobile gaming now permit dynamic inputs beyond just one input. For instance, modern controllers for gaming consoles now include at least two analog sticks, a directional pad (d-pad), and several buttons found on both the front face and side edges of each controller. *See generally* PX-2776 (Nintendo Switch); PX-2777 (Sony PlayStation 5); PX-2778 (Microsoft Xbox Series X).

[342] Though, the Court understands that some games, such as older *Mortal Kombat* games, have utilized motion capture technology in rendering graphics and animations in the game.

[343] Trial Tr. (Allison) 1241:16-1242:18. Although not in the record, the Court generally understands that: (1) *The Oregon Trail* is a game that simulates crossing the United States of America via the historic Oregon Trail in the nineteenth (19th) century; and (2) that *The Sims* is a life simulation game that simulates general modern life (*i.e.*, socializing, employment, romance, family, skills, etc.) through player characters known as sims.

[344] Of course, many games are also narrative driven as recognized by Mr. Kosmynka. Microsoft's internal review of *The Last of Us Part II*, a Sony PlayStation exclusive video game, confirms that at least some games are focused more on the narrative of the game as opposed to the game play itself. *See* PX-2476.002.

[345] Indeed, the genre of gaming seems to include a diversity of genres and styles, with no strict consensus on what a game *must* include in order to be defined as a game.

[346] Trial Tr. (Sweeney) 99:17-22; Trial Tr. (Weissinger) 1295:10-11 (describing a metaverse as a "social place where people can experience events together and hang out together"); Trial Tr. (Kosmynka) 1127:18-23 ("So my own understanding of the Metaverse is a . . . virtual world where you go with your particular character and are with players that you know, players you may not know, and you navigate around that Metaverse, which could include additional worlds in various experiences.").

As discussed, to Messrs. Sweeney and Weissinger "*Fortnite* is a phenomena that transcends gaming."[348] Because of the inclusion of these social and creative experiences, Mr. Weissinger testified that he would not consider the *Party Royale* and *Creative* modes as qualifying as a game.[349]

Plaintiff's characterization of *Fortnite* notwithstanding, the Court **[**122]** need not reach a conclusive definition of a video game or game because by all accounts, *Fortnite* itself is both externally and internally considered a video game.[350] Epic Games markets *Fortnite* to the public as a video game,[351] and further promotes events within *Fortnite* at video game related events.[352] Although *Fortnite* contains creative and social content beyond that of its competitive shooting game modes, there is no evidence or opinion in the record that a video **[*975]** game like *Fortnite* is considered by its parts (*i.e.*, the modes within the game) instead of in its totality. By both Mr. Sweeney and Mr. Weissinger's own descriptions, the metaverse, as an actual product, is very new and remains in its infancy.[353] At this time, the general market does not appear to recognize the metaverse and its corresponding game modes in *Fortnite* as anything separate and apart from the video game market.[354] The Court need not further define the outer boundaries of the definition of video games for purposes of this dispute.[355]

2. *General Video Game Market*

The **[**123]** wider video game market appears dynamic, innovative, and competitive. This wider market includes at least four distinct submarkets for digital game app distribution:

1. online mobile app transaction platforms (*i.e.*, the App Store, the Google Play app store, and the Samsung Galaxy Store);

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347 Trial Tr. (Sweeney) 99:23-25.

348 *Id.* 98:6-8; Trial Tr. (Weissinger) 1295:8-21.

349 Trial Tr. (Weissinger) 1439:8-11 ("There are experiences beyond that, and there are some experiences that are separate and excluded from that as well. So there are some that I don't think I would qualify it as a game.").

350 Trial Tr. (Sweeney) 93:22-94:17, 111:13-17, 116:6-12, 324:14-23; Trial Tr. (Wright) 647:24-25; DX-5552; Trial Tr. (Allison) 1246:7-1247:18; Trial Tr. (Weissinger) 1354:1-1376:15 (explaining the various game modes within *Fortnite*, all of which are and/or contain games).

351 *See, e.g.*, DX-5536.001; Trial Tr. (Allison) 1245:9-1247:18 (discussing DX-5536.001); DX-5541 (YouTube video demonstrating game play mechanics of *Fortnite*); Trial Tr. (Schmid) 3205:1-3 ("Q. And do you know, for example, what category of app Epic chose for *Fortnite*? A. They chose games.").

352 *See* Trial Tr. (Weissinger) 1336:11-15 (describing then upcoming collaborated events at the "Video Game Awards").

353 *See* Trial Tr. (Weissinger) 1295:9-10; Trial Tr. (Sweeney) 99:14-15; Trial Tr. (Schiller) 2834:24-2835:5.

354 There was also much discussion about a similar metaverse game, *Roblox*, which contains creative experiences that are similar to those offered in the creative and party modes in *Fortnite*, and whether it too qualified as a video game. The discussion was not initially helped by Mr. Kosmynka, whose self-acknowledged unfamiliarity with the video game market and lack of knowledge on *Roblox*'s game classification caused him to use imprecise terminology in his testimony. *See* Trial Tr. (Kosmynka) 1015:18-1016:7, 1190:9-1191:6. Indeed, Mr. Schmid noted that while *Roblox* may have renamed the internal games offered within *Roblox* as "experiences," it is "not saying that *Roblox* has decided they are no longer a game." Trial Tr. (Schmid) 3295:15-17.

355 The Court leaves the thornier further questions of what is properly included and excluded in the definition of a video game to the academics and commentators. For instance, one example that arose beyond the issue of *Roblox* was the recent genre of films and shows on Netflix that allow users to make a choice akin to a "choose your own adventure," including in *Black Mirror: Bandersnatch*, and *Unbreakable Kimmy Schmidt: Kimmy vs the Reverend. See* Trial Tr. (Wright) 576:24-577:2. The Court need not determine whether this interactivity is sufficient to convert these forms of media into a video game. Suffice it to say, these examples as well as the ongoing efforts in the metaverse, appear to be an ongoing trend of converging entertainment mediums where the lines between each medium are beginning to mesh and overlap.

2. online gaming stores found on desktop and personal computers ("PCs"), including online transaction platforms focused on game distribution (*e.g.*, Valve Steam), and developers' own stores that directly distribute their games (*e.g.*, Epic Games Store);

3. digital stores on consoles (*i.e.*, Sony PlayStation, Microsoft Xbox, and Nintendo Switch); and,

4. more recently, streaming game services (*e.g.*, Nvidia GeForce Now, Microsoft Xbox Cloud Gaming, Google Stadia).[356]

The gaming market today is the result of actions taken by competitors in the last two decades. The first successful online platform focused on game distribution was Steam, which launched in 2003. Steam By **[*976]** pioneering digital distribution on the PC, Steam enjoyed "a real boom in both Steam's business and just PC gaming and digital gaming in general." Steam "is a dominant player in the space and was in 2018 with 70 to 85 percent market share depending **[**124]** on how you define the space."[357]

Steam's success resulted in the rise of other PC-focused digital distribution platforms. In addition, the console platform owners created their own digital marketplaces: Microsoft launched Xbox Live Marketplace in 2005 (now Xbox Games Store on Xbox Series X and S), Sony launched the PlayStation Store in 2006, and Nintendo launched the Wii Shop Channel that same year (now the Nintendo eShop on the Switch). Most of these platforms, including Steam, charged a 30% commission.[358]

Since the App Store launched in 2008, the marketplace participants for game app distribution increased.[359] For example, Google announced the Android Market in 2008 (which later became Google Play in 2012), Nokia and Samsung launched their Ovi Store and Galaxy Apps Store in 2009, and Nintendo launched its eShop for its 3DS device in 2011.[360]

Today, "[t]here are many ways to monetize [an] app on the App Store," and Apple, like other industry participants, facilitates a variety of business models for developers. At least with respect to the App Store, there are at least five business models developers can use to make money on their apps: the free, freemium, subscription, paid, **[**125]** and paymium models. The record shows that under the "paid model," (also called the "download and install" model), for instance, a developer may charge a price for the user to download the app. As discussed, a developer may instead choose the "freemium model," allowing users to download an app for free but permitting in-app purchases. Alternatively a developer can offer subscriptions to users (for sale in the app, through a different platform, or online), can sell users digital currencies that can be used in the app (for sale in the app, through a different platform, or online), can sell advertisements in the app, or can charge for in-app promotions and events.[361]

3. *Four Submarkets*

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[356] Trial Tr. (Sweeney) 95:23-96:1, 135:21-24, 138:23-25, 177:23-178:14; Trial Tr. (Wright) 637:18-24, 642:19-643:5 (stating that mobile is part of the gaming industry); DX-5532.011 (Microsoft 10-K); Trial Tr. (Schiller) 2748:7-13, 2867:9-20; Trial Tr. (Schmid) 3240:1-7 ("We [Apple] compete with Google Play and the other many Android marketplaces. We compete with the consoles, so Switch, PlayStation, Xbox. We certainly compete with PC and the - the PC stores like Epic Games Store or Steam. And now more and more we're competing with the cloud gaming and - and the many companies that are getting involved in cloud gaming.").

[357] Trial Tr. (Allison) 1201:23-1204:24, 1248:12-22; Trial Tr. (Sweeney) 173:13-74:25.

[358] Ex. Expert 8 (Schmalensee) ¶ 41, Ex. 1; PX-2476.006 (discussing competing gaming stores); Trial Tr. (Wright) 546:7-15; *see also* Trial Tr. (Sweeney) 191:910.

[359] Trial Tr. (Schiller) 2748:1-13; *see also id.* 2772:13-17; PX-0888 (describing competitor commerce models on Xbox, Nintendo, and PlayStation).

[360] Ex. Expert 8 (Schmalensee) ¶ 41, Ex. 1.

[361] PX-2790.009; Trial Tr. (Fischer) 925:24-926:1; DX-4614; Trial Tr. (Schiller) 2768:1-8, 2773:23-2774:5, 2779:12-21, 2791:11-18, 2858:11-22, 3094:11-22, 3100:9-22.

The Court summarizes the evidence with respect to each of the four distinct submarkets as it impacts the market definition:

a. Mobile Gaming

With respect to mobile gaming, the two dominant players are Apple (App Store) and Google (Google Play app store), with several other Android OS players including the Samsung (Samsung Galaxy Store). Importantly, both third-party and internal market reports recognize mobile gaming as a distinct market within the wider video gaming market.[362] Indeed, mobile gaming is "a vast part **[**126]** of the overall gaming industry," so market participants, such as Microsoft, **[*977]** look "at mobile as a segment of the game industry as a whole," and "[i]n any industry analysis, mobile would have to be part of the consideration."[363] Subsumed in mobile gaming are related Android and iOS tablets offered by Apple, Google, Amazon, and Samsung.[364] Notably, whereas Apple iOS devices are closed platform or walled garden devices, Google Android devices are open platform devices.

Apple has always viewed Google Play as a significant competitor, including with respect to games transactions. There is further evidence of platform competition with the Samsung Galaxy store, as well.[365] Apple also understood that other Android marketplace platforms were competitive forces. For example, when Amazon launched its Android app marketplace, Mr. Schiller wrote internally: "[T]he 'threat level' is not 'medium', it is 'very high.'" Later, at the Fourth Annual App Store Global Management Team Summit, Apple spent considerable time discussing competition from Google, Samsung, and Amazon.[366]

Several other platform distributors own and maintain apps that offer some functionality and limited game streaming in connection **[**127]** with their original platforms. Steam also offers a variety of iOS applications through the App Store that allow Steam customers to manage their account and even stream games from their Steam library to their iOS device. PlayStation and Xbox have similar apps in the App Store that allow customers of those consoles to stream games from their consoles in order to play on their iOS device.[367]

Although relatively newer than both PC gaming and console gaming, mobile gaming constitutes a significant portion of the video gaming market. Indeed, as of 2017, it was forecasted that mobile gaming would generate *more than half of all game revenue globally*, and that the market would top more than $ 100 billion by 2021.[368] Similarly, Microsoft's internal report reflects that mobile gaming accounted for "more than half of the industry revenue in CY2019."[369]

Notably, the overwhelming majority of gaming revenue in mobile gaming derives from free-to-play games, or freemium model games.[370] As contrasted to other platforms, women gamers of all ages (*e.g.*, millennials, gen-x,

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[362] *See generally* DX-3248 (identifying mobile gaming as one segment in the video game industry); PX-2477/DX-5523 (same).

[363] Trial Tr. (Wright) 638:9-11, 639:1-2, 643:1-2.

[364] Trial Tr. (Grant) 697:10-13; *see also* DX-3248.004 (defining mobile gaming as tablets and smartphones); PX-2477/DX-5523.002 (defining mobile as "[g]ames executing locally on a phone/tablet form factor (e.g., Clash of Clans); primarily iOS and Android").

[365] Trial Tr. (Schmid) 3239:23-3240:2; Ex. Expert 6 (Hitt) ¶ 142.

[366] Trial Tr. (Schiller) 2866:1-20; DX-4447.001; DX-3734.041-.053.

[367] Trial Tr. (Athey) 1843:7-19, 1844:10-14, 1851:1-23.

[368] DX-3248.008.

[369] PX-2477/DX-5523.008.

[370] PX-2477/DX-5523.053; Trial Tr. (Schiller) 2791:11-18; Ex. Expert 8 (Schmalensee) ¶ 134; DX-3734.030.

and boomers) and gen-x male gamers are predominately more likely to play and game on mobile devices, with an overwhelming focus and interest on **[**128]** casual games.[371]

The mobile gaming market is slightly more nuanced domestically in the United States than it is globally. At least as of 2017, console gaming accounted for 43% of gaming revenue, whereas smartphone and tablets together accounted for approximately 40% of gaming revenue, with the **[*978]** remaining 17% of gaming revenue in browser and PC gaming.[372] Console gaming still accounted for a larger share in the United States and Western European countries, whereas mobile gaming generally made up a larger share of gaming revenue in the remaining parts of the world, but especially in Asia and in developing countries, where mobile gaming was already by 2017 the majority in gaming revenue.[373]

In general, the rate charged by platform owners such as Apple and Google, and those third-party app stores on Android such as Samsung, remain at 30%, notwithstanding both Apple and Google's recent moves to lower this rate for developers earning less than one million dollars annually to 15%. The Court notes however that some third-party mobile device marketplaces have decreased their rate after negotiations between it and developers.[374]

b. PC Gaming

PC gaming is characterized by an open **[**129]** market which includes several digital gaming marketplaces, such as Valve Corporation's Steam Store and more recently Epic Games' Epic Games Store, and several direct distribution platforms operated by larger game developers. As noted above, Steam retains a significant market share in the PC gaming area.

In the United States, as of 2017 PC gaming only accounted for approximately 15% of all gaming revenue. Globally, PC gaming does not account for a majority of gaming revenue in any country, though it has a significant market around or at least one-third (1/3) share in several Eastern European countries and in both China and South Korea.[375] Of the demographics, "male boomer" aged gamed in the United States are more often playing games on the PC, with an interest in casual games.[376]

Similar to mobile gaming, PC gaming generated a majority of its gaming revenue from free-to-play or freemium games. Though, unlike mobile gaming, there is a sizable portion of PC gaming's revenue that is derived from pay-to-play games (*i.e.*, games purchased up-front).[377]

A platform's commission rate in the PC gaming area, historically 30%, now varies among the competing platforms. Steam's **[**130]** 30% cut, adopted since its inception in the early 2000s, was reduced in 2018 shortly before the launch of the Epic Games Store. Steam currently uses a tiered commission rate, whereby larger game sales and revenues decrease the commission rate, as low as to 20% for the highest tier of sales and revenues.[378] Meanwhile the Epic Games Store charges a 12% commission for app distribution, as well as a 12% commission for in-app

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[371] *See generally* DX-4217. The Court notes that it uses the same terminology employed in the cited third-party report to describe the age ranges of certain groups.

[372] DX-3248.028.

[373] *See generally* DX-3248.

[374] *See* Trial Tr. (Schiller) 2810:16-2811:5, 2815:17-23; DX-4168; DX-4096.001; Trial Tr. (Hitt) 2088:10-14; Trial Tr. (Cook) 3860:4-10; Ex. Expert 8 (Schmalensee) ¶ 41, Ex. 1.

[375] *See generally* DX-3248.

[376] *See generally* DX-4217; *supra* n.371 (using report terminology to describe age ranges).

[377] *See* DX-5523.053 (23.3 billion attributed to free-to-play games versus 7.4 billion attributed to pay-to-play).

[378] Trial Tr. (Allison) 1209:13-1210:1.

purchases when the app developer chooses to use Epic Games' direct payment for in-app purchases.[379] Given that the 12% commission rate results in an operating loss, the move could be viewed as merely a litigation tactic. However, on the eve of trial, Microsoft recently announced, that it will be reducing its commission from 30% to 12% in the Windows Store.[380] In terms of digital game sales on **[*979]** PCs and Macs, the Epic Games Store is "[a] clear and strong number two" behind Steam.[381]*See supra* Facts § I.B.3. With respect to its expansion to non-gaming apps, the move was likely litigation related. *Id.* In addition, many other developers launched major digital distribution platforms for their own and others' titles: Ubisoft launched Ubisoft Connect in 2012 and Bethesda launched Bethesda.net **[**131]** in 2016.[382]

c. Console Gaming

There are three recognized market participants in the console gaming arena: Microsoft Corporation Xbox Series X and S (formerly Microsoft Xbox One), Sony Corporation PlayStation 5 (formerly PlayStation 4), and Nintendo Co. Ltd. Switch.[383] The evidence reflects that the market is split between two similar products (*i.e.*, the Xbox and the PlayStation) fiercely competing on both power, graphics, processing, and speed, and one product (*i.e.*, the Switch) that has innovated to compete on mobility.[384]

These three devices are generally considered "single purpose" or "special purpose" devices—as compared to mobile and PC devices, which are more general-purpose devices. In other words, these gaming consoles are generally made for the narrower purposes of gaming or entertainment (*e.g.*, video or music streaming).[385] These platforms "are designed to give you a gaming experience. [For example, p]eople buy an Xbox because they want to play games." In contrast, mobile and computer devices are general-purpose devices because there is a "wide, wide variety" of "different ideas and applications that can come through it." As a special purpose device, for **[**132]** instance, Microsoft's Xbox console is designed and marketed "to optimize the game experience," and it cannot perform many of the functions that mobile devices can, such as requesting a rideshare, taking a photo, or obtaining driving directions.[386]

Both the Xbox Series X and S and the PlayStation 5 were released in 2020, with their prior models (the Xbox One and **[*980]** PlayStation 4) released in the 2010s. With respect to these two devices, both have substantially similar hardware that renders cutting edge graphics similar to those on certain PCs and desktops, and can render and run

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379 Trial Tr. (Sweeney) 126:1-7.

380 Trial Tr. (Wright) 553:17-554:6; Trial Tr. (Allison) 1221:4-7, 1275:20-1276:5 ("Microsoft has switched to an 88/12 share on the Windows 10 Store.").

381 *See* Trial Tr. (Sweeney) 123:15-124:5, 262:19-263:11, 263:22-265:4, 265:7-11; Trial Tr. (Allison) 1199:15-1200:1, 1243:3-11. Among those mentioned was Itchio.io. With respect to this app, Apple's counsel alluded to certain sexually explicit video games (*i.e.*, "Sisterly Lust") offered by Itch.io. Given that the corresponding materials (*e.g.*, storefront game pages) were not submitted to the Court, the Court cannot conclude one way or another whether this particular game, or other games offered on Itch.io, are as problematic as so alluded or suggested by Apple's counsel. Nonetheless, the Court finds that Apple's questioning and Mr. Allison's answers thereto illustrate some problems that may occur when permitting "stores within stores": namely, disparate guidelines and policies, and the difficulty of reviewing materials hosted by third parties. *See* Trial Tr. (Allison) 1257:5-1258:8, 1258:21-1259:22, 1280:20-1281:22.

382 *See* Ex. Expert 8 (Schmalensee) ¶ 41, Ex. 1.

383 *See* DX-5523.002 (defining console gaming as "[g]ames and services [offered] on home consoles (e.g. Xbox and PlayStation) and handheld/hybrid consoles (e.g. Nintendo Switch)").

384 *See generally* PX-2776 (Nintendo Switch); PX-2777 (Sony PlayStation 5); PX-2778 (Microsoft Xbox Series X).

385 *See* Trial Tr. (Sweeney) 138:23-25; Ex. Expert 1 (Evans) ¶¶ 50, 53-54; Trial Tr. (Evans) 1459:5-1461:20; *see also* Ex. Expert 6 (Hitt) ¶ 117; Ex. Expert 7 (Lafontaine) ¶ 34; Trial Tr. (Wright) 556:4-5, 583:8-13; Trial Tr. (Grant) 697:19-20.

386 *See* Trial Tr. (Wight) 535:20-536:12, 555:24-556:5, 557:10-15.

more realistic simulations than would be possible on mobile or other devices.[387] Indeed, the PlayStation and Xbox have the same reliance on additional peripherals and equipment: namely, a television or screen, speakers, and a controller.[388] Both devices further require a constant connection to a power outlet, as well as, for some games, access to the Internet via WiFi or ethernet cable.[389]

Games developed for the Xbox and PlayStation leverage the competitive advantages inherent in these systems. For example, with respect to Xbox console games, "developers have taken a design choice to build an experience **[**133]** that they want to have rendered . . . with all the compute power, graphic fidelity, that this box provides." This contrasts to mobile games, which are generally designed for a "more casual" gaming experience and the "vast majority are free to play and then have in-app purchase mechanisms as part of them." In some instances, console game titles that are rewritten to run on iOS devices can be "different games" in that "[t]hey feel different," "operate different[ly]," and could be "leveraging the marketing brand of that," while being a "different version of the game that is written to run on [mobile devices]."[390]

The remaining player in the console gaming market, the Nintendo Switch uniquely competes on a separate ground: mobility.[391] Nintendo introduced the Switch, a quasi-mobile device, in 2017, and the eShop became the Switch's online store.[392] Unlike the PlayStation and the Xbox, the distinguishing feature of the Switch is that it can be played in *either* a conventional console manner (*i.e.*, with a separate screen and controller) *or* a mobile handheld fashion (*i.e.*, in a modified tablet form, whereby the separating controllers attach to the sides of the tablet).[393] Because of this mobility, **[**134]** there is substantial overlap in the design, form, and function with mobile devices with respect to gaming.[394] Moreover, Mr. Sweeney twice stated in a matter of minutes that the performance of *Fortnite* on the Switch and smartphones **[*981]** are, in fact, "similar."[395] The only identified difference between the Switch and certain mobile devices is that, like the PlayStation and Xbox, a Switch must also rely on a WiFi connection.[396]

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387 *See* Trial Tr. (Sweeney) 139:17-23, 145:18-20, 145:24-25.

388 *See id.* 138:18-21 ("A console is a fixed function device as [it is] typically plugged into a television and controlled using a game controller or a joystick."); Trial Tr. (Wright) 537:10-13.

389 *See* Trial Tr. (Wright) 536:13-537:13.

390 *See id.* 539:22-25, 636:11-17.

391 The Court notes a glaring lack of evidence on the Nintendo Switch, and its previously related but distinct products, in the record. Indeed, the Court is aware that both Sony and Nintendo, at one point, sold separate handheld gaming devices (*e.g.*, Nintendo Gameboy, Nintendo DS, Sony PlayStation Vita). No evidence or explanation was provided on what occurred with these products or the handheld device market, though, the Court surmises that the rise of the mobile gaming market likely subsumed the handheld gaming market and perhaps led to Nintendo's decision to switch to mobility as a competitive edge for the Switch. Regardless, the Court notes the lack of evidence on this point, as well, as the Nintendo Switch generally, where evidence is limited to third-party testimony and certain Nintendo documents. Indeed, neither party called a Nintendo affiliated witness in this action to inquire on issues of competition in the general or console gaming market. Instead, the Court is left with a limited record on these matters.

392 *See* Trial Tr. (Grant) 696:8-11; Ex. Expert 6 (Hitt) ¶ 190 & Fig. 1.

393 *See generally* PX-2776 (Nintendo Switch). Although not reflected in the record, the Court notes that one version of the Switch, the Switch Lite, can *only* be played in a mobile and handheld manner.

394 *See* Trial Tr. (Grant) 696:6-11 (describing similarities in screen size, portability, and other features between smartphones and the Switch); Ex. Expert 6 (Hitt) ¶¶ 87-91.

395 *See* Trial Tr. (Sweeney) 139:17-18 ("The performance of *Fortnite* and Nintendo Switch is similar to many smartphones."); *id.* 140:8-9 ("The performance of *Fortnite* on smartphones and Switch is similar.").

396 *See* Trial Tr. (Evans) 1459:5-1461:20; Trial Tr. (Sweeney) 140:9-11.

However, not all tablets, including some iPads, have or permit cellular connection, and must similarly rely on WiFi.[397]

Based on the business models and choices undertaken by the players in the console gaming market, both Microsoft and Sony are in more direct competition with each other, while the Nintendo Switch remains more distantly in the competitive orbit of these two devices. Microsoft considers Sony's PlayStation a "direct competitor" to the Xbox because of the similarities in the hardware of these devices. In contrast, Microsoft considers the Switch as competition to the Xbox but "to a *much* lesser extent."[398] In relation to other devices, Ms. Lori Wright, Microsoft's Vice President of Xbox Business Development, noted that **[**135]** Microsoft does not consider cellular or tablet devices such as the iPhone or iPad as competitors to the Xbox.[399]

Moreover, on the limited record before the Court, Microsoft and Sony appear to have a different business model whereby digital downloads, including games, in-app purchases, and downloadable content, and physical game purchases effectively subsidize the initial cost of the gaming device. There is some evidence that console manufacturers, especially Microsoft and Sony, sell hardware at a loss and recoup those losses through the subsequent sale of software.[400] This is in contrast to the limited documents and testimony that are in the record which reflect that Nintendo makes a profit on the sale of hardware, *i.e.*, the Switch.[401]

[*982] Despite these differences, there are similarities amongst the players in the console gaming market. Like iOS devices, the Switch, PlayStation, and Xbox have also adopted "closed platforms" or "walled gardens" as Nintendo, Sony, and Microsoft do not allow users to install software on their consoles outside of the platform's official store.[402] Moreover, unlike mobile gaming devices, console gaming platforms use similar controllers consisting **[**136]** of analog sticks, dpads, and buttons located on the face and edges of the controller.[403]

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[397] The Court notes that Epic Games' proposed product market includes both iPhone *and* iPad devices, without regard to whether these iPad devices are limited to those relying on cellular connections or not. Indeed, notwithstanding the distinction raised by some Epic Games witnesses, Epic Games states in its final proposed findings of facts and conclusions of law that "[t]here are no differences between iOS and iPadOS that are relevant to the facts herein." Epic Games FOF ¶ 25 n.1.

[398] Trial Tr. (Wright) 537:14-21 (emphasis supplied). Indeed, Ms. Wright only identified the Switch as a competitor after having been asked the substantively same question for a second time, wherein she identified the Switch as competition but qualified her answer by noting that the Switch competes "much less" than the PlayStation against the Xbox. *Id.* This appears to be in keeping with internal Microsoft documents reviewing its competitors, where numerous PlayStation games are identified over two-thirds of the page, in contrast to Switch games, which are limited primarily to just Nintendo published games and are relegated to the remaining third of the page along with games launched on PC. *See* PX-2476.006.

[399] Trial Tr. (Wright) 537:22-538:2. There is no evidence one way or the other in the record to confirm whether Sony would have a different view than Microsoft on this question of competition.

[400] *See* Trial Tr. (Wright) 551:24-13; Trial Tr. (Weissinger) 1350:18-1351:7; Trial Tr. (Evans) 1476:2-8. Apple contests this assertion where Epic Games did not seek admission of any documents supporting that testimony, and no such documents are otherwise in the record. *See* Trial Tr. (Evans) 1736:3-20. The Court however finds Ms. Wright credible in her statements, especially wherein they are not particularly flattering revelations for her employer, Microsoft (*i.e.*, that Microsoft does not make a profit on the sale of the Xbox hardware).

[401] DX-5322; *see also* Trial Tr. (Evans) 1736:21-24.

[402] *See* Trial Tr. (Sweeney) 180:17-184:9; Trial Tr. (Wright) 554:10-16. The Court notes that Mr. Sweeney testified that he understood that Nintendo permitted "Switch games to be sold by at least one third-party retailer digitally." *See* Trial Tr. (Sweeney) 239:18-240:3. Mr. Sweeney did not identify this third-party retailer, nor is there any further evidence in the record reflecting any arrangement between Nintendo and a third-party with respect to a third-party digital store.

[403] Trial Tr. (Grant) 695:4-9; *see also* PX-2274.001.

The standard commission rate across these console platforms is, like both the App Store and Google Play app store, 30%.[404] Although Epic Games witnesses and other third-party witnesses testified that console makers regularly engage in negotiations with developers and secure terms that factor into the overall value that the app developer receives.[405]

Compared to mobile gaming and PC gaming, the gaming revenue generated by console games in 2019 derived overwhelmingly from pay-to-play or buy-to-play games, as opposed to free-to-play or freemium games.[406] Demographics show that millennial male gamers are most often playing on a gaming console, with an interest in playing action games.[407]

d. Cloud-Based Game Streaming

A newer and ongoing innovation in the gaming industry includes cloud-based game streaming platforms. The companies involved in cloud-based game streaming include: Google Stadia, Nvidia's GeForce Now, Microsoft Xbox Cloud Gaming, and Amazon's Luna. Cloudbased game streaming services provide the experience of playing a game on a device that is being streamed from a **[**137]** remote data or server center. Unlike the other video game submarkets, cloud-based game streaming is not tied to a single device, and is instead a multi-platform service. Indeed, Microsoft has recognized in its 10-K that its Xbox Live services face competition from Amazon, Apple, Facebook, Google, Tencent, and these new "game streaming services."[408]

In light of the unique and innovative nature of cloud-based game streaming, certain issues arise that do not otherwise **[*983]** arise as compared to other gaming submarkets. Game streaming operates similarly to audio and television/film streaming, but further requires the transmission of user input in the game to a remote data center which then processes and renders the user's inputs and choices in the game back to a user's device through an audio and visual stream. The service at minimum requires some wireless or cellular connection to maintain connectivity to these remote data centers. Given this technological framework, the most significant of these issues is the issue of latency. As Mr. Aashish Patel, the Director of Product Management for Nvidia's GeForce Now, describes it, latency "[a]t a high level, [i]s from when you trigger an action to when **[**138]** you see the effect of an action."[409] In other words, latency is the time it takes between when an action is input into a controller or device and when the change is reflected in game. Methods reducing latency ensure there is no lag or delay in displaying the changes on screen or in game. Higher latency can impact game play, especially in certain competitive games.[410]

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[404] *See* Ex. Expert 6 (Hitt) ¶¶ 161-162, 256; Ex. Expert 8 (Schmalensee) ¶ 41, Ex. 1; DX-3955.003; *see also* DX-3582.004-.005; DX-3464.012, .027, .031; Trial Tr. (Sweeney) 142:19-143:1, 161:13-15; Trial Tr. (Weissinger) 1349:14-23.

[405] Trial Tr. (Sweeney) 310:1-17; Trial Tr. (Schmalensee) 1958:1-3; Trial Tr. (Wright) 586:11-21.

[406] *See* DX-5523.002, .053.

[407] *See generally* DX-4217.

[408] Trial Tr. (Sweeney) 135:21-136:5, 177:18-178:14, 256:16-25; Trial Tr. (Cook) 3866:14-22; Trial Tr. (Hitt) 2119:20-2120:14; Trial Tr. (Patel) 422:1, 442:5-12, 471:10-472:21; Ex. Expert 6 (Hitt) ¶ 144; Ex. Expert 6 (Schmalensee) ¶ 120; Trial Tr. (Wright) 647:5-13. The Court notes that Mr. Patel's allegiances became quite apparent when he reluctantly, and hesitantly, equivocated in answering basic questions on cross examination with respect to cross-platform playing of games. Trial Tr. (Patel) 463:18-464:16. The Court accepts his testimony with some discounting based on his bias for controversial issues.

[409] Trial Tr. (Patel) 433:13-17.

[410] *Id.* 422:2-7, 434:18-23 ("Depending on the user and the game, the user may feel uncomfortable with the latency, doing an action and seeing the action performed later, it could result in if they are in a racing game, turning too late, for example."), 435:5-11 ("Depending on the game, yes, there can be competitive disadvantages for a user with higher latency."); Trial Tr. (Sweeney) 135:18-136:9; Trial Tr. (Grant) 712:17-714:10.

The Court summarizes the game streaming services from the record: Google Stadia is a game streaming service launched in November 2019 and is available on iOS through web streaming. Stadia offers a subscription model that provides access to a library of games.[411]

Nvidia GeForce Now launched in February 2020 and is also accessible through iOS as well as through the GeForce Now client. Nvidia GeForce Now allows users to stream games previously acquired or purchased from digital game distribution platforms (such as Steam or Epic Games Store). The GeForce service played on iOS as a web-based service has received mostly positive reviews and has performed excellently even on older devices, notably for which Apple receives no commission or payment. By the third quarter 2020, GeForce had 5 million users with a goal of doubling that within **[**139]** a year. GeForce also has doubled its price for new users. Mr. Patel also raised the issue of the need for an Internet connection and capacity issues for streaming, but those issues arise regardless of whether GForce is offered as a native app or a web app. With expanding bandwidth over the past five years, the overall streaming experience is now vastly better.[412]

Microsoft Xbox Cloud Gaming with Xbox Game Pass Ultimate (formerly known as Project xCloud) is another subscription-based streaming service that allows users to stream games to their Android devices. Xbox Cloud Gaming became available for selected Android devices and was recently launched on iOS, after some support from Apple engineers, in beta version. Press reviews say that the Xbox Cloud Gaming experience is very strong on **[*984]** PC and iOS. Ms. Wright states that it is a "great sign" for the prospects of Xbox Cloud Gaming that the beta is expanding. Epic Games does not support Xbox Cloud Gaming because it views "Microsoft's efforts with xCloud to be competitive with Epic Games' own PC offerings.[413] The Court understands that Epic Games therefore views certain multiplatform game streaming services as a threat to its currently single **[**140]** platform game store.

The Court notes that with respect to the iOS platform, both Nvidia and Microsoft maintain web apps instead of native apps. This is due to Apple's guidelines and rules prohibiting stores within applications and requiring the submission of each individual game to the App Store. Both companies would prefer to provide their services as native apps instead of web apps due to the ease of both optimizing the experience for game streaming users on devices and reducing latency. Neither company, however, provided evidence or testimony on the relative differences in latency between webs apps and native apps, even as to the iOS platform's Safari web browser. The Court cannot otherwise discern based on the limited record whether being limited to web apps has otherwise affected these services—especially considering the foregoing evidence showing positive reception among consumers and the industry to both services on the iOS platform.[414]

4. *Competition Among Platforms and Findings of Relevant Product Market*

Given the multitude and diversity of platforms available to consumers, it is not surprising that there is, at a base and general level, *some* competition amongst **[**141]** them in the overall video game market. As Mr. Sweeney remarked publicly in 2012:

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[411] Trial Tr. (Sweeney) 256:16-25; Trial Tr. (Fischer) 901:19-21, 902:8-11; Ex. Expert 6 (Hitt) ¶ 144.

[412] Trial Tr. (Sweeney) 137:12-16; Trial Tr. (Patel) 422:12-15, 425:4-11, 456:15-24, 458:6-18, 459:18-460:5, 460:8-461:3, 464:11-465:1, 466:18-24, 469:18-23, 470:4-15, 471:25-472:21, 473:24-474:13, 475:5-15, 476:12-19 (acknowledging that "Nvidia and GeForce Now are not in the middle of that transaction" and receive no commission and instead all of that revenue goes to the developer).

[413] Trial Tr. (Wright) 565:20-567:19, 609:22-11:7, 611:21-621:1, 613:11-12; Ex. Expert 8 (Schmalensee) ¶ 120; Ex. Depo. (Kreiner) 106:19-107:6.

[414] Trial Tr. (Patel) 427:9-428:6, 429:11-430:2, 433:13-434:17, 438:11-14; 530:24-531:22; Trial Tr. (Wright) 577:3-579:10. Mr. Patel only characterized the additional latency as a result of using web apps as "a bit higher" than native apps, but otherwise provided no relative or quantitative comparison. Trial Tr. (Patel) 434:16-17. Indeed, Mr. Patel's later testimony hedged as to the actual latency problems with web apps, and he further did not identify any specific latency issues with the iOS platform's Safari web browser. *Id.* 530:1-16 (responding that with web apps, "you *could* argue that in some instances, it's worse than native application decoding," and web apps "*could*" increase latency (emphasis supplied)). Mr. Patel later conceded that regardless of whatever app model they used (*e.g.*, web app or native app), "[t]he majority of the process is the same." *Id.* 532:2-9.

> [W]e have a lot of platforms coming together. There are the tablet platforms, there are the smartphone platforms, and computers, you know, PC and Macintosh, and then there are consoles, Xbox 360, PlayStation, Wii, and some new handheld dedicated gaming devices, and God knows what else.
>
> This is too many platforms. And we're seeing now, iPad sales have surpassed the sales of desktop PCs. That's a real revelation to me. This is a product that wasn't invented until a few years ago, and it's basically supplanting the personal computer industry as we know it.
>
> Over time, these platforms will be winnowed down into a much smaller set of competing platforms. You know, there might be one or two or maybe three winners worldwide across everything—computers, game platforms, smartphones.
>
> So we should expect a lot of consolidation here, and winners and losers according to who picks the right directions and executes successfully on them.[415]

[*985] According to Apple, it faces intense pressure as it competes for developers and users across these platforms.

In a general sense, consumers have a choice of devices and transaction platforms **[**142]** through which to acquire, modify, and play games. Apple's mode of competing resorts to its historic model: user-friendly, reliable, safe, private, and secure. Mr. Sweeney does not dispute that "what is on a particular store is part of the competitive landscape among different stores in which customers make decisions between stores based on the quality, selection, and other policies of stores." Similarly, developers also have a choice among the distribution channels, including various transaction platforms, through which to distribute their apps to consumers. In some measure, Apple must likewise make its platform attractive to developers.[416] Given that Apple built and modeled the App Store in part on its gaming competitors (*e.g.*, Nintendo, Sony, and Microsoft), harnessing these competitors' in-app purchasing systems from the gaming context,[417] it is not surprising that Apple now faces competition amongst these very same players.[418]

Of course, the Court must determine where the *actual* competition lies between these platforms based on the current state of play in the overall market. This is a close question where the general video game market appears to be evolving and dynamic. **[**143]** While there is some competition amongst the players in the general video game market, the Court cannot say that this overall competition is sufficient for purposes of defining a relevant product market—at least not at this time.

What makes this determination difficult is that the market appears to be somewhat in flux. With the recent success of truly cross-platform games like Microsoft's *Minecraft* and Epic Games' own *Fortnite*,[419] these disparate platforms, each with their own unique and competitive advantages, are truly competing for consumers who wish to consume these increasingly popular cross-platform games and any transactions made therein. Indeed, video games can and are able to be ported across multiple devices.[420] However, not all games are like *Minecraft* or *Fortnite*; the market still reflects that video games are, for the most part, cabined to certain platforms that take advantage of certain

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[415] DX-3768 at 26:1-23; Trial Tr. (Sweeney) 243:10-244:9.

[416] Trial Tr. (Schiller) 2748:6-24; *id.* 2867:9-20 (describing the App Store's competition with Steam); Ex. Expert 8 (Schmalensee) ¶¶ 122-126; Trial Tr. (Sweeney) 261:19-23; Trial Tr. (Hitt) 2130:5-7; *see also* Trial Tr. (Schmid) 3240:1-7; DX-4399.046-.054 (Apple has also benchmarked the App Store against Android Market, Google Play, and other competitors in a 2017 presentation, where it listed Google Play in the "Competition" section, along with Facebook Messenger games, publishers, platform marketplaces, and social platforms).

[417] *See generally* PX-0888.

[418] DX-4178.008.

[419] The record demonstrates that the App Store is one of several competing platforms, such as the PlayStation and Xbox, with respect to cross-platform play for *Fortnite*. Trial Tr. (Sweeney) 236:19-237:2; DX-3125.005.

[420] *See generally* Trial Tr. (Grant) 671:2-673:20.

features of that platform, such as graphics and processing, or mobility.[421] The record reflects that the industry players are only slowly and recently reacting to compete against the wider gaming platforms.

With cross-platform games like *Fortnite* available on **[**144]** multiple devices, these platforms are truly competing against one another for these in-app transactions. For instance, an internal Epic Games email from September 2018 notes that "purchase **[*986]** behavior may have changed with the addition of mobile, especially Apple and more recently Android, where users are just logging onto their mobile app to purchase." In other words, "most players are still playing on PC/Epic platform[s] as they did before, but purchasing on other platforms like mobile because it may be easier and more convenient [i.e.] when the store updates."[422] This is despite the fact that iOS *Fortnite* players consisted of only approximately 10% of daily active users, and *Fortnite* players generally prefer playing on alternative platforms.[423]

In response to this exact scenario, where gamers play on one platform but spend on another, some other platform owners have enacted substantive policies regarding cross-wallet and cross-play restrictions. Sony, for instance, enacts a cross-play policy that compensates Sony where players spend on other platforms but primarily game on Sony's PlayStation platform.[424] Meanwhile, Sony and Switch have enacted policies that limit the cross-wallet functionality **[**145]** across platforms.[425] Also unlike certain consoles, Apple does not require price parity; that is, developers are free to price their in-app content on apps downloaded from the App Store higher than the same content sold through other platforms.[426]

While these policies and cross-platform games might evidence some convergence of competition amongst them at some point in the future, the relevant product market does not appear to be so wide as to include all platforms at this time. This is especially so given the distinct submarkets discussed above: namely, mobile gaming, computer gaming, and console gaming.

The question remains however on where (i) the Nintendo Switch, which is distinctly both a hybrid console and mobile gaming device, and (ii) game streaming services, a multiplatform game service also available on iOS platforms, fall in the general market and the above submarkets. Facially, the inclusion of the Switch and game streaming services in a relevant product market defined as mobile gaming transactions has logical appeal. The Switch is essentially a game specific tablet with detachable controllers on its sides. Its inclusion would make logical sense where tablets are also included **[**146]** in the relevant product market. Witnesses also confirmed that games (including *Fortnite*) for both the Switch and mobile devices operate substantially the same on both devices. Moreover, what evidence exists in the record shows that the Switch generally competes significantly differently as compared to the other two console players—the PlayStation and Xbox.

The inclusion of game streaming services has similar logical considerations. Because such services are multiplatform, they can reach the same audience of consumers on the iOS platform as the App Store can by virtue of their design. Specifically, whether by native app or web app, game streaming services are just as available to consumers on the iOS platform as the games are on the App Store. These services essentially compete with the wider market given the lack of a need for any corresponding device. Indeed, due to the multiplatform nature of such services, even players in other submarkets, including Epic Games, have come to view such services **[*987]** as a competitor in their established market spaces.

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[421] *See generally supra* Facts §§ II.B.1-2, II.D.3.

[422] DX-3867.

[423] *See* Trial Tr. (Weissinger) 1346:18-1347:1; DX-3233.009.

[424] DX-3094.006.

[425] *See* Trial Tr. (Sweeney) 197:1-18, 238:9-239:17; Trial Tr. (Schmid) 3208:8-16; Ex. Depo. (Kreiner) 83:12-16.

[426] *See* Trial Tr. (Schiller) 2819:18-2820:2; DX-3582.003.

Despite the foregoing, neither the Switch nor game streaming services are appropriately part of the mobile gaming market—at least not at this **[**147]** time. First, as previously noted, the record is limited as to both Nintendo and the Switch. Nonetheless, the Court notes that there is in evidence one real world example that shows that the Switch's mobility competes against iOS devices for gaming: the introduction of *Fortnite* on the Switch. As the experts' analyses show, the introduction of the Switch shows both substitution and complementary play without a definitive answer. *See supra* Facts § II.B.2.

Second, both products are too new for a determination of whether they should or should not be included in the relevant product market. The Switch and especially game streaming services are relatively new products in the market. Indeed, Nvidia's GeForce Now service only launched months before the filing of this action, and Microsoft's service remained in beta testing at the time of the bench trial. It is unclear at this time whether consumes will or do consider these products reasonably interchangeable and substitute in sufficient numbers between the competing products already in the mobile gaming market.

In sum, in light of the lack of evidence in the record, and the recent introduction of the Switch and game streaming services to the **[**148]** market, the Court declines to include either device or service in the relevant product market for mobile gaming transactions. While the record does not reflect that these products are appropriately included in the relevant product market at this time, the Court does find that these products evidence, at a minimum, market entrants into this mobile gaming space. Whether these entrants will occupy the same space as Apple and Google remain, however, to be seen by both consumers and developers.

Thus, the Court concludes that the competition lies within the smaller recognized mobile gaming transactions submarket, however, this submarket does not include the Switch or game streaming services.

E. Apple's Market Share

For the reasons set forth above, the Court concludes that the competition lies within the smaller recognized mobile gaming transactions submarket, however, this submarket does not include the Switch or game streaming services. The Court next calculates Apple's market share.

The *only* evidence of market share in the proposed market concerning video gaming comes primarily from Apple's expert witness, Dr. Hitt.[427] As discussed, Apple's proposed definition of the market includes all video **[**149]** game platforms, which the Court rejects as the relevant market. Consistent with Apple's proposal, but inconsistent with the Court's finding that mobile gaming is the relevant product market, Dr. Hitt's analysis relies upon the assumption that the App Store has many competitors, including other game transaction platforms, for mobile, PC, and console, as well as game streaming services, and limits the scope to the United States.[428]

Since data on the number of game transactions is not readily available, Dr. Hitt's analysis uses the dollar value of game transactions facilitated as a proxy for the most appropriate measure for estimating market share. To reach his opinion he analyzes: (i) the total revenue for digital game transactions on the App Store in the United States; and (ii) the total revenue **[*988]** for digital game transactions across all digital game transaction platforms in the United States.[429] Again, Dr. Hitt's analysis does not narrow in on the mobile gaming market and Apple's market position therein. Based on his analysis and his review of the relevant evidence, Dr. Hitt finds and concludes that Apple's video game market share based on total revenue from digital game transactions **[**150]** is 37.5%.[430] Based on his calculations, Dr. Hitt concludes: (i) that this video game market share is inconsistent with Apple's ability to exercise

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[427] Ex. Expert 6 (Hitt) ¶ 117.

[428] *See supra* Facts § II.D.; Trial Tr. (Schiller) 2867:1-20; Trial Tr. (Cook) 3865:23-3867:5.

[429] *See* Ex. Expert 6 (Hitt) ¶¶ 137-138.

[430] *Id.* ¶¶ 8, 117, 123-128.

market power; and (ii) that this lack of concentration in the video game market suggests Apple does not possess monopoly power in the relevant product market.[431] While Dr. Hitt's report and analysis aids the Court, it is overbroad for purposes of the Court's finding that the market is limited to mobile gaming.

Despite the limitations of Dr. Hitt's analysis, a similar calculation based on evidence in the record reveals a much more significant *mobile* gaming market share. Apple's internal business records[432] show a consistent belief that Apple's market share of the global video gaming market increased over time beginning in 2015 with 18%; 2016 with either 21.8% or 23%; 2017 with either 24% or 27%; 2018 with 23.8%; 2019 with 23.9% or 25%; and 2020 forecasted at a range between 24.7% and 31%.[433]

The Court has the most evidence for the year 2017. Using Apple's internal documents the Court is able to calculate Apple's market share at 57.1% in the global *mobile* gaming industry. The Court reaches that value by taking Apple's own internal records for 2017 **[**151]** which show Apple's internal calculation that it controls 24%[434] of the global video gaming market and dividing the number by 42%[435] which reflects Apple's belief of the portion of the *mobile* gaming market relative to the global video gaming market (24% divided by 42% equals 57.1%).

Using this same methodology, the Court can calculate Apple's market share in the *mobile* industry before 2017, as 52.9% in **[*989]** 2015 and 54.5% in 2016. This computation is consistent with a view that the market share was less than 57.1% in 2017.[436]

Similarly, for 2020, Apple estimates that its own global market share in the wider video gaming industry is 28.2%, and cites on its internal business record to an external Newzoo report that states that mobile gaming (including mobile and tablets) accounted for 49% of global gaming revenue in 2020.[437] Using these figures and the same methodology as above, Apple would have 57.6% market share in the global mobile gaming industry in 2020.[438]

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[431] *Id.* ¶¶ 138, 140-141.

[432] The Court relies on Apple's business records as admissions.

[433] Compare four internal forecasting documents, namely, DX-4178.008 (2017 Review), PX-0602.027 (2018 Review), PX-0608.014 (2019 Review), and PX-2302.022 (forecasting 2021 and 2020).

[434] *See* PX-2302.022 (reporting 24% market share). The Court notes a discrepancy between two sets of presentations calculating market share from 2015 to 2020 in the wider video gaming industry. The Court notes that the figures found in the most recent Apple presentation, along with figures found in the 2019 review (PX-0608), appear to match and correspond with third-party data found elsewhere in the record. *See* DX-3248. For that reason, the Court concludes that these figures in the most recent presentation are the more correct and updated versions. The market share rates found in the other (generally older) presentations appear to use estimates instead of the actual total revenue in the video game industry for certain years resulting in a lower total annual amount, which appears to inflate Apple's market share in these other presentations. *Compare* DX-4178.007 (2017 presentation, stating 109 billion in total game revenue in the entire industry in 2017) *with* DX-3248.008 (2018 market report, stating 121.7 billion in total game revenue in the entire industry in 2017).

[435] *Compare* DX-4178.007 *with* DX-3248.008. The comparison shows a discrepancy in the portion of the mobile gaming market for the year 2017: namely Apple reports it as 42% in its presentation and third-party Newzoo reports it as 46% in its 2018 Global Games Market Report. The delta between these two figures is a few percentage points: using the third-party Newzoo figure in the Court's methodology, Apple's global market share is computed at 52.1% for 2017.

[436] Relying on the same documents, for 2015, the Court takes Apple's 18% market share divided by 34% of the mobile share of the global market. For 2016, the Court takes Apple's 21.8% market share divided by 40% of the mobile share of the global market.

[437] The Court notes that the 2020 Newzoo report is not in evidence, however, it is found as a "Reference" citation at the bottom of Apple's presentation. *See* PX-2302.022. These third-party references are often noted in presentations but only a few source documents are in evidence. The Court relies upon the reference because Newzoo is a credible third-party report that others in the industry rely upon.

The Court understands that the market share would likely be less if the Switch were included in the relevant product market.[439] However, the record is bare of evidence and, in any event, the new market entry would **[**152]** not have had such a compelling entrance as to discount the market share to under 30%.[440] Nonetheless, even assuming the market were limited to both mobile gaming *and* console gaming (including the Switch, PlayStation, and Xbox), Apple would still have, at a minimum, market power.[441] For the years in the record, the Court's methodology based upon the records shows that Apple would have a market share of such a defined global video gaming market (*e.g.* mobile and console) of 32.9% 2017, and of 31.1% in 2016.[442] For the most recent year 2020, based on estimated and projected revenue and on the cited 2020 Newzoo report, Apple's **[*990]** market share would be 36.6% of such a defined video gaming market.

III. PROPOSED GEOGRAPHIC MARKET AND FINDING

The parties offer differing perspectives on the geographic market. Epic Games argues for a global market, excluding China, and Apple asserts a domestic market.

With respect to its theory, Epic Games argues for a global market because smartphones, and thereby, the smartphones' operating system, are sold globally. Moreover, smartphones generally work regardless of the location with the exception of China where the operating systems are, in fact, different because **[**153]** they are installed by original equipment manufacturers in China.[443] Apple does not challenge the *geographic* market for smartphones, although for the reasons set forth above, it heavily contests the notion that a separate market exists for operating systems.

By contrast, Apple focuses on app gaming transactions arguing that the geographic market is domestic. Apple highlights that consumers access the App Store with country-specific digital storefronts which means that consumers enter into transactions through a digital store-front based on their home country. Generally, Apple customers do not have access to foreign storefronts, and cannot readily switch between storefronts outside of their home country. The same is true for customers in foreign countries.[444] The Court understands that many console and other game transaction platforms similarly organize their stores with geographic overlays.[445] Providers have

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[438] The same level of precision does not exist for 2018 and 2019 given the trial record. While the Court has evidence of Apple's market share in the wider gaming market and for certain years for the *mobile* gaming market, there is no discrete information or evidence for which it could calculate or find Apple's market share within *mobile* gaming for the years 2018 and 2019.

[439] For instance, the Court lacks any revenue specific information regarding the Switch with which to include in any market share determination. As to game streaming services, given the only recent introduction of such products to market, the Court would expect any inclusion of such services to have a minimal impact, if any, on the overall market share calculations in this section.

[440] *See* Trial Tr. (Bornstein) 4091:4-4092:3. Given the Court did not adopt the parties' market definitions, Epic Games' counsel would not commit to whether tablets would be included in that hypothetical market. Assuming a mobile and handheld device market as the relevant market, there are numerous tablet platforms and at least one mobile gaming console platform (Nintendo Switch) that would have to be included in such a market.

[441] The Court also assumes for purposes of this analysis that the video game revenue cited in the corresponding Newzoo report is all attributable to digital game transactions. The Court notes that this overinclusion of non-digital game transactions *and* of the PlayStation and Xbox would depress Apple's market share if the Court were to only include digital game transactions attributed to the Switch. Nonetheless, the purpose of this analysis is to demonstrate that Apple retains market power above 30% even with the overinclusion of these additional platforms and non-digital transactions.

[442] The Court notes that the Switch was released in March 2017, and thus, the inclusion would only affect the years 2017 and later. The Court discloses that Apple's market share for 2015 would be 27%.

[443] Ex. Expert 1 (Evans) ¶¶ 70-71; Trial Tr. (Cook) 3970:10-16; *see also* Trial Tr. (Cook) 3942:18-19, 22 (agreeing that "in China, the iCloud service is operated by a Chinese company").

[444] Trial Tr. (Schiller) 2754:20-2755:9 ("It's how we've been told we need to structure the stores.").

created impediments to switching geographic registration, such as prohibiting it as part of the terms of service, requiring country specific credit cards, and installing software which may make the app inoperable.[446]

Geographic constraints are less pronounced for developers. Foreign and domestic developers can publish on both foreign and domestic platforms. However, they can only access the consumer on the consumer's own domestic storefront.[447] Apple principally relies on Dr. Lafonatine to argue that the "competitive conditions each platform faces varies from country to country. The set of apps available across the world is not uniform. So one accessing the App Store's U.S. storefront would not have an identical selection of game apps to a consumer accessing a foreign storefront. Moreover, different countries feature different slates of competing platforms, with differing relative market shares. All of the above factors affect demand and substitution, creating different market conditions in each country."[448] However, the factual basis for her opinion is weak.[449]

[*991] The Court finds Apple's factual basis for its assertion to be weak. At least for purposes of this case, Apple's restrictions appear to be imposed by Apple, rather than by market forces. Importantly, the Court finds more persuasive that Apple actually treats app distribution as a global enterprise. Its rules and guidelines apply globally to all **[**155]** storefronts, the business development team engages with developers globally, the DPLA applies globally, and the complexity and justification for the complexity of the IAP system is due in large part because of the global nature of the business.[450] The parties agree that China is different.[451]

Thus, the Court finds the relevant geographic market to be global.

IV. MARKET POWER IN RELEVANT MARKET

In addition to Apple's market share in the relevant market of mobile gaming, the Court examines other evidence of Apple's market power in the mobile game transactions market and considers pricing, nature of restrictions, operating margins, and barriers to entry.

A. Pricing

The experts agree that the ability to set and maintain supracompetitive prices is evidence of market power. Dr. Schmalensee emphasizes, however, that two-sided platforms often have skewed pricing so supracompetitive prices on one side may not be indicative. He also opines that only price changes over time are relevant to determining

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[445] *Id.* 2754:14-2755:15; Ex. Expert 7 (Lafontaine) ¶ 9; Trial Tr. (Lafontaine) 2066:24-2067:6; *see also* Trial Tr. (Evans) 1565:12-14.

[446] Ex. Expert 7 (Lafontaine) ¶ 91; DX-4931.001; DX-4920.001 (noting for Microsoft that "[i]f you change your country or region in Microsoft Store, *the stuff you got in one region might not work in another **[**154]*** . This includes: Xbox Live Gold, Xbox Game Pass, Apps, games, music purchases, and movie and TV purchases and rentals").

[447] Apple FOF ¶¶ 444-446 (citations omitted); *see* Ex. Expert 7 (Lafontaine) ¶ 91.

[448] Apple FOF ¶¶ 447-450; Ex. Expert 7 (Lafontaine) ¶¶ 90-91, 93.

[449] Further, Dr. Lafontaine acknowledged that, when reaching her geographic market limited to United States consumers, she did not consider developers' ability to directly distribute apps to consumers. Indeed, she did not know whether direct distribution is limited by national boundaries. Trial Tr. (Lafontaine) 2067:7-2068:3.

[450] Ex. Expert 1 (Evans) ¶¶ 145, 266; Trial Tr. (Kosmynka) 985:21-986:24; Trial Tr. (Schmid) 3221:21-3222:2; Trial Tr. (Grant) 723:25-724:4.

[451] Ex. Expert 1 (Evans) ¶¶ 71, 108.

market power.[452] The parties thus dispute whether Apple's commission is (i) supracompetitive and (ii) has increased or decreased over time.

As an initial matter, as detailed above, the 30% commission was not set **[**156]** by competition or the costs of running the App Store, but as a corollary to other gaming commission rates. Next, the evidence showed four pricing considerations after the initial rate. First, in 2009, Apple introduced IAP using the same 30% commission. Second, in 2011, Apple enabled recurring subscriptions purchases on the iPhone. Third, in 2016, Apple introduced paid search ads on the App Store. Finally, in late 2020, Apple introduced the Small Business Program. That program reduced Apple's commission to 15% for developers making less than one million dollars. *See supra* Facts § I.C.3.c.

Both parties cite these pricing changes as evidence that Apple has or lacks market power. Epic Games cites the introduction of IAP, recurring subscription payments, and search ads as evidence of price increases. This evidence is not persuasive because both IAP and recurring subscriptions correspond to new features, not price increases on existing features. With respect to search ads, one would reasonably expect that a fundamental purpose of an app store is to provide search capability or "discoverability." Thus, by offering developers the option to pay for search ads, one could argue that this is not **[**157]** a new feature and therefore more probative of a price increase. On the other hand, developers do not have to use search ads which suggests this is could be viewed as a new feature. The record was undeveloped on this point.

Apple, on the other hand, cites the reduction on second year subscriptions and the Small Business Program as evidence of price decreases. The subscription reduction **[*992]** is highly probative; the evidence shows that Apple's decision coincided with several large developers ending in-app subscriptions through iOS apps (and therefore exercising power to leave Apple's platform). However, as described above, subscription apps face different market conditions than games, and there is no evidence of *game* developers leaving for other platforms to force a price decrease.[453] Further, the Court has explained above why the evidence on Apple's motivations regarding the Small Business Program is mixed. Regardless of whether altruism or regulatory pressure caused Apple to lower its commission, competition does not appear to have played a role.[454] Given the lack of clear evidence about price increases or decreases due to competition, Dr. Hitt focuses on Apple's average commission, which he argued **[**158]** decreased over time from the growing presence of free apps on which Apple receives no commission. He argues this decrease is inconsistent with market power.[455] However, the evidence is less probative because of the unique nature of Apple's business as both the device maker and app store operator.[456] Namely, Apple has repeatedly acknowledged that free apps make its platform more attractive, which helps it sell more devices.[457] As such, under a two-sided transaction platform analysis, the cost to users from purchasing devices to access free apps likely offsets the reduced price offered to developers of those apps.[458] Given Epic Games' theory that no commission should be levied, where the tipping point is in terms of that offset has not been explored.

Thus, ultimately, the pricing evidence does not show either market power or its absence. Apple's initial rate of 30%, although set by historic gamble, has apparently allowed it to reap supracompetitive operating margins. *See infra* Facts § IV.C. The choice to not raise that price further is consistent with market power if that price already reflects

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452 Ex. Expert 8 (Schmalensee) ¶¶ 108-109.

453 *See* Ex. Expert 6 (Hitt) ¶¶ 102, 105.

454 The Court does note that after Apple introduced the Small Business Program, Google quickly followed suit on Android. However, Mr. Cook was not aware of any other store that did so. This reinforces that Apple and Google compete with one another. Trial Tr. (Cook) 3860:4-10.

455 Ex. Expert 6 (Hitt) ¶¶ 169-176, 184.

456 Notably, the price of game in-app commissions has only grown over time. This again suggests that game developers may be subsidizing the rest of the App Store. Id. ¶¶ 174-175.

457 See, e.g., Trial Tr. (Cook) 3988:14-3989:5; PX-2060.005.

458 Ex. Depo. (Okamoto) 324:04-325:10; PX-2060.018-.019; Trial Tr. (Cook) 3990:18-3991:8.

monopoly levels.[459] Only rarely has Apple reduced its commission in response to competitive pressure, such **[**159]** as with the second-year subscriptions. However, because subscription apps are a separate market from game apps, that does not show lack of market power in the mobile game transaction market.[460]

[*993] B. Nature of Restrictions

Epic Games also cites the nature of the restrictions as evidence of Apple's market power. Apple uses both technical and contractual means to restrict app distribution. Technically, Apple prevents unauthorized apps from downloading on the iPhone. It does so by granting certificates to developers; no certificate means the code will not run.[461] Contractually, Apple imposes the DPLA, which prohibits developers from distributing apps outside the App Store.[462]

These contractual terms are standardized and nonnegotiable—a contract of adhesion. Only a few developers have succeeded in modifying these terms by threatening to go to other platforms. Specifically, Spotify and Netflix have removed in-app purchasing functionality from iOS apps. On the other hand, both Down Dog and Match Group have testified that they have been unable to entice users to other platforms with lower prices. Match Group has employed marketing campaigns and promotions for web purchases, but the app sales have continued **[**160]** to "dominate." Down Dog has had better success at offering cheaper subscriptions on the web, but Apple's anti-steering provision has prevented it from directing users to the cheaper price. Thus, while 90% of Down Dog's Android users make purchases on the web, only 50% of its iOS users do so, even though about half of its total revenues still come from iOS users.

Accordingly, evidence shows Apple's anti-steering restrictions artificially increase Apple's market power by preventing developers from communicating about lower prices on other platforms.[463]

C. Operating Margins

The experts agree that "persistently high economic profit is suggestive of market power." Dr. Schmalensee opines that operating margins and accounting profit are less probative because they fail to take into account intellectual property and similar investments that lower operating costs. Dr. Barnes criticizes this opinion as an accounting matter, and Dr. Evans opines that in this specific case, accounting profits are an appropriate measure of market power. From this issue, we see a classic battle of the experts.[464] See supra Facts §§ II.C.5, II.B.

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[459] As noted previously, Apple executives initially questioned whether they can maintain a 30% commission in response to competition. PX-0417. Apple still does not track costs or pricing on different platforms to determine its rate. Trial Tr. (Fischer) 904:18-905:6; Ex. Depo. 8 (Cue) 141:13-142:09.

[460] Apple makes two additional arguments for lack of market power. First, it claims that it has not restricted output. Apple FOF ¶¶ 467-468. Again, in light of the unique business model, game output here makes Apple's platform more attractive and increases rather than decreases its profits. Second, it claims that the 30% commission is consistent with other online platforms. Apple FOF ¶¶ 469-478. This argument is discussed above and below in relation to anticompetitive conduct. In short, the use of a 30% commission by other platforms is not dispositive because those platforms have a different business model than Apple and frequently negotiate their headline rates, so their effective rates are below 30%.

[461] Trial Tr. (Kosmynka) 986:9-22; Trial Tr. (Federighi) 3373:17-25, 3388:11-3389:12.

[462] PX-2619 §§ 3.2(g), 7.6. Recall that developers may license and use Apple's tools for free to create iOS apps under the Developer Agreement, but actually distributing them requires signing the DPLA. Trial Tr. (Schiller) 2757:1-2760:9.

[463] Trial Tr. (Schiller) 2760:16-21; Trial Tr. (Simon) 354:83-55:1, 359:3-364:13, 401:5-20; Ex. Expert 6 (Hitt) ¶¶ 102, 105; Ex. Depo. (Ong) 24:17-26:5, 28:9-29:22.

[464] Trial Tr. (Schmalensee) 1899:19-21, 1984:2-12; Trial Tr. (Evans) 1545:3-14, 1723:20-1724:19; Trial Tr. (Barnes) 2456:6-2458:11.

Here, in light of all of the evidence, the circumstances of Apple's P&L statements, **[**161]** and Apple's low apparent investment in App Store-specific intellectual property, the Court finds that operating margins are probative of market power. As described above, the App Store operating margins are "extraordinarily high." Thus, even without comparison to other stores, the operating margins strongly show market power.[465]

[*994] Further, Apple cannot hide behind its lack of clarity on the value of its intellectual property. Not all functionality benefits all developers. Further, as discussed, Apple has actually never correlated the value of its intellectual property to the commission it charges. Apple is responsible for the lack of transparency and whole-cloth arguments untethered to its rates do not ultimately persuade.

D. Barriers to Entry

With respect to barriers to entry, the evidence is mixed. On the one hand, Dr. Athey plausibly opines that entry into the platform business is difficult due to the need to attract both users and developers. Said differently, developers do not develop for new platforms unless they have a healthy user base, but users only go to platforms that already have a developed ecosystem. Thus, indirect network effects often dominate and create a "winner-take-all" **[**162]** system that allows only a few large platforms to survive.[466] See also supra Facts § II.B.1.

On the other hand, the mobile game market is changing, including with the introduction of cross-platform policies, cross-platform services (e.g. cloud-based game streaming), and new hybrid platforms such as the Nintendo Switch. First, the introduction of cross-platform middleware like cross-wallet and cross-play has plausibly decreased barriers to new entrants. The rise of game streaming may allow for competition among platforms on iOS in the near future, even if Apple maintains its app distribution restrictions. The role of game streaming and whether it will constrain market power remains to be seen.[467] See supra Facts § II.D. In light of these uncertainties, the Court finds that barriers to entry are currently relatively high but are plausibly decreasing and may be lower in the future.[468]

V. FACTS REGARDING ALLEGED ANTICOMPETITIVE EFFECT

Epic Games contends that Apple's restrictions on iOS app distribution and in-app payment processing create anticompetitive effects. As explained above, the App Store is a twosided transaction market, which may make competitive effects difficult to evaluate. In two-sided **[**163]** transaction markets, an anticompetitive price or restriction on one side may well reflect a competitive equilibrium on the other side.[469] Thus, the experts agree that competitive effects can only be determined after carefully considering both sides of the transaction (developers and users), including any indirect network effects.[470]

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[465] See Trial Tr. (Evans) 1545:3-14 (explaining that in a competitive market, high profits decline because companies would reduce prices and invest in quality to stave off competition).

[466] Ex. Expert 4 (Athey) ¶¶ 16-19, 35-46.

[467] Trial Tr. (Athey) 1787:14-18; Trial Tr. (Patel) 424:8-9 (number of games currently on GeForce is small), 449:8-450:2 (strict limitations on usage), 481:16-484:24 (same), 483:25-484:4 (game streaming not profitable).

[468] Of course, game streaming typically requires an up-front subscription fee, which makes it unlikely to replicate the "freemium" model that gains users by an initial free download. Trial Tr. (Patel) 483:13-485:14; Trial Tr. (Sweeney) 187:24-188:3 (attributing "a lot of [Epic Games'] success" to the freemium model).

[469] For instance, Dr. Schmalensee offers the example of OpenTable that suspends a user's account after a certain number of no-shows. Although this may seem like an arbitrary exercise of power to the user—particularly if there are few other reservation apps in that market—the restriction helps keep the platform attractive for restaurants and thus serves a procompetitive end by increasing participation. Ex. Expert 8 (Schmalensee) ¶ 30.

[470] Ex. Expert 1 (Evans) ¶ 216; Ex. Expert 8 (Schmalensee) ¶ 127.

[*995] With this in mind, the Court reviews evidence of the competitive effect of Apple's challenged conduct.

A. Anticompetitive Effects: App Distribution Restrictions

1. *Effects*

With respect to Apple's app distribution restrictions, Epic Games focuses on the following alleged anticompetitive effects: (a) foreclosed competition; (b) increased consumer app prices; (c) decreased output; (d) decreased innovation; and (e) effect on other markets through the restrictions on app stores. Apple, in turn, argues that the restrictions provide a safe and secure place to conduct game transactions and compensate Apple for its procompetitive investments in iOS. The Court first addresses Epic Games' evidence and then Apple's procompetitive justifications in the next section.

a. Foreclosure of Competition

With respect to the issue of foreclosing competition, the contention is not in dispute. **[**164]** Quite simply, Epic Games wanted to open a competing app store and could not. The evidence is mixed as to the demand to do so. Epic Games relies on the experience of Microsoft and Nvidia, which tried to offer native iOS game streaming apps (xCloud and GeForce NOW) but were blocked by Apple's restrictions.[471] Both companies, however, ultimately succeeded in making their apps available through the web. Although neither party was fully satisfied with the results, their experiences do not show complete foreclosure of competition.[472]

Instead, Epic Games relies on comparative evidence with other markets. On devices without app distribution restrictions, many app and game stores exist. For instance, Windows and Mac computers host game publishers like Steam, Electronic Arts, and Activision Blizzard who directly distribute through their own stores. Apple executives have acknowledged that the Mac App Store matters primarily for Apple software and smaller developers, while developers with market power are not on the Mac store "because they don't have to be."[473] According to Dr. Evans, there are at least ten third-party stores on Mac and Windows, and most top apps are distributed directly from the developer **[**165]** website. Indeed, several large game developers, like Google and Facebook, have tried to distribute games on iOS in recent years.[474]

The evidence also shows that smaller developers might choose direct distribution while remaining in the App Store. For instance, the CEO of Down Dog, the fitness app, testified that he would support users installing directly from a website.[475] Notably, however, these developers did not **[*996]** testify that they would leave the App Store altogether. That is because, as Apple shows, the App Store provides many benefits to developers, including developer tools, promotional support, and a ready audience, that enables small developers to compete with large

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[471] As explained elsewhere, GeForce allows streaming of games users purchased through other platforms, such as Steam. xCloud is limited to Microsoft games. Thus, they are each a type of game store, though idiosyncratic in not needing to access device hardware (which is what allows them to work through the web). Indeed, four of the five stores blocked by Apple's challenged rule concern game streaming. Trial Tr. (Patel) 425:1-11, 432:17-433:12; Ex. Expert 1 (Evans) ¶ 166.

[472] Trial Tr. (Wright) 568:13-571:8, 579:1-10; Trial Tr. (Patel) 429:11-25. Apple has also blocked Big Fish, a "game store within an app," and web stores. PX-0115; PX-0111.

[473] PX-2386.

[474] Ex. Expert 1 (Evans) ¶¶ 163-168; Trial Tr. (Allison) 1200:14-1201:14. Dr. Evans also provides comparison to the over 60 Android app stores in China and numerous third-party stores on early smartphones. However, Epic Games has not shown that those markets are sufficiently comparable to the market here. Ex. Expert 1 (Evans) ¶ 165.

[475] Ex. Depo. (Ong) 33:18-34:07; Trial Tr. (Simon) 392:9-17.

ones. For instance, 72% of small developers lack a marketing budget, and Apple provides significant free advertising and "spotlighting" to help users discover new apps as part of its DPLA.[476]

While plaintiff did not survey developers, taken together, this evidence suggests that Apple's restrictions foreclose competition for large game developers who have well-known games. These developers would likely, and have the resources to, open their own stores to forego Apple's "fees, rules, and review."[477] Smaller developers, on the other **[**166]** hand, would likely stay on the App Store (or a comparable store) for product discovery reasons. Indeed, that is exactly what happened earlier on PCs, which bolsters the likely evaluation and outcome.[478]

b. <u>Increased Consumer App Prices</u>

Next, Epic Games argues that Apple's app distribution restraints increase prices for consumers. Epic Games' argument is plausible. As Dr. Evans testified, "[w]e know from economics, both theory but also practical experience, in situations where there are barriers to competition and they're removed that what typically happens [is] . . . that prices tend to fall [and] quality tends to improve."[479]

In the context of gaming, Dr. Evans's observation has vivid illustration in the PC market. The incumbent Steam store charged a 30% commission for decades before Epic Games' store entered with a 12% commission. Immediately before that time, Steam lowered its commission to 20%, and its average commission rate declined to 10.7%. Microsoft followed suit shortly after, with other stores offering pay-what-you-want. This competition has affected platform margins, which are considerably smaller on PCs than on other devices—5% compared to 45%.[480]

Dr. Evans opines that the same **[**167]** would happen if Apple allowed third-party app stores on iOS. He posits that numerous third-party app stores would enter iOS in the absence of restraints and that these stores would compete for developers. The competition would exert pressure on Apple, which would have to lower prices or improve services. To calculate the resulting prices, Dr. Evans relies on several sources. First, he cites Mr. Schiller's 2011 statement that a 20% or 25% commission is "competitive."[481] Second, he uses Mr. Barnes comparisons of online marketplaces to calculate Apple's commission if its operating margins were only as high as the highest in a competitive market (Alibaba with 45.8% margins). Under that calculation, and assuming that developers would pass on half of the commission, Apple would only charge 15.6% while still being very profitable.[482]

Apple vigorously disputes this evidence. First, it points out that the 30% commission **[*997]** is standard for other stores, including on competitive platforms.[483] For instance, Apple charges 30% on Macs, which Dr. Evans agrees is competitive. However, Apple's argument is suspect. One, Apple relies on "headline" rates that Dr. Evans and Dr. Schmalensee agree are frequently negotiated **[**168]** down. For example, the Amazon App Store has a headline rate of 30%, but its effective commission is only 18.1%. Both Ms. Wright and Mr. Sweeney testified that consoles

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[476] Ex. Expert 8 (Schmalensee) ¶ 51; Trial Tr. (Fischer) 931:23-933:20, 935:15-936:23; DX-3800.038; Trial Tr. (Schiller) 2737:9-24.

[477] PX-2386.

[478] *See* Trial Tr. (Allison) 1206:1-1209:8; Trial Tr. (Evans) 1510:24-1511:7.

[479] Trial Tr. (Evans) 1551:15-1552:2.

[480] Trial Tr. (Allison) 1209:13-1210:1, 1275:18-1276:5; Ex. Expert 1 Evans ¶¶ 170-173; DX-5523.011.

[481] *See* PX-0417.

[482] Ex. Expert 1 (Evans) ¶¶ 180-184; Ex. Expert 2 (Barnes) ¶ 3.

[483] Apple also argues that it charged 30% from the very beginning when it was not a monopolist. However, there is evidence that Apple did not consider the rate to be sustainable at that time and questioned whether "enough challenge from another platform or web based solutions" will cause it to adjust. PX-0417. Moreover, Apple recognized that the App Store was "brand-new," with no true comparisons in the market, and set the rate set without considering costs. Ex. Depo. 8 (Cue) 135:8-136:14, 137:23-138:14. Thus, the initial rate was at least partly protected by the iPhone's "newness" and may not reflect a competitive rate.

frequently negotiate special deals for large developers. Sealed evidence in this case confirms the same. Two, just because it is the competitive rate for games in the console market, does not mean that the rate translates to the mobile games market. As described above, the App Store has very different operating margins than consoles, so even if the commission is the same, the economics and the nature of the products are very different. Thus, ultimately, these comparisons are not useful because the other stores do not operate in the same market.[484]

Neither party grapples with the overarching issue of Apple's choice of model and how it subsidizes certain developers. Rather, each side manipulates the "zero" commission rates on free or freemium apps to their advantage. Apple relies on analysis by Dr. Hitt who argues that the average commission rate in FY2019 was 8.1% for game apps and 4.7% for all apps while Dr. Evans and Dr. Cragg ignore the category all together. Ultimately, neither analysis is helpful.[485] Developers and Apple **[**169]** have learned that the freemium model is significantly more lucrative than the alternatives given the ability for impulse purchases. For those, the commission rate remains at 30% notwithstanding the choice of other developers.

Last, Apple argues that the 30% rate is commensurate with the value developers get from the App Store. This claim is unjustified. One, as noted in the prior section, developers *could* decide to stay on the App Store to benefit from the services that Apple provides. Absent competition, however, it is impossible to say that Apple's 30% commission reflects the fair market value of its services. Indeed, at least a few developers testified that they considered Apple's rate to be too high for the services provided.[486] Two, Apple has provided no evidence that the rate it charges bears any quantifiable relation to the services provided. To the contrary, Apple started with a proposition, that proposition revealed itself **[*998]** to be incredibly profitable and there appears to be no market forces to test the proposition or motivate a change.

Accordingly, the Court finds that Apple's restrictions on iOS game distribution have increased prices for developers. In light of Apple's high profit **[**170]** margins on the App Store, a third-party store could likely provide game distribution at a lower commission and thereby either drive down prices or increase developer profits. The Court must reserve on whether Apple's restrictions have increased prices for consumers as the evidence is mixed.[487] Here, Epic Games' role as a consumer is not in the traditional sense but only in the sense of a consumer of transactions with traditional consumers. This issue was not the focus of this trial.

c. Decreased Output

The parties dispute impact on output. Apple argues that the amount of iOS game output has increased over time. On this, the Court agrees. The evidence shows that iOS game transactions exploded by 1,200% since 2008,[488] with double that growth in developer game revenue. However, that does not mean that Apple's conduct is procompetitive. As Dr. Evans explained, "high-technology industries [often] grow extraordinarily rapidly" even where

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[484] Ex. Expert 6 (Hitt) ¶¶ 166-167; Trial Tr. (Evans) 1686:6-12, 2439:1-2441:23; Trial Tr. (Schmalensee) 1958:1-5; Trial Tr. (Wright) 586:11-21; Trial Tr. (Sweeney) 310:1-17; PX-2392.003. Google, of course, operates in the same market.

[485] Ex. Expert 6 (Hitt) ¶ 180; Ex. Expert 13 (Cragg) ¶ 98; Ex. Expert 16 (Evans) ¶ 50; Trial Tr. (Hitt) 2198:24-2200:6. Similarly unhelpful is Dr. Cragg's analysis of average dollar amounts of Apple's commission. Ex. Expert 13 (Cragg) ¶¶ 99-101. These numbers are coextensive with developers charging higher prices; absent some evidence that Apple caused them to do that, the analysis simply reflects broader growth in the industry. Ex. Expert 6 (Hitt) ¶ 174; Trial Tr. (Hitt) 2110:9-2111:21.

[486] Trial Tr. (Simon) 377:3-10; Trial Tr. (Fisher) 911:4-11 (Apple received developer complaints that the rate is too high).

[487] *See, e.g.*, Trial Tr. (Simon) 355:17-356:17; Trial Tr. (Sweeney) 97:7-14; Ex. Depo. (Ong) 74:8-12; *see also* Ex. Depo. 12 (Gray) 176:23-178:2; PX-0533.010 (even within the Apple ecosystem, app prices are higher on platforms where Apple charges 30% rather than 15%).

[488] The growth in iOS game transactions corresponds to both strong growth in the gaming industry and strong growth in iPhone and iPad sales. Ex. Expert (Hitt) ¶¶ 183-189. These factors could cause mobile game transactions to grow even if Apple's restrictions are anticompetitive.

"a dominant firm emerges very quickly," so "tremendous growth" in these markets is "commonplace." Using growth as a competitiveness metric would "be essentially a free pass for high-tech companies."[489]

Unfortunately, what is needed is a comparison of **[**171]** output in a "but-for" world without the challenged restrictions. Such comparison is not in the record. Dr. Hitt provides some evidence that iOS game revenue grew faster than the game market as a whole and, importantly, that game revenue on iOS grew faster than on Android.[490] Growth rates, however, are difficult to compare because of different initial starting points. Moreover, even assuming that iOS gaming revenue grew faster than the market, it is difficult to attribute that growth to the App Store (as opposed to, for instance, superior iPhone hardware or user experience). Thus, the high output may have been even higher without Apple's restrictions.[491]

Dr. Evans, on the other hand, opines that a high commission reduces output because it leads to higher prices that cause consumers to purchase less, which reduces the number of viable games. Some evidence supports that view. For instance, Apple has recognized that some developers have taken the position that they do not have the margin to support the 30% commission, which is "prohibitive [of] many things." The magnitude of the effect, however, is unclear.[492] Thus, there is no **[*999]** evidence that a *substantial* number of developers actually forego making **[**172]** games because of Apple's commission.[493]

Thus, the analysis is insufficient to determine that Apple's restrictions had either a negative or a positive impact on game transaction volume.

d. <u>Decreased Innovation</u>

Next, Epic Games argues that Apple's app distribution restrictions harm innovation. Epic Games makes two arguments. First, it argues that Apple's 30% commission imposes a burden on developers, who either reduce their game investment or forego making games altogether as a result. Part of this argument is related to output and fails for the same reason: Epic Games has not shown that any developer actually stopped making games because of Apple's commission, albeit they may reduce investment.[494] This, however, is a natural corollary of having to pay app store commissions and does not present a separate argument for anticompetitive effects, particularly since third-party stores would likely continue charging commissions.

Second, Epic Games argues that Apple's restrictions have reduced innovation in game distribution itself. The parties agree that the App Store provides features besides distribution, including search and discoverability to help users discover games, in-app payment processing, **[**173]** developer tools, and security.[495] Competition could improve each of these features: a third-party app store could provide better "matchmaking" between users and

[489] Trial Tr. (Evans) 2366:22-2367:8; Ex. Expert (Hitt) ¶ 183.

[490] Game revenue grew by 2,600% between 2010 and 2018 on iOS but only 367% between 2013 and 2018 on Android. Ex. Expert 6 (Hitt) ¶¶ 183-184.

[491] Ex. Expert (Hitt) ¶¶ 183-185; Ex. Expert 7 (Lafontaine) ¶ 100; Trial Tr. (Hitt) 2083:8-18; Trial Tr. (Evans) 1721:11-18; Ex. Expert 16 (Evans) ¶ 75.

[492] Epic Games cites testimony that Apple is aware of "some developers" who said that they would not launch native iOS apps because of Apple's 30% commission. Ex. Depo. 8 (Cue) 150:5-12.

[493] Ex. Expert 1 (Evans) ¶ 275; Trial Tr. (Schiller) 3111:7-14; PX-0438.

[494] Trial Tr. (Sweeney) 92:8-13.

[495] As explained in this Order, in-app payment processing is an integrated part of the App Store. That does not, however, mean that it would not benefit from competition. Thirdparty app stores could provide substantial innovation in payment processing by incorporating more developer-friendly tools (such as, for example, easy refunds). Thus, all of the anticompetitive effects listed in the next section for in-app payment processing apply to Apple's restrictions on distribution.

developers, could have simpler in-app payments, and could impose a higher standard for app review to create more security.[496]

Notably, Apple conducted developer surveys in 2010 and 2017. Comparing the two indicates that Apple is not moving quickly to address developer concerns or dedicating sufficient resources to their issues. Innovators do not rest on laurels. While more developers may be "satisfied" or "very satisfied" than not, a significant portion are not.[497] For example, a top reason for dissatisfaction with the App Store is lack of functions which other platforms have, such as personalized recommendations.[498] An email summarizing 2018 write-in **[*1000]** answers suggests that developers perceive the App Store as lacking features common to other platforms. For instance:

- "Apple store needs to have 'smart search' ability. Having to require customers to spell names exactly correct in this age is ridiculous for a multi-billion dollar company."
- "[T]he search algorithm is terrible. It is a rating based algorithm rather than a name search. **[**174]** I can search for my apps and type their EXACT name and they still won't come up. I may even need to scroll down 100s of pages before my app shows up."
- "Discoverability is still a significant challenge on the App Store (even after last year's update). Our organic downloads for games on Steam are much higher than our games on the App Store, even though the App Store has more active users. This doesn't make sense."
- "The App Store desperately needs A/B testing. On Google Play, I've been able to optimize my store listing and because of that, I've been able to see unbelievable growth. If Apple added A/B testing for App Store listings, everyone would see a lift in downloads and ultimately more revenue for developers as well as Apple."

Indeed, Apple's own former Head of App Review, Philip Shoemaker, has described the App Store as "antiquated," with "no radical innovation, only evolution" for the last ten years.[499]

In addition, developers complain that app review guidelines lack clarity and are inconsistently applied.[500] Part of this issue stems from the sheer number of apps submitted with only 500 human reviewers. Apple has been slow either to adopt automated tools that **[**175]** could improve speed and accuracy or to hire more reviewers.[501] As discussed further below, Apple's in-app payment processing tool also lacks features.

Apple's slow innovation stems in part from its low investment in the App Store. As Mr. Barnes described, "[o]nly a small amount of direct and allocated R&D . . . [flows] . . . to the Apple App Store." Apple argues that Epic Games fails to account for R&D that affects multiple lines of the business, which counts as joint costs. Even Dr. Schmalensee admitted that the estimates, which were put together specifically for Apple's CEO, show very little

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[496] *See* Trial Tr. (Evans) 1560:12-25 (search and discovery is the "core element of what any store does"); Trial Tr. (Schmalensee) 1954:3-9 (App Store provides "matchmaking"). *But see* Trial Tr. (Evans) 1502:15-1503:18 (excluding in-app payment processing).

[497] The Court acknowledges that the survey data includes five categories (Very Satisfied, Somewhat Satisfied, Neutral, Somewhat Dissatisfied and Very Dissatisfied) and that if combining the two "satisfied" categories, more developer fall within that zone than the two "dissatisfied" categories. That said, by adding in those who are "Neutral," Apple rating is more in the range of 60-40. *See generally* DX-3922.

[498] Ex. Expert 1 (Evans) ¶¶ 191-192, 196; DX-3922.066, .072, .074; DX-3877.019; *see also* DX-3800 (2015 survey). Apple responds by pointing to search ads, which it enabled in 2016 in response to these complaints. Trial Tr. (Cook) 3889:16-3890:2; PX-2284.006. That said, developers must pay for these search ads and competitors may use them to artificially drive traffic, which decreases overall app discoverability. *See* Ex. Depo. (Ong) 59:14-60:14. Thus, the search ads are, at best, a mixed blessing for poor overall matchmaking.

[499] PX-0098.001; *see* Ex. Depo. (Shoemaker) 31:03-05, 64:13-64:20.

[500] *E.g.*, Ex. Depo. (Ong) 62:15-64:16; Ex. Depo. (Shoemaker) 126:20-23; Trial Tr. (Simon) 384:7-385:8.

[501] Trial Tr. (Kosmynka) 1083:12-15, 996:7-12; PX-0137.001 (Google had automated review before Apple). *But see* DX-3642 (describing App Store redesign in response to developer complaints). *See also* Ex. Expert 11 (Rubin) ¶ 57.

R&D allocated to the App Store. Thus, even if the Court accepts that some App Store revenue goes to features that indirectly benefit developers, like hardware, the evidence remains that "core" matchmaking features of the store see little investment.[502]

Ultimately, the point is not that the Apple provides bad services. It does not: most developers are satisfied with the App Store, particularly with its developer tools.[503] Rather, the point is that a third-party app store could put pressure on **[*1001]** Apple to innovate by providing features that Apple has neglected. Because this competition is **[**176]** currently precluded, Apple's restrictions reduce innovation in "core" game distribution services.

e. Other Effects

Epic Games raises two other potential anticompetitive effects. First, Epic Games argues that Apple self-preferences its own apps.[504] Using partial testimony from Mr. Shoemaker, plaintiff claims that Apple used the app review process "as a weapon against competitors" and placed "barriers" between competitor apps, while using the data obtained through app review to create its own apps. For example, Apple Arcade has been allowed on the store, despite being a store within a store. Google Voice, on the other hand, was rejected on "pretextual grounds" because of Apple's concern that the iPhone will "disappear . . . in guise of a Google phone."[505]

Upon review, the proffer is weak. Mr. Shoemaker clearly believes that Apple misuses its app review process. Aside from his limited deposition excerpts, however, there is little objective evidence of self-preferencing. For instance, Apple Arcade apparently complies with App Store requirements that each game be individually downloaded.[506] There is thus at least a factual dispute about whether it accords with the guidelines. As to Google Voice **[**177]** and Rhapsody, even Mr. Shoemaker acknowledges that they were "the first of their kind" and that "Apple just didn't know how to respond" during app review.[507]

Second, Epic Games argues Apple's restrictions reduce "middleware" that could decrease switching costs and increase competition. Dr. Athey testifies broadly to this effect, opining that new platforms face a "chicken-and-egg" problem where they have to attract users through apps but have to attract developers through users. Middleware could help reduce these costs by allowing for app porting from one platform to another.[508] As noted above, Dr. Athey's analysis is plausible but wholly lacking in supporting evidence. She does not show that even her preferred examples of middleware, such as the multi-platform store Steam, have meaningfully increased new entrants,

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502 Ex. Expert 1 (Evans) ¶¶ 187-189; Ex. Expert 2 (Barnes) ¶¶ 19-22; Trial Tr. (Schmalensee) 1902:2-4, 1981:16-1982:5; PX-2385.024.

503 *E.g.*, DX-3922.063. Apple also cites surveys showing very high *user* satisfaction with the iPhone. DX-4275.205; DX-4089.056. The surveys, however, concern the device as a whole and, if anything, reinforce the lesser role played by third-party apps. Thus, the most important features driving purchasing decisions all relate to hardware—battery life, performance, durability, and ease of use—which also form the top reasons for considering other devices. DX-4089.010, .035, .037. By contrast, only 28% of users consider third-party apps an important "other" aspect of their iPhone purchase decision. DX-4089.012.

504 Epic Games argues that Apple self-preferences its apps in search, but provides little evidence in support. In one email, an Apple employee states that Mr. Fischer, "feels extremely strongly about not featuring our competitors on the App Store," but Mr. Fischer says she was misinformed. PX-0058.001; Trial Tr. (Fischer) 954:12-955:12. Another email describes "boosting" certain apps over Dropbox, but Mr. Fischer immediately reversed the decision. PX-0052. As to search, Mr. Schiller testified that Apple does not use search ads for its own products, and Epic Games has not shown otherwise. Trial Tr. (Schiller) 2819:13-14.

505 Ex. Depo. (Shoemaker) 75:14-77:02, 78:13-78:24, 84:16-85:08, 88:02-88:08; PX-0099.006. Epic Games also cites evidence of developers' complaints that Apple's "apps are permitted to do things they are not." PX-0858.002; Trial Tr. (Kosmynka) 1028:11-1030:4. The proffered evidence has no context so it cannot be evaluated.

506 Trial Tr. (Athey) 1854:6-16.

507 PX-0099.005.

508 Ex. Expert 4 (Athey) ¶¶ 42-47, 53-56.

particularly since each platform still requires its own APIs.[509] Thus, **[*1002]** the evidence does not support anticompetitive effects in this area.

2. *Business Justifications*

Apple asserts two business justifications for its app distribution restrictions.[510] First, it argues that prohibitions on third-party app stores helps ensure a safe and secure ecosystem. This benefits both **[**178]** users, who enjoy stronger security and privacy, and developers, who benefit from a larger audience drawn by these features. It also benefits Apple, which uses privacy and security as a competitive differentiator for its devices and operating system.[511]

Second, Apple claims that the distribution restrictions are part of its intellectual property licensing arrangement for which it is entitled to be paid. As the owner of the devices and operating system, Apple could choose not to license its IP and remain the exclusive developer of iOS apps. Instead, Apple has actively licensed, developed, and improved its IP for others, but only on the condition of iOS remaining a "walled garden." Thus, Apple argues that its contractual restrictions are necessary to protect its IP investments and prevent free riding.[512]

Epic Games responds that each of these justifications is pretextual. Apple's commission is wholly disconnected from—and not motivated by—its intellectual property investments. Epic Games also contends that an exclusive app store is not necessary to maintain security, which can be achieved through less restrictive means, such as notarization.[513]

The Court examines the evidence for each.

a. **[**179]** Security, Privacy, and Reliability

Beginning with the security justification, the Court notes at the outset that the parties adopt different definitions of security. Epic Games takes a narrow view of security as preventing an app from performing unauthorized actions or stealing user data. Thus, Epic Games' security expert, Dr. Mickens, defines a "security property" as one that "make[s] an app easier to subvert" or allows it to "improperly interact with other apps" or "expose sensitive user data to potential theft or corruption."[514]

Apple, on the other hand, takes a broader view of security that includes user privacy, reliability, and "trustworthiness." Its security expert, Dr. Rubin, opines that security concerns arise when an app targeted to children asks for a home address; when a simple Tic-Tac-Toe game requests microphone and camera access; when an app developer falsely represents their application; or when an app is so unreliable that its constant crashing endangers offline safety. Dr. Rubin also includes "objectionable **[*1003]** content," such as pornography

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509 *See id*. ¶ 67; Ex. Expert 6 (Hitt) ¶¶ 261-262 (while Steam decreases costs to *offer* games across platforms, it does nothing for costs to *develop* them).

510 In its Findings of Fact, Apple focuses heavily on the procompetitive nature of app stores in general. Thus, Apple argues that before it introduced the App Store, distribution was limited to the web, and that the App Store launched a new wave of innovation that benefited consumers and developers alike. Apple FOF ¶¶ 545-548. Since Epic Games does not challenge Apple's right to maintain the App Store but only its restrictions on other distribution—which may provide similar or equivalent benefits—these procompetitive effects are not directly tied to the challenged conduct.

511 Apple FOF ¶¶ 581-595; Trial Tr. (Schiller) 2734.21-2735:2, 2830:25-2831:3; Ex. Expert 11 (Rubin) ¶¶ 23, 56-59; Trial Tr. (Sweeney) 93:8-11; Trial Tr. (Evans) 1689:16-1690:8; Ex. Expert 8 (Schmalensee) ¶¶ 52-54.

512 Apple FOF ¶¶ 596-602; Ex. Expert 12 (Malackowski) ¶¶ 15-19, 26, 42, 51, 54.

513 Epic Games FOF ¶¶ 564-700; *see also* Trial. Tr. (Malackowski) 3662:13-17, 3666:16-3668:10-18, 3669:22-3670:7, 3692:18-3700:10; Trial Tr. (Schiller) 2738:15-24.

514 Ex. Expert 5 (Mickens) ¶ 49.

and pirated apps, in his definition.[515] Because these apps perform no expressly unauthorized actions—and may be affirmatively authorized **[**180]** by the user—they raise different concerns than traditional malware.

The Court finds it useful to disaggregate these forms of security, as well as the two types of challenged restrictions (sideloading and "store-within-a-store").

i. "Narrow" Security: Malware

Under a narrow conception of security, Apple protects from malware on iOS in at least four ways. *First*, Apple uses malware scanning programs to detect whether a piece of software corresponds to known malware. *Second*, it requires developers to register with a certificate and sign their code with that certificate so that malware can be traced back to a developer and code from unknown entities can be excluded. *Third*, it uses "sandboxing" to prevent an app from doing anything that the user has not authorized.[516]*Fourth*, it includes "reliability checks" on the App Store, which include automated app scanning, as well as human review. Together, these techniques create "layered" security that creates multiple barriers to malware.[517]

All but the last of these malware protections are performed by the operating system or middleware independent of app distribution. Dr. Mickens thus opines that restrictions on app distribution are not necessary because **[**181]** the operating system implements all of the key security features. App review, by contrast, provides only secondary checks on sandbox compliance, exploit resistance, and malware exclusion, as well as "non-security" factors like privacy and legal compliance.[518]

Importantly, however, Dr. Mickens focuses only on preventing unauthorized app functions. He opines that his preferred techniques work by removing "decision-making" power from applications and vesting them in the operating system. The OS then resolves the decision by prompting users for consent. Thus, even though the OS is formally making decisions, the user ultimately determines access.[519] The evidence shows, however, that this may not be enough to protect security because users often grant permissions by mistake. Mr. Federighi credibly testified that malware may use "social engineering" techniques to trick the user into granting access and evade operating system defenses. For example, malware may represent itself as a dating app to ask for photo access—which it can then encrypt and hold for ransom against the user. Epic Games did not explain how, if at all, the operating system can protect against this type of behavior.[520]

Moreover, system-level **[**182]** protections do not fully prevent downloading malware in the first place. As Dr. Rubin plausibly **[*1004]** opines, "[i]t is unwise to *first* trust users to download malicious apps, and *then* try to subsequently detect malicious apps and deny giving malicious apps the permissions they might request."[521] The evidence shows that social engineering attacks act as a dominant vector of malware distribution. A 2020 Nokia report indicates that "[i]n the smartphone sector, the main venue for distributing malware is represented by Trojanized applications," which trick users into downloading by posing as a popular app. For example, a malicious

[515] Ex. Expert 11 (Rubin) ¶¶ 18-21. Mr. Federighi testified that security means "protecting users' data and protecting their control over the device, making sure that what happens on their device is what the user intended and isn't being manipulated by a bad actor." Trial Tr. (Federighi) 3358:5-8. This definition encompasses Dr. Rubin's examples.

[516] "Sandboxing" may encompass other techniques, such as memory isolation and address space layout randomization. Trial Tr. (Federighi) 3376:4-3378:14; Ex. Expert 5 (Mickens) ¶¶ 24-37.

[517] Trial Tr. (Federighi) 3372:10-3375:25, 3383:16-3384:14.

[518] Ex. Expert 5 (Mickens) ¶¶ 6-9, 66-70; Trial Tr. (Mickens) 2559:5-12, 2571:24-2572:5.

[519] Ex. Expert 5 (Mickens) ¶¶ 23, 72.

[520] Trial Tr. (Federighi) 3371:3-3372:1, 3379:10-3380:13; Ex. Expert 11 (Rubin) ¶ 27.

[521] Ex. Expert 11 (Rubin) ¶ 30 (emphasis in original).

app may represent itself as free Microsoft Word to obtain downloads. A 2020 PurpleSec report confirms that "98% of cyberattacks rely on social engineering."[522]

For these types of attacks, human app review plays a meaningful role. During app review, a human reviewer confirms that an app corresponds to its marketing description. This prevents the "trojan" attacks described above, where malware tricks users into download by posing as another popular app. The human reviewer also checks that the app's entitlements are reasonable for the task it purports to accomplish. Thus, a Tic-Tac-Toe **[**183]** game may be rejected if it asks for camera access or health data. Last, although not directly related, app review checks for offline safety issues. Although these tasks are straightforward, they require human review and cannot be implemented by a computer or operating system.[523]

The Court agrees with Epic Games that this process is imperfect. Apple has limited ability to prevent "Jekyll and Hyde" apps that change their behavior after review, and allows some malware to slip through.[524] However, the overall error rate appears to be relatively small, with Apple's former head of app review testifying that it was around 15% in 2015. Mr. Federighi confirmed that the error rate is generally small.[525]

Removing app distribution restrictions could reduce this effectiveness. First, app stores often differ in the quality of app review. On Android, which allows some third-party app stores, the main Google Play app store is secure, but a variety of third-party stores allow blacklisted apps to operate.[526] A Nokia report attributes higher **[*1005]** malware rates on Android to Trojan apps on third-party app stores. This creates a problem because, as Dr. Rubin opined, "security is only as strong as the weakest link."[527] Decentralized **[**184]** distribution thus increases the risk of infection by giving malware more opportunities to break through. Namely, if even one app store permits malware to operate (either accidentally or as a "rogue" app store), a social engineering attack has a chance to work.[528]

Second, with respect to sideloading, app review is likely impossible and thus could not prevent social engineering attacks. Apple currently prevents direct distribution from the web using technical measures. If those measures were

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[522] DX-4975.008; DX-4956.006; Ex. Expert 11 (Rubin) ¶ 96; Trial Tr. (Federighi) 3370:2-12; Trial Tr. (Rubin) 2763:1-9.

[523] Trial Tr. (Federighi) 3384:22-3388:7; Trial Tr. (Kosmynka) 1087:9-21, 1090:22-1094:1; Ex. Expert (Rubin) ¶¶ 31, 36-37. Human review may also provide some benefit against novel and well-hidden malware attacks. Dr. Rubin explains that automated tools investigate based on past threats to flag content, which makes them less able to detect novel attacks. Mr. Kosmynka acknowledged that his team has found new types of threats not picked up by automated tools. He also testified that his team finds well-hidden features not picked up by automated tools, including bait and switch. Trial Tr. (Kosmynka) 1108:1-1109:11, 1095:23-1103:8; Ex. Expert (Rubin) ¶ 40.

[524] These issues appear to have preceded Apple's use of dynamic analyzers, which may partly address the problem. *See* PX-0465; Trial Tr. (Kosmynka) 996:7-19, 1098:17-25.

[525] PX-0465; PX-0335.006; Ex. Depo. (Shoemaker) 133:20-134:9; Trial Tr. (Federighi) 3486:15-23. Both parties also cite statistics about the overall rejection rate of app review. That says nothing about the error rate. Apps may be approved or rejected for proper and improper reasons. Trial evidence did not focus on this later issue.

[526] The parties debate whether Android is less secure than iOS. Although some industry publications show greater malware on Android, Dr. Mickens testified that they are in the same "rough equivalence class." The Court need not resolve this dispute because Android differs in other ways, such as lack of app certification and weaker sandboxing, that could affect malware rates independent of app distribution. *E.g.*, DX-4975.008; DX-4956.004; DX-4959; *see* Trial Tr. (Mickens) 2558:16-2260:8, 2630:12-2631:11; Trial Tr. (Rubin) 3774:3-2777:16.

[527] Ex. Expert 11 (Rubin) ¶ 87. Of course, third-party app stores could also have increased security than Apple. For example, a Disney app store would plausibly screen apps more rigorously than Apple. Trial Tr. (Mickens) 2697:12-21.

[528] DX-4401.005; DX-4975.008; Ex. Expert 11 (Rubin) ¶¶ 47-49, 87-89. The parties also debate whether centralization of app review increases or decreases its effectiveness. Dr. Mickens opines that having many stores perform app review puts more "eyeballs" on the problem and decreases the burden on any one store. Dr. Rubin opines that it fragments learning and makes each store less knowledge. The Court finds both effects plausible, but lacks evidence on their comparative magnitude. Trial Tr. (Mickens) 2702:7-21; Ex. Expert 11 (Rubin) ¶ 93.

lifted, users could download—and thus could be tricked into downloading—directly from the open web. Although Epic Games presents some alternative methods that could be used to prevent malicious direct distribution (which are discussed below), there is little dispute that completely unrestricted sideloading would increase malware infections.[529]

Thus, the Court finds that centralized distribution through the App Store increases security in the "narrow" sense, primarily by thwarting social engineering attacks.

ii. "Broad" Security: Privacy, Quality, Trustworthiness

With respect to a "broader" definition of security, there is less dispute that app distribution restrictions help ensure privacy, quality, **[**185]** and trustworthiness. This again, stems primarily from human app review.

Privacy: Dr. Mickens agrees that computers "lack a generic way to detect which instances of user-submitted touchscreen data contain private information." While the OS can detect app access to computer-generated private data (camera roll), it lacks the capacity to distinguish private from nonprivate user entries. Dr. Mickens agrees that human app review can aid in this process, but opines that Apple does a poor job in practice. His only evidence for this is a Wall Street Journal that reports user tracking on popular iOS apps; he did not analyze any internal Apple data for this opinion.[530]

Apple, by contrast, proffers some evidence that the App Store imposes heightened privacy requirements. For instance, Apple requires developers to publish "privacy labels" that disclose data collection as a condition of being listed on the App Store. It also adopts the stricter privacy policies required by the European Union worldwide, including user opt-out. Not all **[*1006]** developers like these requirements; presumably because it impacts their own bottom line. Thus, privacy concerns may be more at risk with loosened app distribution restrictions. **[**186]** Under the current model, large developers who rely on advertising for monetization must comply or leave the App Store to avoid these requirements.[531] Accordingly, privacy, more than other issues, likely benefits from some app distribution restrictions.[532]

Quality: A variety of content may be safe but objectionable, including pornography, gambling, and inappropriate marketing to children. Mr. Kosmynka testified that human app review is necessary to detect such content because computers cannot do it alone. Importantly, offensiveness is highly context dependent, which makes it difficult to automate. For example, nudity may be appropriate in a medical app but inappropriate in other contexts.[533]

Epic Games responds that Apple's app review still allows objectionable apps. For example, it points that school shooting games have appeared on the App Store.[534] However, this data is largely anecdotal and fails to provide a

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[529] Trial Tr. (Federighi) 3388:24-3389:12, 3416:6-16; Trial. Tr. (Cook) 3884:22-3885:11; Ex. Expert 11 (Rubin) ¶ 54; *see also* Trial Tr. (Mickens) 2709:23-2710:2 (describing this model as "absolute mayhem").

[530] Ex. Expert 5 (Mickens) ¶¶ 71-75; Trial Tr. (Mickens) 2631:16-21.

[531] As explained above, the evidence suggests that decentralized distribution benefits primarily large developers, who do not need to rely on a centralized app store to be discovered. While these developers are unlikely to sell outright malware, they are quite likely to monetize user data, which makes privacy a particularly sensitive issue.

[532] DX-5335.015; Trial Tr. (Cook) 3847:15-3848:21; Trial Tr. (Federighi) 3408:2-3410:4, 3422:17-2423:15; Trial Tr. (Schiller) 3166:6-15; Ex. Expert 11 (Rubin) ¶ 84. Apple also cites "app tracking transparency" as a feature that protects user privacy. The record is not clear, however, whether this feature is implemented by the App Store or by the OS. To the extent that it is implemented by the OS, app review may play a more limited role in ensuring that apps do not incentivize relinquishing privacy. Trial Tr. (Schiller) 3166:22-3167:7; Trial Tr. (Federighi) 3407:73-408:1, 3410:5-9.

[533] PX-0131; PX-1938; PX-1939; Trial Tr. (Kosmynka) 1085:19-1087:8, 1108:20-1109:11; Trial Tr. (Schiller) 3154:7-24; *see also* Trial Tr. (Mickens) 3673:16-23 (agreeing that system-level protections do not protect against inappropriate content).

[534] The alleged "BDSM" apps proved hollow and demonstrates the problem with highly provocative and sexual photos as an enticement to download apps geared towards dating that ultimately does not contain pornographic material. This merely

comparison to the "but-for" world where app review did not take place. Thus, app distribution restrictions likely reduce offensive content available on Apple's devices.

Trustworthiness: App review also protects against scams and other fraud, such as pirated or copycat apps. Dr. **[**187]** Mickens did not consider this aspect in his security analysis and admitted that his opinion about the value of human app review may change if these issues are included. He also agreed that system-level protections do not protect users against this type of content, which confirms that human review is necessary.[535]

As with objectionable content, Epic Games responds by showing that scams still slip through app review.[536] For the same reasons, this anecdotal evidence does not show that scams and other fraud would not be higher without app review. Thus, the Court finds that app distribution restrictions increase security in the "broad" sense by allowing Apple to filter fraud, **[*1007]** objectionable content, and piracy during app review while imposing heightened requirements for privacy.

iii. Impact on Market

These protections have an impact on users, developers, and Apple. First, app review provides Apple with a competitive differentiator. When Apple first launched the App Store, it sought to "strike a really good path" between the dependability of a closed device and the ability to run third-party apps of a PC. As Mr. Jobs explained:

> It is a dangerous world out there. There are mobile viruses of **[**188]** all sorts that people have to put up with and so we've tried to strike a really good path here. On one side you've got a closed device like the iPod, which always works. You pick it up, it always works because you don't have to worry about third party apps mucking it up. And on the other side you've got a Windows PC where people spend a lot of time every day just getting it back up to where it's usable and we want to take the best of both. We want to take the reliability and the dependability of that iPod and we want to take the ability to run third party apps from the PC world but without the malicious applications.[537]

Since then, security and privacy have remained a competitive differentiator for Apple. Mr. Cook testified that privacy is "a very key factor, one of the top factors who people choose Apple." The documents bear this out: internal surveys show that security and privacy was an important aspect of an iPhone purchasing decision for 50% to 62% of users in most countries— and over 70% in India and Brazil—and an important part of an iPad purchasing decision for 76% to 89% of users. Indeed, Mr. Sweeney himself owns an iPhone in part because of its better security and privacy than **[**189]** Android.[538]

Second, there is evidence that Apple's restrictions benefit users. As noted above, many users value their iOS devices for their privacy and security. As the result of having a trusted app environment, users make greater use of their devices, including by storing sensitive data and downloading new apps. The witnesses are unanimous that user security and privacy are valid procompetitive justifications.[539]

Third, the evidence on developers is mixed. On the one hand, developers experience delays and mistaken rejections that would not occur with sideloading or distribution through stores without app review. On the other

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reinforces the subjective and context-dependent nature of "objectionable" content. *See* PX-0131; PX-1938; PX-1939. Trial Tr. (Kosmynka) 1085:19-1087:8, 1108:20-1109:11; Trial Tr. (Schiller) 3154:7-24.

[535] Trial Tr. (Kosmynka)1088:18-1090:16; Trial Tr. (Mickens) 2673:2-7, 2673:24-2675:17, 2679:21-2680:1, 2685:8-18.0

[536] *See, e.g.*, PX-0060; PX-0371.

[537] PX-0880.025.

[538] Trial Tr. (Cook) 3848:22-3849:7; Trial Tr. (Sweeney) 302:19-303:4; DX-4089.012; DX-3465.024.

[539] *See* Trial Tr. (Evans) 1689:22-24 ("[p]rotecting iPhone users from security threats is a procompetitive benefit"), 2415:10-13 (same for protecting users from offensive content); Trial Tr. (Sweeney) 193:3-9 (recognizing importance of privacy and security); Trial Tr. (Federighi) 3421:19-3422:7 (describing importance of security to ecosystem).

hand, developers benefit from the safe environment created by the App Store. Based on a trusted environment, users download apps freely and without care, which benefits small and new developers whose apps might not be downloaded if users felt concern about safety. This is consistent with the indirect network effects identified by Dr. Schmalensee: the small burden on developers maintains a healthy ecosystem that ultimately benefits both sides. Thus, the evidence shows that developers both benefit and suffer from app distribution restrictions.[540]

[*1008] iv. Alternatives

Epic Games **[**190]** argues that the security and privacy benefits described above can be achieved without app distribution restrictions. As explained, most of the benefits derive from app review, which screens for social engineering attacks, filters fraud and offensive content, and impose heightened privacy requirements. Epic Games argues that the same benefits can be achieved in other ways. It focuses on two alternative models.

First, under an "enterprise program" model, Apple could focus on certifying app stores instead of apps. The Enterprise Program is an existing model for distributing apps on iOS where companies apply to distribute apps within its organization. Apple reviews the company and, if conditions are met, gives it a certificate that allows it to sign apps for distribution. Although the program has occasionally been abused, it shows that Apple could shift its review from apps to app stores, while continuing to impose standards for privacy and security.[541]

Second, under a "notarization" model, Apple could continue to review apps without limiting distribution. The notarization model is currently used on macOS. There, Apple scans apps using automatic tools and "notarizes" them as safe before they **[**191]** can be distributed without a warning. Apps can still be distributed through the Mac store (with complete app review) or with a warning if not notarized, but notarization provides a "third path" between full app review and unrestricted distribution. In theory, notarization review could be expanded to include some of the checks Apple currently performs in the App Store, such as human review.[542]

The notarization model is particularly compelling because Apple contemplated a similar model when developing iOS. iOS is based on macOS and share the same kernel. Documents show that Apple initially considered using app signing for security while allowing developers to distribute freely on iOS. As one document explains, "[app] [s]igning does not imply a specific distribution method, and it's left as a policy decision as to whether signed applications are posted to the online store, or we allow developers to distribute on their own." This shows that Apple could continue performing app review even if distribution restrictions were loosened.[543]

Apple responds to Epic Games' proposed alternatives in several ways. First, it disputes that the Enterprise Program provides a comparable model because it is used **[**192]** primarily for employers, who rarely want to hack their own employees. That is factually true, but provides little insight as to why a modified model could not work. **[*1009]** Apple points to unspecified evidence that the Enterprise Program has been used to distribute malware. As with Epic

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540 Trial Tr. (Simon) 384:7-385:8; Trial Tr. (Grant) 727:22-730:4; Ex. Depo. (Ong) 62:15-65:25; Trial Tr. (Federighi) 3421:16-3422:7; Ex. Expert 8 (Schmalensee) ¶ 52.

541 Ex. Expert 5 (Mickens) ¶¶ 56-58; Trial Tr. (Mickens) 2585:24-2586:19, 2667:12-2670:1; Trial Tr. (Federighi) 3412:23-3415:17; Trial Tr. (Schiller) 3145:22-3146:8. For example, Apple could demand that third-party app stores require "privacy labels" and fraud prevention as a condition of certification. Indeed, Apple already implements this model for social media apps, which can (and do) host objectionable content but which implement their own content moderation. Trial Tr. (Evans) 2418:14-2419:1; Trial Tr. (Federighi) 3469:9-25 (noting that Parler was removed from the App Store based on inadequate content moderation).

542 Ex. Expert 5 (Mickens) ¶¶ 85-87; Trial Tr. (Federighi) 3380:19-3381:11, 3463:9-3467:16; *see* DX-5492.103-.104.

543 PX-2756; Trial Tr. (Federighi) 3358:9-21; Trial Tr. (Mickens) 2593:13-2594:15; Ex. Expert 5 (Mickens) ¶¶ 13, 46, 89-96; PX-0877.100-.300; PX-0875.002. Under the notarization model, Apple also retains the ability to revoke notarization and turn off developer accounts associated with malware. Depending on the scope of the option, this could address Mr. Federighi's concern that decentralized distribution creates a "whack-a-mole" problem. Trial Tr. (Rubin) 3794:14-3795:8; Trial Tr. (Federighi) 3392:4-20, 3451:14-2452:6.

Games' evidence of fraud on the App Store, this does not show that the program is unsecure as a general matter.[544]

Second, it claims that Mac faces a different threat model and has more malware than iOS. Mr. Federighi testified that users download apps more casually on mobile devices than on computers and frequently use them to store more valuable data. The Mac model was also adopted at a time when users expected to freely download from the Internet, which limited Apple's ability to impose greater restrictions given customer expectations. In any case, Mr. Federighi testified that Mac has a "malware problem" compared to iOS. Even with notarization, 110 instances of malware broke through on the Mac in 2020.[545]

While Mr. Federighi's Mac malware opinions may appear plausible, they appear to have emerged for the first time at trial which suggests he is stretching the truth for the sake of the argument. During deposition, **[**193]** he testified that he did not have any data on the relative rates of malware on notarized Mac apps compared to iOS apps. At trial, he acknowledged that Apple only has malware data collection tools for Mac, not for iOS, which raises the question of how he knows the relative rates. Prior to this lawsuit, Apple has consistently represented Mac as secure and safe from malware.[546] Thus, the Court affords Mr. Federighi's testimony on this topic little weight.

In any case, even if notarization is less secure on Mac, that only shows the limits of malware scanning. If Apple implemented a more fulsome review, similar to the type done on the App Store, there is no reason why the results would be different. Apple's only response is that app review may not scale given developers' expectation over timing. Given that app review is already required for all apps in the App Store, the scale itself does not appear to be a problem. The question is the amount of resources Apple allocates to the issue and supply of human reviewers. *See supra* Facts § I.C.4.

Ultimately, the Court finds persuasive that app review can be relatively independent of app distribution. As Mr. Federighi confirmed at trial, **[**194]** once an app has been reviewed, Apple can send it back to the developer to be distributed directly or in another store. Thus, even though unrestricted app distribution likely decreases security, alternative models are readily achievable to attain the same ends even if not currently employed.[547]

b. Intellectual Property

Turning to the intellectual property justification, the Court agrees with the general proposition that Apple is entitled to be paid for its intellectual property. The inquiry though does not end with the bald conclusion. Apple provides evidence that it invests enormous sums into developing new tools and features for iOS. Apple's **[*1010]** R&D spending in FY 2020 was $ 18.8 billion.[548] This spending runs the gamut from hardware features like an Accelerometer developed in 2007, to a gyroscope in 2010, stereo speakers in 2016, to LiDAR in 2020, all of which expand the device functions to software features that improve processing speed to combinations of the two, such as FaceTime. It also includes thousands of developer tools, SDKs, and APIs (150,000 today), many of which are directed specifically at game developers. For example, Metal is a tool that allows developers to create powerful computer **[**195]** graphics. Additionally, Apple has invested in longer battery file, and over the last decade, core

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[544] For instance, it is difficult to imagine that Microsoft would be a source of malware for iOS users. *See* Trial Tr. (Mickens) 2668:16-2671:15 (explaining that the Enterprise Program is just a "point in the design space"); Trial Tr. (Schiller) 3146:13-25.

[545] Trial Tr. (Federighi) 3362:2-3365:3, 3389:14-3390:8, 3393:4-25, 3394:1-19, 3401:3-24. Mr. Federighi also expressed confusion about how an enterprise model would work, including how a trustworthy store would be determined. Trial Tr. (Federighi) 3416:17-3417:7. These problems appear comparable determining app trustworthiness, which Apple has managed with adequate success, as described above.

[546] *Id.* 3432:19-3434:4, 3394:4-22; *see, e.g.*, PX-0741.100, .500.

[547] Trial Tr. (Federighi) 3510:5-15.

[548] This number, which is taken from Apple's SEC filings, covers Apple's entire business. Internal financial documents suggest that only a small portion of this spending goes to services like the iTunes store. *Compare* DX-4581.026 (total R&D) *with* PX-2385.024 (R&D breakdown).

processing units (CPU) have increased one hundredfold and relative graphic performance, one thousandfold. Mr. Schiller testified that each of these features enables game developers to create new and innovative games.[549]

Epic Games does not venture to argue that Apple is not entitled to be paid for its intellectual property, but rather claims that these investments have nothing to do with the App Store *specifically*. Apple disagrees. As with other issues in this trial, the answer is somewhere in between the two extremes but the evidence was not presented in a way to make a decision with precision. That said, the record is devoid of evidence that Apple set its 30% commission rate as a calculation related to the value of its intellectual property rights. Nor is there any evidence that Apple could not create a tiered licensing scheme which would better correlate the value of its intellectual property to the various levels of use by developers.[550] More specifically, the evidentiary record is silent as to whether the $ 99 fee paid by developers whose entire app is "free," like banks or other **[**196]** commercial entities, is correlated to the intellectual property as compared to the gaming developers who are paying 30% on each IAP transaction and who appear to be subsidizing most of the other app developers.

Thus, the Court finds that with respect to the 30% commission rate specifically, Apple's arguments are pretextual, but not to the exclusion of some measure of compensation.

B. Anticompetitive Effects: In-App Payment Restrictions

1. *Effects*

Turning to the evidence regarding in-app payment restrictions, Epic Games focuses on the effects on price and quality. Although in-app payment processing is an integrated part of the App Store, the Court reviews its effects because third-party app stores could compete on in-app payment processing—and thus rectify some of the effects—if app distribution restrictions were loosened. The Court also considers procompetitive justifications unique to payment restrictions as those relative to app distribution restrictions apply here as well. Lastly, the Court considers the anti-steering provision, which presents a separate subissue.[551]

[*1011] Starting with Epic Games' two arguments, the Court notes that it has already discussed them, which shows both **[**197]** pro- and anti-competitive benefits.[552] *See supra* Facts § V.A. Moreover, the analysis included the tradeoffs within privacy considerations. *Id.*

Apple's experts opine on other benefits, in addition to fraud prevention. With respect to the user side, Dr. Schmalensee opines that "IAP supports the ability of users to redownload apps and in-app purchase on new devices, share subscriptions and in-app features with family members, view their entire purchase history, and manage subscriptions from one place on their phone," all of which benefits users. While true, these benefits are also a reflection of the ecosystem. Dr. Athey counters that multi-platform payment processors would benefit users

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[549] DX-4581.026; Ex. Expert 12 (Malackowski) ¶¶ 22, 29-33; Trial Tr. (Schiller) 2878:2-2902:10. Other examples included a retina display in 2010, Taptic Engine in 2014, and Neural Engine in 2017. None of these developments are allocated to the App Store but all support games and other applications. Trial Tr. (Schiller) 2878:6-2885:6, 2893:3-2895:15.

[550] *See* Trial Tr. (Malackowski) 3662:13-17.

[551] As with the app distribution restrictions, the Court uses "app" interchangeably with "game" and does not distinguish game and non-game developers here. There is no evidence that gamers experience the effects differently, and they are more likely to be affected by the restrictions because of iOS games' disproportionate use of IAP. *See supra* Facts §§ II.B.3, V.A.

[552] Ex. Depo. (Ong) 169:24-173:06; *see also* Trial Tr. (Sweeney) 128:22-24; PX-2362.300; Ex. Expert 8 (Schmalensee) ¶ 150; Ex. Expert 11 (Rubin) ¶ 127.

more by enabling the same migration, control, and sharing across platforms.[553] On the gaming side, much of this is being done through cross-wallet and cross-platform play.

On the developer side, Apple argues IAP helps streamline in-app payment functions. By providing a consistent and trusted user experience, IAP encourages users to spend freely, which benefits developers through indirect network effects and has resulted in millions of dollars of revenue. Again, as noted above, the ability to profit **[**198]** from impulse purchasing can be viewed as both a sword and a shield in this context. For those developers who rely more heavily on Apple, the benefit is greater than those like Epic Games who would prefer for the revenue stream to be direct.

Beyond this significant feature, it is unclear what else IAP provides to developers. Apple agrees that it is not a payment processor; Apple delegates actual payment processing to thirdparties, such as Visa. Mr. Fischer testified that IAP provides features as part of the "commerce engine," but all of those features relate to users or Apple. Indeed, Dr. Evans shows that IAP does nothing technically aside from returning payment information.[554] Thus, there is no evidence that IAP provides developers with any unique features.[555]

[*1012] Apple cites three additional procompetitive business justifications for its payment processing restrictions. As with app distribution, Apple cites (i) security, including privacy and fraud prevention, (ii) collection of its commission, and (iii) compensation for its intellectual property. The Court addresses each justification only to the extent not already discussed above.

2. *Business Justifications*

a. Security

Dr. Rubin opines **[**199]** that by maintaining all transaction data in one place, *i.e.*, centralization, Apple is better able to detect new patterns in fraudulent transactions using algorithms. Dr. Rubin also claims that Apple benefits from its visibility into the entire transaction, which allows it to verify certain transactions.[556]

As explained above, the Court agrees that decentralization may decrease security in some instances. The other arguments cut both ways. For instance, with respect to scale and fraud mining, Dr. Rubin suggests that having more "data points" will always lead to better fraud detection. Apple admits, however, that IAP is not the largest in-app payment service because it processes at most 3% of in-app purchases.[557] Thus, to the extent that scale allows Apple to better detect fraud, other companies could do it better because they process more transactions. Similarly,

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[553] Ex. Expert 8 (Schmalensee) ¶ 150; Trial Tr. (Schmalensee) 1894:11-1895:12; Trial Tr. (Schiller) 3187:1-6; Ex. Expert 4 (Athey) ¶¶ 76-78; *cf*. PX-2235.004 (email noting difficulty of multi-platform in-app payments). Epic Games also argues that innovative features are precluded, such as carrier billing, but the evidence on this point is scant. *See* PX-2302.013; Trial Tr. (Evans) 1608:20-1609:12.

[554] In its proposed findings of fact, Apple claims that IAP helps developers with currency conversion and tax collection, but its record citations do not support that claim. *See* Apple FOF ¶ 692 (citing Ex. Expert 8 (Schmalensee) ¶¶ 153-154, which does not discuss these features).

[555] Ex. Depo. (Forstall) 252:21-254:4; Trial Tr. (Schiller) 2798:14-19; Ex. Expert 8 (Schmalensee) ¶¶ 152, 154; Ex. Expert 1 (Evans) ¶ 229. Apple raises three additional arguments for IAP. First, it claims that the introduction of IAP "unlocked" the freemium model of monetization. Ex. Expert 8 (Schmalensee) ¶ 134. The parties dispute whether developers used this model on iOS before IAP. Either way, Apple does not claim that freemium requires IAP at present time (as opposed to some other in-app payment processor), so this does not present a *current* procompetitive benefit. Second, Dr. Schmalensee opines that IAP is "essentially free" to developers, who would need to build their own systems or obtain third-party services for payment processing otherwise. *Id.* ¶ 152. In light of Apple's 30% commission, the Court is not persuaded that developers could not obtain these features more cheaply from other companies. Last, Apple claims that IAP helps prevent fraud and ensure privacy. This feature is addressed in the next section as a procompetitive justification.

[556] Ex. Expert 11 (Rubin) ¶¶ 126-128.

[557] Apple FOF ¶ 669; Ex. Expert 8 (Schmalensee) ¶ 170.

with respect to data breaches, although a breach of a payment handler could expose some user data, a breach of Apple itself could expose all Apple users who use IAP.

One of Apple's strongest arguments for IAP security was that it can verify digital good transactions. Unlike for physical goods, Apple uses IAP after confirming that the **[**200]** developer has actually delivered a digital good to the user and is entitled to the corresponding payment. The evidence shows, however, that Apple itself does not perform the confirmation. Apple's Head of Pricing, Mr. Grey, testified that Apple simply asks the developer to confirm that delivery occurred and then issues a receipt. Apple has not shown how the process is any different than other payment processors, and any potential for fraud prevention is not put into practice.[558]

b. Commission Collection

Next, Apple claims that IAP provides the most efficient method for collecting its commission. Dr. Schmalensee opines that without IAP, Apple would have to rely on sellers to remit its 30% commission, with little recourse other than a lawsuit if the money was withheld. Due to the sheer volume of transactions on the App Store, this process could quickly become unwieldy.[559]

Epic Games does not directly dispute these claims. Instead, Epic Games challenges Apple's entitlement to a 30% commission in the first place.[560] Evidence exists to support both views as discussed above. *See supra* Facts §§ I.C.3., II.C., IV.A. The fact of commission is separate from the actual amount of the collection, which the **[**201]** Court addresses next.

[*1013] A corollary point to this topic concerns Apple's restrictions on developers' ability to provide consumers with information about their transactions. Guideline Section 3.1.1 states that apps "may not include buttons, external links, or other calls to action that direct customers to purchasing mechanism other than in-app purchase."[561] This guideline does not prohibit steering toward purchasing mechanisms outside the App Store or its apps, such as on social media, as long as it does not target iOS users but other provisions imply as much.[562]

The competitive effects and justifications for the anti-steering provision are coextensive with those described for Apple's commission previously. *See supra* Facts § V.A.

c. Value of the Intellectual Property

As described above, Apple has not adequately justified its 30% rate. Merely contending that its commission pays for the developer's use of the App Store platform, license to Apple's intellectual property, and access to Apple's user base only justifies a commission, not the rate itself. Nor is the rate issue addressed when Apple claims that it would be entitled to its commission even for games distributed outside the App **[**202]** Store because it provides the device and OS that brings users and developers together.[563]

As noted, no one credibly disputes that Apple and third-party developers act symbiotically. Apple gives developers an audience and developers make Apple's platform more attractive. Thus, Apple earns revenue each time a developer earns revenue creating a feedback loop. However, as revenues show, the ultimate effect appears to vary within developer groups depending on how a developer chooses to monetize its app.

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[558] Ex. Expert 11 (Rubin) ¶ 128; Trial Tr. (Fischer) 958:12-959:2; Ex. Depo. 12 (Gray) 112:18-114:10.

[559] Ex. Expert 8 (Schmalensee) ¶¶ 138-139, 145-146.

[560] Trial Tr. (Schiller) 2826:6-7; Ex. Depo. (Ong) 58:20-59:13, 152:4-152:23; *see also* Trial Tr. (Weissinger) 1314:11-22.

[561] PX-2790.010.

[562] *See* PX-0257; PX-2790.011; Trial Tr. (Lafontaine) 2055:12-2056:20; Trial Tr. (Schmalensee) 1911:1-12.

[563] Apple FOF ¶ 572; Trial Tr. (Cook) 3863:6-3864:8.

Further, there is substantial evidence that Epic Games, and perhaps other larger developers, bring their own audience to iOS. Fortnite was already popular when it arrived on iOS and Apple sought exclusive Fortnite content to attract new users. *See supra* Facts §§ I.B.2.d, I.B.4. That said, Epic Games wanted Apple's user base, to which it did not have access, as it had already saturated its other options. Also, Match Group found that the majority of new users from the App Store organically searched for its apps (*e.g.*, by typing in "Tinder"), while Apple contributed only 6% of discovery. For these developers, Apple's role in generating in-app purchases was "nothing" but it continued to receive a **[**203]** 30% commission on in-app purchases.[564]

C. Combined Effects

Because Apple has created an ecosystem with interlocking rules and regulations, it is difficult to evaluate any specific restriction in isolation or in a vacuum. Thus, looking at the combination of the challenged restrictions and Apple's justifications, and lack thereof, the Court finds that common threads run through Apple's practices which unreasonably restrains competition and harm consumers, namely the lack of information and transparency about policies which effect consumers' ability to find cheaper prices, increased customer service, and options regarding their **[*1014]** purchases. Apple employs these policies so that it can extract supracompetitive commissions from this highly lucrative gaming industry. While the evidence remains thin as to other developers, the conclusion can likely be extended.

More specifically, by employing anti-steering provisions, consumers do not know what developers may be offering on their websites, including lower prices. Apple argues that consumers can provide emails to developers. However, there is no indication that consumers know that the developer does not already have the email or what the **[**204]** benefits are if the email was provided. For instance, Apple does not disclose that it serves as the sole source of communication for topics like refunds and other product-related issues and that direct registration through the web would also mean direct communication. Consumers do not know that if they subscribe to their favorite newspaper on the web, all the proceeds go to the newspaper, rather than the reduced amount by subscribing on the iOS device.

While some consumers may want the benefits Apple offers (*e.g.*, one-stop shopping, centralization of and easy access to all purchases, increased security due to centralized billing), Apple actively denies them the choice. These restrictions are also distinctly different from the brick-and-mortar situations. Apple created an innovative platform but it did not disclose its rules to the average consumer. Apple has used this lack of knowledge to exploit its position. Thus, loosening the restrictions will increase competition as it will force Apple to compete on the benefits of its centralized model or it will have to change its monetization model in a way that is actually tied to the value of its intellectual property.

PART II

APPLICATION OF [205] FACTS TO THE LAW AND CONCLUSIONS THEREON**

I. RELEVANT PRODUCT AND GEOGRAPHIC MARKET

A. Legal Framework

HN7[] "A threshold step in any antitrust case is to accurately define the relevant market, which refers to 'the area of effective competition.'" *FTC v. Qualcomm Inc., 969 F.3d 974, 992 (9th Cir. 2020)* ("*Qualcomm*") (quoting *Ohio v.*

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[564] Ex. Depo. (Ong) 58:20-61:07, 152:04-23; *see also* DX-3922; *supra* Facts §§ I.C.3.b., V.A.1.

Am. Express Co. ("Amex"), 138 S. Ct. 2274, 2285, 201 L. Ed. 2d 678 (2018)); *see also* Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir. 1997) ("*Image Tech Services II*") ("The relevant market is the field in which meaningful competition is said to exist.") (citation omitted). Monopoly power under the first element can be defined as "the power to control prices or exclude competition" and may be inferred from the defendant's predominant market share in the relevant market. United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966). In addition, "courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market." Amex, 138 S. Ct. at 2285. Without a relevant market definition, "there is no way to measure the defendant's ability to lessen or destroy competition." *Id.* (simplified).

HN8[] "The relevant market must include both a geographic market and a product market." Hicks v. PGA Tour, Inc., 897 F.3d 1109, 1120 (9th Cir. 2018) (citation omitted). The latter "must encompass the product at issue as well as all economic substitutes for the product." Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1045 (9th Cir. 2008); *see also id*. ("The consumers do not define the boundaries **[*1015]** of the market; the products or producers do [and] the market **[**206]** must encompass the product at issue as well as all economic substitutes for the product."); P. Areeda & H. Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* § 530a (4th and 5th eds., 2021 Supp.) ("To define a market is to identify those producers providing customers of a defendant firm (or firms) with alternative sources for the defendant's product or service."). "Economic substitutes have a 'reasonable interchangeability of use' or sufficient 'cross-elasticity of demand' with the relevant product." Hicks, 897 F.3d at 1120 (quoting Newcal, 513 F.3d at 1045); *see also* United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956). "Including economic substitutes ensures that the relevant product market encompasses 'the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business.'" Hicks, 897 F.3d at 1120 (quoting Thurman Indust., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989)); *see also* DuPont, 351 U.S. at 393 ("Illegal power must be appraised in terms of the competitive market for the product.").[565]

HN10[] A plaintiff cannot ignore economic reality and "arbitrarily choose the product market relevant to its claims"; rather, the plaintiff must "justify any proposed market by defining it with reference to the rule of reasonable interchangeability and cross-elasticity of demand." Buccaneer Energy (USA) v. Gunnison Energy Corp., 846 F.3d 1297, 1313 (10th Cir. 2017) (internal quotation marks **[**207]** and citation omitted). The proper market definition "can be determined only after a factual inquiry into the commercial realities faced by consumers." High Tech. Careers v. San Jose Mercury News, 996 F.2d 987, 990 (9th Cir. 1993) (internal quotation marks and citation omitted).

HN11[] It is the plaintiff's burden to establish the relevant product and geographic markets. *See* Thurman Indus., 875 F.2d at 1373; Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F.2d 1296, 1302 (9th Cir. 1978) (noting that plaintiffs bear the "burden of proof" to establish a relevant market). To meet that burden, a plaintiff must produce specific evidence supporting the proposed market definition that is "relevant to the particular legal issue being litigated." Areeda & Herbert Hovenkamp § 533c; *see also* Moore v. James H. Matthews & Co., 550 F.2d 1207, 1218-19 (9th Cir. 1977) (plaintiff failed to establish "the relevant product market" where it failed to introduce adequate evidence regarding "the products involved as to price, use, quality, and characteristics"); United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 64 (D.D.C. 2011) ("Courts correctly search for a relevant market—that is a market relevant to the particular legal issue being litigated.") (simplified)).

B. Analysis

1. *Relevant Product Market*

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[565] ***HN9***[] "Interchangeability implies that one product is roughly equivalent to another for the use to which it is put: while there may be some degree of preference for the one over the other, either would work effectively." Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 437 (3d Cir. 1997) (internal quotation marks and citation omitted). For example, "[a] person needing transportation to work could buy a Ford or Chevrolet automobile, or could elect to ride a horse or bicycle, assuming those options were feasible." *Id.* (internal quotation marks and citation omitted).

Epic Games constructs a framework to argue that there are three separate product markets at issue. In the foremarket, Epic Games identifies the product market as one for "Smartphone Operating Systems." Epic Games contends in turn that **[*1016]** there **[**208]** are *two* derivative and relevant aftermarkets that flow from this initial foremarket, including the "iOS App Distribution" market and "iOS In-App Payment Solutions." Epic Games logic flows as follows: the iOS in-app payment solutions market is an aftermarket of the iOS app distribution market which is further an aftermarket of the smartphone operating systems foremarket.

Apple, on the other hand, contends that there is only one relevant product: digital game transactions. This includes any and all digital gaming transactions made on any gaming platform. The Court has discussed the factual profiles of each of the proffer, *see supra* Facts § II, and turns to the determination here.

The parties agree that the Court must determine which products or services are in "the area of effective competition" to define the product market. *Amex, 138 S. Ct. at 2285*; *Thurman Indus., 875 F.2d at 1374* ("For antitrust purposes, defining the product market involves identification of the field of competition: the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business." (citation omitted)). The relevant product market "must encompass the product at issue as well as all economic substitutes **[**209]** for the product." *Newcal, 513 F.3d at 1045*. ***HN12***[] "Economic substitutes have a 'reasonable interchangeability of use' or sufficient 'cross-elasticity of demand' with the relevant product." *Hicks, 897 F.3d at 1120* (quoting *Brown Shoe v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*); *DuPont, 351 U.S. at 404*.

The Court begins with Apple's product market definition as it more closely aligns with the Court's conclusion. Then the Court discusses the reasons why Epic Games has not properly defined the relevant product market.

a. Apple's Product Market Theory

As a threshold issue, the Court considers whether the App Store provides two-sided transaction services or as Epic Games argues "distribution services."[566] The Supreme Court has seemingly resolved the question: two-sided transaction platforms sell transactions. In two-sided markets, a seller "offers different products or services to two different groups who both depend on the platform to intermediate between them." *Amex, 138 S. Ct. at 2280*. Here, try as it might, Epic Games cannot avoid the obvious. Plaintiff only sells to iOS users through the App Store on Apple's platform. No other channel exists for the transaction to characterize the market as one involving "distribution services."

Plaintiff's reliance on Dr. Evans' testimony to the contrary does not persuade. First, Dr. Evans' testimony was **[**210]** internally inconsistent. He agrees that the App Store is a "two-sided transaction platform" and includes the features characteristic of two-sided transaction platforms. Although he testified that Apple also provides services to facilitate those transactions, those services are coextensive with "transactions" under his definition.[567] Thus, there is no substantive difference between "transactions" and "services" to facilitate those transactions. The semantic difference does not warrant departure from Supreme Court precedent.[568] Second, distribution **[*1017]** services may improperly imply that only developers consume Apple's products. The evidence is to the contrary. By contrast, all of the experts agree that both users and developers consume App Store transactions.

Accordingly, the Court finds that the relevant App Store product is transactions, not services, but that providing transactions may include facilitating services (matchmaking, developer support, etc.).[569]

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[566] Trial Tr. (Evans) 1454:11-16, 1457:10-1458:25, 1707:7-17; Trial Tr. (Schmalensee) 1955:3-23.

[567] *See, e.g.*, Trial Tr. (Evans) 1612:7-9, 1634:2-1635:25; Trial Tr. (Schmalensee) 1882:24-1883:2; Trial Tr. (Lafontaine) 2031:25-2032:3, 2037:15-16; Ex. Expert 8 (Schmalensee) ¶ 55.

[568] *See* Trial Tr. (Evans) 1612:7-9, 1634:2-1635:25; *accord* Trial Tr. (Schmalensee) 1954:3-9 (equating transactions with "matchmaking" services), 1940:23-25 (agreeing that Dr. Evans analyzed the App Store as a two-sided platform).

[569] *See, e.g.*, Ex. Expert 8 (Schmalensee) ¶¶ 55-56; Trial Tr. (Evans) 1707:2-17.

i. Apps or Digital Game Transactions?

Next, the Court considers whether to narrow the scope of the transactions in terms of defining the product market. ***HN13***[] "In limited settings . . . the relevant product market may be narrowed **[**211]** beyond the boundaries of physical interchangeability and cross-price elasticity to account for identifiable submarkets or product clusters." *Thurman Indus., 875 F.2d at 1374*. A submarket is "a small part of the general market of substitutable products" and "is economically distinct from the general product market." *Newcal, 513 F.3d at 1045*. Although there are "several 'practical indicia' of an economically distinct submarket," including "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors," *id.* (quoting *Brown Shoe, 370 U.S. at 325*), they are "practical aids for identifying the areas of actual or potential competition" and "their presence or absence does not decide automatically the submarket issue." *Thurman Indus., 875 F.2d at 1375* (citations omitted). The Court considers these factors in its evaluation.

Having considered and reviewed the evidence, the Court concludes based on its earlier findings of facts that the appropriate submarket to consider is digital game transactions as compared to general non-gaming apps. *See supra* Facts § II.B.3. Indeed, the Court concluded that there were nine indicia indicating **[**212]** a submarket for gaming apps as opposed to non-gaming apps: (i) the App Store's business model is fundamentally built upon lucrative gaming transactions; (ii) gaming apps constitute a significant majority of the App Store's revenues; (iii) both the gaming, mobile, and software industry as well as the general public recognize a distinction between gaming apps and non-gaming apps; (iv) gaming apps and their transactions exhibit peculiar characteristics and users; (v) game app developers often employ specialized technology inherent and unique to that industry in the development of their product; (vi) game apps further have distinct producers—game developers—that generally specialize in the production of *only* gaming apps; (vii) game apps are subject to distinct pricing structures as compared to other categories of apps; (viii) games and gaming transactions are sold by specialized vendors; and (ix) game apps are subject to unique and emerging competitive pressures, that differs in both kind and degree from the competition in the market for non-gaming apps. The Court does not reiterate here the detail except to note the following significant points:[570]

[*1018] The evidence was undisputed that over 80% **[**213]** of apps in the App Store are free. For those apps, the user pays nothing either inside the app or at the initial download. The developer also pays nothing aside from an up-front $99 developer fee. Apple thus does not collect commissions on those transactions. Moreover, many of those apps are subject to special treatment, such as the "reader" rule, that allows them to bypass Apple's restrictions and commissions altogether. These differences create economic distinctions between the two categories. Finally, there is insufficient evidence that most apps are impacted by Apple's alleged anticompetitive conduct.[571]

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[570] Dr. Lafontaine suggests that combining game and non-game transactions would require a "clustering" analysis to show that they are subject to the same competitive pressures. Ex. Expert 7 (Lafontaine) ¶¶ 33-35. The Court does not address the issue here because clustering is not necessary to determine that game transactions are the proper focus.

[571] Ex. Expert 6 (Hitt) ¶¶ 118, 121; DX-4178.006; PX-0059.007. Besides games, the other category of apps disproportionately affected by Apple's conduct are subscription services. DX-4178.006; DX-4526.021. There are good reasons not to include those apps in the current litigation. First, Epic Games did not sell subscription services when *Fortnite* was on the iOS platform; their representation in the case is limited to third parties. Only one of those third parties testified at trial, so the Court lacks a full picture of the true opinions of these companies. Games and subscription apps in general are distinct, with little overlap among the popular examples. *Compare* PX-0608.015 *with id.* at .016.

Second, many subscription services are subject to special rules, such as the "reader rule" that permits users to access app content purchased outside iOS on their Apple devices. Indeed, several large subscription providers (*e.g.*, Spotify and Netflix) have stopped offering subscriptions through the App Store. Although games are subject to a similar "multiplatform rule," the rule has only been in place since 2018 and the record is mixed whether game developers may be more or less able to similarly steer consumers to web transactions. Ex. Expert 6 (Hitt) ¶¶ 101-105; Trial Tr. (Schiller) 2808:6-2809:3; Trial Tr. (Sweeney) 110:12-111:1.

By contrast, game apps are disproportionately likely to use in-app purchases for monetization. Over 98% of Apple's in-app purchase revenue came from games in 2018 to 2019. Moreover, game transactions overall accounted for 76% of Apple's App Store revenues in 2017, 62.9% in 2018, and 68% in 2020. Game commissions are also substantially higher than average. Thus, in most economic ways, and in particular with respect to the challenged conduct, the App Store is primarily a *game* store and secondarily an "every other" app store.[572]

Game transactions are also widely **[**214]** recognized as belonging to a separate market. The App Store, Google Play, and Amazon Appstore all include separate "tabs" for apps and games which reflects that consumers view them differently. Apple analyzes them separately with different heads of business for games and non-game apps. The developers for game apps also tend to be distinct, specializing in games with little revenue from non-game apps.[573]

[*1019] Finally, the App Store is also built upon specialized consumers—those iOS consumers who play video games on iOS devices. As summarized above, it is iOS consumers who make frequent in-app purchases within gaming apps who account for the large majority of Apple's revenues in the App Store. *See supra* Facts § 1.C.6.[574] In other words, there is a specialized subset of iOS gaming consumers who are generating and accounting for a significantly disproportionate number of App Store billings and revenue.

Accordingly, between digital game transactions and all app transactions, the relevant product is game transactions. Contrary to Epic Games' suggestion, that is not because plaintiff sells games. Rather, it is because game transactions are disproportionately affected by Apple's challenged **[**215]** conduct, overwhelmingly subsidize other apps, and are recognized as a distinct submarket. Obviously, Epic Games and Apple compete in that market space. That Epic Games is in the market was the impetus for the analysis, not the reason for the conclusion.

ii. All Gaming Transactions or Mobile Gaming Transactions?

The last metric the Court considers is whether to limit the product market to all gaming transactions or only mobile gaming transactions. Apple argues for the former; Epic Games argues (as an alternative) for the latter. The Court is again guided by the "practical indicia" framework articulated in *Newcal* and *Brown Shoe*. The Court considers these factors in its evaluation.

Having considered and reviewed the evidence, the Court concludes based on its earlier findings of facts that the appropriate submarket to consider is the mobile gaming transactions market. *See supra* Facts § II.D. This relevant

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Third, and finally, subscription providers may present different security challenges than game stores. Mr. Kosmynka testified that games are different than passive content because they add to or require the functionality of the smartphone. Mr. Schiller confirmed that Apple allows "stores within a store" that contain purely passive content, such as books and music. Thus, Apple's procompetitive justifications may be significantly different for game and non-game stores and apps. Trial Tr. (Kosmynka) 1073:7-1074:18; Trial Tr. (Schiller) 3115:11-3117:7; Trial Tr. (Federighi) 3429:12-3430:8.

Accordingly, the Court declines to consider subscriptions in this lawsuit because they are a separate submarket for which there is insufficient evidence.

[572] Ex. Expert 6 (Hitt) ¶¶ 117, 120-24; DX-4178.006; PX-0059.007; Trial Tr. (Schmid) 3226:7-12.

[573] Ex. Expert 6 (Hitt) ¶¶ 125-27; DX-5552; Trial Tr. (Schmid) 3205:4-11, 3226:1-22, 3349:24-3352:3. As the Court noted, the limited record also shows that the Google Play app store similarly is constructed upon the same game transactions as the App Store. *See* DX-3913.007. Apple also argues that games are subject to unique competitive pressures, with specialized vendors and emerging dynamic competition. Ex. Expert 8 (Schmalensee) ¶ 104. The Court addresses this evidence below.

[574] That said, the evidence for a single distinct "gamer" demographic is inconclusive. For instance, Michael Schmid, testified that "gamers" as he defined them are a "very large percentage of users" including "all the people you speak with," suggesting a generally diverse gaming consumer base. Trial Tr. (Schmid) 3350:5-3352:3; *see also id.* 3351:15-17 ("The Court: Well, are you saying that all app users are also gamers? The Witness: Certainly not."). But even without distinct customer demographics, the fact that only certain set of iOS consumers (*i.e.*, those users who play games on iOS), as well as the separate set of developers and industry recognition as a distinct submarket make extrapolation from games to the whole market inappropriate.

product market would include mobile game transactions on both mobile phone and tablet devices, which have the competitive advantage of mobility or portability as compared to other platforms and devices. *Id.* Indeed, as the Court summarized and found there, mobile gaming exhibits several of **[**216]** the practical indicia discussed in *Newcal* and *Brown Shoe* including industry and public recognition of the submarket as a separate economic entity, peculiar characteristics and uses, distinct customers and producers, and specialized vendors. The Court again does not repeat the entirety of the findings previously made, but discusses the more significant and relevant findings here:

Substantial evidence was presented showing that mobile gaming is a distinct submarket. As an initial matter, Apple's own documents recognize mobile gaming as a submarket. One industry report describes mobile gaming as a "$100 billion industry *by itself*" that accounts for 59% of global gaming revenue. While PC and console gaming has grown more slowly, mobile gaming has experienced double-digit growth driven by "the free-to-play model" with in-app purchases. "Remarkably," this rapid growth "has not significantly cannibalized revenues from the PC or console gaming markets," which suggests that consumers **[*1020]** are not necessarily substituting among them.[575] Another industry report describes distinct user bases for mobile gaming: young children, teenage girls, and older adults are disproportionally likely to be mobile gamers **[**217]** only. Multiplatform gaming, by contrast, is driven by teenage boys and young adults under 25.[576]

Even without Apple documents, the experts largely agree that mobile and non-mobile platforms provide different types of games. Dr. Hitt—whom Apple commissioned to show that game transactions are substitutable—ended up showing the opposite. In his original written direct testimony (which Apple withdrew after cross-examination), Dr. Hitt showed that only 12% and 16% of the most popular App Store games are available on consoles. Both Dr. Hitt's and Dr. Cragg's trial testimony remain in the record, and each shows that console games are largely separate from mobile games. Moreover, while Dr. Hitt originally opined that mobile games are available on PCs, his work could not be entirely reproduced during trial, as some of the games he listed as available on both platforms (PC and mobile platforms) could not be found. The fact that Apple tried and failed to show cross-availability of mobile games with PC indicates that they are distinct.[577]

This conclusion is bolstered in part by evidence from Dr. Cragg. Dr. Cragg finds that the most popular games on mobile are *only* available on mobile, **[**218]** with a few games also available on PCs. The types of games are also different, with many more casual games on mobile and core games on PC and console platforms. For those games that are available on multiple platforms, such as *Fortnite*, Dr. Cragg finds that the playing and spending on different platforms is complementary, rather than substitution-focused, because playing on another device *increases* the playtime and spending on the previous devices.[578]

Industry participants also support the conclusion. Microsoft documents show that mobile gaming generates more than half of the industry revenue and profits, compared to only a quarter for consoles and PCs each. Moreover, Ms. Wright testified that Microsoft does not view game transactions for cross-platform games on iOS devices as competition to transactions on its Xbox console. Although Ms. Wright also testified that mobile is "a segment of the game industry as a whole," that is consistent with it being a separate submarket. By contrast, Steam is the largest game store on PCs. Mr. Cook's lack of familiarity with it presents strong evidence that the iOS App Store does not compete with PC game stores.[579]

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[575] Although this might be due to the fact that mobile gaming first cannibalized the handheld and portable gaming market, which it may have supplanted and now surpassed. *See supra* n.391.

[576] DX-3248.005, .008; DX-4170.008; *see also id.* at .024 (showing "segments" of gamers with multiple segments "primarily on mobile").

[577] Ex. Expert 6 (Hitt) ¶ 31 & Fig. 3; Trial Tr. (Hitt) 2200:13-2201:18, 2207:6-2216:11; Ex. Expert 13 (Cragg) ¶¶ 34-39, 43-52.

[578] Ex. Expert 13 Cragg ¶¶ 25-33, 79-81, Figs. 10-12; Trial Tr. (Schmid) 3207:8-18.

[579] DX-5523.008-.009; Trial Tr. (Wright) 547:4-9, 549:14-21, 638:6-19; Trial Tr. (Cook) 3993:2-6.

Finally, as the Court concluded in the findings **[**219]** of facts, the Court would not at this time find that the Switch or game streaming services are part of the mobile game transactions market. This is in part due to the underdeveloped record on these products, and in part on the relative recent introduction of these products to the market. While the record supports a finding that these are new entrants into the same **[*1021]** market space as Apple and Google, whether these products ultimately are substitutable and reasonably interchangeable by consumers remain to be seen.

Accordingly, for the same reasons that game transactions, rather than app transactions in general, are the proper focus in this case, the Court finds that mobile gaming, including mobile devices and tablets,[580] is a separate market from gaming in general. Thus, the relevant product market is mobile gaming transactions.

b. Epic Games' Approach: Foremarket/Aftermarket Market Definition

The Court reaffirms here the fundamental factual flaws with Epic Games' market structure. *See supra* Facts §§ II.A—C. Without a product, there is no market for the non-product, and the requisite analysis cannot occur. Thus, where there is no product or market for smartphone operating systems, there **[**220]** are no derivative markets. The payment solutions aftermarket also fails for the independent reason that IAP is not a product for which there is a market. Further, Epic Games' aftermarket approach to market definition is inconsistent with its recognition that the App Store constitutes a two-sided transaction platform which it fails to properly analyze. *Id.;* *Amex, 138 S. Ct. at 2287*. Nonetheless, the Court addresses the additional problems with Epic Games' attempt to define the market with the confines of a single brand.

HN14[] Determining whether a single-brand market is proper requires "a factual inquiry into the 'commercial realities' faced by consumers." *Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* ("*Eastman Kodak*") (quoting, *Grinnell Corp., 384 U.S. at 572*). "Single-brand markets are, at a minimum, extremely rare" and courts have rejected such market definitions "[e]ven where brand loyalty is intense." *Apple, Inc. v. Psystar Corp., 586 F. Supp. 2d 1190, 1198 (N.D. Cal. 2008)* (internal quotation marks and citation omitted). *But see id.* ("Antitrust markets consisting of just a single brand, however, are not per se prohibited . . . . In theory, it may be possible that, in rare and unforeseen circumstances, a relevant market may consist of only one brand of a product."). Indeed, "[a] single brand is *never* a relevant market when the underlying product is fungible." **[**221]** Areeda & Hovenkamp § 563d. "It is an understatement to say that single-brand markets are disfavored. From nearly the inception of modern ***antitrust law***, the Supreme Court has expressed skepticism of single-brand markets[.]" *In re Am. Express Anti-Steering Rules Antitrust Litig., 361 F. Supp. 3d 324, 343 (E.D.N.Y. 2019)*; Herbert J. Hovenkamp, *Markets in IP & Antitrust*, *100 Geo. L.J. 2133, 2137 (2012)* ("[A]ntitrust law has found that a single firm's brand constitutes a relevant market in only a few situations.").

HN15[] Despite the foregoing, "in some instances one brand of a product can constitute a separate market." *See* *Eastman Kodak, 504 U.S. at 482*; *see also* *Newcal, 513 F.3d at 1048* ("[T]he law permits an antitrust claimant to restrict the relevant market to a single brand of the product at issue . . . ."). ***Antitrust law*** has continued to develop since *Eastman Kodak*. Beginning there, the Supreme Court considered whether summary judgment was appropriate for Kodak on a *Sections 1* and *2* claims where the plaintiffs had argued that Kodak possessed monopoly power in the aftermarket of sales of parts and repair services, despite not having **[*1022]** such power in the foremarket of equipment sales. *504 U.S. at 466-471*. In affirming the Ninth Circuit's reversal of summary judgment, the Supreme Court identified two factors that supported the aftermarket framework: the existence of significant (i) "information" **[**222]** costs and (ii) "switching costs." *Id. at 473*.

As to the first, information costs, the Supreme Court noted that "[f]or the service-market price to affect equipment demand, consumers must inform themselves of the total cost of the 'package'—[in *Eastman Kodak*] equipment, service, and parts—at the time of purchase; that is, consumers must engage in accurate lifecycle pricing." *Id.* "Much of this information is difficult—some of it impossible—to acquire at the time of purchasing," and that "even if

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[580] As discussed in the findings of facts, *see supra* Facts §§ II.D—E., this would include both iOS and Android tablets and mobile phone devices.

consumers were capable of acquiring and processing the complex body of information, they may choose not to do so [as a]cquiring [such] information is expensive." *Id. at 473, 474*. Indeed, "[i]f the costs of service are small relative to the equipment price, or if consumers are more concerned about equipment capabilities than service costs, they may not find it cost efficient to compile the information." *Id. at 474-75*.

As to the second factor, switching costs, the Supreme Court stated that "[i]f the cost of switching is high, consumers who already have purchased the equipment, and are thus 'locked in,' will tolerate some level of service-price increases before changing equipment brands." *Id. at 476*. "Under this scenario, a seller profitably could **[**223]** maintain supracompetitive prices in the aftermarket if the switching costs were high relative to the increase in service prices, and the number of locked-in customers were high relative to the number of new purchasers." *Id.* The Supreme Court further noted that this strategy was "likely to prove profitable" especially where a "seller could simply charge new customers below-marginal cost on the equipment and recoup the charges in service,"[581] or offer specific packages including "lifetime warranties or long-term service agreements that are not available to locked-in customers." *Id. at 476-477*.

In sum, given the presence of these two factors, the Supreme Court found a question of fact "foil[ed] the simple assumption that the equipment and service markets act as pure complements to one another." *Id. at 477*.

Since 1992, five circuit courts and numerous district courts refused to find a *Kodak*-type single-brand aftermarket where customers had knowledge of the alleged restrictive policies and were not subject to a post-purchase policy change. Big tech may ultimately convince the Supreme Court to change the calculus, but for now the state of ***antitrust law*** has that distinct parameter. The Court recounts **[**224]** the history.

Four years after *Eastman Kodak*, the Fifth Circuit in *United Farmers Ass'n, Inc. v. Farmers Insurance Exchange, 89 F.3d 233, 238 (5th Cir. 1996)* rejected a claim that insurance agents were "locked-in" to a particular insurance company because the agents "would clearly have become aware of [the alleged anticompetitive] policy long before they faced **[*1023]** significant switching costs." A year later the Sixth Circuit similarly found that an "antitrust plaintiff *cannot succeed* on a *Kodak*-type [single-brand-aftermarket] theory when the defendant has not changed its policy after locking-in some of its customers, and the defendant has been otherwise forthcoming about its pricing structure and service policies." *PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 820 (6th Cir. 1997)* (emphasis supplied). Rounding off the decade, the First Circuit found that "the easy availability of information" and "purely prospective nature" of an allegedly anticompetitive policy "helps to take [a] case out of *Kodak*'s precedential orbit." *SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp., 188 F.3d 11, 19 (1st Cir. 1999)* (citation omitted).

Fast-forward to 2008, the Ninth Circuit in *Newcal* outlined four factors that could indicate whether an alleged market is a properly defined single-brand aftermarket under *Eastman Kodak* at the motion to dismiss stage. *See Newcal, 513 F.3d at 1049-50*. ***HN16***[] The first indicator of an aftermarket is that the market is "wholly derivative from **[**225]** and dependent on the primary market." *Id. at 1049*. The second indicator is that the "illegal restraints of trade and illegal monopolization relate only to the aftermarket, not to the initial market." *Id. at 1050*. The third indicator is that the defendant's market power "flows from its relationship with its consumers" and the defendant did "not achieve market power in the aftermarket through contractual provisions that it obtains in the initial market." *Id.* The fourth indicator is that "[c]ompetition in the initial market . . . does not necessarily suffice to discipline anticompetitive practices in the aftermarket." *Id.*

While not explicitly repeated elsewhere, other circuits have aligned with the contours of *Newcal* and the foregoing cases regarding consumer knowledge and/or post-purchase policy changes. In 2014, the Federal Circuit weighed in concluding that "it is only the customers who learned about the [allegedly anticompetitive policy] after purchasing

[581] The Court notes that this identified problematic business model in *Eastman Kodak*, of selling the initial equipment near marginal cost and recouping profits in later service, appears to mirror more closely the gaming console's business models for their console platforms (selling hardware near or at a loss and recouping through the sale of games and transactions) as opposed to Apple's business model for its iOS platform (profit on both the hardware and transactions). *See supra* Facts §§ II.D.3.c.

their equipment that are relevant to the 'locked-in' analysis." DSM Desotech, Inc. v. 3D Sys. Corp., 749 F.3d 1332, 1346 (Fed. Cir. 2014). Two years later the Third Circuit held that no *Kodak*-type aftermarket existed "when customers were put on clear notice that purchasing [defendant's product] precluded use of [third-party] **[**226]** maintenance." Avaya Inc., RP v. Telecom Labs, Inc., 838 F.3d 354, 405 (3d Cir. 2016).

The breadth of ***antitrust law*** on the issue has counseled that currently "to establish a single-brand aftermarket under *Kodak* and *Newcal*, the restriction in the aftermarket must not have been sufficiently disclosed to consumers in advance to enable them to bind themselves to the restriction knowingly and voluntarily." Datel Holdings Ltd. v. Microsoft Corp., 712 F. Supp. 2d 974, 987 (N.D. Cal. 2010).[582] **HN17**[] Indeed, "[m]arket imperfections" may "prevent consumers from discovering" that purchasing a product in the initial market could restrict their freedom to shop in the aftermarket. Newcal, 513 F.3d at 1048; *see also* Red Lion Med. Safety, Inc. v. Ohmeda, Inc., 63 F. Supp. 2d 1218, 1231 (E.D. Cal. 1999) ("Information costs may be high, and a manufacturer may thus have considerable market power in the aftermarket, even in the absence of a change in **[*1024]** policy."); Ward v. Apple Inc., Case No. 12-cv-05404-YGR, 2017 U.S. Dist. LEXIS 41897, 2017 WL 1075049, at *7 (N.D. Cal. Mar. 22, 2017) (agreeing with Red Lion, 63 F. Supp. 2d at 1231-32, that a policy change is not necessary to find a valid single-brand market under *Newcal*). In other words, a plaintiff must show evidence "to rebut the economic presumption that [defendant's] consumers make a knowing choice to restrict their aftermarket options when they decide in the initial (competitive) market to" purchase in the foremarket. Newcal, 513 F.3d at 1050.

With these principles in mind, the Court analyzes the evidence presented.

As noted, Epic Games created a construct that largely satisfies the Newcal ***[**227]*** test. By definition, distribution of iOS apps and iOS payment processing derive from Apple's operating system (first factor). Next, Epic Games only identified restraints that related to the distribution and payment processing, so again, by design, they do not relate to the "market for Apple's operating system" (second factor). Similarly, given that (i) consumers do not contractually agree to obtain apps only through the App Store when they purchase an iPhone; (ii) developers are contractually restricted in the aftermarket; and (iii) in light of the technical restrictions on iOS devices, Apple's market power flows from its relationship with its consumers and Apple did not achieve market power in the aftermarket through contractual provisions that it obtains in the initial market (third indicator). Thus, three of the four indicators are fulfilled.[583]

It is within the last indicator that problems arise for Epic Games given antitrust jurisprudence. Issues of lock-in or switching costs, and notice or consumer knowledge, fall under the analysis of evaluating whether competition in the initial market suffices to discipline anticompetitive practices in the aftermarkets.

First, the evidence **[**228]** shows no material change in the conditions for accessing the App Store for either side of the platform. In the Sixth Circuit, the absence of a change in policy following the consumers' initial purchase in the alleged foremarket, which locked consumers into the alleged aftermarket (*i.e.*, the concept of lock-in), was fatal. *See* PSI Repair Servs., Inc., 104 F.3d at 820. For consumers, iOS has always been a closed system, and the App Store has been a "walled garden" with respect to native apps from its inception; even prior to any time in which Apple was alleged to have become a monopolist. Indeed, it is undisputed by the parties that a key distinguishing feature of the iOS platform is its closed platform model, as compared to the open Android platform maintained by its main competitor Google. At the very least, previous consumers of iOS devices would have been familiar with the iOS platform and the App Store model when they repurchased a device prior to 2011.

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[582] *See also* Teradata Corp. v. SAP SE, No. 18-CV-03670, 2018 U.S. Dist. LEXIS 209872, 2018 WL 6528009, at *16 (N.D. Cal. Dec. 12, 2018) (single-brand markets are possible only in situations in which customers face "restrictions that were undisclosed at the time of the purchase of the product from the primary market").

[583] Epic Games did not define the foremarket as the market for sale of mobile cellular phones or mobile devices. That said, even Dr. Evans acknowledges, consumers do not buy smartphone operating systems separately from smartphones. Trial Tr. (Evans) 1621:19-23; Ex. Expert 7 (Lafontaine) ¶¶ 61-63. There is no price charged to consumers for either the iOS or the Android operating systems. *See supra* Facts § II.A.; Trial Tr. (Lafontaine) 2022:11-2023:4; Ex. Expert 1 (Evans) ¶ 139.

Epic Games' reliance on a 2007 statement from Steve Jobs when he announced the 70-30 split that Apple did not intend to make a profit, much less an unpublicized, internal 2011 comment by Phil Schiller regarding a reduction of the 70-30 after a billion dollars in profit, **[**229]** do not change the analysis. As discussed above, these statements do not create a policy shift sufficient to show lock-in. At best, these statements reflect Apple's initial expectation that the **[*1025]** App Store was not projected to be profitable for Apple.[584] Apple's miscalculation, while hugely profitable, does not evidence consumers lock-in with iOS devices. While Apple's calculated risk returned incredible profits, the reality is that Apple has maintained the same general rules with both consumers and developers since the inception of the iOS devices. Epic Games' arguments that Apple has otherwise repeatedly increased prices does not persuade, where Apple's rate has always been 30%.[585]

Second, Epic Games failed to prove lock-in, even absent a policy shift. Given the weak showing, plaintiff either found itself with an unachievable task or insufficient time to address the issue. In short, there is no evidence in the record demonstrating that consumers *are unaware* that the App Store is the sole means of digital distribution on the iOS platform. Specifically, there is no evidence in the form of consumer survey data demonstrating the extent of consumers knowledge when purchasing of an iOS device, **[**230]** much less that they are unaware they are purchasing *into* a closed ecosystem that is tightly controlled by Apple.

Instead of addressing the issue head-on, Epic Games pivots to argue that the market imperfections prevent consumers from discovering the true costs of downloading apps. In other words, even those consumers who know the facts about Apple's practices in the iOS app distribution market typically do not or cannot effectively take those facts into account when choosing a smartphone and operating system because the cost of distributing apps is low compared to the overall cost of a smartphone and because it is difficult to calculate and compare the lifecycle costs of smartphones between smartphone operating systems.[586]

These arguments are not supported by the record. Epic Games fails to quantify the actual cost to consumers on downloading and purchasing apps and in-app purchases. Indeed, if anything, the record reflects that cross-platform functionality and apps have only proliferated since the early 2010s, where middleware like streaming services and cross-platform games have only made switching platforms and devices easier and more convenient. That is, the market is responding and **[**231]** evolving.

Epic Games' sole focus on iOS devices simply ignores the market reality that is available to consumers. The Court's definition of the product as "digital mobile game transactions" takes into account that the App Store competes against other platforms for both consumers and developers. Indeed, as discussed in the findings of facts, several recent entrants into the mobile gaming submarket, from Nintendo, Microsoft, and Nvidia, show that this submarket is presently evolving and is dynamic. Moreover, the continued rise and popularity of cross-platform games like **[*1026]** *Fortnite* and *Minecraft* offered on a variety of platforms, even beyond mobile gaming devices, are making switching between platforms seamless because a consumer can carry over rewards and progress between the diverse platforms. As a result, neither consumers nor developers are "locked-in" to the App Store for digital mobile game transactions—they can and do pursue game transactions on a variety of other mobile platforms and increasingly other game platforms.[587] Although the state of the wider gaming market is not at a level where the

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[584] Moreover, this 2007 statement is better categorized as a statement concerning price—not about any restriction on iOS app distribution or payment processing that Epic Games mainly challenges. In other words, this statement taken in the best possible light for Epic Games is a misrepresentation as to price—not as to any of the then and still present restrictions on distribution or payment processing.

[585] Indeed, Epic Games' citation to Apple's 2009 action requiring IAP to process payment for in-app digital content does not persuade where no Epic Games expert witness opines that Apple had monopoly power prior to 2010 or 2011. Even considering this action, along with Apple's 2011 and 2016 rules regarding antisteering, subscriptions, and search ads, do not demonstrate any increase in the rate for consumers *or* developers. Indeed, most of these actions enabled increased functionality for consumers and developers, permitting new business models, and relied on increasing innovation on both the iOS device and the App Store.

[586] Trial Tr. (Evans) 1508:15-1509:25.

entirety of these gaming platforms can truly be characterized as competing for purposes of **[**232]** ***antitrust law*** (*e.g.*, substitutes), the continued rise of cross-platform games, technologies, and innovative ways in which to reach consumers only demonstrate that these differing platforms are converging and ever intertwining.[588]

In sum, with seasoned antitrust counsel at the helm, Epic Games created a market definition which theoretically made a strong showing within the *Newcal* and *Eastman Kodak* framework. For the reasons explained above, the market definition was fundamentally flawed, and in any event, does not satisfy all four of the *Newcal* factors. With respect to the Court's ultimate finding that the relevant market is mobile gaming transactions, the Court further finds that, at a minimum, the fourth *Newcal* factor would similarly not be adequately satisfied on the record before the Court.

2. *Geographic Market*

HN18[] "The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market." *Brown Shoe, 370 U.S. at 336* (citations omitted). "A geographic market is an area of effective competition where buyers can turn for alternate sources of supply." *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1490 (9th Cir. 1991)* (simplified).

"The relevant geographic market for goods sold nationwide **[**233]** is often the entire United States[.]" *Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 228 (2d Cir. 2006)*. As compared to others, in antitrust cases, courts regularly recognize global markets. *See, e.g., United States v. **[*1027]** Microsoft Corp., 253 F.3d 34, 52, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (upholding relevant geographic market encompassing "the licensing of all Intel-compatible PC operating systems worldwide"); *United States v. Eastman Kodak Co., 63 F.3d 95, 108 (2d Cir. 1995)* (upholding worldwide geographic market for film). The United States antitrust laws' concern with anticompetitive conduct, includes harm that such American businesses suffer relating to their transactions with foreign consumers. *See 15 U.S.C. § 6a* (Sherman Act generally applies to conduct affecting "export trade"). Importantly here, the question focuses on the area of effective competition, not the reach of United States antitrust laws which is addressed elsewhere.

Having found the relevant product market to be that of mobile gaming transactions, the Court finds the area of effective competition in the geographic market to be global, with the exception of China. As discussed in the findings of facts, *see* supra Facts § III, Apple's engagement in that market does not change based on national borders. Developers globally access the platform based on the same set of rules and agreements. Even here, Epic Games' related entity was bound by the exact **[**234]** same set of rules and agreements. Given the current record, the Court discerns no meaningful difference for digital mobile gaming transactions domestically than globally.

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[587] On some metrics, Apple is in fact more open than some competitors in the wider digital gaming market. For instance, the record reflects that certain competitors institute restrictions on cross-platform play and cross-platform wallet. Moreover, some platform owners require revenue sharing when game players disproportionately spend on a platform other than their own. Further still, some agreements require that certain goods be charged the same as the cheapest available on other platforms.

[588] The Court has further never been satisfied by Epic Games' explanation as how its aftermarket theory as to Apple would not also apply to other platform holders with similar walled garden models in the wider gaming market, including Nintendo, Microsoft, and Sony. *See Epic Games, Inc. v. Apple Inc., 493 F. Supp. 3d 817, 838-39 (N.D. Cal. 2020)*. The same three *Newcal* factors that readily apply to Apple's iOS devices would also facially apply to Nintendo's, Microsoft's, and Sony's consoles and their digital stores. Epic Games' distinction as to general purpose devices (*e.g.*, iOS devices) versus special purpose devices (*e.g.*, game consoles) has no basis in current ***antitrust law***. Presumably, the factors would be applied in the same fashion.

Instead, and as discussed above, consumers if anything appear to purchase a game console in the same manner they purchase an iOS device: understanding that they must purchase into an ecosystem and are limited in the later transactions for apps and games. Despite the foregoing, Epic Games does not claim that every game console manufacturer has unlawfully created and maintained a monopoly, and in fact, appears content to offer *Fortnite* and other Epic Games on those platforms without complaint. Trial Tr. (Schmalensee) 1904:15-1905:4.

II. SECTIONS 1 AND 2 OF THE SHERMAN ACT (COUNTS 1, 3, 4, 5)

A. General Framework

HN19[] As *Qualcomm* instructs, "[t]he similarity of the burden-shifting tests under §§ 1 and 2 means that courts often review claims under each section simultaneously." Qualcomm, 969 F.3d at 991. Indeed, "[i]f, in reviewing an alleged Sherman Act violation, a court finds that the conduct in question is not anticompetitive under § 1, the court need not separately analyze the conduct under § 2." *Id.* (citing Williams v. I.B. Fischer Nevada, 999 F.2d 445, 448 (9th Cir. 1993)). That result is logical as "proving an antitrust violation under § 2 of the Sherman Act is more exacting than proving a § 1 violation . . . ." Id. at 992 (citing Microsoft Corp., 253 F.3d at 79).

Among the differences in the analysis is the type of evidence used to prove a monopoly. **HN20**[] "[A]lthough the tests are largely similar, a plaintiff may not use indirect evidence to prove unlawful monopoly maintenance via anticompetitive conduct under § 2." *Id.* (citing Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307-08 (3d Cir. 2007) (distinguishing between proving the existence of monopoly power through indirect evidence and proving anticompetitive conduct itself, the second element of a Section 2 claim)).

Here, in light of **[**235]** Qualcomm, the Court reviews Sections 1 and 2 Sherman Act claims together. Underpinning both Sections 1 and 2 claims is the level of market power, and possibly monopoly power, that Apple exercises in the determined product and geographic market. The Court therefore initially assesses Apple's market and monopoly power in the relevant product and geographic market before addressing Epic Games' claims under Sections 1 and 2 of the Sherman Act.

B. Assessing Apple's Market Power in the Relevant Product and Geographic Market

1. *Legal Framework*

HN21[] Market power and monopoly power are related but distinct concepts. As the Supreme Court has stated: "market power is the ability to raise prices above those that would be charged in a competitive market." NCAA v. Bd. of Regents of **[*1028]** the Univ. of Oklahoma, 468 U.S. 85, 109 n.38, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984).[589] Monopoly power is "the power to control prices or exclude competition." Grinnell Corp., 384 U.S. at 571.

The difference between the two is a matter of degree. **HN22**[] "Monopoly power under § 2 requires, of course, something greater than market power under § 1." Eastman Kodak, 504 U.S. at 481; *see also* Image Tech. Servs. II, 125 F.3d at 1206 (same). Courts have described the distinction as "substantial" market power or an "extreme degree" of market power. *See, e.g.,* Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 894 (10th Cir. 1991) (defining monopoly power as **[**236]** "substantial" market power); Deauville Corp. v. Federated Dep't Stores, Inc., 756 F.2d 1183, 1192 n.6 (5th Cir. 1985) (defining monopoly power as an "extreme degree of market power"); Safeway Inc. v. Abbott Lab'ys, 761 F. Supp. 2d 874, 886 n.2 (N.D. Cal. 2011) (defining monopoly power as a substantial degree of market power).[590] Courts have also required that the monopoly power be beyond fleeting or

[589] *See also* Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27 n.46, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984) ("As an economic matter, market power exists whenever prices can be raised above levels that would be charged in a competitive market."), *abrogated on other grounds by* Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006); *cf.* Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 642 (4th ed. 2005) (noting that a firm has market power "if it is profitably able to charge a price above that which would prevail under competition"); William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 939 (1981) ("A simple economic meaning of the term 'market power' is the ability to set price above marginal cost.").

ephemeral which the Court understands to be durable and sustaining. *See* United States v. Syufy Enters., 903 F.2d 659, 665-66 (9th Cir. 1990) ("In evaluating monopoly power, it is not market share that counts, but the ability to *maintain* market share." (emphasis in original)); Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am., 885 F.2d 683, 695-96 (10th Cir. 1989) (finding a firm lacked monopoly power because its "ability to charge monopoly prices will necessarily be temporary").[591]

HN23[] "[M]arket share is just the starting point for assessing market power." Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 925 (9th Cir. 1980). It "should not be equated with monopoly power" but instead is "evidence from which the existence of monopoly power may be inferred . . . ." Hunt-Wesson, 627 F.2d at 924. Indeed, as the Ninth Circuit has cautioned, "[b]lind reliance upon market share, divorced from commercial reality, could give a misleading picture of a firm's actual ability to control prices or exclude competition." *Id.* In other words, "market share, while being perhaps the most important factor, does not alone determine the presence or absence of monopoly power." Pac. Coast Agr. Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1204 (9th Cir. 1975) (affirming jury finding where **[**237]** defendant controlled anywhere from 45-70% of the market and competitors were fragmented with less than 12 to 18% **[*1029]** of the market).

HN24[] The threshold of market share for finding a *prima facie* case of monopoly power is generally no less than 65% market share. *See* Image Tech. Servs. II, 125 F.3d at 1206 ("Courts generally require a 65% market share to establish a prima facie case of market power."); Hunt-Wesson, 627 F.2d at 924-25 ("market shares on the order of 60 percent to 70 percent have supported findings of monopoly power").[592] A more conservative threshold would require a market share of 70% or higher for monopoly power. *See* Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co., 748 F.3d 160, 174 (4th Cir. 2014) ("Although there is no fixed percentage market share that conclusively resolves whether monopoly power exists, the Supreme Court has never found a party with less than 75% market share to have monopoly power. And we have observed that when monopolization has been found the defendant controlled seventy to one hundred percent of the relevant market." (citations omitted)); Syufy Enters. v. Am. Multicinema, Inc., 793 F.2d 990, 995 (9th Cir. 1986) ("[A]s far as we know, neither the Supreme Court nor any other court has ever decided whether a market share as low as 60-69% is sufficient, standing alone, to sustain such a finding."). **HN25**[] Relatedly, "numerous cases hold that a market share of less than 50 percent is presumptively **[**238]** insufficient to establish" the requisite level of market power under a Section 2 claim. Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421, 1438 (9th Cir. 1995).[593]

HN26[] By contrast, Section 1 claims can be satisfied with less market power. For instance, the Ninth Circuit affirmed a finding of a Section 1 violation where the market share was as low as 24% but has also found market share above 30% insufficient. *See, e.g.,* Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264 (9th Cir. 1982). *But see also* Jefferson Parish, 466 U.S. at 26 & n.43 (30 percent market share insufficient); Pilch v.

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[590] *See also* Areeda & Hovenkamp § 801 (stating that "the Sherman Act § 2 notion of monopoly power . . . is conventionally understood to mean 'substantial' market power").

[591] *See also* Areeda & Hovenkamp § 801d; Oahu Gas Serv., Inc. v. Pac. Res., Inc., 838 F.2d 360, 366 (9th Cir. 1988) ("A firm with a high market share may be able to exert market power in the *short run*, but [s]ubstantial market power can persist only if there are significant and continuing barriers to entry." (internal quotation marks omitted) (emphasis supplied).

[592] *See also* Grinnell Corp., 384 U.S. at 571 (noting that the Supreme Court previously found "over two-thirds of the entire domestic field of cigarettes, and over 80% of the field of comparable cigarettes' constituted 'a substantial monopoly'" before finding monopoly power where defendant had an 87% market share).

[593] *See also* Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1274 (9th Cir. 1975) ("We do, however, wish to remind the trial court when considering this case on remand of Judge Learned Hand's famous dictum that while 90% of the market 'is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four per cent would be enough; and certainly thirty-three per cent is not.' It also should be recalled that on several occasions courts have considered a 50% share of the market as inadequate to establish a proscribed monopoly." (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945)).

French Hosp., No. CV 98-9470 CAS(CWX), 2000 U.S. Dist. LEXIS 23125, 2000 WL 33223382, at *7 (C.D. Cal. Apr. 28, 2000) (33.2 percent market share insufficient).

Here, the Court considers other market factors in the form of direct and indirect evidence. ***HN27***[] First, direct evidence is evidence "of the injurious exercise of market power" such as "evidence of restricted output and supracompetitive prices." *Rebel Oil Co., 51 F.3d at 1434*. This kind of evidence is "direct proof of the injury to competition which a competitor with market power may inflict, and thus, [direct proof] of the actual exercise of market power." *Id.* (citing *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*).

HN28[] The second and "more common type of proof is circumstantial evidence pertaining to the structure of the market." *Id.* To demonstrate market power indirectly, a plaintiff must: "(1) define the relevant market, (2) show that the defendant owns **[*1030]** a dominant share of that market, and (3) show that there are significant barriers to entry **[**239]** and show that existing competitors lack the capacity to increase their output in the short run." *Id.* [594]

HN29[] Because "[a] mere showing of substantial or even dominant market share alone cannot establish market power sufficient to carry out a predatory scheme," a plaintiff "must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge the predator's high price." *Rebel Oil Co., 51 F.3d at 1438-39, n.10* ("telltale factors" include "market share, entry barriers and the capacity of existing competitors to expand output"). Entry barriers are market characteristics "that prevent new rivals from timely responding to an increase in price above the competitive level." *FTC v. Qualcomm Inc., 411 F. Supp. 3d 658, 684 (N.D. Cal. 2019)* (quotation marks omitted), *rev'd on other grounds*, *969 F.3d 974 (9th Cir. 2020)*. They include "additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants," or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." *L.A. Land Co. v. Brunswick Corp., 6 F.3d 1422, 1427-28 (9th Cir. 1993)* (quotation marks omitted).

2. *Analysis*

As a starting point, the Court has found Apple's market share in mobile gaming transactions appears to fluctuate anywhere from approximately 52% to 57% over the course **[**240]** of the three years in evidence. *See supra* Facts § II.E. While the prior figures suggest that Apple's share in mobile gaming is increasing, the more recent year reflects some stability in the market between Apple and its main competitor, Google. That Apple has more than a majority in a mostly duopolistic, and otherwise highly concentrated, market indicates that Apple has considerable market power.

Apple's market share is below the general ranges of where courts found monopoly power under *Section 2*. Nonetheless, the Court considers additional direct and indirect evidence to determine whether that market share should be sufficient under *Section 2* or, under any event, sufficient under *Section 1*.

In considering *direct* evidence of monopoly power, Epic Games has failed to demonstrate that there is a necessary restriction in the output of the relevant product—here, mobile game transactions. The record contains substantial evidence that output has increased in mobile gaming transactions. *See supra* Facts §§ IV—V. Even though the Court has concerns about the 30% rate and its appearance of being artificially higher (*i.e.*, supracompetitive) than it would be in a more competitive market, there has not been the corollary impact **[**241]** on output. This could be because of the technological nature of the dispute. *Id.; see also supra* Facts § V.A.1.c. Nonetheless, given the

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[594] *See also* *Microsoft Corp., 253 F.3d at 51* ("Because such direct proof is only rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power. Under this structural approach, monopoly power may be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers." (citations omitted)); *Oahu Gas, 838 F.2d at 367* ("A high market share, though it may ordinarily raise an inference of monopoly power . . . will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors." (internal citation omitted)).

manner in which this case was litigated, Epic Games failed to produce evidence that this rate has had any impact on the output of mobile gaming transactions.

[*1031] ***HN30***[] "[S]upracompetitive pricing, on its own, is not direct evidence of monopoly power." *Safeway Inc.,761 F. Supp. 2d at 887 (N.D. Cal. 2011)* (*citing* *Forsyth v. Humana, Inc., 114 F.3d 1467, 1476 (9th Cir. 1997)* ("The plaintiffs submitted evidence that [defendant] routinely charged higher prices than other [competitors] while reaping high profits. With no accompanying showing of restricted output, however, the plaintiffs have failed to present direct evidence of market power [under *Section 2*]."), *overruled on other grounds by* *Lacey v. Maricopa County¸693 F.3d 896 (9th Cir. 2012)*; *see also* *Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 381 (3d Cir. 2005)*; *Geneva Pharmas. Tech. Corp. v. Barr Lab'ys Inc., 386 F.3d 485, 500 (2d Cir. 2004)*; *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1412 (7th Cir. 1995)*. Indeed, "[t]o prove monopoly power directly, supracompetitive pricing must be accompanied by restricted output." *Safeway Inc., 761 F. Supp. 2d at 887* (*citing* *Rebel Oil Co., 51 F.3d at 1434*). In other words, "[b]oth are required to prove monopoly power directly." *Id.*[595] Given the Court has found the record, at best, incomplete, the lack of evidence of decreased output for mobile gaming transactions and mobile game apps is fatal in demonstrating monopoly power using direct evidence.

With respect to indirect evidence, a more mixed result emerges. A share between 52 and 57 percent is not high enough to sustain a *prima facia* case of a monopoly, but is enough to permit the Court to evaluate the state and durability of the market. ***HN31***[] This evaluation includes whether (i) new rivals are barred from entering the market (*i.e.*, the degree of entry barriers) and (ii) whether existing competitors lack the capacity to expand their output to challenge the predator's high price. In general, entry barriers are "additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants" or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." *L.A. Land Co., 6 F.3d at 1427-28*. Such barriers include "(1) "legal license requirements, (2) control of an essential or superior resource, (3) entrenched buyer preferences for established brands; (4) capital **[**243]** market evaluations imposing higher capital costs on new entrants; and, in some situations, (5) economies of scale." *Rebel Oil Co., 51 F.3d at 1439* (citing *L.A. Land Co., 6 F.3d at 1428 n.4*).

Here, the evidence is both undeveloped and mixed. Given that mobile gaming was not a proposed product market for either party, neither party has adequately presented evidence of these barriers or competitors' ability to challenge monopolistic actions. The Court nonetheless considers the limited evidence in record.

On the one hand, only a small number of platforms, and their attendant licenses on which to distribute mobile games, exist—namely iOS and Android. Moreover, economies of scale in the form of network effects favor these established digital gaming stores and platforms over new entrants. Finally, new entrants may face information barriers to entry, as users may not know that cheaper game distribution may be available on alternative platforms.[596] Although **[*1032]** these factors do not create "lock-in," they are evidence of some entry barriers for new companies providing mobile game transactions.

On the other hand, there are significant changes in both the wider gaming market *and* the mobile gaming market—both appear to be in flux. Indeed, the evidence reflects **[**244]** that the wider gaming market is both dynamic and evolving. Mobile gaming transactions do not appear to be immune to this dynamism. The introduction of the hybrid

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[595] Indeed, as the *Safeway* court notes and explains in a footnote:

> Plaintiffs nevertheless continue to argue that evidence of restricted **[**242]** output is not required because raising prices necessarily depresses sales. This is incorrect. Take for example a market in which demand outstrips supply. In such a hypothetical market, a firm could raise prices—up to a certain point—without necessarily causing a commensurate reduction in sales.

Safeway Inc., 761 F. Supp. 2d at 887 n.3.

[596] *See* Ex. Expert 4 (Athey) ¶¶ 36-37, 45-46; Ex. Expert 1 (Evans) ¶ 118. Although, the Court notes that some platform owners require price parity among other platforms, such that prices are universal amongst each platform. *See supra* Facts §§ II.D.3-4.

platform the Nintendo Switch in 2017 provides some evidence that the barriers of entry are not so high as to deter competitors in related markets from entering the mobile gaming transactions market.[597] Moreover, Microsoft and Nvidia's efforts into mobile game streaming are further evidence that these entry barriers are not so substantial to prevent new market entrants.[598] Indeed, these competitors are moving into the same lucrative mobile gaming submarket without facing substantial market barriers to entry. In short, these competitors appear to be leveraging either existing intellectual property in the form of hardware and gaming content as well as existing established networks, including its own consumer and developer bases, to break into this market space. Given this recent movement by competitors, it is hard to characterize the entry barriers as oppressive or high on this record.

The evidence is further mixed on whether existing competitors, here Google, could increase output in the short run in order to erode Apple's **[**245]** market share. *See* Pacific Coast, 526 F.2d at 1204 (affirming jury's finding of monopoly power where defendant had a market share of 45 to 70% in the relevant years, and the remaining competitors "were relatively small, with no single competitor controlling over 18% [or] 12%" of the market). Beyond similar market share in this market, neither party explored mobile gaming and the record is inconclusive on Google's *actual* capabilities in disciplining and competing with Apple in this sphere.

In sum, given the totality of the record, and its underdeveloped state, while the Court can conclude that Apple exercises market power in the mobile gaming market, the Court cannot conclude that Apple's market power reaches the status of monopoly power in the mobile gaming market. That said, the evidence does suggest that Apple is near the precipice of substantial market power, or monopoly power, with its considerable market share. Apple is only saved by the fact that its share is not higher, that competitors from related submarkets are making inroads into the mobile gaming submarket, and, perhaps, because plaintiff did not focus on this topic.

[*1033] C. Section 1 of the Sherman Act: Apple's Unlawful Restraint of the iOS App Distribution Market (Count [246] 3) and Unlawful Restraint on the iOS In-App Payment Solutions Market (Count 5)**

Epic Games brings two counts under Section 1 of the Sherman Act for unlawful restraint of trade in the iOS app distribution aftermarket (Count 3) and in the iOS in-app payment solutions aftermarket (Count 5). The legal framework is the same for both.

1. *Legal Framework*

HN32[] Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. Section 1 is understood "to outlaw only unreasonable restraints." Amex, 138 S. Ct. at 2283 (internal quotation marks and emphasis omitted); State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59-60, 31 S. Ct. 502, 55 L. Ed. 619 (1911). "To establish liability under § 1, a plaintiff must prove (1) the existence of an agreement, and (2) that the agreement was in unreasonable restraint of trade." Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1178 (9th Cir. 2016).

HN33[] Despite the broad language of the statute, ***antitrust law*** has developed to find that "[t]he essence of a Section 1 claim is concerted action." E.W. French & Sons v. Gen. Portland, 885 F.2d 1392, 1397 (9th Cir. 1989). "[E]xpress 'agreements'" are "direct evidence of 'concerted activity.'" Paladin Assocs., Inc. v. Montana Power Co., 328 F.3d 1145, 1153 (9th Cir. 2003); *see also* Sun Microsystems Inc. v. Hynix Semiconductor Inc., 608 F. Supp. 2d

[597] Although not in the record, the Court is further aware that Valve, a major player in the computer gaming market as the owner of the Steam platform, has also announced its own mobile and portable gaming platform. The Court does not rely on this fact in reaching its conclusions herein, but only mentions it to further support the Court's ultimate conclusion: that entries into the mobile gaming submarket appear to be possible and achievable from competitors in related gaming submarkets.

[598] Of course, game streaming is still relatively new and currently does not replicate freemium games, the primary driver of App Store revenue, because, with the exception of Nvidia's free access tier, such services generally require an up-front subscription payment. *See supra* Facts § II.D.3.d.

1166, 1192 (N.D. Cal. 2009) ("One way of proving concerted action is by express agreement."). A plaintiff "need not prove intent to control prices or destroy competition to demonstrate the element of an **[**247]** agreement among two or more entities." Paladin Assocs., 328 F.3d at 1153-54 (internal quotation marks and alterations omitted). "Unilateral conduct by a single firm, even if it appears to restrain trade unreasonably, is not unlawful under Section 1 of the Sherman Act." The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1152 (9th Cir. 1988) (internal quotation marks omitted); *see also* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984) ("Independent action is not proscribed."). Thus, in evaluating the first element, the Sherman Act distinguishes between concerted conduct and unilateral conduct and "treat[s] concerted behavior more strictly than unilateral behavior." Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

HN34[] With respect to the second element, some restraints are *per se* unreasonable. Where they are not, they are "judged under the 'rule of reason.'" Amex, 138 S. Ct. at 2284. "The rule of reason requires courts to conduct a fact-specific assessment of 'market power and market structure to assess the restraint's actual effect' on competition." *Id.* (quoting Copperweld Corp., 467 U.S. at 768) (alterations omitted). "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885-86, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007) (internal quotation marks and citation omitted). "Appropriate factors to consider include specific information about the relevant business and the **[**248]** restraint's history, nature, and effect." *Id.* (internal quotation **[*1034]** marks and citation omitted). **HN35**[] "Whether the businesses involved have market power is a further, significant consideration." *Id.* (citation omitted). "In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Id.*

HN36[] As the Supreme Court recently explained:

> To determine whether a restraint violates the rule of reason, . . . a three-step, burden shifting framework applies. Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.

Amex, 138 S. Ct. at 2284 (citations omitted); *see also* Qualcomm, 969 F.3d at 989. The three steps "do not represent a rote checklist" and are not "an inflexible **[**249]** substitute for careful analysis." NCAA v. Alston ("NCAA"), 141 S. Ct. 2141, 2160, 210 L. Ed. 2d 314 (2021). Rather, their purpose is "to furnish 'an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.'" *Id.* (quoting Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)).

2. *Count 3: iOS App Distribution Market Analysis*

a. Existence of an Agreement

Count 3 alleges that Apple "require[s] iOS developers distribute their apps through the App Store." Compl. ¶ 210. Starting with the first element, Epic Games relies on the DPLA to demonstrate an agreement.[599] **HN37**[] As noted, express agreements provide "direct evidence" of concerted activity. Paladin Assocs., 328 F.3d at 1153. Apple argues, however, that the DPLA does not qualify because Apple unilaterally imposes it on developers. *See*

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[599] In its Section 2 rule of reason analysis, Apple argues that technical design of iOS cannot form the basis of antitrust liability. Apple COL ¶ 249. In response, Epic Games appears to disclaim any challenge to Apple's code signing restrictions. Epic Games COL ¶ 143. The Court here considers only the DPLA restrictions on distribution.

Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 898 (9th Cir. 2008) (no "meeting of the minds" from unilateral rules).[600]

As explained above, the Sherman Act distinguishes between unilateral and concerted activity. *Jeanery, 849 F.3d at 1152*. ***HN38***[] "Concerted activity subject to *§ 1* is judged more sternly than unilateral activity under *§ 2*" because it "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Copperweld Corp., 467 U.S. [*1035] at 768-69*. It thus "warrant[s] scrutiny even in the absence of incipient monopoly." *Id.* Unilateral conduct, by contrast, may simply represent "robust competition." **[**250]** *Id. at 767-68*; *see Qualcomm, 969 F.3d at 1005* ("hypercompetitive behavior" is not illegal under antitrust laws). Thus, even unreasonable unilateral restraints are not subject to antitrust scrutiny unless "they pose a danger of monopolization." *Copperweld Corp., 467 U.S. at 768*.

HN39[] Given this distinction, a business may set conditions for dealing unilaterally and refuse to deal with anyone who does not meet those conditions. *See Monsanto, 465 U.S. at 761*. However, where the conduct extends beyond announcing a policy and refusing to deal with non-compliant partners to coercing an agreement, the conduct falls under *Section 1*. *See id. at 765*; *see also Dimidowich v. Bell & Howell, 803 F.2d 1473, 1478 (9th Cir. 1986)* (recognizing an exception to the "unilateral refusal to deal" rule where a party "imposes restraints on dealers or customers by coercive conduct and they involuntarily adhered to those restraints").

For example, in *Jeanery*, a jeans manufacturer had set suggested prices for retailers and made clear that those who set prices below the suggested price would be terminated or receive less favorable treatment. *849 F.2d at 1150*. A distributor undercut those prices and was promptly terminated. *Id. at 1151*. The Ninth Circuit found no *Section 1* violation based on insufficient evidence of an agreement. *Id. at 1155*. Specifically, the Ninth Circuit found no evidence that the manufacturer "coerced" the distributors **[**251]** into adherence or that the distributors "communicated acquiescence to such an agreement." *Id. at 1158-60* (reasoning that manufacturer did not nothing more than inform distributors of its policy). Conversely, such evidence was found in *Monsanto*, in which case an agricultural manufacturer threatened to withhold herbicide at a time of short supply and even complained to a distributor's parent company to force compliance, which the distributor expressly communicated in return. *465 U.S. at 764-65 & nn.9-10*.

Here, the DPLA is a unilateral contract which the parties agree that a developer must accept its provisions (including the challenged restrictions) to distribute games on iOS.[601] Thus, under antitrust jurisprudence, element one would not be satisfied. *See Toscano v. Prof. Golfers Ass'n, 258 F.3d 978 (9th Cir. 2001)* (because the sponsors "did not help create anticompetitive rules" but only "agreed to purchase products" under "conditions set by the other party," they were not liable for concerted conduct under *Section 1*). *Id.*

That said, the Court addresses here the potential conflicts with the goals of ***antitrust law*** given this narrow view. The jurisprudence assumes that unilateral conduct may simply be the result of robust competition. That may not always be the case. Ending the analysis on that basis **[**252]** alone does not allow for those assumptions to be tested, especially where, as here, the Court is faced with a highly concentrated market.

Nor is the jurisprudence particularly consistent with tying claims which are allowed under *Section 1*. For example, a tying claim involves a seller exploiting "its control over the tying product to force the buyer into the purchase of a

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[600] In *Costco*, a retailer challenged Washington state's regulations of alcohol sales under antitrust laws. ***522 F.3d at 883***. Washington had required distributors to sell alcohol at a uniform price and to post those prices publicly, among other restrictions. *Id.* To evaluate the conduct, the Ninth Circuit distinguished "unilateral" restraints—which were not prohibited by the Sherman Act—from "hybrid" restraints, which involve concerted action and implicate *Section 1*. ***Id. at 886-87***. The court found that that the price restrictions were unilateral state conduct, but that the requirement to post and adhere to the prices was "hybrid" because private parties still retained discretion. ***Id. at 894, 899***. It then found that the posting requirement violates *Section 1*. ***Id. at 895***. *Costco* shows that even *government command* can create "concerted activity" under *Section 1*. Apple's conduct here is far less unilateral.

[601] PX-2619; PX-2621.

tied product." *Jefferson Parish, 466 U.S. at 12*. The buyer plays no role beyond purchasing the goods under conditions set by the seller. Similarly, an exclusive dealing **[*1036]** claim involves "agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor." *Aerotec, 836 F.3d at 1180*. Again, the buyer passively accepts conditions set by the vendor. More recently, *Amex* involved an anti-steering provision as a vertical restraint imposed by American Express on merchants. *138 S. Ct. at 2277*. The merchants accepted the provision as a condition of dealing with American Express without further involvement. *Id.*[602]

Thus, while the Court does not find the DPLA provides sufficient evidence of an agreement, it nonetheless continues the analysis to inform the issues relating to anticompetitive and incipient antitrust conduct, especially given **[**253]** the anti-steering provision therein.

b. Reasonableness of the Restraint

For the reasons stated, the Court turns to the second element using the rule of reason test. *Amex, 138 S. Ct. at 2284*; *see also* *Copperweld Corp., 467 U.S. at 768* (explaining that vertical agreements "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively" and so "are judged under a rule of reason"). ***HN40***[] As the Court described in *Amex*:

> The rule of reason requires courts to conduct a fact-specific assessment of "market power and market structure . . . to assess the [restraint]'s actual effect" on competition. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L.Ed.2d 628 (1984)*. The goal is to "distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L.Ed.2d 623 (2007)*.

Amex, 138 S. Ct. at 2284. Recognizing that the rule of reason is not a "rote checklist," *NCAA, 141 S. Ct. at 2160*, the Court examines the app distribution restrictions and considers their anticompetitive effects, procompetitive rationales, and less restrictive alternatives. *Amex, 138 S. Ct. at 2284*.

i. Anticompetitive Effects

"To demonstrate anticompetitive effects on the two-sided [mobile gaming] market as a whole," plaintiff must prove that Apple's app distribution provisions increased the cost of mobile gaming **[**254]** transactions "above a competitive level, reduced the number of [mobile gaming] transactions, or otherwise stifled competition in the [mobile gaming] market." *See* *Amex, 138 S. Ct. at 2287*. Evidence of this nature is considered direct evidence. *Id. at 2284* (simplified). Indirect evidence is also admissible and would involve "proof of market power plus some evidence that the challenged restraint harms competition." *Amex, 138 S. Ct. at 2284*.

Here, the Court recognizes significant challenges in assessing the anticompetitive effects of the app distribution restrictions. The market in mobile game transactions has grown dramatically over recent years due to growth in gaming generally, smartphone ownership, and digital transactions as a whole. Apple's commission rate has remained static throughout even though Google, Apple's main competitor (and who also charges a 30% commission rate), does not have the same app distribution restrictions. These facts suggest **[*1037]** prices are artificially high given Apple's growing market power and growing demand. Evaluating competitive effects under these circumstances would require isolating the effects of a particular restriction. This is particularly difficult in light of the expansive market growth caused by innovation **[**255]** in the field. ***HN41***[] It is for these reasons that "novel business practices—*especially* in technology markets—should not be 'conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the

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[602] *See* *Image Tech. Serv., Inc. v. Eastman Kodak Co., 903 F.2d 612, 619 (9th Cir. 1990)* ("*Image Tech Services I*") (rejecting the argument that party "acted unilaterally in tying parts to service" because otherwise, *Monsanto* "without discussing the courts' tying decisions, meant to overturn" tying arrangements); *Eastman Kodak, 504 U.S. at 463 n.8* (conditioning sales is not a "unilateral refusal to deal").

business excuse for their use.'" Qualcomm, 969 F.3d at 990-91 (emphasis in original) (quoting Microsoft Corp., 253 F.3d at 91).

Having carefully considering the evidence, the Court finds that Apple's app distribution restrictions do have *some* anticompetitive effects. The evidence here shows that, unlike the increased merchant fees in Amex, Apple's maintenance of its commission rate stems from market power, *not competition* in changing markets. As explained above, Apple set its 30% commission rate almost by accident when it first launched the App Store without considering operational costs, benefit to users, or value to developers, that is, both sides of the platform.[603] That commission has enabled Apple to collect extraordinary profits as Mr. Barnes credibly shows that the operating margins have exceeded 75% for years. Yet the 30% commission rate has barely budged in over a decade despite developer complaints and regulatory pressure. High commission rates certainly impact developers, and some evidence **[**256]** exists that it impacts consumers when those costs are passed on.[604]

With respect to indirect evidence, the Court discusses these effects in Facts § V.A.1., but summarizes them here. Apple holds considerable market share, 55 percent. Its restrictions harm competition by precluding developers, especially larger ones, from opening competing game stores on iOS and compete for other developers and users on price. Given this but-for-world, increased competition could result in a reduction of Apple's commissions charged to developers, who could then pass on savings to users.[605] Competing game stores could compete on features, including "search and discoverability," in-app payment processing, and security. This could improve the innovation in and perhaps quality of "matchmaking" to increase output.[606] Further, competing game **[*1038]** stores could provide specialized stores tailored to particular groups and otherwise innovate to meet user and developer needs.

Accordingly, Epic Games has put proffered both direct and indirect evidence of anticompetitive effects under Section 1.

ii. Procompetitive Justifications

In response, Apple offers three procompetitive justifications: security, intrabrand competition, **[**257]** and protecting intellectual property investment. ***HN42***[] A procompetitive rationale is a "nonpretextual claim that [defendant's] conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal." Qualcomm, 969 F.3d at 991. It is not enough that "conduct 'has the effect of reducing consumers' choices or increasing prices to consumers.'" *Id. at 990* (quoting Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1202 (9th Cir. 2012)). That is because these effects may arise for procompetitive reasons, such as increased interbrand competition. *See* Leegin, 551 U.S. at 891-93. ***HN43***[] In a two-sided transaction market, a court must consider procompetitive effects on both sides of the market. Amex, 138 S. Ct. at 2287.

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[603] Thus, the facts here differ from Amex. There, American Express raised fees only after a "careful study" of "how much additional value its cardholders offer merchants." 138 S. Ct. at 2288. It used higher merchant fees "to offer its cardholders a more robust rewards program," which created loyalty and "encourage[d] the level of spending that makes Amex valuable to merchants." *Id.* No study or evaluation exists here.

[604] For this reason, the spectacular growth of free apps on the App Store is not dispositive. While Apple may have decided, over time, to use freemium games to subsidize the rest of the App Store, there is no evidence that the commission is calibrated to the costs or value of providing free games, as the merchant fees in Amex were calibrated to providing rewards.

[605] The record is bare as to who would ultimately benefit from a reduction in commissions. With the limited examples in the record, some developers, like Down Dog, pass on the entirety of the reduction in the commission to consumers, whereas Epic Games split the 30% commission by retaining 12% and remitting 18% to consumers. Thus, it is unclear the extent or degree to which developers would pass on any savings to consumers.

[606] Under Amex, services for each of the two sides of the platform are both "inputs" to the single product, which is transactions. 138 S. Ct. at 2286 n.8. Although Apple does not directly restrict game transaction output, it limits the supply of these inputs on iOS, which reduces quality and may reduce output.

Here, the Court finds Apple's security justification to be a valid and nonpretextual business reason for restricting app distribution. As previously discussed, *see supra* Facts § V.A.2., centralized app distribution enables Apple to conduct app review, which includes both technical and human components. Human review in particular helps protect security by preventing social engineering attacks, the main vector of malware distribution. Human review also helps protect against fraud, privacy intrusion, and objectionable content beyond levels achievable by purely technical measures. By **[**258]** providing these protections, Apple provides a safe and trusted user experience on iOS, which encourages both users and developers to transact freely and is mutually beneficial. As a result, Apple's conduct "enhance[s] consumer appeal." *See* *Qualcomm, 969 F.3d at 991*.

As a corollary of the security justification, the app distribution restrictions promote interbrand competition. ***HN44***[] The Supreme Court has recognized that limiting intrabrand competition can promote interbrand competition. *Leegin, 551 U.S. at 890*. For example, restricting price competition among retailers who sell a particular product can help the manufacturer of that product compete against other manufacturers. *Id. at 890-91*. It is this interbrand competition that "the antitrust laws are designed primarily to protect." *Id. at 895*. Here, centralized app distribution and the "walled garden" approach differentiates Apple from Google. That distinction ultimately increases consumer choice by allowing users who value open distribution to purchase Android devices, while those who value security and the protection of a "walled garden" to purchase iOS devices. This, too, is a legitimate procompetitive justification.

Epic Games does not persuasively rebut the security justification nor shows it to be pretextual. **[**259]** Instead, it focuses on the lack of app distribution restrictions (besides code signing) on Mac computers. *See supra* Facts §§ V.A.1.a, V.A.2.a.iv. However, Apple submits some evidence that Mac computers have more malware than iOS and, in any case, provides a compelling explanation for app review's increased effectiveness against certain types of attacks. Epic Games also questions the effectiveness of app review in practice. *See supra* Facts § V.A. That hardly provides a reason against app review. Epic Games' security expert agrees that "mayhem" would result if unfettered app distribution **[*1039]** were allowed.[607] Thus, plaintiff's proffer is really one of the "effectiveness" of Apple's security procedures, not the need for them. Whether the precise restrictions Apple has selected could be replicated through less restrictive means is more properly addressed in the next section. Given the trial record, the Court finds that Apple's security rationale is a valid business justification for the app distribution restrictions.[608]

As for the intellectual property justification, the specific commission rate is pretextual, as the Court previously found. As discussed in Facts § V.A.2.b, there is no evidence **[**260]** that Apple set or maintains its specific commission rate with any consideration of the value or cost of intellectual property in mind.[609] Indeed, the Supreme Court recently rejected a justification without "any direct connection" to the challenged restraint in *NCAA*. *141 S. Ct. at 2162*. There, a sport association argued that restrictions on student athlete compensation were necessary to preserve amateurism and related consumer demand. *Id. at 2152*. The Court rejected this justification based on the district court's findings that the association set those rules without any reference to considerations of consumer demand. *Id. at 2162-63* (quoting *In re NCAA Athletic Grant-in-Aid Antitrust Litig., 375 F. Supp. 3d 1058, 1070, 1075, 1100 (N.D. Cal. 2019)*).

Eastman Kodak is further instructive. There, the photocopier maker argued that companies providing repair services for its machines were "exploiting the investment Kodak has made in product development, manufacturing and equipment sales." *Eastman Kodak, 504 U.S. at 485*. The Supreme Court declined to accept this argument and find in Kodak's favor as a matter of law. *Id. at 486*. Ultimately, on remand, the Ninth Circuit affirmed a jury finding of

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[607] Trial Tr. (Mickens) 2709:23-2710:2.

[608] Relatedly, Apple has a legitimate business justification in maintaining and improving the quality of its services, here, privacy and security. *See* *Cal. Computs. Prods., Inc. v. Int'l Bus. Machs. Corp., 613 F.2d 727, 744 (9th Cir. 1979)* ("IBM, assuming it was a monopolist, had the right to redesign its products to make them more attractive to buyers whether by reason of lower manufacturing cost and price or improved performance.").

[609] *See, e.g.*, PX-0880.021; Ex. Depo. 8 (Cue) 137:23-138:14, 140:10-141:7; Trial Tr. (Malackowski) 3692:18-21, 3693:13-17.

pretext. The evidence showed that "patents 'did not cross [Kodak's] mind at the time Kodak began its parts policy" and that Kodak did not distinguish patented and unpatented parts **[**261]** in its policy. *Image Tech. Servs. II, 125 F.3d at 1219-20*.

Like the defendants in those cases, Apple did not consider intellectual property in setting its specific commission rate, nor does it list any specific intellectual property in the DPLA. Thus, the justification with respect to the 30% commission rate is pretextual.

That said, while the Court has found the *rate itself* pretextual, the Court cannot conclude that Apple's protection of its intellectual property is pretextual. Courts have found similar justifications based on the protection of intellectual property rights valid, albeit rebuttable, procompetitive justifications. *See, e.g., Tech. Res. Servs., Inc. v. Dornier Med. Sys., Inc., 134 F.3d 1458, 1467 (11th Cir. 1998)* (jury could have credited defendant's "need to protect its trade secrets and proprietary information"). Indeed, as the Court has found, Apple is entitled to license its intellectual property for a fee, and to guard its intellectual property from uncompensated use by others. The restrictions on app distribution on the iOS platform accomplishes that aim, whereas Epic Games' proposed alternatives (discussed in more length below) **[*1040]** would weaken it. In short, Epic Games has failed to show that Apple's proffered intellectual property justification is pretextual as it relates to the restrictions **[**262]** on app distribution.

Accordingly, Apple has shown procompetitive justifications based on security and the corollary interbrand competition, as well as generally with respect to intellectual property rights.

iii. Less Restrictive Alternatives

Turning to the last step, the parties dispute whether these procompetitive justifications could be achieved through less restrictive means. ***HN45***[] Generally, "***antitrust law*** does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes." *NCAA, 141 S. Ct. at 2161*. "To the contrary, courts should not second-guess degrees of reasonable necessity so that the lawfulness of conduct turns upon judgments of degrees of efficiency." *Id.* (simplified).[610]

HN46[] Thus, under the third step, an alternative must be "a significantly (not marginally) less restrictive means for achieving the same procompetitive benefits." *Id. at 2164*. It must be "virtually as effective in serving the procompetitive purposes" as current rules "without significantly increased cost." *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1260 (9th Cir. 2020)* (simplified), *aff'd 141 S. Ct. at 2161*. Where a restraint is "*patently and inexplicably* stricter than is necessary to accomplish" the proffered procompetitive objective, "an antitrust **[**263]** court can and should invalidate it and order it replaced with a viable [less restrictive alternative]." *Id.* (quoting *O'Bannon v. NCAA, 802 F.3d 1049, 1075 (9th Cir. 2015)* (emphasis in original)).

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[610] The Court notes slightly differing language at the third step between *Section 1* ("plaintiff [must] demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means") and *Section 2* ("the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit"). *See Qualcomm, 969 F.3d at 991*. Although the Ninth Circuit has recently stated that the rule of reason analysis under both sections is "essentially the same," *id.*, prior case law has explicitly recognized that "there is no least restrictive alternative requirement in the context of a *Section 2* claim." *Image Tech. Servs. I, 903 F.2d at 620*; *accord Apple iPod iTunes Antitrust Litig., No. 05-CV-0037-YGR, 2014 U.S. Dist. LEXIS 165254, 2014 WL 12719194, at *1 (N.D. Cal. Nov. 25, 2014)*; *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp. L.P., Nos. 05-CV-6419-MRP-AJW, 2008 U.S. Dist. LEXIS 112002, 2008 WL 7346921, at *16 (C.D. Cal. July 9, 2008)*, *aff'd 592 F.3d 991 (9th Cir. 2010)*. This is, in part, because the Sherman Act "does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition." *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415-16, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. Regardless, the Court notes this distinction as a potential difference between the two analyses especially where, as recognized, proving a violation of *Section 2* is more exacting than proving a violation of *Section 1*. To the extent appellate courts perceive a practical distinction, clarity is welcomed.

Here, Epic Games argues that the app distribution restrictions can be replaced with the enterprise model or the notarization model. As discussed above, *see supra* Facts § V.A.2.a.iv., Apple already implements both of these models on iOS and Mac, respectively. The enterprise model enables Apple to certify organizations, such as companies, to distribute apps to their own employees. This model could be extended to certify app stores. The notarization model allows Apple to sign apps to verify security while allowing them to be distributed as the developer wishes. Epic Games argues that these models could be implemented on iOS with minimal technical difficulty.

[*1041] However, missing from both the enterprise and notarization models is human app review which provides most of the protection against privacy violations, human fraud, and social engineering. These proposed alternatives would require Apple to either add human review to the notarization model or leave app review to third-party app stores. Apple executives suggested that the first option would not **[**264]** scale well.[611] Under the second option, Apple could in theory set minimum guidelines for app stores to provide a "floor" for privacy, security, and quality. However, security could increase or decrease depending on the quality and diligence of the store. Evidence shows that at least on Android, the experiment shows less security.

HN47[] In evaluating remedies, no court should "impose a duty that it cannot explain or adequately and reasonably supervise." *NCAA, 141 S. Ct. at 2163* (quoting *Verizon, 540 U.S. at 410*). Here, Epic Games has provided requests for its remedy which principally appear to eliminate app review.[612] The requests also leave unclear whether Apple can collect licensing royalties and, if so, how it would do so. At closing argument, Epic Games' counsel suggested that "Apple can charge" for its license, so long as it does not discriminate among developers.[613] However, it has sought to require Apple to give competing app stores access to the same "iOS functionality that the App Store has access to," which is more than the DPLA currently licenses.[614] Thus, the Court need not consider these possibilities because Epic Games has not sufficiently developed them.

In short, Epic Games has not met its burden to show that its proposed alternatives **[**265]** are "virtually as effective" as the current distribution model and can be implemented "without significantly increased cost." *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d at 1260* (quoting *O'Bannon, 802 F.3d at 1074*). Nor has it shown that the restraints are "patently and inexplicably stricter than is necessary." *Id.* (quoting *O'Bannon, 802 F.3d at 1074*). ***HN48***[] "[A]ntitrust courts must give wide berth to business judgments before finding liability." *NCAA, 141 S. Ct. at 2163*. Here, Apple's business choice of ensuring security and protecting its intellectual property rights through centralized app distribution is reasonable, and the Court declines to second-guess that judgment on an underdeveloped record. *See In re Citric Acid Litig., 191 F.3d 1090, 1101 (9th Cir. 1999)* ("Courts have recognized that firms must have broad discretion to make decisions based on their judgments of what is best for them . . . .").

Accordingly, the Court finds that Apple's app distribution restrictions do not violate *Section 1* of the Sherman Act.

3. *Count 5: iOS In-App Payment Solutions Market Analysis*

In Count 5, Epic Games avers that Apple has unreasonably restrained trade in the "iOS In-App Payment Processing **[*1042]** Market" by requiring developers to "use Apple's In-App Purchase for in-app purchases of in-

[611] Trial Tr. (Federighi) 3502:22-3503:15. Professor Mickens even suggested the courts should micro-manage policy decisions.

[612] *See, e.g.*, Dkt. No. 276-1 at 4 (requesting an injunction prohibiting Apple from enforcing its guidelines to "impede" or "disadvantage" app distribution outside of the App store). Although this request purports not to "prohibit Apple from taking steps to prevent the distribution of malware," it is not clear what constitutes "malware" and whether that distinction includes "broad" security (privacy, fraud, offline safety, etc.) or is limited to Dr. Mickens' definition of unauthorized access. Nor is it clear whether Apple can impose standards on other app stores.

[613] Trial Tr. (Closing Arguments) 4156:20.

[614] Dkt. No. 276-1 at 4.

app content to the exclusion of any alternative solution or third-party payment processor."[615] This claim fails for **[**266]** substantially the same reasons that Count 3 fails.

At step one, for the reasons stated, *supra* Facts § V.B.1. and Law § II.C.2.b.i., Epic Games has presented some direct and indirect evidence showing that Apple's IAP functionality has had anticompetitive effects.

At step two, for the reasons stated in both the Count 3 analysis as well as the Court's findings of facts with respect to IAP, *supra* Facts § V.B.2 and Law § II.C.2.b.ii, Apple has proffered more than three procompetitive justifications for the terms of the DPLA relating to IAP. One, IAP is the mechanism by which Apple can easily receive its commission and is further how Apple collects a royalty for the use of its intellectual property. Two, IAP provides consumers with a unitary safe and secure means to execute transactions on the iOS platform. Three, IAP offers consumers a centralized purchasing system, whereby consumes have a convenient way to both execute and track transactions on the iOS platform.

At step three, Epic Games has identified no suitable less restrictive alternative for Apple's use of IAP based on the current record. The only alternative that Epic Games proposes is that Apple be barred from restricting or deterring **[**267]** in any way "the use of in-app payment processors other than IAP."[616] This proposed alternative is deficient for several reasons:

First, and most significant, as discussed in the findings of facts, IAP is the method by which Apple collects its licensing fee from developers for the use of Apple's intellectual property. Even in the absence of IAP, Apple could still charge a commission on developers. It would simply be more difficult for Apple to collect that commission.[617]

Indeed, while the Court finds no basis for the specific rate chosen by Apple (*i.e.*, the 30% rate) based on the record, the Court still concludes that Apple is entitled to *some* compensation for use of its intellectual property. As established in the prior sections, *see supra* Facts §§ II.C., V.A.2.b., V.B.2.c., Apple is entitled to license its intellectual property for a fee, and to further guard against the uncompensated use of its intellectual property. The requirement of usage of IAP accomplishes this goal in the easiest and most direct manner, whereas Epic Games' only proposed alternative would severely undermine it. Indeed, to the extent Epic Games suggests that Apple receive nothing from in-app purchases made on its platform, **[**268]** [618] such a remedy is inconsistent with prevailing intellectual property law.

Second, if Apple could no longer require developers to use IAP for digital transactions, Apple's competitive advantage on security issues, in the broad sense, *see supra* Facts § V.B.2.a., would be undermined and ultimately could decrease consumer choice **[*1043]** in terms of smartphone devices and hardware.

Third, but to a lesser extent, the use of different payment solutions for each app may reduce the quality of the experience for some consumers by denying users the centralized option of managing a single account through IAP. This would harm both consumers and developers by weakening the quality of the App Store to those that value this centralized system. Thus, the Court concludes that Apple's restrictions as to its IAP and separate payment processors do not violate *Section 1* of the Sherman Act.

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[615] Compl. ¶ 227.

[616] Epic Games COL ¶ 642.

[617] In such a hypothetical world, developers could potentially avoid the commission while benefitting from Apple's innovation and intellectual property free of charge. The Court presumes that in such circumstances that Apple may rely on imposing and utilizing a contractual right to audit developers annual accounting to ensure compliance with its commissions, among other methods. Of course, any alternatives to IAP (including the foregoing) would seemingly impose both increased monetary and time costs to both Apple and the developers.

[618] Epic Games COL ¶ 643.

D. *Section 2* of the Sherman Act: Apple's Monopoly Maintenance of the iOS App Distribution Market (Count 1) and iOS in-App Payment Solutions Market (Count 4)

Epic Games brings two claims under *Section 2* arguing monopoly maintenance: Count 1 is based on its theory of the iOS distribution market and Count 4 is based on the iOS in-app payment solutions market. **[**269]** The legal framework is the same for both.

1. *Legal Framework*

HN49[] *Section 2* of the Sherman Act prohibits persons from "monopoliz[ing], or attempt[ing] to monopolize, or combin[ing] or conspir[ing] with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 2*. A claim for unlawful monopolization under *Section 2* of the Sherman Act requires that a plaintiff show: "(a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury." *Qualcomm Inc., 969 F.3d at 989-90*.

HN50[] To recap: monopoly power is "the power to control prices or exclude competition." *Grinnell Corp., 384 U.S. at 571* (quotation marks omitted). "[A] firm is a monopolist if it can profitably raise prices substantially above the competitive level," *Microsoft Corp., 253 F.3d at 51*, "without inducing so rapid and great an expansion of output from competing firms as to make the supracompetitive price untenable," *Harrison Aire, Inc., 423 F.3d at 380* (internal quotation marks omitted).

HN51[] *Section 2* monopolization claims "must be judged on a market-by-market basis." *Syufy Enters., 903 F.2d at 672 n.22*; *see also* *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)* ("Without a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition.").

2. *Count 1: iOS App Distribution Market Analysis* ***[**270]***

In Count 1, Epic Games claims that Apple has a monopoly in the "iOS App Distribution Market" and has unlawfully maintained the monopoly by prohibiting iOS app developers from distributing their apps through alternative channels.

In short, this claim fails for two significant reasons: (1) Epic Games fails to prove the first element, that Apple has monopoly power in the relevant product and geographic market; and (2) Epic Games alternatively fails to satisfy the rule of reason analysis under Section 1—an acknowledged less exacting test as compared to *Section 2*.

First, the Court has found that the relevant market is the global mobile gaming transactions. Epic Games did not argue that Apple had monopoly power in this market. Instead, Epic Games focused on its two-tiered aftermarket theory. The Court will not rehash the failed analysis here. Suffice it to say, neither parties' proposed markets ultimately persuaded the Court. Rather, Epic Games' proposed **[*1044]** market ignored greater market pressures, and Apple's proposed market was overbroad in its inclusion of similar products.

As demonstrated with respect to the relevant market, Apple does not have substantial market power equating to monopoly power. While **[**271]** considerable, Epic Games has failed to show that Apple's market power is durable and sustaining given the current state of the relevant market. For that reason, the Court finds that Epic Games failed to prove the first element of a *Section 2* claim: the possession of monopoly power in the relevant market.

Second, and alternatively, Epic Games' *Section 2* claims fail to satisfy the substantively similar rule of reason analysis for similar reasons as *Section 1*. Epic Games' Section 1 and *Section 2* claims are based on the same conduct and restrictions: namely, restrictions on both distribution of apps as well as the use of non-IAP payment processors. As the Court has found above, Epic Games has failed to persuade on this record that these ultimate restrictions are anticompetitive. ***HN52***[] Because "the three-part burden-shifting test under the rule of reason is essentially the same" under *Sections 1* and *2*, and "proving an antitrust violation under *§ 2* of the Sherman Act is more exacting than proving a *§ 1* violation," the analysis here applies to the monopolization claims if required and fails for the same reasons. *Qualcomm, 969 F.3d at 991-92*; *see also* *Williams, 999 F.2d at 448* ("[A] *§ 1* claim insufficient to withstand summary judgment cannot be used as the sole basis for a *§ 2* claim.").

In sum, Epic Games' **[**272]** monopolization claims fail because Epic Games has failed to demonstrate that (i) Apple possesses monopoly power in the relevant market and that (ii) the challenged restrictions are anticompetitive under the rule of reason.

3. *Count 4: iOS In-App Payment Solutions Market Analysis*

In Count 4, Epic Games claims that Apple has a monopoly in the "iOS In-App Payment Processing Market" and has unlawfully maintained the monopoly by requiring "iOS app developers that sell in-app content to exclusively use Apple's In-App Purchase." This claim fails for the same reasons as Count 2.

As with its *Section 2* monopolization claim for the distribution of apps (Count 2), Epic Games' *Section 2* claim fails at the outset because Apple does not have monopoly power in the relevant product market.

III. *SECTION 1* OF THE SHERMAN ACT: TYING CLAIM (COUNT 6)

Epic Games' Count 6 alleges a violation of *Section 1* of the Sherman Act based on the existence of a tie between app distribution, on the one hand, and IAP on the other.

A. Legal Standard

HN53[] Tying involves the linking of two separate products from two separate product markets. *Jefferson Parish, 466 U.S. at 21*. "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over **[**273]** the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Id. at 12*.

HN54[] Tying arrangements may be evaluated under *Section 1* of the Sherman Act under either *per se* or rule of reason analysis. *See* *id. at 29*. The *per se* rule applies "only after considerable experience with certain business relationships," *Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9, 99 S. Ct. 1551, 60* ***[*1045]*** *L. Ed. 2d 1 (1979)* (citation omitted), shows that a restraint "always or almost always tend to restrict competition and decrease output," *Amex, 138 S. Ct. at 2283* (citation omitted).

HN55[] "For a tying claim to suffer per se condemnation, a plaintiff must prove: (1) that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product; and (3) that the tying arrangement affects a not insubstantial volume of commerce in the tied product market." *Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 913 (9th Cir. 2008)*; *see also* *Jefferson Parish, 466 U.S. at 12-18*; *Eastman Kodak, 504 U.S. at 461-62*.

HN56[] The first element requires that the plaintiff must prove that the alleged tying product and the alleged tied product are "separate and distinct" products. *Rick-Mik Enters., Inc. v. Equilon Enters. LLC, 532 F.3d 963, 974 (9th Cir. 2008)*. Further, if tied, the tie, would link "two separate product markets." *Jefferson Parish, 466 U.S. at 21*; *see also* ***[**274]*** *Microsoft Corp., 253 F.3d at 85* ("[U]nless products are separate, one cannot be 'tied' to the other.").

HN57[] "[T]he answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items." *Jefferson Parish, 466 U.S. at 19*; *see also* *Rick-Mik, 532 F.3d at 975*. There must be "sufficient demand for the purchase of [the tied product] separate from [the tying product] to identify a distinct product market in which it is efficient to offer [the tied product] separately from [the tying product]." *Jefferson Parish, 466 U.S. at 21-22*; *see also* *Rick-Mik, 532 F.3d at 975*.

HN58[] "[T]he 'purchaser demand' test of *Jefferson Parish* examine[s] direct and indirect evidence of consumer demand for the tied product separate from the tying product. Direct evidence addresses the question whether, when given a choice, consumers purchase the tied good from the tying good maker, or from other firms. Indirect evidence includes the behavior of firms without market power in the tying good market, presumably on the notion that (competitive) supply follows demand." *Rick-Mik, 532 F.3d at 975* (internal quotation marks and citations omitted); *see also id.* ("If competitive firms always bundle the tying and tied goods, then they are a single product.").

HN59[] With respect to the second element, a tie exists **[**275]** where "sale of the desired ('tying') product is conditioned on purchase of another ('tied') product." *Aerotec, 836 F.3d at 1178*. "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish, 466 U.S. at 12*. "A plaintiff must present evidence that the defendant went beyond persuasion and coerced or forced its customer to buy the tied product in order to obtain the tying product." *Paladin Assocs., 328 F.3d at 1159*.

HN60[] Finally, "the Supreme Court has condemned tying arrangements when the seller has the market power to force a purchaser to do something that he would not do in a competitive market." *Cascade Health Sols., 515 F.3d at 915*. "[I]n all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." *Illinois Tool Works Inc., 547 U.S. at 46*; *Rick-Mik, 532 F.3d at 972*.

[*1046] B. Analysis

At the outset, the parties dispute whether the *per se* analysis or the rule of reason analysis should control the Court's analysis. The Court need not decide this dispute. ***HN61***[] Epic Games' claim fails under either framework because a tying claim cannot be sustained where the alleged good is not **[**276]** a "separate and distinct product." *Rick-Mik, 532 F.3d at 974*; *Microsoft Corp., 253 F.3d at 85* ("[U]nless products are separate, one cannot be 'tied' to the other."). Here, Epic Games argues that a tying claim exists because Apple is forcing distributors who use the iOS app distribution platform (the alleged tying product) to also use IAP (the alleged tied product). As discussed above, *supra* Facts § II.C., IAP is not a product. Two core factual issues lead to this conclusion: integration and consumer demand.

With respect to integration, the Court described in detail how IAP functions and the Court does not reiterate it here. Suffice it to say, IAP is not merely a payment processing system, as Epic Games suggests, but a comprehensive system to collect commission and manage in-app payments. This IAP system is not bought or sold but it is integrated into the iOS devices. ***HN62***[] "[I]ntegration [is] common" among technological products and services." *Microsoft Corp., 253 F.3d at 93*.

Rick-Mik supports this conclusion. There, the Ninth Circuit found that Equilon's (also known as Shell Oil Co.) requirement that franchisees process all credit and debit card transactions through Equilon's own system did not involve two separate products. *Rick-Mik, 532 F.3d at 967, 974*. Said differently, the purchase of an oil company's **[**277]** franchise (the tying product) and the requirement that it use Equilon's credit-card processing system (the tied product) were not two distinct products. *Id.* Rather, the Court found that franchises are "almost by definition" a bundle of related products and services. *Id. at 674*. The proper inquiry was whether the allegedly tied products were "integral components of the business method being franchised." *Id.*

Here, as there, IAP is but one component of the full suite of services offered by iOS and the App Store. Moreover, and as discussed above, the App Store is a two-sided transaction platform. *See Amex, 138 S. Ct. at 2286 n.8* (noting that "a two-sided platform" is one that "offers different products or services to two different groups who both depend on the platform to intermediate between them"). By definition, the platform has two sides: the developer on one side providing gaming apps and the consumer on the other, purchasing the apps. This is a single platform which cannot be broken into pieces to create artificially two products.[619] *See, e.g., Serv. & Training, Inc. v. Data Gen. Corp., 737 F. Supp. 334, 343 (D. Md. 1990)* (rejecting tying claim because alleged tied product was "one feature of [defendant's] integrated and unified product"); Areeda & Hovenkamp § 1741a ("a car with tires attached might **[**278]** be deemed a single product because a vehicle that can be driven is the essence of what the customer buys").

[*1047] Moreover, with respect to consumer demand, Epic Games presented no evidence showing that demand exists for IAP as a standalone product. As discussed above, *supra* Facts § II.C., Epic Games' argument mischaracterizes IAP and its functionality. Payment processing is simply an input into the larger bundle of services provided by the IAP system.[620] While there may be a market for payment processing, that fact is irrelevant as IAP is not just payment processing.[621]

In sum, whether analyzed as an integrated functionality or from the perspective of consumer demand, IAP is not a separate product from iOS app distribution. Thus, Epic Games' Count 6 fails to show the existence of an illegal tie under *Section 1*.

IV. CALIFORNIA'S *CARTWRIGHT ACT* (COUNTS 7, 8, AND 9)

Epic Games asserts three claims against Apple under the *Cartwright Act*: (i) Count 7 for unreasonable restraint of trade in the iOS app distribution market; (ii) Count 8 for unreasonable restraint of trade in the iOS in-app payment solutions market; and (iii) Count 9 for tying of app distribution and **[**279]** payment processing. Epic Games argues that its Cartwright Act claims are based on the same conduct as the analogous Sherman Act claims. Specifically, Count 7 is based on the same conduct as Count 3; Count 8 is based on the same conduct as Count 5; and Count 9 is based on the same conduct as Count 6. The basic legal framework is the same for all three claims.

A. Legal Framework

HN63[] The Cartwright Act makes "unlawful, against public policy and void" "every trust," which is defined as "a combination of capital, skill, or acts by two or more persons . . . [t]o create or carry out restrictions in trade or commerce." *Cal. Bus. & Prof. Code §§ 16720(a)*, *16726*. Interpretations of federal ***antitrust law*** are at most

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[619] This conclusion is further bolstered by comparison to other platforms in the wider gaming market. *See Microsoft Corp., 253 F.3d at 88* (comparing the bundling to competitive firms); *cf. In re: Cox Enters., Inc., 871 F.3d 1093, 1109 (10th Cir. 2017)* (bundling in the premium cable industry found to be "simply more efficient than offering them separately"). As described above, the wider gaming industry routinely use walled gardens, including the PlayStation Store, the Nintendo eShop, and the Xbox Games Store. These game stores are vertically integrated with respect to distribution, content delivery, and payment functionalities. *See supra* Facts § II.D.3.c. The only exception is Epic Games Store. However, as noted, plaintiff's move occurred in the context of litigation planning. *Id.* § I.B.3.a.

[620] In fact, as noted, IAP does not itself even *process payments*—that function is performed by a third-party settlement provider like Chase Bank with which Apple contracts. And unlike the purported alternatives that Epic Games proposes (*e.g.*, PayPal), Apple has never tried to market the technology for use on other digital transaction platforms, and Epic Games does not contend otherwise.

[621] The Court also notes that in the but-for world where developers could use an alternative processor, Apple would still be contractually entitled to its commission on any purchase made within apps distributed on the App Store. Thus, so long as the alternative processor charged a non-zero commission or fee for its services, no economically rational developer would choose to use the alternative processor, because on each transaction, they would *still* have to pay Apple its commission, *and* they would have to pay the alternative processor a commission for its services. For the same reason, the fact that some developers like Facebook and Spotify have tried to avoid Apple's commission by bypassing IAP is not evidence that there is separate demand for IAP, only that developers would prefer not to pay Apple a commission. Epic Games' reliance on this evidence thus "conflates competition on the merits with Epic Games' goal of avoiding Apple's 30%." *Epic Games, Inc., 493 F. Supp. 3d at 843*.

instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century." *Aryeh v. Canon Bus. Sols., Inc., 55 Cal. 4th 1185, 1195, 151 Cal. Rptr. 3d 827, 292 P.3d 871 (2013)*. "The Ninth Circuit has recognized after *Aryeh* it 'is no longer the law in California' that the Cartwright Act is 'coextensive with the Sherman Act.'" *In re Lithium Ion Batteries Antitrust Litig., No. 13-MD-2420, 2014 U.S. Dist. LEXIS 141358, 2014 WL 4955377, at *10 (N.D. Cal. Oct. 2, 2014)* (quoting *Samsung **[*1048]** Elecs. Co. v. Panasonic Corp., 747 F.3d 1199, 1205 n.4 (9th Cir. 2014)*).

B. Analysis

Epic Games argues that, even if its claims under the Sherman Act fail, it is nevertheless entitled to relief on its **[**280]** Cartwright Act claims because the Cartwright Act is broader in range and deeper in reach than the Sherman Act.[622] Apple disagrees arguing that where, as here, Epic Games has not identified any specific and material differences between the Cartwright Act and the Sherman Act, plaintiff cannot prevail on a Cartwright Act where its claims fail under the Sherman Act.

The Court agrees with Apple. Epic Games has not cited any authority for the contrary position. Plaintiff's authorities contain conclusory statements about the broader "reach" of the Cartwright Act relative to the Sherman Act.[623] Because the context of these statements is inapposite, the statements do not support a finding that the Cartwright Act claims here can survive notwithstanding the failure of Sherman Act claims. *See, e.g., Cianci v. Superior Court, 40 Cal. 3d 903, 917-18, 221 Cal. Rptr. 575, 710 P.2d 375 (1985)* (holding that the "broad" scope of the Cartwright Act covers entities involved in anticompetitive conduct "in every type of business," including in the "medical profession," and noting, in dicta, that the reach of the Cartwright Act includes "threats to competition in their incipiency" similarly to *Section 7* of the Clayton Act, which prohibits mergers that may substantially lessen competition); *In re Capacitors Antitrust Litig., 106 F. Supp. 3d 1051, 1072 (N.D. Cal. 2015)* (declining to **[**281]** apply standard for federal antitrust standing in the context of claims brought under the Cartwright Act in light of the absence of a "definitive decision" by California courts that doing so would be permissible). Because Epic Games has not met its burden to show that it can prevail on its Cartwright Act claims despite the failure of its analogous Sherman Act claims, the Court finds and concludes that Epic Games' Cartwright Act claims fail for the same reasons as its analogous Sherman Act claims.

This conclusion is confirmed by a review of California authorities applying the Cartwright Act in the context of claims asserting an unreasonable restraint of trade, as in Counts 7 and 8, and tying, as in Count 9.

HN64[] As in the context of claims under *Section 1* of the Sherman Act, California courts employ the rule of reason to determine whether a restraint of trade that is not subject to *per se* treatment, such as the DPLA[624] , is unreasonable and, therefore, unlawful under the Cartwright Act. *See In re Cipro Cases I & II, 61 Cal. 4th 116, 146, 187 Cal. Rptr. 3d 632, 348 P.3d 845 (2015)* (holding that "antitrust illegality" under the Cartwright Act where a **[*1049]** "challenged agreement involves a restraint of trade" depends on the "traditional rule of reason" analysis because both "the Cartwright Act and **[**282]** Sherman Act carry forward the common law understanding that 'only

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[622] *See* Epic Games COL ¶ 426.

[623] *See* Dkt. No. 276 at 84-85; Epic Games COL ¶ 426.

[624] Apple argues that Epic Games' Cartwright Act claims fail for lack of concerted action because the claims challenge "only unilateral conduct," and the Cartwright Act "does not impose liability for 'wrongful conduct on the part of a single entity.'" Apple COL ¶¶ 588-589. The Court disagrees with this interpretation of Epic Games' claims. While Counts 7 and 8, as Counts 3 and 5, are predicated on the theory that the DPLA is an agreement between Apple and Epic Games, it may include particular terms that would constitute unreasonable restraints of trade. *See Kolling v. Dow Jones & Co., 137 Cal. App. 3d 709, 719, 187 Cal. Rptr. 797 (1982)* ("If a 'single trader' pressures customers or dealers into adhering to" restraints of trade, then "an unlawful combination [under the Cartwright Act] is established, irrespective of any monopoly or conspiracy, and despite the recognized right of a producer to determine with whom it will deal" (citations omitted)).

unreasonable restraints of trade are prohibited'" (citation omitted)). The rule of reason inquiry in the context of the Cartwright Act, as in the federal context, looks to "whether the challenged conduct promotes or suppresses competition," based on "the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption." *Id.* (internal quotation marks and citation omitted).

Here, the Court has carefully considered the evidence in the record and has determined, based on the rule of reason, that the DPLA provisions at issue in Counts 3 (app distribution) and 5 (IAP) have procompetitive effects that offset their anticompetitive effects, and that Epic Games has not shown that these procompetitive effects can be achieved with other means that are less restrictive. These findings, which defeat Counts 3 and 5, also defeat Counts 7 and 8. As noted above, Epic Games has cited no authority that compels a different conclusion.

The result is similar with respect to Count 9. ***HN65***[] As is the case with a tying claim in violation **[**283]** of the Sherman Act, a tying claim under the Cartwright Act requires the existence of two separate products. *See Freeman v. San Diego Ass'n of Realtors, 77 Cal. App. 4th 171, 184, 91 Cal. Rptr. 2d 534 (1999)* ("The threshold element for a tying claim is the existence of separate products or services in separate markets. Absent separate products in separate markets, the alleged tying and tied products are in reality a single product." (internal citation omitted)).

Here, as discussed above, the Court has found and concluded Epic Games' tying claim under the Sherman Act (Count 6) fails because plaintiff has not shown that IAP is a separate product from iOS App Distribution. Because the tying claim under the Cartwright Act (Count 9) is based on the same conduct as Count 6, that claim fails for the same reason as Count 6. *See Freeman, 77 Cal. App. 4th at 184* (holding that a tying claim under the Cartwright Act fails in the absence of two separate products in separate markets). Again, Epic Games has cited no authority that warrants a different outcome.

V. *SECTION 2* OF THE SHERMAN ACT: APPLE'S DENIAL OF AN ESSENTIAL FACILITY IN THE IOS APP DISTRIBUTION MARKET (COUNT 2)

The legal elements of an essential facility claim under governing Ninth Circuit precedent are undisputed. ***HN66***[] To establish such a claim, a plaintiff must **[**284]** show that (i) the defendant is "a monopolist in control of an essential facility"; (ii) the plaintiff "is unable reasonably or practically to duplicate the facility"; (iii) the defendant "has refused to provide [the plaintiff] access to the facility"; and (iv) "it is feasible for [the defendant] to provide such access". *Aerotec, 836 F.3d at 1185*; *MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1128-29 (9th Cir. 2004)*; *Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 542-46 (9th Cir. 1991)*.

Epic Games has failed to prove this claim for myriad reasons, but most convincingly for two. First, for the reasons set forth above, Epic Games has failed to prove that Apple is an illegal monopolist in control of the iOS platform. This alone is sufficient to defeat the claim. Second, the claim would still fail because Epic Games failed to prove that the iOS platform is an essential facility. The best evidence of this **[*1050]** is Epic Games' own expert, Dr. Evans, who refused to endorse the argument that the iOS platform is an essential facility.[625] On this issue, he and Professor Schmalensee agree.[626]

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[625] Not only did Dr. Evans confirm in his live testimony that he would not describe iOS or Android as utilities, Trial Tr. (Evans) 2381:21-2383:18, Dr. Evans twice declined to express any opinion related to an essential facilities claim. Trial Tr. (Evans) 1673:4-11, 2390:16-2391:2; *see also generally* Ex. Expert 1 (Evans) § II.

[626] As a corollary, given that the nature of the "facility" is one solely comprised of intellectual property, as opposed to a physical structure, the question arises whether this claim could ever be recognized under *Section 2* as a matter of law. Citing primarily district court cases, Apple argues it cannot be forced to license its intellectual property and to hold otherwise would chill innovation and investment. While the argument appears meritorious, the Court declines to rule on this issue as it was not fully vetted and is not necessary to the resolution of this claim.

The term "essential facility" is a term of art under the antitrust laws. ***HN67***[] Caselaw describes essential facilities as those that are not capable of being replicated by competitors and serve as a conduit for the distribution of another product. For example, sports **[**285]** stadiums facilitate the display of indoor sports, *see Fishman v. Estate of Wirtz, 807 F.2d 520, 532 (7th Cir. 1986)*, and railroad bridges permit continuation of rail service and delivery of freight, *see United States v. Terminal R.R. Ass'n, 224 U.S. 383, 392-94, 32 S. Ct. 507, 56 L. Ed. 810 (1912)*. While prior cases have focused only on physical infrastructures of a finite availability (such as a bridge or a power network), an "essential facility" can exist even in the absence of such traditional physical attributes. *See MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1148 (7th Cir. 1983)*.

HN68[] To constitute an essential facility, "access to the facility or resource must be truly 'essential' in the sense that competitors cannot simply duplicate it or find suitable alternatives, and that absent access, competitors' ability to compete will be substantially constricted." 1 William C. Holmes, Intellectual Property and ***Antitrust Law*** § 6:10 (2021)[627] ; *Paladin Assocs., 328 F.3d at 1162-63* (no viable claim under the "essential facilities" doctrine where customers were able to obtain gas from other pipelines and sources and noting that a facility is 'essential' only if control of the facility carries with it the power to eliminate competition in a downstream market").

Obviously, under its theory, given the proprietary nature of iOS, plaintiff could not replicate iOS. However, as defined by the Court, in terms of distribution of mobile apps, multiple **[**286]** avenues *do exist* to **[*1051]** distribute the content to the consumer. Distribution can occur through web apps, by web access, and through other games stores. This doctrine does not require distribution in the manner preferred by the competitor, here native apps. The availability of these other avenues of distribution, even if they are not the preferred or ideal methods, is dispositive of Epic Games' claim. ***HN69***[] The doctrine does not demand an ideal or preferred standard. Based on these reasons, the *Section 2* claim based on an essential facilities theory fails.

VI. CALIFORNIA'S UNFAIR COMPETITION LAW (COUNT 10)

Antitrust law does not end with the Sherman Act. ***HN70***[] "States have regulated against monopolies and unfair competition for longer than federal government, and federal law is intended only 'to supplement, not to displace, state antitrust remedies.'" *In re Cipro Cases I & II, 61 Cal. 4th at 160* (quoting *Cal. v. ARC Am. Corp., 490 U.S. 93, 102, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*); *see also* Areeda & Hovenkamp §§ 216, 2401 (describing legislative history).

HN71[] California's Unfair Competition Law ("UCL") prohibits business practices that constitute "unfair competition," which is defined, in relevant part, as "any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. Each of these descriptions provides a separate "variety" of unfair **[**287]** competition. Thus, "a practice may be deemed unfair even if not specially proscribed by some other law" and even if not violating an antitrust statute. *See Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*.

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[627] Citing circuit cases: *e.g., Pittsburg County Rural Water Dist. No. 7 v. City of McAlester, 358 F.3d 694, 721 (10th Cir. 2004)* (affirming dismissal of an essential facilities claim where the competitor admitted that it had a "suitable available alternative water supply"); *Midwest Gas Services, Inc. v. Indiana Gas Co., Inc., 317 F.3d 703, 713-14 (7th Cir. 2003)* (dismissing an essential facilities claim where a distributor of natural gas had other routes available even if more costly); *Paddock Publ'ns, Inc. v. Chicago Tribune Co., 103 F.3d 42, 44-46 (7th Cir. 1996)* ("Unlike *United States v. Terminal R.R. Ass'n, 224 U.S. 383, 32 S. Ct. 507, 56 L. Ed. 810 (1912)*, the granddaddy of these cases, in which the Court held that a bottleneck facility that could not feasibly be duplicated must be shared among rivals, this case does not involve a single facility that monopolizes one level of production and creates a potential to extend the monopoly to others. We have, instead, competition at each level of production; no one can 'take over' another level of production by withholding access from disfavored rivals."); *Twin Lab'ys, Inc. v. Weider Health & Fitness, 900 F.2d 566, 570 (2d Cir. 1990)* (defendant's resource was not "essential" where alternate resources existed); *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co., 833 F.2d 606 (6th Cir. 1987)* (same).

HN72[] The UCL permits claims to be brought by any "person," which includes "natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons." Cal. Bus. & Prof. Code §§ 17201, 17204. To bring a claim under the UCL, a plaintiff must "(1) establish a loss or deprivation of money or property sufficient to quantify as injury in fact, i.e., *economic injury*, and (2) show that the economic injury was the result of, i.e., *caused by*, the unfair business practice." Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 322, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011) (emphasis in original); *see also* Cal. Bus. & Prof. Code § 17204.

Epic Games challenges Apple's conduct under the "unlawful" and "unfair" provisions of the UCL. Apple disputes both claims and further argues that Epic Games lacks "customer" standing. The Court addresses standing and then each claim.

A. Standing

HN73[] The injury-in-fact requirement of the UCL incorporates standing under Article III of the United States Constitution. Kwikset, 51 Cal. 4th at 322-23. Accordingly, the injury in fact must be "concrete and particularized . . . and actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (simplified). In addition, the UCL requires an economic injury. Kwikset, 51 Cal. 4th at 323. For example, "[a] **[**288]** plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary." *Id.* Last, a plaintiff must **[*1052]** show "a causal connection" between the defendant's conduct and the alleged injury. Id. at 326 (internal quotation marks and citation omitted).

Here, Apple does not dispute Epic Games' standing as a potential competitor: Epic Games wanted to open a competing iOS game store and could not. Because Epic Games would earn revenues from a competing store, it has suffered an economic injury. However, Apple challenges Epic Games' standing as a consumer. For that interpretation, Epic Games argues that it is a business customer of Apple's App Store and has been economically injured because it could not distribute games directly to consumers at lower cost.

The precise meaning of "consumer" under the UCL is undefined. **HN74**[] Generally, the UCL makes a distinction between "consumer" and "competitor" suits. *See* Cel-Tech, 20 Cal. 4th at 187 & n.12; Barquis v. Merchs. Collection Assn., 7 Cal. 3d 94, 109-10, 101 Cal. Rptr. 745, 496 P.2d 817 (1972) **[**289]** ; Kasky v. Nike, Inc., 27 Cal. 4th 939, 949, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002). There is no specific third category for non-competitor business.[628] Here, despite Apple's position, both parties' experts agree that developers like Epic Games jointly consume Apple's game transactions and distribution services together with iOS users.[629] Thus, although the question is close, the Court finds that Epic Games has standing to bring a UCL claim as a quasi-consumer, not merely as a competitor.

B. "Unlawful" Practices

HN75[] Under the "unlawful" prong of the UCL, Epic Games must show that Apple's conduct "can properly be called a business practice and that at the same time is forbidden by law." Korea Supply Co. v. Lockheed Martin

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[628] The Court recognizes *Levitt v. Yelp! Inc.*, and finds it distinguishable. There, in terms of analyzing the UCL claim, the court found the competitor standard applied even though plaintiffs and *Yelp*! did not compete. There, "the crux of the business owners' complaint [was] that Yelp's conduct unfairly injures their economic interests [relative] to the benefit of other businesses who choose to advertise with Yelp." 765 F.3d 1123, 1136 (9th Cir. 2014). Here, Epic Games is not claiming that it is injured relative to other developers—developers are all subject to the same restrictions. This action, unlike *Levitt*, includes a view that Epic Games is a consumer of Apple's two-sided platform.

[629] Ex. Expert 8 (Schmalensee) ¶¶ 31-34, 42; Ex. Expert 1 (Evans) ¶¶ 14, 22-24.

Corp., 29 Cal. 4th 1134, 1143, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003) (internal quotation marks and citation omitted). "Virtually any law . . . can serve as a predicate for an action under *Business and Professions Code section 17200*." *Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1361, 108 Cal. Rptr. 3d 682 (2010)* (citation omitted).

Here, for the reasons stated above, Epic Games has not shown a violation of any other law. Accordingly, the claim under the "unlawful" standard fails.

C. "Unfair" Practices

HN76[] The "unfair" prong of the UCL may differ for consumer and competitor suits. As a competitor who claims to have suffered injury from Apple's unfair practices, Epic Games must show that Apple's conduct (1) "threatens an incipient violation of an ***antitrust law***," (2) "violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law," or (3) "otherwise significantly threatens or harms competition." *Cel-Tech, 20 Cal. 4th at 187*. These findings must be "tethered to some legislatively **[**290]** declared policy or proof of some actual or threatened impact on competition." *Id.* ***[*1053]*** *at 186-87*; *see also* *Hodsdon v. Mars, Inc., 891 F.3d 857, 866 (9th Cir. 2018)*.

As a quasi-consumer, on the other hand, Epic Games has several tests available for showing unfairness. Although some courts have continued to apply the "tethering" test stated above, others have applied a "balancing" test that requires the challenged business practice to be "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers" based on the court's weighing of "the utility of the defendant's conduct against the gravity of the harm to the alleged victim."[630] *Drum v. San Fernando Valley Bar Ass'ndu pon, 182 Cal. App. 4th 247, 257, 106 Cal. Rptr. 3d 46 (2010)* (citations omitted). ***HN77***[] Stated otherwise, the balancing test "involves an examination of that practice's impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer." *Nationwide Biweekly Admin., Inc. v. Superior Court of Alameda Cty., 9 Cal. 5th 279, 303 n.10, 261 Cal. Rptr. 3d 713, 462 P.3d 461 (2020)* (internal quotation marks and citation omitted).

These tests "are not mutually exclusive." *Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 736 (9th Cir. 2007)*; *see also* *Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1169-70 (9th Cir. 2012)* (applying both tests). Accordingly, the Court considers both.

1. *Tethering Test*

HN78[] Under the "tethering" test, "California courts require a close nexus between the challenged act and the legislative policy." *Hodsdon, 891 F.3d at 866* (citation omitted). That is because "courts may not apply purely subjective notions of fairness" **[**291]** or "determine the wisdom of any economic policy," which "rests solely with the legislature." *Cel-Tech, 20 Cal. 4th at 184* (internal quotation marks and citation omitted). However, unfair practices under this test are not limited to violations of existing laws. *Id. at 180*. Instead, California courts distinguish between conduct made lawful (or for which relief is barred) by a statute and conduct not prohibited by any statute. *See* *id. at 183*. The latter may be actionable under the "unfair" prong. *Id.*

Here, Epic Games seeks relief for the same conduct that it challenged under the Sherman and Cartwright Acts. Apple argues that separate consideration under the UCL is inappropriate.[631] The Court disagrees. ***HN79***[] *Cel-*

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[630] Still others have applied the "*FTC* test," which requires that "(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." *Drum, 182 Cal. App. 4th at 257* (internal quotation marks and citation omitted). The Court notes the Ninth Circuit has declined to apply the *FTC* test with respect to anti-consumer conduct "in the absence of a clear holding from the California Supreme Court . . . ." *Lozano, 504 F.3d at 736*. The Court does not apply it directly, only as parallel guidance for purposes of the anticompetitive conduct which the Ninth Circuit distinguished. *Id.*

[631] Apple cites *Chavez v. Whirlpool Corp., 93 Cal. App. 4th 363, 375, 113 Cal. Rptr. 2d 175 (2001)*, but that case does not counsel otherwise. *Chavez* expressly rejected the notion that "an 'unfair' business act or practice must violate an ***antitrust law*** to

Tech expressly recognizes that "incipient" violations of antitrust laws and violations of the "policy or spirit" of **[*1054]** those laws with "comparable" effects are prohibited. *20 Cal. 4th at 187*. Under Apple's interpretation, that standard would be rendered meaningless because any conduct that fails under the Sherman Act failed would also fail the UCL. ***HN80***[] The UCL, however, has "broad, sweeping language[] precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of [one's] invention would contrive." *Id. at 181* (simplified). Thus, **[**292]** it warrants separate consideration apart from antitrust laws.

On the present record, however, Epic Games' claims based on the app distribution and in-app payment processing restrictions fail for the same reasons as stated for the Sherman Act. As explained, Epic Games has demonstrated real anticompetitive effects, but Apple has proffered mostly valid and non-pretextual procompetitive justifications. To a large extent that makes the conduct more than "not anticompetitive" but potentially beneficial to consumers. However, as the Court demonstrated, the procompetitive justifications were only tethered as to certain restrictions. With respect to *those* restrictions, under the *Cel-Tech* framework, Apple's conduct is protected. *20 Cal. 4th at 183*.

That does not, however, end the matter.[632] ***HN81***[] "A UCL action is equitable in nature." *Korea Supply Co., 29 Cal. 4th at 1144*. Courts have "broad discretion" to fashion equitable remedies to serve the needs of justice. *Zhang v. Superior Court, 57 Cal. 4th 364, 371, 159 Cal. Rptr. 3d 672, 304 P.3d 163 (2013)*; *see also* *Nationwide Biweekly Admin., 9 Cal. 5th at 300*. The statute reinforces that discretion by permitting courts to "make such orders or judgments . . . as may be necessary to prevent the use or employ by any person of any practice which constitutes unfair competition." *Cal. Bus. & Prof. Code § 17203*.

Epic Games did challenge and litigate the anti-steering provisions **[**293]** albeit the record was less fulsome. While its strategy of seeking broad sweeping relief failed, narrow remedies are not precluded.[633] As discussed at length, the evidence presented showed anticompetitive effects and excessive operating margins under any normative measure. The lack of competition has resulted in decrease information which also results in decreased innovation relative to the profits being made. The costs to developer are higher because competition is not driving the commission rate. As described, the commission rate driving the excessive margins has not been justified. Cross-reference to a historic gamble made over a decade ago is insufficient. Nor can Apple hide behind its self-created web of interlocking rules, regulations, and generic intellectual property claims; or the lack of transparency among various businesses to feign innocence.

Apple's own records reveal that two of the top three "most effective marketing activities to keep existing users coming back" in the United States, and therefore increasing revenues, are "push notifications" (no. 2) and "email outreach" (no. **[*1055]** 3).[634] Apple not only controls those avenues but acts anticompetitively by blocking developers from **[**294]** using them to Apple's own unrestrained gain. As explained before, Apple uses anti-steering provisions prohibiting apps from including "buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase," and from "encourag[ing] users to use a purchasing method other than in-app purchase" either "within the app or through communications sent to points of contact obtained from account registrations within the app (like email or text)."[635] Thus, developers cannot

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be actionable under the unfair competition law," but found that conduct cannot be unfair where it is "deemed reasonable and condoned under the antitrust laws." *Id.* As explained here, there is a difference between conduct "deemed reasonable" and conduct for which a violation has not been shown.

[632] The Court recognizes a contrary unpublished opinion in *LiveUniverse, Inc. v. MySpace, Inc., 304 F. App'x 554, 557 (9th Cir. 2008)* which summarily treated the UCL as rising and falling with the Sherman Act. The Court respectfully disagrees (on this record) for the reasons stated.

[633] The FTC Act, which California courts have used as guidance on the UCL, similarly permits remedies beyond the "specific violations alleged in the complaint" that were "litigated in the manner contemplated by the statute." *Sears, Roebuck & Co. v. FTC, 676 F.2d 385, 390-91 (9th Cir. 1982)*.

[634] DX-3922.057.

[635] PX-2790 §§ 3.1.1, 3.1.3.

communicate lower prices on other platforms either within iOS or to users obtained from the iOS platform. Apple's general policy also prevents developers from informing users of its 30% commission.[636]

These provisions can be severed without any impact on the integrity of the ecosystem and is tethered to legislative policy. ***HN82***[] As an initial matter, courts have long recognized that commercial speech, which includes price advertising, "performs an indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona, 433 U.S. 350, 364, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)* (citation omitted). Restrictions on price information "serve to increase the difficulty of discovering the lowest cost seller . . . and [reduce] the incentive **[**295]** to price competitively[.]" *Id. at 377*. Thus, "where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising." *Id.* Antitrust scholars have recognized the same: "The less information a consumer has about relative price and quality, the easier it is for market participants to charge supracompetitive prices or provide inferior quality." Areeda & Hovenkamp § 2008c.

In the context of technology markets, the open flow of information becomes even more critical. As explained above, information costs may create "lock-in" for platforms as users lack information about the lifetime costs of an ecosystem. Users may also lack the ability to attribute costs to the platform versus the developer, which further prevents them from making informed choices.[637] In these circumstances, the ability of developers to provide cross-platform information is crucial. While Epic Games did not meet its burden to show actual lock-in on this record, the Supreme Court has recognized that such information costs may create the potential for anticompetitive exploitation of consumers. *Eastman Kodak, 504 U.S. at 473-75*.

Thus, although Epic Games has not proven a present antitrust violation, the **[**296]** anti-steering provisions "threaten[] an incipient violation of an ***antitrust law***" by preventing informed choice among users of the iOS platform. *Cel-Tech, 20 Cal. 4th at 187*; *cf. FTC v. Neovi, Inc., 604 F.3d 1150, 1158 (9th Cir. 2010)* (requiring that "consumers ha[ve] a free and informed choice" under the FTC test for unfairness).[638] Moreover, the anti-steering provisions violate the **[*1056]** "policy [and] spirit" of these laws because anti-steering has the effect of preventing substitution among platforms for transactions. *Id.*

Accordingly, the Court finds that the anti-steering provisions violate the UCL's unfair prong under the tethering test.

2. *Balancing Test*

HN83[] Under the balancing test, the Court must weigh "the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Drum, 182 Cal. App. 4th at 257*. Under this test the focus is on the injury to consumers. Here, the harm to users and developers who are also quasi-consumers, is considerable.[639] This trial has exposed numerous anticompetitive effects which need not be recounted in detail. The only justification Apple offers is an analogy: just like a store such as Nordstrom does not advertise prices at Macy's on its goods, Apple should not have to advertise prices on the web or on Android.[640] Apple also cites *Amex, 138 S. Ct. at 2280*, which also **[**297]** involved anti-steering,to justify its anti-steering provisions.

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[636] PX-0257; Trial Tr. (Simon) 365:3-367:5; Ex. Depo. (Shoemaker) 144:10-23.

[637] Ex. Expert 1 (Evans) ¶ 118.

[638] *See Cel-Tech, 20 Cal. 4th at 185* (looking "for guidance to the jurisprudence arising under the 'parallel' *section 5* of the [FTC] Act" to determine "what is unfair" under the UCL); *see also People ex rel. Mosk v. Nat'l Res. Co. of Cal.*, 20 Cal. App. 2d 765, 773 (1962) ("[D]ecisions of the federal court [as to what constitutes "unfair" under the FTC Act] are more than ordinarily persuasive.").

[639] *E.g.*, Trial Tr. (Simon) 365:3-367:5; Trial Tr. (Evans) 1715:11-16.

[640] *See* Trial Tr. (Schiller) 2821:8-20 (explaining that the "key idea" of anti-steering outside the App Store is to prevent "targeting this individual user who really is being acquired from the App Store").

Both are distinguishable. In *Amex*, American Express prohibited merchants from dissuading customers from using Amex cards as a way of avoiding its merchant fees. *Id. at 2283*. It did so because merchants would often advertise Amex acceptance to attract users who used American Express's rewards program, but then would steer them towards cards with lower merchant fees, such as Visa or Mastercard. *Id. at 2289*. The Court found that this was not anticompetitive because there was strong evidence of procompetitive effects (as discussed above) and "[p]erhaps most importantly, antisteering provisions *do not prevent Visa, MasterCard, or Discover from competing against Amex* by offering lower merchant fees or promoting their broader merchant acceptance." *Id. at 2289-90* (emphasis supplied).

Here, the information base is distinctly different. In retail brick-and-mortar stores, consumers do not lack knowledge of options. Technology platforms differ. Apple created a new and innovative platform which was also a black box. It enforced silence to control information and actively impede users from obtaining the knowledge to obtain digital goods on other platforms. Thus, **[**298]** the closer analogy is not American Express' prohibiting steering towards Visa or Mastercard but a prohibition on letting users know that these options exist in the first place. Apple's market power and resultant ability to control how pricing works for digital transactions, and related access to digital products, distinguishes it from the challenged practices in *Amex*. The same would extend to the Nordstrom/Macy's analogy.[641] Apple has **[*1057]** not offered any justification for the actions other than to argue entitlement. Where its actions harm competition and result in supracompetitive pricing and profits, Apple is wrong. Accordingly, the harm from the anti-steering provisions outweighs its benefits, and the provision violates the UCL under the balancing test.

D. Remedies

HN84[] "[T]he primary form of relief available under the UCL to protect consumers from unfair business practices is an injunction." *In re Tobacco II Cases, 46 Cal. 4th 298, 319, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009)*. A private party seeking injunctive relief under the UCL may request "public injunctive relief," *McGill v. Citibank, N.A., 2 Cal. 5th 945, 954, 216 Cal. Rptr. 3d 627, 393 P.3d 85 (2017)*, which is "relief that by and large benefits the general public and that benefits the plaintiff, if at all, only incidentally and/or as a member of the general public," *id. at 955* (simplified). "[F]ederal courts **[**299]** must apply equitable principles derived from federal common law to claims for equitable [relief] under California's Unfair Competition Law[.]" *Sonner v. Premier Nutrition Corp., 971 F.3d 834, 837 (9th Cir. 2020)*. This means that, "even if a state authorizes its courts to provide equitable relief when an adequate legal remedy exists, such relief may be unavailable in federal court because equitable remedies are subject to traditional equitable principles unaffected by state law." *Id. at 841* (citation omitted).

HN85[] Accordingly, under *Sonner*, a plaintiff seeking equitable relief under the UCL in federal court must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)*.

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[641] Best Buy may not be the traditional "brick-and-mortar" analogy as the Court previously footnoted and Mr. Cook, ironically, referenced. According to news reports, in order for Best Buy to compete with the likes of Amazon, and not just be a place where consumers physically test product but buy them more cheaply elsewhere, the company pivoted. It appears Best Buy actually rents square footage to companies like Apple and Samsung for "branded space" where they sell their own products and provide Best Buy not only with a revenue stream but the foot traffic to compete on other products. *Compare* Trial Tr. (Cook) 3864:24-3865:3 *with* Justin Bariso, Amazon Almost Killed Best Buy. Then, Best Buy Did Something Completely Brilliant, Inc., June 24, 2021, https://www.inc.com/justin-bariso/amazon-almost-killed-best-buy-then-best-buy-did-something-completely-brilliant.htmlhttps://www.inc.com/justin-bariso/amazon-almost-killed-best-buy-then-best-buy-did-something-completely-brilliant.html. Thus, there is no need to put a sign inside Best Buy as Apple's store is already there.

Based on the reasoning discussed above, the Court finds the elements for equitable relief are satisfied. While Apple's conduct does not fall within the confines of traditional ***antitrust law***, the conduct falls within the purview of an incipient antitrust violation with particular anticompetitive **[**300]** practices which have not been justified. Apple contractually enforces silence, in the form of anti-steering provisions, and gains a competitive advantage. Moreover, it hides information for consumer choice which is not easily remedied with money damages. The injury has occurred and continues and can best be remedied by invalidating the offending provisions. In terms of balancing, Apple's business justifications focus on other parts of the Apple ecosystem and will not be significantly impacted by the increase of information to and choice for consumers. Rather, this limited measure balances the justification for maintaining a cohesive ecosystem with the public interest in uncloaking the veil hiding pricing information on mobile devices and bringing transparency to the marketplace.

While the Court has defined the relevant market for antitrust purposes as the market for mobile gaming transactions, UCL jurisprudence does not require that the Court import that market limitation. The Court cannot discern any principled reason for eliminating the anti-steering provisions to mobile gaming only. The lack of information **[*1058]** and transparency extends to all apps, not just gaming apps.

Apple argues that **[**301]** any equitable relief issued "under state law," presumably including under the UCL, must be "limited to California" to avoid a violation of the *Commerce Clause*. The only authority that Apple cites to support this proposition is *Healy v. Beer Inst., Inc., 491 U.S. 324, 336, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989)*, which holds that "[t]he *Commerce Clause* precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[642]

In *Healy*, an association of brewers and importers of beer sought declaratory judgment that a Connecticut statute was unconstitutional because it regulated out-of-state conduct in violation of the *Commerce Clause*. *Healy, 491 U.S. at 326*. The statute in question required out-of-state shippers of beer to affirm that their prices for beer sold to Connecticut wholesalers were no higher than prices at which those products were sold in bordering states. *Id. at 326-27*. The Supreme Court held that the Connecticut statute violated the *Commerce Clause* because the interaction of the Connecticut statute with beer-pricing statutes of bordering states had the "practical effect" of controlling prices "wholly outside" of Connecticut's borders. *Id. at 336-37*.

Healy is inapposite. Here, in contrast to *Healy*, there is no challenge to the constitutionality of the UCL. Rather **[**302]** than seeking to invalidate the UCL on the basis that it violates the *Commerce Clause*, Apple seeks to restrict the geographic scope of any injunction issued under the UCL to California based on the *Commerce Clause*. The proper scope of an injunction issued under state law is not an issue that was addressed in *Healy*. Further, even if *Healy* had any relevance to that issue, *Healy*'s holding that a state statute cannot be applied "to commerce that takes place wholly outside" of that state would nevertheless be inapposite. Here, neither the conduct at issue, nor its effects, are taking place "wholly outside" of California. Apple is headquartered in California; the DPLA is governed by California law; and the commerce affected by the conduct that the Court has found to be unfair takes place at least in part in California. Accordingly, Apple has not shown that *Healy* prevents the Court from enjoining conduct outside of California that undisputedly harms California and its residents. *See* *RLH Indus., Inc. v. SBC Commc'ns, Inc., 133 Cal. App. 4th 1277, 1291-93, 35 Cal. Rptr. 3d 469 (2005)* (holding that "the *commerce clause*, even as construed in *Healy*, does not necessarily prohibit state antitrust and unfair competition law from reaching out-of-state anticompetitive practices injuring state residents").

By the same token, Epic Games provides **[**303]** the Court with no authority that an injunction could issue globally based upon a violation of California's UCL.

Accordingly, a nationwide injunction shall issue enjoining Apple from prohibiting developers to include in their:

> Apps and their metadata buttons, external links, or other calls to action that direct customers to purchasing mechanisms, in addition to IAP.

Nor may Apple prohibit developers from:

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[642] *See* Apple COL ¶¶ 739-740.

Communicating with customers through points of contact obtained voluntarily from customers through account registration within the app.

[*1059] VII. APPLE'S COUNTERCLAIMS

Apple asserts counterclaims against Epic Games that arise out of Epic Games' breach of the DPLA, including (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) unjust enrichment; (4) indemnification; and (5) declaratory judgment.[643] These counterclaims are based on Epic Games' covert implementation of the hotfix in *Fortnite* and its failure to pay Apple its commission on in-app purchases through *Fortnite*. Apple alleges that these acts breached the DPLA provisions requiring developers (i) not to "hide, misrepresent or obscure any features, content, services or functionality" in their apps[644] and **[**304]** not to "provide, unlock or enable additional features or functionality through distribution mechanisms other than the App Store"[645] ; and (ii) to pay Apple "a commission equal to thirty percent (30%) of all prices payable by each end-user" through the App Store.[646]

Plaintiff has admitted that it breached the DPLA in the manner that Apple alleges, and that Apple is entitled to relief on its counterclaim for breach of contract to the extent that the Court finds that the DPLA is enforceable. Epic Games does not admit liability as to any other counterclaim.[647]

Pointing to its affirmative defenses, Epic Games contends that all of Apple's counterclaims are barred notwithstanding its admitted breach of the DPLA because the DPLA provisions it breached are unenforceable (i) under the doctrine of illegality; (ii) because they are void as against public policy; and (iii) because they are unconscionable.[648]

The Court first considers whether any of the DPLA's provisions upon which Apple's counterclaims depend are unenforceable based on Epic Games' affirmative defenses, and if they are not, the Court next considers whether Apple has shown that it is entitled to relief on each **[**305]** of its counterclaims.

A. Epic Games' Affirmative Defenses

1. *Doctrine of Illegality*

HN86[] "[T]he general rule [is] that the courts will deny relief to either party who has entered into an illegal contract or bargain which is against public policy." *Tri-Q, Inc. v. Sta-Hi Corp., 63 Cal. 2d 199, 216, 45 Cal. Rptr. 878, 404 P.2d 486 (1965)*. "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." *Cal. Civ. Code § 1599*. Thus, if the alleged "illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are

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[643] Apple asserted other counterclaims in its answer, Docket No. 66. Based on its proposed findings of fact and conclusions of law, the Court finds Apple has abandoned all counterclaims except those addressed herein. *See generally* Apple FOF and COL.

[644] Apple's Answer and Counterclaims ¶ 50 (citing DPLA § 6.1).

[645] *Id.* (citing DPLA §§ 3.2, 3.3.2, 3.3.3, 3.3.25).

[646] *Id.* (citing DPLA, Schedule 2, §§ 1.1(a), 3.4(a)).

[647] *See* Docket No. 474.

[648] Epic Games asserted other affirmative defenses in its answer, Docket No. 106. Based on its proposed findings of fact and conclusions of law, the Court finds Epic Games has abandoned all affirmative defenses except those addressed herein. *See generally* Epic Games FOFs.

appropriate." *Marathon Entm't, Inc. v. Blasi, 42 Cal. 4th 974, 996, 70 Cal. Rptr. 3d 727, 174 P.3d 741 (2008)* (quotation marks omitted). "The burden ordinarily rests upon the party asserting **[*1060]** the invalidity of the contract to show how and why it is unlawful." *Rock River Commc'ns, Inc. v. Universal Music Grp., Inc., 745 F.3d 343, 350 (9th Cir. 2014)* (citation omitted).

Epic Games alleges that Apple's counterclaims are barred because "the contracts on which Apple's counterclaims are based" are "illegal and unenforceable" on the basis that they violate the Sherman Act, the Cartwright Act, and the UCL.[649]

As discussed above, the Court has found and concluded that no provision of the DPLA at issue in this action is unlawful **[**306]** under the Sherman Act or the Cartwright Act and only one unrelated provision under the UCL.

While the Court has found that evidence suggests Apple's 30% rate of commission appears inflated, and is potentially anticompetitive, Epic Games did not challenge the rate. Rather, Epic Games challenged the imposition of any commission whatsoever. Nor did plaintiff show either that the provision of the DPLA which required developers not to "provide, unlock or enable additional features or functionality through distribution mechanisms other than the App Store," was illegal or unenforceable or that it was forced to violate the agreement to bring this lawsuit.[650] Accordingly, the Court finds and concludes that Apple's counterclaims are not barred on the basis that they arise out of an illegal and unenforceable contract.

2. *Void as Against Public Policy*

HN87[] "In general, a contract contrary to public policy will not be enforced." *Kelton v. Stravinski, 138 Cal. App. 4th 941, 949, 41 Cal. Rptr. 3d 877 (2006)*. A contract need not be contrary to a statute for it to be deemed contrary to public policy. *Altschul v. Sayble, 83 Cal. App. 3d 153, 162, 147 Cal. Rptr. 716 (1978)* ("There is no requirement that a contract violate an express mandate of a statute before it may be declared void as contrary to public policy."); *see also* *Cal. Civ. Code § 1667(2)* ("That is not lawful which **[**307]** is . . . contrary to the policy of express law, though not expressly prohibited.").

HN88[] "The authorities all agree that a contract is not void as against public policy unless it is injurious to the interests of the public as a whole or contravenes some established interest of society." *Rosenberg v. Raskin, 80 Cal. App. 2d 335, 338, 181 P.2d 897 (1947)*. "California has a settled public policy in favor of open competition." *Kelton, 138 Cal. App. 4th at 946*. It also has a public policy of protecting consumers of goods and services. *See* *Margolin v. Shemaria, 85 Cal. App. 4th 891, 901, 102 Cal. Rptr. 2d 502 (2000)* ("Both legislative enactments and administrative regulations can be utilized to further this state's public policy of protecting consumers in the marketplace of goods and services."). "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." *Cal. Civ. Code § 1599*.

Plaintiff alleges that Apple's counterclaims are barred in whole or in part because the contracts on which they are based "are void as against public policy pursuant to the antitrust laws and unfair competition laws[.]"[651] Epic Games contends that the DPLA violates "the public policy in favor of competitive markets" **[*1061]** because it forecloses all alternative app stores and non-IAP payment **[**308]** solutions in the iOS app distribution market and iOS in-app payment solutions market, respectively; they facilitate the imposition of Apple's supracompetitive 30% commission; and they were forced upon Epic Games through Apple's exercise of its market power.[652]

[649] *See* Epic Games' Answer to Counterclaims at 17 (affirmative defenses 1 and 2).

[650] *Id.* (citing DPLA §§ 3.2, 3.3.2, 3.3.3, 3.3.25).

[651] *See* Epic Games' Answer to Counterclaims at 17 (affirmative defense 3).

[652] *See* Epic Games FOF ¶ 547.

The Court is not persuaded by Epic Games' broad-brush argument that it should not be bound by certain portions of the agreement. The DPLA provisions related to the breaching conduct arising from Project Liberty were not found to be invalid. For the reasons discussed at length above, the Court has found and concluded that these DPLA provisions are not contrary to the interests of the public as a whole and do not contravene some established interest of society, in the context of competition or otherwise. Accordingly, the remaining DPLA provisions are not unenforceable on the basis that they violate public policy. *Rosenberg, 80 Cal. App. 2d at 338* ("The authorities all agree that a contract is not void as against public policy unless it is injurious to the interests of the public as a whole or contravenes some established interest of society.").

Even though the Court has found the anti-steering provisions to be unfair under the UCL, the result was a measured alternative **[**309]** to plaintiff's overreach. These provisions can be severed while maintaining the provisions that require honesty to control the parties' relations and the coding of apps. Epic Games never adequately explained its rush to the courthouse or the actual need for clandestine tactics. The marketing campaign appears to have resulted in indirect benefits but it does not provide a legal defense.

In light of the foregoing, the Court finds and concludes that Apple's counterclaims are not barred based on Epic Games' public policy affirmative defense.

3. *Unconscionability*

a. Legal Framework

HN89[] "[A] contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable.'" *Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 820, 171 Cal. Rptr. 604, 623 P.2d 165 (1981)*. "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Phrased another way, unconscionability has both a 'procedural' and a 'substantive' element. . . . [B]oth the procedural and substantive elements must be met before a contract or term will be deemed unconscionable. **[**310]** Both, however, need not be present to the same degree. A sliding scale is applied so that the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Lhotka v. Geographic Expeditions, 181 Cal. App. 4th 816, 821, 104 Cal. Rptr. 3d 844 (2010)* (internal quotation marks and citations omitted).

HN90[] "Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion. The term contract of adhesion signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 113,* ***[*1062]*** *99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000)* (quotation marks and alterations omitted). "The procedural element of the unconscionability analysis concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. The element focuses on oppression or surprise. ***HN91***[] Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise is defined as the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking **[**311]** to enforce the disputed terms." *Gatton v. T-Mobile USA, Inc., 152 Cal. App. 4th 571, 581, 61 Cal. Rptr. 3d 344 (2007)* (internal quotation marks and citations omitted)).

HN92[] "The substantive element of the unconscionability analysis focuses on overly harsh or one-sided results," *Gatton, 152 Cal. App. 4th at 586*, or "whether a contractual provision reallocates risks in an objectively unreasonable or unexpected manner," *Lhotka, 181 Cal. App. 4th at 821*. Substantive unconscionability "traditionally involves contract terms that are so one-sided as to 'shock the conscience,' or that impose harsh or oppressive terms." *Wherry v. Award, Inc., 192 Cal. App. 4th 1242, 1248, 123 Cal. Rptr. 3d 1 (2011)*.

HN93[] In California, "where a single contract provision is invalid, but the balance of the contract is lawful, the invalid provision is severed, and the balance of the contract is enforced." *Kec v. Superior Court of Orange Cnty., 51 Cal. App. 5th 972, 974-75, 264 Cal. Rptr. 3d 761 (2020)*. For example, when a contract is held to be unconscionable, "the strong legislative and judicial preference is to sever the offending term and enforce the balance of the agreement." *Lange v. Monster Energy Co., 46 Cal. App. 5th 436, 453, 260 Cal. Rptr. 3d 35 (2020)* (quotation marks omitted); *see also* *Cal. Civ. Code § 1670.5* ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause **[**312]** as to avoid any unconscionable result.").

b. Analysis

Again, Epic Games alleges that Apple's counterclaims are barred because "the contracts on which Apple's counterclaims are based are unconscionable" on the basis that they are "are contrary to the antitrust laws and unfair competition laws[.]"[653] Epic Games contends that the DPLA provisions upon which Apple's counterclaims depend are (i) procedurally unconscionable because they are non-negotiable terms in contracts of adhesion, and (ii) are substantively unconscionable because "they foreclose all alternative app stores and non-IAP payment solutions in the iOS app distribution market and iOS in-app payment solutions market, respectively, and they facilitate the imposition of Apple's supra-competitive 30% commission."[654]

The Court finds and concludes that Epic Games has not shown that the DPLA is unconscionable. ***HN94***[] A contractual term is not unconscionable unless it is found to be *both* procedurally and substantively unconscionable. Here, the absence of substantive unconscionability is dispositive. ***HN95***[] A contractual term is not substantively unconscionable unless it so "one-sided so as to 'shock the conscience,'" *Wherry, 192 Cal. App. 4th at **[*1063]** 1248*. Based on the record before it, **[**313]** the Court cannot conclude that the DPLA meets that standard. Plaintiff's response that the unconscionability stems from the violations of antitrust and unfair competition laws fails.[655] Because the Court has found only one unrelated provision to violate the UCL, the Court cannot conclude that the remaining provisions are substantively unconscionable.

Epic Games points to no other evidence or authority based upon which the Court could find that the provisions at issue "shock the conscience." These are billion and trillion dollar companies with a business dispute. Epic Games itself uses adhesion contracts. Plaintiff points to no authority in which a court has held that contractual provisions similar to the ones at issue, despite their longevity and relative ubiquity, are unenforceable on the ground that they are unconscionable. The Court finds and concludes, therefore, that Apple's counterclaims are not barred on the basis that they arise out of contractual terms that are unconscionable.

The Court now turns to the question of whether Apple is entitled to relief with respect to any counterclaim that is based on breaches to DPLA provisions other than the one stricken.

B. Breach of Contract [**314]

HN96[] Under California law[656] , "the elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiffs performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." *Oasis W. Realty, LLC v. Goldman, 51 Cal. 4th 811, 821, 124 Cal. Rptr. 3d 256, 250 P.3d 1115 (2011)*. To prove causation, a plaintiff must show "the breach was a substantial factor in causing the damages." *US Ecology, Inc. v. California, 129 Cal. App. 4th 887, 909, 28 Cal. Rptr. 3d 894 (2005)*.

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[653] *See* Epic Games' Answer to Counterclaims at 17-18.

[654] Epic Games FOF ¶ 192.

[655] *See* Epic Games FOF ¶¶ 191-192.

[656] The parties agree that the DPLA is governed by California law. *See* Dkt. No. 276 at 99; *see also* PX-2619 (DPLA) § 14.10 (providing that the DPLAis "governed by and construed in accordance with the laws of the United States and the State of California").

Apple asserts a counterclaim against Epic Games for breach of contract arising out Project Liberty. In particular, Epic Games' actions violated the DPLA provisions (1) requiring developers not to "hide, misrepresent or obscure any features, content, services or functionality" in their apps[657] and not to "provide, unlock or enable additional features or functionality through distribution mechanisms other than the App Store,"[658] ; and (2) requiring Epic Games to pay Apple "a commission equal to thirty percent (30%) of all prices payable by each end-user" through the App Store.[659]

As noted, plaintiff has admitted that it breached the DPLA as Apple alleges and has conceded that, if the Court finds that the breached provisions of the DPLA are enforceable against Epic Games, then Apple would be entitled to relief as a result of the **[**315]** breach.[660]

Because Apple's breach of contract claim is also premised on violations of DPLA provisions independent of the anti-steering provisions, the Court finds and concludes, in light of plaintiffs admissions and concessions, that Epic Games has breached these provisions of the DPLA and that **[*1064]** Apple is entitled to relief for these violation.

C. Breach of the Implied Covenant of Good Faith and Fair Dealing

HN97[] "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." *Durell, 183 Cal. App. 4th at 1369* (emphasis and citation omitted). While "[a] breach of the implied covenant of good faith is a breach of the contract," "breach of a specific provision of the contract is not . . . necessary to a claim for breach of the implied covenant of good faith and fair dealing." *Thrifty Payless, Inc. v. The Americana at Brand, LLC, 218 Cal. App. 4th 1230, 1244, 160 Cal. Rptr. 3d 718 (2013)* (internal quotation marks and citation omitted).

HN98[] "In California, the factual elements necessary to establish a breach of the covenant of good faith and fair dealing are: (1) the parties entered into a contract; (2) the plaintiff fulfilled his obligations under the contract; (3) any conditions **[**316]** precedent to the defendant's performance occurred; (4) the defendant unfairly interfered with the plaintiff's rights to receive the benefits of the contract; and (5) the plaintiff was harmed by the defendant's conduct." *Rosenfeld v. JPMorgan Chase Bank, N.A., 732 F. Supp. 2d 952, 968 (N.D. Cal. 2010)* (citation omitted).

HN99[] "In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract." *Love v. Fire Ins. Exch., 221 Cal. App. 3d 1136, 1153, 271 Cal. Rptr. 246 (1990)* (emphasis in original). It exists to "prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. The covenant thus cannot be endowed with an existence independent of its contractual underpinnings. ***HN100***[] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Durell, 183 Cal. App. 4th at 1369* (citations omitted) (emphasis in original). "If there exists a contractual relationship between the parties, . . . the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not **[**317]** contemplated in the contract." *Racine & Laramie, Ltd. v. Dep't of Parks & Recreation, 11 Cal. App. 4th 1026, 1032, 14 Cal. Rptr. 2d 335 (1992)*.

Apple asserts a counterclaim against Epic Games for breach of the implied covenant of good faith and fair dealing. Apple contends that "*[t]o the extent that any of Epic's bad faith actions did not breach the express terms of the*

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[657] Dkt. No. 66 ¶ 50 (citing DPLA § 6.1).

[658] *Id.* (citing DPLA §§ 3.2, 3.3.2, 3.3.3, 3.3.25).

[659] *Id.* (citing DPLA, Schedule 2, §§ 1.1(a), 3.4(a)).

[660] *See* Stipulation, Dkt. No. 474.

[DPLA], Epic Games frustrated Apple's right to receive the benefits of the agreement actually made, including by publishing an update to *Fortnite* that circumvented payment of commissions to which Apple was contractually entitled, by violating the Guidelines, and by otherwise undermining Apple's operation and maintenance of the App Store."[661] Accordingly, Apple asserts this counterclaim in the alternative to its breach of contract claim.

Because the Court has found and concluded that Apple is entitled to relief on its breach-of-contract claim, the Court denies **[*1065]** relief to Apple as to its alternative claim for breach of the implied covenant of good faith and fair dealing.

D. Unjust Enrichment

HN101[] "[T]he elements for a claim of unjust enrichment" are "[1] receipt of a benefit and [2] unjust retention of the benefit at the expense of another." *Lectrodryer v. SeoulBank, 77 Cal. App. 4th 723, 726, 91 Cal. Rptr. 2d 881 (2000)*. "Under California law, unjust enrichment is an action in quasi-contract, and is not cognizable when **[**318]** there is a valid and enforceable contract between the parties." *Cont'l Cas. Co. v. Enodis Corp., 417 F. App'x 668, 670 (9th Cir. 2011)* (citation omitted). "The doctrine applies where plaintiffs, while having no enforceable contract, nonetheless have conferred a benefit on defendant which defendant has knowingly accepted under circumstances that make it inequitable for the defendant to retain the benefit without paying for its value." *Hernandez v. Lopez, 180 Cal. App. 4th 932, 938, 103 Cal. Rptr. 3d 376 (2009)*.

Apple asserts a counterclaim for unjust enrichment against plaintiff based on its alleged failure to pay Apple the agreed-upon 30% commission under the DPLA, but it asserts this counterclaim only "[i]n the alternative" to its claim for breach of contract. *See* Docket No. 66 ¶ 63.

Because the Court has found and concluded that Apple is entitled to relief on its claim for breach of contract, as discussed above, the Court denies relief to Apple as to its alternative claim for unjust enrichment.

E. Indemnification

HN102[] Under California law, "[a]n indemnity agreement is to be interpreted according to the language and contents of the contract as well as the intention of the parties as indicated by the contract." *Myers Bldg. Indus., Ltd. v. Interface Tech., Inc., 13 Cal. App. 4th 949, 968, 17 Cal. Rptr. 2d 242 (1993)*; *see also* *Herman Christensen & Sons, Inc. v. Paris Plastering Co., 61 Cal. App. 3d 237, 245, 132 Cal. Rptr. 86 (1976)* (where the parties "have expressly contracted with respect to the duty to indemnify, the extent of that duty must **[**319]** be determined from the contract and not by reliance on the independent doctrine of equitable indemnity" (quotation marks omitted)). Such agreements "are construed under the same rules that govern the interpretation of other contracts." *Alki Partners, LP v. DB Fund Servs., LLC, 4 Cal. App. 5th 574, 600, 209 Cal. Rptr. 3d 151 (2016)*.

Apple asserts a counterclaim against Epic Games for indemnification in the form of the recovery of its attorneys' fees and costs of defending this litigation and pursuing its counterclaims. This counterclaim is based on Section 10 of the DPLA, which provides:

> To the extent permitted by applicable law, You agree to indemnify and hold harmless, and upon Apple's request, defend, Apple, its directors, officers, employees, independent contractors and agents (each an "Apple Indemnified Party") from any and all claims, losses, liabilities, damages, taxes, expenses and costs, including without limitation, attorneys' fees and court costs . . . incurred by an Apple Indemnified Party and arising from or related to any of the following . . . : (i) Your breach of any certification, covenant, obligation, representation or warranty in this Agreement, including Schedule 2; . . . or (vi) Your use (including Your Authorized Developers' use) of the Apple Software or services, Your Licensed **[**320]** Application Information, Pass Information,

[661] Dkt. No. 66 ¶ 60 (emphasis supplied).

> metadata, Your Authorized Test Units, Your Registered Devices, Your Covered Products, or **[*1066]** Your development and distribution of any of the foregoing.[662]

Apple contends that it is entitled to indemnification from Epic Games under this indemnification provision because plaintiffs lawsuit involves claims arising from or related to its breaches of its certifications, covenants, obligations, representations, or warranties under the DPLA, and its use of the Apple Software or services, its licensed application information, its covered products, and its development and distribution of the foregoing.

Epic Games counters that Apple is not entitled to indemnification under Section 10 because that section applies only to claims brought by third parties against Apple and not "claims between Epic and Apple," and because the indemnification clause would be unconscionable to the extent that it is interpreted as covering intra-party disputes.[663]

The Court's interpretation of the indemnification provision is guided by the following principles:

> Generally, an indemnification provision allows one party to recover costs incurred defending actions by third parties, not attorney fees **[**321]** incurred in an action between the parties to the contract. ***HN103***[] Courts look to several indicators to distinguish third party indemnification provisions from provisions for the award of attorney fees incurred in litigation between the parties to the contract. The key indicator is an express reference to indemnification. *A clause that contains the words 'indemnify' and 'hold harmless' generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons*—that is, it relates to third party claims, not attorney fees incurred in a breach of contract action between the parties to the indemnity agreement itself. Courts also examine the context in which the language appears. Generally, if the surrounding provisions describe third party liability, the clause will be construed as a standard third party indemnification provision. *The court will not infer that the parties intended an indemnification provision to cover attorney fees between the parties if the provision "'does not specifically provide for attorney's fees in an action on the contract*[.]"

Alki Partners, 4 Cal. App. 5th at 600-01 (internal citations omitted) (emphasis supplied).

Here, the indemnification provision at **[**322]** issue contains the words "indemnify" and "hold harmless," and the surrounding provisions describe third-party liability, which, under *Alki Partners*, suggests that any obligation by Epic Games to reimburse Apple would arise only in the context of third-party claims, and not claims between the two. Additionally, the provision does not specifically provide for attorneys' fees and costs in an action on the contract between the parties to the contract, which also weighs against interpreting the provision at issue as covering Apple's attorneys' fees and costs in this action.

Apple argues that the indemnification provision *does* contain language specifically providing "for attorneys' fees in an action on the contract" because the indemnification provision is "triggered" by Epic Games' breach of the DPLA.[664] The Court is not persuaded. ***HN104***[] For an indemnification provision to be interpreted as covering attorneys' fees and costs in an action on a contract *between the parties*, there must be language in the contract that **[*1067]** "reasonably can be interpreted as addressing the issue of an action *between the parties* on the contract." *Alki, 4 Cal. App. 5th at 601* (citation and internal quotation marks omitted) (emphasis supplied). For example, **[**323]** attorneys' fees and costs are recoverable in an action between the parties where the indemnity provision includes "*express language* for attorney's fees incurred *in enforcing [the] indemnity agreement*." *Id. at 602* (citations omitted) (emphasis supplied); *see also* *Baldwin Builders v. Coast Plastering Corp., 125 Cal. App. 4th 1339, 1342, 24 Cal. Rptr. 3d 9 (2005)* (holding that an indemnity provision authorized the recovery of attorneys' fees on an action on the contract between the parties because it included express language that "[s]ubcontractor shall pay all costs, including attorney's fees, *incurred in enforcing this indemnity agreement*'" (emphasis supplied)). No

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[662] PX-2619 ¶ 10.

[663] Epic Games FOF ¶¶ 573, 578.

[664] Apple FOF ¶ 841.

such express language is included in the indemnification provision at issue. In light of the absence of such express language, and in light of the terms used in the indemnification provision that suggest that it covers only third-party claims, as discussed in more detail above, the Court finds and concludes that Apple has not shown that it is entitled to recover attorneys' fees and costs from Epic Games pursuant to Section 10 of the DPLA.

F. Declaratory Judgment

1. *Legal Framework*

"In a case of actual controversy within its jurisdiction . . . , any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal **[**324]** relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." *28 U.S.C. § 2201(a)*.

HN105[] Courts have "substantial discretion in deciding whether to declare the rights of litigants" under the Declaratory Judgment Act. *MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 136, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)*. This "substantial" discretion permits the Court to consider "equitable, prudential, and policy arguments" for or against the declaratory relief sought. *Id.* A "district court should avoid needless determination of state law issues," "should discourage litigants from filing declaratory actions as a means of forum shopping," and "should avoid duplicative litigation." *Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 672 (9th Cir. 2005)* (quotation marks omitted). Courts also consider "whether the declaratory action will settle all aspects of the controversy; whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue; whether the declaratory action is being sought merely for the purposes of procedural fencing or to obtain a 'res judicata' advantage; or whether the use of a declaratory action will result in entanglement between the federal and state court systems." **[**325]** *Gov't Emps. Ins. Co. v. Dizol, 133 F.3d 1220, 1225 n.5 (9th Cir. 1998)*. Essentially, the district court must "balance concerns of judicial administration, comity, and fairness to the litigants." *Principal Life Ins. Co., 394 F.3d at 672* (quotation marks omitted).

2. *Analysis*

Apple seeks a declaratory judgment that: (a) the DPLA is valid, lawful, and enforceable contracts; (b) Apple's termination of the DPLA with Epic Games was valid, lawful, and enforceable; (c) Apple has the contractual right to terminate the DPLA with any or all of **[*1068]** Epic Games' wholly owned subsidiaries, affiliates, and/or other entities under its control; and (d) Apple has the contractual right to terminate the DPLA with any or all of the Epic Affiliates for any reason or no reason upon 30 days written notice, or effective immediately for any "misleading fraudulent, improper, unlawful or dishonest act relating to" the DPLA Docket No. 66 ¶ 88.

Epic Games contends that Apple is not entitled to the declaratory judgment it seeks on the basis that the challenged provisions of the DPLA are "unlawful" and that Apple's termination of the DPLA as to Epic Games was "unlawful" retaliation.[665] The parties have not litigated every aspect of the DPLA, and the Court has raised concerns about issues lacking a full evidentiary record. Thus, it **[**326]** is not inclined to make a broad pronouncement that the DPLA in its entirety is valid, lawful, and enforceable.

That said, with respect to the sections of the DPLA requiring developers not to "provide, unlock or enable additional features or functionality through distribution mechanisms other than the App Store," DPLA §§ 3.2, 3.3.2, 3.3.3, 3.3.25, those have not been found to be unlawful under federal and state ***antitrust law*** or the UCL.

This case does not involve retaliation. Epic Games never showed why it had to breach its agreements to challenge the conduct litigated. Two parallel antitrust actions prove the contrary. Apple had contractual rights to act as it did. It merely enforced those rights as plaintiff's own internal documents show Epic Games expected. Accordingly, plaintiff's challenges to Apple's claim for declaratory relief fail as to the remaining requests.

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[665] Epic Games FOF ¶¶ 566-567.

G. Remedies

The relief to which Apple is entitled is that to which Epic Games stipulated in the event that the Court found it liable for breach of contract, namely:

(1) damages in an amount equal to (i) 30% of the $12,167,719 in revenue Epic Games collected from users in the *Fortnite* app on iOS through Epic Direct Payment between August and October **[**327]** 2020, plus (ii) 30% of any such revenue Epic Games collected from November 1, 2020 through the date of judgment; and

(2) a declaration that (i) Apple's termination of the DPLA and the related agreements between Epic Games and Apple was valid, lawful, and enforceable, and (ii) Apple has the contractual right to terminate its DPLA with any or all of Epic Games' wholly owned subsidiaries, affiliates, and/or other entities under Epic Games' control at any time and at Apple's sole discretion.[666]

CONCLUSION

This trial highlighted that "big tech" encompasses many markets, including as relevant here, the submarket for mobile gaming transactions. This lucrative, $100 billion, market has not been fully tapped and is ripe for economic exploitation. As a major player in the wider video gaming industry, Epic Games brought this lawsuit to challenge Apple's control over access to a considerable portion of this submarket for mobile gaming transactions. Ultimately, Epic Games overreached. As a consequence, the trial record was not as fulsome with respect to antitrust conduct in the relevant market as it could have been.

Thus, and in summary, the Court does not find that Apple is an antitrust monopolist **[**328]** in the submarket for mobile gaming transactions. However, it does find that Apple's conduct in enforcing anti-steering restrictions is anticompetitive. A remedy to eliminate those provisions is appropriate. **[*1069]** This measured remedy will increase competition, increase transparency, increase consumer choice and information while preserving Apple's iOS ecosystem which has procompetitive justifications. Moreover, it does not require the Court to micromanage business operations which courts are not well-suited to do as the Supreme Court has appropriately recognized.

A separate judgment shall issue based on the findings of fact and conclusions of law set forth above, the Court will enter a separate permanent injunction barring the noted restraints.

For the reasons set forth herein, the Court finds in favor of Apple on all counts except with respect to violation of California's Unfair Competition law (Count Ten) and only partially with respect to its claim for Declaratory Relief. The preliminary injunction previously ordered is terminated.

Each party shall bear its own costs. No party shall file any post-trial motions based on previously-made arguments.

IT IS SO ORDERED.

Date: September 10, 2021

/s/ **[**329]** Yvonne Gonzalez Rogers

YVONNE GONZALEZ ROGERS

UNITED STATES DISTRICT COURT JUDGE

APPENDIX: ORDER OUTLINE

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[666] *See* Dkt. No. 474 ¶ 3.

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PART I

FINDINGS OF FACT

Mears v. Cal. W. Sch. of Law E-File

Superior Court of California, County of San Diego

September 10, 2021, Decided

37-2020-00023126-CU-BC-CTL

Reporter

2021 Cal. Super. LEXIS 56277 *

Mears V. California Western School of Law [E-FILE]

Core Terms

cause of action, conversion, in-person, promise, demurrer, leave to amend, unfair, Policies, tuition, unjust enrichment, contract claim, lectures, online, integration clause, final examination, catalogue, courts, amend

Counsel: **[*1]** Michael Baughman, counsel, present for Defendant(s) via remote video conference.

Cheryl Kenner, counsel, present via remote video appearance for Plaintiffs.

Kevin Crisp, counsel, present via remote video appearance for Defendant.

Judges: John S. Meyer.

Opinion by: John S. Meyer

Opinion

MINUTE ORDER

The Court hears oral argument and the tentative ruling as follows:

Defendant California Western School of Law's demurrer to the consolidated class action complaint is **SUSTAINED**. The demurrer is sustained with leave to amend as to the first (breach of contract) and fourth (unlawful competition) causes of action, and without leave to amend as to the second (unjust enrichment) and third (conversion) causes of action.

Defendant's unopposed request for judicial notice of the specific date classes began and ended is denied as not relevant to the issues presented. (See *People ex rel. Lockyer v. Shamrock Foods Co. (2000) 24 Cal.4th 415, 422, fn. 2*.) Defendant's unopposed request for judicial notice of its Student Financial Responsibility Agreement, Student Handbook, and Statement of Academic Policies (Exs. 1-5) is granted, in part. The Court takes judicial notice of the existence of these documents, but does not resolve conflicting interpretations of those documents. (See *Fremont Indemnity Co. v. Fremont General Corp. (2007) 148 Cal.App.4th 97, 112-118*.)

Breach of Contract (First Cause of **[*2]** Action)

Plaintiffs' breach of contract claim is premised on California Western closing campus and transitioning to online classes due to COVID. California Western's main argument is that Plaintiffs have not adequately alleged the existence of a contract to provide in-person instruction.

Although the relationship between a student and educational institution is contractual, courts have recognized that "contract law should not be strictly applied Universities are entitled to some leeway Mears VS California Western School of 37-2020-00023126-CU-BC-CTL

Law [E-FILE] in modifying their programs from time to time to exercise their educational responsibility properly." (*Kashmiri v. Regents of University of California (2007) 156 Cal.App.4th 809, 823-824*.) Courts have therefore "been reluctant to apply contract law to general promises or expectations. Courts have, however, not been hesitant to apply contract law when the educational institution makes a specific promise to provide an educational service, such as a failure to offer any classes or a failure to deliver a promised number of hours of instruction." (*Id. at p. 826*.) A dispute that "would not require an inquiry into the nuances of educational processes and theories, but rather an objective assessment of the [school's] performance **[*3]** of its promise," is not an impermissible educational malpractice claim. (*Id. at pp. 826-827*.)

"[S]ince a formal contract is rarely prepared between the student and the institution of higher learning, the general nature and terms of the agreement are usually implied, with specific terms to be found in the university bulletin and other publications; custom and usages can also become specific terms by implication." (*Kashmiri, supra, 156 Cal.App.4th at p. 828*.) "Cases involving contractual obligations of colleges based on language in catalogues or handbooks focus on what is reasonable. The reasonableness of the student's expectation is measured by the definiteness, specificity, or explicit nature of the representation at issue." (*Id. at p. 832*.) The existence of an implied agreement "is generally a question of fact." (*Id. at p. 829*.)

Both parties rely heavily on a variety of non-binding federal district court opinions from across the country in similar cases against educational institutions that closed campus due to COVID. Some courts have granted motions to dismiss claims alleging a breach of contract to provide in-person instruction, while others have denied them. Given the varying outcomes, the different pleading standard in federal court, and the fact specific nature **[*4]** of the opinions, they are of limited value. The Court also disregards both parties' improper citations to various superior court orders. The Court instead takes guidance from a prior California Court of Appeal opinion addressing a pleading challenge to a student's breach of contract claim against a university. (*Zumbrun v. University of Southern California (1972) 25 Cal.App.3d 1*.)

In *Zumbrun*, a 63-year-old student enrolled at USC intending to complete his education in Gerontology and Sociology. (*Id.* at p. 6.) He paid tuition and began attending his classes, including a required Sociology 200 course. (*Ibid*.) The student alleged that USC "represented, agreed, promised, and warranted to [him] that said Sociology 200 course would be a full and complete course with a final examination, that said class would be conducted on Tuesdays and Thursdays at 11:00 a.m. until 12:50 p.m. beginning February 3, 1970 and ending with a final examination on or before June 2, 1970, and that [USC] would exercise good faith and judgment concerning said course." (*Id.* at p. 7.) The professor refused to teach the last month of a class due to a faculty strike and simply issued the student a "B" instead of conducting a final examination. (*Ibid*.) The trial court sustained a demurrer without **[*5]** leave to amend, but the court of appeal reversed holding:

"The allegations heretofore summarized spell out a contract obligating defendant USC to give the course 'Sociology 200' consisting of a given number of lectures and a final examination in consideration of the tuition and fees for the course paid by plaintiff. The stated number of lectures and the normal type of final examination were not given. The reason for this deviation from the announced schedule is alleged to have been a faculty strike protesting the United States foreign policy in Cambodia. It is obvious that plaintiff did not receive all that she bargained for when she enrolled in 'Sociology 200.'"

(*Id.* at pp. 10-11.) The court recognized "a minimal departure from a projected course of study does not entitle the student (or his parent who paid for it) to recover the tuition paid to any part of it," but Mears VS California Western School of 37-2020-00023126-CU-BC-CTL

Law [E-FILE] concluded that whether the partial failure "justifie[d] refund of a portion of the tuition and fee allocable to the course is a matter of proof, under the present state of the pleadings, at trial in an appropriate forum." (*Id.* at p. 11.)

Here, Plaintiffs **[*6]** allege that they "registered and paid for in-person law classes for the Spring 2020 term based on Defendants' representations made in a course catalogue." (CAC, ¶ 25.) Plaintiffs also allege that by "the act of matriculation, together with payment of required fees, a contract between Plaintiffs and Class members, on the one hand, and Defendants, on the other hand, was created." (CAC, ¶ 54.) These allegations do not allege a specific promise to provide in-person instruction. As phrased, Plaintiffs allegedly decided to enroll at California Western based on its course catalogue, with a general expectation that courses would be in-person. Plaintiffs do not allege that the course catalogues themselves promised in-person instruction. As in *Zumbrun*, Plaintiffs must at least allege the nature of the representations in the course catalogue or other publications forming the basis of their contract claim.

However, Plaintiffs' opposition demonstrates a reasonable possibility that they can amend the complaint to state a viable claim. For example, Plaintiffs identify provisions in California Western's "Statement of Academic Policies" imposing an "in residence" requirement (§ 1.01.3), a limit on credits **[*7]** for "non-classroom activities" (§ 1.02), and various references to a "classroom." These provisions arguably indicate a promise to provide in-person instruction. Plaintiffs also note that California Western actually offers an online LL.M. program. (See § 14.01-14.03.) It is arguably reasonable for students to interpret a traditional J.D. program that has historically been taught on campus, offered alongside a separate "online" program, as a specific promise to provide in-person instruction.

California Western disputes that the referenced statements in the Statement of Academic Policies constitute promises to provide in-person instruction. For example, it contends that the "in residence" requirement does not mean "on campus," but rather at California Western instead of a different school. However, other portions of the policies appear to equate the term "residence" with physical presence. (See § 14.02 ["The program includes a one-week period of residency in San Diego at the beginning of the program, three trimesters of online study, and a one-week capstone period of residency in San Diego at the end of the program"].) California Western's competing interpretations of the Statement of Academic Policies are **[*8]** not a basis to deny leave to amend. (See *Fremont Indemnity, supra, 148 Cal.App.4th at p. 115*.)

California Western also argues that the preface to the Statement of Academic Policies states they are "subject to change at any time by the faculty and/or Academic Affairs Committee," at which point revised copies would be made "available in the Vice Dean's office and on the school's website." The reservation, standing alone, does not necessarily foreclose a contract claim. (See *Asmus v. Pacific Bell (2000) 23 Cal.4th 1, 15-16*.) Whether the written policies were so amended is beyond the four corners of the complaint. There is also a reasonable possibility that other publications or California Western's website included similar statements without indicating they were subject to change.

Finally, California Western relies on an integration clause in the Plaintiffs'"Student Financial Responsibility Agreement" that states: "This agreement supersedes all prior understandings, representations, negotiations, and correspondence between the student and [California Western], constitutes the entire agreement between the parties with respect to the matters described, and shall not be modified or affected by any course of dealing or course of performance." (CAC, ¶ 29.) Plaintiffs note the integration **[*9]** clause is limited to "the matters described," i.e., students' financial responsibility and their right to a refund upon withdrawal. The Student Financial Responsibility Agreement does not address Mears VS California Western School of 37-2020-00023126-CU-BC-CTL

Law [E-FILE]

the manner in which courses would be taught or the consequences for California Western's failure to provide promised instruction. As such, California Western's interpretation of the integration clause as foreclosing the existence of a separate implied contract for in-person instruction is debatable. (See e.g., *Jenks v. DLA Piper Rudnick Gray Cary US LLP (2015) 243 Cal.App.4th 1, 15-20*.) The existence of the integration clause is not dispositive of whether Plaintiffs will be able to amend. (See *Kanno v. Marwit Capital Partners II, L.P. (2017) 18 Cal.App.5th 987, 1007-1010* [the presence of an integration clause "is not controlling" and the court must look at facts "beyond the four corners of the agreement" in resolving the issue].)

The Court expresses no opinion on the ultimate merits of California Western's arguments. The court only concludes that Plaintiffs should be given a chance to amend. For the reasons set forth above, the demurrer to the first cause of action for breach of contract is sustained with leave to amend.

Unjust Enrichment (Second Cause of Action)

"Although **[*10]** some California courts have suggested the existence of a separate cause of action for unjust enrichment, [the Fourth District Court of Appeal, Division One] has recently held that there is no cause of action in California for unjust enrichment." (*Levine v. Blue Shield of California (2010) 189 Cal.App.4th 1117, 1138*.) Other districts have likewise affirmed orders sustaining demurrers to causes of action labeled "unjust enrichment" without leave to amend. (E.g., *Everett v. Mountains Recreation & Conservation Authority (2015) 239 Cal.App.4th 541, 553*.)

This Court follows *Levine*. Accordingly, the demurrer to the second cause of action for unjust enrichment is sustained without leave to amend.

Conversion (Third Cause of Action)

The "law has been careful to distinguish proper claims for the conversion of money from other types of monetary claims more appropriately dealt with under other theories of recovery. Thus, although our law has dispensed with the old requirement that each coin or bill be earmarked, it remains the case that money cannot be the subject of an action for conversion unless a specific sum capable of identification is involved. Where the money or fund is not identified as a specific thing the action is to be considered as one upon contract or for debt-or perhaps upon some other appropriate theory-but not for conversion." (*Voris v. Lampert (2019) 7 Cal.5th 1141, 1151*.)

"Equally **[*11]** important, the 'specific thing' at issue must be a thing to which the plaintiff has a right of ownership or possession-a right with which the defendant has interfered by virtue of its own disposition of the property. This means that a cause of action for conversion of money can be stated only where a defendant interferes with the plaintiff's possessory interest in a specific, identifiable sum; the simple failure to pay money owed does not constitute conversion. Were it otherwise, the tort of conversion would swallow the significant category of contract claims that are based on the failure to satisfy mere contractual rights of payment [T]o put the matter simply, a plaintiff has no claim for conversion merely because the defendant has a bank account and owes the plaintiff money." (*Id. at pp. 1151-1152*; see *McKell v. Washington Mutual, Inc. (2006) 142 Cal.App.4th 1457, 1492* ["Plaintiffs cite no authority for the proposition that a cause of action for conversion may be based on an overcharge"].)

Plaintiffs' theory is that they are entitled to recover a portion of the tuition they paid because California Western failed to provide in-person instruction as agreed. They do not identify any specific sum of money that the law school allegedly converted. In their opposition, Plaintiffs **[*12]** posit that they can calculate a per-lecture rate by dividing tuition by the total number of lectures, which can then be multiplied by the number of lectures each student took online to identify the specific sum converted. However, this assumes that all in-person lectures had the same value and all online lectures had no value. It is, at best, an estimated measure of the damages that Plaintiffs hope to recover under their breach of contract claim. More fundamentally, Plaintiffs do not allege that California Western interfered with their possessory interest in any such money. At its core, Plaintiffs' attempt to seek a prorated refund of their tuition under these circumstances is simply not a claim for conversion.

Accordingly, the demurrer to the third cause of action for conversion is sustained. As Plaintiffs have not demonstrated a reasonable possibility that they can amend to state a viable claim, the demurrer is sustained without leave to amend.

Unlawful Competition (Fourth Cause of Action)

Unlawful competition includes an "unlawful, unfair or fraudulent business act or practice." (*Bus. & Prof. Code, § 17200*.) The statute is written in the disjunctive and therefore conduct need only meet one of the three criteria **[*13]** to be considered unfair competition. (See *Graham v. Bank of America, N.A. (2014) 226 Cal.App.4th 594, 610*.) UCL claims must "state with reasonable particularity the facts supporting the statutory elements of the violation." (*Khoury v. Maly's of California, Inc. (1993) 14 Cal.App.4th 612, 619*.)

Plaintiffs do not adequately allege a claim under the unlawful prong because they do not identify any particular law that California Western allegedly violated. (CAC 82-96; *Graham, supra, 226 Cal.App.4th at p. 610*.) Nor do Plaintiffs adequately allege a claim under the fraud prong because they have not alleged facts in support of that theory with reasonable particularity (CAC 88, 96; *Khoury, supra, 14 Cal.App.4th at p. 619*.)

Plaintiffs appear to primarily base this claim on the unfair prong, but their allegations under this theory are also insufficient. (CAC 84-86.) There is a split of authority as to the proper definition of "unfair" in actions brought by consumers rather than competitors. Citing one line of cases, Plaintiffs allege that California Western's conduct was unfair because it either "offends an established public policy" or is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." (CAC ¶ 84.) However, the Fourth District Court of Appeal, Division One has consistently rejected that definition and has applied a much narrower test, the so-called "Cel-Tech test" **[*14]** for establishing unfairness. (*Graham, supra, 226 Cal.App.4th at p. 613*.) Under that test, a plaintiff must prove that the "defendant's conduct is tethered to an underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of an ***antitrust law***." (*Ibid*.) Plaintiffs have failed to allege an unfair business act or practice under this definition, which controls in this case.

Accordingly, the demurrer to the fourth cause of action for unfair competition is sustained. The Court will grant leave to amend to allege a claim in accordance with the standards set forth in *Khoury* and *Graham*.

IT IS SO ORDERED:

/s/[John S. Meyer]

Judge John S. Meyer

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[Anesthesia Assocs. of Ann Arbor, PLLC v. Blue Cross Blue Shield of Mich.]

United States District Court for the Eastern District of Michigan, Southern Division

September 14, 2021, Decided; September 14, 2021, Filed

2:20-CV-12916

Reporter
2021 U.S. Dist. LEXIS 174021 *; 2021 WL 4169711

ANESTHESIA ASSOCIATES OF ANN ARBOR, PLLC, Plaintiff, v. BLUE CROSS BLUE SHIELD OF MICHIGAN, Defendant.

Prior History: *Anesthesia Assocs. of Ann Arbor v. Blue Cross Blue Shield of Mich., 2021 U.S. Dist. LEXIS 33216 (E.D. Mich., Feb. 23, 2021)*

Core Terms

antitrust, anesthesiologists, pricing, anesthesiology, reimbursement rate, alleges, patients, consumers, predatory, insureds, providers, network, output, competitors, conspiracy, artificially, buyer, practices, anti trust law, anticompetitive, factors, conversion factor, depressed, harmed, health insurer, reimbursement, facilities, Shield, inputs, district court

LexisNexis® Headnotes

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

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

Fed. R. Civ. P. 12(b)(6) permits dismissal of a lawsuit where the defendant establishes the plaintiff's failure to state a claim upon which relief can be granted. Consideration of a Rule 12(b)(6) motion is confined to the pleadings. But courts may also look to exhibits attached to the complaint, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss without altering this standard. In evaluating the motion, courts must construe the complaint, accept all well-pled factual allegations as true and determine whether the plaintiff undoubtedly can prove no set of facts consistent with their allegations that would entitle them to relief.

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

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

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

Though the Fed. R. Civ. P. 12(b)(6) standard is liberal, it requires a plaintiff to provide more than labels and conclusions, and a formulaic recitation of the elements of a cause of action in support of her grounds for entitlement to relief. Under Ashcroft v. Iqbal, the plaintiff must also plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. A plaintiff falls short if she pleads facts merely consistent with a defendant's liability or if the alleged facts do not permit the court to infer more than the mere possibility of misconduct.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN3[] **Remedies, Damages**

In the context of an antitrust suit, antitrust standing and Article III standing are not one and the same, and the court must reject claims under Fed. R. Civ. P. 12(b)(6) when antitrust standing is missing. An antitrust plaintiff must do more than make allegations of consequential harm resulting from a violation of the antitrust laws. Even though a complaint may allege that the defendant had an intent to harm the plaintiff, district courts must still consider other relevant factors—the nature of the claimant's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the claimant's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy—weigh heavily against judicial enforcement.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN4[] **Standing, Requirements**

In short, antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement, courts must dismiss it as a matter of law. Antitrust standing ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN5[] **Standing, Requirements**

Article III standing and antitrust standing are not one and the same. District courts are required to dismiss claims under Fed. R. Civ. P. 12(b)(6) when a plaintiff fails to satisfy antitrust standing. As the Sixth Circuit explained: Antitrust standing to sue is at the center of all ***antitrust law*** and policy. It is not a mere technicality. The requirement of antitrust standing ensures that antitrust litigants use the laws to prevent anticompetitive action and makes certain that they will not be able to recover under the antitrust laws when the action challenged would tend to promote competition in the economic sense. The antitrust standing requirement makes certain that the laws are used only to deal with the economic problems whose solutions these policies were intended to effect.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN6[] Standing, Requirements

Antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement, the court must dismiss it as a matter of law—lest the antitrust laws become a treble-damages sword rather than the shield against competition-destroying conduct that Congress meant them to be.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN7[] Standing, Requirements

District courts assessing an antitrust claim for standing consider the following five-factor inquiry: (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation.

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN8[] Scope, Monopolization Offenses

Congress enacted the Sherman Act as a way of protecting consumers against prices that were too high, not too low. This is achieved, for instance, by prohibiting firms from pricing below incremental cost, otherwise known as predatory pricing. That is because predatory pricing harms competitors, cannot be maintained, and is unlikely to provide consumer benefits.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN9[] Standing, Requirements

The First Circuit has rejected the argument that a dominant insurer commits an antitrust injury when it uses its market power to bargain for low prices. That is because in the particular circumstances of the health insurance market, the roles insurers play on behalf of patients are like those of a buyer. And, ***antitrust law*** rarely stops the buyer of a service from trying to determine the price or characteristic of the product that will be sold.

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN10[] Attempts to Monopolize, Elements

In the Sixth Circuit, an antitrust plaintiff who challenges a competitor's pricing practices must do so under a theory of predatory pricing.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN11[] **Anticompetitive & Predatory Practices, Predatory Pricing**

When a private plaintiff complains about a defendant's prices, only predatory pricing has the requisite anticompetitive effect to establish antitrust injury.

Antitrust & Trade Law > Clayton Act > Scope

HN12[] **Antitrust & Trade Law, Clayton Act**

Monopsony is market power on the buy side of the market. The classical theory of monopsony envisions a market with only one buyer that uses its power to reduce the quantity purchased, thereby reducing the price that the monopsonist has to pay.

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

Public Contracts Law > Dispute Resolution > Bid Protests

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Public Contracts Law > Bids & Formation > Competitive Proposals

HN13[] **Scope, Monopolization Offenses**

Predatory bidding involves the exercise of market power on the market's buy, or input side. A predatory bidder bids up the market price of an input so high that rival buyers cannot survive. Thus, the predatory bidder acquires monopsony power, which is market power on the buy side of the market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN14[] **Actual Monopolization, Monopoly Power**

Dominant buyers in a market are generally free to bargain aggressively when negotiating the prices they will pay for goods and services. However, when a firm exercises monopsony power pursuant to a conspiracy, its conduct is subject to more rigorous scrutiny.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN15[] **Sherman Act, Claims**

Antitrust law protects consumers from anticompetitive conduct that can lead to higher prices. Antitrust standing protects competitors from claims that fail to plausibly allege an antitrust injury.

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Judges: TERRENCE G. BERG, UNITED STATES DISTRICT JUDGE.

Opinion by: TERRENCE G. BERG

Opinion

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITHOUT PREJUDICE

This case pits Michigan's largest physician-owned anesthesiology practice group, Anesthesia Associates of Ann Arbor (or "A4"), in an anti-trust lawsuit against the state's dominant health insurer, Blue Cross Blue Shield of Michigan ("BCBS-MI"). Plaintiff A4 brings claims under the *Sherman Act*, *Clayton Act*, and state law that Defendant BCBS-MI has used its dominant position as the buyer of healthcare services to pay A4's anesthesiologists artificially depressed reimbursement rates. Plaintiff also asserts that the defendant has used its **[*2]** position to coerce Michigan hospitals to refuse to deal with providers who leave its insurance network, to the detriment of anesthesiology patients. Finally, Plaintiff says that Defendant used its dominant position to coerce hospitals to solicit Plaintiff's own anesthesiologists in violation of private non-compete and non-solicitation agreements. Defendant moves to dismiss for failure to state a claim under *Rule 12(b)(6)*.

As explained below, the motion to dismiss will be **GRANTED WITHOUT PREJUDICE**.

I. Background

The following facts are alleged in Plaintiff's Complaint. *See* ECF No. 1.

A. The parties

This suit is between a healthcare provider group and a health insurer.[1] The Plaintiff is Anesthesia Associates of Ann Arbor ("A4"), a physician-owned anesthesiology practice. ECF No. 1, PageID.21. A4 is one of the largest

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[1] Two other hospital systems—Trinity Health and Beaumont Health—are not parties to this suit, but play roles in the events giving rise to this action.

anesthesiology groups in Michigan. *Id.* Plaintiff's principal place of business is in Ann Arbor, Michigan. Its anesthesiologists have obtained board certification, introduced new procedures to Michigan hospitals, and lectured as professors at Wayne State University. *Id.* at PageID.5.

The Defendant is Blue Cross Blue Shield of Michigan ("BCBS" or "BCBS-MI"). ECF No. 1, PageID.54-55. Controlling **[*3]** at least 67% of the market in the state, Defendant is the largest commercial health insurer in Michigan. *Id.* at PageID.7. For example, Defendant insures at least 4.5 million people in Michigan and another 1.6 million in other states. *Id.* at PageID.35. Defendant is also the ninth-largest health insurer in the country. The Blue Cross Blue Shield branding is administered by the Blue Cross Blue Shield Administration. *Id.* at PageID.22. One of Defendant BCBS-MI's board of directors, Rob Casalou, also serves as chief executive officer for the Trinity Health hospital system. *Id.*

Trinity Health is a national hospital network with nine hospitals in Michigan. ECF No. 1, PageID.7. Trinity has had a longstanding relationship with Plaintiff A4, so much so that it designates A4 as a "Preferred Provider." *Id.* at PageID.8-9. Beaumont is another hospital group that has shared a longstanding and fruitful partnership with Plaintiff A4 in Michigan. *Id.*

B. The market for anesthesiology services in Michigan

Anesthesiologists keep patients alive, safe, and in comfort while they undergo invasive surgical procedures. ECF No. 1, PageID.24. They "make split-second decisions and adjustments to ensure that the patient's **[*4]** airways, breathing, and circulation are functioning properly." *Id.* In order to provide their services, anesthesiologists must have access to facilities where anesthesia is administered—hospitals and other medical facilities. *Id.* at PageID.7.

Anesthesiology compensation is driven by "compensation factors." *Id.* at PageID.26-27. Unique to anesthesiologists, the compensation factors consider a base factor, modifiers, time spent, and a conversion factor. *Id.* Base factors and modifiers vary depending on the procedure being performed and the characteristics of the patient. *Id.* at PageID.27. The more complicated a procedure is, the higher the base factor will be. *Id.* Patients with greater complicating conditions are associated with higher modifiers. *Id.* Base factors and modifiers are relatively standardized across the United States, as private insurers usually adopt the base factors set by Medicare. *Id.* Time as a compensation factor is also generally standardized, and it is measured in 15-minute increments. Although anesthesiologists receive greater compensation for more complex procedures, base factors and modifiers makeup a smaller part of the overall compensation factors. As a result, they **[*5]** do not substantially influence the differences in compensation among anesthesiologists.

The "conversion factor" is the most significant and most variable of the factors across the country. *Id.* at PageID.28. The conversion factor accounts for geographic differences, differences in cost of care, and the quality of the anesthesiologist. For instance, an anesthesiologist in a higher cost of living area, such as Detroit, will have a higher conversion factor than one in a less populated area of Michigan. An anesthesiologist who delivers a higher quality of care will have a higher conversion factor than an anesthesiologist who delivers a lower quality of care. *Id.* Commercial insurers in a normal market, therefore, compete to sign up anesthesiologists to their networks by offering higher conversion factors than their competitors. An in-network anesthesiologist, in other words, means that he or she has already agreed to financial terms for treating patients with a particular insurer. *Id.* at PageID.32-33.

Anesthesiology groups like Plaintiff receive compensation from three sources: hospital stipends, insurance reimbursement, and the patient's share of that reimbursement. *Id.* at PageID.40, 43. **[*6]** According to Plaintiff, Defendant's reimbursement rate for anesthesiologists in Michigan is in the lowest band nationally out of four bands. *Id.* at PageID.58. It is also lower than surrounding states in the Great Lakes region. This is despite the fact that Medicare's anesthesiology conversion factor for the Detroit area is one of the highest in the country. *Id.* at PageID.16. As a result of the low reimbursement rates, Plaintiff alleges that it has recently lost anesthesiologists who left to practice in neighboring Toledo, Ohio.

C. The relationship between BCBS-MI and A4

In April 2019, Plaintiff attempted to negotiate a higher reimbursement rate with Defendant. ECF No. 1, PageID.7-8. Plaintiff notified Defendant that "it could not continue to accept BCBS-MI's artificially low rate" and that it sought to "bring BCBS-MI's conversion factor more in line with market realities." *Id.* But Defendant refused to engage in negotiations.

As a consequence of Defendant's refusal to engage in negotiations, Plaintiff announced that it would be leaving Defendant's network. *Id.* Plaintiff also announced that even though it was going out of network, it would continue to provide the same medical care and would **[*7]** not charge patients any more than when it was in-network. *Id.* Instead, any conflict over rates would be resolved between Plaintiff and Defendant. *Id.*

On April 22, 2019, Rob Casalou, who serves as both the CEO of Trinity's Michigan operations and as a board member on Defendant's board of directors, reacted to Plaintiff's announcement in an email to Plaintiff. *Id.* at PageID.41-42. Casalou conveyed to Plaintiff that Defendant was concerned about the impact of Plaintiff's decision to go out of network. Defendant was considering a new process that would require anesthesiology services with its insureds to have pre-authorization from surgeons. Casalou also stated that Defendant would look to "steer work away from facilities with A4." *Id.*

A few weeks later, Plaintiff reiterated its intent to leave Defendant's network by July 15, 2019. *Id.* at PageID.42. In its statement, Plaintiff stressed that it could not continue to operate as a business with the same reimbursement rate. Plaintiff noted that it has had the same reimbursement rate for the last six years, during which the cost of providing anesthesiology services has increased. *Id.*

Plaintiff's announcement caused local hospitals—such as Trinity **[*8]** and Beaumont—to terminate their relationship with A4. For instance, on July 5, 2019, Beaumont issued a notice of termination with Plaintiff. *Id.* at PageID.44. After Plaintiff left Defendant's network on July 15, Trinity, which had enjoyed a relationship with Plaintiff for nearly fifty years, sent a termination notice to Plaintiff. Trinity later explained that it could not afford to lose Defendant's business. *Id.* at PageID.44.

At the same time in July, Plaintiff further alleges that Defendant was inducing Plaintiff's anesthesiologists to breach their non-compete provisions. *Id.* at PageID.47-50. This was despite the non-solicitation agreements between Plaintiff and Trinity. Plaintiff has limited non-compete and non-solicitation agreements to protect its efforts in recruiting and retaining its anesthesiologists. Defendant was aware of these provisions because Casalou executed and was aware of such terms through his position as Trinity's CEO. *Id.* at PageID.47.

Despite the restrictive terms, Plaintiff states that in June 2019, Saint Joseph Mercy Health System, a Trinity subsidiary, circulated a document to Plaintiff's anesthesiologists practicing in its facility offering employment. *Id.* at **[*9]** PageID.47-48. This document promised that the subsidiary would indemnify Plaintiff's anesthesiologists against any risk from breaching their non-compete agreements. *Id.* The document also expressed concerns about Defendant's reputation as an aggressive negotiator when a provider group threatens or actually leaves its network. *Id.*

A month later, another Trinity subsidiary, Mercy Health Saint Mary's, circulated a similar document offering to indemnify Plaintiff's anesthesiologists from any breach under their non-compete agreements if they were to leave A4. *Id.* at PageID.49. In order to stop the violations, Plaintiff sought and obtained a temporary restraining order against Trinity, Trinity's subsidiary, and Casalou in Michigan state court. The TRO restrained them from continuing to breach their contract and tortious actions against Plaintiff. *Id.* at PageID.49.

A4's business could not withstand the effects of hospitals terminating their relationships and denying access to their facilities because anesthesiologists require access to hospitals in order to provide their services. Plaintiff therefore acquiesced and went back in network with Defendant. *Id.* at PageID.51. In late October 2020, **[*10]** the parties along with Trinity, attempted to resolve Plaintiff's claims against Defendant. *Id.* at PageID.52. Defendant, however, again refused to engage in negotiations. Plaintiff alleges that on October 27, 2020, Defendant induced and coerced Trinity to ultimately terminate its relationship with Plaintiff, effective in 180 days. *Id.*

D. Plaintiff's Complaint

Plaintiff's Complaint raises ten causes of action: (1) tortious interference with a contract under Michigan law; (2) civil conspiracy to commit tortious interference with a contract under Michigan law; (3) unlawful and malicious threats under Michigan law; (4) duress under Michigan law; (5) violation of *Section 8* of the Clayton Act; (6) conspiracy in violation of *Section 1* of the Sherman Act; (7) monopsonization in violation of *Section 2* of the Sherman Act; (8) attempted monopsonization in violation of *Section 2* of the Sherman Act; (9) a claim for injunctive relief under *Section 16* of the Clayton Act; and (10) claim for injunctive relief under Michigan law. *See* ECF No. 1.

On January 4, 2021, Defendant moved to dismiss Plaintiff's Complaint. *See* ECF No. 13. The Court held oral argument on the pending motion on May 26, 2021.

II. Legal Standard

HN1[] *Rule 12(b)(6) of the Federal Rules of Civil Procedure* permits dismissal of a lawsuit where **[*11]** the defendant establishes the plaintiff's "failure to state a claim upon which relief can be granted." *Jones v. City of Cincinnati, 521 F.3d 555, 562 (6th Cir. 2008)*. Consideration of a *Rule 12(b)(6)* motion is confined to the pleadings. *Id.* But courts may also look to "exhibits attached [to the complaint], public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss" without altering this standard. *Rondigo, LLC v. Twp. of Richmond, 641 F.3d 673, 680-81 (6th Cir. 2011)*. In evaluating the motion, courts "must construe the complaint, accept all well-pled factual allegations as true and determine whether the plaintiff undoubtedly can prove no set of facts consistent with their allegations that would entitle them to relief." *League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 527 (6th Cir. 2007)* (citing *Kottmyer v. Maas, 436 F.3d 684, 688 (6th Cir. 2006)*).

HN2[] Though this standard is liberal, it requires a plaintiff to provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action" in support of her grounds for entitlement to relief. *Albrecht v. Treon, 617 F.3d 890, 893 (6th Cir. 2010)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 554, 555, 127 S. Ct. 1955, 16 L. Ed. 2d 929 (2007)*). Under *Ashcroft v. Iqbal*, the plaintiff must also plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citation omitted). A plaintiff falls short if she pleads facts "merely consistent with a defendant's liability" or if the alleged facts **[*12]** do not "permit the court to infer more than the mere possibility of misconduct." *Albrecht, 617 F.3d at 893* (quoting *Iqbal, 556 U.S. at 678-679*).

HN3[] Moreover, in the context of an antitrust suit, "antitrust standing and Article III standing are not one and the same, and we not only may—but we must—reject claims under *Rule 12(b)(6)* when antitrust standing is missing." *NicSand, Inc. v. 3M Co., 507 F.3d 442, 449 (6th Cir. 2007)*. An antitrust plaintiff "must do more than make allegations of consequential harm resulting from a violation of the antitrust laws." *Id.* (citing *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 545, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983)* (quotations omitted)). Even though a complaint may allege that the defendant had an intent to harm the plaintiff, district courts must still consider "[o]ther relevant factors—the nature of the [claimant's] injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the [claimant's] alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy—weigh heavily against judicial enforcement." *Associated Gen., 459 U.S. at 545*.

HN4[] In short, antitrust standing is a "threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement," courts must dismiss it as a matter of law. *NicSand, 507 F.3d at 450*. "Lest the antitrust laws become a treble-damages **[*13]** sword rather than the shield against competition-destroying conduct that Congress meant them to be." *Id.* Antitrust standing "ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Atl. Richfield. Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (emphasis in original).

III. Discussion

A. Antitrust Standing

Defendant moves to dismiss Plaintiff's case for failure to state a claim under *Rule 12(b)(6)*. *See* ECF No. 13. Although Defendant raises numerous arguments as to why the Complaint should be dismissed, the Court need only focus on the pleading-stage threshold question of antitrust standing.

Defendant argues that Plaintiff lacks antitrust standing because its Complaint fails to plead that Defendant's conduct caused an antitrust injury. Specifically, Defendant contends that Plaintiff has not plausibly pled an illegal price effect, a reduction in output, or reduction in quality. Accordingly, the Court need only address the issue of standing because, as it will further explain below, Plaintiff's Complaint does not plausibly allege any injury "of the type that the antitrust statute was intended to forestall." *Associated Gen., 459 U.S. at 545*.

Plaintiff responds that it has in fact alleged two types of antitrust injuries **[*14]** resulting from Defendant's allegedly anticompetitive conduct. First, Plaintiff alleges abuse of monopoly because Defendant has used its significant market power to impose an "artificially low rate for anesthesiology" in violation of *Section 2* of the Sherman Act. ECF No. 1, PageID.17. This artificially low rate "is itself anticompetitive." *Id.* at PageID.16. Defendant's "state-wide anesthesiology conversion factor is one of the lowest in the country" even though Medicare's anesthesiology conversion factor for the Detroit area "is one of the highest in the country." *Id.*

Plaintiff states that Defendant's depressed reimbursement rates have caused the following anticompetitive violations. ECF No. 1, PageID.16-17. Plaintiff alleges that Defendant's rates are "so low that it reduces output, including by restricting the supply of anesthesiologists in Michigan." *Id.* at PageID.17. Plaintiff notes that "Michigan faces a shortage of anesthesiologists and CRNAs [Clinical registered nurse anesthetists]" and that "anesthesiology groups across Michigan have complained to BCBS that its rates are impeding their ability 'to recruit anesthesiologists to work in Michigan.'" ECF No. 22, PageID.513. Plaintiff adds **[*15]** that "[b]ecause an anesthesiologist cannot be in two places at once, the volume of anesthesiology services in a market is directly tied to the number of anesthesiology providers." *Id.*

Defendant's rates have also reduced the quality of anesthesiology services. Plaintiff cites, for instance, "how Michigan patients are being deprived of the option of working with their surgeon's preferred choice of anesthesiologist." ECF No. 22, PageID.514. Plaintiff also notes how after it left Defendant's network, the replacements for Plaintiff at Beaumont hospital led to "cutbacks in weekend anesthesiology service and delayed provision of anesthesia." *Id.* In another example, consumers are harmed because "patients are restricted to choosing the anesthesiology services that BCBS is willing to pay for 'regardless of whether they are insured by BCBS-MI or some other insurer.'" *Id.*

Despite paying anesthesiologists less, Plaintiff claims that "this "artificially low conversion factor has not resulted in lower premiums for consumers." ECF No. 1, PageID.17. Plaintiff cites, for instance, data from the Kaiser Family Foundation that "shows that Michigan has some of the highest insurance premiums in the country." **[*16]** *Id.* Plaintiff also alleges that prices for anesthesiology services will increase because Defendant's conduct "endanger[s] the practice group model of anesthesiology." ECF No. 1, PageID.59. Anesthesiology practice groups cannot afford to stay in business under the artificially depressed reimbursement rates driven by Defendant. ECF No. 22, PageID.514-15. With the practice group model destroyed, providers "would have to seek employment directly with hospitals." *Id.* And Plaintiff asserts that when anesthesiologists are employed by hospitals, the result is higher prices from the perspective of patients. *See* ECF No. 1, PageID.60.

Plaintiff further alleges as an antitrust injury that Defendant conspired with Trinity and Beaumont to shut out Plaintiff when it threatened to leave Defendant's network. Defendant "exploited its monopoly power over medical facilities and coerced those facilities into conspiring with BCBS-MI to exclude A4 from practicing medicine in Michigan" when Plaintiff threatened and did leave Defendant's network. *Id.* at PageID.13.

Plaintiff's theory is that Defendant acted in concert with hospitals to refuse "to deal with anesthesiologists who are out of BCBS's network." ECF **[*17]** No. 22, PageID.515. This refusal to deal protects Defendant from needing to engage in competition, enabling it "to require anesthesiologists to accept below-competitive rates." *Id.* This concerted refusal to deal, Plaintiff alleges, harms competition because it leaves anesthesiologists with no alternative. But in a competitive market, anesthesiologists would "have the option of going out of network" and still be able to practice at local hospitals. *Id.* Instead, under Defendant's domination of the market, anesthesiologists in Michigan are forced to take Defendant's artificially low reimbursement rates at a loss. This causes "qualified and experienced anesthesiologists" to leave Michigan. *Id.* at PageID.516.

The question presented, therefore, is whether Plaintiff's allegations constitute an injury that the antitrust laws were intended to prevent. ***HN5***[] Article III standing and antitrust standing are not one and the same. District courts are required to dismiss claims under *Rule 12(b)(6)* when a plaintiff fails to satisfy antitrust standing. *NicSand, 507 F.3d at 449-50*. As the Sixth Circuit explained:

> Antitrust standing to sue is at the center of all ***antitrust law*** and policy. It is not a mere technicality. It is the glue that cements each suit with **[*18]** the purposes of the antitrust laws, and prevents abuses of those laws. The requirement of antitrust standing ensures that antitrust litigants use the laws to prevent anticompetitive action and makes certain that they will not be able to recover under the antitrust laws when the action challenged would tend to promote competition in the economic sense. Antitrust laws reflect considered policies regulating economic matters. The antitrust standing requirement makes certain that the laws are used only to deal with the economic problems whose solutions these policies were intended to effect.

HyPoint Tech., Inc. v. Hewlett-Packard Co., 949 F.2d 874, 877 (6th Cir. 1991).

The Sixth Circuit elaborated on antitrust standing in *NicSand, Inc. v. 3M Co.* ***HN6***[] "[A]ntitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement we must dismiss it as a matter of law—lest the antitrust laws become a treble-damages sword rather than the shield against competition-destroying conduct that Congress meant them to be." *507 F.3d at 450* (noting that "federal courts have been 'reasonably aggressive' in weeding out meritless antitrust claims at the pleading stage."); *see also* *Twombly, 127 S.Ct. at 1966* ("[S]omething beyond the mere possibility of [relief] must be alleged, **[*19]** lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value.") (internal quotation marks omitted). Notably, the Sixth Circuit "has dismissed numerous lawsuits for lack of antitrust standing under *Rule 12(b)(6)*." *NicSand, 507 F.3d at 450*. (collecting cases).

The Sixth Circuit in *Southaven Land Co., Inc. v. Malone & Hyde, Inc.* summarized the test for antitrust standing as set forth by the Supreme Court. ***HN7***[] District courts assessing an antitrust claim for standing consider the following five-factor inquiry:

> (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused;
> (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market;
> (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative;
>
> (4) the potential for duplicative recovery or complex apportionment of damages; and
>
> (5) the existence of more direct victims of the alleged antitrust violation.

715 F.2d 1079, 1085 (6th Cir. 1983) (citing Associated Gen., 459 U.S. at 537-44); *see also* Re/Max Int'l Inc., v. Realty One, Inc., 173 F.3d 995, 1022 (6th Cir. 1999).

Having reviewed the controlling authorities **[*20]** on antitrust standing, the Court now turns to the application of its factors to the present case.

i. The nature of Plaintiff's alleged injury

Plaintiff alleges that Defendant's conduct has led to reduced output and quality in the market for anesthesiology services, and has also led to increased prices for consumers. Because Defendant's reimbursement rates drive the market price and because it is relatively low, Plaintiff alleges it has "lost multiple doctors who left to practice in Toledo, Ohio." ECF No. 1, PageID.17. Defendant's low reimbursement rates have also made it more difficult for Plaintiff and other anesthesiology groups "to recruit anesthesiologists to work in Michigan." *Id.* at PageID.38. Furthermore, Defendant's conduct has deprived Michigan patients "of the option of working with their surgeon's preferred choice of anesthesiologist." ECF No. 22, PageID.514.

Defendant, on the other hand, asserts that Plaintiff's Complaint fails to allege anticompetitive harm to the market for anesthesiology services, while alleging harm to its own business instead. ECF No. 13, PageID.255. Defendant characterizes Plaintiff's position as merely alleging that its own reimbursement rates "*did* ***[*21]*** *not go up* as much as A4 wanted." *Id.* at PageID.255-56 (italics in original). But, Defendant stresses, lower payments for anesthesiology services lead to "lower prices for customers and patients (in the form of lower provider payments for self-insured customers and lower premiums)." *Id.* at PageID.256. This, according to Defendant, "is not an 'injury' that the antitrust laws address." *Id.*

Antitrust law in the healthcare setting focuses on protecting patients from prices that are too high. In *Kartell v. Blue Shield of Massachusetts, Inc.*, the First Circuit considered whether defendant Blue Shield's reimbursement practice of banning "balance billing"—where an insurer pays doctors for treating in-network patients in exchange for doctors promising to not make any additional charge to the subscriber—constituted an unlawful restraint of trade in violation of the antitrust laws. *749 F.2d 922 (1st Cir. 1984)*. The First Circuit held that it did not.

In so ruling, the First Circuit opined on when and how practices affecting prices may be deemed unlawful under ***antitrust law***. *Kartell* noted that Congress enacted the Sherman Act "as a way of protecting consumers against prices that were too high, not too low." *Id. at 931*. ***HN8***[] This is achieved, **[*22]** for instance, by prohibiting firms from pricing below incremental cost, otherwise known as predatory pricing. *Id. at 927*. That is because predatory pricing "harms competitors, cannot be maintained, and is unlikely to provide consumer benefits." *Id.*

In *Kartell*, the plaintiffs, a group of physicians, did not raise a claim of predatory pricing. Instead, the plaintiffs stated that the insurer used its market power to impose low reimbursement rates on doctors. *Id. at 927*. Such "low prices discouraged them from introducing new highly desirable medical techniques." *Id.* The physicians maintained that "fully informed patients would have wanted to pay more for those techniques had they been allowed to do so." *Id.*

The First Circuit rejected the argument that a dominant insurer commits an antitrust injury when it uses its market power to bargain for low prices. ***HN9***[] That is because in the particular circumstances of the health insurance market, the roles insurers play on behalf of patients "are *like* those of a buyer." *Id. at 926* (italics in original). And, relevant here, ***antitrust law*** "rarely stops the buyer of a service from trying to determine the price or characteristic of the product that will be sold." *Id. at 925*. The "more closely Blue **[*23]** Shield's activities resemble, in essence, those of a purchaser, the less likely that they are unlawful." *Id.*

HN10[] In the Sixth Circuit, an antitrust plaintiff who challenges a competitor's pricing practices must do so under a theory of predatory pricing. In *N.W.S. Michigan, Inc. v. General Wine Liquor Co., Inc.*, the Sixth Circuit similarly considered when an antitrust plaintiff's challenge to a competitor's pricing practices gives rise to antitrust standing. *58 Fed App'x 127, 129 (6th Cir. 2003)*. The appellate court affirmed the district court's dismissal on the basis that the plaintiff "failed to allege predatory pricing and, as a result, did not have standing." *Id.*

In *General Wine*, the plaintiff was a liquor distributor who brought an antitrust suit against a competitor. The plaintiff alleged that defendant competitor enticed suppliers "to enter into exclusive contracts" by promising kick-backs in the form of advertising. *Id. at 128-29*. The defendant competitor would then "pass on the cost savings associated with being able to store and transport the dual supplier's spirits and wine products together." *Id.* The plaintiff alleged that this arrangement violated "regulations restricting vertical integration within the industry." *Id. at 129*. Characterizing **[*24]** the plaintiff's antitrust claim as an attack on the defendant's pricing practices, the district court "dismissed the case because [the plaintiff] failed to allege predatory pricing and, as a result, did not have standing." *Id.*

On appeal, the plaintiff argued that "it did not need to allege predatory pricing to satisfy the antitrust injury requirement." *Id.* The Sixth Circuit explicitly disagreed, finding that the plaintiff did not "have standing because it failed to allege predatory pricing." *Id.* The court noted that "[f]or antitrust claims based on pricing practices, the Supreme Court has adopted a strict antitrust injury rule requiring plaintiffs to allege predatory pricing." *Id.* (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-23, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* and *Atlantic Richfield, 495 U.S. at 339*). ***HN11***[] "When a private plaintiff complains about a defendant's prices, 'only predatory pricing has the requisite anticompetitive effect' to establish antitrust injury." *Id.* (citation omitted). "The economic rationale for emphasizing predatory pricing is clear: Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *Id. at 129-30* (internal quotation marks omitted).

Here, Plaintiff's claim hinges on the depressed reimbursement **[*25]** rates as a harm causing anticompetitive injury. Thus, as with *General Wine*, Plaintiff's main antitrust claim is against Defendant's pricing practices. But rather than assert a theory of predatory pricing, Plaintiff's theory is "that BCBS has monopsony power in the market for anesthesiology services." ECF No. 22, PageID.518.[2] Here, Plaintiff alleges that BSBS-MI uses its monopsony power to impose low reimbursement prices for anesthesiologists. It is not altogether clear, however, how insisting on low reimbursement rates results in a cognizable antitrust injury comparable to predatory pricing.

Plaintiff cites *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co*. for the proposition that Defendant's use of its monopsony power to drive the market price for anesthesia results in an antitrust harm. *See 549 U.S. at 320*. And monopsonization acts as a basis for competitive harm. ECF No. 22, PageID.517-18. In *Weyerhaeuser*, the Supreme Court discussed what kind of monopsonization is unlawful under the antitrust laws. The plaintiff, a sawmill operator, sued a competitor under *Section 2* of the Sherman Act. It alleged that defendant competitor attempted to monopolize the regional input market for sawlogs through predatory **[*26]** bidding. The district court rejected defendant's proposed jury instructions incorporating elements of the *Brooke Group* test. *Id. at 316-17*; *see also Brooke Group, 509 U.S. at 209 (1993)* (establishing that a plaintiff alleging predatory pricing must prove that rival priced its goods below cost and that rival had a dangerous probability of recouping its investment in below-cost prices after driving others out of business.). It instead entered judgment on the jury verdict in favor of plaintiff. The Ninth Circuit Court of Appeals affirmed. On appeal, the Supreme Court considered whether the *Brooke Group* test applies to claims of predatory bidding. *Id. at 315*. The Supreme Court held that it should and reversed the Ninth Circuit.

HN13[] Predatory bidding "involves the exercise of market power on the market's buy, or input side." *Id. at 312*. A predatory bidder "bids up the market price of an input so high that rival buyers cannot survive." *Id.* Thus, the predatory bidder acquires monopsony power, "which is market power on the buy side of the market." *Id.* The Supreme Court opined that "[p]redatory-pricing and predatory bidding are analytically similar" and that "the close theoretical connection between monopoly and monopsony suggests that similar legal standards should **[*27]** apply to both sorts of claims." *Id. at 313*. The Supreme Court further observed that "[b]oth involve the deliberate use of

[2] ***HN12***[] "Monopsony is market power on the buy side of the market." *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)* (citation omitted). "The classical theory of monopsony envisions a market with only one buyer that uses its power to reduce the quantity purchased, thereby reducing the price that the monopsonist has to pay." Blair & Harrison, Antitrust Policy and Monopsony, *76 Cornell L. Rev. 297 (1991)*.

unilateral pricing measures for anticompetitive purposes and both require firms to incur certain shortterm losses on the chance that they might later make supracompetitive profits." *Id.*

The anticompetitive injury defined in *Weyerhaeuser* is inapt here. Although the competitor in that case and Defendant here both hold dominant positions as buyers in their respective markets, that is as far as the comparison will go. One key difference is that, unlike the buyer in *Weyerhaeuser*, Defendant here is using its buying power to keep the price of inputs—anesthesia services—*down*. This would have the tendency to benefit Defendant's competitors, because as Plaintiff points out, "reimbursement concerns need to start with BCBS-MI since they are driving the market price for anesthesia." ECF No. 1, PageID.15-16. Other health insurers in the Michigan market function essentially as buyers for their insureds. *See* *Kartell, 749 F.2d at 925*. Buyers, even the competitors of buyers, favor lower prices for their inputs. And lower prices would not have the effect of driving competitors from the market. Thus, there is no risk **[*28]** that the monopsonist predatory buyer would be able to raise output prices to a supracompetitive level.

But a more fundamental flaw is that Plaintiff does not plausibly plead that low reimbursement rates incur short-term losses for Defendant. *See* *Weyerhaeuser, 549 U.S. at 323* ("A predatory-bidding scheme requires a buyer of inputs to suffer losses today on the chance that it will reap supracompetitive profits in the future."). Indeed, Plaintiff states that Defendant has profited from *low* reimbursement rates—not that BCBS-MI has suffered losses now so that they will be able to generate big profits later. Thus, Plaintiff's attempt to characterize Defendant's pricing practices as comparable to the anticompetitive practices outlined in *Weyerhaeuser* fails.

Next, Plaintiff asserts that competition is harmed when Defendant is insulated from competition as a result of paying anesthesiologists a depressed reimbursement rate. ECF No. 22, PageID.516. Plaintiff maintains that Defendant and the other hospitals have formed a conspiracy where anesthesiologists have to join Defendant's network, or else be excluded from practicing in hospitals in the local market. This traps anesthesiologists into accepting low reimbursement rates, **[*29]** which in turn discourages anesthesiologists from practicing in Michigan in the long run.

Plaintiff relies on the Third Circuit's decision in *W. Penn Allegheny Health Sys., Inc. v. UPMC* for the proposition that depressed reimbursement rates may harm competition through "suboptimal output, reduced quality, allocative inefficiencies, and (given the reductions in output) higher prices for consumers in the long run." *See* *UPMC, 627 F.3d 85, 104 (3d Cir. 2010)*. Although *UPMC* and this case both deal with allegations of depressed reimbursement rates, they are distinguishable. Not only are the facts in *UPMC* materially different from the situation before the Court, it is an out-of-circuit case and a review of the Sixth Circuit case law yields no cases with a similar holding.

In *UPMC*, plaintiff West Penn Allegheny Health System was the second-largest hospital system in metropolitan Pittsburgh. It brought an antitrust claim against the University of Pittsburgh Medical Center (UPMC), the area's dominant hospital system, and Highmark, Inc., the area's dominant health insurer. *Id.* West Penn brought claims under both the Sherman Act and state law, asserting that the defendants formed an unlawful conspiracy to protect one another from competition. **[*30]**

Specifically, "the dominant hospital system used its power in the provider market to insulate the health insurer from competition, and in exchange the insurer used its power in the insurance market to strengthen the hospital system and to weaken the plaintiff." *Id. at 91*. The plaintiff also asserted an antitrust theory that UPMC attempted to monopolize the area for specialized hospital services. The defendants moved to dismiss for failure to state a claim, which the district court granted. The alleged conspiracy was as follows. Although once locked in an intense competitive struggle, UPMC and Highmark formed a "truce." *Id. at 93*. They formed an agreement in which UPMC would "use its power in the provider market to prevent Highmark competitors from gaining a foothold in the Allegheny County market for health insurance." *Id.* In exchange, "Highmark agreed to take steps to strengthen [UPMC] and to weaken West Penn." *Id.*

Plaintiff West Penn alleged that pursuant to the defendants' "truce," Highmark paid it artificially low reimbursement rates. *Id.* at 94. Highmark "repeatedly refused to increase them." *Id.* Highmark admitted that it paid West Penn "artificially low reimbursement rates" because it feared that **[*31]** if it raised them, "[UPMC] would retaliate." *Id.* at 94. The plaintiff asserted that "the amount of underpayments—*i.e.*, the difference between the reimbursements it would have received in a competitive market and those it actually received—constitutes an antitrust injury." *Id.* at 103.

The Third Circuit observed that "had Highmark been acting alone, West Penn would have little basis for challenging the reimbursement rates." *Id. at 103*. **HN14**[] That is because dominant buyers in a market are "generally free to bargain aggressively when negotiating the prices [they] will pay for goods and services." *Id.* However, "when a firm exercises monopsony power pursuant to a conspiracy, its conduct is subject to more rigorous scrutiny." *Id.*

The question presented before the Third Circuit was whether the defendant hospital *working together with* defendant health insurer unreasonably restrained trade through their "truce." It determined that the defendants did because West Penn alleged that "Highmark paid West Penn depressed reimbursement rates, not as a result of independent decisionmaking, but pursuant to a conspiracy with UPMC, under which UPMC insulated Highmark from competition in return for Highmark's taking steps **[*32]** to hobble West Penn." *Id. at 104*. In other words, the plaintiff's allegation of antitrust injury hinged on the formation of a conspiracy where a dominant buyer used its position to reduce competition by coercing another entity to impose artificially depressed reimbursement rates on sellers of inputs. In the case of *UPMC*, the inputs were healthcare services.

Plaintiff's Complaint here is not the same. Unlike in *UPMC* where there was a direct allegation of a conspiracy in the form of an agreement requiring each conspirator to "use its market power to protect the other from competition," *id. at 93*, there is no such agreement here. UPMC paid plaintiff West Penn "artificially low reimbursement rates" essentially *at the direction* of defendant Highmark. In other words, plaintiff plausibly alleged that the defendants in *UPMC* conspired to fix prices. *See 627 F.3d at 94*.

In contrast, A4's Complaint suggests that Defendant on its own determined what it would reimburse Plaintiff. Plaintiff's theory of a conspiracy centers not on pricing but on an agreement to refuse to deal with providers that leave Defendant's network. Crucially, Plaintiff has not alleged that Defendant and its hospital affiliates Trinity or Beaumont formed an **[*33]** agreement to fix prices. And under *UPMC* it was the conspiracy to fix prices—and not a unilateral decision on reimbursement rates for anesthesiology services—that could give rise to a plausible antitrust injury. *See UPMC, 627 F.3d at 103* (observing "the general hesitance of courts to condemn unilateral behavior...But when a firm exercises monopsony power pursuant to a conspiracy, its conduct is subject to more rigorous scrutiny."). A monopsonist stating its own willingness to pay a certain price for a particular good or service is not a cognizable antitrust injury under the reasoning of *UPMC*.

Furthermore, Plaintiff alleges that Defendant worked with Trinity and its hospitals "to restrict competition in the market for anesthesiology services by, among other things, denying anesthesiologists access to medical facilities unless they go in-network." ECF No. 1, PageID.82. In an attempt to support this claim, Plaintiff refers to an email from Casalou stating his concern about the effect on Trinity's facilities and patients if Plaintiff left Defendant's network. *Id.* at PageID.42.

But this allegation is insufficient to raise an inference of conspiracy. While Casalou and Defendant were clearly acting out of their **[*34]** own legitimate business interests, in the email Casalou was relaying *potential* unilateral actions by the Defendant. For instance, Casalou wrote that Defendant would "*consider* a new process" and would "*look to* steer work away from facilities with A4." *Id.* (emphasis added). Even in the light most favorable to Plaintiff, these statements only describe *potential* courses of action. It does not even assert that Defendant had already decided on what to do, let alone that it formed an agreement with another entity.

In addition, as explained above in this subsection, Plaintiff's allegations that Defendant's low reimbursement rates tend to decrease quality and output are not sufficient to withstand a motion to dismiss. And, as explained below, it is not clear whether consumers would obtain the benefit of lower prices if Defendant paid a higher anesthesiology reimbursement rate. So, even if there had been a conspiracy between Defendant and Trinity, Plaintiff's claim would still be unavailing.

The court in *UPMC*, for instance, was concerned about combining the power of dominant buyers with the inherent dangers of conspiracies in a marketplace. That is because such restraints create the risk of "suboptimal **[*35]** output, reduced quality, allocative inefficiencies, and (given the reductions in output) higher prices for consumers in the long run." *UPMC, 627 F.3d at 104*. For instance, "UPMC's increased revenue came largely from the 'sweetheart' reimbursements it received from Highmark." *Id. at 95*. In *UPMC* the "sweetheart deal" in combination with the artificially depressed rates for West Penn were to the detriment of the rest of the competitors.

But here, Defendant's low reimbursement rates drive the market for anesthesiology services while also benefiting Defendant's competitors because insurers seek to pay lower reimbursement rates to their providers. Plaintiff thus fails to plead an antitrust injury. For these reasons, Plaintiff's reliance on *UPMC* to assert that it has suffered an antitrust injury is misplaced.

Plaintiff also alleges that but-for Defendant's anticompetitive conduct, the market for healthcare services in Michigan would see an increase in the quality of anesthesiology services because the top anesthesiologists would be incentivized to work and stay in Michigan if their rates were higher. But it is not clear from the Complaint how this would also lead to more competitive prices from the perspective of the consumer. **[*36]** In fact, it is not clear from Plaintiff's Complaint whether it is even asserting that but-for Defendant's conduct, consumers would obtain the benefit of lower premiums.

Plaintiff approaches this argument when it alleges that prices would improve for consumers if the practice group model of anesthesiology is preserved. The theory is that if Defendant is permitted to continue to engage in its allegedly anticompetitive behavior, physician-owned anesthesiology groups would not be able to continue to practice at a loss. This would force such practice groups to close down, and individual anesthesiologists would migrate to working for hospitals. Such a migration, Plaintiff alleges, results in higher prices for consumers. This potential for harm, however, is too speculative to satisfy the pleading-stage inquiry for antitrust standing. It also undercuts the contention that Plaintiff has yet suffered any antitrust injury at this point. Finally, it is not clear how preserving one business model while increasing anesthesiology rates would result in *lower* prices for consumers than would switching to some other costlier alternative, such as working at hospitals. Both would apparently run the risk **[*37]** of increased prices according to Plaintiff.

All Plaintiff alleges is that if Defendant's reimbursement rates were higher for anesthesiologists, Plaintiff would be able to retain and recruit higher quality anesthesiologists. So, it is entirely plausible that consumers would obtain the benefit of better anesthesiology services— but at a higher cost. This is not an antitrust injury because such an outcome does not clearly leave consumers better off—they may well benefit from "better" anesthesiology services, but the cost of those services would be "worse."

More critically, however, the allegations about the benefits of physician-owned provider groups that Plaintiff relies upon are painted in too broad a brush; they do not specifically apply to anesthesiologists practicing in Michigan. For example, Plaintiff claims in general that physician-owned practice groups "are an efficient method of providing quality anesthesiology services" over "the old model whereby anesthesiologists were hospital employees." ECF No. 1, PageID.60. Plaintiff cites several studies suggesting that "hospital ownership of physician practices leads to higher prices and higher levels of hospital spending." *Id.* at PageID.60 **[*38]** (quotations omitted). Another study showed that "between 2009 and 2012, hospital-owned physician organizations in California incurred higher expenditures for commercial HMO enrollees for professional, hospital, laboratory, pharmaceutical, and ancillary services than did physician-owned organizations." *Id.*

Without assessing the merit of these studies, even when viewing them in the light most favorable to Plaintiff, they fail to convince because they are not applicable to the market dynamics of anesthesiologists in Michigan. The first study, for instance, draws conclusions about "higher costs and higher levels of hospital spending" for healthcare services *in general*. It says nothing about whether anesthesiology services in Michigan would increase as a result of hospital-owned practices. The number and kinds of healthcare services offered are vast. An overall increase in healthcare costs for patients says nothing about whether patients would have to pay more for anesthesiology services—which is the issue here.

The second study is unpersuasive for similar reasons. It deals with the healthcare ecosystem in California—not Michigan. General assertions about the potential for rising costs for **[*39]** healthcare services are akin to conclusory allegations, which are inadequate in a motion to dismiss.

At bottom, ***antitrust law*** protects consumers from anticompetitive conduct that can lead to higher prices. ***HN15***[] Antitrust standing, furthermore, protects competitors from claims that fail to plausibly allege an antitrust injury. Here, Plaintiff's Complaint falls short of this threshold inquiry. Plaintiff articulates no predatory pricing theory and its attempt to graft a predatory bidding framework onto Defendant's pricing practices fails as well. Finally, Plaintiff does not make plausible allegations that Defendant's low reimbursement rates for anesthesiologists hurt consumers in the form of higher prices, reduced output, or reduced quality.

Accordingly, Plaintiff does not plausibly allege an antitrust injury.

ii. Whether Defendant's conduct was aimed at harming or actually caused harm to Plaintiff

The alleged causal chain involves Defendant conspiring with Trinity and Beaumont hospitals to pressure them to refuse to deal with providers like Plaintiff who choose to go outside of Defendant's network. This in turn enables Defendant to pay providers like Plaintiff artificially low reimbursement rates **[*40]** because providers need access to the hospital. Artificially low reimbursement rates then make it harder to recruit anesthesiologists, driving down quality of services and reducing output. For instance, Plaintiff alleges that BCBS's "artificially low rate for anesthesiology services has caused A4 to lose multiple anesthesiologists who left to work in Ohio." ECF No. 1, PageID.23.

Plaintiff also states that the low reimbursement rate "has also made it more difficult for A4 to compete nationally to recruit anesthesiologists." *Id.* In describing the nature of the harm, Plaintiff begins in April 2019 when "A4 told BCBS-MI that it could not continue to accept BCBS-MI's artificially low rate." *Id.* at PageID.7. Plaintiff identifies this point as the beginning of the conspiracy between Defendant, Trinity, and other hospitals to refuse, or threaten to refuse, to deal with providers seeking to leave Defendant's network.

Defendant responds that Plaintiff has its causal chain backwards. "A4 must allege that the harm it suffered was *caused by* the conduct it challenges." ECF No. 24, PageID.613. Defendant further argues that "A4 has not alleged facts plausibly explaining how any agreement caused illegally **[*41]** low prices *before* it existed." *Id.* (emphasis in original). Another way of putting this is that the low reimbursement rates were already in effect before BCBS-MI, Trinity, or any other hospital systems allegedly got together to exclude A4.

A review of the Complaint shows that Plaintiff has not adequately pled the causation element to establish antitrust standing. While Plaintiff alleges that Defendant's conduct against it began in April 2019 and culminated in October 2020, its allegations of harm to competition— low reimbursement rates for anesthesiology services leads to reduced output and quality—*precede* the time period when the conspiracy was formed. For instance, Plaintiff's citations for Defendant's artificially low reimbursement rates are from 2018. ECF No. 1, PageID.55. In another instance, Plaintiff relies on a 2010 RAND study as proof that Michigan "has been facing a shortage of both anesthesiologists and CRNAs." *Id.* at PageID.17. Taking this allegation as true does nothing to support the notion that Defendant's conduct harmed Plaintiff starting in April 2019 and onward. In other words, the alleged reduction in output has been occurring long before the events giving rise to **[*42]** this case.

Plaintiff states that "BCBS-MI's acts were calculated to reduce competition among commercial health insurers in Michigan." ECF No. 1, PageID.13-14. This claim is not supported by plausible allegations because the rest of the Complaint details how Defendant's actions led to reduced output and quality among anesthesiologists, as well as increased prices for consumers. However, these allegations, if true, would tend to increase competition among insurance companies because potential entrants would be incentivized to enter the commercial health insurance market by the low cost of inputs (providers) and the ability to charge relatively higher prices to buyers (insureds).

It is also not clear whether Plaintiff has adequately pled that Defendant had the requisite intent to cause the type of antitrust harm that is raised here. Although Plaintiff alleges that Defendant has intended to pay low reimbursement rates, it is not altogether clear from Plaintiff's Complaint whether Defendant also intended to reduce output and quality of services. Plaintiff needs adequate pleadings in this regard to overcome the natural inference that as a buyer of anesthesiology services on behalf of patients, **[*43]** Defendant has incentives to procure the best quality at the lowest price. Defendant is also incentivized to pay for anesthesiology services at an amount it deems fit to meet the demands of its insureds.

As such, the causal factor also weighs against Plaintiff.

iii. The directness or indirectness of Plaintiff's injury, and the related inquiry of whether the damages are speculative

Here, Plaintiff's alleged injury—low reimbursement rates leading to reduced output and quality—is indirect because it is derivative of the harm on healthcare consumers.

In *Park Avenue Radiology Associates, P.C. v. Methodist Health Systems, Inc.*, the Sixth Circuit affirmed a district court's holding that an antitrust plaintiff lacked standing and discussed the test for determining such standing. *198 F.3d 246 (6th Cir. 1999)*. The plaintiffs were providers of "outpatient radiology services for patients referred to them by primary care physicians" in the area. *Id.* They brought an antitrust suit against a group of local hospitals and insurers. *Id.* The plaintiffs challenged defendants' referral policies as anticompetitive. Specifically, they alleged that their referral arrangement steered defendants' insureds, as well as non-enrollees whose plans **[*44]** also included plaintiffs, from choosing plaintiffs' services.

The district court dismissed the case for lack of antitrust standing. The district court stated that "reduced to its essence, plaintiffs' complaint challenges the fundamental structure of the modern PPO, in that requiring in-plan referrals for plan patients is one of the primary means by which a PPO is able to fulfill its promise of increased patient volume for the preferred providers." *Id.* Furthermore, plaintiffs sought relief "to remove the primary bargaining tool by which PPOs are able to reduce health care providers' prices." *Id.* The result being that "consumers would therefore suffer if Plaintiffs were to prevail in this litigation." *Id.*

On appeal, the Sixth Circuit considered whether plaintiffs' complaint adequately pled antitrust standing. In applying the five-factor test, the court held that they did not. It rejected the plaintiff's claim that it suffered an antitrust injury in part because "their claimed lost profits are derivative of the alleged harm inflicted on the third parties—the healthcare consumers and their third-party providers, if any." *Id.* The court found that "the parties directly harmed due to the alleged **[*45]** violations are the healthcare consumers—both Health Choice members and nonmembers—and their third-party providers." *Id.* Thus, "the harm is not sufficiently causally related to the violation, and their damages are speculative in that the number of lost referrals is not easy to measure." *Id.* (citing *Associated Gen., 459 U.S. at 551-52*). The court found that "the injury is directed to the patients, or third-party insurers as the case may be, as opposed to Plaintiffs." *Id.* The district court's dismissal for lack of antitrust standing was affirmed.

Here, the harm accruing to Plaintiff is low reimbursement rates. At the same time, Plaintiff alleges that consumers, *i.e.*, patients, are harmed because the Defendant's conduct results in reduced output and quality of anesthesiology services. These alleged harms, while related, are not in harmony with each other because Plaintiff's interest in seeking higher reimbursement rates is in direct conflict with the patients' interest in keeping insurance premiums and provider payments low. So, as with *Park Avenue*, "the harm is not sufficiently causally related to the violation." *See Park Avenue, 198 F.3d at 246*.

The factor of whether its injury was direct or indirect weighs against Plaintiff's case.

iv. The potential [*46] for duplicative recovery or complex apportionment of damages and the existence of more direct victims of the alleged antitrust violation

If Defendant's conduct is in fact an antitrust violation, the harms of decreased output and quality of anesthesiology services more directly impact Defendant's insureds than they do Plaintiff. The insured patients are the ones who would suffer from reduced output and a lower quality of anesthesiology services. Plaintiff's alleged injury, low reimbursement rates, is not an antitrust injury because while it challenges Defendant's pricing practices, it is neither predatory nor exclusionary. The more direct victims of the reduced output and quality are patients and Defendant's competitors. In other words, other buyers of anesthesiology services—health insurers in the Michigan market.

Indeed, even Plaintiff's allegation that Defendant's low reimbursement rates increase the cost of health insurance premiums in the long run suggests that the more direct victims of high cost of health insurance are Defendant's own insureds. That is because Plaintiff's objective of obtaining higher reimbursement rates for providing anesthesia services is at direct odds with **[*47]** the interests of anesthesia patients, who naturally seek lower prices for those services. The existence of more direct victims of the alleged antitrust injury increases the potential for duplicative recovery.

As such, these two factors for establishing antitrust standing also weigh against Plaintiff. Without a proper basis for standing, the antitrust claims, Counts V-IX, must be dismissed without prejudice. In the absence of any federal question jurisdiction, the Court declines to exercise supplemental jurisdiction over the state law claims, Counts IIV, and X. The Complaint therefore will be dismissed without prejudice.

CONCLUSION

For all the reasons stated above, Defendant's motion to dismiss the Complaint is **GRANTED WITHOUT PREJUDICE**. Should Plaintiff wish to seek leave to amend the Complaint, **it must file a motion for leave to amend within twenty-one (21) days of the date of this Order**, or the case will be dismissed with prejudice.

IT IS SO ORDERED.

Dated: September 14, 2021

/s/ Terrence G. Berg

TERRENCE G. BERG

UNITED STATES DISTRICT JUDGE

Dichello Distribs., Inc. v. Anheuser-Busch, LLC

United States District Court for the District of Connecticut

September 14, 2021, Decided; September 14, 2021, Filed

No. 3:20-cv-01003 (MPS)

Reporter
2021 U.S. Dist. LEXIS 174001 *; 2021 WL 4170681

DICHELLO DISTRIBUTORS, INC., Plaintiff, v. ANHEUSER-BUSCH, LLC, Defendant

Core Terms

beer, wholesalers, brands, distributor, alleges, market power, manufacturers, products, prices, monopolization, monopoly power, retailers, market share, distribute, antitrust, adverse effect, Sherman Act, competitors, argues, relevant market, courts, fails, anticompetitive, contractual, horizontal, vertical, promotion, declaratory judgment, consumers, high-end

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For Anheuser-Busch, LLC, Defendant, Counter Claimant: Mark S. Baldwin, LEAD ATTORNEY, Brown Rudnick LLP, Hartford, CT.

Judges: Michael P. Shea, United States District Judge.

Opinion by: Michael P. Shea,

Opinion

RULING ON MOTION TO DISMISS

Plaintiff, Dichello Distributors, Inc. ("Dichello"), is a family-owned wholesale distributor of beer, including the beer brands manufactured by the Defendant, Anheuser-Busch, LLC ("AB"), a company that owns more than forty major brands and operates nineteen breweries within the United States. Dichello has been the exclusive distributor of AB's beer brands in New Haven, Fairfield, and Middlesex counties for many decades. Dichello has brought this action alleging that certain features of its distributor agreement with AB violate federal and state ***antitrust law*** and *Connecticut's Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. §§ 42-110a et seq.*, and that AB is tortiously interfering with Dichello's contract with the employee charged with managing its business. Dichello also seeks **[*2]** a declaration that its distributor agreement with AB is illegal and unenforceable. AB seeks to dismiss Dichello's complaint in its entirety. For the following reasons, I grant in part and deny in part AB's motion to dismiss.

I. FACTUAL BACKGROUND

The following facts are drawn from Dichello's Amended Complaint, ECF No. 17, and are accepted as true for the purposes of this ruling. I also consider the Equity Agreement and the Modified Final Judgment in *United States v. Anheuser-Busch InBev SA/NV, No. 16-1483, 2018 U.S. Dist. LEXIS 216015, 2018 WL 6684721 (D.D.C. Oct. 22, 2018)*, on which the Amended Complaint relies. *Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002)* (On a *Rule 12(b)(6)* motion, "the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference. Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint." (internal quotation marks and citations omitted)). I may also take judicial notice of the Modified Final Judgment. *Staehr v. Hartford Fin. Servs. Grp., Inc., 547 F.3d 406, 425 (2d Cir. 2008)* (On *Rule 12(b)(6)* motion, "the court may also consider matters of which judicial notice may be taken" (internal quotation marks omitted)); *DiBa Fam. Ltd. P'ship v. Ross, No. 13-06384, 2014 U.S. Dist. LEXIS 152353, 2014 WL 5438068, at *2 (S.D.N.Y. Oct. 27, 2014)* ("Courts may also take judicial notice of matters of public record, including court **[*3]** rulings, when considering motions to dismiss.").

A. State Regulation of the Beer Industry

Connecticut's Liquor Control Act "dictate[s] how alcohol is distributed from manufacturers to consumers." (ECF No. 17 ¶ 11). "The beer industry [in Connecticut] ... is divided into three tiers[:]" "(i) manufacturers; (ii) wholesalers; and (iii) retailers." (*Id.* ¶ 10, 12). "Each tier within the 'Three Tier System' is regulated by state law and any company operating within a given tier must secure a state permit to do so." (*Id.* ¶ 12). "Manufacturers in the first tier are generally prohibited from selling directly to retailers, and instead, must sell to wholesalers—who in turn sell to retailers, who then ultimately sell the beer products to the consumer." (*Id.* ¶ 13). "[A]ny given brand of beer can only be distributed by a single wholesaler within a defined territory." (*Id.* ¶ 14).

Companies operating within a tier are prohibited "from owning, operating[,] or controlling a company in a different tier." (*Id.* ¶ 15). Thus, wholesalers are protected and remain independent, which "serves as an important check on the market power of large manufacturers...." (*Id.* ¶ 19). Wholesaler independence "also facilitates **[*4]** the entry into that market of competing brands of beer, including local 'craft' beers, all of which inures to the benefit of consumers and the public." (*Id.* ¶ 20). Specifically, independent wholesalers are "critical for the marketplace" because they "can invest in relationships with brewers of all sizes to provide them with the opportunity to compete, prosper[,] and grow in the beer marketplace[,]" and, consequently, can meet consumer demand for "choice, variety, access[,] and price." (*Id.* ¶¶ 20-21).

B. The Parties

AB is a beer manufacturer that "owns and operates 19 breweries in the United States and owns more than 40 major beer brands, including Bud Light, Budweiser, Busch, Michelob, Rolling Rock, Natural Light, Stella Artois, LandShark, Shock Top, Goose Island, Blue Point, and Beck's." (*Id.* ¶ 4). AB "uses wholesalers to merchandise, sell[,] and deliver its beer brands to retailers in Connecticut. The retailers include package stores, grocery stores, restaurants[,] and bars." (*Id.* ¶ 28). "[I]ndependent wholesalers distribute the largest volume of AB beer in the United States and AB's beer brands account for a large percentage of the overall business of these independent wholesalers." **[*5]** (*Id.* ¶ 29).

Dichello is one such wholesaler. Dichello is a family-owned Connecticut corporation that distributes "numerous beer brands, including beer brands manufactured by [AB], [to retailers] and has been the exclusive distributor of AB beer brands in New Haven, Fairfield and Middlesex counties for many decades." (*Id.* ¶¶ 1-2). In addition to distributing AB's brands, Dichello also distributes brands that compete with AB, "including high-end beers that constrain AB's ability to raise prices on its premium and sub-premium brands." (*Id.* ¶ 30). The categories of beer brands are explained below.

C. The Beer Market

Beer, typically "made from a malted cereal grain, flavored with hops, and brewed via a fermentation process[,]" has a "taste, alcohol content, image, price, [among other] factors, [that] make it substantially different from other alcoholic beverages." (*Id.* ¶¶ 31, 32). As a result, "[o]ther alcoholic beverages, such as wine and distilled spirits, are not sufficiently substitutable to beer from the consumers' perspective, and ... relatively few consumers would substantially reduce their beer purchases in the event of a small but significant and non-transitory increase in the price **[*6]** of beer." (*Id.* ¶ 33).

"Americans spend nearly $120 [b]illion each year on beer, and [AB, the largest beer brewing company both in the United States and in the world,] accounts for approximately 40% of all beer sales in the U.S." (*Id.* ¶¶ 37, 38). In addition, AB sells a "vast number of brands and those brands account for a large percentage of [each] independent wholesaler's revenues." (*Id.* ¶ 39). "[T]hus, AB has significant power in the relevant market...." (*Id.* ¶ 40). The relevant market is "beer sold within the State of Connecticut and the United States[]" because, although competition between beer manufacturers exists on a national level, and decisions about brewing, marketing, and branding take place on a national level, competition is regulated by the state via the Connecticut Liquor Control Act. (*Id.* ¶¶ 34-36).

The beer market is also "segmented, based on price and quality, into three categories: (1) sub-premium, (2) premium, and (3) high-end." (*Id.* ¶ 23). Only a small portion of the beer sold by AB comes from the high-end category. (*Id.* ¶ 24). Therefore, AB seeks to maintain a "price gap" between each category so that consumers are less willing to trade up from one category to **[*7]** the next. (*Id.* ¶¶ 25-26). The price gaps "minimize competition across segments." (*Id.* ¶ 25).

D. Anheuser-Busch's Anticompetitive Conduct

Dichello alleges that "AB has used its market power in the relevant market to disadvantage rivals, restrict supply, and reduce competition." (*Id.* ¶ 41). Specifically, Dichello asserts that "AB ... has used a variety of practices and contractual provisions that impede and restrain the free and independent promotion and distribution of competing beers, generally, and high-end beers, more specifically." (*Id.* ¶ 42). Dichello alleges that AB "forced" it to enter into the Amended and Restated Wholesaler Equity Agreement ("Equity Agreement") on August 25, 2006. (*Id.* ¶¶ 43-44). These contractual terms "(i) limit the wholesaler's ability to promote, supply[,] and sell beers that compete with AB's beer brands, and (ii) place control of the wholesaler, its operations, and its business, in the hands of AB." (*Id.* ¶ 43). Dichello alleges that AB has "forced all of its independent wholesalers to sign identical or nearly identical agreements." (*Id.* ¶ 45).

The Equity Agreement requires Dichello to "devote greater effort" to AB products than other products and give priority **[*8]** "over all other products" to the efforts and resources devoted to AB products. (*Id.* ¶ 44(a), (b)). Further, "AB must approve the individual employed by Dichello to manage Dichello's entire business (the 'Equity Manager')" and the successor to the Equity Manager ("Successor Manager"). (*Id.* ¶ 44(c), (h)). The AB-approved Equity Manager has sole control of Dichello's day-to-day operations and Dichello must convey to the Equity Manager an ownership interest of at least twenty-five percent. (*Id.* ¶ 44(d), (e)). AB can withdraw its approval of the Equity Manager for good cause. (*Id.* ¶ 44(f) -(h)). Dichello alleges that the ownership interest for the Equity Manager "gives AB the ability to influence and control the individual at the wholesaler who has day-to-day control over the sale of AB's brands[,] as well as the brands of its competitors." (*Id.* ¶ 52 (emphasis omitted)). Thus, Dichello asserts that AB "effectively assumes control over its wholesalers" through its power over the Equity Manager and ability to terminate its relationship with the wholesaler if the wholesaler does not give the Equity Manager control over "the entirety of [the wholesaler's] business." (*Id.* ¶ 53). Dichello alleges **[*9]** that AB's "core qualifications" for approving an Equity Manager "are loyalty to AB and unwavering allegiance to the promotion of AB's interests alone." (*Id.* ¶ 54).

To support its claim that AB holds inappropriate control over the Equity Manager position, Dichello cites one example. In 2013, Dichello alleges that "AB orchestrated and approved the hiring of Sal DiBetta as [the] Equity Manager." (*Id.* ¶ 55). Mr. DiBetta had no experience in managing a beer wholesaler but had worked as an AB salesman for thirty-one years. (*Id.*). AB then conspired with Mr. DiBettta to control Dichello for AB's benefit. (*Id.* ¶ 56). For example, Mr. DiBetta, "under the direction of AB[,] ... changed Dichello's sales force incentives structure" to prohibit higher commissions on any products competing with AB brands. *Id.* Dichello alleges that Mr. DiBetta supplied Dichello's confidential information to AB and that Mr. DiBetta regularly communicated with AB concerning strategies to undermine Dichello's attempts to maintain independence and manage the business for the benefit of all its beer brands. (*Id.* ¶¶ 57-58).

The Equity Agreement also mandates that AB must approve of "any sale, transfer[,] or other disposition **[*10]** of any interest in Dichello, and may attempt to dictate and impose restrictions on trusts and estate planning instruments executed in connection with family ownership transfers." (*Id.* ¶ 44(j)). Dichello cannot transfer or sell an ownership interest to a third party so that Dichello becomes publicly-owned in any way. (*Id.* ¶ 44(k)). AB can terminate Dichello's distribution rights "in a manner inconsistent with Connecticut law." (*Id.* ¶ 44(l)).

Using the terms of the Equity Agreement and its market power, "AB has attempted to wrongfully exert control over its independent wholesalers including Dichello." (*Id.* ¶ 46). Dichello alleges that AB has "historically" used independent wholesalers to ensure AB's market dominance in the following ways:

- AB withheld incentives from wholesalers whose brand portfolios were not adequately aligned with AB brands and pressured wholesalers to dispense with non-aligned brands in exchange for newly acquired AB brands;
- AB "requir[ed] wholesalers to use best efforts to achieve and maintain the highest practicable sales volume and retail placement of AB products to the detriment of competing brands in the geographic area";
- AB "condition[ed] wholesaler incentives **[*11]** on sales volume for AB products, the retail placement of AB products[,] and/or on AB's percentage of beer sales in a geographic area, thereby disincentivizing a wholesaler from promoting competing brands";
- AB required wholesalers to allocate marketing spending for AB products in proportion to the wholesaler's revenues from AB products in the prior year;
- AB prohibited wholesalers from requesting that a retailer replace AB taps or shelf space with competing brands' products;
- AB also required wholesalers to report sales of AB and competitor products on a regular basis; and
- AB also "prohibit[ed] wholesalers from compensating its salespeople for the sale of competing brands unless it provides the same incentive for the sale of (typically less profitable) AB products."

(*Id.* ¶ 47).

Dichello alleges that the anticompetitive effects of the Equity Agreement and AB's conduct are intended to harm consumers of high-end beers as well as small and local brewers that impose "an important constraint on AB's ability to raise prices of premium and subpremium beers." (*Id.* ¶ 48). According to Dichello, the result of AB's conduct deters or prevents independent distributors "from selling more profitable **[*12]** competing brands," and forces them to "spend more on the promotion and distribution of less profitable AB brands than they otherwise would." (*Id.*). Dichello asserts that the anticompetitive effects of the Equity Agreement and AB's conduct "pose more acute harm to competition in states, such as Connecticut, where AB's competitors distribute a beer brand through one wholesaler in a given territory and that one wholesaler is illegally controlled by AB and its Equity Agreements." (*Id.* ¶ 50).

E. Modified Final Judgement

Some of the conduct by AB described in the Complaint has already been "curtailed" by a "Modified Final Judgment" ("MFJ") entered in litigation between AB and the Department of Justice ("DOJ"). (*Id.* ¶ 51). DOJ filed suit against AB's parent company and SABMiller plc. in response to the parent company's proposed acquisition of SABMiller. (*Id.*). As a result, in 2018, AB's parent company agreed to the MFJ, which prohibited certain anticompetitive practices under the Equity Agreement. (*Id.*). Among other things, the MFJ prohibits AB (as a subsidiary of the parent company) from "provid[ing] any reward or penalty to, or in any other way condition[ing] its relationship with an Independent **[*13]** Distributor ... based upon the amount of sales the Independent Distributor makes of a Third-Party Brewer's Beer or the marketing, advertising, promotion, or retail placement of such Beer." *United States v. Anheuser-Busch InBev SA/NV, No. 16-1483, 2018 U.S. Dist. LEXIS 216015, 2018 WL 6684721, at *8 (D.D.C. Oct.*

22, 2018). This prohibition applies to actions such as requiring the distributor to offer incentives to sell AB's beer if the distributor offers incentives to sell a third-party brewer's beer and preventing the distributor from using best efforts to sell or advertise a third-party brewer's beer. 2018 U.S. Dist. LEXIS 216015, [WL] at *8. The MFJ prevents AB from disapproving the Equity Manager or Successor Manager based on the distributor's dealings with a third-party brewer. 2018 U.S. Dist. LEXIS 216015, [WL] at *9. The MFJ also prohibits AB from requesting or requiring a distributor to report any financial information associated with the purchase, sale, or distribution of a third-party brewer's beer. *Id.*

The MFJ expressly allows AB to require distributors to use best efforts to sell, market, advertise, or promote AB's beer. 2018 U.S. Dist. LEXIS 216015, [WL] at *8 (describing best efforts as "achiev[ing] and maintain[ing] the highest practicable sales volume and retail placement of [AB's beers] in a geographic area"). AB is also allowed to condition incentives, programs, or contractual terms based on the distributor's **[*14]** sales volume of AB's beers, retail placement of AB's beers, or AB's percentage of beer industry sales in that geographic area as long as the conditions do not encourage the distributor to provide less than best efforts to third-party brewers. *Id.* AB may require a distributor to allocate to AB's beers a portion of the distributor's annual spending on marketing no greater than the portion of revenues generated by AB's beers. *Id.* The MFJ does not otherwise address AB's approval of the Equity Manager because this practice fell outside the scope of the DOJ's complaint. (ECF No. 17 ¶ 51).

F. Procedural History

Dichello first filed a complaint against AB in the Connecticut Superior Court, Judicial District of New Haven at New Haven on June 16, 2020. Case No. NNH-CV20-6105163-S, ECF No. 1. On July 17, 2020, AB removed the case to federal court on the basis of diversity jurisdiction. (ECF No. 1). AB moved to dismiss the Amended Complaint on September 11, 2020. (ECF Nos. 26, 27).

II. DISCUSSION

AB seeks dismissal under Rule 12(b)(6), arguing that Dichello failed to plead adequately (i) any antitrust claims under the Sherman Act and the Connecticut Antitrust Act, (ii) a violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), (iii) a claim for tortious interference, **[*15]** and (iv) a claim for declaratory relief. (Mot. to Dismiss, ECF No. 27 at 10-13). I will address each in turn.

A. Legal Standard

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ray v. Watnick, 688 F. App'x 41, 41 (2d Cir. 2017) (quoting Ashcroft, 556 U.S. at 678 (citations and internal quotation marks omitted)). The Court must accept the well-pleaded factual allegations of the complaint as true and draw all reasonable inferences in the plaintiff's favor. *See* Warren v. Colvin, 744 F.3d 841, 843 (2d Cir. 2014). The Court must then determine whether those allegations "plausibly give rise to an entitlement to relief." Hayden v. Paterson, 594 F.3d 150, 161 (2d Cir. 2010). In deciding a Rule 12(b)(6) motion, the Court may consider documents attached to, integral to, or incorporated by reference in the complaint.[1] Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.").

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[1] The Equity Agreement and Modified Final Judgment are incorporated into the Amended Complaint by reference. (ECF No. 17 ¶¶ 44, 51). The Court may also take judicial notice of the provisions of the Modified Final Judgment.

B. Antitrust Claims (Counts Two, Three, Four, Five, Six, and Seven)

Dichello brings six claims under the *Sherman Act* and the Connecticut Antitrust Act, seeking **[*16]** damages and injunctive relief. (ECF No. 17). AB moves to dismiss all of Dichello's antitrust claims, arguing that the Amended Complaint: (1) fails to allege antitrust standing; and (2) fails to allege adverse effects on competition. (Mot. to Dismiss, ECF No. 27 at 21-35). AB also moves to dismiss Counts Three and Seven for failure to allege monopoly power and failure to allege anticompetitive conduct, specific intent, or a dangerous probability of achieving monopoly power. (*Id.* at 30-34). AB moves to dismiss Count Four for failure to allege a per se antitrust violation and Count Five for failure to allege a tying agreement. (*Id.* at 34-36).[2] Because I agree that the Amended Complaint fails to allege per se antitrust violations, adverse effects on competition, market power, or an unlawful exclusive dealing relationship, I find that all of the antitrust claims fail, and I do not address AB's other arguments.

1. Counts Two, Four, and Six: *Conn. Gen. Stat. §§ 35-26*, *35-28* and *Section 1* of the Sherman Act

AB argues that Dichello has failed to allege conduct that violates *Section 1* of the Sherman Act and the *Conn. Gen. Stat. §§ 35-26*, *25-28*. I analyze these claims together because Connecticut courts follow "federal precedent" when interpreting the Connecticut Antitrust **[*17]** Act "unless the text of our antitrust statutes or other pertinent state law" requires a different interpretation, which neither party suggests is the case here. *Reserve Realty, LLC v. Windemere Reserve, LLC, 335 Conn. 174, 185, 229 A.3d 708 (2020)*; *see also id.* (noting that *Conn. Gen. Stat. § 35-26* is "the state analogue of [*Section 1* of the Sherman Act]"); *Tremont Pub. Advisors, LLC v. Connecticut Res. Recovery Auth., 333 Conn. 672, 693-94, 217 A.3d 953 (2019)* (noting that *Conn. Gen. Stat. § 35-28* codifies the prohibition against per se violations set forth in *Section 1* of the Sherman Act). For the reasons below, I grant the Motion to Dismiss as to Counts Two, Four, and Six.

Section 1 of the Sherman Act prohibits "[e]very contract ... or conspiracy in restraint of trade." *15 U.S.C. § 1*. Despite its broad wording, however, *Section 1* was "intended to outlaw only unreasonable restraints." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. "To prove a [Section] 1 violation, a plaintiff must demonstrate: (1) a combination or some form of concerted action between at least two legally distinct economic entities that (2) unreasonably restrains trade." *Geneva Pharms. Tech. Corp. v. Barr Laboratories, Inc., 386 F.3d 485, 506 (2d Cir. 2004)*.

Section 1 treats vertical and horizontal restraints differently. Horizontal restraints are agreements between competitors at the same level of the market structure and are sometimes considered per se violations of *Section 1*, which means that they are deemed illegal even without any evidence that they have an adverse effect on competition. *See* *United States v. Topco Assocs., Inc., 405 U.S. 596, 608-11, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)* (explaining that horizontal agreements allocating **[*18]** territories are per se illegal). The per se treatment of certain horizontal restraints reflects the "longstanding judgment that the prohibited practices by their nature have a 'substantial potential for impact on competition.'" *F.T.C. v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411, 433, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990)* (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*).

Vertical agreements, by contrast, are "combinations of persons at different levels of the market structure, *e.g.*, manufacturers and distributors." *Anderson News, L.L.C. v. American Media, Inc., 680 F.3d 162, 182 (2d Cir. 2012)* (quoting *Topco Assocs., Inc., 405 U.S. at 608*). Typically, vertical agreements are subject to rule of reason analysis, *Anderson News, L.L.C., 680 F.3d at 183*, which involves an assessment of the impact of the agreement on competition. Rule of reason analysis "requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition." *Id.* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*). In particular, under the rule of reason,

[2] AB also argues that the Amended Complaint fails to allege any injury and that it seeks an advisory opinion from the Court about conduct that AB has not actually engaged in. (Mot. to Dismiss, ECF No. 27 at 28-30).

the plaintiff must establish that the defendant's conduct "adversely affected competition in the relevant market." *MacDermid Printing Sols. LLC v. Cortron Corp., 833 F.3d 172, 182 (2d Cir. 2016)*.

a. Horizontal Restraint

Dichello argues that AB, through the Equity Agreements, is "orchestrating a horizontal restraint of trade," which "justifies per se treatment." (Opp'n, ECF No. 27 at 23). AB argues that the Equity Agreement is a "non-price vertical restraint[]" which must be analyzed under **[*19]** the rule of reason. (Reply, ECF No. 48 at 8).

I agree with AB. The Equity Agreement is a vertical restraint, not a horizontal one requiring per se treatment under Section 1. AB is a beer manufacturer (ECF No. 17 ¶ 4), and Dichello is a wholesale distributor of beers (*id.* ¶ 20). Manufacturers and distributors operate at different levels of the market. *See* *Anderson News L.L.C.., 680 F.3d at 182* (noting that agreements between manufacturers and distributors are typically vertical restraints). The Equity Agreement, as alleged, is an agreement between a manufacturer and a distributor, making it a vertical restraint subject to the rule of reason analysis.

Relying on *United States v. Apple, 791 F.3d 290 (2d Cir. 2015)*, Dichello argues that even though the Equity Agreement may be a vertical restraint, "AB's role in orchestrating a horizontal restraint of trade justifies per se treatment." (Opp'n, ECF No. 42 at 23). In *Apple*, the Second Circuit found that Apple "orchestrated a horizontal conspiracy among [publishers] to raise ebook prices." *Apple, 791 F.3d at 297*. Apple facilitated this conspiracy by contracting (vertically) with publishers on terms that "were only attractive ... to the extent [the publishers] acted collectively." *Id. at 320*. There was "strong evidence that Apple consciously orchestrated a conspiracy **[*20]** among [the publishers]" along with evidence of "express collusion among [the publishers]." *Id. at 316*. "Apple consciously played a key role in organizing that collusion" between the publishers. *Id.* The Second Circuit described this arrangement as a "'hub-andspoke' conspirac[y] in which an entity at one level of the market structure, the 'hub,' coordinates an agreement among competitors at a different level, the 'spokes.'" *Id. at 314* (citing *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 255 (3d Cir. 2010)*). To successfully allege a hub-and-spoke conspiracy, "the plaintiff must also prove the existence of a 'rim' to the wheel in the form of an agreement among the horizontal competitors." *Apple, 791 F.3d at 314 n.15*.

Dichello argues that AB, by imposing the Equity Agreement upon all the distributors, has orchestrated a conspiracy similar to the one in *Apple*. (Opp'n, ECF No. 42 at 26). But the facts alleged in the Amended Complaint belie this argument and suggest instead that AB would have little opportunity to orchestrate collusion in the manner Apple did. First, the Amended Complaint alleges that under the Connecticut Liquor Control Act, "any given brand of beer can only be distributed by a single wholesaler within a defined territory" (ECF No. 17 ¶ 14), which means there may be limited competition **[*21]** between distributors to begin with and none between distributors in the same territory over which AB would have any influence (because there can only be one distributor per territory that sells AB brands). Second, the Amended Complaint fails to allege that the Equity Agreement gives AB any direct control over prices or that it creates incentives for distributors to collude with each other as to price. Third, even if the Amended Complaint is construed as alleging that AB imposes uniform practices on all its distributors, there is still a key missing ingredient: the "rim." Nowhere does the Amended Complaint suggest that Dichello is colluding with its fellow distributors as to price, other terms or conditions of sale, or anything else. "At the pleading stage, a complaint claiming conspiracy, to be plausible, must plead 'enough factual matter (taken as true) to suggest that an agreement was made,' *i.e.*, it must provide 'some factual context suggesting [that the parties reached an] agreement,' not facts that would be 'merely consistent' with an agreement." *Anderson News, L.L.C., 680 F.3d at 184* (quoting *Bell Atlantic Corp., 550 U.S. at 556*). None of Dichello's allegations provide any facts suggesting that the distributors agreed or conspired with each other for **[*22]** anticompetitive ends.

Dichello fails to allege a horizontal conspiracy or any other agreement that warrants per se treatment under *Section 1* of the Sherman Act.

b. Vertical Restraint

As noted, the Equity Agreement is a vertical restraint that must be judged under the rule of reason. Under the rule of reason, the plaintiff bears the burden of showing that the defendant's conduct "had an actual adverse effect on competition as a whole in the relevant market." *Geneva Pharms., 386 F.3d at 506-07*. The plaintiff may satisfy the adverse effect requirement in one of two ways: (1) show an actual adverse effect on competition, or (2) establish that defendant had sufficient market power to cause harm to competition. *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 546 (2d Cir. 1993)*.

Plaintiffs can show actual adverse effects on competition by demonstrating reduced output, increased prices, or decreased quality. *Virgin Atl. Airways Ltd. V. British Airways PLC, 257 F.3d 256, 264 (2d Cir. 2001)*. Dichello fails to plausibly allege that AB's conduct has caused actual adverse effects on the market. In the Amended Complaint, Dichello states that "AB has used its market power in the relevant market to disadvantage rivals, restrict supply, and reduce price competition." (ECF No. 17 ¶ 41). But this statement is conclusory, and Dichello alleges no facts to support it.

Dichello alleges that "AB **[*23]** ... has used a variety of practices and contractual provisions that limit, impede and restrain the free and independent promotion and distribution of competing beers, generally, and high-end beers, more specifically." *Id.* ¶ 42. "AB has forced upon its independent wholesalers contractual terms that (i) limit the wholesaler's ability to promote, supply and sell beers that compete with AB's beer brands, and (ii) place control of the wholesaler, its operations, and its business, in the hands of AB." *Id.* ¶ 43. Taken as true, these statements do not suggest that these restraints on promotion and distribution actually harmed competition by reducing output, increasing prices, or decreasing quality. Nor is there any suggestion that they actually succeeded in foreclosing competition. The Amended Complaint also states that AB's requirement for wholesalers to allocate marketing spending for AB products proportionally to the revenues generated by AB products "limit[s] the marketing spending necessary for new products entering the marketplace from competing manufacturers," (ECF No. 17 ¶ 47(e)), but Dichello has not alleged that any competitors either failed to gain entry to the market because of **[*24]** AB's conduct or that any distributors declined to carry other manufacturers' products because of AB's conduct. At most, the Court can draw an inference that AB makes it more difficult for the wholesalers to spend disproportionately large amounts of their marketing on the promotion and distribution of competing beers. That is insufficient to plead an actual adverse effect on competition.

The indirect method to establish actual adverse effects is to show that the defendant had sufficient market power to cause an adverse effect on competition. "Market power is the ability: '(1) to price substantially above the competitive level *and* (2) to persist in doing so for a significant period without erosion by new entry or expansion.'" *Com. Data Servers, Inc. v. Int'l Bus. Machs. Corp., 262 F.Supp.2d 50, 73 (S.D.N.Y. 2003)* (quoting *AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, 227 (2d Cir.1999)*). Plaintiffs may prove market power "directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share of the market." *Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 98-99 (2d Cir. 1998)*.

The Second Circuit has held "that a market share of over 70 percent is usually 'strong evidence' of monopoly power," *Tops Mkts., Inc., 142 F.3d at 98-99*, but "a market share below 50% is rarely evidence of monopoly power," *Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc., 651 F.2d 122, 129 (2d Cir. 1981)*. The higher the market share, the stronger the inference of monopoly power, **[*25]** but there is not a threshold market share to find market power. *Id. at 129-30* (stating that because the evidence presented a "fair jury issue of monopoly power," the jury should not have been instructed to find monopoly power lacking below a specified market share).

Dichello argues that the Amended Complaint plausibly alleges market power through market share, control over prices, and exclusion of competition. (Opp'n, ECF No. 42 at 33-34). Dichello identifies the relevant market as beer sold in Connecticut and the United States, and AB does not contest this market definition for purposes of this motion. (ECF No. 17 ¶ 36). Dichello alleges that AB is the "largest beer brewing company both in the United States and the world" and "accounts for approximately 40% of all beer sales in the United States." (*Id.* ¶¶ 37-38). Further, AB "account[s] for a large percentage of independent wholesaler's [sic] revenues." (*Id.* ¶ 39). These allegations, even when construed in the light most favorable to Dichello, are insufficient to support a reasonable inference of market power. A market share of 40% in the United States, without more, does not support a reasonable inference of market power. *See* *PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 109 (2d Cir. 2002)* (finding that "a **[*26]** 64 percent market share is insufficient to infer monopoly power" "[a]bsent additional evidence, such as an ability to control prices or exclude competition"); *Tops Mkts., Inc., 142 F.3d at 98-99* (concluding that there was no monopoly power even with 72% market share due to low barriers to entry); *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1411 (7th Cir. 1995)* ("Fifty percent is below any accepted benchmark for inferring monopoly power from market share."). Further neither AB's alleged status as the "largest beer brewing company" nor the allegation that it accounts for "a large percentage" of each wholesaler's revenues suggests that it has market power.

Dichello also argues that it has alleged that AB has market power through its control over prices and/or exclusion of competition. (Opp'n, ECF No. 42 at 33). Specifically, "AB (1) withheld incentives against wholesalers/distributors who did not adequately 'align' their portfolios with AB brands; (2) pressured wholesalers to dispense with non-AB brands in favor of AB brands; (3) conditioned incentives on sales volume of AB products; and (4) forbade wholesalers from even requesting that a retailer replace AB taps or shelf space with competing taps or shelf space."[3] (Opp'n, ECF No. 42 at 33); (*see* ECF No. 17 ¶ 47). Dichello also alleges **[*27]** that AB has forced upon distributors contractual terms that limit the wholesaler's ability to promote, supply, and sell competing beers, and place control of the wholesaler in the hands of AB through the approval of the Equity Manager. (*Id.* ¶¶ 43-44). But these allegations do not speak to control over pricing at all. And there are no facts pled anywhere else in the Amended Complaint suggesting that AB can dictate the pricing of its products once they are in the hands of independent distributors, let alone that it can successfully price above competitive levels for significant periods through control over pricing in the market. If anything, Dichello's allegations indicate that AB *lacks* the ability to price independently in the premium and sub-premium beer segments. "[C]ompetition in the high-end beer segment serves as an important constraint on the ability of AB to raise beer prices in the premium and sub-premium segments." (ECF No. 17 ¶ 27). Further, while Dichello's allegations suggest that AB has sought to require independent distributors to favor its brands at the expense of competing brands, they do not suggest this strategy has been successful in actually excluding any competing **[*28]** beer manufacturers from the relevant market. *See* *Tops Markets, Inc., 142 F.3d at 96* (no adverse effect on competition where plaintiff did not allege that other supermarkets were excluded from the market but only that plaintiff was prevented from opening store).

Because Dichello fails to allege actual adverse effects or market power, Dichello fails to plead a violation of *Section 1* under the rule of reason. Therefore, I grant the Motion to Dismiss as to Counts Two, Four, and Six.

2. Counts Three and Seven: *Conn. Gen. Stat. § 35-27* and *Section 2* of the Sherman Act

Dichello also makes claims under *Section 2* of the Sherman Act and *Conn. Gen. Stat. § 35-27*. I analyze these claims together because *Section 35-27* "is patterned after *[Section] 2* of the Sherman Act." *Shea v. First Federal Sav. & Loan Asso., 184 Conn. 285, 304 (Conn. 1981), 439 A.2d 997*; *see also* *Tremont Pub. Advisors, 333 Conn. at 691* (stating that the Connecticut state courts "follow federal precedent" when interpreting the act unless state law indicates otherwise). For the reasons below, I grant the Motion to Dismiss as to Counts Three and Seven. *Section 2* of the Sherman Act prohibits monopolization and attempts to monopolize. *See* *15 U.S.C. § 2*. Dichello alleges two claims under *Section 2*: (1) monopolization and (2) attempted monopolization. (ECF No. 17 ¶ 103).

[3] Although some of these practices are no longer allowed under the Modified Final Judgment which prohibits AB from "condition[ing] its relationship with[] an Independent Distributor ... upon the amount of sales the Independent Distributor makes of a Third-Party Brewer's Beer or the marketing, advertising, promotion, or retail placement of such beer," *MFJ, 2018 U.S. Dist. LEXIS 216015, 2018 WL 668472 at *8*, I consider them to the extent they could support a claim for damages for AB's past practices.

a. Monopolization

To establish a monopolization claim, "plaintiffs must prove that defendants possessed monopoly power, and willfully acquired or maintained **[*29]** that power in the relevant market." *Geneva Pharms., 386 F.3d at 495* (citing *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*). Monopoly power, which is a synonym for market power, is the "power to control prices or exclude competition." *Geneva Pharms., 356 F.3d at 500*; *see* *In re Aluminum Warehousing Antitrust Litig., 95 F.Supp.3d 419, 453 (S.D.N.Y. 2015)* (stating that market power is sometimes referred to as monopoly power). Plaintiffs may prove monopoly power "directly through evidence of control over prices or the exclusion of competition" or indirectly based on market share. *Geneva Pharms., 389 F.3d at 500*. "[W]illful acquisition or maintenance" is shown if the defendant "use[s] monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak Co. v. Image Tech Servs., Inc., 504 U.S. 451, 482-83, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. "The willful acquisition or maintenance of monopoly power is to be distinguished from growth or development that is the result of superior product, business acumen or historical accident." *Id. at 495*.

As discussed above in connection with *Section 1* of the Sherman Act, Dichello has failed to allege facts suggesting that AB has monopoly or market power. Therefore, the monopolization claim fails.

b. Attempted Monopolization

Attempted monopolization requires "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. "Attempted **[*30]** monopolization requires some degree of market power," but a "lesser degree of market power" than monopolization claims. *Tops Mkts., Inc., 142 F.3d at 100*. "In order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market." *Spectrum Sports, Inc., 506 U.S. at 456*; *see also* *Tops Mkts., Inc., 142 F.3d at 100* (noting that in determining the likelihood of achieving market power, the Court must look at "the defendant's relevant market share in light of other market characteristics, including barriers to entry").

Dichello argues that it has adequately pled attempted monopolization based on AB's alleged anticompetitive conduct via the Equity Agreement and AB's market share. (Opp'n, ECF No. 42 at 37). As noted, the Amended Complaint alleges that "AB accounts for approximately 40% of all beer sales" in the relevant market. (ECF No. 17 ¶¶ 38, 36). Although an attempted monopolization claim requires a "lesser degree of market power," *Tops Mkts., Inc., 142 F.3d at 100*, Dichello's allegations still fall short. As discussed above, market share of 40% does not support a reasonable inference of market power. Further, Dichello fails to allege market conditions that make the beer market **[*31]** ripe for monopolization, such as high barriers to entry, or that AB has the ability or is near gaining the ability to insulate its prices from competitive pressure. *See* *Apotex Corp. v. Hospira Healthcare Indian Priv. Ltd., No. 18-4903, 2020 U.S. Dist. LEXIS 2343, 2020 WL 58247, at *7 (S.D.N.Y. Jan. 6, 2020)* (finding that the Plaintiff failed to allege a dangerous probability of acquiring market power with market shares of 43.57% and 30.76% and allegations that "make plain that there was never a 'dangerous probability' that [Defendant] could insulate its prices from competition, given that [Defendant] was bound to prices set by" competitors).

Dichello argues that it has pled "high barriers to entry in this business," (Opp'n, ECF No. 42 at 37), but one searches the Amended Complaint in vain for any factual allegations about barriers to entry. Indeed, the Amended Complaint suggests that even local "craft" beers have succeeded in entering the market, thanks in part to the "tiered" market structure and the independence of wholesalers. (ECF No. 17 at ¶¶ 19-21). Although the Amended Complaint alleges that AB has sought to undermine that independence, it has not alleged any facts suggesting that AB has succeeded in erecting barriers to entry. The Amended Complaint alleges no facts about whether it is difficult for new beer manufacturers **[*32]** to enter the market or how long it takes to enter the market. *See* *United States v. Visa U.S.A., Inc., 163 F.Supp.2d 322, 342 (S.D.N.Y. 2001)* (stating that the "longer the lags before new entry, the less likely it is that potential entrants would be able to enter the market in a timely, likely, and sufficient scale to deter or counteract any anticompetitive restraints"). And as noted above, Dichello alleges that the "competition in the high-end beer segment serves as an important constraint on the ability of AB to raise beer prices in the premium and sub-premium segments." (ECF No. 17 ¶ 27). As previously discussed, this allegation undermines any argument that AB can insulate or control prices in those segments.

Dichello has failed to allege a dangerous probability of achieving market power. Because Dichello failed to plead adequately a claim of monopolization or attempt to monopolize under *Section 2* of the Sherman Act, I grant the Motion to Dismiss as to Counts Three and Six.

3. Count Five: *Conn. Gen. Stat. § 35-29*

Dichello also sets forth a claim under *Conn. Gen. Stat. § 35-29*, which provides that "[e]very lease, sale or contract for the furnishing of services or for sale of commodities ... shall be unlawful where the effect of such lease or sale or contract for sale or such condition or understanding may be to **[*33]** substantially lessen competition or tend to create a monopoly in any part of trade or commerce." *Conn. Gen. Stat. § 35-29* is "the Connecticut analogue of [Section] 3 of the Clayton Act." *Reserve Realty, LLC, 335 Conn. at 199*. "Section 3 provides a cause of action for anti-competitive 'product tying' and 'exclusive dealing' arrangements." *Campbell v. Austin Air Systems, Ltd., 423 F.Supp.2d 61, 70 (W.D.N.Y. 2005)*. To prove an illegal tying arrangement, the plaintiff "must demonstrate ... that a defendant tied the sale of two distinct products; in other words, that it sold one product on the condition that another be purchased as well." *Id.*

An exclusive dealing agreement is a contract between a seller and a buyer that prohibits the buyer from purchasing the goods from another seller. *Conn. Ironworkers Employers' Ass'n v. New England Reg'l Council of Carpenters, 324 F.Supp.3d 293, 306 (D. Conn. 2018)*. The agreement does not need to contain an "express exclusivity requirement ... because *de facto* exclusive dealing may be unlawful." *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 282 (3d Cir. 2012)*; *see also* *Maxon Hyundai Mazda v. Carfax, Inc., No. 13-2680, 2014 U.S. Dist. LEXIS 139480, 2014 WL 4988268, at *11 (S.D.N.Y. Sept. 29, 2014)* ("The concept of *de facto* exclusivity is based on the premise that some agreements, though they do not require a contracting party not to deal in its counterparty's competitor's goods in so many words, still have the effect of being exclusive."). Section 3 of the Clayton Act only prohibits exclusive dealing agreements that "substantially lessen competition or tend to create a monopoly in a line of commerce." *Anheuser-Busch, Inc. v. G.T. Britts Distrib., Inc., 44 F.Supp.2d 172, 176 (N.D.N.Y. 1999)*; *see* *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)* (stating **[*34]** that there is no violation of the Clayton Act unless the agreement "will foreclose competition in a substantial share of the line of commerce affected"). In determining whether the agreement is illegal, courts examine if competitors can reach the market through other ways and if there are high barriers to entry. *See* *CDC Technologies, Inc. v. IDEXX Laboratories, Inc. 186 F.3d 74, 80-81 (2d Cir. 1999)* (concluding that there was no evidence that the exclusive dealing contract impeded a competitor's ability to reach customers or that there were "significant barriers to entry"). In addition, courts evaluate whether the agreements are imposed on distributors rather than end-users, because the former are "generally less cause of anticompetitive concern [since] there may be other avenues available to competing manufacturers to distribute their product." *Anheuser-Busch, Inc., 44 F.Supp.2d at 176*.

In its opposition brief, Dichello asserts that it did not allege a "tying arrangement," but, instead, an exclusive dealing arrangement in violation of *Conn. Gen. Stat. § 35-29*. (Opp'n, ECF No. 42 at 38-39). Specifically, Dichello argues that it pled an exclusive dealing arrangement based on AB's coercion of distributors to sign the Equity Agreement, which "forced Dichello to devote greater efforts" to AB products. (*Id.* at 39). I disagree. The Amended **[*35]** Complaint does not plead an unlawful exclusive dealing agreement. First, Dichello admits being the "wholesale distributor of numerous beer brands" including AB. (ECF No. 17 ¶ 2). While AB contracts only with Dichello to distribute AB beers in New Haven, Fairfield, and Middlesex—as required by state law—Dichello is free to distribute other beer manufacturers' products. (*Id.* ¶ 2); *see also* (*id.* ¶ 14 (alleging that the Connecticut Liquor Control Act prohibits a single brand from being distributed by more than one distributor in the same territory, but not that distributor may not carry competing brands)). Nor does Dichello allege that the effect of the Equity Agreement is to impose *de facto* exclusivity. The Amended Complaint does not contain allegations suggesting that, as a result of the Equity Agreement and the "best efforts" clause, Dichello cannot distribute other products or that Dichello has, in fact, stopped distributing other brands.

Even if the Equity Agreement were an exclusive dealing arrangement, Dichello has not pled that it forecloses competition in a substantial share of the beer market either in Connecticut or the United States. As discussed above, Dichello has not alleged **[*36]** that the requirements imposed on it under the Equity Agreement have actually succeeded in foreclosing any competition. The allegations that the Equity Agreement requires Dichello to favor AB's brands do not suggest that the Agreement has had the effect of foreclosing competition from other brands. Indeed, competing beer manufacturers may, according to the allegations, sell their brands through other distributors, even in Dichello's territory. (ECF No. 17 ¶ 14); *see* *Anheuser-Busch, Inc., 44 F.Supp.2d at 176* (dismissing the distributor's counterclaim under Section 3 of the Clayton Act because "[t]he Complaint does not allege that [the manufacturer's] competitors are precluded from reaching retailers because of the [manufacturer's handling of its distributor arrangements]").

Dichello fails to plead a claim under *Conn. Gen. Stat. § 35-29*. I grant the Motion to Dismiss as to Count Five.

C. Count One: CUTPA

CUTPA prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Conn. Gen. Stat. § 42-110b*. A CUTPA claim must allege that "(1) the defendant committed an unfair or deceptive act or practice; (2) the act complained of was performed in the conduct of trade or commerce; and (3) the prohibited act was the proximate cause of **[*37]** harm to the plaintiff." *Pellet v. Keller Williams Realty Corp., 177 Conn.App. 42, 62, 172 A.3d 283 (2017)*. Courts consider three factors to determine whether an act or practice is unfair: 1) whether it is in violation of public policy as established by common law or statute, 2) whether it is otherwise immoral, and 3) whether it causes substantial harm to consumers. *Tillquist v. Ford Motor Credit Co., 714 F. Supp. 607, 616 (D. Conn. 1989)*.

Dichello's CUTPA claim is based on two theories: (1) AB violates the public policy underlying state and federal antitrust laws, and (2) AB's control of Dichello through the Equity Agreement violates the public policy embodied in the Connecticut Liquor Control Act. (Opp'n, ECF No. 42 at 15-23); (ECF No. 17 ¶¶ 60-70). I address only the latter theory and find it sufficient to support the CUTPA claim.

Under the Connecticut Liquor Control Act, the state grants separate permits for beer manufacturers, wholesalers, and retailers. *See e.g.*, *Conn. Gen. Stat. §§ 30-16*, *30-17c*, *30-20*. Regulations issued under the Act prohibit any "person, corporation or group of persons or corporations who, through stock ownership or otherwise, control or have the power to control a permit business of one class" from "control[ing] or hav[ing] the power to control a permit business of another class of permit." *Conn. Agencies Regs. § 30-6-A4(b)*. I find that Dichello has alleged a violation of the **[*38]** public policy underlying this provision and, thus, has alleged a CUTPA violation based on the "public policy" prong.

The Connecticut Liquor Control Act was enacted in part to "eliminate[] the so-called 'tied-house evil.'" *Eder v. Patterson, 132 Conn. 152, 155, 42 A.2d 794 (1945)*. "Tied-house evil" is the "monopolistic control of distributors by manufacturers" of alcohol. *Park Benziger & Co., Inc. v. Southern Wine & Spirits, Inc., 391 So.2d 681, 683 n.3 (Fla. 1980)*. Here, Dichello alleges that AB is violating the public policy of preventing "tied-house evil" because it has approval rights over the Equity Manager, only the Equity Manager can control the daily operations of the wholesaler, Dichello must convey the Equity Manager an ownership interest of at least 25%, AB can withdraw its approval of the Equity Manager, and AB must approve the successor to the Equity Manager. (ECF No. 17 ¶ 44). Regardless of whether these allegations describe an actual violation of the "control" restrictions in the Liquor Control Act, when construed in Dichello's favor, they amount to a violation of the broader policy underlying the Act. From the facts pled, it is reasonable to believe that AB asserts substantial influence over the wholesaler.

AB argues that it does not control Dichello and that Dichello is a family-owned business. (Mot. to Dismiss, ECF **[*39]** No. 27 at 19). AB relies on *Eder v. Patterson, 132 Conn. 152, 42 A.2d 794 (1945)*, which involved the Connecticut Liquor Control Commission's refusal to renew wholesale liquor permits in two cases. Both cases involved an employer and employee who held retail permits and also owned stock in an applicant for a wholesale permit. *132 Conn. at 154-55*. Individually, the employer and employee owned less than 50% of the stock, but together they owned 50% or more. *Id.* The court found that neither employer-employee pair controlled the corporations that sought the permit because neither owned a majority of the stock. *Id. at 155*. The court noted that the decision might have been different had there been evidence about the relationship between the employer and the employee to justify treating their stock ownership as a single bloc. *Id. at 155-56*.

Eder is distinguishable for two reasons. First, *Eder* involved a violation only of the Liquor Control Act, *Id. at 153-54*, not CUTPA, and CUTPA sweeps more broadly. "[W]hile a violation of another statute *can* serve as the basis for a CUTPA claim, the defendant in the present case does not necessarily have to be found to have violated the Liquor Control Act in order to be found to have violated CUTPA for conduct controlled by the Liquor Control Act. [The Connecticut **[*40]** Supreme Court] previously has indicated that a plaintiff may bring a CUTPA claim that is predicated upon the public policy embodied in another statute, irrespective of whether the conduct in question expressly is prohibited by the letter of that statute, so long as the claim is consistent with the regulatory principles established by the underlying statute." *Eder Bros. v. Wine Merchs. of Conn., Inc., 275 Conn. 363, 381 (2005)* (internal quotation marks and citation omitted). Second, as the decision itself notes, *Eder* does not involve facts relating to control outside of stock ownership and does not foreclose a finding of control based on other facts. Because of the breadth of CUTPA, I need not decide whether the facts alleged regarding the influence AB has gained through the Equity Agreement actually amount to a prohibited level of control under the Liquor Control Act. I note only that the *Eder* decision would not foreclose a finding of such control.

Because Dichello has pled a plausible CUTPA claim, I deny the motion to dismiss Count One.

D. Count Eight: Tortious Interference with Contract

Dichello alleges that AB, through the terms of the Equity Agreement and its direct dealings with Dichello's Equity Manager, has interfered with Dichello's contractual **[*41]** relationship with its Equity Manager. (ECF No. 17 ¶¶ 108-10). "A claim for tortious interference with contractual relations requires the plaintiff to establish (1) the existence of a contractual or beneficial relationship, (2) the defendants' knowledge of that relationship, (3) the defendants' intent to interfere with the relationship, (4) the interference was tortious, and (5) a loss suffered by the plaintiff that was caused by the defendants' tortious conduct." *Landmark Inv. Grp., LLC v. CALCO Constr. & Dev. Co., 318 Conn. 847, 864, 124 A.3d 847 (Conn. 2015)* (quoting *Appleton v. Bd. of Ed. of Town of Stonington, 254 Conn. 205, 212-13, 757 A.2d 1059 (2000)*). For a successful tortious interference claim, the plaintiff "must prove that the defendant's conduct was in fact tortious." *Landmark Inv. Grp., LLC, 318 Conn. at 868*. "This element may be satisfied by proof that the defendant was guilty of fraud, misrepresentation, intimidation or molestation ... or that the defendant acted maliciously." *Id.* (quoting *Daley v. Aetna Life & Casualty Co., 249 Conn. 766, 805, 734 A.2d 112 (1999)*). "The plaintiff in a tortious interference claim must demonstrate malice on the part of the defendant, not in the sense of ill will, but intentional interference without justification." *Daley, 249 Conn. at 806*. "[N]ot every act that disturbs a contract or business expectancy is actionable." *Id.* Thus, "an action for intentional interference with business relations ... requires the plaintiff to plead ... at least some improper **[*42]** motive or improper means." *Blake v. Levy, 191 Conn. 257, 262, 464 A.2d 52 (1983)*.

AB argues that Dichello's tortious interference claim is limited to its allegations about the dealings with Sal DiBetta, which is time-barred. (Mot. to Dismiss, ECF No. 27 at 36); *see* *Conn. Gen. Stat. § 52-577* (stating that "[n]o action founded upon a tort shall be brought but within three years from the date of the act or omission"). I disagree that Dichello's allegations are limited to Sal DiBetta. Even if the claims about Mr. DiBetta are time-barred,[4] Dichello

[4] It is not clear if the claims are time-barred. Dichello hired Mr. DiBetta in 2013. (ECF No. 17 ¶ 55). The Amended Complaint does not mention when Mr. DiBetta terminated his employment with Dichello.

alleges an ongoing interference with its current contractual relationship with the Equity Manager. Dichello asserts that AB is aware of the relationship between Dichello and the Equity Manager, that the Equity Manager owes a duty of loyalty to Dichello, but that AB maintains control over the Equity Manager. (*See* ECF No. 17 ¶¶ 52-53, 108-09). There are no allegations suggesting that the Equity Manager position has been terminated or that the Equity Agreement provisions concerning the Equity Manager no longer apply.

AB also argues that Dichello fails to allege that AB had an improper motive or used improper means. (Mot. to Dismiss, ECF No. 27 at 37). I disagree. Dichello alleges that AB seeks to undermine Dichello's relationship **[*43]** with the Equity Manager "to advance its own economic interests to the detriment of Dichello." (ECF No. 17 ¶ 110). Dichello further asserts that AB "has used a variety of practices and contractual provisions that limit, impede and restrain the free and independent promotion and distribution of competing beers, generally, and high-end beers, more specifically." (*Id.* ¶ 42). Dichello supports this assertion by pointing to provisions of the Equity Agreement by which AB seeks to limit the wholesaler's promotion of competing beers. (*See id.* ¶ 47). When these allegations are construed in Dichello's favor, they are adequate to plead improper motive.

Because Dichello has pled a tortious interference claim, I deny the Motion to Dismiss as to Count Seven.

E. Declaratory Relief (Count Nine)

The Declaratory Judgment Act provides that the courts "may declare the rights and other legal relations of any interested party seeking such declaration" in a case of "actual controversy." *28 U.S.C. § 2201(a)*. An actual controversy exists when there is a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co., 411 F.3d 384, 388 (2d Cir. 2005)* (quoting *Md.* *Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826 (1941)*). **[*44]**

However, the Declaratory Judgment Act "confers a discretion on the courts rather than an absolute right upon the litigant." *Wilton v. Seven Falls Co., 515 U.S. 277, 287, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995)*. Courts may exercise their discretion to refuse to hear a "declaratory action that they would otherwise be empowered to hear." *Dow Jones & Co. v. Harrods Ltd., 346 F.3d 357, 359 (2d Cir. 2003)* (per curiam). In deciding whether to exercise their discretion to issue a declaratory judgment, courts consider "(1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; ... (2) whether a judgment would finalize the controversy and offer relief from uncertainty[;] ... [(3)] whether the proposed remedy is being used merely for 'procedural fencing' or a 'race to res judicata'; [(4)] whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court; and [(5)] whether there is a better or more effective remedy." *Id. at 359-60*. Courts reject declaratory judgment claims "'when other claims in the suit will resolve the same issues,' because under such circumstances, a declaratory judgment will not serve any useful purpose." *Optanix v, Alorica Inc., No. 20-9660, 2021 U.S. Dist. LEXIS 125808, 2021 WL 2810060, at *3 (S.D.N.Y. July 6, 2021)* (quoting *EFG Bank AG, Cayman Branch v. AXA Equitable Life Ins. Co., 309 F. Supp. 3d 89, 99 (S.D.N.Y. 2018)*).

Dichello "seeks a declaration that the AB Equity Agreement and/or its provisions **[*45]** are illegal, invalid and/or unenforceable," (ECF No. 17 ¶ 116), because it violates the Connecticut Liquor Control Act, the Connecticut Antitrust Act, and the Sherman Act, (ECF No. 17 ¶ 114). The request for declaratory judgment is thus duplicative of the relief sought under Counts One through Seven. Dichello also seeks a declaration that the Equity Agreement is invalid because it "lacks consideration." (ECF No. ¶ 115). But Dichello pleads no facts that support this conclusory allegation and provides little explanation for the notion of lack of consideration in its opposition brief. Under these circumstances, I decline to grant the requested declaratory judgment and dismiss Count Nine.

III. CONCLUSION

Defendant's Motion to Dismiss is GRANTED with respect to Counts Two through Seven and Count Nine and DENIED with respect to Counts One and Eight.

IT IS SO ORDERED.

/s/ Michael P. Shea, U.S.D.J.

Dated: Hartford, Connecticut

September 14, 2021

To v. Jbs USA Food Co. Holdings (In re Cattle Antitrust Litig.)

United States District Court for the District of Minnesota

September 14, 2021, Decided; September 14, 2021, Filed

Civil No. 19-1222 (JRT/HB); Civil No. 19-1129 (JRT/HB); Civil No. 20-1319 (JRT/HB); Civil No. 20-1414 (JRT/HB)

Reporter
2021 U.S. Dist. LEXIS 255869 *; 2021 WL 7757881

IN RE CATTLE ANTITRUST LITIGATION. This Document Relates to: All Actions.KENNETH PETERSON et al., Plaintiffs, v. JBS USA FOOD COMPANY HOLDINGS et al., Defendants.IN RE DPP BEEF LITIGATION. This Document Relates to: All Actions.ERBERT & GERBERT'S, INC., Plaintiff, v. JBS USA FOOD COMPANY HOLDINGS et al., Defendants.

Core Terms

Defendants', cattle, motion to dismiss, beef, Purchaser, Plaintiffs', slaughter, Indirect, consumer protection, prices, conspiracy, Producer, volumes, per head, allegations, antitrust, unjust enrichment, margins, packers, reductions, Approve, Practices, email, anticompetitive, coordinated, factors, courts, claim for damages, fourth quarter, unconscionable

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Judges: JOHN R. TUNHEIM, Chief United States District Judge.

Opinion by: JOHN R. TUNHEIM

Opinion

MEMORANDUM OPINION AND ORDER

Plaintiffs, comprising four putative classes across several actions, allege that Defendants, the nation's four largest beef packers, conspired to generate historically unprecedented profit margins in violation of the Sherman Act, the Packers and Stockyards Act, and myriad state laws; and that Defendants manipulated the Live Cattle Futures market in violation of the Commodity Exchange Act. Defendants ask the Court to dismiss **[*3]** Plaintiffs' claims.

Previously, the Court granted Defendants' first joint motions to dismiss because Plaintiffs had not pleaded plausible direct evidence of an unlawful agreement or enough defendant-specific allegations of parallel conduct. The Court also granted Plaintiffs leave to amend. Because Plaintiffs now plausibly plead that Defendants conspired to suppress the price of fed cattle and drive up the price of beef in order to realize sky-high margins, the Court will deny Defendants' Joint Motions to Dismiss except with respect to some of Plaintiffs' state law claims. Additionally, the Court will deny Defendants' Individual Motions to Dismiss and grant Plaintiffs' Motions to Approve Alternative Service on JBS S.A.

BACKGROUND

I. FACTUAL BACKGROUND[1]

Plaintiffs consist of cattle producers, producer organizations, and those who transact in live cattle futures and options (collectively, "Producer Plaintiffs"); direct purchasers of beef ("Direct Purchaser Plaintiffs"); and consumer and commercial-and-institutional indirect purchasers of beef (collectively, "Indirect Purchaser Plaintiffs").[2] Defendants—Cargill, Inc. and a Cargill subsidiary ("Cargill"), JBS S.A. and JBS subsidiaries ("JBS"), **[*4]** Tyson Foods, Inc. and a Tyson subsidiary ("Tyson"), and National Beef Packing Company, LLC ("National Beef")—are packers that purchase fed cattle for slaughter and then sell high-quality beef products to processors, wholesalers, and retail outlets. (ECF 19-1222, Sealed Third Am. Compl. ("TAC") ¶¶ 3, 42-67, Dec. 28, 2020, Docket No. 312.)[3] Defendants purchase and slaughter between 82% and 87% of all fed cattle sold on an annual basis. (*Id.* ¶ 4.)

Fed cattle prices increased steadily from 2009 to 2014 in response to strong beef demand and a shortage of fed cattle following several years of droughts. (*Id.* ¶ 7.) In November 2014, the price for fed cattle peaked at $170 per hundredweight ("cwt"). (*Id.*) The industry expected the price of fed cattle to stabilize in 2015, continue at or around the $150/cwt mark for several years, and then experience a gradual decline. (*Id.*) However, beginning in 2015, the

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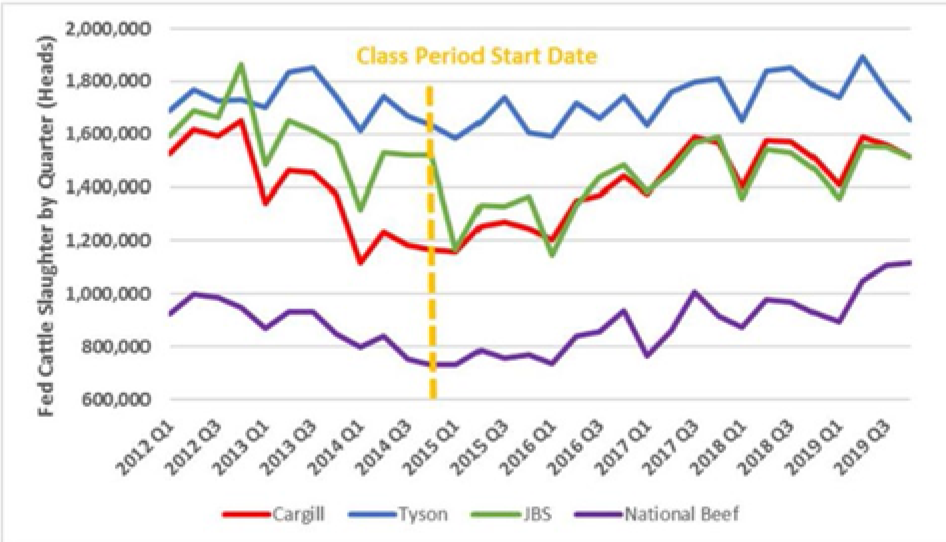
[1] The Court will provide a general background of Plaintiffs' allegations here and more specific allegations when discussing Plaintiffs' separate claims below.

[2] The Court will occasionally refer to the consumer and commercial-and-institutional indirect purchasers separately. When doing so, the consumer indirect purchaser plaintiffs will be referred to as "Peterson Plaintiffs" and the commercial-and-institutional indirect purchasers will be referred to as "Erbert & Gerbert's."

[3] As Plaintiffs' complaints are nearly identical, the Court will cite almost exclusively to Producer Plaintiffs' operative complaint.

start of Plaintiffs' proposed class period, the price for fed cattle plummeted while the price for beef soared. (*Id.* ¶¶ 1, 16-17.) The "meat margin," which is the spread between the price packers pay for fed cattle and the price they charge for beef products, grew by historic proportions after **[*5]** hitting a low of $50 in the months leading up to 2015, (*id.* ¶¶ 5, 99), as depicted in the following figure:



(*Id.* ¶ 16, fig. 5.)

Defendants' profitability is driven by the meat margin. (*Id.* ¶ 5.) Plaintiffs allege that Defendants' unprecedented profits from 2015 onward resulted from coordinated conduct to jointly manage fed cattle slaughter volumes; jointly manage cash cattle purchases and enforce anticompetitive procurement practices; import foreign cattle after it became uneconomical to do so; and close and idle plants. (*Id.* ¶¶ 8-9; ECF 20-1414, Sealed Am. Compl. ("DPP Am. Compl.") ¶¶ 9-10, Jan. 28, 2021, Docket No. 125.) Defendants' coordinated conduct allegedly led to a suppression of the price of fed cattle, which meant that producers were paid less than they would have been in a competitive market, (TAC ¶ 2), and an increase in the price of beef, which meant that purchasers paid more than they would have absent such conduct by Defendants, (DPP Am. Compl. ¶ 3.) Plaintiffs also allege that Defendants manipulated the Live Cattle Futures to further increase their profits. (TAC ¶¶ 345, 396.)

II. PROCEDURAL BACKGROUND

Plaintiffs allege that Defendants engaged in a price-fixing conspiracy **[*6]** in violation of § 1 of the Sherman Act. (*E.g.*, TAC ¶¶ 446-53.) Additionally, Producer Plaintiffs bring claims under the Packers and Stockyards Act ("PSA") and the Commodity Exchange Act ("CEA"). (*Id.* ¶¶ 454-83.) Indirect Purchaser Plaintiffs bring claims for damages under various state antitrust and consumer protection laws and for unjust enrichment.[4] (ECF 19-1129, Sealed Third Am. Comp. ("Peterson TAC") ¶¶ 375-743, Jan 27, 2021, Docket No. 256; ECF 20-141, Sealed Am. Compl. ("E&G Am. Compl.") ¶¶ 347-414, Jan. 28, 2021, Docket No. 125.)

Previously, the Court granted Defendants' first joint motions to dismiss after concluding that Plaintiffs had failed to plausibly plead direct evidence of an antitrust conspiracy or parallel conduct by which to infer such a conspiracy. *In re Cattle Antitrust Litig.*, No. 19-1222, 2020 WL 5884676, at *5-6 (D. Minn. Sept. 29, 2020). With respect to the PSA, the Court concluded that Plaintiffs failed to plausibly allege that Defendants could have suppressed or reduced competition. *Id.* at *7. The Court then granted Plaintiffs leave to amend. *Id.* at *8.

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[4] The District of Columbia is, of course, not a state. However, for the sake of simplicity, the Court will refer to all non-federal claims as state law claims.

Plaintiffs timely amended the operative complaints, and now Defendants, individually and collectively, ask the Court to dismiss Plaintiffs' claims with prejudice. (*E.g.*, ECF 19-1222, Mots. Dismiss, Feb. 18, 2021, Docket Nos. 326, 330, 333, 338, and 342.) Plaintiffs **[*7]** oppose the Motions and ask the Court to approve alternative service on JBS S.A. in Brazil. (*E.g.*, ECF 19-1222, Mot. Approve Alternative Service, Mar. 30, 2021, Docket No. 356.)

DISCUSSION

I. DEFENDANTS' JOINT MOTIONS TO DISMISS

A. Standard of Review

In reviewing a motion to dismiss under Rule 12(b)(6), the Court considers all facts alleged in the complaint as true to determine if the complaint states a "'claim to relief that is plausible on its face.'" *Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009)* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)*). The Court construes the complaint in the light most favorable to the plaintiff, drawing all inferences in their favor. *See Ashley Cnty. v. Pfizer, Inc., 552 F.3d 659, 665 (8th Cir. 2009)*. Although the Court accepts the complaint's factual allegations as true, and in the light most favorable to the plaintiff, it is "not bound to accept as true a legal conclusion couched as a factual allegation," *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)*, or mere "labels and conclusions or a formulaic recitation of the elements of a cause of action," *Iqbal, 556 U.S. at 678* (quotation omitted). Instead, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* At the motion to dismiss stage, the record for review before the Court is generally limited **[*8]** to the complaint and any documents attached as exhibits that are necessarily embraced by the complaint. *Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999)*.

B. Federal Claims

1. Sherman Act

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. To establish a claim under § 1, "a plaintiff must demonstrate (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce." *Insignia Sys., Inc. v. News Am. Mktg. In—Store, Inc., 661 F. Supp. 2d 1039, 1062 (D. Minn. 2009)*. Because § 1 of the Sherman Act "does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy," *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 775 (1984)*, "'the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express,'" *Twombly, 550 U.S. at 553* (cleaned up).

"Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused." *Copperweld, 467 U.S. at 768*. Thus, where—as here—plaintiffs allege **[*9]** horizontal price fixing or agreements, the only thing that must be alleged at the motion to dismiss stage is that defendants acted in concert.

"'[T]o satisfy the concerted action requirement, the plaintiff must demonstrate that the defendants shared a unity of purpose or a common design and understanding, or a meeting of the minds.'" *Insulate SB, Inc. v. Advanced Finishing Sys., Inc., 797 F.3d 538, 543 (8th Cir. 2015)* (quoting *Impro Prods., Inc. v. Herrick, 715 F.2d 1267, 1273*

(8th Cir. 1983). This showing can be accomplished through either direct or circumstantial evidence. ES Dev., Inc. v. RWM Enters., Inc., 939 F.2d 547, 554 (8th Cir. 1991).

a. Direct Evidence

Plaintiffs rely on two confidential witnesses to provide direct evidence of Defendants' alleged antitrust agreement. The Court previously concluded that, even though a heightened pleading standard was not required, Plaintiffs failed to "adequately explain [the witnesses'] jobs and how their interactions in those jobs would lead to them acquiring the knowledge they allegedly possess," and that the complaints presented "mismatched" allegations of anticompetitive behavior. *In re Cattle Antitrust Litig.*, 2020 WL 5884676, at *5. The question now is whether the amended complaints overcome these pleading deficiencies.

Regarding Witness 1, Jason F., Plaintiffs disclose that he worked as a quality assurance officer at Swift's Cactus, Texas plant—an operating JBS subsidiary—for approximately ten years, up **[*10]** until early 2018. (TAC ¶ 102.) Witness 1 was primarily responsible for the kill floor, and hotboxes and coolers (where carcasses are stored before being broken down), and thus he was well-positioned to know about slaughter volumes. (*Id.* ¶ 103.) In 2015, Witness 1 had a conversation with James Hooker, head of fabrication at the plant, after Hooker had received a phone call from his immediate supervisor. (*Id.* ¶¶ 104, 117.) At that time, Hooker told Witness 1 that each Defendant expressly agreed to periodically reduce its purchase and slaughter volumes to reduce the prices they would pay for fed cattle, stating that the agreement was to cut back on kills when prices were getting too high.[5] (*Id.* ¶¶ 101, 118.) Hooker knew of Defendants' agreement from speaking regularly with higher ups at JBS, including some at JBS's head office in the United States who were in charge of beef production, and with former colleagues working at packing plants owned by the non-JBS Defendants. (*Id.* ¶¶ 107-13, 115.) Witness 1 also recalls Swift management telling staff that kill levels were being reduced in response to fed cattle prices, and he reports that his plant would reduce its slaughter around November **[*11]** and then regularly maintain lower kill volumes through April of the following year. (*Id.* ¶¶ 121, 122.)

Regarding Witness 2, Matt T., Plaintiffs disclose that he was a former manager of a 35,000 head commercial feedlot, Carrizo Feeders, in Texline, Texas, from 2012 until July 1, 2015. (*Id.* ¶ 143.) In this capacity, Witness 2 was responsible for marketing (selling) the cattle fed there, negotiating with Defendants' field buyers on a weekly basis, and managing certain customers' risk positions by trading Live Cattle contracts on their behalf. (*Id.* ¶ 143 n.58.) Witness 2 would market between 600-1,500 head of cattle most weeks, of which the majority were sold on the cash cattle market. (*Id.*) However, in 2015, Witness 2 reports that Defendants worked together to reduce their purchases of cash cattle, predominately offering only top-of-the-market bids instead, after Defendants realized that taking cattle out of the cash market would create an actual or perceived oversupply of slaughter-ready cattle and lower the base cash price. (*Id.* ¶¶ 143-44.) The reduced cash price, together with an interlinked depression of the Live Cattle Futures prices, lowered the price Defendants paid for all the **[*12]** cattle they purchased, with cash or otherwise. (*Id.*)

The Court finds that above allegations adequately explain the confidential witnesses' jobs and how their job interactions would lead them to acquire knowledge of Defendants' alleged agreement to, respectively, reduce slaughter volumes and reduce cash cattle purchases. The Court also finds that, while the allegations involve two different types of reductions, they are not mismatched. Plaintiffs allege that reductions in slaughter volumes and cash cattle purchases were both used by Defendants for the same purpose: to drive down the price for fed cattle while simultaneously driving up the price of beef. (*See, e.g., id.* ¶¶ 9, 18-20; DPP Am. Compl. ¶¶ 6, 10.)

As such, the Court concludes that Plaintiffs have presented sufficiently detailed direct evidence at this stage to plausibly allege that Defendants have violated § 1 of the Sherman Act.[6] Accordingly, the Court will deny Defendants' Joint Motions to Dismiss in this regard.

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[5] For example, even though the Swift plant had a slaughtering capacity of 5,500-6,000 head per day, it might drop its kill level to around 4,800-5,200 head per day when implementing Defendants' agreement. (TAC ¶ 121.)

b. Circumstantial Evidence

Although "[a]llegations of direct evidence of an agreement, if sufficiently detailed, are independently adequate," *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 323 (3d Cir. 2010)*, the Court will also consider the sufficiency of Plaintiffs' circumstantial evidence, as **[*13]** concerted action may also be demonstrated by alleging parallel conduct that "would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." *In re Cattle Antitrust Litig.*, 2020 WL 5884676, at * 5 (quoting *Twombly, 550 U.S at 557 n.4* (cleaned up)).

In addition to parallel conduct, Plaintiffs must also plead one or more "plus factors," or additional facts to demonstrate that a parallel price action amounts to an unlawful conspiracy as opposed to producers merely paralleling each other's prices. *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., 203 F.3d 1028, 1032-33 (8th Cir. 2000)* (en banc). Plus factors might include "(1) a shared motive to conspire; (2) action against self-interest; (3) market concentration; and (4) a substantial amount of interfirm communication in conjunction with the parallel conduct." *In re Pork Antitrust Litig., 495 F. Supp. 3d 753, 768 (D. Minn. 2020)*.

i. Plus Factors

The Court previously concluded that "the plus factors identified and discussed by Plaintiffs are undoubtedly strong and are of the type often used to support an inference of an agreement." *In re Cattle Antitrust Litig.*, 2020 WL 5884676, at * 6. The same factors are alleged by Plaintiffs here, including that the market for fed-cattle processing is highly concentrated, with Defendants making up more than 80 percent of it; demand for fed cattle and beef is inelastic; Defendants can **[*14]** regularly communicate through trade associations and other industry events; Defendants acted against self-interest, as when importing cattle from abroad when domestic prices were low; and that there were market-wide changes in pricing practices from cash sales to formula contracts. (TAC ¶¶ 180-88, 290-313; DPP Am. Compl. ¶¶ 196-239); *see also In re Cattle Antitrust Litig.*, 2020 WL 5884676, at * 6.

Additionally, Plaintiffs now point to how Defendants are being investigated by the U.S. Department of Justice ("DOJ") and the U.S. Department of Agriculture ("USDA") for the same conduct alleged in the operative complaints. (*E.g.*, TAC ¶¶ 314-15.) While some courts have declared that pending investigations carry no weight, *e.g., In re Graphics Processing Units Antitrust Litig. ("GPU"), 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007)*, others have concluded that "the plausibility of [an] alleged conspiracy is bolstered, at least to some extent, by [an] ongoing [DOJ] investigation into the same alleged misconduct," *In re GSE Bonds Antitrust Litig., 396 F. Supp. 3d 354, 363 (S.D.N.Y. 2019)*.[7] While a pending government investigation does not serve as a smoking gun or allow for an inference of a conspiracy by itself, the Court agrees that it certainly bolsters such an inference.

In sum, the Court concludes that the plus factors identified by Plaintiffs are even stronger than they were before. The only remaining question **[*15]** is whether Plaintiffs have managed to plausibly allege parallel conduct.

ii. Parallel Conduct

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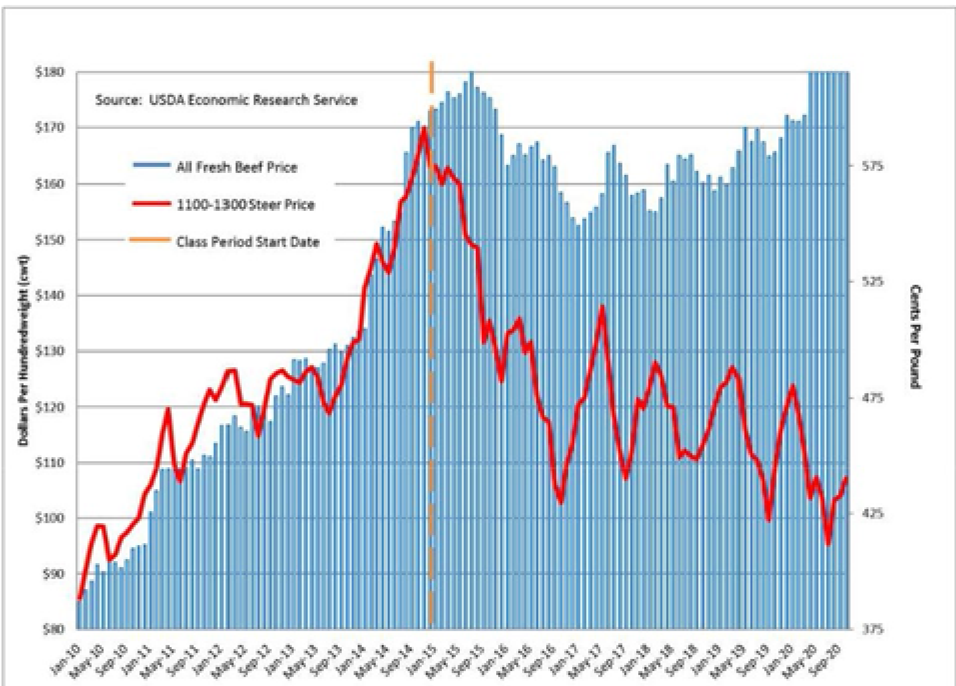
[6] Defendants suggest that Plaintiffs' direct evidence is based on hearsay and speculation, so the Court should not credit it. However, at the motion to dismiss stage, all allegations are taken as true and construed in Plaintiffs' favor. To be sure, Plaintiffs will face a higher bar at summary judgment and their claims will likely need more evidentiary support and points of connection to survive a challenge then, but the litigation has not yet reached this point.

[7] *Accord Starr v. Sony BMG Music Enter., 592 F.3d 314, 325 (2d Cir. 2010)* (finding inference of conspiracy plausible in part because the DOJ had launched investigations); *In re Packaged Seafood Prod. Antitrust Litig., No. 15-2670, 2017 WL 35571, at *8 (S.D. Cal. Jan. 3, 2017)* (recognizing *GPU*'s holding but concluding that "it is perfectly permissible to take as true the fact that a government investigation has been instituted").

The Court previously concluded that Plaintiffs' allegations of parallel conduct were sparse and conclusory. *In re Cattle Antitrust Litig.*, 2020 WL 5884676, at *6. More specifically, with respect to coordinated slaughter reductions, the Court found that Plaintiffs failed to provide a basis "to analyze which, how many, or when any of the individual Defendants may have affirmatively acted" and, with respect to coordinated cash cattle reductions, that Plaintiffs "rel[ied] almost exclusively on industry-wide data and ask[ed] the Court to infer that the individual Defendants all contributed to the decrease." *Id.*

Regarding coordinated slaughter reductions, Plaintiffs present a nuanced theory and a bevy of facts and figures to analyze whether each Defendant affirmatively acted to promote the alleged price-fixing conspiracy.[8] Prior to 2015, fed cattle prices typically rose in the late winter/early spring, declined in the summer months, bottomed out in July for a few weeks, and then rose again in the fall. (TAC ¶ 124.). Seasonal slaughter reductions also typically occurred near the beginning of each year. (*Id.*) However, in January 2015 (the start of the class **[*16]** period), Plaintiffs allege that Defendants agreed to deviate from these cyclical patterns and began to moderate their slaughter volumes in lockstep. (*Id.* ¶¶ 123-124.) Doing so served to suppress the price for fed cattle, (*id.*), and drive up the price of beef, (*e.g.*, DPP Am. Compl. ¶¶ 255-57), which allowed Defendants to realize tremendous profits. Plaintiffs provide a new figure to capture Defendants' tandem movements:



(TAC ¶ 127, fig. 2.) Plaintiffs also break down the significance of what this figure depicts, quarter by quarter and year by year.

In 2015, Tyson's, National Beef's, and JBS's year-over-year slaughter volume decreased in the first quarter by -1.8%, -8.6%, and -11.2%, respectively (Cargill's quarterly slaughter volume rose slightly but was still down on its 2014 fourth quarter volume). (*Id.* ¶ 199.) Across quarter two and into quarter three, Tyson, National Beef, and JBS

[8] To arrive at the numbers alleged below, Plaintiffs drew from a variety of materials, including Defendants' actual transaction data, Plaintiffs' records of transactions with Defendants, securities filings from three Defendants (Cargill is privately held), public statements from Tyson's CEO, industry data consisting almost entirely of Defendants' transactions, and contemporaneous reporting on Defendants' actions. Defendants question the reliability of these materials and the accuracy of Plaintiffs' methodology when crunching the data. However, at the motion to dismiss stage, "the Court need not now engage in a *Daubert-like* analysis of Plaintiffs' statistical pleadings. Instead, the Court may, indeed must, accept as true Plaintiffs' factual assertions regarding pricing and other economic data." *City of Philadelphia v. Bank of Am. Corp., 498 F. Supp. 3d 516, 528 (S.D.N.Y. 2020)*.

further reduced their slaughter volumes by approximately -5.4%, -6.2%, and -12.8%, respectively, while Cargill continued to hold steady. (*Id.* ¶ 202.) Then, in the last quarter, each Defendant slaughtered between 5.8% and 17.1% less cattle compared to their 2012-14 average.[9] (*Id.* ¶ 213.) Because **[*17]** of Defendants' reductions, less cattle were sold for slaughter in 2015 than in 2014.[10] (*Id.* ¶ 220.)

All the while, the fed cattle price plummeted. (*Id.* ¶ 212.) As a result, producers' margins were reduced across the second, third, and fourth quarters of 2015, averaging, respectively, -$51, -$1, and - $359 per head. (*Id.* ¶ 224.) Conversely, Defendants posted average per head margins of between approximately $47 and $66 across the three quarters, well above their averages of between -$16 and $25 per head from 1997 to 2014. (*Id.*) Yet, even in this context, no Defendant sought to capture market share to drive its individual margins even higher. (*See id.* ¶ 223.)

In 2016, Defendants again slaughtered less cattle in the first quarter than they did from 2012 to 2014: quarter-over-quarter change, Tyson -0.7%, Cargill -3.3%, National Beef -4.4%, and JBS -16.3%; year-over-year change, Tyson -4.5%, Cargill -9.3%, National Beef -14.9%, and JBS -21.7%. (*Id.* ¶ 226 n.111 & n.112.) Meanwhile, fed cattle prices remained low, around $130/cwt, which allowed Defendants to have one of their best quarters in history, approximately $63 per head compared to the pre-class period average of $0 per head. **[*18]** [11] (*Id.* ¶ 227.)

Across the second and third quarters of 2016, Defendants' kill volumes remained below 2012-2014 averages and created a supply glut, which allowed Defendants to unseasonably increase kill volumes in the fourth quarter—Tyson, Cargill, and National Beef's volumes rose 2.3%, 3.3%, and 10.9%, respectively—and experience their most profitable fourth quarter in modern history, about $153 per head, which was $100 more per head than previously realized. (*Id.* ¶¶ 233-38.) Producers, on the other hand, lost -$67 per head over the year. (*Id.*) Again, however, no Defendant acted to capture individual market share to capitalize on the record margins. (*Id.* ¶ 238.) In fact, even with the increased availability of fed cattle and Defendants' unseasonably large fourth quarter harvest, annual slaughter volumes in 2016 were -6% below 2014 levels (Tyson and JBS) or flat (National Beef).[12] (*Id.* ¶ 237.)

In 2017, Plaintiffs allege that Defendants' coordinated activity was much the same: reductions by Defendants in the first quarter—Cargill -4.6%, Tyson -6.1%, JBS -6.6%, National Beef -17.9%—followed by increases in the second quarter after the price had been driven down—JBS 5.3%, Tyson 7.5%, Cargill **[*19]** 7.7%, National Beef 12.4%. (*Id.* ¶ 239 n.126 & n.127.) Across the year, prices fell steadily to a low of $105/cwt by mid-September, which allowed Defendants to again post slaughter increases during the third quarter: Tyson 8.5%, JBS 9.0%, Cargill 16.0%, and National Beef 17.7%. (*Id.* ¶ 240.) Defendants' average per head margins for the first and fourth quarter in 2017, $42 and $88 per head, respectively, stood second only to the record quarterly profits generated in 2016. (*Id.* ¶ 241.) But Defendants continued to refuse to expand individual market share despite the obvious profit potential. (*Id.*)

In 2018, the same again: the first quarter saw reductions—National Beef -4.7%, Tyson -8.6%, Cargill -10.5%, JBS -14.4%—and prices were driven down to $110/cwt by the end of May, even though they should have allegedly risen because of the record beef demand and the tight supply of slaughter-ready cattle. (*Id.* ¶¶ 242-43.) Capitalizing on the low price, Defendants then increased slaughter volumes by 11.4%-13.6% and held this steady across the third

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[9] Regarding pre-2015 behavior, Plaintiffs paint a very different picture. In the fourth quarter of 2012, Cargill and JBS both increased their slaughter volumes (3.7% and 12%) while Tyson held steady (0.1% increase) and National Beef cut back (-4%). (TAC ¶ 130.) Then, in the third quarter of 2013, Tyson and National Beef increased their slaughter volumes, while JBS and Cargill reduced theirs. (*Id.*) Further, across the second and fourth quarters of 2014, JBS looked to capture market share from the others, increasing its slaughter volumes by 16.3%. (*Id.*)

[10] Tyson's annual slaughter volumes were down 4%, National Beef's 6%, and JBS's 17% when compared to 2014. (TAC ¶ 214.) Cargill's remained flat; however, its slaughter volumes were still significantly below historic levels. (*Id.*)

[11] In fact, over the class period, Defendants' average per head net margins for the first, second, third, and fourth quarters greatly exceeded pre-class period averages: respectively, $37 v. $0, $127 v. $21, $134 v. $25, and $116 v. -$16. (TAC ¶ 126.)

[12] Cargill's 2016 slaughter volumes rose 10% against 2014, but they were still significantly below Cargill's 2007-2014 average. (TAC ¶ 237.)

quarter so as to not get in front of the available supply. (*Id.* ¶ 244.) When supply decreased in the fourth quarter, Defendant then reduced their slaughter **[*20]** volumes: Tyson -3.7%, Cargill -4.0%, National Beef -4.1%, and JBS -4.2%. (*Id.*)

Over 2018, Defendants experienced record margins across the second, third and fourth quarters ($229, $198, and $175 per head, respectively). (*Id.* ¶ 245.) Conversely, producers suffered $30 and $41 per head losses in the second and third quarters before realizing a modest $27 per head profit in the fourth, though the latter was still well below the pre-class period average of $89 per head. (*Id.*)

In 2019, after a severe winter had decreased slaughter weights, a substantial rally in cattle prices was expected because packers would have to secure a greater number of cattle to make up the weight. (*Id.* ¶ 247.) However, Defendants maintained comparably lighter slaughter volumes across the first three months of 2019 and kept collective demand in check. (*Id.* ¶ 248.) The glut of cattle resulting from Defendants' slaughter restraint drove the price down and, as before, most Defendants then began to increase slaughter volumes. (*Id.* ¶ 250; *see also id.* figs. 28-32.)

Even then, however, no Defendant worked to capture market share. (*Id.* ¶ 253.) Emblematically, after a fire closed a Tyson plant in August 2019 and left a 5,500-6,000 **[*21]** head per day hole for others to fill, the non-Tyson Defendants' slaughter volumes remained steady. (*Id.* ¶¶ 256-57.) Defendants also simultaneously stepped down fed cattle prices and raised beef prices after the fire, which allowed them to reap record high margins. (*Id.* ¶ 261.) By September, the profit margin between packer and producers exceeded $600, with packers making over $400 per head and producers losing $200 per head. (*Id.*)

As a whole, the Court finds that the above allegations plausibly demonstrate that each Defendant, from 2015 on, unlawfully acted in concert with the others to moderate slaughter volumes to fix the price of fed cattle and beef. The Court also finds that Plaintiffs' new defendant-specific dataset, (*id.* ¶¶ 135-36, 139-41; *see also id.* ¶ 137, tbl. 1; *id.* ¶ 138, tbl. 2), plausibly shows that Defendants also unlawfully worked in tandem to reduce their cash cattle purchases to place further downward pressure on fed cattle prices. By coordinating the amount and timing of their cash cattle purchases, their bidding, and the regions and feedlots where they would bid, Defendants ended up paying lower and remarkably similar prices for fed cattle, which would not have been **[*22]** the case, Plaintiffs allege, had any Defendant sought a greater market share to take advantage of the record beef demand. (*Id.* ¶¶ 147-49, 151-53; *see, e.g., id.* ¶¶ 175-78.)

In sum, the Court concludes that Plaintiffs plausibly plead parallel conduct among Defendants to coordinate slaughter volumes and cash cattle purchases in order to suppress the price of fed cattle and drive up the price for beef. When these allegations are considered alongside Plaintiffs' undoubtedly strong plus factors, the Court further concludes that Plaintiffs have raised a reasonable expectation that discovery will reveal evidence of an illegal agreement between Defendants, which is all that is required at the motion to dismiss stage. *Twombly, 550 U.S. at 556-57*. The Court will therefore deny Defendants' Joint Motions to Dismiss in this regard.[13]

2. Packers and Stockyards Act

"[A] practice which is likely to reduce competition and prices paid to farmers for cattle can be found an unfair practice under the [PSA]." *IBP, Inc. v. Glickman, 187 F.3d 974, 977 (8th Cir. 1999)* (quotation omitted). In fact, "the lack of competition between buyers, with the attendant possible depression of producers' prices, was one of the evils at which the [PSA] was directed." *Farrow v. U.S. Dep't of Agric., 760 F.2d 211, 215 (8th Cir. 1985)* (quotation omitted). Based on the above **[*23]** allegations concerning Defendants' anticompetitive conduct to suppress the

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[13] Regarding some of the Producer Plaintiffs, it is true that the organizational members do not have standing to pursue damages. Accordingly, these Plaintiffs have agreed to drop the organizations' claims for damages and instead pursue injunctive and declaratory relief, which they are entitled to do under *15 U.S.C. § 26*.

price paid to producers for fed cattle, Producer Plaintiffs state a plausible claim to relief with respect to the PSA. Accordingly, the Court will deny Defendants' Joint Motions to Dismiss regarding Producer Plaintiffs' PSA claim.

3. Commodity Exchange Act

To plausibly plead a CEA claim, the plaintiff must show "(1) the defendant possessed an ability to influence market prices; (2) an artificial price existed; (3) the defendant caused the artificial price; and (4) the defendant specifically intended to cause the artificial price." *Anderson v. Dairy Farmers of Am., Inc., No. 08-4726, 2010 WL 1286181, at *5 (D. Minn. Mar. 29, 2010)* (citation omitted). "The specific intent to cause a market distortion, scienter, can be pled by alleging facts (1) showing that the defendants had both motive and opportunity to commit the fraud or (2) constituting strong circumstantial evidence of conscious misbehavior or recklessness." *In re Amaranth Nat. Gas Commodities Litig., 587 F. Supp. 2d 513, 530 (S.D.N.Y. 2008)*, *aff'd*, *730 F.3d 170 (2d Cir. 2013)*.

Producer Plaintiffs sufficiently demonstrate that Defendants possessed the ability and opportunity to influence market prices, as they allegedly participated in the Live Cattle Futures market and controlled nearly 100% of the facilities approved for the slaughter of cattle linked to Live Cattle Futures contracts. **[*24]** (TAC ¶¶ 374-80.) Likewise, Plaintiffs have also demonstrated that Defendants had a motive to manipulate the Live Cattle Futures market, as the prices paid for fed cattle under Defendants' forward contracts were inextricably intertwined with Live Cattle Futures prices. (*Id.* ¶¶ 345, 382.) Moreover, Defendants are alleged to have improperly taken extensive short positions rather than long ones to further increase their profits, even though packers are buyers of cattle and should protect against price increases, not bet on price decreases. (*Id.* ¶¶ 393, 396.) Finally, regarding whether an artificial price existed and whether Defendant caused the artificial price, because a suppression of the price of fed cattle leads to a reduction in the Live Cattle Futures price, (*id.* ¶¶ 390-92), Defendants' alleged antitrust agreement plausibly caused an artificial price.

In sum, the Court concludes that Producer Plaintiffs adequately plead their CEA claims. Accordingly, the Court will dismiss Defendants' Joint Motions to Dismiss in this regard.

4. Statute of Limitations

A statute of limitations is "typically an affirmative defense, which the defendant must plead and prove . . . and therefore the possible **[*25]** existence of a statute of limitations defense is not ordinarily a ground for Rule 12(b)(6) dismissal unless the complaint itself establishes the defense," as when the complaint rules out tolling on its face. *Jessie v. Potter, 516 F.3d 709, 713 n.2 (8th Cir. 2008)* (citations omitted). However, when some or all of a defendant's arguments rely on disputed or insufficiently developed facts, a statute of limitations defense cannot be resolved on a motion to dismiss. *Willis Elec. Co. v. Polygroup Macau Ltd., 437 F. Supp. 3d 693, 707 (D. Minn. 2020)*.

a. Sherman Act and Packers and Stockyards Act

The limitations period for any claims for damages under the Sherman Act and the PSA is four years. *15 U.S.C. § 15b*; *Jackson v. Swift Eckrich, Inc., 53 F.3d 1452, 1460 (8th Cir. 1995)*. The period begins to run when a defendant commits the injurious act. *Zenith Radio Corp. v. Hazeltine Rsch., Inc., 401 U.S. 321, 338 (1971)*.

Defendants' alleged conspiracy is said to have begun on January 1, 2015. Producer Plaintiffs filed their complaint on April 23, 2019[14] and Direct Purchaser Plaintiffs did so on June 6, 2020.[15] As such, unless the limitations period

[14] The docket shows this complaint being filed in early May; however, the action was first filed in Illinois before being refiled here.

[15] Only Producer Plaintiffs may bring a PSA claim and only Producer Plaintiffs and Direct Purchaser Plaintiffs may recover damages under the Sherman Act.

for their claims for damages can be extended, all or some would be time-barred. Plaintiffs argue that two extension doctrines apply: the continuing violation doctrine, which would allow them to recover most but not all the claimed damages, and the fraudulent concealment doctrine, which would allow them to recover all the claimed damages.

A continuing violation restarts **[*26]** the statute of limitations period each time the defendant commits a new and independent act that inflicts new and accumulating injury on the plaintiff. *In re Pre-Filled Propane Tank Antitrust Litig., 860 F.3d 1059, 1063 (8th Cir. 2017)* (en banc). To adequately plead a continuing violation in the context of an alleged price-fixing conspiracy, Producer and Direct Purchaser Plaintiffs must demonstrate: (1) a price-fixing conspiracy; (2) that brings about a series of unlawfully priced sales during the class period; (3) and sales involving Plaintiffs during the class period. *Id. at 1068*.

Plaintiffs have successfully pleaded the first and third elements by demonstrating that Defendants' alleged conspiracy had the effect of decreasing the price for fed cattle and increasing the price paid for beef, and that Plaintiffs either sold fed cattle to or purchased beef from Defendants during the class period. Regarding the second element, Plaintiffs must adequately allege that the conspiracy continued into the non-time-barred class period—for Producer Plaintiffs, April 23, 2015, and for Direct Purchaser Plaintiffs, June 6, 2016. The Court finds that this element is easily met, for Plaintiffs' allegations involve activity occurring throughout 2015 and then continuing from 2016 up until 2020. **[*27]** (*See, e.g.*, TAC ¶¶ 198-262; DPP Am. Compl. ¶¶ 140-72.)

As such, the Court concludes that the Producer and Direct Purchaser Plaintiffs have adequately pleaded continuing violations and therefore at least some of their claims for damages are not time-barred. Having concluded as much, the Court will defer deciding the issue of fraudulent concealment until a more robust record has been developed and a need to determine damages, whether for the entire class period or a portion of it, has arisen.

b. Commodity Exchange Act

The limitations period for CEA claims is two years, *7 U.S.C. § 25(c)*, which begins to run from the discovery of the injury. *Levy v. BASF Metals Ltd., 917 F.3d 106, 108 (2d Cir. 2019)*, *cert. denied*, *140 S. Ct. 536 (2019)*; *see also* *Rotella v. Wood, 528 U.S. 549, 555 (2000)* (noting that federal courts generally apply a discovery accrual rule when a statute is silent on the issue). "The proper standard for determining the commencement of the limitations period is when the plaintiff knew or in the exercise of reasonable diligence should have known of defendant's alleged misconduct." *Anderson, 2010 WL 1286181, at *5*.

Producer Plaintiffs' operative complaint does not disclose whether they knew or should have known through the exercise of reasonable diligence of Defendants' alleged misconduct before April 23, 2017, especially given the confidential nature of Defendants' **[*28]** actual trading on the Live Cattle Futures market. Additionally, the Court notes that material facts—specifically, the full measure of Defendants' trading activity—will not be known until after discovery, and that questions of actual or constructive knowledge are fact-intensive inquiries often left undecided even at summary judgment, *see* *id. at *7*. As such, the Court finds that the question of whether Producer Plaintiffs' CEA claims are time-barred is best left for a later stage of the litigation.

C. State Law Claims

Indirect Purchaser Plaintiffs bring claims for damages under the antitrust laws of 26 jurisdictions,[16] the consumer-protection laws of 25 jurisdictions,[17] and for unjust enrichment in 32 jurisdictions.[18] Defendants argue that these claims should be dismissed for lack of standing and various state-specific reasons.[19]

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[16] Arizona, California, the District of Columbia, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin. (Peterson TAC ¶¶ 377-540; E&G Am. Compl. ¶¶ 355-78.)

1. Standing

Defendants argue that the Indirect Purchaser Plaintiffs lack standing to assert several state law claims because they lack a representative plaintiff from the respective jurisdictions. The Court will exercise its discretion to defer consideration of this issue until after class certification, "which is 'logically antecedent' to the question raised by Defendants[.]" **[*29]** *In re Pork Antitrust Litig., 495 F. Supp. 3d at 776*. However, if "standing issues remain after class certification, Defendants are free to make a motion at that time." *Id.*

2. Antitrust Laws

a. AGC

Defendants challenge Indirect Purchaser Plaintiffs' antitrust standing in several states pursuant to *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters ("AGC"), 459 U.S. 519, 535-45 (1983)*. In the opinion, the Supreme Court states that a plaintiff's right to maintain an antitrust action turns on the nature of the alleged injury, and that being denied the benefits of price competition in the market in which trade was allegedly restrained is an appropriate injury. *See* *id. at 538-39*; *see also* *South Dakota v. Kansas City S. Indus., Inc., 880 F.2d 40, 47 (8th Cir. 1989)* ("[S]tanding has been generally limited to the actual participants in the relevant market: competitors and consumers.").

Here, Indirect Purchaser Plaintiffs claim that Defendants' horizontal price fixing restrained or eliminated beef price competition and deprived everyone down the supply chain in the relevant market of the benefit of price competition. Thus, Indirect Purchaser Plaintiffs allege an appropriate injury. *Accord* *In re Aftermarket Filters Antitrust Litig., No. 08-4883, 2009 WL 3754041, at *7-8 (N.D. Ill. Nov. 5, 2009)*. Additionally, Indirect Purchaser Plaintiffs allege that the cost they paid for beef is traceable through the product distribution chain, which is adequate both to show that the alleged injury was the direct result of Defendants' allegedly **[*30]** anticompetitive conduct, *accord* *In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 813-14 (N.D. Ill. 2017)*, and to satisfy the remaining three factors concerning the speculative nature of the harm, the risk of duplicative recovery, and the complexity in apportioning damages, *accord* *In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1155-56 (N.D. Cal. 2009)*. The Court therefore concludes that Indirect Purchaser Plaintiffs have standing to assert their antitrust claims.[20]

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[17] Arkansas, California, the District of Columbia, Florida, Hawaii, Illinois, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, and Wisconsin. (Peterson TAC ¶¶ 543-740; E&G Am. Compl. ¶¶ 381-96.)

[18] Arizona, Arkansas, California, the District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin. (Peterson TAC ¶¶ 741-43; E&G Am. Compl. ¶¶ 397-414, at 150 n.70.)

[19] Defendants also aver that many claims are time-barred, as the continuing violation doctrine is not recognized in eleven jurisdictions. Yet, Defendants fail to offer any analysis of the relevant case law from these states. Plaintiffs, on the other hand, discuss state case law, but often their citations involve unrelated causes of action. As such, neither party's briefing allows the Court to make an educated *Erie* guess on a per state basis regarding whether Plaintiffs' claims would likely be tolled in these jurisdictions. The Court will therefore defer consideration of this question, which will also allow a fuller factual and legal record to be developed. Regarding the remaining jurisdictions, however, the Court has already found that Plaintiffs have adequately pleaded a continuing violation by Defendants to toll any applicable statute of limitation.

[20] As such, the Court declines to decipher the state of antitrust standing in each jurisdiction referenced by Defendants, as the same result would obtain even if state law dictated that *AGC* governs in a certain jurisdiction.

b. *Illinois Brick*

In *Illinois Brick Co. v. Illinois*, the Supreme Court held that only direct purchasers may sue for damages in Sherman Act price-fixing cases. *431 U.S. 720, 737 (1977)*. Most state courts generally interpret their states' antitrust laws in line with federal case law; however, in *California v. ARC Am. Corp.*, the Supreme Court held that state legislatures could pass laws, so-called "repealers," to provide for damages to indirect purchasers under state antitrust laws. *See 490 U.S. 93, 105-06 (1989)*.

Defendants claim that *Illinois Brick* has not been repealed under Missouri state law, which prevents Indirect Purchaser Plaintiffs from asserting claims pursuant to Missouri's Merchandising Practices Act ("MMPA"). In interpreting state law, the Court is bound by the decisions of the state's highest court or, when there is no state supreme court case directly on point, in predicting how the state supreme court would rule. **[*31]** *N. Oil & Gas, Inc. v. EOG Res., Inc., 970 F.3d 889, 892 (8th Cir. 2020)*. Based on the reasoning within a Missouri Supreme Court decision, *Gibbons v. Nuckolls, Inc.*, the Court predicts that it would rule that indirect suits are allowed under the MMPA. *See 216 S.W.3d 667, 669-70 (Mo. 2007)* (en banc) (declining to read the MMPA as limited to only direct purchaser suits); *see also In re Pool Prod. Distribution Mkt. Antitrust Litig., 946 F. Supp. 2d 554, 571 (E.D. La. 2013)* (making the same prediction). The Court will therefore deny Defendants' Joint Motions in this regard.

Defendants also assert that *Illinois Brick* bars Indirect Purchaser Plaintiffs from pursuing damages under either Montana's or South Carolina's consumer protection laws, as these claims are simply repackaged antitrust claims and these states have not repealed *Illinois Brick*. However, the Court finds the reasoning in *In re Generic Pharms. Pricing Antitrust Litig.* to be persuasive: "Defendants' 'repackaging' argument is not enough to require dismissal of [plaintiffs'] consumer protection law claims . . . so long as their allegations are enough to plead the relevant consumer protection violation."[21] *368 F. Supp. 3d 814, 840 (E.D. Pa. 2019)*. Defendants do not assert any relevant pleading deficiencies with respect to Indirect Purchaser Plaintiffs' Montana or South Carolina consumer protection claims.[22] Thus, the Court will deny Defendants' Joint Motions regarding **[*32]** these claims.

c. Intrastate Activity

A claim made pursuant to the Mississippi's ***antitrust law*** must involve, in part, transactions occurring wholly within the state. *State ex rel. Fitch v. Yazaki N. Am., Inc., 294 So. 3d 1178, 1189 (Miss. 2020)*. Indirect Purchaser Plaintiffs acknowledge that they have not adequately pleaded their Mississippi antitrust claims and thus ask for leave to amend. Given that this pleading deficiency has not been addressed before, and that the actions will survive Defendants' motions to dismiss, the Court will grant Indirect Purchaser Plaintiffs leave to amend their Mississippi antitrust claims.

3. Consumer Protection Laws

Defendants assert state-specific reasons for why several of Indirect Purchaser Plaintiffs' consumer protection claims are not actionable. The Court covered much of this ground in *In re Pork Antitrust Litig. See 495 F. Supp. 3d*

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[21] While the Eighth Circuit has spoken in favor of precluding attempts to get around *Illinois Brick* by alleging the equitable remedy of disgorgement, it has not addressed whether plaintiffs can pursue damages under state consumer protection laws. *See In re Pre-Filled Propane Tank Antitrust Litig., 893 F.3d 1047, 1059 (8th Cir. 2018)*.

[22] Defendants do ask the Court to reconsider its holding in a similar case that allegations pleading violations of state consumer protection laws based on anticompetitive conduct, not fraud, are not subject to Rule 9(b). *See In re Pork Antitrust Litig., 495 F. Supp. 3d at 779-90*. The Court remains unpersuaded by Defendants' argument and, as a result, will deny Defendants' Joint Motions to Dismiss with respect to Indirect Purchaser Plaintiffs' state consumer protection claims, including their Montana and South Carolina claims.

at 785-90. For the most part, the Court's reasoning and conclusions remain unchanged, and Defendants' Joint Motions to Dismiss will be granted in part and denied in part accordingly.[23] The parties do offer some new arguments, however, which the Court will now address.[24]

a. Massachusetts

The Court previously determined that a claim brought pursuant to § 11 of the Massachusetts consumer protection statute required **[*33]** that the actions or transactions constituting the claim occur primarily and substantially within the state. *Id. at 788*. Now, however, Peterson Plaintiffs assert their claim under § 9, which contains no such wording. *See Mass. Gen. Laws Ann. ch. 93A, § 9*. Thus, Peterson Plaintiffs are no longer required to allege that the acts constituting their claim occurred primarily and substantially in Massachusetts. *Geis v. Nestle Waters N. Am., Inc., 321 F. Supp. 3d 230, 241 (D. Mass. 2018)*. As such, the Court will deny Defendants' Joint Motions to Dismiss in this regard.

b. Michigan

The Court previously held that the Michigan Consumer Protection Act "is narrower than other state consumer-protection statutes because it specifically defines what constitutes unfair or unconscionable conduct." *In re Pork Antitrust Litig., 495 F. Supp. 3d at 785* (citing *Mich. Comp. Laws Ann. § 445.903*). Here, Peterson Plaintiffs point out that § 445.911 specifies that actions for damages involving section 5(a)(1) of the Federal Trade Commission Act are also allowed under Michigan law. This is true, if "a circuit court of appeals or the United State Supreme Court" has declared a "method, act, or practice in trade or commerce . . . to be an unfair or deception act or practice within the meaning of section 5(a)(1[.]" *Mich. Comp. Laws Ann. § 445.911(4)(c)*. But Peterson Plaintiffs do not point the Court's attention to such a declaration by a court of appeals or the Supreme Court. Accordingly, the Court will grant Defendants' **[*34]** Joint Motions in this regard.

c. Minnesota

With respect to Minnesota's Consumer Fraud Act, plaintiffs must plead allegations involving misrepresentations by defendants that affected the market. *In re Pork Antitrust Litig., 495 F. Supp. 3d at 786* (discussing *State v. Minn. Sch. of Bus., Inc., 935 N.W.2d 124, 135 (Minn. 2019)*). This is not the case alleged here, and the Court will therefore grant Defendants' Joint Motions to Dismiss in regard to Peterson Plaintiffs' related claim. Regarding Minnesota's Uniform Deceptive Trade Practices Act ("MUDTPA"), however, the Court will deny Defendants' Joint Motions in so far as Erbert & Gerbert's seek injunctive relief, as a continuing conspiracy has been alleged and, thus, a plausible likelihood of future harm.[25] *Cf. id.*

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[23] Defendants ask the Court to reconsider its earlier holding that certain state prohibitions against class actions are procedural, not substantive. *In re Pork Antitrust Litig., 495 F. Supp. 3d at 776-78, 790*. The Court comes to the same conclusion here and, accordingly, will deny Defendants' Joint Motions to Dismiss in regard to Indirect Purchaser Plaintiffs' Montana, South Carolina, and Utah consumer protection claims.

[24] Indirect Purchaser Plaintiffs concede that their South Dakota consumer protection claims and Erbert & Gerbert's New York consumer protection claim fail for a lack of alleging, respectively, that Defendants made false promises or misrepresentations to them or materially misled them. Erbert & Gerbert's also states that it will withdraw its Missouri and Rhode Island consumer protection claims. Accordingly, the Court will grant Defendants' Joint Motions to Dismiss with respect to these five claims. Additionally, Defendants withdrew their arguments with respect to Indirect Purchaser Plaintiffs' New Mexico consumer protection claims and Peterson Plaintiffs' Hawaii consumer protection claim. The Court will therefore deny Defendants' Joint Motions as to these claims.

[25] The Court notes that the sole remedy under MUDTPA is injunctive relief. *See Hudock v. LG Elecs. U.S.A., Inc., 16-1220, 2017 WL 1157098, at *7 (D. Minn. Mar. 27, 2017)*.

d. Nebraska

Defendants argue that Nebraska's Consumer Protection Act expressly prohibits Plaintiffs' claims because Defendants are regulated by the USDA. *See* *Neb. Rev. Stat. § 59-1617(1)*. "[T]he relevant question is not whether the defendant is generally regulated, but whether the challenged practice is regulated." *In re ConAgra Foods Inc., 908 F. Supp. 2d 1090, 1103 (C.D. Cal. 2012)* (citation omitted) (collecting Nebraska cases). "[T]he exception to the Nebraska statute is broad[] . . . and applies to all conduct regulated by federal agencies." *Id. at 1104*.

Here, the USDA mandates packers to report the price paid for fed cattle and the price charged **[*35]** for beef, 7 C.F.R. §§ 59.101-104, in order to encourage competition in the marketplace, *7 U.S.C. §§ 1635(3)*. As such, the Court finds that Defendants' alleged anticompetitive conduct falls within the broad sweep of Nebraska's statutory exemption and, accordingly, will grant Defendants' Joint Motions to Dismiss in this regard.

e. New Hampshire

Previously, the Court found that New Hampshire's Consumer Protection Act requires the proscribed conduct to occur within the state after being persuaded by the weight of authority concluding as much. *In re Pork Antitrust Litig., 495 F. Supp. 3d at 789*. The additional case cited by Indirect Purchaser Plaintiffs does not persuade the Court to the contrary. Thus, the Court will grant Defendants' Joint Motions to Dismiss in this regard.

f. North Dakota

In so far as the Peterson Plaintiffs seek injunctive relief, not damages, the Court will deny Defendants' Joint Motions to Dismiss with respect to their Unlawful Trade Practices Law claim. *Id. at 786*. Regarding Erbert & Gerbert's claim made pursuant to Nebraska's Unlawful Sales or Advertising Practices statute, it is true that the statute was amended to include unconscionable acts or practices. *See* *N.D. Cent. Code § 51-15-02*. However, Erbert & Gerbert's points to no state court decisions (or even legislative history) that might **[*36]** provide an appropriate lens to interpret whether its claim falls within the statute's reach. As it "is not the role of a federal court to expand state law in ways not foreshadowed by state precedent," *Ashley Cnty., 552 F.3d at 673*, the Court will grant Defendants' Joint Motions to Dismiss with respect to this claim.

g. Oregon

Oregon's Unlawful Trade Practices Act prohibits "any unconscionable tactic in connection with selling, renting or disposing of real estate, goods or services, or collecting or enforcing an obligation." *Or. Rev. Stat. § 646.607*. "Unconscionable" tactics may include knowingly taking advantage of a customer's physical infirmity, ignorance, illiteracy or inability to understand the language of the agreement, or knowingly permitting a customer to enter into a transaction from which the customer will derive no material benefit. *See Id.* § 646.605(9). Based on these examples, courts have construed "unconscionable" to require allegations involving false and misleading representations made by defendants to plaintiffs. *See, e.g.,* *In re Packaged Seafood Prod. Antitrust Litig., 242 F. Supp. 3d 1033, 1084 (S.D. Cal. 2017)*; *In re Lidoderm Antitrust Litig., 103 F. Supp. 3d 1155, 1170-71 (N.D. Cal. 2015)*. The Court finds these decisions persuasive and will grant Defendants' Joint Motion to Dismiss with respect to this claim, as Peterson Plaintiffs fail to allege such conduct.

h. Utah

Utah's Consumer Sales Practice **[*37]** Act only prohibits deceptive and unconscionable acts, not unfair competition. *In re Pork Antitrust Litig., 495 F. Supp. 3d at 787*. However, as Peterson Plaintiffs rightly point out, the

Act is to be construed liberally. *Utah Code Ann. § 13-11-2*. As such, federal courts have found that an antitrust violation can be unconscionable. *In re Namenda Indirect Purchaser Antitrust Litig., No. 15-6549, 2021 WL 2403727, at *33 (S.D.N.Y. June 11, 2021)* (collecting cases); *see also* *In re Intel Corp. Microprocessor Antitrust Litig., 496 F. Supp. 2d 404, 418 (D. Del. 2007)*. The Court agrees and will therefore deny Defendants' Joint Motions as to this claim.

With respect to Utah's Unfair Practices Act, however, the Utah Supreme Court has signaled that it only protects commercial competitors, not consumers. *See* *Garrard v. Gateway Fin. Servs., Inc., 207 P.3d 1227, 1230 (Utah 2009)*. While Peterson Plaintiffs argue that the court's statement to this effect was mere dicta, it still is an accurate predictor of how Utah's highest court would likely rule on the issue. Thus, the Court will grant Defendants' Joint Motions as to this claim.

4. Unjust Enrichment Claims

The Court has covered much of the same ground before. *See* *In re Pork Antitrust Litig., 495 F. Supp. 3d at 790-99*. As in that case, Indirect Purchaser Plaintiffs lump their state claims together rather than individually pleading each element for every state. However, they have alleged that Defendants unlawfully overcharged them by conducting inequitable, traceable acts that enriched Defendants and that Defendants do not deserve to keep the **[*38]** benefits of this enrichment. This is sufficient at the motion to dismiss stage.[26] *Id. at 790-91*. Additionally, "when it is still unclear whether [plaintiffs'] other legal remedies will prevail, it is unnecessary to dismiss unjust-enrichment claims because they are pleaded in the alternative." *Id. at 799*.

With respect to the parties' state-specific arguments, the Court and the parties are familiar with the Court's earlier holdings regarding many of the same ones made here. *Id. at 791-99*. The Court's reasoning and conclusions remain unchanged with respect to most of Plaintiffs' claims, and Defendants' Joint Motions to Dismiss will be granted in part and denied in part accordingly.[27] There are, however, some new arguments to consider.[28]

a. Arizona

The plaintiffs in *In re Pork Antitrust Litig.* failed to make out a cognizable claim under Arizona law because they did not allege the necessary indirect connection between themselves and defendants. *Id. at 792-93*. The requisite showing is not onerous, nor does the presence of an intermediary between a plaintiff and a defendant defeat a claim. *Id.* In fact, all that is required to survive a motion to dismiss is an allegation that the plaintiff conferred a benefit on a defendant. **[*39]** *Id.*; *see also* *Yee v. Nat'l Gypsum Co., No. 09-8189, 2010 WL 2572976, at *4 (D. Ariz. June 22, 2010)*. Here, Indirect Purchaser Plaintiffs allege that they indirectly conferred a benefit on Defendants, which suffices at this stage. As such, the Court will deny Defendants' Joint Motions to Dismiss in this regard.

b. New Hampshire

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[26] The Court notes that Defendants are free to bring a motion for summary judgment to ask the Court to consider whether any surviving claims fail to meet the elements required by certain jurisdictions then.

[27] The Court notes that the parties presented a few additional cases to consider. After careful review, they did not alter the Court's thinking.

[28] One argument, that *Illinois Brick* bars certain claims, has already been decided based on the Court's conclusions above: because *Illinois Brick* does not bar Plaintiffs' Missouri, Montana, or South Carolina consumer protection claims, neither does it bar Plaintiffs' Missouri, Montana, or South Carolina unjust enrichment claims. Thus, the Court will deny Defendants' Joint Motions to Dismiss in this regard.

Under New Hampshire law, courts have allowed indirect purchasers to bring parasitic unjust enrichment claims based on defendants' violations of New Hampshire's consumer protection statute. *In re Pork Antitrust Litig., 495 F. Supp. 3d at 792*. However, given that the Court will grant Defendants' Joint Motions to Dismiss with respect to Indirect Purchaser Plaintiffs' New Hampshire consumer protection claims, there is no host for their unjust enrichment claims. Accordingly, the Court will grant Defendants' Joint Motions to Dismiss in this regard.

c. North Dakota

Previously, the Court stated that "North Dakota does not require a direct conferral of a benefit in order to bring a claim for unjust enrichment . . . However, as with the Arizona claim, [plaintiffs] have failed to allege even the bare 'connection' required under North Dakota law." *Id. at 796*. Here, however, as mentioned above with respect to Indirect Purchaser Plaintiffs' Arizona claims, they have alleged the requisite bare connection. Thus, the Court **[*40]** will deny Defendants' Joint Motions to Dismiss in this regard.

d. Rhode Island

To recover for unjust enrichment under Rhode Island law, a plaintiff must allege that a benefit was conferred upon the defendant by the plaintiff, that the defendant appreciated such benefit, and that it is inequitable for the defendant to retain the benefit without paying its value. *Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 99 (R.I. 2006)*.

The parties do not cite to any decisions by the state's highest court requiring that the benefit be conferred directly to a defendant, nor has the Court found any cases specifically addressing this issue.[29] The Rhode Island Supreme Court has stated that the third prong of the analysis is the most important and dispositive. *Emond Plumbing & Heating, Inc. v. BankNewport, 105 A.3d 85, 90-91 (R.I. 2014)*. It has also stated that "it is contrary to equity and good conscience for one to retain a benefit that has come to him at the expense of another." *Merchants Mut. Ins. Co. v. Newport Hosp., 272 A.2d 329, 332 (R.I. 1971)*. Based upon the reasoning contained in these decisions, and in the absence of contrary authority, the Court predicts that the state's highest court would construe "benefit" broadly and not require a direct connection. The Court will therefore deny Defendants' Joint Motions to Dismiss in this regard.

e. Utah

Utah law distinguishes between a direct benefit and an incidental, **[*41]** not indirect, benefit. *In re Packaged Seafood, 242 F. Supp. 3d at 1092* (citing Utah cases). "'Direct' is used to draw a distinction from 'incidental,' as in the realm of a by-product, specifically to explicate that services performed by the plaintiff for his own advantage cannot constitute grounds for unjust enrichment." *In re Processed Egg Prod. Antitrust Litig., 851 F. Supp. 2d 867, 934 (E.D. Pa. 2012)* (cleaned up). "Furthermore, Utah law recognizes that benefits under unjust enrichment are broadly defined." *Id.* As such, courts have found that when plaintiffs allege that defendants have profited directly from an alleged price-fixing conspiracy, then they have sufficiently alleged a direct benefit. *In re Packaged Seafood, 242 F. Supp. 3d at 1092-93*; *see also* *Johnson v. Blendtec, Inc., 500 F. Supp. 3d 1271, 1292 (D. Utah 2020)* (collecting cases) ("The lack of direct contact between indirect purchaser plaintiffs and a distributor does not doom

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[29] Each party does cite to a lower court decision. The one presented by Defendants cites to New York law for the proposition that a benefit must be direct. *Alessi v. Bowen Court Condominium*, No. 03-0235, 2010 WL 897246, at *4 (R.I. Super. Mar. 10, 2010). The one presented by Indirect Purchaser Plaintiffs cites to another lower court decision that then cites to the Restatement of Restitution for the proposition that "benefit" denotes any form of advantage conferred to a defendant. *State v. Purdue Pharma L.P.*, No. PC-2018-4555, 2019 WL 3991963, at *17 (R.I. Super. Aug. 16, 2019) (citing *State v. Lead Ind. Assn., Inc.*, No. 99-5226, 2001 WL 345830, at *15 (R.I. Super. Apr. 2, 2001). Given that neither holding is grounded in Rhode Island law, the Court finds that both are equally unpersuasive.

an unjust enrichment claim." (cleaned up)). The Court is persuaded by the weight of this authority and will therefore deny Defendants' Joint Motions to Dismiss in this regard.

II. DEFENDANTS' INDIVIDUAL MOTIONS TO DISMISS

National Beef and subsidiaries of the other Defendants each assert that Plaintiffs' allegations fail to demonstrate that it participated in any antitrust agreement. For the reasons discussed above, the Court disagrees, finding that Plaintiffs have sufficiently demonstrated **[*42]** that National Beef and each subsidiary plausibly participated in the conspiracy and will therefore dismiss Defendants' Individual Motions to Dismiss in this regard.

The corporate parents of Cargill, Tyson, and JBS individually assert that Plaintiffs fail to allege that they participated in the conspiracy, simply lumping them in with their subsidiaries instead. However, Producer Plaintiffs make specific allegations against the corporate parents with respect to their CEA claims. Furthermore, with respect to the Sherman Act and the PSA, Plaintiffs demonstrate that the corporate parents undertook specific acts in furtherance of the alleged anticompetitive conspiracy. (*E.g.*, TAC ¶ 45, Sealed App. 1 ¶¶ 1-37, Dec. 28, 2020, Docket No. 312-1.) This is sufficient to plausibly allege that the parents are liable too.[30] *Cf. Reg'l Multiple Listing Serv. of Minn., Inc. v. Am. Home Realty Network, Inc., 9 F. Supp. 3d 1032, 1045 (D. Minn. 2014)*. As such, the Court will deny Defendants' Individual Motions to Dismiss in this regard. However, given that discovery may disclose a different picture, the Court will allow Defendants to reassert this question at summary judgment.

Finally, JBS makes two additional arguments.[31] First, it asserts that the Court cannot exercise personal jurisdiction over JBS S.A. However, given that **[*43]** the Court has concluded that the allegations concerning the conspiracy and the acts attributed to JBS S.A. in furtherance of the conspiracy are plausible, then conspiracy jurisdiction can be had. *See Yellow Brick Rd., LLC v. Childs, 36 F. Supp. 3d 855, 866 (D. Minn. 2014)*. Second, JBS S.A. contends that it was not properly served by Plaintiffs. The Court agrees, as letters rogatory were required at the time Plaintiffs attempted service, but they sent the summons and complaint via certified mail instead. However, as discussed next, because the Court will grant Plaintiffs' Motions to Approve Alternative Service, this point is moot. Thus, the Court will deny JBS's Individual Motion to Dismiss in both regards.

III. PLAINTIFFS' MOTIONS TO APPROVE ALTERNATIVE SERVICE

Plaintiffs ask the Court to approve alternative service with respect to JBS S.A., namely by serving its attorneys here in the United States. *Federal Rule of Civil Procedure 4(f)(3)* allows the Court to order any means of service, so long as it is not prohibited by international agreement. Brazil is now a party to the Hague Convention, which is the only applicable international agreement. Under Article 10 of the Convention, service of process by mail is allowed unless a country objects. Brazil has objected, so service by mail is not **[*44]** an option.

However, courts have concluded that service of process sent to an international defendant via email is not prohibited by Article 10. *See, e.g., Patrick's Rest., LLC v. Singh, No. 18-764, 2018 WL 5307839, at *3 (D. Minn. Oct. 26, 2018)*, *aff'd*, *No. 18-764, 2019 WL 121250 (D. Minn. Jan. 7, 2019)*; *see also Nagravision SA v. Gotech Int'l*

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[30] The Court notes, without deciding, that Plaintiffs' single-enterprise theory could provide another plausible ground. *See Arandell Corp. v. Centerpoint Energy Servs., Inc., 900 F.3d 623, 631 (9th Cir. 2018)* ("[I]n a single-enterprise situation, it is the affiliated corporations' collective conduct—i.e., the conduct of the enterprise they jointly compose—that matters; it is the enterprise which must be shown to satisfy the elements of a [Sherman Act] claim." (cleaned up)); *see also Copperweld, 467 U.S. at 771* ("[I]n reality a parent and a wholly owned subsidiary always have a unity of purpose or a common design.").

[31] Regarding the misnaming of a JBS Defendant by Direct and Indirect Purchaser Plaintiffs, the Court will allow amendment back for Plaintiffs to rename JBS USA Food Company Holdings as JBS USA Food Company. *See Roberts v. Michaels, 219 F.3d 775, 777-78 (8th Cir. 2000)*.

Tech. Ltd., 882 F.3d 494, 498 (5th Cir. 2018) (holding that serving an international defendant by email does not even constitute service effected pursuant to the Hague Convention).

Additionally, emailing the international defendant's counsel in the United States avoids the dictates of the Hague Convention altogether, as it does not involve transmitting documents abroad. *See Water Splash, Inc. v. Menon, 137 S. Ct. 1504, 1509, (2017)*; *see also In GLG Life Tech Corp. Sec. Litig., 287 F.R.D. 262, 267 (S.D.N.Y. 2012)* (collecting cases). This method also avoids the possible issue of sending an email to an address not actively monitored abroad. *See, e.g., Ehrenfeld v. Salim a Bin Mahfouz, No. 04-9641, 2005 WL 696769, at *3 (S.D.N.Y. Mar. 23, 2005)*. Thus, the Court elects this method. Accordingly, it will grant Plaintiffs' Motions and order service on JBS S.A.'s counsel in the United States via email.[32]

ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

ECF 19-1222

1. Defendants' Joint Motion to Dismiss [Docket No. 326] is **DENIED**;

2. Cargill Defendants' Motion to Dismiss [Docket No. 330] is **DENIED**;

3. Defendant National Beef's Motion to Dismiss [Docket No. 333] is **DENIED**;

4. JBS Defendants' Motion to Dismiss [Docket No. 338] **[*45]** is **DENIED**;

5. Tyson Defendants' Motion to Dismiss [Docket No. 342] is **DENIED**;

6. Plaintiffs' Motion to Approve Alternative Service [Docket No. 356] is **GRANTED**. Plaintiffs are authorized to serve JBS S.A. by serving counsel for JBS S.A., Patrick E. Brookhouser, Jr. and William F. Hargens of McGrath North, with the summons, complaint, and this Memorandum Opinion and Order via email.

ECF 19-1129

1. Defendants' Joint Motion to Dismiss [Docket No. 258] is **DENIED in part and GRANTED in part**, as follows:

a. Plaintiffs' Michigan consumer protection claim is **DISMISSED with prejudice**;

b. Plaintiffs' Nebraska consumer protection claim is **DISMISSED with prejudice**;

c. Plaintiffs' New Hampshire consumer protection claim is **DISMISSED with prejudice**;

d. Plaintiffs' Oregon consumer protection claim is **DISMISSED with prejudice**;

e. Plaintiffs' South Dakota consumer protection claim is **DISMISSED with prejudice**;

f. Plaintiffs' Utah Unfair Practices Act claim is **DISMISSED with prejudice**;

g. Plaintiffs' Florida unjust enrichment claim is **DISMISSED with prejudice**;

h. Plaintiffs' New Hampshire unjust enrichment claim is **DISMISSED with prejudice**;

[32] The Court notes that because it will order service on attorneys who have already appeared on behalf of JBS S.A., no due process concerns are implicated. *See, e.g., Washington State Inv. Bd. v. Odebrecht S.A.*, No. 17-8118, 2018 WL 6253877, at *5 (S.D.N.Y. Sept. 21, 2018).

i. With respect to all other claims and issues, the Motion is **DENIED;**

2. Cargill **[*46]** Defendants' Motion to Dismiss [Docket No. 263] is **DENIED**;

3. Defendant National Beef's Motion to Dismiss [Docket No. 266] is **DENIED**;

4. JBS Defendants' Motion to Dismiss [Docket No. 271] is **DENIED**;

5. Tyson Defendants' Motion to Dismiss [Docket No. 275] is **DENIED**;

6. Plaintiffs' Motion to Approve Alternative Service [Docket No. 289] is **GRANTED**. Plaintiffs are authorized to serve JBS S.A. by serving counsel for JBS S.A., Sami
H. Rashid of Quinn Emanuel Urquhart & Sullivan LLP, with the summons, complaint, and this Memorandum Opinion and Order via email.

ECF 20-1319

1. Defendants' Joint Motion to Dismiss [Docket No. 166] is **DENIED**;

2. Cargill Defendants' Motion to Dismiss [Docket No. 170] is **DENIED**;

3. Defendant National Beef's Motion to Dismiss [Docket No. 173] is **DENIED**;

4. JBS Defendants' Motion to Dismiss [Docket No. 178] is **DENIED**;

5. Tyson Defendants' Motion to Dismiss [Docket No. 182] is **DENIED**;

6. Plaintiffs' Motion to Approve Alternative Service [Docket No. 194] is **GRANTED**. Plaintiffs are authorized to serve JBS S.A. by serving counsel for JBS S.A., Sami
H. Rashid of Quinn Emanuel Urquhart & Sullivan LLP, with the summons, complaint, and this Memorandum Opinion and Order via email.

ECF 20-1414 **[*47]**

1. Defendants' Joint Motion to Dismiss [Docket No. 127] is **DENIED in part and GRANTED in part**, as follows:

a. Plaintiff's Missouri consumer protection claim is **DISMISSED with prejudice**;

b. Plaintiff's Nebraska consumer protection claim is **DISMISSED with prejudice**;

c. Plaintiff's New Hampshire consumer protection claim is **DISMISSED with prejudice**;

d. Plaintiff's New York consumer protection claim is **DISMISSED with prejudice**;

e. Plaintiff's North Dakota consumer protection claim is **DISMISSED with prejudice**;

f. Plaintiff's Rhode Island consumer protection claim is **DISMISSED with prejudice**;

g. Plaintiff's South Dakota consumer protection claim is **DISMISSED with prejudice**;

h. Plaintiff's Florida unjust enrichment claim is **DISMISSED with prejudice**;

i. Plaintiffs' New Hampshire unjust enrichment claim is **DISMISSED with prejudice**;

j. With respect to all other claims and issues, the Motion is **DENIED;**

2. Cargill Defendants' Motion to Dismiss [Docket No. 132] is **DENIED**;

3. Defendant National Beef's Motion to Dismiss [Docket No. 135] is **DENIED**;

4. JBS Defendants' Motion to Dismiss [Docket No. 140] is **DENIED**;

5. Tyson Defendants' Motion to Dismiss [Docket No. 144] is **DENIED**;

6. Plaintiff's Motion to Approve Alternative **[*48]** Service [Docket No. 155] is **GRANTED**. Plaintiff is authorized to serve JBS S.A. by serving counsel for JBS S.A., Sami H. Rashid of Quinn Emanuel Urquhart & Sullivan LLP, with the summons, complaint, and this Memorandum Opinion and Order via email.

IT IS FURTHER ORDERED that the parties show cause on or before ten (10) calendar days from the date of this Order why the Court should not allow the Order to be accessible to the general public and specify any portion of the Order warranting redaction.

DATED: September 14, 2021

at Minneapolis, Minnesota.

/s/ John R. Tunheim

JOHN R. TUNHEIM

Chief Judge

United States District Court

[Twin Bridges Waste & Recycling, LLC v. County Waste & Recycling Serv.]

United States District Court for the Northern District of New York

September 14, 2021, Decided; September 14, 2021, Filed

1:21-CV-263

Reporter
2021 U.S. Dist. LEXIS 175158 *; 2021 WL 4192606

TWIN BRIDGES WASTE AND RECYCLING, LLC, Plaintiff, -v- COUNTY WASTE AND RECYCLING SERVICE, INC.; ROBERT WRIGHT DISPOSAL, INC.; WASTE CONNECTIONS US, INC.; and WASTE CONNECTIONS, INC., doing business as Waste Connections, Defendants.

Subsequent History: Motion denied by *[Twin Bridges Waste & Recycling, LLC v. Cnty. Waste & Recycling Serv., Inc., 2022 U.S. Dist. LEXIS 182967 (N.D.N.Y., Oct. 6, 2022)]*

Prior History: *County Waste & Recycling Serv. v. Twin Bridges Waste & Recycling, 72 Misc. 3d 1217(A), 150 N.Y.S.3d 893, 2021 N.Y. Misc. LEXIS 4459, 2021 WL 3611979 (Aug. 13, 2021)*

Core Terms

alleges, landfills, personal jurisdiction, customers, prices, defendants', subsidiaries, competitors, motion to dismiss, market share, antitrust, contracts, monopolization, predatory, disposal, owns, anticompetitive conduct, monopoly power, residential, Recycling, quotation, marks, amended complaint, plaintiff's claim, waste disposal, ownership, barriers, monopoly, lock, vertical integration

Counsel: **[*1]** For Plaintiff: DONALD W. BOYAJIAN, ESQ., JAMES R. PELUSO, JR. ESQ., LAUREN S. OWENS, ESQ., WILLIAM J. DREYER, ESQ., OF COUNSEL, DREYER BOYAJIAN LLP, Albany, New York.

For Defendants: ANDREW C. ROSE, ESQ., WILLIAM E. REYNOLDS, ESQ., ERIN HUNTINGTON, ESQ., OF COUNSEL, NIXON, PEABODY LAW FIRM ALBANY OFFICE, Albany, New York.

For Defendants: GORDON L. LANG, ESQ., OF COUNSEL, NIXON, PEABODY LAW FIRM D.C. OFFICE, Washington, District of Colombia.

Judges: DAVID N. HURD, United States District Judge.

Opinion by: DAVID N. HURD

Opinion

MEMORANDUM-DECISION and ORDER

INTRODUCTION

On May 28, 2021, plaintiff Twin Bridges Waste and Recycling, LLC ("Twin Bridges" or "plaintiff") filed a 387-paragraph, 79-page amended complaint. It included 57 pages and 334 paragraphs of alleged facts. Plaintiff alleges antitrust violations against defendant waste disposal companies County Waste and Recycling Service, Inc. ("County Waste") and Robert Wright Disposal, Inc. ("Robert Wright"), both of which are allegedly indirect subsidiaries of defendants Waste Connections US, Inc. ("WCUSI") and Waste Connections, Inc. ("WCI" and collectively "defendants").

More specifically, Twin Bridges claims that defendants are trying to freeze it (and everyone else) **[*2]** out of the market for waste disposal services in New York's Capital Region (the "Capital Region Market"). Plaintiff alleges that defendants are attacking that objective through a multifaceted strategy of price-gouging, locking customers into nearly inescapable long-term contracts, impugning competitors' integrity, and consolidating control over landfills to exclude other waste companies.

On June 18, 2021, defendants moved to dismiss Twin Bridges' amended complaint under *Federal Rule of Civil Procedure ("Rule") 12(b)(2)* for lack of personal jurisdiction and *12(b)(6)* for failure to state a claim. Those motions, having been fully briefed, will now be decided on the submissions and without oral argument.

BACKGROUND

In some senses, Twin Bridges' amended complaint (Dkt. 21, "Compl.") can be read as an ongoing feud between two waste disposal companies: plaintiff on the one hand and defendant County Waste on the other. But in other ways, the conflict is more complicated than that, especially considering plaintiff's allegations that the larger corporate defendants are responsible for directing County Waste's efforts. As a result, deciding defendants' present motion involves three steps. First, sorting out each party's role in this litigation and their **[*3]** relationships to each other. Second, deciphering what bad acts plaintiff alleges against each defendant. And third, seeing if those alleged bad acts can support claims under federal ***antitrust law***.

To that end, it makes the most sense to start with Twin Bridges' main alleged rivals, defendants County Waste and Robert Wright. County Waste is a New York limited liability company with a principal place of business in Texas.[1] Dkt. 21 Compl. ¶ 14. But County Waste also does business more locally under a number of other names, including Ace Carting, D.J.'s Roll Off Service, Hardesty and Sons Sanitation, and others. *Id.* ¶ 15.

Robert Wright is also a New York limited liability company, but unlike County Waste its principal place of business is in the County of Albany, New York. Compl. ¶ 16. Robert Wright is a wholly-owned subsidiary of County Waste. *Id.* ¶¶ 22, 30.

One step up from County Waste is WCUSI. Though there are precious few allegations against this defendant, Twin Bridges at least alleges that WCUSI is a Delaware corporation with a principal place of business in Texas. Compl. ¶ 17. Otherwise, plaintiff only alleges that WCUSI "transact[s] substantial business within New York State[.]" **[*4]** *Id.* ¶ 29.

Finally, defendant WCI is a Canadian corporation, although it apparently also operates out of Texas. Compl. ¶ 18. WCI describes itself as "the third-largest waste management company" in North America, at least as far as revenue is concerned. *Id.* ¶ 26. Twin Bridges alleges that WCI prioritizes "exclusive and secondary markets" across the United States and Canada." *Id.* ¶ 25. To that end, plaintiff claims that WCI avoids larger, more competitive urban markets and instead targets "markets where [it] can attain high market share[,] either through exclusive contracts, vertical integration[,] or asset positioning." *Id.* ¶ 74.

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[1] To the extent defendants' motion comes under *Rule 12(b)(6)*, the facts are taken from plaintiff's amended complaint, as well as any documents attached to it or incorporated by reference, and read in the light most favorable to it. To the extent defendants' motion comes under *Rule 12(b)(2)*, however, some facts may be considered from beyond the four corners of the complaint.

One method of vertical integration that WCI occasionally employs is landfill ownership. WASTE CONNECTIONS, *2019 Annual Report* ("Annual Report"), p. 11[2] (2019) http://online.fliphtml5.com/jvcm/ycal/#p=1 (last visited Sept. 13, 2021). In its own words, WCI "generally own[s] landfills to achieve vertical integration in markets where the economic and regulatory environments make landfill ownership attractive." *Id.* at 14. Plaintiff alleges that defendants own nine landfills in the Capital Region through nine different subsidiaries. Compl. ¶ 33. In its 2019 Annual Report, **[*5]** WCI nevertheless repeatedly refers to the landfills as "our" landfills that "we own[ ] or operate[.]" Annual Report p. 14.

Ultimately, Twin Bridges alleges that defendants collectively "market their services and operate as [a] single integrated business entity known as 'Waste Connections.'" Compl. ¶ 39. According to defendants, though, the relationship between them involves a fair sight more distance than plaintiff suggests. WCI claims that it "owns a subsidiary that owns another subsidiary that owns another subsidiary that owns another subsidiary that owns WCUSI." Dkt. 22-2 ("Pio Aff."), ¶ 8. From there, WCUSI owns yet another subsidiary, that in turn owns County Waste. *Id.* ¶ 9. And of course, County Waste then owns Robert Wright. *Id.* ¶ 22.

WCI describes its management of its subsidiaries as "decentralized." Annual Report p. 47. Under that management strategy, "[l]ocal managers have the authority to make many decisions concerning their operations without obtaining prior approval from executive officers, subject to compliance with general company-wide policies." *Id.*

Defendants were operating along those lines when Twin Bridges burst onto the Capital Region waste disposal scene in 2019. **[*6]** Compl. ¶ 81. Plaintiff describes itself as a "local" disposal and recycling company stationed out of the Town of Halfmoon in the Capital Region of New York. Compl. ¶¶ 1, 7. Fledgling as it is—and as a contrast to defendants' well-oiled corporate machinery—plaintiff alleges that it owns no landfills. *Id.* ¶ 8.

Nevertheless, Twin Bridges set its sights on making a name for itself in the Capital Region Market. In plaintiff's own words, that market is "the provision [of] Waste Services to residential, commercial[,] and governmental customers within the Capital Region counties of Albany, Fulton, Rensselaer, Saratoga, Washington[,] and Warren." Compl. ¶ 101. The market also includes commercial—but not residential—customers in Schenectady County, because plaintiff does not serve residential customers in that county. *Id.* ¶¶ 102-03.

According to Twin Bridges, breaking into the Capital Region Market was daunting from the jump. As plaintiff would have it, County Waste and Robert Wright together enjoyed a market share of "well over fifty percent of the residential subscription-based customers in the Capital Region Market." Compl. ¶ 78. In fact, plaintiff alleges that Robert Wright had a complete **[*7]** monopoly in southern Albany County. *Id.* ¶ 79.

In 2019, Twin Bridges claims that County Waste and Robert Wright's market power was such that plaintiff emerged as the "only alternative" for "most residential customers." Compl. ¶ 80. According to plaintiff's narrative, its arrival in the Capital Region Market immediately led to monopolistic gambits by defendants. *Id.* ¶ 81.

Those alleged gambits come in three flavors. First, under Count I, Twin Bridges alleges that defendants cut their prices below their costs to starve plaintiff out of the market. *See* Compl. ¶ 83. Specifically, plaintiff claims that County Waste slashed its prices from between $41 and $43 per month in 2011 to between $26 and $32 per month once plaintiff and its predecessor attempted to enter the market. *Id.* ¶¶ 112, 114.

That effort would prove to be only the first salvo in a price-cutting war between County Waste on the one side and Twin Bridges and its predecessor on the other. *See* Compl. ¶¶ 115-28. Plaintiff provides a number of alleged examples. Recently, plaintiff alleges that County Waste offered new residential customers twelve months of free service followed by two years of service at $12 per month. *See id.* ¶¶ 127-28. **[*8]** That rate amounts to only $8 per month for the first thirty-six months of service, which, according to plaintiff, is significantly below the $15-27 per month County Waste would need to charge to recoup its average variable costs. *See id.* ¶¶ 128, 131.

[2] Pagination refers to the overall page number, not the page numbers the document gives itself. Because the amended complaint specifically refers to WCI's 2019 annual report, the Court may rely on it in resolving defendants' personal jurisdiction and failure to state a claim arguments.

Twin Bridges alleges similarly drastic pricing offers in other spheres as well. Plaintiff alleges that Robert Wright and County Waste have offered deals equivalent to: (1) $1.67 per month for the first thirty-six months of contracts with homeowners' associations; (2) $8.95 for the Village of Nassau; and (3) $5.03 per month for the City of Gloversville, not to mention several other similarly drastic price cuts. Compl. ¶¶ 147, 162, 164, 173-213. Plaintiff alleges that each of these offers falls below the minimum defendants need to collect to break even on these contracts. *Id.* ¶¶ 148, 162, 166, 180, 189, 196.

Second, under Count II, plaintiff brings a kind of catchall claim of other anticompetitive conduct. *See* Compl. ¶ 83. Specifically, plaintiff points to an ongoing campaign to defame plaintiff's owner, including a County Waste memorandum maligning the relative size of plaintiff and declaring that County Waste will "win the war" against plaintiff **[*9]** and its owner. *Id.* ¶ 96. Plaintiff also alleges that when defendants absorbed Robert Wright, they kept its former owner on board because he claimed that he could "control" plaintiff's owner. *Id.* ¶¶ 224-25.

Twin Bridges further claims that defendants have locked their residential customers into contracts that renew automatically unless the customer provides written notice of his or her intent to end service well in advance of the deadline. Compl. ¶ 226. Those contracts also include rights of first refusal, which allow defendants to match the price offer of any competitor. *Id.*

Effectively, Twin Bridges claims that these policies keep customers trapped in contracts with defendants, because defendants could simply match any competitor's price to prevent an exodus to other disposal companies. *Id.* ¶ 229. Plaintiff also alleges that defendants are engaging in a widespread and ongoing effort to poach any customers plaintiff manages to bring on board by offering them special deals including drastic price cuts. *See id.* ¶¶ 243-249.

As a further example of allegedly anticompetitive conduct, Twin Bridges points to a number of alleged examples of defendants smearing plaintiff's reputation while working **[*10]** to keep their own customers in the dark as to defendants' contractual terms. *See* Compl. ¶¶ 252-85. Of particular weight, plaintiff claims that defendants published a letter on social media falsely accusing plaintiff's owner of being investigated by the Department of Justice for wire fraud. *Id.* ¶¶ 307-323.

Third, under Count III, Twin Bridges claims that defendants denied it access to their landfills to drive up plaintiff's costs. *See* Compl. ¶ 83. According to plaintiff, defendants have a "controlling market share in the ownership and operation of transfer stations and landfills in the Capital Region Market." Compl. ¶ 289. What is more, plaintiff claims that defendants spoke to other waste haulers and landfill owners to discourage them from working with—or even speaking positively of—plaintiff. *Id.* ¶¶ 303-04

Despite Twin Bridges' ranging allegations of misconduct, it was defendants who cast the first stone. Apparently fed up with their ongoing battles for the Capital Region Market, County Waste and Robert Wright brought a lawsuit against plaintiff in New York Supreme Court, Albany County. Compl. ¶ 334. Plaintiff responded by filing antitrust counterclaims not unlike the ones before this **[*11]** Court. *See id.* Upon realizing that federal courts have exclusive jurisdiction of federal ***antitrust law***, plaintiff voluntarily withdrew those claims without prejudice. *Id.*

Twin Bridges promptly refiled its antitrust claims against defendants before this Court on March 8, 2021. Dkt. 1. On May 7, 2021, defendants moved to dismiss plaintiff's complaint under *Rule 12(b)(2)* and *12(b)(6)* for lack of personal jurisdiction and failure to state a claim, respectively. Dkt. 22. This decision now follows.

LEGAL STANDARDS

A. *Rule 12(b)(6)* Failure to State a Claim

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. That factual matter may be drawn from "the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010)*.

Importantly, "the complaint is to be construed liberally, and all reasonable inferences must be drawn in the plaintiff's favor." *Ginsburg v. City of Ithaca, 839 F. Supp. 2d 537, 540 (N.D.N.Y. 2012)* (citing *Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002)*). If the complaint and its additional materials—when viewed through that pro-plaintiff lens—are not enough to raise the plaintiff's right to relief on a claim above the speculative level, that claim **[*12]** must be dismissed. *See* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

B. *Rule 12(b)(2)* Lack of Personal Jurisdiction

If a defendant calls personal jurisdiction into question under *Rule 12(b)(2)*, the burden of establishing jurisdiction falls to the plaintiff. *Nat'l Elec. Sys., Inc. v. City of Anderson, 601 F. Supp. 2d 495, 497 (N.D.N.Y. 2009)* (citing *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 784 (2d Cir. 1999)*). To carry that burden, the plaintiff must "allege facts constituting a prima facie showing of personal jurisdiction." *Nat'l Elec. Sys., 601 F. Supp. 2d at 497* (citing *PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1106 (2d Cir.1997)*).

At this early stage, all pleadings and factual ambiguities are construed in the plaintiff's favor. *Nat'l Elec. Sys., 601 F. Supp. 2d at 497* (citing *Robinson v. Overseas Mil. Sales Corp., 21 F.3d 502, 507 (2d Cir.1994)*).

However, the same is not true of argumentative inferences, nor will the court "accept as true a legal conclusion couched as a factual allegation[.]" *In re Terrorist Attacks on September 11, 2001, 714 F.3d 659, 673 (2d Cir. 2013)* (internal citations and quotation marks omitted). Moreover, on a motion to dismiss under *Rule 12(b)(2)*, courts may consider materials outside the pleadings "without converting [the] motion . . . into a motion for summary judgment." *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A., 722 F.3d 81, 86 (2d Cir. 2013)*.

From that factual footing, a court must determine whether the plaintiff has made "legally sufficient allegations of jurisdiction, including an averment of facts that, if credited, would suffice to establish jurisdiction over the defendant." *Penguin Grp. (USA) Inc. v. Am. Buddha, 609 F.3d 30, 35 (2d Cir. 2010)* (cleaned up).

DISCUSSION

Defendants' arguments for dismissal have three levels of scale. First, defendants raise one case-wide argument for dismissal: that **[*13]** Twin Bridges has failed to sufficiently allege that there is a substantial enough risk of defendants achieving a monopoly. Second, defendants raise three claim-based arguments, each of which would dispose of a claim as to all defendants, but can only dispose of the case altogether if defendants are correct on all three points. Third, defendants argue that this Court lacks personal jurisdiction over WCI and WCUSI, which would only dismiss those defendants from the case. To avoid unnecessary duplication of effort, the Court will consider defendants' arguments from broadest to narrowest, only reaching the jurisdictional arguments if any of plaintiff's claims remain viable.

A. Probability of Achieving a Monopoly

Defendants begin their assault on Twin Bridges' complaint by arguing that plaintiff has failed to adequately allege that they possess monopoly power. "To state an attempted monopolization claim, a plaintiff must allege plausible facts supporting that the defendant has engaged in [(1)] predatory or anticompetitive conduct, [(2)] with a specific intent to monopolize a particular and defined market, and [(3)] a dangerous probability of success." *In re Zinc Antitrust Litig., 155 F. Supp. 3d 337, 381 (S.D.N.Y. 2016)* (citing *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*).

The third element of a dangerous **[*14]** probability of success requires courts to "consider the relevant market and the defendant's ability to lessen or destroy competition in that market." *Spectrum Sports, 506 U.S. at 456*. In other words, "a defendant's market share is the primary indicator of the existence of a dangerous probability of success." *AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, 226 (2d Cir. 1999)* (internal citations and quotation marks omitted).

But "primary" does not mean "only." On the contrary, other barriers to entry have their say as well. *See Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 99 (2d Cir. 1998)*. For example, even an alleged market share north of 70% does not conclusively establish monopoly power if there is evidence of a lack of barriers to entry. *Id.* (holding that high market share is not dispositive of monopoly power in upholding grant of summary judgment). By contrast, a market share greater than 50% accompanied by evidence of other barriers to entry can establish monopolization. *See id.* And in either case, a claim of attempted monopolization can be supported by a showing of lesser power than is required to establish a claim of completed monopolization. *Id. at 100*.

As the varied factors at play in the monopoly power calculation should make clear, "[t]he existence of monopoly power, or the dangerous probability of acquiring it, is heavily fact-dependent." **[*15]** *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig., 562 F. Supp. 2d 392, 401 (E.D.N.Y. 2008)*. As a result, "courts rarely grant dismissal of [attempted monopolization claims] on the basis of insufficient market share, unless the plaintiff rests its claims on market share allegations to the exclusion of other evidence." *Id.* (collecting cases).

Upon review, Twin Bridges' showing of defendants' market power is not so feeble or contradicted as to justify dismissal. Remember, plaintiff alleges that defendants held a market share of "well over fifty percent of the residential subscription-based customers in the Capital Region Market." Compl. ¶ 78. Although defendants correctly point out that this figure does not account for commercial or government customers, plaintiffs have nevertheless still alleged that defendants have a "leading market position" in the Capital Region Market as defined by the amended complaint. *Id.* ¶¶ 9, 28, 32, 346.

In addition, Twin Bridges has alleged that defendants have assumed control over landfills in the Capital Region Market to vertically integrate and construct additional barriers to entry. *See* Annual Report p. 11. Between defendants' market power and their other barriers to entry, plaintiff has alleged that customers are frequently faced with no alternatives **[*16]** to defendants. *See* Compl. ¶ 77. At this early stage, these allegations of substantial market power and barriers to entry are enough to carry plaintiff's burden. Defendants' motion to dismiss on this score must be denied.

B. Predatory Pricing

Next, defendants argue that Twin Bridges has failed to properly plead the requisite element of anticompetitive conduct for its Count I predatory pricing claim. To that end, "[p]redatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run." *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 117, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. Ultimately, predatory pricing claims look like this. The seller starts by cutting its prices to levels that its competitors, actual or prospective, cannot match. *Irvin Indus., Inc. v. Goodyear Aerospace Corp., 974 F.2d 241, 244 (2d Cir. 1992)*. Would-be competitors find themselves forced to drop out of the market, which allows the seller to build or maintain a monopoly. *Id.* Then, once the seller has secured its power, it takes advantage of consumers' lack of alternatives by charging high prices to recoup the losses from its earlier, lower prices. *Id.*

Alleging such a long-term scheme is no meager feat. Eventually, a predatory pricing plaintiff "must prove that prices complained **[*17]** of are below an appropriate measure of its rival's costs" and "that the competitor had a . . . dangerous probability [ ] of recouping its investment in below-cost prices." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*.

Of course, low prices are more often a sign of healthy competition than of the predatory sort. *See* Id. at 226-227. As a consequence, and to prevent inadvertently chilling appropriate competition, predatory pricing claims are difficult to plead and prove. *Id.*

Even so, Twin Bridges has once again cleared the modest hurdle of plausibility required of a Rule 12(b)(6) motion. Plaintiff has alleged that defendants have cut their prices well below their average variable cost for several groups of customers. *See* Compl. ¶¶ 127-28, 131, 147-48, 162, 164, 166, 173-213. Plaintiff has also alleged that defendants lock their customers into contracts that are nearly impossible to escape. Compl. ¶¶ 226, 229.

Between those two alleged facts, Twin Bridges has plausibly established that defendants are cutting costs below the levels necessary to make a short-term profit, while locking customers into long-term contracts to take advantage of them later. Once again, defendants' motion to dismiss misses the mark, and plaintiff's Count I attempted monopoly claim relying **[*18]** on predatory pricing must survive that motion.

C. Anticompetitive Conduct

Defendants also argue that Twin Bridges' Count II general anticompetitive conduct claim cannot pass muster. "[A]nticompetitive conduct is conduct without a legitimate business purpose that makes sense only because it eliminates competition." *In re Adderall XR Antitrust Litig., 754 F.3d 128, 133 (2d Cir. 2014)* (internal citations and quotation marks omitted). That definition is a narrow one, which works to ensure that exceptions to the general rule that "businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing" are "rare." *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 448, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*.

As discussed above, Twin Bridges' claims of anticompetitive conduct cash out to claims that defendants improperly lock customers into long-term contracts to prevent them from signing with competitors, all while attacking those competitors with unfounded allegations. To defendants' mind, these facts are not enough to carry water.

As for the first theory, defendants argue that Twin Bridges has failed to adequately allege that defendants' exclusive contracts with their customers have foreclosed competition in a substantial share of the Capital Region Market. *See* *Maxon Hyundai Mazda v. Carfax, Inc., 726 F. App'x 66, 70 (2d Cir. 2018)* (summary order) (affirming grant **[*19]** of summary judgment for failure to prove substantial foreclosure of competition in applicable market in exclusive contracts case).

As Twin Bridges correctly notes, though, defendants are asking for far too much from it at the motion to dismiss stage. Plaintiff has alleged that defendants have substantial control over the Capital Region Market for waste disposal and are using that control to lock customers into exclusive contracts. Compl. ¶¶ 77, 226, 229.

Although plaintiff will likely have to establish substantial foreclosure of the market down the road,[3] at present there is no need to require plaintiff to allege anything more concrete than that. *See, e.g.,* *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig., 383 F. Supp. 3d 187, 237 (S.D.N.Y. 2019)* ("At the motion to dismiss stage, . . . specific mathematical pleading is unnecessary."). To the extent it relies on exclusive contracts, Count II must survive.[4] *See, e.g.,* *All Star Carts & Vehicles, Inc. v. BFI Canada Income Fund, 596 F. Supp. 2d 630, 642 (E.D.N.Y. 2009)* (allowing claims of overly restrictive contracts in waste disposal to survive motion under Rule 12(b)(6)).

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[3] Unless plaintiff can establish that defendants' contracts are "so plainly anti-competitive and so lacking in redeeming pro-competitive value that [they are] presumed illegal without further examination," plaintiff will have to clear the rule of reason test. *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 506 (2d Cir. 2004)*. Under that test, plaintiff would be required to establish an "actual adverse effect on competition as a whole in the relevant market." *Id.*

[4] Because Count II survives as a whole, the Court need not delve into whether plaintiff's alternate theories of recovery under this count have merit at this juncture.

D. Refusal of Access

Defendants also set their sights on Count III of Twin Bridges' complaint, alleging anticompetitive refusal of access to defendants' landfills. "As a general rule, businesses are free to choose the parties with whom they will deal[.]" *Pac. Bell, 555 U.S. at 448*. In some "limited **[*20]** circumstances," though, a firm's "unilateral refusal to deal with its rivals can give rise to antitrust liability." *Id.*

But the Supreme Court has been "very cautious" in giving their blessing to circumstances overpowering the freedom to deal. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP ("Trinko"), 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. The one exception that the Supreme Court has recognized is "[t]he unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing" with a competitor. *Id. at 409*. If a firm is willing to break a presumably profitable agreement, the logic goes, a jury could reasonably determine that the purpose in breaking that agreement was to forgo profit in the short term to achieve the long-term goal of weakening a competitor. *Id.* Much less certain is Twin Bridges' submitted "essential facility" exception.

The essential facility test as laid out by the Eleventh Circuit states that "a company that has exclusive control over a facility essential to effective competition may not deny potential competitors access to that facility on reasonable terms and conditions if to do so would create or maintain monopoly power in the relevant market." *Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1294 (11th Cir. 2004)*.

There are two grave problems with Twin Bridges' reliance on the essential facility exception. First, neither **[*21]** the Supreme Court nor the Second Circuit have ever accepted that theory. *Trinko, 540 U.S. at 411*; *see* *RxUSA Wholesale Inc. v. Alcon Labs., 391 F. App'x 59, 61 (2d Cir. 2010)* (summary order) (dismissing claim relying on essential facility exception "to the extent that such a claim is viable"). Instead, the only exception recognized by the Second Circuit to the "broad right of a firm to refuse to deal with its competitors" is a monopolist's termination of "a prior (voluntary) course of dealing with a competitor."[5] *In re Adderall, 754 F.3d at 134*.

Second, even if there an authority binding on this Court that recognized the essential facility exception, that exception contains an "indispensable requirement" that there be "unavailability of access to the essential facilities." *Trinko, 540 U.S. at 411* (cleaned up). "[W]here access exists, the doctrine serves no purpose." *Id.* In other words, where the plaintiff alleges only "inconvenience, or even some economic loss," an essential facilities claim must fail. *Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 570 (2d Cir. 1990)*. Instead, the plaintiff must allege "that an alternative to the facility is not feasible." *Id.*

Twin Bridges' refusal to deal claim cannot pass muster. Even if the Court were to take the bold step of applying the essential facility doctrine, plaintiff has failed to adequately plead an essential facility claim.

After all, **[*22]** Twin Bridges claims that it "routinely disposes of waste and recyclables collected in the Capital Region Market at disposal facilities located outside of New York State, including at facilities located in Pennsylvania." Compl. ¶ 327. That long haul is an inconvenience, to be sure, and likely involves some economic loss. But it is a feasible alternative nevertheless. *Twin Labs, 900 F.2d at 570*. Accordingly, even if the essential facility doctrine were available to plaintiff, its complaint would not present a claim under that doctrine's auspices. *See id.* (noting that plaintiff must allege absence of feasible alternative to sustain hypothetical essential facility claim).

Twin Bridges also fails to allege that defendants previously permitted it to use their landfills before suddenly reneging on that arrangement. As a result, plaintiff cannot avail themselves of the only fully recognized exception to

[5] To the extent that plaintiff relies on an "intent" theory also recognized by the Eleventh Circuit, the Second Circuit has never acknowledged that theory, either. *Compare* *Morris, 364 F.3d at 1294* (Eleventh Circuit describing "intent theory" of monopolization), *with* *In re Adderall, 754 F.3d at 134* (recognizing termination of prior course of dealing as "sole exception" to right to refuse to deal with competitor).

the general rule of freedom to deal. *In re Adderall, 754 F.3d at 134*. Defendants' motion to dismiss Count III must be granted.

E. Personal Jurisdiction over WCI and WCUSI

At this point, Counts I and II remain active against all defendants. However, defendants argue that this Court lacks personal jurisdiction over WCI and WCUSI. By extension, defendants **[*23]** still urge the Court to at least release those defendants from this case.

To that end, personal jurisdiction for an antitrust claim can be established under federal or state law. But in either case, that jurisdiction must comport with the due process guarantees of the *Fourteenth Amendment*. Under federal law, the venue provision of the Clayton Act ("*§ 22*") provides personal jurisdiction over a defendant in an antitrust case "wherever [the defendant] may be found." *15 U.S.C. § 22*. That provision allows nationwide service of process against a defendant, but only if the provision's venue provision is met. *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 424-25 (2d Cir. 2005)*.

Section 22 establishes venue over an antitrust defendant both: (1) "in the judicial district whereof it is an inhabitant"; and (2) "in any district wherein it may be found or transacts business." *15 U.S.C. § 22*. "Transacting business" is sustained by the "practical, everyday business or commercial concept of doing or carrying on busines of any substantial character." *Daniel, 428 F.3d at 428*. The nature of a corporate defendant's business is ultimately essential to the inquiry. *All Star Carts, 596 F. Supp. 2d at 637*. "A parent-subsidiary relationship may form a basis for the exercise of Clayton Act jurisdiction." *Id.*

Regarding defendant WCI, Twin Bridges has adequately established personal jurisdiction under **[*24]** *§ 22*. In arguing otherwise, defendants make much of the Canadian corporation's observance of corporate formalities and their extremely remote distance from the nitty-gritty conflicts between plaintiff, County Waste, and Robert Wright. And indeed, their arguments are not without merit, particularly to the extent that defendants urge that WCI limits itself to larger issues and allows its subsidiaries to primarily govern themselves through their decentralized organization scheme. Annual Report p. 47.

But WCI's treatment of landfills in this district is what ultimately convinces the Court of its jurisdiction over this defendant. WCI frequently refers to the landfills as "ours." *See, e.g.*, Annual Report pp. 14-18, 23, 27-28, 37, 39, 44, 56-57, 60. That is no mere accident, because WCI specifically describes purchasing those landfills as a strategy to aid in vertical integration in markets where it would be advantageous. *Id.* at 11. What is more, plaintiff has alleged WCI's ownership of nine landfills in the Capital Region Market. Compl. ¶ 33.

Defendants do not dispute any of those facts. Instead, defendants point out that WCI itself does not own the landfills: its subsidiaries do. *See* Compl. ¶ **[*25]** 33. That may be true, but the amended complaint alleges—and defendants do not meaningfully dispute—that WCI guides the overall strategy that dictates that those subsidiaries purchase landfills where it presents a market advantage. *See id.* After all, if WCI claims the landfills as its own and specifically outlines a strategy for when landfills should be purchased, it can hardly contend that it does not have a hand in purchasing them and thereby transacting business. Annual Report pp. 11, 14-18, 23, 27-28, 37, 39, 44, 56-57, 60.

Accordingly, personal jurisdiction under *§ 22* is met for WCI. Yet that does not answer whether the *Due Process Clause* also permits the Court's personal jurisdiction over the Canadian defendant. To that end, there are two types of personal jurisdiction contemplated by the *Due Process Clause*: general and specific.

"For an individual, the paradigm forum for the exercise of general jurisdiction [comporting with due process] is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." *Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773, 1780, 198 L. Ed. 2d 395 (2017)*. "A corporation that operates in many places can scarcely be deemed at home in all of them." *Sonera Holding B.V.*

v. Cukurova Holding A.S., 750 F.3d 221, 225 (2d Cir. 2014) (citing Daimler AG v. Bauman, 571 U.S. 117, 139 n.20, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014)).

Instead, the affiliations capable of supporting **[*26]** general jurisdiction "have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable." Sonera, 750 F.3d at 225. Nothing in Twin Bridges' complaint suggests that New York or its Northern District is fairly regarded as WCI's home. On the contrary, this defendant is a Canadian corporation operating out of Texas. Compl. ¶ 18. General personal jurisdiction over WCI can thus safely be ruled out.

But the specific jurisdiction inquiry tells a different story. That inquiry follows three steps. First, the plaintiff must demonstrate that the defendant has sufficient "minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (citations and quotation marks omitted). It is "insufficient to rely on a defendant's random, fortuitous, or attenuated contacts or on the unilateral activity of a plaintiff with the forum to establish specific jurisdiction." U.S. Bank Nat'l Assoc. v. Bank of Am. N.A., 916 F.3d 143, 150 (2d Cir. 2019) (internal citations and quotation marks omitted).

"Nor is it sufficient for a plaintiff to show simply that a defendant's actions caused an 'effect' in the forum state where the defendant has not expressly aimed its conduct at the **[*27]** forum." U.S. Bank, 916 F.3d at 151 (internal citations and quotation marks omitted). In a case involving the flow of commerce into a state, "[t]he defendant's transmission of goods permits the exercise of jurisdiction only where [it] can be said to have targeted the forum[.]" J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 882, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011).

If a plaintiff makes that showing, the second step tasks it with demonstrating that "the litigation results from alleged injuries that 'arise out of or relate to' those activities." In re Terrorist Attacks, 714 F.3d at 674 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)).

Finally, for the third step, the Court "considers those contacts in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." U.S. Bank, 916 F.3d at 151 (internal citations and quotation marks omitted). For specific jurisdiction, those factors are: (1) the defendant's burden; (2) the interests of the forum State; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in efficient resolution; and (5) public policy. Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102, 113, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987).

The first step of the personal jurisdiction inquiry carries over neatly from the Clayton Act analysis. Twin Bridges has alleged that WCI strategically directed its subsidiaries to consolidate ownership of landfills in the Capital Region Market, **[*28]** which involves a deliberate decision to conduct business in New York. Annual Report pp. 11, 14-18, 23, 27-28, 37, 39, 44, 56-57, 60.

The second step is similarly straightforward. Twin Bridges has alleged that WCI purchased those landfills to advance a competitive advantage through vertical integration. Compl. ¶ 74; Annual Report p. 11. By plaintiff's logic, WCI is trying to consolidate monopoly power for its local offshoots. Accordingly, because WCI's conduct is directly related to an element of plaintiff's claims against defendants, plaintiff's injuries attributable to that monopoly power "arise from" WCI's landfill ownership. In re Terrorist Attacks, 714 F.3d at 674.

As for the third step, the Court is satisfied that New York's interests in preventing monopolies in its back yard and plaintiff's ability to obtain injunctive relief in the district where the alleged harm is taking place outweigh any burden WCI might face. Asahi, 480 U.S. at 113. In fact, WCI's burden is especially minimal because WCI's subsidiaries will need to be defended in any case.

In short, all three steps of specific personal jurisdiction under the Due Process Clause are met. Defendants' motion to dismiss Twin Bridges' complaint under Rule 12(b)(2) must be denied as to WCI, at least at this juncture.

See, ***[*29]*** *e.g.*, *All Star Carts, 596 F. Supp. 2d at 638-39* (denying motion to dismiss on personal jurisdiction grounds for owner of subsidiary garbage companies because of broad scope of personal jurisdiction under *§ 22*).

The outlook is not quite so bright for Twin Bridges' claims against WCUSI, however. Plaintiff offers precious few allegations unique to this defendant. On the contrary, most of the complaint simply lumps WCUSI together with the other defendants. *See, e.g.*, Compl. ¶ 30 (noting that most of complaint will collectively refer to defendants as "Waste Connections"). Otherwise, plaintiff only offers the conclusory allegation that WCUSI "transact[s] substantial business within New York State[.]" *Id.* ¶ 29.

By contrast, defendants have submitted an affidavit that disavows any operational functions by WCUSI relevant to the present complaint. Pio Aff. ¶¶ 15-20. Similarly, that affidavit insists that there are no WCUSI employees in New York State at present. *Id.* ¶ 32.

For its part, Twin Bridges objects that this affidavit is self-serving and should be rejected. But even if the Court were to take plaintiff up on that invitation, the complaint simply provides no allegations tying WCUSI to any conduct it complains of. Even assuming that **[*30]** plaintiff could somehow establish personal jurisdiction through *§ 22* or New York's long-arm statute[6] on these barebones facts, the lack of any link between any conduct in the complaint attributable to WCUSI and the harms plaintiff complains of would prove fatal to the second step of the Due Process analysis. *In re Terrorist Attacks, 714 F.3d at 674* (requiring harm plaintiff complains of to arise from contacts with forum state).

Accordingly, Twin Bridges has failed to satisfy its burden of proving personal jurisdiction over WCUSI. Defendants' motion to dismiss under *Rule 12(b)(2)* must be granted on that score, and WCUSI must be dismissed from this case.

CONCLUSION

Despite defendants' best efforts, Twin Bridges' antitrust claims remain largely intact in the aftermath of their motion to dismiss. Even so, that motion has nevertheless allowed the Court to streamline the issues—and defendants—in this case going forward. Counts I and II against defendants County Waste, Robert Wright, and WCI may proceed.

Therefore, it is

ORDERED that

1. Defendants' motion to dismiss under *Rule 12(b)(2)* and *12(b)(6)* is GRANTED in part and DENIED in part;
2. Count III for attempt to monopolize for a refusal of access to disposal facilities is DISMISSED;
3. Defendant Waste Connections U.S., **[*31]** Inc. (WCUSI) is DISMISSED;
4. Plaintiff Twin Bridges Waste and Recycling, LLC's claims under Counts: (I) attempt to monopolize through predatory pricing; and (II) attempt to monopolize through anticompetitive conduct remain against defendants County Waste and Recycling Service, Inc., Robert Wright Disposal, Inc., and Waste Connections, Inc.; and
5. The remaining defendants are directed to answer Counts I and II of plaintiff Twin Bridges Waste and Recycling, LLC's amended complaint no later than Tuesday, September 28, 2021.

IT IS SO ORDERED.

Dated: September 14, 2021

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[6] If a plaintiff cannot meet *§ 22*'s venue requirements, the plaintiff must establish personal jurisdiction through state law. *See* *Daniel, 428 F.3d at 427* (noting that plaintiff failing to meet venue requirements of *§ 22* "must look to other service of process provisions, notably those specified in [Rule] 4 or incorporated therein from state law to satisfy this requirement").

Utica, New York.

/s/ David N. Hurd

David N. Hurd

U.S. District Judge

Wisk Aero LLC v. Archer Aviation Inc.

United States District Court for the Northern District of California

September 14, 2021, Decided; September 14, 2021, Filed

Case No. 3:21-cv-02450-WHO

Reporter

2021 U.S. Dist. LEXIS 205669 *

WISK AERO LLC, Plaintiff, v. ARCHER AVIATION INC., Defendant.

Prior History: *Wisk Aero LLC v. Archer Aviation Inc., 2021 U.S. Dist. LEXIS 103951 (N.D. Cal., May 27, 2021)*

Core Terms

press release, allegations, blog, aircraft, lawsuit, cases, posts, public interest, incidental, contractual relationship, trade secret, Reply, argues, patent, communications, quotation, criminal investigation, confidential, disruption, appears, designs, marks, eVTOL, misappropriated, privileged, campaign, website, intellectual property, substantial interest, third party

LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN1[] **Fundamental Freedoms, Freedom to Petition**

Cal. Code Civ. Proc. § 425.16 was enacted to allow early dismissal of meritless First Amendment cases aimed at chilling expression through costly, time-consuming litigation. These lawsuits are also known as Strategic Lawsuits Against Public Participation, or SLAPPs. Under § 425.16, a party may file an anti-SLAPP motion to strike a cause of action based on an act in furtherance of the right to petition or free speech. In ruling on an anti-SLAPP motion, a court engages in a two-step process. At step one, the court assesses whether the moving party has made a prima facie showing that the lawsuit arises from an act in furtherance of its First Amendment right to free speech. At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN2[] Freedom of Speech, Strategic Lawsuits Against Public Participation

With respect to an anti-SLAPP motion, if the moving party can establish step one, the burden shifts to the non-moving party which must then show a reasonable probability that it will prevail on its claim. For a plaintiff to establish a probability of prevailing on a claim, he must satisfy a standard comparable to that used on a motion for judgment as a matter of law. This standard requires that a claim be dismissed if the plaintiff presents an insufficient legal basis, or if no reasonable jury would find in its favor. But when the step-two analysis depends on the defendant's assertion that a privilege applies, the defendant bears the burden of establishing it.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN3[] Fundamental Freedoms, Freedom to Petition

With respect to an anti-SLAPP motion, a defendant satisfies the first step of the analysis by demonstrating that the conduct by which plaintiff claims to have been injured falls within one of the four categories described in Cal. Code Civ. Proc. § 425.16(e) and that the plaintiff's claims in fact arise from that conduct. The four categories in subdivision (e) describe conduct in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue. Cal. Code Civ. Proc. § 425.16(e).

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN4[] Freedom of Speech, Strategic Lawsuits Against Public Participation

With respect to an anti-SLAPP motion, there is no bright-line rule to evaluate whether speech or conduct falls within the catch-all category at Cal. Code Civ. Proc. § 425.16(e). The California Court of Appeal has, several times, synthesized large groups of authorities and developed multiple tests to determine whether a defendant's activity is in connection with a public issue. A commonly cited test looks to whether the statements (1) concerned a person or entity in the public eye, (2) could directly affect a large number of people beyond the direct participants, or (3) concerned a topic of widespread, public interest.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Torts > ... > Defamation > Public Figures > Limited Purpose Public Figure

HN5[] Freedom of Speech, Strategic Lawsuits Against Public Participation

The California Court of Appeal has provided guiding principles on how to evaluate whether speech or conduct falls within the catch-all category at Cal. Code Civ. Proc. § 425.16(e). First, public interest does not equate with mere curiosity. Second, a matter of public interest should be something of concern to a substantial number of people.

Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. Third, there should be some degree of closeness between the challenged statements and the asserted public interest; the assertion of a broad and amorphous public interest is not sufficient. Fourth, the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy. Finally, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure. A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN6[] **Freedom of Speech, Strategic Lawsuits Against Public Participation**

With respect to an anti-SLAPP motion, once a defendant has demonstrated that the claims against them arise out of protected activity, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment.

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

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

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

HN7[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The essence of the Noerr-Pennington doctrine is that those who petition any department of the government for redress are immune from statutory liability for their petitioning conduct. The doctrine stems from the First Amendment's Petition Clause, which protects the right to petition the Government for a redress of grievances. Petitioning a court via lawsuit is no less protected than any other form of governmental petition. Though the core of the doctrine is statements made in litigation, it also protects certain conduct incidental to a lawsuit. If the conduct is protected, the court then asks whether the lawsuit falls into the sham litigation exception.

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

HN8[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

For purposes of the Noerr-Pennington doctrine, conduct incidental to a lawsuit does not mean conduct in any way related to a lawsuit.

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

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

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

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

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

HN9[] Noerr-Pennington Doctrine, Right to Petition Immunity

A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods. But in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations.

Administrative Law > ... > Evidence > Admissibility of Evidence > Privileged Communications

Torts > ... > Defenses > Privileges > Absolute Privileges

Torts > ... > Defenses > Privileges > Statutory Privileges

HN10[] Admissibility of Evidence, Privileged Communications

Cal. Civ. Code § 47(b) renders privileged a publication or broadcast made, among other things in any judicial proceeding. When it applies, the privilege is absolute and, so, prevents a claimant from showing it can prevail on the merits. The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. The privilege exists to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. California law is clear, however, that republications to nonparticipants in the action are generally not privileged under the litigation privilege, and are thus actionable unless privileged on some other basis.

Torts > ... > Defenses > Privileges > Absolute Privileges

HN11[] Privileges, Absolute Privileges

With respect to the privilege that applies to a publication or broadcast made in any judicial proceeding, one requirement is that the publication be to achieve the objects of the litigation. This means that the communicative act must be a necessary or useful step in the litigation process and must serve its purposes. In other words, it is not sufficient that the communication's content need only be related in some way to the subject matter of the litigation.

Evidence > Privileges > Journalist's Privilege > Scope

Torts > ... > Defenses > Privileges > Absolute Privileges

Torts > ... > Defamation > Defenses > Fair Comment & Opinion

Torts > ... > Defenses > Privileges > Statutory Privileges

Torts > ... > Defenses > Privileges > Qualified Privileges

HN12[] Privileges, Journalist's Privilege

Cal. Civ. Code § 47(d) renders privileged a publication or broadcast made, with several exceptions, by a fair and true report in, or a communication to, a public journal, of a judicial proceeding, or of anything said in the course thereof. When it applies, the privilege is absolute. And although the fair report privilege is typically invoked by news media defendants, it also protects those who communicate information to the media.

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

Torts > ... > Contracts > Intentional Interference > Elements

HN13[] **Complaints, Requirements for Complaint**

The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.

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

HN14[] **Intentional Interference, Elements**

The elements of the intentional version of the tort of interference with prospective economic advantage are (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. The difference between the intentional and negligent torts is that the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship.

Torts > ... > Prospective Advantage > Intentional Interference > Defenses

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

HN15[] **Intentional Interference, Defenses**

With respect to the intentional version of the tort of interference with prospective economic advantage, California law requires that the defendant's conduct be wrongful by some legal measure other than the fact of interference itself.

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

Torts > Business Torts > Unfair Business Practices > Elements

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

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

HN16[] **State Regulation, Claims**

The Unfair Competition Law (UCL) provides a cause of action against business practices that are (1) unlawful, (2) unfair, or (3) fraudulent. Cal. Bus. & Prof. Code § 17200. Generally, by proscribing any unlawful business practice, § 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.

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

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

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

A common law violation such as breach of contract is insufficient to make out an Unfair Competition Law (UCL) claim. But the law is clear that the unlawful practices prohibited by Cal. Bus. & Prof. Code § 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made. The Ninth Circuit has held that international interference with contractual relations can be actionable under the UCL.

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

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

HN18[] **Trade Practices & Unfair Competition, State Regulation**

With respect to unlawful practices prohibited by Cal. Bus. & Prof. Code § 17200, it appears that alleged misrepresentations to third parties about legal issues can constitute an unfair violation.

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For Archer Aviation Inc., A Delaware Corporation, Defendant, Counter-claimant: Arturo J. Gonzalez, LEAD ATTORNEY, Morrison & Foerster LLP, San Francisco, CA; Benjamin Wagner, LEAD ATTORNEY, Gibson Dunn Crutcher, Palo Alto, CA; Josh A. Krevitt, Joshua H. Lerner, LEAD ATTORNEYS, Gibson, Dunn & Crutcher LLP, Palo Alto, CA; Orin Snyder, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn and Crutcher, LLP, New York, NY; Daniel J Thomasch, PRO HAC VICE, Gibson Dunn Crutcher LLP, New York, NY; Diana Michelle Feinstein, PRO HAC VICE, Wayne M. Barsky, Gibson, Dunn and Crutcher LLP, Los Angeles, CA; Frank P Cote, Gibson, Dunn & Crutcher LLP, Irvine, CA.

For Jing Xue, Miscellaneous: David Rossiter Callaway, LEAD ATTORNEY, Goodwin Procter LLP, Redwood City, CA.

Judges: William H. Orrick, United States District Judge.

Opinion by: William H. Orrick

Opinion

ORDER DENYING MOTION TO STRIKE AND DISMISS [*2]

Re: Dkt. No. 118

INTRODUCTION

Plaintiff Wisk Aero LLC ("Wisk") alleges that defendant Archer Aviation Inc. ("Archer") misappropriated its trade secrets and infringed its patents when developing an all-electric vertical takeoff and landing ("eVTOL") aircraft. Archer countersued, claiming that Wisk's publicity campaign associated with the suit constitutes tortious interference with contractual and economic relations, defamation, and an unfair business practice. The heart of its claims is that Wisk wrote several blog posts and a press release that accused Archer of theft of trade secrets and, in one case, stated that the federal government was conducting a criminal investigation "into" Archer. According to Archer, the trade-secret allegations are false. It is not disputed that Archer was not under criminal investigation—it had been subpoenaed in one related to an investigation into an employee.

Wisk now moves to strike those claims under California's anti-SLAAP law or dismiss them in the alternative. Its motion is denied. Though the challenged statements were about a matter of public interest, Wisk has not shown that they are privileged or otherwise immune from creating liability. Archer **[*3]** has adequately pleaded them. And whether the statements are indeed true or can create tort liability is a matter for the merits.

BACKGROUND

The allegations in the complaint in this case were discussed in detail in a recent denying Archer's partial motion to dismiss. *See* Dkt. No. 133. In brief, Wisk alleges that Archer misappropriated a large group of its trade secrets related to Wisk's eVTOL aircraft when developing its own. *See id.* at 22-26.

On April 6, 2021, when Wisk filed this suit, it published a post on its own online blog. *See* Dkt. No. 90-1 ("Blog Post"). On May 19, 2021, it updated it. *Id.* The original post was entitled "Why We're Taking Legal Action Against Archer Aviation." *Id.* at 2.[1] It first laid out Wisk's history and a summary of eVTOL aircraft. *Id.* at 3-4. Because it is the centerpiece of the current motion, I reproduce the part discussing Archer in full:

> Unfortunately, and as discussed in the Complaint we filed earlier today, it appears that Archer Aviation, a new entrant in the eVTOL market, is seeking to gain a foothold in this industry without respecting the rules of fair competition. As detailed in the Complaint, we have discovered significant and troubling evidence **[*4]** indicating that Archer has been using Wisk's proprietary intellectual property without our permission. Among other things, we discovered the misappropriation of thousands of highly confidential files containing very valuable trade secrets, as well as the use of significant innovations Wisk has patented. Wisk's confidential, proprietary trade secrets and patented innovations represent the hard work and dedication of hundreds of Wisk's engineers over multiple years. Today we took legal action to ask a federal court to stop Archer from using that stolen Wisk technology and from infringing our patents. This isn't a step we wanted to take, but we must protect our IP and the decade's worth of work and innovation we've put into Wisk. Here's some more context.
>
> **Archer's Actions**
>
> Archer has made a series of recent pronouncements about its technology and business that surprised the industry, including that it would soon release its own eVTOL aircraft. Just a year ago, Archer appeared to have little or no meaningful operations, let alone the years of research, development, and testing required to fly even a prototype of an eVTOL aircraft.
>
> Archer's stated timeline for releasing an aircraft was a fraction **[*5]** of the time taken by its serious competitors, using a fraction of the number of employees of those competitors. The development of an entirely new kind of passenger aircraft requires years of engineering and significant expertise to get right, as demonstrated by Wisk

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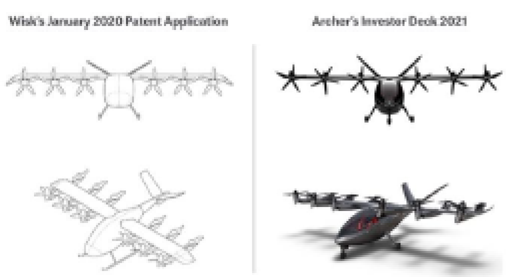
[1] References to exhibits are to their ECF-generated page numbers.

and the other leading players in this space. For example, after 10 years of hard engineering and testing, Wisk is currently developing its sixth-generation aircraft, which it plans to certify with the U.S. Federal Aviation Administration (FAA). We believe it is virtually impossible for Archer to have produced an originally-designed aircraft in this timeframe that has gone through the necessary testing and is ready for certification with the FAA.

The design that Archer released for its eVTOL aircraft was particularly surprising. As detailed in our Complaint, it appears to copy the same design that Wisk developed and submitted in a confidential patent application to the U.S. Patent and Trademark Office in January 2020. The copied design includes six front rotors that each consist of five blades and can tilt to be positioned either horizontally or vertically, as well as six rear rotors that each consist of two blades and remain **[*6]** fixed in a vertical position. The design also includes an unconventional "V" tail. A comparison of Wisk and Archer's designs is shown below: As detailed in our Complaint, the striking similarity in these designs could not have been a



coincidence. The same month that Wisk submitted its patent application, Archer hired ten of Wisk's engineers. Concerned about this targeted recruiting, Wisk hired a third party to conduct a forensic investigation. That investigation yielded troubling information. We discovered that one of those engineers downloaded thousands of Wisk files near midnight, shortly before he announced his resignation and immediately departed to Archer. Those files contain our valuable trade secrets and confidential information about Wisk's aircraft development spanning the history of the company, accumulated over countless hours of incremental progress by scores of engineers. Another engineer downloaded numerous files containing test data just before departing for Archer. Yet another wiped any trace of his computer activities shortly before leaving for Archer.

The stolen files include a multitude of Wisk trade secrets for aircraft designs, component designs, system designs, **[*7]** manufacturing, and test data. They include voluminous confidential presentations reporting on the development, simulation and testing of Wisk aircraft, as well as highly technical confidential documents focused on research, design, development, testing and fabrication of specific systems, which compile years of effort by engineers to develop Wisk's proprietary technology. As our Complaint explains, the design Archer disclosed above reflects its insider knowledge of Wisk's extensive aerodynamic test and evaluation data based on years of experimentation and modeling. The similarity in overall aircraft design further indicates Archer's use of more detailed design features, including features related to aircraft propulsion, power management, avionics, flight control, and manufacturing methodology.
The design of the aircraft submitted in Wisk's patent application is not a result of common knowledge among the industry or basic eVTOL aircraft design. This is a completely new type of aircraft and other companies in the space have come up with their own distinct designs based on their own unique innovation process, as shown below:
[White space appears in exhibit.]

All of this taken together — **[*8]** from the massive downloads and other suspicious activity that occurred just before employee transitions to Archer, the copycat aircraft design, and Archer's startlingly short operational history — have led us to conclude Archer is improperly using Wisk's intellectual property, as further detailed in the Complaint.

Id. at 3-8. It ended the post by saying, "[y]ou can learn more about why we're asking the Court for an injunction to stop Archer from using our IP, among other remedies, in our Complaint and related press release." *Id.* at 8. The words "Complaint" and "related press release" were hyperlinks to those documents. *See id.*

The May 19 update said the following:

> After Wisk filed its Complaint on April 6, Archer publicly disclosed a criminal investigation relating to some of the claims Wisk brought, and Archer's [special purposes acquisition company] sponsor Atlas Crest Investment Corp [("Atlas")] filed an 8-K noting that it was reviewing these matters. Wisk is fully cooperating with the FBI and Department of Justice in their criminal investigation into Archer relating to the theft and use of Wisk's intellectual property.

Id. at 2-3. Archer's public disclosure, however, was that it had **[*9]** been subpoenaed in a criminal investigation into a former Wisk employee that joined Archer. *See* Lauren Hirsch and Niraj Chokshi, Electric Aircraft Start-Up Accuses Rival of Stealing Its Secrets, *New York Times*, April 6, 2021, https://www.nytimes.com/2021/04/06/business/wisk-archer-lawsuit.html ("Archer also said it had placed an employee accused in the suit on paid leave 'in connection with a government investigation and a search warrant issued to the employee, which we believe are focused on conduct prior to the employee joining the company.' Archer said it and three employees who had worked with the individual had been subpoenaed in that investigation and were cooperating with the authorities."). Atlas's SEC disclosure stated much the same. *See* Dkt. No. 115-8. There is no evidence on this record that Archer is the target of a criminal investigation.

Wisk also released that press release on April 6. *See* Dkt. No. 90-2 ("Press Release"). It was entitled "Wisk Aero Sues Archer Aviation for Theft of Trade Secrets and Patent Infringement." Two bullet points beneath the title stated, "[l]awsuit follows discovery of suspicious file downloads and Archer's recent public disclosures," and "[s]eeks **[*10]** injunction halting use of Wisk's IP and other remedies against Archer." *Id.* at 2. The press release stated, "[t]he lawsuit alleges that Archer's business is 'built on intellectual property that is not its own' and brings claims for trade secret misappropriation and patent infringement." *Id.* It gave several descriptions of the allegations in the suit preceded by "[a]s detailed in the filing in federal court in the Northern District of California, this lawsuit follows:" and then said,

> • Wisk's discovery of suspicious file downloads by certain former employees who left Wisk to work for Archer, including thousands of files related to Wisk's confidential aircraft designs, component designs, system designs, manufacturing, and test data.
>
> • Archer's recent disclosure of an aircraft design appears to be a copy of a design Wisk developed and submitted in a confidential patent application to the U.S. Patent and Trademark Office back in January 2020. Archer's aircraft disclosure was made in connection with its plan to merge with Atlas Crest Corporation.
>
> As stated in the Case complaint, "Wisk brings this lawsuit to stop a brazen theft of its intellectual property and confidential information, and **[*11]** protect the substantial investment of resources and years of hard work and effort of its employees and their vision of the future in urban air transportation." Wisk Aero LLC vs. Archer Aviation Inc. (Case No. 5:21-cv-02450).
>
> Additional context for Wisk's legal action can be found in a recent blog post.

Id. at 2-3.

After Wisk filed its First Amended Complaint, Archer filed its First Amended Counterclaims ("CC") [Dkt. No. 90]. As relevant here, the first counterclaim alleges interference with contractual relations, the second alleges interference with prospective economic advantage, and the third alleges defamation, and the fourth alleges violations of California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code § 17200*.[2] Wisk now moves to strike or dismiss those claims. *See* Motion to Strike or Dismiss ("Mot.") [Dkt. No. 113].

LEGAL STANDARD

[2] Since briefing closed on this motion, Archer filed its operative Answer and incorporated its counterclaims "so as to avoid any suggestion of waiver." *See* Dkt. No. 142 51 n.2. Because they are unchanged, that filing did not moot the motion and no party has suggested otherwise.

HN1[] California Code of Civil Procedure § 425.16 "was enacted to allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation." Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 839 (9th Cir. 2001). These lawsuits are also known as "Strategic Lawsuits Against Public Participation," or "SLAPPs." Makaeff v. Trump Univ., LLC, 715 F.3d 254, 261 (9th Cir. 2013). Under Section 425.16, a party may file an "anti-SLAPP motion" to strike "a cause of action based on an act in furtherance **[*12]** of [the] right to petition or free speech." Metabolife, 264 F.3d at 840 (internal quotations omitted).

In ruling on an anti-SLAPP motion, a court engages in a two-step process. Equilon Enterprises v. Consumer Cause, Inc., 29 Cal.4th 53, 67, 124 Cal. Rptr. 2d 507, 52 P.3d 685 (2002). At step one, the court assesses whether the moving party has made "a prima facie showing that the lawsuit arises from an act in furtherance of its First Amendment right to free speech." Nat'l Abortion Federation v. Center for Medical Progress, Case No. 15-cv-03522-WHO, 2015 U.S. Dist. LEXIS 114851, 2015 WL 5071977, at *3 (N.D. Cal. Aug. 27, 2015).

> At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached.

Baral v. Schnitt, 1 Cal. 5th 376, 398, 205 Cal. Rptr. 3d 475, 376 P.3d 604 (2016).

HN2[] If the moving party can establish step one, the burden shifts to the non-moving party which must then show a reasonable probability that it will prevail on its claim. Makaeff, 715 F.3d at 261. "For a plaintiff to establish a probability of prevailing on a claim, he must satisfy a standard comparable to that used on a motion for judgment as a matter of law." Price v. Stossel, 620 F.3d 992, 1000 (9th Cir. 2010). This standard requires that a claim be dismissed if the plaintiff presents an insufficient legal basis, **[*13]** or if no reasonable jury would find in its favor. Metabolife, 264 F.3d at 840; *see also* Price, 620 F.3d at 1000 (an anti-SLAPP motion will be granted if the plaintiff "presents an insufficient legal basis for the claims or when no evidence of sufficient substantiality exists to support a judgment for the plaintiff") (internal quotations omitted). But when the step-two analysis depends on the defendant's assertion that a privilege applies, the defendant bears the burden of establishing it. *See* Mandel v. Hafermann, 503 F. Supp. 3d 946, 963-64 (N.D. Cal. 2020) (collecting authorities).

DISCUSSION

I. ANTI-SLAPP STEP ONE

HN3[] A defendant satisfies the first step of the analysis by demonstrating that the "conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e) [of Section 425.16] . . . and that the plaintiff's claims in fact arise from that conduct." Rand Res., LLC v. City of Carson, 6 Cal.5th 610, 620, 243 Cal. Rptr. 3d 1, 433 P.3d 899 (2019) (internal quotation marks and citations omitted). The four categories in subdivision (e) describe conduct "in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue." Cal. Civ. Proc. Code § 425.16(e).

Wisk argues that several of these categories apply. I agree with it that the challenged statements at least qualify as "conduct in furtherance of the exercise of the constitutional right **[*14]** of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Cal. Civ. Proc. Code § 425.16(e).

HN4[] There is no bright-line rule to evaluate whether speech or conduct falls within this "catch-all" category. Healthsmart Pac., Inc. v. Kabateck, 7 Cal. App. 5th 416, 427, 212 Cal. Rptr. 3d 589 & n.7 (2016), *as modified* (Jan. 10, 2017). The California Court of Appeal has, several times, synthesized large groups of authorities and "developed multiple tests to determine whether a defendant's activity is in connection with a public issue." *Hilton v. Hallmark Cards, 599 F.3d 894, 906 (9th Cir. 2010)*. A "commonly cited test," *id.*, looks to whether the statements (1) "concerned a person or entity in the public eye," (2) "could directly affect a large number of people beyond the direct participants," or (3) concerned "a topic of widespread, public interest." *Rivero v. Am. Fed'n of State, Cty., & Mun. Emps., AFL-CIO, 105 Cal. App. 4th 913, 924 (2003)*. ***HN5***[] The Court of Appeal has elsewhere provided "guiding principles" on the question:

> First, "public interest" does not equate with mere curiosity. Second, a matter of public interest should be something of concern to a substantial number of people. Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. Third, there should be some degree of closeness between the challenged statements and the asserted public interest; **[*15]** the assertion of a broad and amorphous public interest is not sufficient. Fourth, the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy. Finally, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure. A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

Weinberg v. Feisel, 110 Cal. App. 4th 1122, 1132-33, 2 Cal. Rptr. 3d 385 (2003) (internal quotation marks, citations, and alteration omitted).

The blog post and press release qualify under this section. As evidenced by the existence of many news articles in well-trafficked publications, Wisk and Archer are in an industry that is a "topic of widespread, public interest" to a "substantial number of people"—including coverage specifically of them.[3] In fact, Wisk and Archer's lawsuit alone has attracted significant press coverage.[4] *Cf. Henley v. Jacobs, No. C 18-2244 SBA, 2019 U.S. Dist. LEXIS 229894, 2019 WL 8333524, at *9 (N.D. Cal. Aug. 2, 2019)* (finding a "well-known" company sufficiently "in the public eye"). The content of the posts related to allegations that Archer—a company that was about to go public, inviting investors on the open market—built its business on misappropriated **[*16]** trade secrets. *Cf. id.* ("Given Uber's prominence, statements about the company's illegal and unethical practices, which include accusations of stealing trade secrets and conducting surveillance on competitors and politicians, unquestionably concern an 'entity in the public eye' on a matter of 'widespread, public interest.'"); *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc., 946 F. Supp. 2d 957, 969 (N.D. Cal. 2013)*, *aff'd*, *609 F. App'x 497 (9th Cir. 2015)* (finding allegations of unethical business practices by one company against another to qualify because they amounted to a "warning to consumers not to do business with plaintiffs because of their allegedly faulty business practices"). And the blog post (to which the press release linked) alleged that there was a criminal investigation "relating to some of the claims Wisk brought" and that the FBI and Department of Justice—public agencies charged with protecting the public and enforcing the law in its name—had a "criminal investigation into Archer relating to the theft and use of Wisk's intellectual property." Blog Post at 2-3. *Cf. Healthsmart, 7 Cal. App. 5th at 430* (finding allegations of bribery of a state senator to relate to the public interest). All of this together removes this case from the ambit of a run-of-the-mill private dispute and makes it an issue of public interest.

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[3] *See,* ***[*17]*** *e.g.*, Andrew J. Hawkins, GM surprises with autonomous Cadillac and flying car concepts, *The Verge*, Jan. 12, 2021, https://www.theverge.com/2021/1/12/22226778/gm-flying-car-cadillachalo-av-evtol-concept-autonomous-ces-2021; Antuan Goodwin, Archer reveals first photos of its Maker eVTOL air taxi, *CNET*, June 10, 2021, https://www.cnet.com/roadshow/pictures/archermaker-evtol-air-taxi-revealed/; Loz Blain, Stunning video shows just how quiet Joby's eVTOL air taxi will be, *New Atlas*, Feb. 24, 2021, https://newatlas.com/aircraft/joby-aviation-evtol-video/.

[4] *See, e.g.*, Andrew J. Hawkins, Judge rejects Wisk Aero's effort to block rival air taxi startup Archer from using 'stolen' patents, *The Verge*, July 23, 2021, https://www.theverge.com/2021/7/23/22590204/wisk-archer-air-taxi-lawsuit-injunction-denied; Phil LeBeau, Futuristic aircraft maker Archer seeks to dismiss competitor's lawsuit claiming theft of trade secrets, *CNBC*, June 1, 2021, https://www.cnbc.com/2021/06/01/evtol-start-up-archer-seeks-to-dismiss-trade-secret-lawsuit.html; Lauren Hirsch and Niraj Chokshi, Electric Aircraft Start-Up Accuses Rival of Stealing Its Secrets, *New York Times*, April 6, 2021, https://www.nytimes.com/2021/04/06/business/wisk-archer-lawsuit.html; Tracy Rucinski, Air taxi maker Archer seeks $1 billion in damages from Boeing-backed rival, *Reuters*, August 11, 2021, https://www.reuters.com/legal/litigation/air-taxi-maker-archer-seeks-1-billion-damages-boeing-backed-rival-2021-08-11/. I take judicial notice of the of these articles' existence (not of the truth of anything within) because they are publicly available on the publications' websites. *See Fed. R. Evid. 201*.

II. ANTI-SLAPP STEP TWO

HN6[] Once a defendant has demonstrated that the claims against them arise out of protected activity, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. *Baral, 1 Cal.5th at 384*. The inquiry "is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment." *Id. at 384-85*. As noted, Wisk bears the burden of establishing that a privilege applies. *See Mandel, 503 F. Supp. 3d at 963-64*. Wisk argues that it is immune from liability for several reasons and that, in any event, Archer has failed to state any of its claims.

A. *Noerr-Pennington* Doctrine

Wisk first contends that its statements are immunized from liability by the *Noerr-Pennington* doctrine. They are not.

HN7[] "The essence of the *Noerr-Pennington* doctrine is that those who petition any department of the government for redress are immune from statutory liability for their petitioning conduct." *Theme Promotions, Inc. v. News Am. Mktg. FSI, 546 F.3d 991, 1006 (9th Cir. 2008)*. The doctrine stems from the First Amendment's Petition Clause, which protects the right to "petition the Government for a redress of grievances." Petitioning a court **[*18]** via lawsuit is no less protected than any other form of governmental petition. *Sosa v. DIRECTV, Inc., 437 F.3d 923, 929 (9th Cir. 2006)*. To analyze whether the doctrine protects Wisk from liability, the court first asks whether the conduct is protected. Though the core of the doctrine is statements made in litigation, it also protects certain "[c]onduct incidental to a lawsuit." *Theme Promotions, 546 F.3d at 1007*. If the conduct is protected, the court then asks whether the lawsuit falls into the "sham litigation" exception. *Id.*

Wisk argues that its blog posts and press release are "conduct incidental to a lawsuit." Mot. 7-9. Although district courts have divided on this issue, most courts within this Circuit to have addressed the question have concluded that a communication like this that simply describes the lawsuit is not protected by the doctrine. I agree.

HN8[] Conduct "incidental" to a lawsuit does not mean conduct "in any way related" to a lawsuit. As one court has put it, Wisk's reading of Ninth Circuit precedent is "overly broad." *Arista Networks, Inc. v. Cisco Sys. Inc., No. 16-CV-00923-BLF, 2018 WL 11230167, at *11 (N.D. Cal. May 21, 2018)*. The doctrine was given its most substantial treatment by the Ninth Circuit in *Sosa*. There, the court, relying on past cases, described the test as whether conduct was "incidental to the *prosecution* of the suit." *Sosa, 437 F.3d at 929* (emphasis added). In that case, **[*19]** the court held that pre-suit demand letters could fall within the reach of the doctrine. *Id. at 936*. As it explained, "preceding the formal filing of litigation with an invitation to engage in negotiations to settle legal claims is a common, if not universal, feature of modern litigation" and "[r]estricting such prelitigation conduct when the same demands asserted in a petition to the court is protected would render the entire litigation process more onerous, imposing a substantial burden on a party's ability to seek redress from the courts." *Id.* Significant, too, is that these communications were often privileged under state law. *Id.* And demand letters also served the same interest as litigation because they can help resolve disputes outside of formal litigation. *Id. at 936-37*.

The cases that *Sosa* relied on in formulating the "incidental to the prosecution of the suit" standard similarly concern extra-judicial communications with a tight connection to furthering the litigation and the values underlying the doctrine. One of those cases held that communications accepting or rejecting settlement offers were "conduct incidental to the prosecution of the suit." *Columbia Pictures Indus., Inc. v. Pro. Real Est. Invs., Inc., 944 F.2d 1525, 1528 (9th Cir. 1991)*, *aff'd*, *508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*.[5] Another held that communications in discovery **[*20]** are likewise incidental to the prosecution of the suit. *Freeman v. Lasky, Haas & Cohler, 410 F.3d 1180, 1184 (9th Cir. 2005)*. The "incidental" language came from *Noerr* itself. That case, and the

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[5] *Columbia Pictures* passingly cited one district court case that cuts against my holding here; that issue is addressed below.

Supreme Court's cases expanding on the doctrine, also show its limited scope. There, railroads carried out a campaign to achieve legislative reform related to truckers; the Court held that the publicity campaign had the "incidental" effect of harming the truckers' perception, which was protected from antitrust liability. *E. R. R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 142, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*. ***HN9***[] The Court later explained that holding: "A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods. *Noerr, supra, 365 U.S., at 140-141*. But in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations." *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499-500, 108 S. Ct. 1931, 1936-37, 100 L. Ed. 2d 497 (1988)*. And, as the Ninth Circuit characterized a set of Supreme Court decisions employing the principle: "the Court held that laws restricting the ability of unincorporated associations to employ attorneys for their members, or to advise their members to seek legal advice and to recommend specific lawyers, violated the members' rights of association and petition, **[*21]** notwithstanding that such laws did not directly restrict the members' access to the courts or ability to obtain counsel independently." *Sosa, 437 F.3d at 935* (citations omitted).

Wisk's blog posts and press release were not "incidental to the prosecution of the lawsuit." The blog posts and press release communicated with the public *about* the lawsuit. But they did not, in any manner, affect it or advance Wisk's interests in it. Not giving them *Noerr-Pennington* immunity also does not threaten the values underlying the doctrine: If Wisk were subject to liability for the blog post and press release, it would not hamper its ability to prosecute this case at all. It is not like pre-suit demand letters, discovery communications, or other conduct that is useful or necessary to successfully petition a court for redress, to give Wisk adequate "breathing space" to petition the court, or to achieve the materially same end as litigation.

Other cases have so held. As one judge in this District explained *when examining blog posts about a lawsuit*, the defendant's "communications are in one sense related to the CLI litigation because they discuss the parties' copyright dispute. However, those communications have no relation **[*22]** to the prosecution of the CLI lawsuit as they are merely statements about the status of the parties' litigation and Cisco's intellectual property rights." *Arista, 2018 U.S. Dist. LEXIS 241347, 2018 WL 11230167, at *11*. Another judge in this District has found that a commercial publication that compared companies' products and described one of their litigating positions against the other was not protected. *Riverbed Tech., Inc. v. Silver Peak Sys., Inc., No. C 13-02980 JSW, 2015 U.S. Dist. LEXIS 188737, 2015 WL 12941890, at *3 (N.D. Cal. Apr. 7, 2015)*. It was, the court explained, not incidental to the prosecution of the suit even though it was "about" it. *Id.*

Wisk unpersuasively attempts to distinguish these cases. Wisk tries to distinguish *Arista* on the ground that it "examined the 'issue of how to evaluate a constitutionally protected lawsuit as part of a larger anticompetitive scheme,' and found that 'conduct incidental to [the] litigation [is] not protected by the *Noerr-Pennington* doctrine [where] Cisco used such [anticompetitive] conduct as tools to further the . . . scheme.'" Reply ISO Mot. ("Reply") [Dkt. No. 131] 7 (alterations in Wisk's Reply). It is true that the case *involved* an anti-competitive scheme, but that does not and did not alter the *Noerr-Pennington* analysis. The question there, as in any such analysis, was still whether the statements were protected. Not only is this plain **[*23]** from *Arista*'s reasoning, *Arista* also rejected Wisk's primary cases as inconsistent with *Sosa*. *Arista, 2018 U.S. Dist. LEXIS 241347, 2018 WL 11230167, at *11*. (*Noerr-Pennington* was originally built for ***antitrust law***, so that it cropped up in that context is no surprise and further shows Wisk's attempted distinction is mistaken.) And though it is true that *Riverbed* addressed a commercial comparison document (which is not the situation here), its *reasoning* was still that *Noerr-Pennington* does not extend protection to statements merely describing litigation. *See* *Riverbed, 2015 U.S. Dist. LEXIS 188737, 2015 WL 12941890, at *3*.

Wisk also relies on a group of cases that, as noted above, disagreed with this approach and found that various descriptions of litigation or publicity related to litigation are protected by the doctrine. Mot. 8; Reply 7. I do not find them persuasive. The only case in the Ninth Circuit that Wisk points to largely addressed cease and desist letters, a type of communication not at issue here. *See* *ABC Int'l Traders v. Yamaha Corp. of Am., NO. CV-86-7892-RSWL,* 1993 U.S. Dist. LEXIS 20947, at *11 (C.D. Cal. Jan. 27, 1993).[6] Then, in one sentence it held that "[w]hen publicity is incident to a lawsuit that is not a sham, that publicity is also protected by the Noerr-Pennington doctrine." Id., at *10. It offered no further explanation for that holding. In support, it cited two cases. The first, from the Fifth Circuit, held nothing of the sort: the cited **[*24]** portion held that threats of litigation were protected. Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358, 1367 (5th Cir. 1983). It only mentioned "publicity" to stay that "*the* publicity" connected to the threats of litigation was protected. *Id.* (emphasis added).

The other case is a decision from the District of Kansas that, as noted below, appears to be the wellspring for all of these cases. That case *did* hold that publicity attendant to a lawsuit was protected by the doctrine. *See* Aircapital Cablevision, Inc. v. Starlink Commc'ns Grp., Inc., 634 F. Supp. 316, 326 (D. Kan. 1986). To start, that court's analysis elided the distinction between general publicity and threats about litigation, and the cases it cited were all about the protection of litigation threats. *See id.* This aside, Aircapital did not engage with the values animating the *Noerr-Pennington* doctrine on this issue; it did not explain how mere description of the suit publicly affected the suit itself, let alone was incidental to its prosecution or necessary to safeguard the right to petition; and it long predated Sosa. It is true that the Ninth Circuit cited Aircapital in passing in Columbia Pictures and its parenthetical characterization was "where underlying litigation is not a sham, attendant publicity is protected by *Noerr-Pennington* doctrine." Columbia Pictures, 944 F.2d at 1529. But Wisk overreads the Ninth Circuit's stray citation as approval. The citation **[*25]** came in the substantive discussion of ***antitrust law***, not in the court's discussion of the doctrine. It was cited for the point that the antitrust claim rose or fell with the copyright action (so it is somewhat puzzling that the court chose that citation). *See id.* And the only *Noerr-Pennington* issue the court examined was the sham exception. In short, one buried and oblique reference with no supporting rationale about an issue not in the case does not transform one decision from the District of Kansas into Ninth Circuit law.

Wisk's next case only relied on cases finding things like warning or threat letters protected, except for Aircapital, and did not provide substantive discussion for why mere descriptions of the suit should be protected. *See* Kemin Foods, L.C. v. Pigmentos Vegetales del Centro S.A. de C.V., 384 F. Supp. 2d 1334 (S.D. Iowa 2005), *aff'd*, 464 F.3d 1339 (Fed. Cir. 2006). And its last case (marked not for citation) did the same thing, citing only Kemin, Aircapital, and *ABC International. See* Cap. Health Sys., Inc. v. Veznedaroglu, No. 15-8288, 2017 U.S. Dist. LEXIS 28390, 2017 WL 751855, at *13 (D.N.J. Feb. 27, 2017).

Finally, Wisk and the cases it relies on often cited cases in which a public relations campaign incident to a *legislative* petition was found protected. *See, e.g.*, Reply 7. If anything, that highlights how inappropriate applying the doctrine here would be. Litigation, unlike legislation, is not influenced by public pressure campaigns, so **[*26]** the idea that publicity is incident to prosecuting a lawsuit makes still less sense.

Accordingly, Wisk's blog posts and press release are not "incidental to the prosecution" of this litigation because they merely described it to the public.[7] They are not entitled to protection under the *Noerr-Pennington* doctrine.

B. Litigation Privilege

Next, Wisk argues that California's statutory litigation privilege shields its statements. Again, it does not.

HN10[] *California Civil Code § 47(b)* renders privileged a "publication or broadcast" made, among other things "[i]n any . . . judicial proceeding." When it applies, the privilege is absolute and, so, prevents a claimant from

[6] Wisk's other case from this Circuit concerned a letter sent to customers of the other party announcing the litigation and putting them on notice that they may be sued for purchasing infringing products, which is a far cry from the situation here. *See* AirHawk Int'l, LLC v. TheRealCraigJ, LLC, No. SACV1600624JVSKESX, 2017 U.S. Dist. LEXIS 147499, 2017 WL 3891214, at *3 (C.D. Cal. Jan. 19, 2017).

[7] The situation described in this Order is materially different from one in which the blog post or press release served some purpose in the litigation. If, for instance, the post were part of a class action notice plan, a search for class members, a search for witnesses, or something similar, the reasoning here would plainly not apply.

showing it can prevail on the merits. *Argentieri v. Zuckerberg, 8 Cal. App. 5th 768, 780, 214 Cal. Rptr. 3d 358 (2017)*. "The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Silberg v. Anderson, 50 Cal. 3d 205, 212, 266 Cal. Rptr. 638, 786 P.2d 365 (1990)*, *as modified* (Mar. 12, 1990). The privilege exists "to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." *GetFugu, Inc. v. Patton Boggs LLP, 220 Cal. App. 4th 141, 152, 162 Cal. Rptr. 3d 831 (2013)* (internal quotation marks, **[*27]** alteration, and citations omitted). California law is clear, however, that "republications to nonparticipants in the action are generally not privileged under the litigation privilege, and are thus actionable unless privileged on some other basis." *Id.* (internal quotation marks and emphasis omitted); *accord Silberg, 50 Cal. 3d at 219; Susan A. v. Cty. of Sonoma, 2 Cal. App. 4th 88, 93, 3 Cal. Rptr. 2d 27 (1991)*.

Wisk's blog posts and press release are not shielded by the privilege. ***HN11***[] First, one requirement is that the publication be "to achieve the objects of the litigation." *Silberg, 50 Cal. 3d at 212*. The Court of Appeal has explained that this means that the "communicative act" must be "a necessary or useful step in the litigation process and must serve its purposes." *Rothman v. Jackson, 49 Cal. App. 4th 1134, 1146, 57 Cal. Rptr. 2d 284 (1996)*. In other words, it is not sufficient that the "communication's *content* need only be related in some way to the subject matter of the litigation." *Id.* (emphasis in original). As explained above in the discussion on the *Noerr-Pennington* doctrine, the press release and blog posts were not a useful or necessary step in the litigation and were not for purposes of achieving its objects. The only connection to the litigation is that the communications discussed it: their "content [was] related in some way to the subject matter of the litigation." *Id.* ***[*28]*** As a judge in this District has explained, a "public post on the internet"—essentially on all fours with Wisk's blog posts—cannot be found to further the objects of the litigation. *Canaday v. Peoples-Perry, No. 17-CV-05602-JSC, 2017 U.S. Dist. LEXIS 206804, 2017 WL 6405618, at *6 (N.D. Cal. Dec. 15, 2017)*.

Even setting this aside, Wisk's blog posts and press release were republished to non-participants in the action, so they are not covered by the litigation privilege. *GetFugu, 220 Cal. App. 4th at 152*. The blog post was republished for anyone, not just those in the litigation, to read. The press release was affirmatively sent out to the world at large. That is why, even in one of *Wisk's* leading cases, an emailed statement to the press that "summariz[ed] a pleading on the day it was filed"—essentially on all fours Wisk's press release—was found to not be privileged. *Argentieri, 8 Cal. App. 5th at 784*.

Wisk's counterarguments do not change this reality. In its Motion, Wisk countered that *its complaint and allegations* were made in a judicial proceeding. Mot. 10. That is true and irrelevant, the counterclaims are about the blog posts and press release. In the Reply, Wisk argues that they are "related to this lawsuit." Reply 9. Again, that is true; but that is not the test, as described above.

Wisk invokes an exception for when the republication is to nonparties "with a substantial **[*29]** interest in the proceeding." *GetFugu, 220 Cal. App. 4th at 152*; Mot. 10. That exception does not apply here. Again, Wisk did not send either the blog post or the press release to someone with a substantial interest in the proceeding, it posted the blog entry online and sent the press release out to whomever would read them. Neither of Wisk's cases on this issue are like the facts here. In one, the party *did* post a statement on a website. *FIVE Hotel FZCO v. Viceroy Hotels, LLC, No. B288793, 2019 Cal. App. Unpub. LEXIS 33, 2019 WL 91567, at *7 (Cal. Ct. App. Jan. 3, 2019)* (unpublished). But, in holding that the webpage was aimed at those with a substantial interest in the litigation, the court found that "[t]he Web site statement was not made to an 'unlimited worldwide audience.' Rather, it was placed on the [defendant]-owned webpage that had previously offered reservations to the hotel and now informed travelers why reservations were no longer offered on that page." *Id., at *8*. That was significant in part because a court threatened to impose liability on "any other person who knows of this order and does anything which helps or permits the defendant to breach the terms of this order." *Id.*, at *7 (internal quotation marks omitted). Because liability would extend to those who did business on that website, they had a "substantial interest" in the proceedings. *Id.* Wisk's **[*30]** other case found that a press release sent to buyers or prospective buyers of the company's goods was transmitted to people with a substantial interest in the litigation. *Weiland Sliding Doors & Windows, Inc. v. Panda Windows & Doors, LLC, 814 F. Supp. 2d 1033, 1041 (S.D. Cal. 2011)*. Neither of Wisk's communications was only transmitted to those it or Archer did business with who may have an interest in this litigation. Wisk's Reply attempts to reframe the question as whether it was transmitted to "interested parties who visit the site," but that is quite different than parties with a *substantial* interest *in the litigation*.

C. Fair Reporting Privilege

Wisk's Motion initially argued that "[b]ecause Archer's tortious interference and unfair competition claims are based on the transmittal of Wisk's blog posts and press release to news outlets, they are barred by the California fair and true reporting privilege." Mot. 11. Its Reply narrows that argument to the press release, and only to the extent that it was transmitted via a wire service (not, apparently, posted it on its website). Based on Wisk's Reply, I address only this updated argument.

HN12[] *California Civil Code § 47(d)* renders privileged a "publication or broadcast" made, with several exceptions not relevant here, "[b]y a fair and true report in, or a communication to, a public **[*31]** journal, of . . . a judicial . . . proceeding, or . . . of anything said in the course thereof." When it applies, the privilege is absolute. *Healthsmart, 7 Cal. App. 5th at 431*. And "[a]lthough the fair report privilege is typically invoked by news media defendants, it also protects those who communicate information to the media." *Id.*

There appears, however, to be no real dispute between the parties. The press release apparently was put out both in Wisk's website and via a wire service. Wisk does not defend the post on its website on the basis of this privilege (nor, presumably, could it). Archer's Opposition admits that it only challenges the statement to the extent it was published on its website. *See* Opposition to the Mot. ("Oppo.") [Dkt. No. 123] 18. Both parties will be bound by those representations going forward: Archer cannot impose liability for transmitting the press release to a wire service or the damages that resulted from that transmission; Wisk cannot argue that the posts on its own website are shielded by the fair reporting privilege.

D. Failure to State a Claim

Wisk next argues that Archer cannot make the showing that it will prevail on the merits because it has failed to state a claim on three of the **[*32]** four challenged counts.[8]

i. Interference with Contractual Relations

Archer's first counterclaim alleges interference with contractual relations. ***HN13***[] "The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Pac. Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 1126, 270 Cal. Rptr. 1, 791 P.2d 587 (1990)*. Archer argues that two such contractual relationships were disrupted: (1) the merger with Atlas, through which Archer will go public and raise $1.1 billion, *see* CC ¶ 38, and (2) causing an employee to withdraw acceptance of a job offer. *Id.* ¶¶ 65-71.

Wisk's Motion argued that Archer had not pleaded that the Atlas contract was actually breached (as opposed to a mere disruption), Mot. 12, but that is unnecessary because "I follow the line of cases that requires actual breach *or disruption* of the contractual relationship because that is how the California Supreme Court has stated the element." **[*33]** *Park Miller, LLC v. Durham Grp., Ltd., No. 19-CV-04185-WHO, 2017 U.S. Dist. LEXIS 206804, 2020 WL 1955652, at *10 (N.D. Cal. Apr. 23, 2020)* (emphasis added, internal quotation marks and citation omitted).

[8] The motion to dismiss is derivative of the arguments made in this part of the motion to strike.

Wisk also contends that Archer does not allege that Wisk knew about the potential employee or had knowledge of the contract with them. Mot. 13. Archer's Opposition cites a case in which the court held that "in order to satisfy the second element of this tort under California law, the Plaintiff does not have to identify the specific contractual relations which have allegedly been disrupted . . . . If a potential defendant was completely unaware of contractual relations with a third party, then it would be impossible to infer any intent to interfere on the defendant's part. However, such intent can certainly be inferred if the defendant knows that contractual relations with a third party exist, but does not know the specific identity of the contractual party." *Sebastian Int'l, Inc. v. Russolillo, 162 F. Supp. 2d 1198, 1203-04 (C.D. Cal. 2001)*. Wisk cited no contrary authority and did not respond to the argument in its Reply. It appears plausible that Wisk had reason to know that Archer was hiring employees at pace—it was a centerpiece of its complaint. *See* Dkt. No. 133 at 24 (summarizing allegations). Wisk's only response is that this argument would impose tort liability whenever **[*34]** a company is hiring, but that is incorrect because a plaintiff will ultimately have to prove the defendant's intent to interfere.

ii. Interference with Prospective Economic Advantage

Archer's second counterclaim alleges interference with prospective economic advantage. ***HN14***[] The elements of the intentional version of the tort are "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *Pac. Gas, 50 Cal. 3d at 1126* & n.2. The difference between the intentional and negligent torts is that "the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship." *N. Am. Chem. Co. v. Superior Ct., 59 Cal. App. 4th 764, 786, 69 Cal. Rptr. 2d 466 (1997)*. Archer alleges that it had economic relationships with "potential investors, lenders, **[*35]** and employees" that were disrupted. CC ¶ 73.

First, Wisk contends that Archer has failed to identify a specific relationship. Archer argues that the same relationships are at issue as with the interference with contract claim. *See* Oppo. 21. The economic advantage claim does incorporate the contractual relations allegations. CC ¶ 72. On the understanding that Archer is limited to Atlas (and its individual investors) and the single withdrawn employee, the claim may proceed. Otherwise, I would agree with Wisk that Archer's pleading is too vague to plausibly state a claim against others. *See, e.g.*, *Buxton v. Eagle Test Sys., Inc., No. C-08-04404 RMW, 2010 U.S. Dist. LEXIS 29190, 2010 WL 1240749, at *1 (N.D. Cal. Mar. 26, 2010)*. The case will proceed on those allegations alone.

Next, Wisk alleges that Archer has not pleaded any wrongful conduct. ***HN15***[] California law requires that "the defendant's conduct be wrongful by some legal measure other than the fact of interference itself." *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers, 795 F.3d 1124, 1133 (9th Cir. 2015)* (internal quotation marks and citation omitted). Archer, however, has alleged that Wisk made false representations publicly, which appears to be an independent wrongful act sufficient to support liability. *Rausch v. Blair, No. CV154212DSFAGRX, 2015 U.S. Dist. LEXIS 189082, 2015 WL 13283839, at *2 (C.D. Cal. Oct. 1, 2015)*. Wisk mustered no authority to the contrary and did not address the argument in reply.

Finally, **[*36]** Wisk argues that Archer has not adequately pleaded proximate cause.[9] Yet Archer has pleaded that the blog post and press release directly led to these contractual and economic problems—a fact that would be within its knowledge. *See* CC ¶¶ 70, 77. The loss of an employment contract as a direct result of blog posts and a press release is sufficient to plausibly trace the causal chain to the posts. I agree that those allegations are not as specific as they could possibly be, but they are sufficient to create a reasonable inference of liability, especially as

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[9] Its Reply attempted to expand this argument to the contractual relations claim as well, but I decline to address that improper argument.

proximate causation is a quintessential jury matter. *Pac. Shores Properties, LLC v. City of Newport Beach, 730 F.3d 1142, 1168 (9th Cir. 2013)*.

iii. UCL

HN16[] The UCL provides a cause of action against business practices that are (1) unlawful, (2) unfair, or (3) fraudulent. *See Cal. Bus. & Prof. Code §17200*.

Wisk first argues that Archer has failed to allege "unlawful" conduct under the UCL. Generally, "[b]y proscribing 'any unlawful' business practice, *section 17200* 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)* (some internal quotation marks omitted). Wisk argues that Archer only alleges common-law violations, which it claims are not actionable. It misunderstands the law. **HN17**[] Its pull-quote **[*37]** comes from the broader holding that "a common law violation s*uch as breach of contract* is insufficient" to make out a UCL claim. *Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1044 (9th Cir. 2010)* (emphasis added). But the law is clear that "[t]he 'unlawful' practices prohibited by *section 17200* are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Superior Ct., 27 Cal. App. 4th 832, 838-39, 33 Cal. Rptr. 2d 438 (1994)*. The Ninth Circuit has held that international interference with contractual relations can be actionable under the UCL. *CRST Van Expedited, Inc. v. Werner Enterprises, Inc., 479 F.3d 1099, 1107 (9th Cir. 2007)*. Wisk has presented no principled basis to treat interference with economic advantage any differently—and it too is a "a tortious violation of duties imposed by law," the key reason the Ninth Circuit imposed liability. *Id.*

Wisk asserts that Archer has failed to allege "unfair" conduct under the UCL. **HN18**[] It appears, however, that alleged misrepresentations to third parties about legal issues can constitute an "unfair" violation. *See Luxul Tech. Inc. v. Nectarlux, LLC, 78 F. Supp. 3d 1156, 1174 (N.D. Cal. 2015)*. Without any contrary authority from Wisk (it again does not address the issue in reply), the claim will not be dismissed at this early stage on this basis.

E. Truth Defense

Wisk briefly argues that its statements were substantially true, which is a defense to some types of liability. *See Savage v. Pac. Gas & Elec. Co., 21 Cal. App. 4th 434, 449, 26 Cal. Rptr. 2d 305 (1993)*. Its argument **[*38]** is close to undeveloped but is, in any event, rejected.

Wisk's statements are not mere opinions or puffery; they are capable of being proven true or false. Archer has adequately pleaded that they are false, so to the extent Wisk's attack is facial, it fails. Most of the statements concern whether, as a factual matter, Archer misappropriated Wisk's trade secrets, which Archer alleges to be false. The remaining statement is that there was a federal criminal investigation "into" Archer, which no one disputes is not true, so the question will be whether Wisk has an adequate defense to that. Nor is it enough at this stage that Wisk sometimes described its *complaint* as making these allegations, because a reasonable layperson might well understand Wisk to be asserting that Archer in fact did so (and some of the statements were not couched in that way, so it would not wholly doom the claims). To the extent Wisk's attack is factual, Archer has presented sufficient evidence that it has a reasonable prospect of succeeding on the merits. Among other things, I previously found that Wisk, in an evidentiary showing, had not demonstrated misappropriation of trade secrets, which may mean that its statements **[*39]** were not true. *See* Dkt. No. 133 at 26-46. And again, the claim about the criminal investigation is not accurate in any event, because Archer only admitted it was subpoenaed in the course of the investigation into Xue, not that it itself was under investigation.

CONCLUSION

The motion to strike and dismiss is DENIED.

IT IS SO ORDERED.

Dated: September 14, 2021

/s/ William H. Orrick

William H. Orrick

United States District Judge

Truck-Lite Co. v. Grote Indus.

United States District Court for the Western District of New York

September 17, 2021, Decided; September 17, 2021, Filed

18-CV-599-JLS-MJR

Reporter

2021 U.S. Dist. LEXIS 177769 *

TRUCK-LITE CO., LLC, Plaintiff, -v- GROTE INDUSTRIES, INC., Defendant.

Core Terms

registration, trademark, counterclaims, fraudulent, allegations, Lanham Act, cross-appeal, procure, antitrust, patent, lamp, Sherman Act, Recommendation, monopolization, cause of action, immunity, allege fraud, trade dress, damages, sham, statute of limitations, fraud claim, cancellation, argues, anti-competitive, notice, motion to dismiss, functionality, registered, grounds

Counsel: **[*1]** For Truck-Lite Co., LLC, Plaintiff: Byron A. Bilicki, Carl Alfred Hjort, III, LEAD ATTORNEYS, The Bilicki Law Firm, P.C., Jamestown, NY.

For Grote Industries, Inc., c/o CT Corporation System, Defendant: Carol E. Heckman, Vincent M. Miranda, LEAD ATTORNEYS, Carson R. Cooper, Lippes Mathias Wexler Friedman LLP, Buffalo, NY; Daniel J. Lueders, LEAD ATTORNEY, PRO HAC VICE, Woodard, Emhardt, Henry, Reeves & Wagner LLP, Indianapolis, IN.

Judges: MICHAEL J. ROEMER, United States Magistrate Judge.

Opinion by: MICHAEL J. ROEMER

Opinion

REPORT AND RECOMMENDATION

This case has been referred to the undersigned by the Hon. John L. Sinatra, Jr. pursuant to *28 U.S.C. §636(b)(1)* for all pre-trial matters and to hear and report upon dispositive motions.[1] Presently before the Court is plaintiff Truck-Lite Co., LLC's motion to dismiss defendant Grote Industries, Inc.'s counterclaims for failure to state a claim under *Federal Rule of Civil Procedure 12(b)(6)*. (Dkt. No. 53). For the following reasons, it is recommended that plaintiff's motion be granted in part and denied in part.

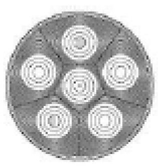
BACKGROUND

Complaint[2]

[1] This case was originally assigned to the Hon. Lawrence J. Vilardo and subsequently reassigned to Judge Sinatra, who maintained the dispositive referral to the undersigned.

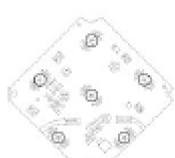
[2] The facts in this section are reiterated from the Court's prior Report and Recommendation. (Dkt. No. 40).

Plaintiff Truck-Lite Co., LLC ("Truck-Lite"), a Delaware limited liability company with its principal place of business in Falconer, New York, is a leading manufacturer and distributor of vehicular lighting **[*2]** products, such as work lamps, strobe lamps, and stop/tail/turn lamps. (SAC ¶¶6, 33). In 1999, plaintiff redesigned its flagship stop/tail/turn lamp (the Model 44) by developing "a unique and visually pleasing arrangement for the LED's"[3] within the lamp. (SAC ¶34). Plaintiff refers to this arrangement of LED's as the "penta-star" pattern. (*Id.*). In 2007, plaintiff applied for a trade dress trademark on the penta-star pattern embodied in the Model 44. (*Id.* ¶36). The United States Patent and Trademark Office ("USPTO" or "PTO") examined the application and issued plaintiff U.S. Trademark Registration 3,483,147 (the "'147 Registration"). (*Id.*). The following image depicts the trade dress at issue in the '147 Registration:



(*Id.*).

In 2008, plaintiff applied for a second trade dress trademark on the penta-star pattern embodied in a variety of its vehicular lighting products. (*Id.* ¶37). The USPTO examined the application (U.S. Trademark Serial No. 77/618,319 (the "'319 Application")) and published it for opposition. (*Id.*). The following image depicts the trade dress at issue in the '319 Application:



(*Id.*).

Defendant Grote Industries, Inc. ("Grote"), an Indiana corporation with its principal place **[*3]** of business in Madison, Indiana, filed with the Trademark Trial and Appeal Board ("TTAB") a Notice of Opposition against the '319 Application and a Petition for Cancellation against the '147 Registration. (*Id.* ¶¶7, 47-48). The TTAB consolidated defendant's Notice of Opposition and Petition for Cancellation into a single proceeding (*id.* ¶49), and in 2018, the TTAB issued a decision sustaining both the Notice and the Petition (*id.* ¶52 & Ex. C (TTAB Decision)).

Plaintiff thereafter commenced the instant action seeking *de novo* judicial review of the TTAB's decision under *15 U.S.C. §1071(b)(1)*. (Dkt. No. 1 (Original Complaint)). Plaintiff then filed an Amended Complaint (Dkt. No. 15) and a Second Amended Complaint (Dkt. No. 29), with the Second Amended Complaint now serving as the operative complaint. Plaintiff's Second Amended Complaint asserts ten causes of action, the first nine of which concern defendant's alleged advertisement, offer for sale, and sale of competing work lamp, strobe lamp, and stop/tail/turn lamp products that make use of the penta-star pattern. (*See id.*). Specifically, plaintiff's first and fourth causes of action assert federal unfair competition and trademark infringement claims concerning **[*4]** defendant's alleged advertisement, offer for sale, and sale of a competing work lamp product. (*Id.* ¶¶55-71, 107-22). The second and fifth causes of action assert federal unfair competition and trademark infringement claims concerning defendant's alleged advertisement, offer for sale, and sale of a competing strobe lamp product. (*Id.* ¶¶72-88, 123-38). Plaintiff's third and sixth causes of action assert federal unfair competition and trademark infringement claims concerning defendant's alleged advertisement and promotion of a competing stop/tail/turn lamp product. (*Id.* ¶¶89-106, 139-54).[4] The seventh, eighth, and ninth causes of action assert New York state law claims for trademark infringement,

[3] "LED" stands for light-emitting diode, a type of light source.

unfair competition, and dilution relating to defendant's advertisement, offer for sale, and sale of its competing work lamp, strobe lamp, and stop/tail/turn lamp products. (*Id.* ¶¶155-96). Plaintiff's tenth cause of action again seeks *de novo* judicial review of the TTAB's decision. (*Id.* ¶¶197-202).

Grote moved to dismiss the Second Amended Complaint for lack of personal jurisdiction under *Rule 12(b)(2)* and for summary judgment under *Rule 56*. (Dkt. No. 30). Following briefing and oral argument on the motion, this Court **[*5]** recommended that the motion be denied based on a finding that the Court has personal jurisdiction over Grote for Truck-Lite's Lanham Act and state law claims and may exercise pendent personal jurisdiction over Grote for Truck-Lite's TTAB review claim. On September 29, 2020, Judge Sinatra issued a Decision and Order adopting this Court's Report and Recommendation over Grote's objections and referring the matter back for further proceedings. (Dkt. No. 46).

Counterclaims

On October 13, 2020, Grote filed an answer to the Second Amended Complaint and also asserted several affirmative defenses and counterclaims against Truck-Lite. (Dkt. No. 48). Grote's first counterclaim alleges fraud in the prosecution of the '147 Registration and seeks damages and upholding cancellation of the trademark registration under the Lanham Act, *15 U.S.C. §§ 1120* and *1064*, respectively. (*Id.* ¶¶ 17-46). Grote's second counterclaim alleges fraud in the prosecution of the '319 Application and seeks damages and upholding of the TTAB decision. (*Id.* ¶¶ 47-75). Grote's third and fourth counterclaims allege antitrust monopolization and restraint of trade, and attempted monopolization, under antitrust laws, including the Sherman Act, *15 U.S.C. §§ 1* and *2*, and the Clayton **[*6]** Act, *15 U.S.C. § 14*. (*Id.* ¶¶ 76-120).

In response, Truck-Lite filed the instant motion to dismiss each of Grote's counterclaims. (Dkt. No. 53). Grote filed a response in opposition, (Dkt. No. 54), to which Truck-Lite replied (Dkt. No. 55). On January 27, 2021, the Court heard oral argument on the motion to dismiss and requested further briefing on the issues. On February 10, 2021, the parties each submitted supplemental memoranda. (Dkt. Nos. 57; 58). At that time, the Court considered the matter submitted.

DISCUSSION

The Court will address plaintiff's numerous arguments in support of dismissal first as they relate to the TTAB decision, and then, as they apply to each of defendant's counterclaims.

I. *Legal Standard*

In order to state a claim on which relief can be granted, a complaint must contain, *inter alia*, "a short and plain statement of the claim showing that the pleader is entitled to relief." *See* *Fed. R. Civ. P. 8(a)(2)*. In reviewing a complaint in the context of a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, the court must accept as true all factual allegations and draw all reasonable inferences from those allegations in favor of the plaintiff. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007)*. Specifically, a complaint must plead "enough facts to state a claim to relief that is **[*7]** plausible on its face," *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, and must "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). The Supreme Court has further instructed that "[d]etermining whether a complaint states a plausible claim for relief [...] requires the [...] court to draw on its judicial experience and common sense." *Iqbal, 556 U.S. at 679*. "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of

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[4] Plaintiff's federal unfair competition and trademark infringement claims are brought under the Lanham Act, *15 U.S.C. §1051 et seq.*

misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'" *Id.* (citing *Fed. R. Civ. P. 8(a)(2)*).

II. *Effect of the TTAB Decision on Arguments in this Action*

Truck-Lite first argues that Grote's counterclaims alleging fraud in the prosecution of the '147 Registration and the '319 Application are barred based on the TTAB's prior decision. Truck-Lite puts forth the following arguments: (1) because Grote's failed to cross-appeal the TTAB decision on grounds related to fraud and functionality, it cannot now rely upon those grounds; and (2) based on principles of collateral estoppel, or issue preclusion, Grote **[*8]** cannot re-litigate issues of fraud and functionality because they were decided by the TTAB. The Court declines to adopt either theory.

a. Cross-Appeal

In the TTAB proceeding, Grote plead several grounds for opposition and cancellation of the penta-star trade dress. Those grounds were functionality under *Section 2(e)(5)* of the Trademark Act, *15 U.S.C. § 1052(e)(5)* (prohibiting registration of marks that are functional); lack of acquired distinctiveness under *Section 2(f)* of the Act, *15 U.S.C. § 1052(f)*; and fraud. (Dkt. No. 1-3). The TTAB decision was issued on March 30, 2018. (Dkt. No. 1-3). In it, the Board concluded that "Truck-Lite's product configuration is not functional, but Truck-Lite has not established that its configuration has acquired distinctiveness [...]." *Id.*, pg. 39. Because it found that Truck-Lite's product configuration did not have acquired distinctiveness, the Board declined to reach Grote's fraud claim. *Id.* In other words, Grote prevailed in its opposition but the TTAB disagreed with its functionality argument and, instead, based its decision on the product's lack of acquired distinctiveness.

Truck-Lite appealed the TTAB decision by filing this action seeking *de novo* review under *§ 1071(b)(1)*, as well as asserting additional infringement and **[*9]** other claims. Truck-Lite objects that Grote raises fraud and functionality[5] arguments and counterclaims without making a cross-appeal. Grote's first attempt to raise arguments on the issue of functionality, in its answer and counterclaim on October 30, 2020, was made 214 days after the TTAB decision. Truck-Lite argues that because Grote failed to cross-appeal TTAB's finding of non-functionality, it is now precluded from arguing any of its other grounds. Grote counters that it had no standing to appeal the decision, that it is entitled to raise each of these arguments within this action, and that it has properly done so with its answer, affirmative defenses, and counterclaims.

Any applicant for registration of a mark or party to an opposition or cancellation proceeding "who is dissatisfied with the decision of the Director or [TTAB], may appeal [...]." *15 U.S.C. § 1071(a)* and *(b)*. The appeal of a TTAB decision can be pursued in two different manners. An appeal can be made to the United States Court of Appeals for the Federal Circuit by filing a notice with the Director of the TTAB no later than 63 days from the date of the final decision. *See* *15 U.S.C. § 1071(a)(1)*; *37 C.F.R. § 2.145(d)(1)*. Alternately, a civil action can be brought in a district **[*10]** court within 63 days of the date of the final decision. *See* *15 U.S.C. § 1071(b)(1)*; *37 C.F.R. §*

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[5] Fraud and functionality are interrelated issues here because the statement on which Grote bases one of its allegations of fraud is linked to the TTAB's decision that the product configuration is non-functional. More specifically, Grote alleges that Robert E. Ives, Vice President for Marketing at Truck-Lite, submitted to the USPTO a sworn declaration which fraudulently stated: "[t]he trade dress of the subject application is not the subject of either a pending design or utility patent application or of any issued or expired design or utility patents." (Dkt. No. 48, ¶¶ 21-31). Grote contends that Mr. Ives knew of the existence of a utility patent issued to Truck-Lite (U.S. Patent 6,654,172, "the '172 patent") which disclosed the functional nature of the penta-star mark, or 5-around-1 LED configuration, in stop/tail/turn lamps, but he made a false declaration to prevent rejection by the examiner on the grounds that the trade dress did not function as a mark. (*Id.*) Truck-Lite argued before the TTAB that the penta-star design is ornamental and nonfunctional and was only incidentally disclosed in the '172 patent. The TTAB agreed, concluding that although the '172 patent stated that the penta-star pattern was the "preferred embodiment of the invention," other light configurations could be used, and the pattern was not essential to the use or purpose of the article. (Dkt. No. 1-3, pg. 20). By extension, Truck-Light submits that the TTAB already determined the veracity of the representation that no utility patent disclosed functionality of the subject pattern.

2.145(d)(3). Further, in an *inter partes* case that is appealed by one party, a cross-action, or cross-appeal, may be filed by the other party, if done within 14 days after service of the summons and complaint or 63 days from the date of the decision of the TTAB, whichever is later. *See* 37 C.F.R. § 2.145(d)(3).

Addressing cross-appeals, the Federal Circuit has ruled that a cross-appeal by a party who succeeded in a lower court is not proper. *See* Praxair, Inc. v. ATMI, Inc., 543 F.3d 1306, 1322 (Fed. Cir. 2008) ("A party lacks standing to cross-appeal unless it is adversely affected by the judgment it seeks to challenge."); Bailey v. Dart Container Corp., 292 F.3d 1360 (Fed. Cir. 2002); *see also* Weight Watchers Int'l, Inc. v. Rokeach & Sons, Inc., 546 F. Supp. 841, 842 (2d Cir. 1982) (citations omitted) ("Notwithstanding the ["dissatisfied"] language of the statute, a party satisfied with the result of a Board decision may raise issues before a federal court on an appeal initiated by the dissatisfied party that lost before the Board."); Maremont Corp. v. Air Lift Co., 463 F.2d 1114, 1116, 59 C.C.P.A. 1152 (C.C.P.A. 1972) (finding a winning party's cross-appeal on a ground of opposition which the Board ruled against to be "pure surplusage"); *but see* Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc., 458 F.3d 244 (3d Cir. 2006) (holding that the prevailing party in a TTAB cancellation proceeding could have appealed the Board's finding on a specific issue and, because it did not appeal, issue preclusion applied). In *Bailey v. Dart* **[*11]** *Container Corp.*, a party who prevailed on the merits of a patent infringement case in district court filed a "conditional" cross-appeal so that it could raise arguments regarding noninfringement and claim construction in the event the reviewing court reversed the noninfringement decision. The Court held that such a cross-appeal was not permitted, explaining "[i]t is only necessarily and appropriate to file a cross-appeal when a party seeks to enlarge its own right under the judgment or lessen the rights of an adversary under the judgment." Id., at 1362. "Thus, a party must file a cross-appeal when acceptance of the argument it wishes to advance would result in a reversal or modification of the judgment rather than an affirmance." *Id.*

Further, a non-appealing party is entitled to argue all grounds on appeal. RLS Assocs., LLC v. United Bank of Kuwait PLC, 380 F.3d 704, 712 (2d Cir. 2004) (*quoting* Mass Mut. Life Ins. Co. v. Ludwig, 426 U.S. 479, 481, 96 S. Ct. 2158, 48 L. Ed. 2d 784 (1976) ("The appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."); Bailey, 292 F.3d at 1362 ("an appellee can present in this court all arguments supported by the record and advanced in the trial court in support of **[*12]** the judgment as an appellee, even if those particular arguments were rejected or ignored by the trial court"); Maremont, 463 F.2d at 1116 ("Appellees in trademark oppositions are entitled to reargue issues which they raised below but on which either they lost or the board did not rely.").[6]

Truck-Lite urges the Court to find that Grote could, and should, have cross-appealed the TTAB's holding on non-functionality. However, Grote prevailed in its opposition to the '147 Registration and the '319 Application before the TTAB. The Board denied the Grote's arguments that the penta-star trade dress was functional, and therefore not entitled to trade dress protection. The Board chose not to consider Grote's arguments alleging fraud in the prosecution of the trademarks. Instead, the Board grounded its decision in the penta-star's lack of acquired distinctiveness. Truck-Lite brought this appeal seeking review and other relief. Based upon Truck-Lite's appeal, Grote is entitled to re-argue its prior claims and ask this Court to reconsider any of the TTAB's findings. Grote is not bound by the regulatory deadline for timeliness of a cross-appeal. Indeed, a cross-appeal would be improper because, if successful, Grote's arguments **[*13]** will not expand the scope of the TTAB judgment in its favor. *See* Aventis Pharma S.A. v. Hospira, Inc., 637 F.3d 1341, 1344 (Fed. Cir. 2011).

b. Collateral Estoppel

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[6] To this point, in an appeal to the Federal Circuit, a case proceeds on a closed administrative record and no new evidence is permitted. CAE, Inc. v. Clean Air Engineering, Inc., 267 F.3d 660, 673 (7th Cir. 2001). In contrast, an appeal to the district court is both an appeal and a new action, which allows the parties to request additional relief and to submit new evidence. *Id.*

Truck-Lite also seeks preclusion of Grote's fraud and functionality arguments based on the Supreme Court holding in *B&B Hardware, Inc. v. Hargis Indus., 575 U.S. 138, 135 S. Ct. 1293, 191 L. Ed. 2d 222 (2015)*. It is Grote's position that the TTAB decision is not final because an appeal has been filed in this Court, and therefore collateral estoppel does not apply.

B&B Hardware addressed the question of whether issue preclusion could apply to situations where the same issue was raised before an administrative agency and then a court. Answering in the affirmative, the Supreme Court held that a court deciding a Lanham Act claim should give preclusive effect to a TTAB decision if the ordinary elements of issue preclusion are met.[7] *Id., at 141*. In *B&B Hardware*, respondent Hargis lost its attempt to register a trademark. The TTAB ruled that the subject trademark should not be registered because of the likelihood of confusion between the subject trademark and the trademark of B&B Hardware, who stood in opposition. Hargis did not seek judicial review of that decision. In a subsequent civil action for infringement of the trademark, B&B Hardware sought, and received, a ruling that Hargis was now precluded from **[*14]** re-litigating the likelihood of confusion issue that was determined by the TTAB.

B&B Hardware is readily distinguishable from the case at bar. There, the petitioner urged application of issue preclusion from an *unchallenged* TTAB decision. Here, the TTAB decision is placed before this court for review by a party who did not prevail in the administrative proceeding. Had Truck-Lite declined to appeal the decision and the matter came before this Court only on infringement or other claims of Grote, Truck-Lite might be estopped from re-litigating certain issues. But that is not the case.

In fact, the Supreme Court noted that its reasoning would not be applicable to an instance where a party urged a district court reviewing a TTAB registration to give preclusive effect to the very TTAB decision under review. *575 U.S. at 152*. The Supreme Court contrasted the posture of *B&B Hardware* to that of *Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991)*. In *Astoria*, the respondent was not precluded from relitigating his claims under the Age Discrimination in Employment Act of 1967. The Court explained that, as the Age Discrimination law required respondent to exhaust an administrative process as prerequisite to bringing suit in court, giving a preclusive effect to the agency's prior determination could **[*15]** render the judicial suit "strictly pro forma." *575 U.S. at 152*. Here, although the Lanham Act does not require exhaustion of administrative remedies, allowing Truck-Lite to seek preclusion on the TTAB findings it agrees with while asking for *de novo* review of the ones its objects to would risk just such a *pro forma* review as was feared in *Astoria*.[8]

III. *Fraud in the Prosecution of the '147 Registration*

Truck-Lite next argues that, to the extent Grote's first counterclaim can be construed as a claim for damages under Section 38 of the Lanham Act, *15 U.S.C. § 1120*, it is barred by the applicable the statute of limitations. Truck-Lite asserts that Grote is time-barred from alleging fraud in its answer, affirmative defenses and counterclaim. For the following reasons, the Court concludes that Grote's fraud counterclaim is not time-barred.

a. Statute of Limitations

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[7] Issue preclusion is the well-recognized doctrine that "the determination of a question directly involved in one action is conclusive as to that question in a second suit." *B&B Hardware, 575 U.S. at 147* (quoting *Cromwell v. County of Sec, 94 U.S. 351, 354 (1877)*). The ordinary elements necessary for issue preclusion to apply are as follows: (1) the issues in both proceedings must be identical, (2) the issue in the prior proceeding must have been actually litigated and actually decided, (3) there must have been a full and fair opportunity for litigation in the prior proceedings, and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits. *See, e.g., Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 44 (2d Cir. 1986)*.

[8] It is also noted that because the TTAB did not reach the fraud arguments, no findings related to fraud were essential to the judgment. Thus, it would be untenable for Truck-Lite to argue that Grote is estopped from litigating the fraud allegations which are unrelated to functionality of the design.

Because the Lanham Act establishes no limitations period for claims arising under it, and because there is no corresponding federal statute of limitations, courts must look to state law for the "most appropriate" or "most analogous" statute of limitations. *See* *Conopco, Inc. v. Campbell Soup Co., 95 F.3d 187, 191 (2d Cir. 1996)*. This timeliness inquiry is also viewed within the equitable defense of laches. If a plaintiff fails to bring a **[*16]** Lanham Act suit within the applicable limitations period, the presumption of laches will apply. *See id.*, at 10-11; *see also* *Belmora LLC v. Bayer Consumer Care AG, 987 F.3d 284, 293-94 (4th Cir. 2021)* (opining that the doctrine of laches is a more appropriate standard than analogous state statute of limitations to determine timeliness of Lanham Act claims). The Second Circuit has held that, as fraud and intent play an important role in all Lanham Act claims, the most appropriate analogous statute of limitations for such claims is to a state law cause of action sounding in fraud. *See* *Conopco, 95 F.3d at 191-92* (in the context of a false advertising claim).

For example, in *Lurzer GMBH v. American Showcase, Inc., 73 F. Supp. 2d 327, 330 (S.D.N.Y. 1998)*, the district court applied New York's six-year statute of limitations for fraud to a Section 38 fraudulent trademark registration claim. *See* N.Y. C.P.L.R. § 231(b). There, the court found that the limitations period commenced at the time American registered its mark because it was then that Lurzer had constructive notice of the allegedly fraudulently procured registration. *See* *id., at 330, n.4*. Accordingly, the court ruled that Lurzer's claim of fraudulent procurement was time-barred insofar as it was premised on the 1987 registration, which occurred more than six years prior to the claim. *Id.*

Here, Grote alleges two instances of fraud during prosecution of the **[*17]** '147 Registration. First, the statement made by Mr. Ives in a declaration dated February 22, 2008 which disclaimed that the trade dress was the subject of a design or utility patent; and second, Truck-Lite's claim of exclusive and continuous use of the trade dress made on March 20, 2008. Each occurred prior to the issuance of the '147 Registration in 2008. Applying the rule of *Lurzer*, Truck-Lite calculates that the time for filing a Section 38 Lanham Act claim premised on fraud occurring during the '147 registration expired on August 12, 2014. Thus, Truck-Lite argues that Grote's claims with respect to these two instances are time-barred. Truck-Lite also submits that Grote's third allegation of fraud, with respect to the filing of an unaccepted declaration of incontestability on May 29, 2014, is time-barred because Grote's counterclaim was brought after the six-year statute of limitations expired on May 29, 2020.

Grote does not contest the applicability of New York's six-year statute of limitations but argues that its fraud claims are timely, nonetheless. Grote contends that this is a compulsory counterclaim under *Fed. R. Civ. P. 13(a)* for which the statute of limitation is tolled by the filing of the initial action **[*18]** before the TTAB. *See* *Rubin v. Valicenti Advisory Servs., 471 F. Supp. 2d 329, 335 n.4 (W.D.N.Y. 2007)* ("[C]ourts generally hold that the filing of an action tolls the limitations period for compulsory counterclaims."); *see also* *Silva Run Worldwide Ltd. v. Gaming Lottery Corp., 96-CV-3231, 2003 U.S. Dist. LEXIS 18354 (S.D.N.Y. Oct. 15, 2003)*.

Principles of equity counsel against dismissal here. There is no indication that Grote has slept on its fraud claims, which were first raised in its notice of opposition filed with the TTAB on October 6, 2010. Indeed, "[n]umerous courts have recognized that pursuing an opposition in the USPTO excused delay in filing suit on a Lanham Act claim." *Gaudreau v. Am. Promotional Events, Inc., 511 F. Supp. 2d 152, 159 (D.D.C. 2007)* (collecting cases); *see* *Floralife, Inc. v. Floraline International, Inc., 633 F. Supp. 108, 113 (N.D. Ill. 1985)* (explaining that while a notice of opposition to registration is not the same as a trademark infringement claim, the assertion of opposition "sufficiently informs the registrant of the trademark holder's objections and renders unreasonable any detriment the registrant may suffer in reliance on the plaintiff's delay in filing suit."). Grote filed an amended petition on January 21, 2011 which included allegations of Truck-Lite's fraudulent behavior during the prosecution of the '147 Registration. The instances of fraud of which Grote had notice in 2008 were brought to the TTAB within three years and Truck-Lite was informed of Grote's claims without unreasonable delay.

Further, **[*19]** the claim based on Truck-Lite's allegedly fraudulent statement regarding incontestability in 2014 is not time-barred. That claim, and Grote's pre-registration fraud claims, constitute compulsory counterclaims to this federal action, filed by Truck-Lite on May 23, 2018. A pleading must state as a counterclaim any claim which "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." *Fed. R. Civ. P. 13(a)(1)(A)*. A claim is compulsory under *Rule 13(a)* if "a logical relationship exists between the claim and the counterclaim and [if] the essential facts of the claims are so logically connected that consideration of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." *Critical-Vac Filtration Corp. v. Minuteman Int'l Inc., 233 F.3d 697, 699 (2d Cir. 2000)*. Truck-Lite's current claims against Grote include unfair competition, infringement of the '147 Registration, and reversal of the TTAB decision. Grote's allegations of fraudulent misrepresentations in obtaining the registration and attempting to seek incontestable status share an obvious logical connection and are based on the same essential facts as those claims. Grote's claim is timely because the statute of limitations was tolled upon Truck-Lite's initiation of this action.[9]

The Court **[*20]** rejects Truck-Lite's contention that the fraud counterclaims should be dismissed because the TTAB has no authority to hear or award damages for *§ 1120* claims. This argument goes to the remedies that were or were not available within the administrative proceeding and does not change that Grote's fraud claims were asserted without undue delay. Truck-Lite relies on *Johnson v. Railway Express, Inc., 421 U.S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975)*, for the holding that the statute of limitations for an employee's claim of racial discrimination under *42 U.S.C. § 1981* was not tolled during the pendency of his Title VII action before the Equal Employment Opportunity Commission. There, the Supreme Court held that "the remedies available under Title VII and under *§ 1981*, although related, and although directed to most of the same ends are separate, distinct, and independent." *Id., at 461*. Thus, it held that the petitioner could not be excused from his failure to bring a *§ 1981* action within the relevant limitations period. *Id., at 466*. This Court is not persuaded that the relationship between Title VII and *§ 1981* is analogous to a TTAB trademark registration proceeding and a Lanham Act civil suit. Unlike *§ 1981*, the Lanham Act itself provides the administrative mechanisms for registering, and opposing, a trademark within the USPTO. *See 15 U.S.C. § 1051, et seq.* Indeed, Truck-Lite **[*21]** provides no caselaw supporting its theory in the context of trademark law.[10]

In sum, Truck-Lite was on notice as early as 2010 that Grote was raising claims of fraud relative to the '147 Registration, and Grote's counterclaims should not be time-barred as a result. Moreover, Grote's fraud claims are timely as compulsory counterclaims to the instant action.

b. *Elements of a Fraud Claim*

Truck-Lite next argues that Grote's claim of fraud in the prosecution of the '147 Registration must be dismissed for failure to plead the necessary elements and failure to plead with particularity as required by *Fed. R. Civ. P. 9(b)*.

Fraud in procuring a trademark registration occurs when an applicant knowingly makes false, material representations of fact in connection with his application. *In re Bose Corp., 580 F.3d 1240, 1243 (D.D.C. 2009)*; *see 15 U.S.C. § 1120*. A trademark is obtained fraudulently under the Lanham Act only if the applicant or registrant knowingly makes a false, material representation with the intent to deceive the PTO. *580 F.3d at 1245*. A party seeking cancellation of a trademark registration for fraudulent procurement bears a heavy burden of proof. *Id. at 1243*. As delineated by the Second Circuit, a party alleging that a registration was fraudulently obtained must prove the following elements by **[*22]** clear and convincing evidence:

> (1) A false representation regarding a material fact; (2) the person making the representation knew [...] that the representation was false;[11] (3) an intention to induce the listener to act or refrain from acting in reliance on the

[9] Grote's Answer and Counterclaim against Truck-Lite was timely under *Fed. R. Civ. P. 12(a)(4)(A)*, having been filed within 14 days after Judge Sinatra's Decision and Order denying Grote's motion to dismiss for lack of personal jurisdiction. (Dkt. Nos. 46; 48).

[10] *American Cyanamid v. Campagna Per La Farmacie in Italia S.P.A., 678 F. Supp. 1049 (S.D.N.Y. 1987)* is inapposite as it addressed questions of primary jurisdiction, not timeliness. That Court concluded that a trademark infringement action did not need to be stayed pending a USPTO determination of the registrability of the allegedly infringing marks. Such a holding does not dictate that a USPTO proceeding cannot toll the statute of limitations for a later Lanham Act claim.

[11] *See MPC Franchise, LLC v. Tarntino, 826 F.3d 653, 659 (2d Cir. 2016)* for clarification of this element. The distinction is not of issue here.

> misrepresentation; (4) reasonable reliance on the misrepresentation; and (5) damage proximately resulting from such reliance.

Patsy's Italian Rest., Inc. v. Banas, 658 F.3d 254, 270-71 (2d Cir. 2011).

Any fraud pleading is also subject to the heightened pleading standards of Rule 9(b), which states, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). "That ordinarily requires a complaint alleging fraud to (1) specify the statements [or omissions] that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements [or omissions] were made, (4) explain why the statements [or omissions] were fraudulent." United States ex rel. Chorches for Bankr. Estate of Fabula v. Am. Med. Response, Inc., 865 F. 3d 71, 81 (2d Cir. 2017) (citations and internal quotations omitted). Rule 9(b) further provides that "[m]alice, intent, knowledge, and other conditions of the person's mind may be alleged generally." Fed. R. Civ. P. 9(b). Though, this leeway is not a "license to base claims of fraud on speculation and conclusory allegations." Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co., 375 F.3d 168, 187 (2d Cir. 2004) (citation omitted). "Plaintiffs **[*23]** must allege facts that give rise to a strong inference of fraudulent intent," which may be established "either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." Id., 375 F.3d at 187 (quoting Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994)). "'[T]he adequacy of particularized allegations under Rule 9(b) is...case-and context-specific.'" Chorches, 865 F.3d at 81-82 (quoting Espinoza ex rel. JPMorgan Chase & Co. v. Dimon, 797 F.3d 229, 236 (2d Cir. 2015)).

A review of Grote's first counterclaim shows that it has met these standards and alleged the necessary elements for this cause of action. The pleadings specify the speakers of the alleged fraudulent statements (naming the affidavits and declarations submitted), the exact dates the statements were made, the contents of those statements, and why those statements were allegedly fraudulent. Although Truck-Lite objects to Grote having based some of its factual allegations "upon information and belief," the Court finds that these allegations are sufficiently plead. "'Despite the generally rigid requirement [of Rule 9(b)], allegations may be based on information and belief when facts are peculiarly within the opposing party's knowledge." Chorches, 865 F.3d at 81-82. Where a fraud pleading is permitted **[*24]** on information and belief," courts require that the complaint "adduce specific facts supporting a strong inference of fraud." Id. at 82. Here, Grote has adduced such detailed facts supporting its inferences. Further, the few allegations based upon information and belief are those that can be described as within the particular knowledge of Truck-Lite or the USPTO.

Truck-Lite also challenges the element of reliance in this case. It submits that Truck-Lite's Section 15 declaration made to secure incontestable status of the '147 Registration was not relied upon because it was rejected by the PTO Examiner. In that affidavit, filed on May 29, 2014, Carl Hjort, Esq., attorney for Truck-Lite, declared that no proceedings affecting the subject trademark rights were pending in Trademark Office, when, in actuality, the TTAB proceeding was pending. Truck-Lite admits such a statement was made, but states that it was "an honest mistake." On June 14, 2014, the PTO found that the Section 15 affidavit could not be acknowledged because there was a pending proceeding before the TTAB involving ownership of the subject registered mark. As such, the registration was not granted incontestable status.

The Court rejects the lack of reliance **[*25]** argument because the affidavit was submitted to the PTO for its reliance in reviewing incontestable status. The submission of a false declaration is presumed to be material and to be relied upon. *See* Southco, Inc. v. Penn Eng'g & Mfg. Corp., 768 F. Supp. 2d 715, 725-26 (D. Del. 2011); citing Refac Int'l, Ltd., v. Lotus Dev. Corp., 81 F.3d 1576, 1583 (Fed. Cir. 1996) ("The affirmative act of submitting an affidavit must be construed as being intended to be relied upon.").[12] This sub-part of the claim is actionable as plead.

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[12] In the non-precedential TTAB opinion cited by Truck-Lite on this point, the facts are distinguishable and, although the court saw no reliance by the examiner on respondent's claims about exclusive right to use a certain term, the finding of no fraud in

Truck-Like further challenges whether Grote can establish quantifiable damages from the alleged fraudulent conduct. It is unknown at this juncture whether Grote can, in fact, prove such damages. However, it is inarguable that Grote has alleged that it was damaged as a result of Truck-Lite's fraudulently procured trademark registration. Thus, the required element is plead.

For the above reasons, the Court recommends that Truck-Lite's motion to dismiss Grote's counterclaim (Count I) alleging fraud in prosecution of the '147 Registration be denied.

IV. *Fraud in Prosecution of '319 Application*

Truck-Lite argues that to the extent Grote's second counterclaim can be construed as a claim for damages under *Section 1120*, it is subject to dismissal because the Lanham Act does not support a cause of action where there was a trademark application, **[*26]** but no registration was issued. The Court agrees.

Section 38 of the Lanham Act provides:

> Any person who shall procure registration in the Patent and Trademark Office of a mark by a false or fraudulent declaration or representation, oral or in writing, or by any false means, shall be liable in a civil action by any person injured thereby for any damages sustained in consequence thereof.

15 U.S.C. § 1120.

It is well-settled that preregistration damages are not cognizable under *§ 1120*. *See* *Country Mut. Ins. Co. v. Am. Farm Bureau Fedn., 876 F.2d 599, 600-01 (7th Cir. 1989)* (holding that unless the PTO grants the trademark application, the consequences of registration, as opposed to use, do not come to pass, and no damages are sustained as a consequence); *GMA Accessories, Inc. v. Idea Nuova, Inc., 157 F. Supp. 2d 234, 242 (S.D.N.Y. 2000)* (finding that a claim based on a suspended trademark application must fail because "by its terms[,] Section 38 [...] does not apply to trademark applications that have not been registered"); *Bernard v. Commerce Drug Co., 774 F. Supp. 103, 109 (E.D.N.Y. 1991)*, *aff'd by* *964 F.2d 1338 (2d Cir. 1992)* ("plaintiff's claim for a fraudulent trademark registration cannot be maintained at a point in time prior to procurement of registration"). *Gaudreau, supra*, is further instructive on this point. There, the Court dismissed a Section 38 fraud claim where defendants were yet to procure registration of the contested mark. *See* *511 F. Supp. 2d at 160*. "[W]hile it may be true that allegations of fraud on the USPTO **[*27]** may be raised at the TTAB level prior to the registration of a mark, it is nonetheless clear that trademark owner must have actually procured a federal trademark registration in order for its deeds to be actionable in federal court under Section 38." *Id.*

Here, Truck-Lite's '319 application never matured into registration of the trademark. Grote opposed the registration and its opposition to the application was sustained by the TTAB. (Dkt. No. 1-3, pg. 39). Grote alleges that Truck-Lite engaged in fraudulent behavior in prosecuting the application, but it has not asserted a valid claim under *§ 1120* because Truck-Lite has neither procured registration of the mark, nor has Grote suffered a qualifying injury. *See* *Dunn Computer Corp. v. Loudcloud, Inc., 133 F. Supp. 2d 823, 831-33, 259 B.R. 472 (E.D. Va. 2001)*. In *Dunn*, the Court explained that there was limited effect of filing an intent-to-use trademark application and another party, even if left waiting for the PTO's registration decision, was not injured within the meaning of Section 38. *Id.*

It is Grote's position that Truck-Lite did "procure" registration within the meaning of the statute because it did more than file an application; it allowed its application to be published for opposition. Grote asks the Court to construe the term "procure" broadly to include **[*28]** liability for fraudulent conduct in efforts to obtain registration. Grote cites *Nationstar Mortg., LLC v. Ahmad, 155 F. Supp. 3d 585 (E.D. Va. 2015)* for a holding in which fraud was found based on an application, not a registration. However, this argument has been declined by the Seventh Circuit and the meaning of the statutory term has been decided. In *Country Mutual*, the Court reasoned that "Section 38 makes sense when 'procure' is taken to mean 'obtain' and little sense when taken to mean 'apply for[.]'" *876 F.2d at 601*. The Court went on to explain that "the law has consistently forbidden procuring registration by fraud and neglected

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prosecution of the application was based on lack of evidence of respondent's intent to deceive the Trademark Office. *See* *Eddy Packing Co., Inc. v. HEB Grocery Co., 2010 TTAB LEXIS 108, at *52-55 (TTAB Apr. 15, 2010)* (unpublished opinion).

the possibility of penalizing those who seek but not get registration via fraud." *Id.* That holding is squarely applicable here and Grote's argument is rejected.[13]

Further, any claim for cancellation of the '319 Application must also be dismissed. There is no cognizable claim to cancel an application that has not matured into a registration. *See* *GMA Accessories, 157 F. Supp. 2d at 241* (finding no authority for the proposition that the Lanham Act permits a district court to cancel an unregistered trademark). The Court does not find it necessary to reach Truck-Lite's additional arguments in support of dismissal.

For the above reasons, the Court recommends that Grote's **[*29]** counterclaim (Count II) alleging fraud in prosecution of the '319 Application be dismissed.

V. *Antitrust Monopolization and Restraint of Trade Claims*

Grote's third and fourth counterclaims allege that Truck-Lite has engaged, or has attempted to engage, in wrongful and anti-competitive activity regarding the '147 Registration and the '319 Application to willfully acquire and maintain market and monopoly power in the relevant market, including by (1) filing for such registration and applying for product configuration exclusivity; (2) committing fraud in the prosecution of said registration; (3) engaging in, and maintaining, sham litigation and a "cease and desist letter campaign" against Grote and third-parties; (4) seeking to have a third-party vendor not supply Grote or others with 5-around-1 appearance circuit board used to make stop/tail/turn lights; and (5) making an agreement with said vendor to deal exclusively with Truck-Light on said product. (Dkt. No. 48, ¶¶ 76-120).

Truck-Lite moves to dismiss these counterclaims on two bases: first, because the claims are blocked by the Noerr-Pennington doctrine, and second, because the Supreme Court decision in *Walker-Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)* has not been applied to trademark **[*30]** cases.

a. Noerr-Pennington Doctrine

The Noerr-Pennington doctrine derives from the Supreme Court cases of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*, and *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*. This basic principle of antitrust immunity holds that "joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *Pennington, 381 U.S. at 670*. Originally, the doctrine developed to allow business interests to combine and lobby various governmental branches or agencies without worry of violating ***antitrust law***, and the doctrine has expanded to provide immunity from liability for bringing suits in contexts beyond antitrust. *See* *Matsushita Elecs. Corp. v. Loral Corp., 974 F. Supp. 345, 355 n.17 (S.D.N.Y. 1997)*. The doctrine holds that, by virtue of the right to petition guaranteed by the *First Amendment*, attempts to influence legislative, executive, administrative, or judicial action are immune from antitrust liability. *Twin City Bakery Workers & Welfare Fund v. Astra Aktiebolag, 207 F. Supp. 2d 221, 223 (S.D.N.Y. 2002)*. Under the doctrine, the owner of a trademark is entitled to protect its registered rights through litigation without exposing itself to Sherman Act liability. *Scooter Store, Inc. v. SpinLife.com LLC, 777 F. Supp. 2d 1102, 1114 (S.D. Ohio 2011)*.

Noerr-Pennington immunity is not absolute and does not protect all actions. Conduct that might otherwise be immune under this doctrine may **[*31]** form the basis for Sherman Act liability when the alleged conspiracy "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business

[13] Grote also maintains that the cases relied on above are distinguishable in their application progression. Grote identifies that in *GMA Accessories* and *Bernard*, the subject applications were "suspended" but not "allowed" for publication. The Court does not find the factual differences of those cases and the case at bar to be meaningful, as none of the applications proceeded to registration.

relationships of a competitor." *California Motor Transport Co., v. Trucking Unlimited, 404 U.S. 508, 511, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)* (quoting *Noerr, 365 U.S. at 144*). To establish "sham" administrative or judicial proceedings, a plaintiff must show that the litigation in question is: (i) "objectively baseless," and (ii) "an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process -- as opposed to the outcome of that process -- as an anticompetitive weapon." *Primetime 24 Joint Venture v. NBC, 219 F.3d 92, 100-01 (2d Cir. 2000)* (citing *Prof'l Real Estate Investors, Inc., v. Columbia Pictures Indus., 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*).

Courts have recognized two specific kinds of conduct that can trigger the sham exception: (1) sham lawsuits; and (2) fraudulent misrepresentations. *See* *Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 842 (7th Cir. 2011)*. The fraud exception to the doctrine is based on the Supreme Court's desire to protect the integrity of non-political governmental proceedings. *Id., at 844-45*. False statements can be accommodated in the political sphere more than they can be in the adjudicatory sphere — where information is relied on as accurate for decision making and dispute resolving. *Id.* "As a result, fraudulent statements in the adjudicative context 'threaten[ ] the fair and impartial functioning **[*32]** of these agencies and do[ ] not deserve immunity from the antitrust laws." *Id.* (internal quotation omitted).

Truck-Lite submits that to the extent any of its actions may be considered anticompetitive or in restraint of trade, they are afforded immunity from antitrust liability under Noerr-Pennington. Truck-Lite believes that its actions in seeking, obtaining, and enforcing its intellectual property rights, including trade dress rights, are fully immunized, and the conduct or communications alleged by Grote were incidental to effective litigation. *See* *Matsushita Electronics, 974 F. Supp. at 359* ("[A]cts incidental to protected litigation --acts that are 'reasonably and normally attendant upon protected litigation,' such as sending letters threatening court action -- are entitled to immunity to the same extent as the related litigation.") (quoting *Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358, 1367 (5th Cir. 1983)*). Grote contends that the Noerr-Pennington doctrine does not apply here.

The Court concludes that the Noerr-Pennington doctrine would apply in this context, but that Grote has plead adequate facts to support the sham exception to its immunity. Indeed, Grote has alleged that Truck-Lite engaged in fraudulent conduct and made misrepresentations in filing for and prosecuting the '147 Registration **[*33]** and '319 Application.[14] "There is little doubt that fraudulent misrepresentations may render purported petitioning activity a sham not protected from antitrust liability." *Mercatus Group, 641 F.3d at 842-43* (collecting cases). Here, unlike in *Twin City Bakery Workers*, Grote has plead with particularity the alleged frauds on the USPTO. *See* *207 F. Supp. 2d at 224* (holding that no exception to Noerr-Pennington applied where plaintiff's complaint lacked the "who, what, when, where, and how" of the alleged frauds on the Patent Office). Grote has further alleged that Truck-Lite engaged in sham litigation and a letter campaign against Grote and third-parties, with some or all of its claims being objectively baseless and with a subjective intent to maintain market power and monopoly power. Determinations of whether a party's conduct is a genuine attempt to avail itself of the judicial process or is merely a sham is a question of fact that is inappropriate for a motion to dismiss. *Scooter Store, 777 F. Supp. 2d at 1115* (citing *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, 690 F.2d 1240, 1253 (9th Cir. 1982)*).

"Of course, even a plaintiff who defeats the defendant's claim to Noerr immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; **[*34]** it does not relieve the plaintiff of the obligation to establish all other elements of his claim." *Prof'l Real Estate Investors, 508 U.S. at 61*. Whether Grote can prove such claims remains to be seen. However, at the pleading stage, Grote has made allegations sufficient to support a finding that Truck-Lite's alleged conduct is not immune from liability.[15]

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[14] Although the Court recommends dismissal of Grote's Section 38 claim for damages arising from the '319 Application, it does not believe that precludes Grote from relying on the alleged fraudulent statements to support its antitrust claims.

[15] The Court acknowledges but does not find persuasive Truck-Lite's reliance on *Virgin Enters. v. Virginic LLC*, wherein the district court characterized the "antitrust defense" to trademark infringement as "more theoretical than actual." *See* *19-CV-0220-F, 2020 U.S. Dist. LEXIS 63580, at *8-9 (D. Wyo. Apr. 10, 2020)*. There, the court granted a motion to strike the affirmative

b. Antitrust Claims Stemming from Trademark Activity

Truck-Lite further disputes that a cause of action for violation of *§ 2* of the Sherman Act can be sustained based on fraud in obtaining or enforcing a trademark. The Court finds no authority to support categorical dismissal of this claim.

The Supreme Court has ruled that enforcement of a patent procured by fraud upon the Patent Office may be a basis for an action under *§ 2* of the Sherman Act, provided that the other elements necessary for such a claim were present. *See Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. In *Walker Process*, Food Machinery filed a suit for infringement on its patent covering a type of aeration equipment for sewage treatment systems. *Id., at 173-74*. After discovery, Walker Process brought a counterclaim alleging that Food Machinery had illegally monopolized interstate and foreign **[*35]** commerce by fraudulently, and in bad faith, obtaining and maintaining its patent while knowing that it had no basis for such patent. *Id.* It further alleged that Food Machinery had sworn before the Patent Officer that it neither knew nor believed that its invention had been in public use when, in fact, Food Machinery was a party to prior use during the relevant time. *Id.* Ruling that proof of intentional fraud in procurement of the patent would be sufficient to strip Food Machinery of its exemption from antitrust laws, the Court remanded to afford Walker Process opportunity to establish the necessary elements of the alleged *§ 2* violation. *Id., at 177-78*.

The viability of Grote's antitrust and attempted antitrust claims are supported by the *Walker Process* precedent. Lending further support to the availability of a Sherman Act claim based on fraudulent procurement or enforcement of a trademark is the earlier Supreme Court holding in *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 71 S. Ct. 971, 95 L. Ed. 1199 (1951)*. There, the Court explained that "while a trademark merely affords protection to a name, the [anti-competitive] agreement in the case went far beyond the protection of the name 'Timken' and provided for control of the manufacture and sale of antifriction bearings whether carrying **[*36]** the mark or not." *Id., at 598-99*. Accordingly, the Court held that a trademark cannot be legally used as a device for a Sherman Act violation. *Id., at 599*. *See also Scooter Store, 777 F. Supp. 2d 1102* (denying motion to dismiss defendant's antitrust counterclaim based on allegations that plaintiff filed a baseless trademark infringement action). Additionally, the Lanham Act itself explicitly provides that a defense to the right to use an incontestable registered mark exists where "the mark has been or is being used to violate antitrust laws of the United States." *15 U.S.C. § 1115(b)(7)*.

Here, Grote argues that "the product configuration trade dress at issue is in the nature of a patent, covering the product itself rather than a classic trademark that is a work/symbol separate from the associated with the product." It further submits that such product configuration rights can, and have, given rise to market and monopoly power. It is clear that exclusionary rights granted by the USPTO, whether for a patent or trademark, are exclusionary rights which cannot be used in violation of antitrust laws. Accordingly, there is no reason that this claim should be barred.

c. Elements of Sherman Act and Clayton Act Violations

Finally, Truck-Lite seeks dismissal of these counterclaims **[*37]** for failure to state a claim under the pleading standards. It submits that Grote's antitrust counterclaims lack particularity to enable it to present a defense. The Court disagrees.

The elements of a Sherman Act, *§ 2* offense of monopolization are:

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defense because defendant did not provide a basis for its antitrust claims, apart from plaintiff's civil litigation and trademark proceedings. Id., at *10-11. Based on defendant's failure to dispute its own infringing conduct, the Court found that plaintiff's actions were not objectively baseless under a sham exception. *Id.*, at *13-14. By comparison, Grote has not conceded infringement on its own part and it has alleged objectively baseless litigation. The Court also finds *In re Humira (Adalimumab) Antitrust Litigation* inapplicable. *See 19-CV-1873, 465 F. Supp. 3d 811 (N.D. Ill. Jun 8, 2020)*. *Humira* held that a party cannot aggregate immunized and non-immunized conduct without nullifying the immunity. *Id., at 834*. In this case, the Court does not view any of the alleged anticompetitive conduct as immune.

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

Volvo North America Corp. v. Men's International Professional Tennis Council, 857 F.2d 55, 73 (2d Cir. 1998); *see* 15 U.S.C. § 2.

The elements of the offense of attempted monopolization are:

> The offense of attempted monopolization under § 2 of the Sherman Act requires proof of three elements: (1) anti-competitive or exclusionary conduct; (2) specific intent to monopolize; and (3) a dangerous probability that the attempt will succeed.

Id. Grote's counterclaims plead facts adequate to meet these essential elements. Grote alleges that Truck-Lite holds monopoly power in the relevant markets. It defines the relevant market in terms of geographic market in the United States and the product market and submarket ("(a) OEMs (e.g. manufacturers of new trucks **[*38]** and trailers) [...], and (b) aftermarket, for replacement STTs".) It also alleges specific acts by Truck-Lite demonstrating willful acquisition or maintenance of that market power by reference to the fraud allegations, detailed in its prior counterclaims, and the allegations that Truck-Lite entered into a refusal to deal agreement or agreements. Grote further pleads that the monopolization has caused it injury. Thus, the elements of a § 2 offense are plausibly alleged. The elements of attempted monopolization are also sufficiently plead, in the alternative.

The elements of a Sherman Act, § 1 offense of illegal restraint of trade are: (1) concerted action by two or more persons, (2) that unreasonably restrains interstate or foreign trade or commerce. *Primetime 24 Joint Venture v. NBC, 21 F. Supp. 2d 350, 355 (S.D.N.Y. 1998)*, *rev'd on other grounds*, *219 F.3d 92 (2d Cir. 2000)*; *see* 15 U.S.C. § 1. This proscription is directed only at joint action and does not prohibit independent business actions and decisions. *See Modern Home Inst., Inc. v. Hartford Acci. & Indem. Co., 513 F.2d 102, 108-09 (2d Cir. 1975)*. "While normally only those agreements which impose an unreasonable restraint upon interstate commerce are condemned, [...] certain agreements, including concerted refusals to deal and group boycotts of the type alleged here, have long been held to be *per se* unreasonable and always illegal[.]" **[*39]** *Id.* (citations omitted).

Truck-Lite argues that Grote's allegation of exclusive dealing between Truck-Lite and a third-party supplier of LED circuit boards, even if true, does not constitute anticompetitive behavior. It maintains that the claim is insufficient because Grote does not state that it cannot obtain such circuit boards from other vendors, or that if it cannot, that the cause is Truck-Lite's anti-competitive actions. *See A.V.E.L.A., Inc. v. Estate of Marilyn Monroe, LLC, 241 F. Supp. 3d 461, 488 (S.D.N.Y. 2017)* ("[E]xclusive dealing is not uniformly anticompetitive[;] ... in order to plead exclusionary conduct through an exclusive dealing policy, [a plaintiff] 'must allege as a threshold matter ... a substantial foreclosure of competition' in the relevant market."). However, the Court finds that Grote has plausibly alleged a concerted refusal to deal, *i.e.* an agreement with the vendor (Phillips/LumiLEDS) not to sell 5-around-1 premade LED circuit boards to Grote and others. It further finds that the allegation that Truck-Lite holds monopoly power over the relevant market for stop/tail/turn lights and has foreclosed competition in that market is sufficient to allege unreasonable restraint on commerce as a threshold matter. Allegations of a vertical competitor-vendor **[*40]** agreement may support a claim such as this. *See Tunis Bros. Co. v. Ford Motor Co., 763 F.2d 1482, 1497 (3d Cir. 1985)*, *vacated for further consideration*, *475 U.S. 1105 (1986)* (recognizing that an illegal restraint on trade occurs where one distributor seeks to suppress its competition by utilizing the power of a common supplier).

Truck-Lite next argues that, to the extent Grote's counterclaim can be understood as a claim under Section 3 of the Clayton Act, it fails to state a claim because it does not allege an agreement among competitors. The statute provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the

> District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor **[*41]** or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14. The language of the statute defines liability in terms of a person who makes a sale or contracts for sale and nowhere provides for liability of the buyer. *See* *McGuire v. Columbia Broadcasting System, Inc., 399 F.2d 902, 906 (9th Cir. 1968)*. In general, the Clayton Act has not been applied to situations, such as here, where a buyer (Truck-Lite) is alleged to have required a seller (Phillips) to refrain from selling to other buyers (e.g., Grote). *See* *Genetic Systems Corp., v. Abbott Laboratories, 691 F. Supp. 407, 414 (D.D.C. 1988)* ("Though few courts have ever addressed the issue, plaintiff has not pointed to any case where a court found a purchaser liable for an exclusive dealing contract, and it appears from the plain language of the statute, the relevant legislative history, and the observations of commentators that *Section 3* does not impose liability on purchasers for exclusive dealing contracts."). Truck-Lite is not the seller and consequently no cause of action is available against it under this statute. *See* *McGuire, 399 F.2d at 906*.

For the above reasons, the Court recommends that Grote's counterclaims (Counts III and IV) alleging anti-trust monopolization and **[*42]** restraint of trade, and attempted antitrust monopolization, under the Sherman Act survive, and that Grote's counterclaims alleging anti-competitive agreement under the Clayton Act be dismissed.

CONCLUSION

For the foregoing reasons, it is recommended that plaintiff Truck-Lite's motion to dismiss Grote's counterclaims (Dkt. No. 53) be granted in part and denied in part.

Pursuant to *28 U.S.C. §636(b)(1)*, it is hereby ORDERED that this Report and Recommendation be filed with the Clerk of Court.

Unless otherwise ordered by Judge Sinatra, any objections to this Report and Recommendation must be filed with the Clerk of Court within fourteen days of service of this Report and Recommendation in accordance with the above statute, *Rules 72(b)*, *6(a)*, and *6(d) of the Federal Rules of Civil Procedure*, and Local Rule of Civil Procedure 72. Any requests for an extension of this deadline must be made to Judge Sinatra.

Failure to file objections, or to request an extension of time to file objections, within fourteen days of service of this Report and Recommendation WAIVES THE RIGHT TO APPEAL THE DISTRICT COURT'S ORDER. *See* *Small v. Sec'y of Health & Human Servs., 892 F.2d 15 (2d Cir. 1989)*.

The District Court will ordinarily refuse to consider *de novo* arguments, case law, and/or evidentiary material which could have been, but were not, presented to the Magistrate Judge in the first **[*43]** instance. *See* *Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985, 990-91 (1st Cir. 1988)*.

Pursuant to Local Rule of Civil Procedure 72(b), written objections "shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for each objection, and shall be supported by legal authority." ***Failure to comply with these provisions may result in the District Court's refusal to consider the objection***.

SO ORDERED.

Dated: September 17, 2021

Buffalo, New York

/s/ Michael J. Roemer

MICHAEL J. ROEMER

United States Magistrate Judge

LexisNexis

TCS John Huxley Am., Inc. v. Sci. Games Corp.

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

September 20, 2021, Decided; September 20, 2021, Filed

Case No. 19-CV-01846

Reporter

2021 U.S. Dist. LEXIS 178014 *; 2021 U.S.P.Q.2D (BNA) 966; 2021 WL 4264403

TCS JOHN HUXLEY AMERICA, INC., et al., Plaintiffs, v. SCIENTIFIC GAMES CORP., et al., Defendants.

Core Terms

patent, Shuffle, prior art, antitrust, Shuffler, reexamination, infringement, invalid, statute of limitations, summary judgment, lawsuit, accrued, settle, settlement agreement, inequitable conduct, allegations, pre-filing, settlement, discovery, reason to know, unenforceable, proceedings, initiation, references, undermines, four-year, parties

Counsel: **[*1]** For TCS John Huxley America, Inc., a Nevada corporation, TCS John Huxley Europe Limited, a United Kingdom corporation, TCS John Huxley Asia Limited, a Macau corporation, Taiwan Fulgent Enterprise Co., Ltd., a Taiwan corporation, Plaintiff: Jeffery Moore Cross, LEAD ATTORNEY, Matthew H. Bunn, Freeborn & Peters LLP, Chicago, IL; Joseph Scott Presta, PRO HAC VICE, Nixon & Vanderhye P.c., Arlington, VA; Robert A. Rowan, PRO HAC VICE, Nixon & Vanderhye, Arlington, VA.

For Alfred T Giuliano as Liquidation Trustee for RIH Acquisitions NJ, LLC dba The Atlantic Club Casino Hotel, Plaintiff: Shannon Marie McNulty, Clifford Law Offices, Chicago, IL.

For Rancho's Club Casino, Inc. d/b/a Magnolia House Casino, Plaintiff: Shannon Marie McNulty, LEAD ATTORNEY, Clifford Law Offices, Chicago, IL.

For Scientific Games Corporation, a Nevada corporation, formerly a Delaware corporation, Bally Technologies, Inc., a Nevada corporation doing business as SHFL Entertainment doing business as Shuffle Master, Bally Gaming, Inc., a Nevada corporation formerly known as Bally Gaming and Systems formerly known as SHFL Entertainment, Inc. formerly known as Shuffle Master, Inc. doing business as Bally Technologies, Defendants: **[*2]** Craig Christopher Martin, LEAD ATTORNEY, Aaron Jerome Hersh, Matt D. Basil, Sara Tonnies Horton, Willkie Farr & Gallagher LLP, Chicago, IL; Matthew Stephen Freimuth, PRO HAC VICE, Willkie Farr & Gallagher LLP, New York, NY.

Judges: John Robert Blakey, United States District Judge.

Opinion by: John Robert Blakey

Opinion

MEMORANDUM OPINION AND ORDER

This case arises from alleged sham patent litigation involving automatic card shufflers. Plaintiffs claim Defendants committed fraud on the Patent Office and pursued sham litigation to maintain their monopoly on the market, thereby violating *§ 2* of the Sherman Act. *See* [32]. Defendants moved to dismiss, arguing that Plaintiffs' claim fell outside the statute of limitations and that Plaintiffs lacked standing to bring an antitrust claim. *See* [35]. The Court denied the motion, finding that Plaintiffs had standing and finding that the record failed to conclusively demonstrate that Plaintiffs filed their claim too late. *See* [43]. Following discovery, Defendants now move for summary judgment, arguing again that Plaintiffs' claim falls outside the four-year statute of limitations. [100]. For the reasons set forth below, the Court finds that genuine issues of material fact remain **[*3]** concerning timeliness and, accordingly, denies the motion.

I. Background[1]

Plaintiff Taiwan Fulgent (TF) is a Taiwanese corporation which manufactures a card shuffling device known as the A-Plus Shuffler. [102] at ¶¶ 4, 5. Plaintiffs TCS John Huxley Europe Limited, Asia Limited, and America, Inc. are subsidiaries of the TCS John Huxley Group (TCS), the exclusive worldwide distributor for the A-Plus Shuffler. *Id.* at ¶¶ 7-9. Defendants Scientific Games[2] and SG Gaming, Inc. are Nevada corporations that invent, design, manufacture, and sell casino products, including automatic card shufflers. *Id.* at ¶¶ 11-13. SG Gaming, Inc. was formerly known as Bally Gaming, Inc. *Id.* at ¶ 12. In 2013, Bally Technologies acquired SHFL Entertainment, Inc., formerly known as Shuffle Master, the original entity engaged in the invention, design, manufacture, and sale of automatic card shufflers. *Id.* at ¶¶ 14, 15.

In November 2009, Shuffle Master sued TF for patent infringement based upon the A-Plus Shuffler. *Id.* at ¶¶ 6, 18. TF retained Alston & Bird LLP, an international law firm, to represent it in the litigation. *Id.* at ¶ 20. David Ho, the owner and primary decision maker at TF, advised the attorneys he wanted **[*4]** the case resolved "expeditiously and efficiently." [108] at ¶ II.A.1. In December, TF's counsel sent a letter[3] raising possible issues with the pre-filing investigation of Shuffle Master's patents, claiming that Shuffle Master lacked a *Rule 11* basis for claiming infringement and also suggesting the case could be settled outside of litigation as TF was not yet selling the shuffler. *Id.* at ¶¶ II.A.2,1. Counsel raised *Rule 11* concerns on the mistaken belief that Shuffle Master had not accessed the inner workings of the accused shuffler to conduct a proper pre-filing investigation. *Id.* ¶ II.A.4. The litigation continued, however, and TF filed an answer and counterclaim, which included what Plaintiffs characterize as standard language regarding §§ 102, 103, and 112 defenses and counterclaims, as well as a standard request for a finding that the case was "exceptional" under § 285, to preserve the option of seeking attorney fees. *Id.* at ¶¶ 27, II.A.16. Plaintiffs represent that none of the claims or defenses they asserted in that prior litigation reflected allegations of inequitable conduct or fraud. *Id.* at ¶ II.A.16. The parties settled the 2009 litigation in February of 2010. [102] at ¶ 32. As part of the settlement agreement, **[*5]** both parties agreed to "release[] the other for all claims, liabilities and damages of any kind that either has or may have against the other, as of the date of this Agreement, whether known or unknown, asserted or unasserted, or accrued or unaccrued." *Id.* at ¶ 35.

After the litigation was settled, TF challenged the patentability of two of the asserted patents (the '344 patent and the '751 patent) at the U.S. Patent Office. [108] at ¶ II.B.19. As of the filing of the reexaminations in August 2010, TF believed both these patents were invalid. [102] at ¶ 43. Plaintiffs claim the challenge was based solely on prior art patents, rather than any other publications. [108] at II.B.20. They claim the prior art that Defendants withheld was hidden on CDs and DVDs that were submitted as "other publications." *Id.*

In late 2009 or early 2010, TF and TCS began negotiations for a distributorship agreement for TF's A-Plus Shuffler. [102] at ¶ 57. During its diligence for the arrangement, TCS expressed some concerns about Shuffle Master, asked TF for indemnity if Shuffle Master sued, and suggested that Shuffle Master would act aggressively, even illegally, to keep its monopoly advantage in the shuffler market. *Id.* at ¶¶ 59-63, **[*6]** 65. In fact, in September 2012, Shuffle Master sued TCS John Huxley based upon its distribution and display of the A-Plus Shuffler. *Id.* at ¶¶ 10, 66. Notably, in the suit against TCS (in contrast to the 2009 suit against TF), Shuffle Master did not allege infringement

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[1] This Court takes the following facts from Defendants' Rule 56.1 Statement of Material Facts, Plaintiffs' Statement of Material Facts, and Defendants' Response to Plaintiff's Statement of Material Facts [102], [108], [119].

[2] Scientific Games formerly operated a technology campus in Chicago, Illinois. [102] at ¶ 12.

[3] Plaintiffs characterize this letter as a settlement letter, Defendants characterize it as a *Rule 11* letter.

of either the '344 patent or the '576 patent. [108] at ¶ II.C.23. Plaintiffs believed this was because the PTO had by that time rejected the claims of the '344 patent as unpatentable, and the '576 patent was closely related and similar in scope. *Id.* TCS' primary patent litigation counsel was in the middle of his prior art review when the litigation settled. *Id.* at ¶ II.C.24.

On March 20, 2015, a TCS employee, Jonathon Pettemerides, learned that two TCS investors had uncovered patent fraud by Shuffle Master and planned to take legal action in the coming weeks. *Id.* at ¶ II.C.27. Mr. Pettemerides emailed three other TCS employees, including the then-Managing Director of Asia, to tell them about the patent fraud. *Id.* at ¶ II.C.28.

TF and TCS filed this antitrust complaint on March 15, 2019. *Id.* at ¶ II.C.30.

II. Legal Standard

A Court may properly enter summary judgment when there remains "no dispute as to any material fact and the movant is entitled to judgment as a matter **[*7]** of law." *Fed. R. Civ. P. 56(a)*. A genuine dispute as to any material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. When ruling on a motion for summary judgment, the Court "views the record in the light most favorable to the non-moving party and draws all inferences in its favor." *Shuffle Tech Int'l LLC v. Sci. Games Corp., No. 15 C 3702, 2017 U.S. Dist. LEXIS 141445, 2017 WL 3838096, at *5 (N.D. Ill. Sept. 1, 2017)* (citing *Estate of Simpson v. Gorbett, 863 F.3d 740, 745 (7th Cir. 2017)*).

III. Analysis

Defendants argue that they are entitled to summary judgment for two reasons: (1) the four-year statute of limitations bars Plaintiff's claims; and (2) TF released its claims as part of a settlement agreement in 2010. *15 U.S.C. § 15b*; [100]. When Defendants raised these arguments in their motion to dismiss, the Court determined that the record did not definitively set forth when Plaintiffs' claim accrued. On this issue, the Court held as follows:

> Although Plaintiffs contend that their cause of action accrued on March 8, 2019, their complaint includes allegations suggesting that they may have known something was amiss long before this date. For example, Plaintiffs allege that, in 2009, after reviewing SHFL's complaint, TF's counsel advised SHFL's counsel (on December 12, 2009), that he believed SHFL had failed to conduct a proper pre-filing investigation to **[*8]** confirm that the infringement allegations were valid. [32] at ¶ 120. Although SHFL responded that, in its view, its pre-filing investigation satisfied *Rule 11*, *id.* at ¶ 121, the fact remains that, as early as December 2009, TF may have had a factual and legal basis to conclude that the asserted patents were invalid and unenforceable, and thus TF knew or should have known that the infringement suit was groundless. The complaint, however, fails to explain the basis for counsel's assertion that SHFL failed to conduct a proper pre-filing investigation. Did counsel have reason to know when he challenged the complaint that the patents were procured by fraud or that the patents were invalid as anticipated by prior art, which SHFL had withheld? If so, Plaintiffs' cause of action may have accrued by that date. If, on the other hand, counsel's assertion stemmed from simple adversarial posturing, which would only seem prescient in hindsight, it may not have triggered the running of the statute of limitations.
>
> TF's initiation of reexamination proceedings on the asserted '751 patent may also be significant to the timeliness analysis. For example, if TF initiated reexamination because it knew or had reason to know **[*9]** at that time that the patentee had fraudulently withheld prior art, its discovery rule arguments would fail. But the complaint's allegations do not explain why TF requested reexamination. As such, the allegations do not definitively show that Plaintiffs' claim had expired when they filed this case on March 15, 2019.
> Having said that, the current record also undermines Plaintiffs' claim that its cause of action accrued on March 8, 2019. Given DigiDeal's antitrust lawsuit, in the exercise of due diligence, Plaintiffs should have been

> wondering about their antitrust injury long before they had a post-verdict conversation with DigiDeal's lawyers. Plaintiff's assertion of a March 8, 2019 accrual date appears to be as unreasonable as Defendants' assertion that the cause of action necessarily accrued when SHFL filed the underlying patent infringement lawsuits.

[43] at 12-13. Now, with the benefit of discovery and evidence, Defendants attempt to prove the points they argued at the motion to dismiss stage. But, as discussed below, genuine issues of material fact remain as to when Plaintiffs knew (or reasonably should have known) they had a *Walker Process* claim, and thus the record even at this **[*10]** stage precludes the requested ruling on timeliness and the validity of TF's release of any claim.

A key question in this case remains: when did Plaintiffs know or have reason to know that they had suffered an antitrust injury? Defendants argue that Plaintiffs knew as early as 2009, and thus their claim is barred both under the applicable four-year statute of limitations and under the release executed in 2010. *15 U.S.C. § 15b*; [100]. Plaintiffs claim the earliest date they could have known was March 20, 2015, just inside the four-year statute of limitations; they also claim that the release cannot be enforced as to the current claim. [107] at 13.

A. Statute of Limitations

The Sherman Act's four-year statute of limitations applies to Plaintiffs' antitrust claim. *15 U.S.C. §15b*. This statute of limitations generally begins to run "when a defendant commits an act that injures a plaintiff's business," but, as here, it can be "qualified by the discovery rule," which tolls the beginning of the period until the date when the Plaintiff discovers the injury. *Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990)*; *Saunders v. Nat'l Basketball Ass'n, 348 F. Supp. 649, 652 (N.D. Ill. 1972)*. Accrual occurs "when the plaintiff discovers that 'he has been *injured* and who *caused* the injury.'" *In re Copper Antitrust Litig., 436 F.3d 782, 789 (7th Cir. 2006)* (quoting *Barry Aviation, Inc. v. Land O'Lakes Mun. Airport Comm'n, 377 F.3d 682, 688 (7th Cir. 2004)*). Here, Plaintiffs' injury—exclusion from the market—occurred **[*11]** when Shuffle Master sued them in 2009 and 2012. But when they knew or should have known that this exclusion amounted to an antitrust injury is a separate question.

A patent infringement suit is not necessarily an antitrust injury. In fact, the *Noerr-Pennington* doctrine provides immunity from antitrust claims to patent holders. *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1067-68 (Fed. Cir. 1998)*. To overcome such immunity, a plaintiff must show the patent holder obtained the patent through *intentional* fraud or brought the case in bad faith, with *knowledge* that the asserted patent was invalid, unenforceable, or not infringed. *See* *Professional Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*; *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. Thus, to know they had suffered an antitrust injury, Plaintiffs needed to know, or have reason to know, Defendants had intentionally engaged in fraud to obtain the asserted patent or brought sham litigation to keep TF from competing in the market.

Defendants argue that TF's litigation strategy and preparation, the initiation of reexamination proceedings challenging the validity of two of Shuffle Master's patents, and the discussions with TCS prior to the TF/TCS distributor agreement, all show Plaintiffs knew or had reason to know they had been injured. And, indeed, the Court flagged this issue when it noted that TF may have **[*12]** had a factual and legal basis to conclude that the asserted patents were invalid and unenforceable in December 2009, when it challenged Shuffle Master's pre-suit investigation. But discovery has now revealed that TF's *Rule 11* challenge stemmed not from any knowledge or belief about the validity or enforceability of the asserted patents, but from the belief that Shuffle Master sued without accessing the inner workings of the accused shufflers. *See* [108] at II.A.3.

TF's counsel at the time, Helen Su, testified that, after reviewing the 2009 complaint, she reviewed the asserted patents' claims and looked at the client's product to see whether they could develop noninfringement defenses. [111] at 18. She testified that, although she sometimes reviews the documents and other publications cited in the patent, she did not do so here because she knew the client wanted to settle the case quickly, without incurring unnecessary expenses. *Id.* at 18-19. She also testified that she understood that Shuffle Master "failed to conduct a very preliminary test of investigating our client's product" before filing suit. *Id.* at 22-23. She testified that the whole point of the letter described above was not to disclose **[*13]** any knowledge of fraud or invalidity, but to lay the groundwork for a quick settlement. *Id.* at 23, 46. She testified that TF wanted to settle quickly because "the cost of defense is so expensive, that [TF] simply could not afford [it]." *Id.* at 34. Su also explained that she commonly included invalidity and noninfringement defenses based upon a cursory review of the patents to preserve such claims for trial, *id.* at 27-28; and may have used boilerplate language because the client just wanted to settle as soon as possible without incurring legal fees, *id.* at 49. This testimony undermines Defendants' claim that TF's answer and counterclaim in the 2009 litigation necessarily reflected knowledge of invalidity, unenforceability, or fraud. Su also testified that she typically also preserved the right to seek attorneys' fees later in the case by claiming at the outset that the case was "exceptional," *id.* at 30, undermining any claim that the exceptional case allegation in TF's responsive pleading similarly reflected knowledge of antitrust injury.

Elizabeth Rader, who represented TF along with Helen Su in the Shuffle Master lawsuit, testified that she challenged Shuffle Master's pre-suit investigation **[*14]** because TF was not "doing anything that would constitute infringement," [110] at 46; TF was not even selling the accused product in the United States, *id.*, and, additionally, Rader had reviewed the claims of the asserted patents and knew that TF's product did not "work like that," *id.* at 47. She testified that TF believed that filing the lawsuit without really understanding the nature of the accused product violated *Rule 11*. *Id.* at 50. She also testified that, although the asserted patents may have identified prior art sources, she did not request any of those sources because her client elected to settle the case a month after the complaint was filed. *Id.* at 55. Rader testified that her client instructed her that it "was not interested in engaging in U.S. patent litigation" and "wanted the lawsuit to be resolved expeditiously and efficiently." *Id.* at 72.

Based upon this evidence, a reasonable jury could find that TF challenged Shuffle Master's lawsuit not because it knew the asserted patents were invalid, but because it wanted to settle the matter quickly, without incurring the significant expense involved in litigating the matter. A jury could also reasonably find that, given the mandate **[*15]** from her client to settle quickly, Rader acted reasonably by not ordering all of the prior art CDs referenced in the asserted patents.

Defendants also argue that TF's initiation of reexamination proceedings reflected knowledge of its antitrust injury. But Andrew Spence, the attorney who initiated the reexamination proceedings on behalf of TF, testified that he never reviewed Shuffle Master's litigation history and did not consider any litigation of the asserted patents, [114] at 39; he testified that he would not have investigated in connection with the reexamination whether Shuffle Master had previously been accused of inequitable conduct; that information would serve no purpose in the reexamination proceeding, as it was irrelevant to the PTO, *id.* at 45. Spence testified that, in August of 2011, about a year into the reexamination proceeding, he was continuing to assess potential prior art to be used in the reexam; and he admitted that, in February of 2011, he considered ordering, at some point in the future, the file history of art proposed for rejection of claims. *Id.* at 51. He also admitted that his billing records reflect that, on May 2, 2011, he spoke with the patent examiner **[*16]** regarding obtaining a copy of the file history of Roblejo, one of the prior art references cited in Defendants' patent; he testified that this likely reflected his effort to obtain non-patent literature relating to this reference. *Id.* at 51-52.

But Spence also testified that issues like inequitable conduct, fraud, and *Walker Process* fraud simply are not issues raised in a reexamination proceeding. *Id.* at 55. He testified that TF hired him to address whether the claims in the asserted patents could be canceled over the prior art on obviousness or anticipation grounds. *Id.* To the extent Defendants argue that Spence should have uncovered any hidden references or exposed secreted prior art, Spence's testimony undermines that argument: he testified that he would not have "thought much of" "other publications" cited in the patents because they would not have been available as prior art. *Id.* at 56. He testified that he has never submitted DVDs to the PTO, has never ordered DVDs from the PTO, and has never seen a DVD under the "other publications" section in a patent. *Id.* In other words, he did not discover any fraud related to references hidden on DVDs, and would not, in the exercise of reasonable **[*17]** diligence, have discovered such fraud. He also testified that, if the patentee submitted a CD with a bunch of shuffler prior art on it, it would be impossible to tell which of the references on that CD had been considered by the patent examiner. As a result, he testified, it would be highly unusual for a patentee to submit prior art in this manner. *Id.* at 57. Spence testified, in short, that proceedings on reexamination are limited, and as a result, he reasonably limited his investigation and efforts to prior art references relied upon by the examiner, rather than hunting down lawsuits and reviewing docket sheets. *Id.* at 58, 71.

Beyond undermining Defendants' arguments about when they knew about their antitrust injury, Plaintiffs offer evidence to show that they first learned of Shuffle Master's patent fraud when TCS' Jonathan Pettemerides spoke to investors on March 20, 2015 and then emailed other TCS employees to pass along the information. [117] at 7-8. Pettemerides testified that, prior to March 20, 2015, he had no knowledge of any patent fraud or improper litigation by Shuffle Master; nor did he have any awareness of any such knowledge across the company (TCS). *Id.* at 11. If this **[*18]** were the case (and a reasonable jury could find that it is), this lawsuit, filed March 15, 2019, is timely.

Ultimately, the statute of limitations question turns on the same factual issues as Plaintiffs' *Walker Process* claim; the latter asks whether Defendants knew, when they sued Plaintiffs in 2009 and 2012, the asserted patents were invalid or otherwise unenforceable, *see e.g., C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1371 (Fed. Cir. 1998)* ("to violate the ***antitrust law*** there must be an improper use of the patent right, 'coupled with violations of *§ 2*.'") (emphasis added) (quoting *Walker Process, 382 U.S. at 177-78*); the former asks whether (and when) Plaintiffs knew as much. The Court simply cannot resolve these issues on the current, disputed record. Certainly, the record does not allow the Court to definitively rule that Plaintiffs knew they had suffered an antitrust injury before March 15, 2015, which is what Defendants need to prove to obtain a summary judgment based upon the statute of limitations. Accordingly, the Court denies Defendants' motion for summary judgment based upon timeliness under the Sherman Act's statute of limitations.

B. The 2010 Release

Defendants also argue that TF's current claim is barred by the release included in the settlement agreement the parties **[*19]** executed to resolve the 2009 litigation. The parties' agreement provided "except for each party's undertakings and obligations under [the Settlement] Agreement, each party hereby generally releases the other for all claims, liabilities and damages of any kind that either has or may have against the other, as of the date of this Agreement, whether known or unknown, asserted or unasserted, or accrued or unaccrued." [103] at 441. Initially, consistent with the Court's findings above, the record fails to establish, as a matter of law, that TF had a *Walker Process* claim "as of the date of" the Settlement Agreement. And if it did not, then the current claim falls outside the scope of the release.

Additionally, such a broad release is valid only if it is entered into knowingly and voluntarily. *See Wagner v. NutraSweet Co., 95 F.3d 527, 533 (7th Cir. 1996)*. A waiver signed under the "advice of independent counsel" is presumed knowing and voluntary "absent claims of fraud." *Riley v. Am. Fam. Mut. Ins. Co., 881 F.2d 368, 373 (7th Cir. 1989)*. But "[e]ven where the parties intend to release a specific claim, the release of that claim will not be enforced if there has been fraud, duress, mutual mistake, or, at least in some cases, unconscionability." *Fed. Deposit Ins. Corp. v. FBOP Corp., No. 14 CV 4307, 2017 U.S. Dist. LEXIS 194133, 2017 WL 5891033, at *12 (N.D. Ill. Nov. 27, 2017)* (quoting *Carlile v. Snap-on Tools, 271 Ill. App. 3d 833, 648 N.E.2d 317, 322, 207 Ill. Dec. 861 (Ill. Ct. App. 1995)*). Further, "[a]n exculpatory clause cannot protect persons **[*20]** from the results of their willful and wanton misconduct. Such a contractual shield is illegal." *Time Warner Sports Merch. v. Chicagoland Processing Corp., 974 F.Supp. 1163, 1175 (N.D. Ill. 1997)* (quoting *Zimmerman v. Northfield Real Estate. Inc., 156 Ill. App. 3d 154, 510 N.E.2d 409, 415, 109 Ill. Dec. 541 (Ill. App. Ct. 1986)*).

Here, Defendants emphasize that sophisticated counsel represented TF during settlement, suggesting that TF made a knowing and voluntary waiver.[4] But TF's counsel testified that, when she represented TF during those settlement negotiations, she had no knowledge that TF might have a claim against Defendants for inequitable conduct, fraud, or sham litigation. [110] at 98. She testified that, although she had worked on cases where

[4] Defendants also repeat their arguments that TF knew about the potential antitrust claims when it released its claims. But, as explained above, issues of material fact remain as to whether Plaintiffs were aware of these claims.

inequitable conduct allegations were a huge deal and the subject of discovery, this was not such a case. On the contrary, this case settled before it really even got started and before she spent any time considering invalidity. *Id.*

Additionally, TF argues that Defendants' attorney misled TF during those negotiations, thereby preventing TF from realizing it incurred an antitrust injury. Kimball Anderson, the attorney representing Shuffle Master in the 2009 litigation, represented to Elizabeth Rader (TF's counsel) that he had reviewed Shuffle Master's documentation of its pre-filing investigation and was "completely satisfied that your client's A-Plus Shuffler **[*21]** infringes Shuffle Master's patents and that your client has violated the United States Patent Act by, among other things, making an offer to sell the infringing product at the Global Gaming Expo." [109] at 177. And Attorney Rader testified that she did not believe TF had a basis at the time of the settlement to allege inequitable conduct. [109] at 34. Similarly, she testified that, at the time of the settlement, TF had no reason to believe Shuffle Master had committed any kind of fraud on the patent office; she testified that TF was reviewing validity and analyzing prior art and just never discussed anything about Shuffle Master withholding material prior art from the PTO at that time. *Id.* at 42; [110] at 94-95.

Based upon this evidence, a jury could reasonably find that Shuffle Master fraudulently induced TF to settle the 2009 lawsuit and sign the broad release by doubling down on its infringement claim, knowing that the asserted patents were invalid or procured by fraud. Fraudulent inducement is a "classic example of an issue of fact," generally not appropriate for summary judgment. *Dopke v. Stavriotis, No. 87 C 1069, 1987 U.S. Dist. LEXIS 11411, 1987 WL 30979, at *4 (N.D. Ill. Dec. 10, 1987)*. Given the existence of questions of fact concerning whether TF's *Walker Process* claim existed in **[*22]** 2010 when the parties executed the settlement agreement, the Court declines to enter summary judgment in Defendants' favor based upon the release.

IV. Conclusion

For the reasons explained above, the Court finds that issues of fact remain as to whether Plaintiffs knew, or in the exercise of reasonable diligence should have known, before March 15, 2015, that they suffered an antitrust injury. As a result, summary judgment based upon the statute of limitations or the parties' 2010 settlement agreement is inappropriate, and the Court, accordingly, denies Defendants' motion for summary judgment [100].

Dated: September 20, 2021

Entered:

/s/ John Robert Blakey

John Robert Blakey

United States District Judge

Somers v. QVC, Inc.

United States District Court for the Eastern District of Pennsylvania

September 23, 2021, Decided; September 23, 2021, Filed

CIVIL ACTION NO. 19-cv-04773

Reporter

2021 U.S. Dist. LEXIS 181757 *; 2021 WL 4318045

SUZANNE SOMERS, et al., Plaintiffs, v. QVC, INC., Defendant.

Prior History: Somers v. QVC, Inc., 2021 U.S. Dist. LEXIS 148568, 2021 WL 3487315 (E.D. Pa., Aug. 9, 2021)

Core Terms

antitrust, supplements, consumers, nutritional, geographic, monopolization, relevant market, products, summary judgment, television programming, genuine dispute, material fact, Sherman Act, customers, purposes, vendors, direct response, matter of law, competitors, substitutes, practices, submarket, monopoly, parties, prices, unfair

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Judges: CHAD F. KENNEY, JUDGE.

Opinion by: CHAD F. KENNEY

Opinion

MEMORANDUM

KENNEY, J.

This case concerns QVC's alleged monopolization of the direct response television programming market and exercise of control over the sale of nutritional supplements in that market in breach of QVC's obligations to Plaintiffs, Suzanne Somers and SLC Sweet, Inc. ("Plaintiffs"). Presently before the Court is Defendant's Motion for Partial Summary Judgment on Counts V and IX. ECF No. 63.

Plaintiffs have sued QVC for allegedly intentionally removing Plaintiffs as sellers of nutritional supplements in the direct response television programming market (the "T.V. Market"), so that QVC could protect sales of HSN's preferred provider of nutritional supplements, Andrew **[*2]** Lessman. Plaintiffs claim QVC acted to monopolize the television programming nutritional supplement market and engaged in anticompetitive, exclusionary, and predatory conduct. In addition to their antitrust claims, Plaintiffs assert claims against QVC for unfair competition, fraud, promissory estoppel, violations of the UCC, and breach of the parties' Agreement. Plaintiffs intend to establish that QVC's actions caused Plaintiffs over $20 million in damages.

Defendant responds that this case is a straightforward commercial contract dispute that Plaintiffs have twisted into a business tort and antitrust lawsuit. QVC claims that there is no genuine dispute of material fact and Plaintiffs' antitrust and business tort claims fail as a matter of law. QVC also argues it expended significant efforts in its performance under the terms of its Agreement with Plaintiffs, did not breach any provisions of the Agreement, appropriately terminated the Agreement, and that Plaintiffs are not entitled to any damages.

I. BACKGROUND

Plaintiffs in this case are actress and entrepreneur Suzanne Somers and her affiliated company, SLC Sweet, Inc, which sells products such as clothing, jewelry, and books. ECF No. **[*3]** 65 ¶¶ 1 & 3. Defendant is QVC, Inc., a multi-platform retailer that sells products through direct response television programming, online retail, and other channels. ECF No. 63-2 ¶ 6. Plaintiffs allege that Defendant QVC and the Home Shopping Network ("HSN") acted in tandem to control the sale of nutritional supplements in the T.V. Market and eliminate competitor vendors in that market, including Plaintiffs. *See generally* ECF No. 7. The claimed monopoly began in July 2017, when QVC's parent, Qurate, acquired HSN. *Id.* at ¶ 26. Plaintiffs estimate that HSN and QVC together control ninety-five percent of the T.V. Market. *Id.* Plaintiffs claim that after Qurate acquired HSN, QVC suppressed the sale of Plaintiffs' products to protect this illegal monopoly and advance the career of HSN's provider of nutritional supplements, Andrew Lessman. *Id.*

Prior to 2017, Ms. Somers sold nutritional supplements on Evine, another home shopping television network. Pl. Statement of Undisputed Facts ¶ 9; Def. Statement ¶¶ 9-19. In December 2016, a QVC vendor contacted Rich Yoegel, QVC's Vice President of Merchandising, to see whether QVC would be interested in doing business with SLC. Def. Statement ¶ 20. In **[*4]** early 2017, the parties negotiated a merchandising agreement over several weeks. Def. Statement ¶ 25. On March 17, 2017, SLC notified Evine it was terminating their relationship. Def. Statement ¶ 29. On March 21, 2017, SLC and QVC signed a Merchandising Agreement (the "Agreement") for SLC to sell nutritional supplements on QVC. Joint Undisputed Fact No. 7. Caroline Somers, Suzanne's daughter-in-law and the President of SLC, signed the Agreement on behalf of SLC. Joint Undisputed Fact No. 8. In March 2017, QVC placed its first purchase orders with SLC, totaling approximately $1.3 million. Joint Undisputed Fact No. 9.

Andrew Lessman sells nutritional supplements on QVC and HSN. Joint Undisputed Fact No. 2. His company ProCaps was one of HSN's largest vendors before the Liberty/HSN acquisition, and still is one of HSN's largest vendors today. Joint Undisputed Fact No. 10. Andrew Lessman has an agreement with HSN which provides that the parties to the agreement intend him to be the sole provider of nutritional supplements on HSN. ECF No. 69 at 8; ECF No. 83 at 4.

In July 2017, Liberty Interactive announced the HSN acquisition. Joint Undisputed Fact No. 4. In December 2017, Liberty Interactive **[*5]** formally completed the HSN acquisition and comes to own 100% of QVC and 100% of HSN. Joint Undisputed Fact No. 5.

II. PROCEDURAL HISTORY

SLC and Suzanne Somers initiated this action against QVC on October 15, 2019, alleging breach of contract, wrongful rejection of goods, failure to use best efforts, anticipatory repudiation, unfair competition, fraud, promissory estoppel, intentional interference with contractual relations, unfair business practices, and violation of the Sherman Act. ECF No. 1. Plaintiffs then filed an Amended Complaint on December 20, 2019. ECF No. 7. Defendant filed a Motion to Dismiss for Failure to State a Claim on January 24, 2021 (ECF No. 8), which the Court denied. ECF No. 18. Defendant filed its Answer on March 18, 2020 (ECF No. 19), and the case proceeded through discovery.

On May 7, 2021, Plaintiffs filed a Partial Summary Judgment Motion, seeking summary judgment on Count I (Breach of Contract) and Count II (Violation of the UCC). ECF No. 65. Defendant also brought a Partial Summary Judgment Motion seeking judgment in its favor on Counts I, III, IV, V, VI, VII, VIII and IX. ECF No. 63. On August 24, 2021, the Court denied Plaintiffs' Motion (ECF No. 65) in **[*6]** its entirety and denied Defendant's Motion (ECF No. 63) as to Counts I, III, IV, VI, VII, and VIII.[1] Presently before the Court is Defendant's Motion for Partial Summary Judgment as to Counts V (Violation of *CA Business and Professions Code § 17200*) and IX (Violation of *§ 2* of the Sherman Act). ECF No. 65.

III. JURISDICTION AND LEGAL STANDARD

The Court has jurisdiction over this matter under *28 U.S.C. § 1331* as it arises under the laws of the United States. This Court also has subject matter jurisdiction under *28 U.S.C. § 1332* because the matter in controversy exceeds the sum of $75,000 and is between citizens of different states.

Summary judgment will be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The party moving for summary judgment bears the burden of demonstrating that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *see* *Celotex, 477 U.S. at 322-23*. If the movant sustains its burden, the nonmovant must set forth facts demonstrating the existence of a genuine dispute. *See* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A dispute as to a material fact is genuine if "the evidence is such that a reasonable jury **[*7]** could return a verdict for the nonmoving party." *Id.* A fact is "material" if it might affect the outcome of the case under governing law. *Id.* To establish "that a fact cannot be or is genuinely disputed," a party must:

> (A) cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
> (B) show[ ] that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). The adverse party must raise "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion and cannot survive by relying on unsupported assertions, conclusory allegations, or mere suspicions. *Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989)*. The "existence of disputed issues of material fact should be ascertained by resolving all inferences, doubts and issues of credibility against" the movant. *Ely v. Hall's Motor Transit Co., 590 F.2d 62, 66 (3d Cir. 1978)* (citations and quotation marks omitted).

IV. DISCUSSION

A. Count IX — Violation of the Sherman Act

In Count IX of the Amended Complaint, **[*8]** Plaintiffs allege that Defendant violated the Sherman Act, *15 U.S.C. § 2*, through its monopolization or attempted monopolization of the trade or commerce of nutritional supplements in the T.V. Market. ECF No. 7 ¶¶ 222-31.

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[1] The Court noted in ruling on the Defendant's Partial Summary Judgment Motion as to Counts I, III, IV, VI, VII, and VIII that the Court would revisit the sufficiency of the evidence pursuant to *F.R.C.P. 50*.

Section 2 makes it unlawful to "monopolize, or attempt to monopolize," interstate or international commerce. 15 U.S.C. § 2. It is "the provision of the antitrust laws designed to curb the excesses of monopolists and near-monopolists." Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 306 (3d Cir. 2007). "[Section] 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993).

A plaintiff bringing an attempted monopolization claim must allege that: (1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 75 (3d Cir. 2010) (internal quotations omitted). "Liability hinges on whether valid business reasons, as part of the ordinary competitive process, can explain [QVC]'s actions that resulted in a dangerous probability of achieving monopoly power." Phila. Taxi Ass'n, Inc v. Uber Techs., Inc., 886 F.3d 332, 339 (3d Cir.), cert. denied, *139 S. Ct. 211, 202 L. Ed. 2d 126 (2018)* (citing Avaya Inc., RP v. Telecom Labs, Inc., 838 F.3d 354, 393 (3d Cir. 2016)). The Court must "carefully scrutinize[] enforcement efforts by competitors because their interests are not necessarily congruent with the consumer's stake in competition." **[*9]** Barr Lab'ys, Inc. v. Abbott Lab'ys, 978 F.2d 98, 109 (3d Cir.1992). As an essential part of their case, Plaintiffs must articulate the relevant product and geographic market, show a cognizable antitrust injury, and explain QVC's power within the market. *See* Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997).

Plaintiffs claim that Defendant QVC has an illegal monopoly over the sale of nutritional supplements in the T.V. Market. ECF No. 7 ¶¶ 222-31. Per Plaintiffs, QVC evidenced its specific intent to monopolize the T.V. Market by falsely luring and inducing Plaintiffs into the "sham" Agreement and purchase orders so it could eliminate competition from Plaintiffs in the T.V. Market. *Id.* ¶ 227. Plaintiffs further claim QVC possesses and controls nearly all of the T.V. Market and that Plaintiffs have suffered antitrust injury in the form of, among other things, lost profits from a reduced ability to compete, which was proximately caused by QVC's monopolization or attempted monopolization of the television programming nutritional supplement market. *Id.* ¶ 227-30.

Defendant claims Plaintiffs' antitrust allegations fail as a matter of law for four reasons: the lack of (1) antitrust injury; (2) support for Plaintiffs' claimed relevant market; (3) market power by QVC and HSN; and, (4) evidence for QVC's specific **[*10]** monopolistic intent. ECF No. 63-1 at 4. Defendant states that Plaintiffs failed to create genuine issues of fact on these key points during fact discovery and exacerbated that problem by failing to engage an antitrust expert. *Id.*

1. Product Market

A product market's "outer boundaries" are defined by looking to the "reasonable interchangeability of use" between the product itself and substitutes for it. Queen City Pizza, 124 F.3d at 436 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)). Interchangeability of use means that one product is "roughly equivalent" to another product for its intended use. 124 F.3d at 437. "In most cases, proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers." Id. at 436. Factors to be considered include price, use, and qualities. Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991) (citing United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)). The products in a relevant product market would be characterized by a cross-elasticity of demand, meaning that a rise in the price of a good within a relevant product market would tend to create a greater demand for other like goods in that market. 952 F.2d at 722. Put differently, if a consumer were looking to purchase a product in a particular market, are "reasonable substitutes" available if a preferred product is unavailable. *See* Novak v. Somerset Hosp., No. 3:07CV304, 2014 U.S. Dist. LEXIS 138028, 2014 WL 4925200, at *13 (W.D. Pa. Sept. 30, 2014), aff'd, 625 F. App'x 65 (3d Cir. 2015).

Plaintiffs claim that **[*11]** "the television programming nutritional supplement market" is a relevant market for antitrust purposes and that the T.V. Market is a distinct and recognized market. ECF No. 7 ¶ 226; ECF No. 84-2 at 3-4. Plaintiffs argue that summary judgment should be denied here because "special characteristics" of the relevant industry can influence the market definition and "a discrete channel of distribution" can be a relevant market for antitrust purposes. *See* ECF No. 84-2 at 4-5 (citing *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 28 (3d Cir. 1978)*, cert. denied, *439 U.S. 876, 99 S. Ct. 214, 58 L. Ed. 2d 190 (1978)* and *GN Netcom, Inc. v. Plantronics, Inc., 967 F. Supp. 2d 1082, 1087 (D. Del. 2013)*).

However, Plaintiffs have not presented any evidence sufficient to raise a genuine dispute of material fact as to whether the T.V. Market has the "special characteristics" necessary to render it a relevant market for antitrust purposes, nor have they shown "that enough customers do not view other methods of distribution as viable substitutes to the distribution method in question." *GN Netcom, Inc., 967 F. Supp. 2d at 1087*. Plaintiffs' only factual citations for their propositions come from the Agreement between QVC and SLC and statements from Qurate's CEO and advertising materials. ECF No. 84-2 at 5-7. Nowhere in the record do Plaintiffs make any kind of showing that consumers who purchase nutrition supplements on the T.V. Market **[*12]** view other channels of distribution, such as e-commerce or brick-and-mortar stores, as nonviable substitutes if their preferred product is not offered on the T.V. Market. Nor have Plaintiffs shown what other nutritional supplements are reasonable substitutes for their products, even if certain consumers would prefer to purchase Plaintiffs' products. In fact, nowhere in the record have Plaintiffs clearly proposed a product market that contains all products that consumers consider reasonably interchangeable, nor have they presented any evidence or analysis on cross-elasticity of demand.

Plaintiffs cite to *Brown Shoe Co. v. U.S* for their proposition that the T.V. Market is a valid submarket for antitrust purposes, but have not attempted to make the showing outlined in that case. *370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. In *Brown Shoe Co.*, the Court stated that well-defined submarkets can constitute product markets for antitrust purposes where such a submarket can be determined by "examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price **[*13]** changes, and specialized vendors." *Id. at 325*. However, Plaintiffs have not brought forward any evidence on any of these factors to show that the T.V. Market meets this standard for a recognizable submarket. Plaintiffs cite only to QVC's Agreement with SLC—which contains several provisions limiting SLC's ability to promote and sell its products only on other "Direct Response Television Programs"—and statements made by Qurate which show that the company sought to differentiate itself from e-commerce platforms and brick-and-mortar companies. ECF No. 84-2 at 5-7. Plaintiffs cite no evidence showing industry or public recognition of the T.V. Market as a separate economic entity, the product's peculiar characteristics and uses, any unique production facilities, that there are distinct T.V. Market customers, distinct prices, sensitivity to price changes, and specialized vendors.

Therefore, Plaintiffs have not articulated a coherent product market. *See, e.g., Multiple Energy Techs. v. Under Armour, No. 2:20-CV-664-NR, 2021 U.S. Dist. LEXIS 120744 (W.D. Pa. June 29, 2021)*.

2. Geographic Market

As with the product market, the Plaintiffs bear the evidentiary burden of proving the relevant geographic market. *Tunis Bros. Co., 952 F.2d at 726*. "[T]he relevant geographic **[*14]** market is the area in which a potential buyer may rationally look for the goods or services he or she seeks." *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc., 806 F.3d 162, 183-84 (3d Cir. 2015)* (citation omitted). The geographic market "may be local, regional, national or international in origin." *In re Mushroom Direct Purchaser Antitrust Litig., 514 F. Supp. 2d 683, 697 (E.D. Pa. 2007)*. The geographic market is defined with reference to both "the market area in which the seller operates" and where "the purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 331-32, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*; *see also Tunis Bros. Co., 952 F.2d at 726* ("the geographic market is not comprised of the region in which the seller attempts to sell its product, but rather is comprised of the area where his customers would look to buy such a product").[2]

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[2] While *Tunis* and several other cases relied on by the Court involved alleged violations of *Section 1 of the Sherman Act*, the Court finds the cited analysis instructive here. The Third Circuit has made it clear that, while "'inquiries into the scope of

Plaintiffs assert that the relevant geographic market is defined in the Agreement. ECF No. 84-2 at 7-8. However, the geographic market must be defined by buyer behavior, i.e. where consumers wanting to purchase nutritional supplements would look to purchase such supplements. *See* *Novak v. Somerset Hosp., 2014 U.S. Dist. LEXIS 138028, 2014 WL 4925200, at *16*. Plaintiffs reject Defendant's argument that Plaintiffs' competitors include brick-and-mortar and online sellers of supplements, but they have not even argued that consumers, when shopping for supplements, limit themselves to certain distribution channels, such as the T.V. Market. *See, e.g.,* *Tunis Bros. Co., 952 F.2d at 726* (finding that plaintiff's evidence **[*15]** failed to establish a geographic market in part because "customers testified [ ] that they did not limit themselves to such a restricted geographic region"). Because Plaintiffs cite no evidence on buyer behavior, they have not established a relevant geographic market. *Id. at 727* (a geographic market delineated "without reference to a market as perceived by consumers and suppliers, fails to meet the legal standard necessary for the relevant geographic market").

Though Plaintiffs dispute Defendant's claim that Plaintiffs are required to introduce expert testimony to define a relevant market, the Court need not address that issue because the Plaintiffs have clearly not met their burden. The Court will not opine on whether Plaintiffs could have proposed a viable relevant market or what evidentiary showing could have met the standards under these circumstances.

The Plaintiffs' failure to define a legally sufficient relevant market is fatal to their *Section 2* claim (*see* *Queen City Pizza, Inc., 124 F.3d at 436*) and thus the Court will not address the remaining elements (whether QVC has the requisite market power or anticompetitive intent). *Novak v. Somerset Hosp., 2014 U.S. Dist. LEXIS 138028, 2014 WL 4925200, at *16*.

Nonetheless, the Court will discuss Plaintiffs' failure to state an antitrust injury, which is equally fatal **[*16]** to Plaintiffs' antitrust claim.

3. Injury to Competition

"Competition is at the heart of the antitrust laws." *Phila. Taxi Ass'n, Inc., 886 F.3d at 338*. The Sherman Act does not "proscribe all unseemly business practices," *Sitkin Smelting & Ref. Co. v. FMC Corp., 575 F.2d 440, 448 (3d Cir. 1978)*; rather, the antitrust laws aim only to curtail anticompetitive conduct, "or a competition-reducing aspect or effect of the defendant's behavior," *Phila. Taxi Ass'n, Inc., 886 F.3d at 338*. If consumers can purchase comparable goods at competitive prices, there can be no antitrust violation. *Tunis Bros. Co., 952 F.2d at 728*. Thus, Plaintiffs "must prove that the challenged conduct affected the prices, quantity or quality of goods and services, not just [their] own welfare." *Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 641 (3d Cir. 1996)* (quotations omitted). This requirement reflects the fundamental purpose of ***antitrust law***: "to protect competition, not competitors." *Id.*

The Court finds that Plaintiffs have failed to show that QVC caused any injury to competition. *See* *Tunis Bros. Co., 952 F.2d at 727-28*. The record does not raise any genuine dispute of material fact or support a reasonable finding that Plaintiffs were forced out of a relevant market or that consumers were harmed.

Plaintiffs claim that by removing Plaintiffs and their products from the T.V. Market, QVC reduced competition, consumer choice, and the quantity of goods. ECF No. 84-2 at 8-9; *see also id.* at 10 ("[b]y **[*17]** eliminating Plaintiffs from the Direct Response Television Programming Market, QVC has eliminated product choice and the quantity of goods for the consumer"). However, Plaintiffs have not brought forward any evidence showing that a single customer paid a higher price for a supplement because of QVC's alleged conduct or that consumers were deprived of the option to purchase Plaintiffs' supplements. In fact, Plaintiffs have stated that consumers had access to Plaintiffs' products through their website and on other platforms, including SuzanneSomers.com and Facebook Live. ECF No. 7 ¶ 10. Plaintiffs have also not cited any evidence showing that the quality or quantity of supplements for sale in any relevant market has declined. Moreover, Plaintiffs' claimed lost profits from a reduced ability to

competition under *§ 1* and *§ 2* are not precisely the same,'" where the Plaintiffs have failed to "present a sufficiently close factual issue," it is not necessary for the Court to confine itself to case law only dealing with claims brought under the same section. *Tunis Bros. Co., 952 F.2d at 724 n.3* (citing *Columbia Metal Culvert Co., 579 F.2d at 27 n.11*).

compete (ECF No. 7 ¶ 229-30) are not a cognizable antitrust injury. *See* *Huhta v. Children's Hosp. of Phila., No. CIV. A. 93-2765, 1994 U.S. Dist. LEXIS 7327, 1994 WL 245454, *2 (E.D. Pa. May 31, 2004)* (harm to doctor from lost referrals was not harm to competition). Therefore, the Court agrees with Defendant that Plaintiffs have not met their burden to put forward evidence to create a genuine issue of fact as to whether Defendant's conduct caused the type of injury that is redressable under the Sherman Act.

Because Plaintiffs **[*18]** are unable to demonstrate antitrust injury or define a legally sufficient relevant market, Count IX fails as a matter of law.

B. Count V — Violation of CA Business and Professions Code 17200

The California Unfair Competition Law ("UCL") creates a cause of action for business practices that are unlawful, unfair, or fraudulent. *Cal. Bus. & Prof. Code § 17200* (West). Where a UCL action is based on contracts not involving either the public in general or individual consumers who are parties to the contract, a corporate plaintiff may not rely on the UCL for the relief it seeks. *Dollar Tree Stores Inc. v. Toyama Partners LLC, 875 F. Supp. 2d 1058, 1083 (N.D. Cal. 2012)* (citing *Linear Tech. Corp. v. Applied Materials, Inc., 152 Cal. App. 4th 115, 135, 61 Cal. Rptr. 3d 221 (Cal. Ct. App. 2007)*); *see also* *Capella Photonics, Inc. v. Cisco Sys., Inc., 77 F. Supp. 3d 850, 866 (N.D. Cal. 2014)* (a corporate competitor is not entitled to the protection of the fraudulent prong of the UCL).

Plaintiffs claim that QVC's business practices were both "unfair" and "unlawful" under *§ 17200*. ECF No. 7 ¶ 153; ECF No. 84 at 25.[3] Because the Court has found that Defendant did not violate the Sherman Act, the only remaining predicate acts that could be the basis for the UCL claim are based on the parties' Agreement and do not include allegations of harm to the general public or individual consumers. A UCL action based on a contract is not appropriate where the public in general or consumers are not harmed by the defendant's alleged unlawful **[*19]** practices. *Rosenbluth Int'l, Inc. v. Superior Ct., 101 Cal. App. 4th 1073, 1077, 124 Cal. Rptr. 2d 844 (Cal. Ct. App. 2002)*; *see also* *Linear Tech. Corp. v. Applied Materials, Inc., 152 Cal. App. 4th 115, 61 Cal. Rptr. 3d 221 (Cal. Ct. App. 2007)* ("Where a UCL action is based on contracts not involving either the public in general or individual consumers who are parties to the contract, a corporate plaintiff may not rely on the UCL for the relief it seeks."). Plaintiffs have not put forward evidence that QVC's alleged conduct caused harm to the public or consumers, as Plaintiffs have not claimed that the public was deceived in any way or forced to pay higher prices for nutrition supplements. Rather, this is a dispute between commercial parties over their economic relationship. *In re ConocoPhillips Co. Serv. Station Rent Contract Litig., No. M:09-CV-02040 RMW, 2011 U.S. Dist. LEXIS 40471, 2011 WL 1399783, at *3 (N.D. Cal. Apr. 13, 2011)*. Therefore, Plaintiffs' UCL claim fails and the Defendant is entitled to judgment as a matter of law on Count V.

V. CONCLUSION

For the foregoing reasons, the Court will **GRANT** Defendant's Partial Motion for Summary Judgment (ECF No. 63) as to Counts V and IX of the Amended Complaint, as outlined above. An appropriate order follows.

DATE: 09/23/2021

BY THE COURT:

/s/ Chad F. Kenney

CHAD F. KENNEY, JUDGE

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[3] In their Amended Complaint, Plaintiffs also allege that that QVC's conduct was fraudulent under the UCL. ECF No. 7 ¶ 156. However, Plaintiffs do not address this claim in their Response to the Motion (ECF No. 84), and it is clear that corporate competitors cannot bring claims under the fraudulent prong of the UCL. *See* *77 F. Supp. 3d at 866*.

ORDER

AND NOW, this **23** rd day of **September, 2021**, upon consideration of Defendant's Motion for Partial Summary Judgment (ECF No. 63), Plaintiffs' Response in Opposition (ECF No. 84), Defendant's Reply (ECF No. 90) and Plaintiffs' Surreply **[*20]** (ECF Nos. 93), it is hereby **ORDERED** that Defendant's Motion (ECF No. 63) is **GRANTED as to Counts V and IX of the Amended Complaint**.

The Clerk of the Court is directed to enter judgment in the Defendant's favor on Counts V and IX only of the Amended Complaint.

BY THE COURT:

/s/ Chad F. Kenney

CHAD F. KENNEY, JUDGE

Best Carpet Values, Inc. v. Google LLC

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

September 24, 2021, Decided; September 24, 2021, Filed

Case No. 5:20-cv-04700-EJD

Reporter

2021 U.S. Dist. LEXIS 183693 *; 2021 U.S.P.Q.2D (BNA) 989; 2021 WL 4355337

BEST CARPET VALUES, INC., et al., Plaintiffs, v. GOOGLE LLC, Defendant.

Subsequent History: Petition granted by *Best Carpet Values, Inc. v. Google LLC, 2022 U.S. App. LEXIS 16574 (9th Cir., June 15, 2022)*

Core Terms

website, Google, Plaintiffs', users, internet, trespass to chattel, advertising, conversion, display, domain name, rights, unjust enrichment, phone, superimposed, screens, homepage, tangible, prong, preemption, unfair, web, implied-in-law, Carpet, click, intangible property, subject matter, competitors, obscured, software, browser

Counsel: **[*1]** For Best Carpet Values, Inc., on behalf of themselves and all others similarly situated, Thomas D. Rutledge, on behalf of themselves and all others similarly situated, Plaintiffs: Alexander H Schmidt, LEAD ATTORNEY, PRO HAC VICE, Alexander H. Schmidt, Esq., Colts Neck, NJ; Asil A. Mashiri, Mashiri Law Firm, A Professional Corporation, San Diego, CA.

For Google LLC, Defendant: Dale Richard Bish, Wilson Sonsini Goodrich & Rosati, A Professional Corporation, Palo Alto, CA; Jonathan S.M. Francis, Wilson Sonsini Goodrich & Rosati P.C., San Francisco Office, Spear Street Tower, San Francisco, CA; Victor Jih, Wilson Sonsini Goodrich & Rosati, PC, Los Angeles, CA.

Judges: EDWARD J. DAVILA, United States District Judge.

Opinion by: EDWARD J. DAVILA

Opinion

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Re: Dkt. No. 19

Plaintiffs Best Carpet Values, Inc. and Thomas D. Rutledge (collectively "Plaintiffs") initiated this putative class action suit, asserting claims against Defendant Google LLC ("Google") for implied-in-law contract and unjust enrichment; trespass to chattels; and unfair and unlawful conduct in violation of *California Business and Profession Code § 17200*. Pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, Google moves to dismiss the complaint without leave to amend. Dkt. No. 19. Plaintiffs **[*2]** filed an opposition (Dkt. No. 22) and Google filed a reply (Dkt. No. 28). For the reasons discussed below, the Court will grant in part and deny in part Google's motion.

I. BACKGROUND[1]

Plaintiffs are owners of active U.S.-based websites. Compl. ¶ 1. Plaintiff Best Carpet Values, Inc. ("Best Carpet") owns bestcarpetvalue.com and Plaintiff Thomas D. Rutledge ("Rutledge") owns thomasrutledgelaw.com. *Id.* ¶ 9. A website is a digital document built with software and housed on a computer called a "web server." *Id.* ¶ 34. A webserver is owned or controlled in part by the website's owner. *Id.* Commercial websites typically have a unique "domain name" or "URL" (Uniform Resource Locator) address which enables an internet user to find the webserver on which the website resides. *Id.* ¶ 35. All websites have at least one page, called a homepage. *Id.* ¶ 36. Plaintiffs allege that "[b]y rights of ownership—and under the *First Amendment*—website owners are entitled to control the content and information displayed on their websites' web pages, including any advertisements, without interference." *Id.* ¶ 51. Once a website is "published" and becomes "active," Internet users can reach a website by entering the website's domain **[*3]** name into an internet "browser" program such as Google Chrome, Mozilla Firefox or Microsoft Edge. *Id.* ¶ 37.

Internet users do not necessarily need a URL to reach a website. Internet users can find the website by entering "search terms" into the "search bar" of an internet search engine such as Google.com, Yahoo.com or Bing.com. *Id.* ¶ 38. Performing searches on search engines yields "search results" typically in the form of a list of websites or documents that are potentially responsive to the user's search terms. *Id.* When the internet user clicks on a link to a website, the user's internet browser will connect the user to, and upload a page from, the website. *Id.* "The browser does this by finding and connecting to the web server hosting the website. The browser then obtains a copy of the requested website page from the host web server and delivers the copy to the user by translating the website's codes and recreating the website page on the user's computer monitor or mobile device screen." *Id.* ¶ 39.

Google operates several internet related businesses that provide a variety of internet related products and services. *Id.* ¶ 54. Among other things, Google (1) makes and controls Android mobile **[*4]** phone software, including the Android operating system, which allows users to wirelessly access the internet; (2) owns and operates the world's most used internet browser, Google Chrome, and the world's most-used internet search engine, google.com; and (3) owns the world's largest internet advertising network, offering products serving every aspect of that industry, including Google Ads (for clients advertising on Google's search results pages), AdSense (matching buyers and sellers of display advertising on websites), and AdX (for buyers and sellers of premium, high-end website display ads). *Id.* ¶¶ 55-58.

Android phone users can search the internet by either (1) opening a browser, such as Chrome, by clicking the Chrome icon on one of their Android home screens; or (2) using Google's Search App, which is incorporated into nearly every Android phone. *Id.* ¶¶ 59-60. Android users searching the internet are able to retrieve virtually the same search results, whether they use Search App or Chrome. *Id.* ¶¶ 63-64.

Before March of 2018, the Search App icon " " appeared in the suite of Google apps that Google installs on Android phones, and many Android users had to click on the Search App icon **[*5]** to use the App. *Id.* ¶ 62. In late March of 2018, Google updated its Search App software by placing the Search App's search bar at the top of the first page of most Android home screens. *Id.* ¶¶ 65, 66. This software update eliminated the need for Android users to click an icon before conducting an internet search using Google's Search App. *Id.* ¶ 60. The Search App search bar bears Google's " " logo. *Id.* ¶ 67. Between March of 2018 and April of 2020 (the "Class Period"), virtually all of the approximately 50 million Android phone users in America have used the Search App's search bar to search the internet. *Id.* ¶ 68.

When Android users input internet search terms in the Search App's search bar, the Search App provides the user with search results, which appear on the Android user's screen as a list of websites and other documents available on the internet. *Id.* ¶ 69. The names of the websites on this search results list contain hyperlinks to those websites.

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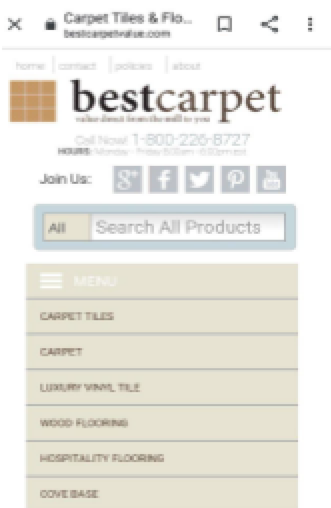
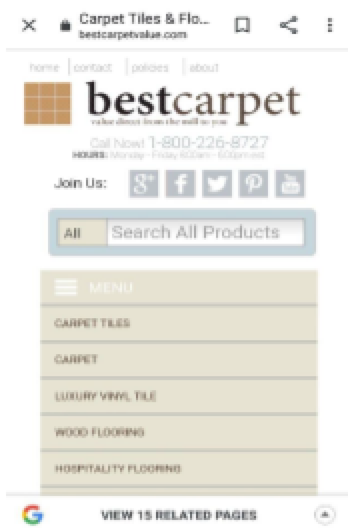
[1] The Background is a summary of the allegations in the Complaint.

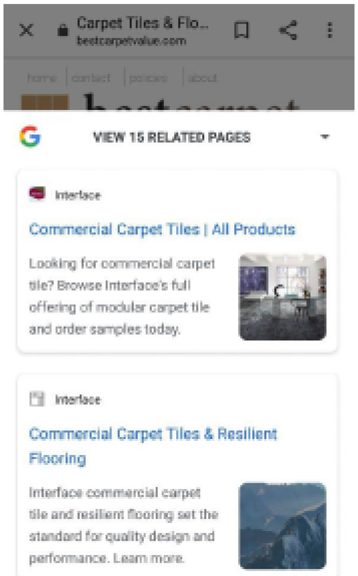
Id. ¶ 70. When users click on a website name, Google's search result page disappears from their screen and is replaced by the website's homepage. *Id.*

During the Class Period, "most websites retrieved via Search App, when activated by **[*6]** an Android user's touching and toggling of their phone's screen, had Google's unlawful ads superimposed on their homepages or other 'landing' pages.'" *Id.* ¶ 64. More specifically, Google superimposed a leaderboard ad at the bottom of homepages that consisted of Google's logo, the phrase "VIEW 15 RELATED PAGES," and a pop-up button. *Id.* ¶¶ 73-74. To illustrate, when a Search App user clicked Best Carpet's homepage link from the search results list, the website appeared as depicted in the image below on the left. *Id.* ¶ 73.





Id. ¶ 73. Once a user engaged Best Carpet's website by toggling its homepage, however, Google's Search App activated and superimposed Google's leaderboard ad on top of Best Carpet's website as depicted above in the image to the right. *Id.* The result was that Google's leaderboard, "VIEW 15 RELATED PAGES," covered Best Carpet's invitation to users to view its "Cove Base" products. *Id.* If a user were to click on the pop-up button (encircled triangle) in the leaderboard, the Search App superimposed two half-page "banner" ads that blocked 80% of what was previously viewable, and shadowed the remaining 20%. *Id.* ¶ 74. The two half-page banner ads were for Best Carpet's direct **[*7]** competitors. *Id.* ¶ 74, 79. Technically, the superimposed "banner" ads appeared on the copy of Best Carpet's website that was reproduced on the user's screen. *Id.* ¶ 75. Best Carpet considers that copy its property. *Id.* Each banner ad contained a link that, if clicked, redirected the users from Best Carpet's homepage to its competitor's web page. *Id.* ¶¶ 76, 79-80. The image below illustrates the superimposed "banner" ads.



Google's ads intruded on website owners' limited space and created distractions that undermined every web page's central purpose. *Id.* ¶ 88. They also "compelled" business owners in nearly every conceivable industry to advertise for others, including competitors. *Id.* ¶¶ 89, 91. Google's ad could also be misperceived by Android users as endorsements of unaffiliated businesses and people. *Id.* ¶ 91. The Related Pages banner ads often included ads for the host website's competitors (*id.* ¶ 77) and links to news stories about the host website's owner, including negative news articles (*id.* ¶¶ 78, 85).

The purpose of the March 2018 software update was to generate profit and Google succeeded in doing so. *Id.* ¶¶ 100-148. Google updated its Search App on or about April 22, 2020 to **[*8]** discontinue (at least temporarily) the conduct alleged in the Complaint. *Id.* ¶ 8, n.1. Plaintiffs estimate that for those two years, Google obtained over $2 billion of non-consensual free advertising. *Id.* ¶ 146.

II. STANDARDS

Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient specificity "to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal quotations omitted). A complaint which falls short of the *Rule 8(a)* standard may, therefore, be dismissed if it fails to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*.

To survive a *Rule 12(b)(6)* motion to dismiss, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp., 550 U.S. at 570*). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* In evaluating the complaint, the court must generally accept as true all "well-pleaded factual allegations." *Id. at 664*. The court must also construe the alleged facts in the light most favorable to the plaintiff. *See Retail Prop. Trust v. United Bhd. Of Carpenters & Joiners of Am., 768 F.3d 938, 945 (9th Cir. 2014)* (the court must "draw all reasonable inferences in favor **[*9]** of the nonmoving party" for a *Rule 12(b)(6)* motion). The court, however, "does not have to accept as true conclusory allegations in a complaint or legal claims asserted in the form of factual allegations." *In re Tracht Gut, LLC, 836 F.3d 1146, 1150-51 (9th Cir. 2016)* (citing *Bell Atl. Corp., 550 U.S. at 555-56*). Dismissal "is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*.

III. DISCUSSION

Plaintiffs assert three claims on behalf of themselves, a Class, a Georgia Subclass, and a California Subclass.[2] Each claim is addressed separately below.

A. Trespass to Chattels Claim

Trespass to chattels lies where an intentional interference with the possession of personal property has caused injury. *Intel Corp. v. Hamidi, 30 Cal. 4th 1342, 1350-51, 1 Cal. Rptr. 3d 32, 71 P.3d 296 (2003)*; *see also* *Brodsky v. Apple Inc., 2019 U.S. Dist. LEXIS 148808, at *8 (N.D. Cal. Aug. 30, 2019)*. "Dubbed by Prosser the 'little brother of conversion,' the tort of trespass to chattels allows recovery for interferences with possession of personal property 'not sufficiently important to be classed as conversion, and so to compel the defendant to pay the full value of the thing with which he has interfered.'" *Hamidi, 30 Cal. 4th at 1350* (quoting Prosser & Keeton, Torts (5th ed. 1984) § 14, pp. 85-86). Under California law, "[i]n cases of interference with possession of personal property not amounting to conversion, 'the owner has **[*10]** a cause of action for trespass or case [sic], and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use.'" *In re iPhone Application Litig., 844 F. Supp. 2d 1040, 1069 (N.D. Cal. 2012)* (quoting *Hamidi, 30 Cal. 4th at 1351*).

Here, there are two potential chattels: the computers hosting Plaintiffs' websites and the copies of Plaintiffs' websites appearing on users' screens. Google contends the trespass to chattels claim fails as a matter of law as to both potential types of chattel because its Search App does not cause physical injury (*i.e.*, intrusion, interference or harm) to any tangible property. Mot. at 6. In making this argument, Google implicitly acknowledges that the computers hosting Plaintiffs' websites are tangible property, but contends that the Search App does not interact with those computers, much less damage them. As for the copies of Plaintiffs' websites appearing on users' screens, Google contends that they are not tangible property, and therefore cannot be the subject of a trespass claim.

In response, Plaintiffs contend that tangible and intangible property alike can be the subject of a trespass to chattels claim, and that they are alleging an injury to their intangible property, namely their websites.[3] Google allegedly **[*11]** injured their websites because the superimposed ads impaired the website's "condition, quality, or value." Opp'n at 18.

Consistent with *Kremen v. Cohen, 337 F.3d 1024, 1029-31, 1034-35 (9th Cir. 2003)*, and subsequently issued cases, the Court agrees with Plaintiffs that a website can be the subject of a trespass to chattels claim. In *Kremen*, the Ninth Circuit held that a registrant has property rights in a domain name, and further that a domain name is intangible property[4] that is protected by California conversion law. *Id. at 1035*. In doing so, the *Kremen* court recognized that conversion was originally a remedy for the wrongful taking of another's goods, so it applied only to

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[2] The "Class" is: "All persons or entities residing in the United States that owned websites that were active between March 2018 and April 2020 (the 'Class Period') on which Google's logo and Related Pages banner ads appeared when their websites were viewed by Android mobile phone owners using the Search App." Compl. ¶ 156.

The "Georgia Subclass" is: "All persons or entities residing in Georgia that owned websites that were active between March 2018 and April 2020 on which Google's logo and Related Pages banner ads appeared when their websites were viewed by Android mobile phone owners using the Search App." *Id.* ¶ 157.

The "California Subclass" is: "All persons or entities residing in California that owned websites that were active between March 2018 and April 2020 on which Google's logo and Related Pages banner ads appeared when their websites were viewed by Android mobile phone owners using the Search App." *Id.* ¶ 158.

[3] None of Plaintiffs' websites, files, or data were physically altered in any way. Nor were Plaintiffs' servers disrupted.

[4] A property right exists in a domain name because (1) it is an interest capable of precise definition; (2) it is capable of exclusive possession or control; and (3) registrants of the domain name have a legitimate claim to exclusivity. *Id. at 1030*.

tangible property. *Id. at 1030*. The *Kremen* court, however, observed that virtually every jurisdiction has discarded this limitation to some degree and cited to the *Restatement* as one example of an alternative test:

> (1) Where there is conversion of a document in which intangible rights are merged, the damages include the value of such rights. (2) One who effectively prevents the exercise of intangible rights of
>
> (2) One who effectively prevents the exercise of intangible rights of the kind customarily *merged in a document* is subject to a liability similar to that for conversion, even though the document **[*12]** is not itself converted.

Restatement (Second) of Torts § 242 (1965) (emphasis added). The *Kremen* court surveyed California cases, determined that California does not follow the *Restatement*'s merger requirement quoted above,[5] and opined that conversion is a remedy for conversion of "every species of personal property," whether tangible or intangible. *Id. at 1033* (quoting *Payne v. Elliot 54 Cal. 339, 341 (1880)*). Nevertheless, the *Kremen* court found it unnecessary to resolve whether or not California applies the merger requirement because Kremen's domain name had a "connection to a document or tangible object," namely the Domain Name System ("DNS")—the distributed electronic database that associates domain names with particular computers connected to the internet. *Id. at 1033-34*. The DNS was, in the Ninth Circuit's view, akin to an electronic document. *Id. at 1034*. The Ninth Circuit explained:

> We need not delve too far into the mechanics of the Internet to resolve this case. It is sufficient to observe that information correlating Kremen's domain name with a particular computer on the Internet must exist somewhere in some form in the DNS; if it did not, the database would not serve its intended purpose. Change the information in the DNS, and you change the website people see when they type "www.sex.com." **[*13]**

Id. at 1034. After *Kremen*, several courts have held that domain names are subject to conversion in California. *See e.g.*, *CRS Recovery, Inc. v. Laxton, 600 F.3d 1138, 1142 (9th Cir. 2010)* ("Domain names are thus subject to conversion under California law, notwithstanding the common law tort law distinction between tangible and intangible property for conversion claims."); *United States Marine Surveyors, Inc. v. Reiner, 2016 U.S. Dist. LEXIS 189026, 2016 WL 9131961, at *4 (C.D. Cal. Aug. 4, 2016)* ("A website domain is property which may be converted."); *Salonclick LLC v. SuperEgo Mgmt. LLC, 2017 U.S. Dist. LEXIS 6871, 2017 WL 239379, at *4 (S.D.N.Y. Jan. 18, 2017)* (holding that plaintiff had stated a claim for conversion of domain name and social media accounts under New York law).

Plaintiffs have property rights to their websites for the same reasons a registrant has property rights to a domain name. The owner of an Internet website "has the right to establish the extent to (and the conditions under) which members of the public will be allowed access to information, services and/or applications which are available on the website." *U.S. v. Drew, 259 F.R.D. 449, 461 (C.D. Cal. 2009)* (citing *U.S. v. Phillips, 477 F.3d 215, 219-21 (5th Cir. 2007)*; *EF Cultural Travel BV v.Zefer Corp., 318 F.3d 58, 62 (1st Cir. 2003)*; *Register.com, Inc. v. Verio, Inc., 126 F. Supp. 2d 238, 245-46 (S.D.N.Y. 2000)*; and *CompuServe Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1023-24 (S.D. Ohio 1997)*). Plaintiffs contend that website ownership grants them a right to be paid for the advertising space occupied by Google on their websites. And like a domain name, a website is a form of intangible property that has a connection to an electronic document. "A website is a digital document built with software and housed on a computer called **[*14]** a 'web server,' which is owned or controlled in part by the website's owner. A website occupies physical space on the web server, which can host many other documents as well." Compl. ¶ 34. Plaintiffs' website is also connected to the DNS through its domain name, bestcarpetvalue.com, just as Kremen's domain name was connected to the DNS. Under the *Kremen* court's reasoning, Plaintiffs' website has a connection to a tangible object, which satisfies the *Restatement*'s merger requirement.[6] Therefore, consistent with *Kremen*,

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[5] The *Kremen* court observed that "courts routinely apply the tort to intangibles without inquiring whether they are merged in a document and, while it's often possible to dream up *some* document the intangible is connected to in some fashion, it's seldom one that represents the owner's property interest." *Kremen, 337 F.3d at 1033*.

[6] After *Kremen*, the California Court of Appeal, Sixth Appellate District, noted that conversion traditionally required a taking of *tangible* property and that "this restriction has been greatly eroded," but not "destroyed." *Silvaco Data Sys. v. Intel Corp., 184*

trespass to chattels ought to apply to a website, and several courts have so found. *See YLD Ltd. v. Node Firm, 2016 U.S. Dist. LEXIS 182756, 2016 WL 7851414, at *2 (N.D. Cal. Aug. 17, 2016)* (applying New York and federal law and denying motion to dismiss claims for trespass to chattels and conversion that were based, in part, on an alleged disruption to the use of a website); *Combs v. Doe, 2011 U.S. Dist. LEXIS 17599, 2011 WL 738052, at *1 (N.D. Cal. Feb. 23, 2011)* (magistrate's report and recommendation granting default judgment on conversion claim based on allegations that defendant stole website and domain names by hacking into plaintiff's email); *Astroworks, Inc. v. Astroexhibit, Inc., 257 F. Supp. 2d 609, 618 (S.D.N.Y. 2003)* (sustaining claim for conversion of copyrighted website); *Ground Zero Museum Workshop v. Wilson, 813 F. Supp. 2d 678, 698 (D. Md. 2011)* (finding allegations that defendant deprived plaintiff of possession of website and damaged the chattel by inserting a redirect command support a legally **[*15]** cognizable trespass to chattels claim); *State Analysis, Inc. v. Am. Fin. Servs. Assoc., 621 F. Supp. 2d 309, 320 (E.D. Va. 2009)* (sustaining trespass to chattels claim where defendant accessed a password protect portion of plaintiff's website and thereby diminished the value of plaintiff's "possessory interest in its computer network"). Google points to only one case in the Ninth Circuit where the court rejected a claim for trespass to chattels involving intangible property. *See e.g., GNI Waterman LLC v. A/M Valve Co. LLC, 2007 U.S. Dist. LEXIS 68715, 2007 WL 2669503, at *11 (E.D. Cal. Sept. 7, 2007)* (dismissing trespass to chattels claim that was based on intangible ownership rights of forms, designs and patterns). The *Waterman* case, however, is not helpful because it lacks any analysis.[7]

Having concluded that a website is a form of intangible property subject to the tort of trespass to chattels, the next issue is whether Plaintiffs have alleged an injury. *Hamidi, 30 Cal. 4th at 1348* ("the trespass to chattels tort . . . may not, in California, be proved without evidence of an injury to the plaintiff's personal property or legal interest therein"). "In modern American law generally, '[t]respass remains as an occasional remedy for minor interferences, resulting in some damage, but not sufficiently serious or sufficiently important to amount to the greater **[*16]** tort' of conversion." *Id. at 1351* (quoting Prosser & Keeton, Torts, supra, § 15, p. 90, italics added.). "Therefore, one who intentionally intermeddles with another's chattel is subject to liability only if his intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest of the possessor is affected." *Id.*; *see also Grace v. Apple, Inc., 2019 U.S. Dist. LEXIS 143899, 2019 WL 3944988, at *7 (N.D. Cal. Aug. 21, 2019)* (same). In *Hamidi*, Intel filed suit again a former employee, claiming that by communicating with employees over the company's e-mail system, Hamidi committed trespass to chattels. *Id. at 1346-47*. The California Supreme Court concluded that Intel was not entitled to summary judgment on its trespass to chattels claim because Intel had not presented undisputed facts demonstrating that the emails caused any "physical *or* functional harm *or* disruption" to the company's computer system. *Id. at 1360* (emphasis added).

Cal. App. 4th 210, 239 n.21, 109 Cal. Rptr. 3d 27 (2010) (emphasis in original). The *Silvaco* court also cautioned that "the expansion of conversion law to reach intangible property should not be permitted to 'displace other, more suitable law.'" *Id.* As discussed above, however, Plaintiffs' websites have a connection to a tangible object.

[7] In ***Gary Friedrich Enters., LLC v. Marvel Enters., 713 F. Supp. 2d 215 (S.D.N.Y. 2010)***, the court held that the claim for trespass to chattels under Illinois and New York law failed because (1) defendant never assumed "physical control" over plaintiff's story idea and characters and (2) the claim was preempted by federal copyright law. Other cases cited by Google do not discuss the distinction between tangible and intangible property and offer little guidance. *See e.g., Level 3 Commc'ns, Inc. v. Lidco Imperial Valley, Inc., 2012 U.S. Dist. LEXIS 146887, 2012 WL 4848929, at *4 (S.D. Cal. Oct. 11, 2012)* (explaining that trespass to chattels requires "intentionally bringing about a physical contact with the chattel"); *In re L.T., 103 Cal. App. 4th 262, 265, 126 Cal. Rptr. 2d 778 (2002)* (explaining that for arson, "chattels" are things that are "visible, tangible, movable"); *Italiani v. Metro-Goldwyn-Mayer Corp., 45 Cal. App. 2d 464, 467, 114 P.2d 370 (1941)* (explaining that trover, detinue and replevin require "interference with possession of, or damage to, some specific tangible property, and are not concerned with intangible or incorporeal rights which may exist in connection with, or entirely apart from any particular piece of physical property"); *In re iPhone Application Litig., 844 F. Supp. 2d 1040, 1069 (N.D. Cal. 2012)* (dismissing trespass claim because although placement of data on Iphones may have caused "harm" by taking up bandwidth, storage space, or shortening the battery life of a device, plaintiffs did not plausibly establish a significant reduction in service constituting an "interference with the intended functioning of the system, as by *significantly reducing* its available memory and processing power") (citation omitted); *Angelica Textile Servs., Inc. v. Park, 220 Cal. App. 4th 495, 508, 163 Cal. Rptr. 3d 192 (2013)* (conversion claim asserted against an employee who retained plaintiff's documents was not displaced by California's Uniform Trade Secrets Act).

Here, although Plaintiffs are not alleging physical harm to their websites, they do allege functional harm or disruption. Specifically, Plaintiffs allege that "[b]y obscuring and blocking the contents of [Plaintiffs'] **[*17]** website homepages when viewed on Android's Search App, Google's ads substantially interfered with and impaired the websites' published output and exposed the website owners to unwanted risks of lost advertising revenues and lost sales to competitors, thereby materially reducing the websites' value and utility to the website owners. Defendant's unauthorized interferences proximately caused Plaintiffs . . . actual damage by impairing the condition, quality and value of their websites." *Id.* ¶ 186. Plaintiffs seek damages equal to the diminished market value of their websites and a permanent injunction requiring Google to disable the ad-generating feature of its Search App on every Android phone on which it is installed and preventing Google from installing any similar feature in the future. *Id.* ¶¶ 187-90.

Google argues that there is no cognizable injury because its Search App does not affect how Plaintiffs' websites function or how they are displayed by other programs. Mot. at 2. Google explains that its Search App does not alter Plaintiffs' websites at all, but rather "displays additional content in a separate, user-controlled frame that overlays and coexists on phone screens with Plaintiffs' **[*18]** sites." Mot. at 7 (citing Compl. ¶¶ 73-74). But at the pleading stage, Plaintiffs' factual allegations must be taken as true. *Ashcroft, 556 U.S. at 678*. Plaintiffs allege that the ads obscured and blocked their websites, which if true, would interfere with and impair their websites' published output. Google's ad allegedly obscured the "Cove Base" product link on Best Carpet's home page. Compl. ¶ 73. Although Google's ad may not have disabled or deactivated the "Cove Base" product link, it nevertheless allegedly impaired the functionality of the website: an Android phone user cannot engage a link that cannot be seen. At the pleading stage, the alleged decrease in functionality of Plaintiffs' website is sufficient to plausibly state a cognizable injury for a trespass to chattels claim. *See Compuserve Inc. v. Cyber Promotions, 962 F. Supp. 1015, 1026 (S.D. Ohio 1997)* (plaintiff asserting injury aside from physical impact on computer equipment stated cognizable trespass to chattels claim based on decreased utility of plaintiff's e-mail service and resulting customer complaints); *eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1070 (N.D. Cal. 2000)* (granting injunction based on likelihood of success on merits of trespass to chattels claim based, in part, on showing that web crawlers diminished the quality or value of eBay's computer system, even though eBay **[*19]** did not claim physical damage).

B. Implied Contract/Unjust Enrichment Claim

Plaintiffs also assert a claim labeled "Implied Contract/Unjust Enrichment." Compl. ¶¶ 176-182. Google contends that the Implied Contract/Unjust Enrichment claim should be dismissed because it is preempted by *section 301* of the Copyright Act. Google reasons that Plaintiffs' demand to be paid inevitably depends on their ability to control how copies of their websites are displayed on different users' devices, and any right to control the way the websites appear must be grounded in the principles of copyright law.

Copyright preemption applies to claims that are "asserted to prevent nothing more than the reproduction, performance, distribution, or display of" the plaintiff's copyrightable property. *Butler v. Target Corp., 323 F. Supp. 2d 1052, 1056 (C.D. Cal. 2004)* (citation and internal quotation marks omitted). *Section 301* of the Copyright Act preempts a state law claim when two conditions are satisfied: (1) the work involved falls within the general subject matter of the *Copyright Act* as specified by *sections 102* and *103*; and (2) the rights that the plaintiff asserts under state law are equivalent to those protected by the Act in *section 106* in works of authorship that are fixed in a tangible medium of expression. *Kodadek v. MTV Networks, Inc., 152 F.3d 1209, 1213 (9th Cir. 1998)*. Here, **[*20]** the first condition is satisfied because websites and the manner in which they are displayed fall within the subject matter of copyright. *See Ticketmaster LLC v. Prestige Entm't W., Inc., 315 F. Supp. 3d 1147, 1160-61 (C.D. Cal. 2018)* ("the typical commercial website readily qualifies for copyright protection."); *Bangkok Broad. & TV Co. v. IPTV Corp., 742 F. Supp. 2d 1101, 1110 (C.D. Cal. 2010)* (copyright protects website owners'"exclusive rights to copy, distribute or display the copyrighted work publicly").

Plaintiffs rely on *Downing v. Abercrombie & Fitch, 265 F.3d 994, 1004 (9th Cir. 2001)*, which sets forth a slightly different formulation of the test for preemption. Plaintiffs argue that Google's ads (and not the websites) are the subject matter of their claim, and because they do not assert any copyright in Google's ads, their claim is not preempted. In *Downey*, the Ninth Circuit stated that the two conditions that must be satisfied for copyright preemption are: (1) "the content of the protected right must fall within the subject matter of copyright" and (2) "the right asserted under state law must be equivalent to the exclusive rights contained in *section 106* of the Copyright Act." *Id.* The plaintiffs in *Downing* brought suit against defendant because it published a photograph of them without their authorization. The Ninth Circuit held that the first condition was not satisfied because "the subject matter of [plaintiffs'] statutory **[*21]** and common law right of publicity claims [was] their names and likenesses," which were not copyrightable, even though their names and likeness were embodied in a copyrightable photograph. *Id. at 1005*. Here, the "subject matter" of Plaintiffs' claim necessarily concerns both Plaintiffs' websites and the advertisements. Plaintiffs allege that it is the placement of the ads "on top" of their websites that give rise to their right to damages. Compl. ¶¶ 17, 73. As stated previously, websites fall within the subject matter of copyright. Therefore, the first part of the preemption test is satisfied.

Turning to the second condition, the Second Circuit has instructed that *section 301* preemption "only applies to those state law rights that 'may be abridged by an act which, in and of itself, would infringe one of the exclusive rights' provided by federal copyright law.'" *Comput. Assocs. Int'l, Inc v. Altai, Inc., 982 F.2d 693, 716 (2d Cir. 1992)* (citing *Harper & Row, Publishers, Inc. v. Nation Enters., 723 F.2d 195, 200 (2d Cir. 1983)*, *rev'd on other grounds*, *471 U.S. 539, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985)*). In other words, copyright preemption applies to claims that are "asserted to prevent nothing more than the reproduction, performance, distribution, or display of" a plaintiff's copyrightable property. *Butler v. Target Corp., 323 F. Supp. 2d 1052, 1056 (C.D. Cal. 2004)* (citation and internal quotation marks omitted). If the state law claim requires an extra element "instead of **[*22]** or in addition to the acts of reproduction, performance, distribution or display . . . , then the right does not lie 'within the general scope of copyright' and there is no preemption." *Nat'l Car Rental Sys. v. Comput. Assocs. Int'l, 991 F.2d 426, 431 (8th Cir. 1993)* (quoting 1 Nimmer on Copyright § 1.01[B], at 1-13)). To avoid preemption, the state law claim must include "an 'extra element' that makes the right asserted *qualitatively different* from those protected under the Copyright Act" and "must effectively change the nature of the action so that it is qualitatively different from a copyright infringement claim." *Media.net Adver. FZ-LLC v. NetSeer, Inc., 156 F. Supp. 3d 1052, 1069-70 (N.D. Cal. 2016)* (state law claims predicated on alleged copying of "source code, design and look and feel" of search results page were preempted).

Here, Plaintiffs are not asserting infringement of any right to the reproduction, performance, distribution, or display of their websites.[8] Plaintiffs want and expect Google to copy and display their websites in Chrome browser and Search App, and acknowledge that Google has license to do so. Opp'n at 6. Rather, Plaintiffs' implied-in-law contract/unjust enrichment claim is a state claim with extra elements "instead of or in addition to" the acts giving rise to a copyright infringement claim. *Nat'l Car Rental Sys., 991 F.2d at 431*. An implied-in-law contract **[*23]** claim "is a common law obligation implied by law based on the equities of a particular case." *Fed. Deposit Ins. Corp. v. Dintino, 167 Cal. App. 4th 333, 346-47, 84 Cal. Rptr. 3d 38 (2008)*; *see also* *Parino v. Bidrack, Inc., 838 F. Supp. 2d 900, 908 (N.D. Cal. 2011)* ("a claim for unjust enrichment/restitution is properly pled as a claim for a contract implied-in-law"). A party may be required to make restitution under an implied-in-law contract if that party is unjustly enriched at the expense of another. *Id. at 346*. "Unjust enrichment claims are not categorically preempted by the Copyright Act." *Martin v. Walt Disney Internet Grp., 2010 U.S. Dist. LEXIS 65036, 2010 WL 2634695, at *7 (S.D. Cal. 2010)*.

Plaintiffs allege that Google "unjustly enriched itself by saving substantial advertising costs and earning undue profits at Plaintiffs' expense . . ., and it did so through the coercive act of superimposing advertisements on their websites' homepages and other landing pages without obtaining their consent or paying them compensation." Compl. ¶ 178. Plaintiffs allege that this unjust enrichment "gives rise to an implied-in-law obligation and contract with Plaintiffs . . . requiring Defendant (i) to restore them to their original positions by making restitution to them

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[8] As such, this case is distinguishable from the cases cited by Google in which the plaintiff asserted claims of copyright infringement. *See* *1-800 Contacts, Inc. v. WhenU.com, 309 F. Supp. 2d 467, 479 (S.D.N.Y. 2003)*; *Wells Fargo & Co. v. WhenU.com, Inc., 293 F. Supp. 2d 734, 738 (E.D. Mich. 2003)*; and *U-Haul Int'l, Inc. v. WhenU.com, Inc., 279 F. Supp. 2d 723, 724 (E.D. Va. 2003)* (rejecting copyright infringement claim, but dismissing unjust enrichment claim without prejudice).

equal to the full value of the cost savings benefits that Defendant unjustly obtained, and (ii) to disgorge and pay to them Defendant's undue profits gained from its ads." *Id.* Plaintiffs **[*24]** do not rely on copyright protection for their websites in pleading their claim; Plaintiffs do not allege that Google "improperly benefited from using a certain work." *Firoozye v. Earthlink Network, 153 F. Supp. 2d 1115, 1123-24 (N.D. Cal. 2001)*.[9] Instead, Google allegedly covered up or obscured a portion of Plaintiffs' websites from Android phone users for financial benefit, which makes their claim "qualitatively different" from a copyright claim.

Indeed, the content of Plaintiffs' websites and whether that content enjoys copyright protection are irrelevant to Plaintiffs' claim. Plaintiffs analogize their claim to that of a store owner, asserting:

> Google could not in the brick-and-mortar marketplace lawfully plant its logo on Plaintiffs' storefront windows without Plaintiffs' consent, even if Google owned their buildings. Nor could Google place ads in Plaintiffs' marketing brochures or superimpose ads on top of Plaintiffs' print advertisements without Plaintiffs' permission and without paying Plaintiffs' price. Likewise, Google cannot in the online marketplace unilaterally superimpose ads on Plaintiffs' website without Plaintiffs' consent and without compensation just because Google makes the software through which Android users view that website on their **[*25]** mobile screens.

Compl. ¶ 17. According to Plaintiffs, a storefront business owner is injured when its window is obscured, regardless of whether that window is clear or covered with advertisements. By analogy, a website owner is injured when its website is obscured by unwanted ads, regardless of the content displayed in the website.

From Google's perspective, the subject matter of Plaintiffs' websites is surely significant. The leaderboard pop-up button Google superimposed on the Best Carpet website homepage led to ads for alternative products of potential interest to the Android phone user: "Commercial Carpet Tiles" and "Commercial Carpet Tiles & Resilient Flooring." Compl. ¶ 74. Google no doubt placed carpet ads on Best Carpet's website to lure business and make profit. But from Plaintiffs' perspective, the content of their websites is not germane to their claims. What matters for purposes of Plaintiffs' claim is that their websites are potential revenue-generating advertising space, and not that they display copyrightable content.

Under Plaintiffs' theory, a Google ad obscuring a website with trivial or no content at all could support a claim for implied contract/unjust enrichment. **[*26]** Hypothetically, a website could consist of nothing more than a single line of noncopyrightable text such as "Pat and Jo's Wedding."[10] If this hypothetical noncopyrightable website was overlaid with ads for wedding attire and tableware, an argument could be made that the advertiser was unjustly enriched at the expense of the wedding planners. "California law recognizes a right to disgorgement of profits resulting from unjust enrichment, even where an individual has not suffered a corresponding loss." *In re Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 599 (9th Cir. 2020)*. Plaintiffs' claim to recover advertising fees is not preempted. *See* *In re De Laurentiis Entm't Grp., Inc., 963 F.2d 1269, 1271-72 (9th Cir. 1992)* (copyright preemption not implicated as defense against implied-in-law contract claim to recover "the reasonable value of the advertising [plaintiff] had provided for [defendant's] benefit and for which it had not been paid").

C. *Section 17200* Claim

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[9] As such, this suit is distinguishable from cases relied on by Google. *See* *Identity Arts v. Best Buy Enter. Servs., Inc., 2007 U.S. Dist. LEXIS 32060, 2007 WL 1149155, at *20 (N.D. Cal. Apr. 18, 2007)* (preemption applied to unjust enrichment claim that was based on wrongful creation and use of derivative works of a movie trailer); *Design Data Corp. v. Unigate Enter., 2013 U.S. Dist. LEXIS 12060, 2013 WL360542, at *7 (N.D. Cal. Jan. 29, 2013)* (preemption applied to implied contract claim that was based on unauthorized use of copyrighted structural steel detailing software); *Santos v. Telmundo Commc'ns Grp. LLC, 2012 U.S. Dist. LEXIS 189524, 2012 WL 9503003, at *8 (C.D. Cal. Dec. 19, 2012)* (unjust enrichment claim based on same facts and same rights as copyright claim, i.e. alleged broadcasting of songs without permission, was preempted).

[10] Copyrights extend to "original works of authorship fixed in any tangible medium of expression," such as literary, musical, graphic, architectural works and sound recordings. *17 U.S.C. § 102(a)*.

Plaintiffs allege the Android Search App violates *Section 17200* of California's Unfair Competition Law ("UCL"), which prohibits business practices that are "unlawful, unfair, or fraudulent." *Cal. Bus & Prof Code § 17200*. Plaintiffs bring their claim under only the first two prongs: unlawful and unfair. Compl. ¶ 194. As to the unlawful business practices prong, Plaintiffs allege that "Defendant plac[ed] nonconsensual advertisements **[*27]** on Plaintiffs' . . . websites without compensation in violation of the common law doctrines of implied-in-law contract and unjust enrichment, and by trespassing on Plaintiffs' . . . websites in violation of the common law prohibition against trespass to chattels." Compl. ¶ 195. As to the unfair business practices prong, Plaintiffs allege that Google's conduct is "immoral, unethical, oppressive, unscrupulous, unconscionable and substantially injurious to Plaintiffs." *Id.* ¶ 196. Plaintiffs also allege that Google's conduct is contrary to public policy as well as the common law, and the harm it caused (and threatens to continue to cause) outweighs its utility, if any. *Id.*

1. Unlawful Prong

The unlawful prong of the UCL prohibits "anything that can properly be called a business practice and that at the same time is forbidden by law." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal.4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)* (quotation markets and citations omitted). Plaintiffs' UCL claim, as pled under the unlawful prong, survives because the trespass to chattels and the breach of implied contract/unjust enrichment may serve as the predicate for the claim.

2. Unfair Prong

There are two standards for determining what "unfair competition" is under the UCL, and the parties disagree **[*28]** on the applicable standard. Defendants argue that Plaintiffs' claim is essentially one "between competitors," and therefore the applicable standard is whether the conduct complained of threatens "an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech, 20 Cal.4th at 187*. Plaintiffs rely on the second standard, which is applicable to claims brought by a consumer and "involves balancing the harm to the consumer against the utility of the defendant's practice." *Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 735 (9th Cir. 2007)*. Plaintiffs characterize themselves as "consumers of Google's services giving the public access to their websites (which they did not have to pay for because the service is free)." Opp'n at 19.

Google has the better argument. Plaintiffs are not consumers of the product that has caused the alleged injury, the Google Search App.[11] In the context of this case, the consumers are Android phone users who search the Internet for content. Therefore, the *Cel-Tech* standard applies. Because Plaintiffs effectively concede they cannot meet the *Cel-Tech* standard, the UCL claim, as pled **[*29]** under the unfair prong, is dismissed.

D. *First Amendment* Defense

Finally, Google argues that the *First Amendment* prohibits Plaintiffs' attempts to control what information is displayed to users when they access Plaintiffs' websites. Mot. at 12. In response, Plaintiffs contend that their *First Amendment* rights as website publishers are paramount and that Google has no right to force its own messages onto Plaintiffs' websites.

The *First Amendment* states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press." *U.S. Const. amend. I*.

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[11] California's Consumer Legal Remedies Act defines a consumer as "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes." *Cal. Civ. Code § 1761*; *see also* *Cal. Civ. Code § 1791* ("consumer goods" are products "used, bought, or leased for use primarily for personal, family, or household purposes").

"[T]he *First Amendment* guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." *Riley v. National Federation of Blind, Inc., 487 U.S. 781, 796-97, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988)*. The *Free Speech Clause of the First Amendment* "can serve as a defense in state tort suits." *Snyder v. Phelps, 562 U.S. 443, 451, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011)* (citing *Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50-51, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988)*). In the context of the Internet, courts have recognized that search-engine results may constitute speech protected by the *First Amendment*. *See* *E-Ventures Worldwide, LLC v. Google, Inc., 188 F. Supp. 3d, 1265, 1274 (2016)* (search engine output results are protected by the *First Amendment*); *Zhang v. Baidu.Com, Inc., 10 F. Supp. 3d 433, 439 (S.D.N.Y. 2014)* ("When search engines select and arrange others' materials, and add the all-important ordering that causes some materials to be displayed first and others last, they are engaging in fully protected *First Amendment* expression."); *Search King, Inc. v. Google Tech., Inc., 2003 U.S. Dist. LEXIS 27193, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003)* (Google's PageRank system was "entitled **[*30]** to full constitutional protection"). Thus, a company such as Google cannot be compelled to place ads in "prominent places" on its search engine results. *Langdon v. Google, Inc., 474 F. Supp. 2d 622, 629 (D. Del. 2007)* ("Defendants are correct in their position that the injunctive relief sought by Plaintiff contravenes Defendants' *First Amendment* rights.").

Here, Plaintiffs are not challenging Google's search engine results. Rather, Plaintiffs complain that after users see Google's search results and then choose to link to their proprietary websites, the users see unpaid-for Google ads on their webpages that entice and redirect those users to Best Carpet's competitors' or naysayers' websites in order to generate profits for Google. Compl. ¶¶ 71-88. Therefore, the cases cited above are inapposite.

Furthermore, the *First Amendment* defense is not absolute. *Downing, 265 F.3d at 1001*. For example, the *First Amendment* does not immunize deceptive advertising. *Id. at 1002* (holding that defendant's commercial use of photographs to promote clothing "does not contribute significantly to a matter of the public interest and that Abercrombie cannot avail itself of the *First Amendment*"). Here, Plaintiffs allege that Google's leaderboard and banner ads are commercial speech that misleadingly imply that they endorse Google's ads or were compensated by Google **[*31]** for placing the ads. Compl. ¶¶ 75, 85. Therefore, if Plaintiffs prevail in this suit, Google can be enjoined from tethering similar ads to Plaintiffs' websites in the future. *See* *Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626, 637-38, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985)* (advertising is a form of commercial speech and can be enjoined if false, deceptive or misleading); *Compuserve Inc. v. Cyber Promotions, 962 F. Supp. 1015, 1026 (S.D. Ohio 1997)* (holding that the *First Amendment* provides no defense for intentional bulk emailing to plaintiff's subscribers).

Relatedly, Google argues that Android users' have a "right to hear"—the right to receive information—that is "no less protected by the *First Amendment* than [Google's] right to speak. *Conant v. Walters, 309 F.3d 629, 643 (9th Cir. 2002)*. However, this right is "a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Bd. of Educ., Island Tress Union Free School Dist. v. Pico, 457 U.S. 853, 867, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982)*. Here, it is the Android users who are the recipients of the advertising, not Google. The "right to hear" does not provide Google a defense against Plaintiffs' claims.[12]

IV. CONCLUSION

For the reasons stated above, Google's motion to dismiss is GRANTED as to the UCL claim under the unfair prong and DENIED in all other respects. The UCL claim under the unfair prong is dismissed without leave to amend.

IT IS SO ORDERED.

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[12] The other cases relied upon by Google are inapplicable here. *See* *Stanley v. Georgia, 394 U.S. 557, 564, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969)* (holding that *First* and *Fourteenth Amendments* prohibit making private possession of obscene material a crime); *Citizens United v. FEC, 558 U.S. 310, 339, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)* (federal statute barring independent corporate expenditures for electioneering communications violated *First Amendment*).

Dated: September 24, 2021

/s/ Edward J. Davila

EDWARD J. DAVILA

United States District Judge **[*32]**

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BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr.

United States District Court for the Western District of Louisiana, Shreveport Division

September 27, 2021, Decided; September 27, 2021, Filed

CIVIL ACTION NO. 20-142

Reporter
563 F. Supp. 3d 578 *; 2021 U.S. Dist. LEXIS 184956 **

BRFHH SHREVEPORT, LLC VERSUS WILLIS-KNIGHTON MEDICAL CENTER

Subsequent History: Affirmed by *BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr., 2022 U.S. App. LEXIS 26151, 2022 WL 4298764 (5th Cir. La., Sept. 19, 2022)*

Core Terms

antitrust, conspiracy, allegations, cooperate, funding, medical school, Sherman Act, anticompetitive, anticompetitive conduct, competitor, communicated, motion to dismiss, entities, demands, meeting of the minds, anti trust law, monopoly power, healthcare, pleadings, argues, monopolization, exclusionary, contends, restrain, survive, conclusory allegation, antitrust violation, restraint of trade, referrals, coercion

LexisNexis® Headnotes

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

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

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

Fed. R. Civ. P. 8 requires a short and plain statement of the claim showing the pleader is entitled to relief. A complaint is not required to contain detailed factual allegations, however, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Plausibility does not equate to possibility or probability; it lies somewhere in between. This plausibility requirement asks for more than a sheer possibility that a defendant has acted unlawfully. However, the complaint cannot be simply unadorned, the-defendant-unlawfully-harmed-me accusations. Plausibility simply calls for enough factual allegations to raise a reasonable expectation that discovery will reveal evidence to support the elements of the claim.

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

Evidence > Inferences & Presumptions > Inferences

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

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

In order to survive a *Fed. R. Civ. P. 12(b)(6)* motion, the complaint must contain either direct allegations on every material point necessary to sustain a recovery or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial. Moreover, a statement of facts that merely creates a suspicion that the pleader might have a right of action is insufficient. Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief. The court is not required to conjure up unpled allegations or construe elaborately arcane scripts to save a complaint. Further, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

Although courts generally are not permitted to review materials outside of the pleadings when determining whether a plaintiff has stated a claim for which relief may be granted, there are limited exceptions to this rule. Specifically, a court may consider documents attached to a *Fed. R. Civ. P. 12(b)(6)* motion to be part of the pleadings if the plaintiff refers to those documents and they are central to the claim. Additionally, pleadings filed in state or other federal district courts are matters of public record and the Court may take judicial notice of those documents in connection with a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN4[] **Sherman Act, Claims**

Antitrust injury is necessary for a plaintiff to pursue either a *15 U.S.C.S. § 1* or *15 U.S.C.S. § 2* claim under the Sherman Act. Antitrust injury is a component of antitrust standing. Antitrust standing, in turn, is a judicially-created set of threshold requirements that a private plaintiff must show before a court can entertain its antitrust claims. The three antitrust standing requirements are 1) injury-in-fact, i.e., an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit. These requirements, which supplement U.S. Const. art. III standing requirements, ensure that successful antitrust claims only redress the types of harm that ***antitrust law*** was designed to prevent, rather than create a fortuitous windfall for all parties proximate to the defendant, regardless of whether they were injured by anticompetitive conduct.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN5[] **Sherman Act, Claims**

The second component of antitrust standing, antitrust injury, requires that a plaintiff's injury is of the type the antitrust laws were intended to prevent and flows from that which makes defendants' acts unlawful. This means that in an antitrust suit, but-for causation is insufficient. Instead, a plaintiff must be able to trace its injury to the anticompetitive effects of the defendant's antitrust violation. Thus, an inquiry into antitrust injury always asks whether there is a causal connection between the alleged injury of the plaintiff and the anticipated anticompetitive effect of the specific practice that allegedly violates ***antitrust law***. A court can ascertain antitrust injury only by identifying the anticipated anticompetitive effect of the specific practice at issue and comparing it to the actual injury the plaintiff alleges.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

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

HN6[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

15 U.S.C.S. § 1 prohibits any contract, combination, or conspiracy that unreasonably restrains trade. Over a century of Supreme Court interpretation of *§ 1* has distilled its expansive definition into a number of well-recognized causes of action, such as vertical and horizontal price fixing, tying agreements, and exclusive dealing agreements.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN7[] **Sherman Act, Claims**

There are three elements of a *15 U.S.C.S. § 1* claim: (1) a conspiracy; (2) that restrained trade; (3) in the relevant market. Antitrust claims do not necessitate a higher pleading standard and a plaintiff need only plead enough facts to state a claim to relief that is plausible on its face.

Antitrust & Trade Law > Sherman Act > Claims

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

HN8[] **Sherman Act, Claims**

In the context of a *15 U.S.C.S. § 1* claim, the rule of reason analysis also requires that the plaintiff show that the defendants' activities injured competition. The rule of reason is designed to help courts differentiate between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest. Regardless of which rule applies, the court's inquiry should ultimately focus upon forming a judgment about the competitive significance of the restraint.

Antitrust & Trade Law > Sherman Act > Claims

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

HN9[] Sherman Act, Claims

Section 1 of the Sherman Act, 15 U.S.C.S. § 1, does not proscribe independent conduct. Thus, a *§ 1* violation requires concerted action. To be sure, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express. To satisfy this inquiry, plaintiff must show that defendant engaged in concerted action, defined as having a conscious commitment to a common scheme designed to achieve an unlawful objective. Under Twombly, to successfully plead a *§ 1* claim, the complaint must assert sufficient facts to suggest an agreement was made; that is, enough factual matter to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. Parallel business behavior, i.e., parallelism, does not constitute a conspiracy, nor does a conclusory allegation of agreement at some unidentified point supply facts adequate to show illegality. A plaintiff's allegations must plausibly suggest the unlawful agreement, not simply be consistent with an agreement. Without context showing a meeting of the minds, the defendant's conduct remains in neutral territory.

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

HN10[] Complaints, Requirements for Complaint

The court must disregard a complaint's conclusory and formulaic assertions, as those are not entitled to a presumption of truth. The remaining allegations must then be examined to determine whether they plausibly suggest entitlement to relief.

Antitrust & Trade Law > Sherman Act > Claims

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

HN11[] Sherman Act, Claims

In the context of a *15 U.S.C.S. § 1* claim, a bare allegation of conspiracy and a conclusory allegation of agreement at some unidentified point are insufficient to plead illegal antitrust activity. Not only does the naked allegation of a conspiracy, without additional facts, not state a plausible antitrust claim, such conclusory allegations are not entitled to be accepted as true for the purposes of a motion to dismiss.

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

HN12[] Complaints, Requirements for Complaint

A complaint can be long-winded, even prolix, without pleading with particularity.

Antitrust & Trade Law > Sherman Act > Claims

HN13[] Sherman Act, Claims

Resisting competition is routine market conduct. When examining a 15 U.S.C.S. § 1 claim, circumstances must reveal a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement. Thus, the court must determine whether there is concerted action, and if so, whether that concerted action was the result of a meeting of the minds to agree to restrain competition. The pivotal question is whether the concerted action was a result of an agreement to unreasonably restrain trade.

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN14[] Private Actions, Sherman Act

In the context of conspiracy allegations in a 15 U.S.C.S. § 1 claim, plaintiff is required to allege the general contours of when an agreement was made, supporting those allegations with a context that tends to make said agreement plausible. There must be an agreement to a scheme and an agreement to work together to further a common goal.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN15[] Civil Conspiracy, Elements

An overt act is an act taken in furtherance of a conspiracy only so long as there is, in fact, a conspiracy in existence; otherwise, the act is just an act. Broad brushes and generalized theories of long-standing coercion cannot withstand Fed. R. Civ. P. 12(b)(6) scrutiny.

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN16[] Private Actions, Sherman Act

In the context of conspiracy allegations in a 15 U.S.C.S. § 1 claim, there must be a meeting of the minds. The U.S. Supreme Court has defined that as something more than mere acquiescence. The downstream entity is free to acquiesce in the demand in order to avoid termination. A conspiracy requires more than a showing that the distributor conformed. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.

Antitrust & Trade Law > Sherman Act > Claims

HN17[] Sherman Act, Claims

In the context of conspiracy allegations in a 15 U.S.C.S. § 1 claim, plaintiff is required to sufficiently plead an agreement, a meeting of the minds. Absent any agreement, there is no § 1 claim, because an anticompetitive agreement is the sine qua non of a § 1 violation.

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Evidence > Inferences & Presumptions > Inferences

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

HN18[] **Private Actions, Sherman Act**

In the context of conspiracy allegations in a *15 U.S.C.S. § 1* claim, a plaintiff must first allege a fact from which the inferential leap can be made. An inference cannot exist without the underlying premise. In the law, these premises must take the form of nonspeculative allegations of fact. Without those, no reasonable inferences may be drawn at all. When the complaint presents various conclusory allegations that support one of many inferential possibilities, it falls short of Twombly's pleading standards.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

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

HN19[] **Actual Monopolization, Claims**

Section 2 of the Sherman Act, 15 U.S.C.S. § 2, prohibits the monopolization or attempted monopolization of any trade or commerce. *15 U.S.C.S. § 2*. In contrast to *15 U.S.C.S. § 1*, *15 U.S.C.S. § 2* covers both concerted and independent action, but only if that action monopolizes or threatens actual monopolization, a category that is narrower than restraint of trade. A defendant is liable for monopolization under *§ 2* when it (1) possesses monopoly power and (2) achieves or maintains its monopoly power through anticompetitive conduct. *15 U.S.C.S. § 2*. The monopolist must have acquired or maintained that power willfully, as distinguished from the power having arisen and continued by growth produced by the development of a superior product, business acumen, or historic accident.

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

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

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

HN20[] **Attempts to Monopolize, Elements**

To establish *15 U.S.C.S. § 2* violations asserting monopolization, a plaintiff must define the relevant market.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN21[] Attempts to Monopolize, Elements

For purposes of a 15 U.S.C.S. § 2 claim, the necessity of proving anticompetitive conduct, in addition to monopoly power, reflects federal courts' judgment that in the short term, the monopolist's ability to charge above-market prices invites more, rather than less, competition. The opportunity to charge monopoly prices induces risk taking that produces innovation and economic growth. Thus, while the definition of anticompetitive conduct has many accepted permutations, the essence of the conduct that it makes actionable is the achievement or maintenance of monopoly power by means other than competition on the merits. If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as anticompetitive. To be condemned as anticompetitive under § 2, the conduct must harm the competitive process and thereby harm consumers. Proving anticompetitive conduct also generally requires some sign that the monopolist engaged in behavior that—examined without reference to its effects on competitors—is economically irrational.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN22[] Sherman Act, Claims

For purposes of a 15 U.S.C.S. § 2 claim, under Twombly, plaintiff's complaint must plead facts that, when viewed together, make anticompetitive conduct plausible.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Anticompetitive & Predatory Practices

HN23[] Actual Monopolization, Anticompetitive & Predatory Practices

Courts also label anticompetitive conduct exclusionary conduct, predatory conduct, and improper conduct. They use the terms predatory and exclusionary interchangeably.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

HN24[] Attempts to Monopolize, Elements

For purposes of a 15 U.S.C.S. § 2 claim, the key factor in the inquiry is the proffered business justification for the anticompetitive conduct. If the conduct has no rational business purpose other than its adverse effects on competitors, an inference that it is exclusionary is supported. Nonetheless, not all unfair conduct—even by a monopolist and a fortiori by one who is not—fits within the prohibition of § 2. Conduct must not only be inconsistent with competition on the merits, it must also have the potential for making a significant contribution to monopoly power. The rationality of the defendant's business decision is a significant, yet not dispositive, factor in ascertaining whether conduct is exclusionary. Courts are also to consider whether the exclusionary conduct required the active approval of the consumer or whether there was the potential existence of bribery or threats that tainted an otherwise independent business decision.

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

HN25[] Scope, Monopolization Offenses

There is a great distinction between antitrust activity and victorious, if unrelenting, business practices. Indeed, competition, even the maintenance of monopoly, through superior business acumen is allowed under 15 U.S.C.S. § 2.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Anticompetitive & Predatory Practices

HN26[] Actual Monopolization, Anticompetitive & Predatory Practices

The distinction between unfair conduct and anticompetitive conduct is critical to maintain because the antitrust laws do not create a federal law of unfair competition or purport to afford remedies for all torts committed by or against persons engaged in interstate commerce. Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws.

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Judges: ELIZABETH ERNY FOOTE, UNITED STATES DISTRICT JUDGE. MAG. JUDGE KAYLA D. MCCLUSKY.

Opinion by: ELIZABETH ERNY FOOTE

Opinion

[*582] **MEMORANDUM RULING**

Before the Court is a motion to dismiss filed by the Defendant, Willis-Knighton Medical Center ("Willis-Knighton"). Record Document 20. Willis-Knighton seeks to dismiss the complaint filed by the Plaintiff, BRFHH Shreveport, LLC, which alleges, in broad terms, that Willis-Knighton committed antitrust violations by coercing LSU Health Shreveport to refuse to cooperate with BRFHH in the operations of its Shreveport hospital. As the Court concludes that the Plaintiff has failed to sufficiently **[*583]** allege antitrust violations in more **[**2]** than a nonspeculative manner, Willis-Knighton's motion to dismiss [Record Document 20] is **GRANTED**.

Background

The Court begins by noting that this is the second antitrust civil action filed by the Plaintiff against this Defendant, the alleged violations stemming from the same acrimonious relationship that has heretofore existed between these two parties. See BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr., 05:15-cv-2057 (W.D. La.) (the "2015 case"). The allegations in the instant case concern a more recent time period than those in the 2015 case and set forth contentions regarding different antitrust activity; nonetheless, the cases generally involve the same players competing in the same relevant market.

I. The Relevant Entities

LSU is a State university with a medical school component which employs physician faculty members throughout the State. Record Document 1 at 5. The faculty physicians treat patients, teach students, and train residents and fellows in their respective fields. Id. LSU Health Shreveport is the medical school in Shreveport, Louisiana. Id.

Plaintiff BRFHH, doing business as University Health Shreveport ("UHS"), operated University Health Hospital in Shreveport. Once **[**3]** a state-owned and -operated charity facility, the hospital was operated by BRFHH starting in September of 2013, when LSU, whose neighboring medical school traditionally supplied physicians for UHS, and the parent entities of BRFHH signed a Cooperative Endeavor Agreement transferring hospital management authority from the State of Louisiana to BRFHH's parent entity. See generally BRFHH Shreveport v. Willis-Knighton, 15-cv-2057, Record Document 121. To be discussed in more detail below, the hospital run by UHS is now run by Ochsner (named Ochsner LSU), the result of UHS's sale of its hospital business to Ochsner. Thus, the Plaintiff in this suit is no longer involved in the operations of the current hospital. But, the alleged antitrust conduct in this case preceded that sale and ceased when Ochsner acquired the hospital.

As a result of the 2013 privatization of the hospital, UHS treated a substantial portion of the Shreveport area's indigent population and was dependent upon hospital admissions from LSU physicians. See id. One of the underlying issues in the 2015 case stems from the notion that in order for UHS to remain financially viable, a critical, if minority, mass of the patients **[**4]** treated at UHS needed to have private, commercial insurance; the higher reimbursement rates associated with commercial insurance would help offset the relatively low profitability of treating the indigent. See id.

Defendant Willis-Knighton is a competing healthcare provider that operates four hospitals and several free-standing clinics in Shreveport and Bossier City. See id. Besides Willis-Knighton and UHS, a third entity, CHRISTUS Health Northern Louisiana ("Christus") also operates hospitals in the Shreveport and Bossier City area. See id. The allegations in the prior suit regard Willis-Knighton's predominate share of the commercially-insured healthcare market, as opposed to the much smaller shares held by UHS and Christus. See id. Suffice it to say that UHS and Willis-Knighton were competing healthcare providers, each trying to reduce costs while increasing efficiency and profitability.

II. Post-Privatization

From the commencement of the privatization agreement in 2013 until October of **[*584]** 2018, UHS was LSU Health Shreveport's clinical partner and its teaching hospital. Record Document 1 at 6. The UHS medical staff was limited to LSU Health Shreveport-approved physicians. Id. UHS depended **[**5]** upon admissions from those faculty physicians. Id.

When UHS took over the hospital from LSU, it took on the lease of the hospital facilities from the State, which owned the buildings on campus and the assets of the hospital. Id. at 8. UHS alleges that when it assumed those operations, the hospital was inefficient, experiencing "extraordinarily high overtime use, an absence of productivity standards and management dashboards, and lengthy wait times at clinics." Id. UHS submits that once it took over the hospital, it created a much more "effective, efficient and patient-friendly hospital." Id. UHS articulates several successful measures it experienced, which can be summarized as an increase in admissions, an increase in clinic and emergency room visits, improved earnings, and decreased expenses to the State of Louisiana. Id. at 9. According to UHS, these improvements attracted more patients to the hospital, which resulted in UHS becoming a significant competitor to Willis-Knighton. Id. at 9-10. During this period, UHS and LSU Health Shreveport worked closely together, engaging in weekly meetings, cooperating to improve operations, and enjoying open communications between the department **[**6]** chairs and UHS executives. Id. at 15. Taking UHS's allegations as true, in response to UHS's success,

> Willis-Knighton attempted to prevent UHS' competition by implementing a plan to divert LSU Health Shreveport's commercial patients from UHS to Willis-Knighton. Accordingly, UHS filed the 2015 Case. Because of the 2015 Case, Willis-Knighton put its efforts to fully implement this plan on hold. However, . . . in spring of 2016, it commenced a new scheme intended to cause harm to UHS and to keep it from improving its operations and competitiveness, by coercing LSU Health Shreveport into refusing to cooperate with UHS' new initiatives to further improve the hospital and its competitiveness. Willis-Knighton also coerced LSU into an effort to terminate the contract whereby UHS owned and operated the hospital.

Id. at 10. That contention—that Willis-Knighton unlawfully and in violation of ***antitrust law***, coerced LSU Health Shreveport into refusing to cooperate with UHS in the improved operations of the hospital—is the crux of the instant suit.

A. The Financial Crisis

Historically, Willis-Knighton was a major donor to LSU Health Shreveport; these donations predated the alleged antitrust conduct **[**7]** at the heart of this suit. The parties agree that during the relevant timeframe, LSU Health Shreveport perceived it was facing a significant financial crisis, with a "heightened need for additional funds." Id. at 14. Quite simply, LSU Health Shreveport needed an influx of a large amount of money, and it required support from outside sources, lest its school accreditation, amongst other things, be placed at risk. Id. at 22 & 26. Willis-Knighton was aware of LSU Health Shreveport's ongoing need for money, shortfalls historically caused by State budget deficits and then more recently related to the privatization of the hospital. The budget crisis allegedly made LSU Health Shreveport susceptible to the whims and demands of Willis-Knighton, the deep-pocket power player in the local healthcare market.

By 2015 and 2016, LSU Health Shreveport desperately needed millions of dollars. It was LSU Health Shreveport's need for continued funding that fueled the alleged **[*585]** antitrust conduct here. The medical school's Vice-Chancellor Victor Yick ("Yick") authored a document conceding that LSU Health Shreveport was in a financial crisis, that it experienced an "operating loss of $40-$50M per year since **[**8]** privatization of the hospital," and that the "cash reserve can run out in [fiscal year] 2016-17." Id. at 27. Consequently, LSU Health Shreveport first approached UHS and requested $100 million in "mission support." Id. UHS declined. Id. LSU Health Shreveport then turned to Willis-Knighton, asking for a $50 million "mission support" grant. Id. Yick later reported that Willis-Knighton "conceptually agreed to provide working capital" to the medical school. Id. UHS asserts this statement is evidence that "LSU Health Shreveport believed that it was acting in Willis-Knighton's interest by refusing to cooperate with . . . UHS." Id. The alleged lack of cooperation, as well as the inferences UHS draws from LSU Health Shreveport's actions, are discussed in greater detail below.

B. Dr. Ghali

In early 2016, Dr. Ghali Ghali ("Dr. Ghali") was named as interim Chancellor of LSU Health Shreveport and subsequently named the permanent Chancellor. Id. at 14 & 21. UHS insists that Willis-Knighton was instrumental in Dr. Ghali's promotion, as Dr. Ghali was otherwise unqualified for such a prominent administrative position. Id. at 21. Dr. Ghali was a senior partner in the Willis-Knighton Oral and Maxillofacial **[**9]** Surgery Institute, a member of the Willis-Knighton Physician Network, his primary clinic practice for many years was at Willis-Knighton and his income was determined in significant part by his collections, and Willis-Knighton provided Dr. Ghali's department at LSU Health Shreveport—presumably the Department of Oral and Maxillofacial Surgery—with $1 million or more annually. Id. at 20. Dr. Ghali also allegedly used Willis-Knighton's private plane on occasion. Id. Thus, UHS asserts that Dr. Ghali "received substantial benefit from working for Willis-Knighton, and at its direction." Id. "Dr. Ghali's appointment as permanent Chancellor cemented Willis-Knighton's control over LSU Health's direction." Id. at 22.

According to UHS, after Dr. Ghali assumed his new role, he acted essentially as Willis-Knighton's agent. With Dr. Ghali at the helm, LSU Health Shreveport's administration ceased its cooperation with UHS. Id. at 15. Bruce Solomon of LSU Health Shreveport required all UHS communications to go through him and also restricted LSU Health Shreveport department chairs from directly communicating with UHS. Id. The weekly meetings were cancelled. Id. And, when UHS proposed cooperative initiatives, **[**10]** LSU Health Shreveport refused to participate. Id. Its refusal, it is alleged, was entirely against its own self-interest and must, therefore, have resulted from Willis-Knighton's coercion. Id.

C. Means of Coercion

1. Allegedly Contingent Funding

UHS contends that Willis-Knighton linked its funding to LSU Health Shreveport's agreement not to cooperate with UHS. That is, Willis-Knighton "would continue to fund LSU Health Shreveport only if LSU Health Shreveport did not support its competitors." Id. at 23. According to UHS, Willis-Knighton wanted to eliminate UHS as the hospital operator, or at the very least, ensure UHS could not be competitive. Id.

As evidence, UHS cites to a time in 2012 when James Elrod ("Elrod"), the President and CEO of Willis-Knighton, told the Willis-Knighton Board that it would only continue its current level of funding to LSU Health Shreveport if the two entities **[*586]** "remain[ed] partners, not competitors." Id. at 23. Also in 2012, there was some indication that Willis-Knighton was aware that if another hospital corporation managed LSU Health Shreveport, Willis-Knighton may encounter an adversarial relationship with LSU Health Shreveport with respect to its market share. **[**11]** Id. In 2013, at a Willis-Knighton Board meeting, Elrod said that Willis-Knighton's continued support of the medical school would continue only so long as LSU Health Shreveport did not directly compete with Willis-Knighton and if Willis-Knighton could have some level of oversight. Id. In 2014, Willis-Knighton drafted a letter to its employees that said that UHS would begin "seeking to draw private patients from Willis-Knighton and Christus Highland. So the LSU hospital that once was an ally is now a competitor." Id. at 24. All of the comments above were made prior to the antitrust activity alleged in this case.

Aside from Elrod's and Willis-Knighton's direct statements about UHS and/or the medical school, UHS also contends that Willis-Knighton had a pattern of stymying LSU Health Shreveport's efforts to work with Willis-Knighton's competitors. Id. at 25. In 2015, LSU Health Shreveport's department chairs were invited to meet with UHS and Ochsner on a possible joint venture. Id. In testimony in the 2015 case, the LSU Health Shreveport Dean, Dr. Marymont, stated that Willis-Knighton told him that if he went forward with the meeting, Willis-Knighton would cease funding the medical school. **[**12]** Id. Dr. Marymont testified that "on other occasions," Willis-Knighton threatened to pull its funding from LSU Health Shreveport "if it was unhappy with LSU actions." Id. The 2015 meeting predates the antitrust activity in this case, as well; and, UHS provides no temporal context for the "other occasions" mentioned by Dr. Marymont.

In 2016, Willis-Knighton gave a PowerPoint presentation to Yick that represented it was aware of the critical funding issues faced by LSU Health Shreveport and that it was willing to increase its funding of programs and services to LSU Health Shreveport if there was "increased cooperation from leadership and the faculty." Id. at 26. Willis-Knighton also proposed a consolidation of programs and services with LSU Health Shreveport, though this never occurred. Id.

In July of 2016, Yick authored an email to the LSU President and CFO stating that LSU Health Shreveport still needed to raise $50 million in mission support. Id. at 29. He stated that Willis-Knighton "is our mother lode" and that the medical school "still [has] work to do with WK." Id. Yick's email further opined that LSU Health Shreveport's energy needed to be spent on rebuilding rather than collaborating **[**13]** with UHS and that the medical school needed to "form a sustainable long term partnership" with Willis-Knighton. Id. Yick also stated that letters of intent LSU had entered into with other hospitals, aside from Willis-Knighton, were "initially just for cover." Id. That Yick felt the need for cover is, according to UHS, proof of LSU Health Shreveport's complicity in an unlawful scheme. Id. Nonetheless, because of the 2015 case, Willis-Knighton never provided the anticipated funding to LSU Health Shreveport. Id. at 28.

Lastly, in a 2017 deposition, Elrod agreed that without Willis-Knighton, LSU Health Shreveport would have a difficult time surviving. Id. at 22.

2. Noncompliant Physicians

UHS contends that Willis-Knighton engaged in a pattern of threatening non cooperative physicians. Id. at 24. In essence, the allegation seems to be that Willis-Knighton would punish physicians who made referrals to non-Willis-Knighton facilities **[*587]** by hiring new Willis-Knighton physicians to compete with those physicians. The new physicians would receive all of the Willis-Knighton referrals, thus creating a "starvation of referrals" to the non-compliant physicians. Id. UHS claims that Elrod communicated this **[**14]** threat through the publication of his book, and as such, the entire Shreveport-Bossier healthcare community was made aware of the consequences of competing against Willis-Knighton. Id. at 25.

UHS also asserts that Dr. Ghali fired Dr. Anil Nanda ("Dr. Nanda"), the "most renowned physician at LSU Health Shreveport" because Dr. Nanda "did not admit sufficient numbers of patients at Willis-Knighton to satisfy James Elrod, and because he had always cooperated with UHS." Id. at 43-44. Elrod allegedly told Dr. Ghali that "the best thing Dr. Ghali ever did was to fire Dr. Nanda as head of the Neurosurgery Department." Id. at 45. The firing of Dr. Nanda is allegedly evidence of one form of retaliation Willis-Knighton had in its arsenal to use against non-compliant physicians.

D. Lack of Cooperation

There are myriad ways in which LSU Health Shreveport allegedly refused to cooperate with or acted to undermine UHS, including: (1) its refusal to combine fixed overhead activities to reduce costs; (2) its refusal to participate in a narrow network product with Blue Cross; (3) its refusal to improve productivity, efficiency, and quality of care in various departments; (4) its refusal to cooperate in **[**15]** recruitment of new physicians; (5) Dr. Ghali's dismissal of Dr. Jay Marion as Chair of the Department of Medicine and Dr. Nanda as the Chair of the Neurosurgery Department of LSU Health Shreveport; (6) Dr. Ghali's miscellaneous defamatory statements; and (7) LSU Health Shreveport's attempts in 2016 and 2017 to terminate UHS as the owner and operator of the hospital, which caused damage to UHS's reputation. Id. at 16-19.[1] UHS contends that LSU Health Shreveport's "conduct was inconsistent with unilateral, self-interested behavior, and can only be explained by [its] acquiescence in and agreement to Willis-Knighton's demands" because "no rational medical school would have undertaken" the actions LSU Health Shreveport did absent "coercion by Willis-Knighton." Id. at 19.

In 2018, Ochsner bought an interest in both the Shreveport and Monroe[2] hospitals and created Ochsner LSU. Id. at 48. As a result, LSU Health Shreveport received an additional $40 million annually, plus a fifty percent stake in the hospital. Id. Allegedly, LSU Health Shreveport now cooperates in initiatives with Ochsner in ways it refused to cooperate with UHS. Id. at 49. This is so, UHS asserts, because LSU Health Shreveport **[**16]** is no longer susceptible to Willis-Knighton's coercion. Id.

III. The Instant Suit

In 2020, UHS brought this suit, alleging that between 2016 and 2018, Willis-Knighton violated both *Section 1 of the Sherman Act*, which prohibits concerted activity relating to unreasonable restraints of trade, *15 U.S.C. § 1*; and *Section 2* of the Sherman Act, which prohibits monopolization and attempted monopolization, *15 U.S.C. § 2*. UHS did not name LSU Health Shreveport as a defendant in this matter.

[*588] Willis-Knighton has filed the instant motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*. It argues that there are five principal reasons to dismiss UHS's claims. First, UHS has not established antitrust injury, a threshold requirement for a plaintiff in any antitrust claim. Record Document 20-1 at 11. Second, UHS has not sufficiently alleged an agreement or conspiracy between LSU Health Shreveport and Willis-Knighton, for purposes of *Section 1* of the Sherman Act. Id. at 14. Third, UHS has not alleged the requisite anticompetitive conduct, that is exclusionary conduct, to sustain its claim under *Section 2* of the Sherman Act. Id. at 17. Fourth, the *First*

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[1] Not all of these issues are given equal attention in UHS's complaint. Some are mentioned in passing and never discussed again. As such, the Court's analysis will follow suit and focus on the issues to which UHS has given its attention.

[2] University Hospital Conway was located in Monroe, Louisiana.

Amendment shields Willis-Knighton's actions from antitrust liability under the Noerr-Pennington Doctrine.[3] Id. at 21. And fifth, Willis-Knighton is shielded from **[**17]** liability by the State Action Doctrine. Id. at 28. Following extensive briefing by the parties, the matter is now ripe for review.

Law and Analysis

I. *Federal Rule of Civil Procedure 12(b)(6)* Standard

HN1[] *Federal Rule of Civil Procedure 8* requires a short and plain statement of the claim showing the pleader is entitled to relief. A complaint is not required to contain detailed factual allegations, however, "a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal marks and citations omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2008)* (internal marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. Plausibility does not equate to possibility or probability; it lies somewhere in between. See id. This plausibility requirement "asks for more than a sheer possibility that a defendant has acted unlawfully." Id. However, the complaint cannot be simply "unadorned, **[**18]** the-defendant-unlawfully-harmed-me accusation[s]." Id. Plausibility simply calls for enough factual allegations to raise a reasonable expectation that discovery will reveal evidence to support the elements of the claim. See *Twombly, 550 U.S. at 555-56*.

HN2[] As the Fifth Circuit has explained, in order to survive a 12(b)(6) motion, "the complaint must contain either direct allegations on every material point necessary to sustain a recovery or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Rios v. City of Del Rio, Tex., 444 F.3d 417, 420-21 (5th Cir. 2006)* (internal marks and citation omitted). Moreover,

> a statement of facts that merely creates a suspicion that the pleader might have a right of action is insufficient. Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief. The court is not required to conjure up unpled allegations or construe elaborately arcane scripts to save a complaint. Further, conclusory allegations or legal conclusions masquerading as factual conclusions **[*589]** will not suffice to prevent a motion to dismiss.

Id. at 421 (internal marks and citations omitted).

HN3[] Although courts generally are not permitted to review materials outside of the **[**19]** pleadings when determining whether a plaintiff has stated a claim for which relief may be granted, there are limited exceptions to this rule. Specifically, a court may consider documents attached to a *Rule 12(b)(6)* motion to be part of the pleadings if the plaintiff refers to those documents and they are central to the claim. See *Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498-99 (5th Cir. 2000)*; *Causey v. Sewell Cadillac-Chevrolet, Inc., 394 F.3d 285, 288 (5th Cir. 2004)*. Additionally, pleadings filed in state or other federal district courts are matters of public record and the Court may take judicial notice of those documents in connection with a *Rule 12(b)(6)* motion to dismiss. See *Cinel v. Connick, 15 F.3d 1338, 1343 (5th Cir. 1994)*.

II. Antitrust Injury

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

Willis-Knighton argues that UHS has not sufficiently alleged antitrust injury. ***HN4***[] Antitrust injury is necessary for a plaintiff to pursue either a *Section 1* or *Section 2* claim under the Sherman Act. *Jebaco, Inc. v. Harrah's Operating Co., 587 F.3d 314, 319 (5th Cir. 2009)*. Antitrust injury is a component of antitrust standing. Antitrust standing, in turn, is a judicially-created set of threshold requirements that a private plaintiff must show before a court can entertain its antitrust claims. See *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters ("AGC"), 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 & n.31 (1983)*. The three antitrust standing requirements are "1) injury-in-fact, [i.e.,] an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not **[**20]** better situated to bring suit." *Sanger Ins. Agency v. HUB Int'l, Ltd., 802 F.3d 732, 737 (5th Cir. 2015)* (citing *Jebaco, 587 F.3d at 318*). These requirements, which supplement Article III standing requirements, ensure that successful antitrust claims only redress the types of harm that ***antitrust law*** was designed to prevent, rather than create a fortuitous windfall for all parties proximate to the defendant, regardless of whether they were injured by anticompetitive conduct. See *AGC, 459 U.S. at 535*.

HN5[] The second component of antitrust standing, antitrust injury, requires that a plaintiff's injury is "of the type the antitrust laws were intended to prevent and . . . flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. This means that in an antitrust suit, but-for causation is insufficient. Instead, a plaintiff must be able to trace its injury to the anticompetitive effects of the defendant's antitrust violation. See id. Thus, an inquiry into antitrust injury always asks whether there is a causal connection between the alleged injury of the plaintiff and the anticipated anticompetitive effect of the specific practice that allegedly violates ***antitrust law***. See *Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 122 (2d Cir. 2007)* ("We can ascertain antitrust injury only by identifying the anticipated anticompetitive effect of the specific practice at issue and comparing it to **[**21]** the actual injury the plaintiff alleges.").

UHS contends that Willis-Knighton's unlawful conspiracy targeted UHS's business in order to stymie competition and increase its monopoly power in the relevant market. Taking UHS's allegations **[*590]** as true, as a result of Willis-Knighton's anticompetitive scheme, UHS was not prevented from working with LSU Health Shreveport on pre-established initiatives and programs, but rather it was restrained from improving and becoming more competitive in other areas and on other healthcare measures. Stated another way, Willis-Knighton's anticompetitive intention was to restrict UHS's ability to compete with it, which could have resulted in diminishing Willis-Knighton's predominance in the local healthcare market. Consequently, UHS alleges, Willis-Knighton restrained competition by hindering UHS's ability to work with its physicians on measures which ultimately would have decreased costs, improved quality of care, or ensured and/or increased access to care.[4] So viewed, UHS's competitive disadvantage "fall[s] within the conceptual bounds of antitrust injury, whatever the ultimate merits of its case." *Doctor's Hosp. v. Southeast Medical Alliance, 123 F.3d 301, 305 (5th Cir. 1997)* (finding antitrust injury, for purposes of standing, was aptly **[**22]** demonstrated by plaintiff, a direct competitor of the alleged monopolist who colluded with a third party to remove plaintiff from the relevant market and weaken its competitive state). Therefore, the Court finds that UHS has sufficiently alleged antitrust injury for standing purposes.

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[4] Many of the areas in which UHS claims LSU Health Shreveport refused to cooperate are insufficient for purposes of establishing antitrust injury. For example, the litany of ways in which the two entities could have shared costs, coordinated on a drug formulary, or established an outpatient imaging center, allegedly would have decreased costs or increased profitability. For these, there is no suggestion that they would have harmed, or in the converse, helped patients or the consumer market. The Court will not consider those allegations for purposes of assessing whether UHS has alleged an antitrust injury, as the antitrust laws protect competition, not the competitor. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*. The Court is concerned with harm to UHS only insofar as that harm resulted in a concomitant effect upon consumer costs, the quality of care, access to care, and patient choice. With that in mind, the Court deems sufficient the allegations regarding the narrow insurance network, co-management of certain departments, improvements upon physician productivity, recruitment of or privileges to new physicians, staffing of clinics, Dr. Nanda's termination, and improved clinical documentation.

III. Section 1 of the Sherman Act

HN6[] Title *15, United States Code, Section 1* prohibits any contract, combination, or conspiracy that unreasonably restrains trade. Over a century of Supreme Court interpretation of *Section 1* has distilled its expansive definition into a number of well-recognized causes of action, such as vertical and horizontal price fixing, tying agreements, and exclusive dealing agreements. Holmes and Mangiaracina, ***Antitrust Law*** Handbook § 2.2. Here, UHS's complaint does not coherently describe one of the more familiar antitrust allegations, however, its opposition to the motion to dismiss clarifies that it has alleged an unlawful vertical integration.

HN7[] There are three elements of a *Section 1* claim: (1) a conspiracy; (2) that restrained trade; (3) in the relevant market. *Golden Bridge Tech., Inc. v. Motorola, Inc., 547 F.3d 266, 271 (5th Cir. 2008)*. "Antitrust claims do not necessitate a higher pleading standard and a plaintiff need only plead enough facts to state a claim to relief that is plausible on its face." *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n, 751 F.3d 368, 373 (5th Cir. 2014)* (internal **[**23]** marks omitted). Only the sufficiency of the first element—conspiracy—was challenged by Willis-Knighton's **[*591]** motion to dismiss.[5]

A. Conspiracy

Willis-Knighton submits that UHS has failed to sufficiently plead a conspiracy between it and LSU Health Shreveport under *Section 1* of the Sherman Act. In response, UHS argues that it has adequately alleged that Willis-Knighton threatened LSU Health Shreveport into unlawfully restraining UHS's ability to compete by making Willis-Knighton's monetary contributions contingent upon LSU Health Shreveport's accession to its demands. The Court disagrees.

"*Section 1* **HN9**[] of the Sherman Act does not proscribe independent conduct." *Viazis v. Am. Ass'n of Orthodontists, 314 F.3d 758, 761 (5th Cir. 2002)* (citing *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*). Thus, a *Section 1* violation requires concerted action. To be sure, "[t]he crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, **[**25]** tacit or express." *Twombly, 550 U.S. at 553* (internal marks omitted).

To satisfy this inquiry in the present case, UHS must show that Willis-Knighton "engaged in concerted action, defined as having a 'conscious commitment to a common scheme designed to achieve an unlawful objective.' " *Golden Bridge Tech., 547 F.3d at 271* (quoting *Monsanto, 465 U.S. at 764*). Under Twombly, to successfully plead a *Section 1* claim, the complaint must assert sufficient facts to suggest an agreement was made; that is, enough factual matter "to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly,*

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[5] Although they are not at issue in this opinion, the Fifth Circuit has set forth the analysis for the other elements:

> Once a plaintiff establishes that a conspiracy occurred, whether it violates *§ 1* is determined by the application of either the *per se* rule or the rule of reason. The *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason. Moreover, the *per se* rule should only be applied when conduct is so pernicious and devoid of redeeming virtue that it is condemned without inquiry into the effect on the market in the particular case at hand.
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> Under a rule of reason analysis, the factfinder considers all of the circumstances to determine whether a restrictive practice imposes an unreasonable restraint on competition. The court's considerations should include the restrictive practice's history, nature, and effect and whether the businesses involved have market power. Market power has been defined as the ability to raise prices above those that would be charged in a competitive market. The rule **[**24]** of reason analysis also requires that the plaintiff show that the defendants' activities injured competition. **HN8**[] The rule of reason is designed to help courts differentiate between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest. Regardless of which rule applies, the court's inquiry should ultimately focus upon forming a judgment about the competitive significance of the restraint.

Marucci Sports, 751 F.3d at 374 (cleaned up).

550 U.S. at 556. Parallel business behavior, i.e., parallelism, does not constitute a conspiracy, nor does a "conclusory allegation of agreement at some unidentified point . . . supply facts adequate to show illegality." Id. at 556-57. A plaintiff's allegations must plausibly suggest the unlawful agreement, not simply be consistent with an agreement. Id. at 557. Without context showing "a meeting of the minds," the defendant's conduct remains "in neutral territory." Id.

[*592] As a preliminary matter, per the instructions of Iqbal and Twombly, this**HN10**[] Court must disregard the complaint's conclusory and formulaic assertions, as those are not entitled to a presumption of truth. The remaining allegations must then be examined **[**26]** to determine whether they plausibly suggest entitlement to relief. **HN11**[] As the district court explained in Dowdy & Dowdy Partnership v. Arbitron, Inc.,:

> A "bare allegation of conspiracy" and "a conclusory allegation of agreement at some unidentified point" are insufficient to plead illegal antitrust activity. Not only does the naked allegation of a conspiracy, without additional facts, not state a plausible antitrust claim, such conclusory allegations are not entitled to be accepted as true for the purposes of this motion.

Dowdy & Dowdy P'ship v. Arbitron Inc., No. 2:09CV253 KS-MTP, 2010 U.S. Dist. LEXIS 108798, 2010 WL 3942755, at *3 (S.D. Miss. Oct. 6, 2010) (internal citations omitted).

Here, although the complaint repeatedly uses the term "threat," what actually constitutes a threat seems to be a more complicated question than UHS has recognized. Within the context of the case and in light of the way in which the complaint was drafted, the Court finds the use of the term "threat" is a legal conclusion masquerading as a fact. Other problematic areas within the complaint include UHS's allegation that Willis-Knighton threatened to pull its existing financial support if LSU Health Shreveport refused to participate in Willis-Knighton's "scheme" to harm UHS. Record Document 1 at 14. Disregarding the use of the term threat, the **[**27]** allegation is still in peril, as it relies broadly on the existence of a scheme, when one is never sufficiently alleged. UHS also generally alleges that Willis-Knighton made "promises to provide [and] threats to withhold funds based on LSU's acquiescence in its demands . . . ." Id. at 22. Again, however, the so- called "demands" are never described in terms that are nonconclusory or nonspeculative. These allegations will not be given the presumption of truth.

The Court has examined UHS's actual factual allegations to determine whether they plausibly state a claim under Section 1 of the Sherman Act. Despite spanning seventy-six pages, the complaint is lacking in detail. **HN12**[] "A complaint can be long-winded, even prolix, without pleading with particularity. Indeed, such a garrulous style is not an uncommon mask for an absence of detail." Southland Sec. Corp. v. INSpire Ins. Sols., Inc., 365 F.3d 353, 362 (5th Cir. 2004) (quoting Williams v. WMX Techs., Inc., 112 F.3d 175, 178 (5th Cir. 1997)). UHS's claims of antitrust conspiracy rest on four bases:

> (1) Elrod's involvement: (a) his 2012 statement to the Willis-Knighton Board that it would continue to fund LSU Health Shreveport so long as the two entities remained partners, not competitors; (b) his 2013 comment at a Willis-Knighton Board meeting that Willis-Knighton would continue to support the **[**28]** medical school so long as LSU Health Shreveport's business model was not in direct competition with Willis-Knighton and Willis-Knighton could have some oversight; and (c) his 2017 deposition testimony in which he agreed that the medical school would have a difficult time surviving without Willis-Knighton;
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> (2) Yick's involvement: (a) Willis-Knighton's 2016 PowerPoint presentation to Yick that represented it was willing to increase its funding of programs and services to LSU Health Shreveport if there was "increased cooperation from leadership and the faculty"; (b) Yick's 2016 email stating that LSU Health Shreveport still needed to raise $50 million in mission support, that Willis-Knighton **[*593]** "is our mother lode," and his opinion that LSU Health Shreveport's energy needed to be spent on rebuilding rather than collaborating with UHS; (c) his report that Willis-Knighton had "conceptually agreed to provide working capital" to the medical school; and (d) his statement that letters of intent into which LSU had entered with other hospitals, aside from Willis-Knighton, were "initially just for cover";
> (3) Willis-Knighton's referral shortage; and

(4) LSU Health Shreveport's refusals to cooperate **[**29]** with UHS, including Dr. Ghali's statement that he did not enter into a narrow insurance network with Blue Cross because it would have angered Elrod.

As these bases are interdependent, the Court's analysis must view them jointly to determine whether UHS has alleged a plausible *Section 1* claim.[6] The Court finds that all of UHS's factual allegations suffer from the same deficit: UHS has not pleaded sufficient facts to suggest a prior agreement existed between Willis-Knighton and LSU Health Shreveport to unreasonably restrain trade of medical services. ***HN13***[] "[R]esisting competition is routine market conduct." *Twombly, 550 U.S. at 566*. As the Supreme Court has explained, when examining a *Section 1* claim, "[c]ircumstances must reveal 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.' " *Monsanto, 465 U.S. at 764* (quoting *Am. Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*). Thus, the Court must determine whether there is concerted action, and if so, whether that concerted action was the result of a meeting of the minds to agree to restrain competition. See *Marucci Sports, 751 F.3d at 375* (instructing that the "pivotal question is whether the concerted action was a result of an agreement . . . to unreasonably restrain trade.").

Here, the complaint does not allege **[**30]** facts demonstrating an intention on the part of LSU Health Shreveport to engage in a conspiracy. See *id. at 378-79* (complaint dismissed because plaintiff failed to set forth facts showing a meeting of the minds or any actual agreement among the conspirators). As to the statements made by Elrod to the Willis-Knighton Board in 2012 and 2013, these two statements were made three and four years prior to the alleged antitrust activity in this case. Further, Elrod's comments were made to his own Board, not to LSU Health Shreveport. UHS has not alleged that the statements were ever communicated to LSU Health Shreveport or that LSU Health Shreveport ever learned of them. There is no suggestion that these statements were repeated at a time more contemporaneous with the alleged conspiracy. These statements **[*594]** do not plausibly suggest a conspiracy.

Nonetheless, using the 2016 PowerPoint presentation to Yick, UHS makes inferential leaps to connect Elrod's historical statements to Yick's more contemporaneous comments, thereby deducing a conspiratorial link exists. However, Yick's statements, even when viewed against the backdrop colorfully painted by UHS, still do not plausibly suggest a conspiracy to restrain **[**31]** competition.

UHS argues LSU Health Shreveport was desperate for money and that, in exchange for the money it so badly needed, Willis-Knighton required LSU Health Shreveport to accede to its unlawful, anticompetitive whims by halting UHS's competitive momentum. UHS, however, cannot survive *Rule 12(b)(6)* scrutiny simply by supplanting its subjective beliefs for facts. There is a paucity of facts to entitle UHS to the inferences upon which its claims are premised. The complaint is silent as to (1) when, where, or how the conspiracy was formed; (2) whether Willis-Knighton communicated with LSU Health Shreveport about the conspiracy; (3) whether LSU Health Shreveport communicated with Willis-Knighton about the conspiracy; and (4) whether they shared a common intent or meeting of the minds to restrain trade.

UHS points out that it is not required to set forth a "specific time, place, or person" for its conspiracy allegations. See *In re Pool Prod. Distrib. Mkt. Antitrust Litig., 988 F. Supp. 2d 696, 715 (E.D. La. 2013)*. ***HN14***[] It is, however, required to "allege the general contours of when an agreement was made, supporting those allegations with a context that tends to make said agreement plausible." Id. Like the district court in Pool Products, the Court here is

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[6] While the Court has not tightly compartmentalized each set of allegations, analyzed them independently, and wiped the slate clean after each examination, it does note that the Fifth Circuit has expressed doubt as to whether instances of alleged conduct, which individually are not anticompetitive, can be aggregated to be considered cumulatively anticompetitive. *Retractable Techs., Inc. v. Becton Dickinson & Co., 842 F.3d 883, 892 (5th Cir. 2016)* (citing with approval *City of Groton v. Conn. Light & Power, 662 F.2d 921, 928 (2d Cir. 1981)* (holding alleged instances of misconduct, none of which is anticompetitive, cannot be cumulatively anticompetitive.)). The Retractable Technologies opinion explained that there has been no case since its 1980 decision in *Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342, 1356 (5th Cir. 1980)*, in which "a congeries of business torts was found so egregious as to constitute actionable predatory or exclusionary conduct." Id. Nonetheless, in the instant case, the Court's antitrust analysis has been as coterminous as UHS's complaint and the law allow.

unable to infer the "general contours **[**32]** of when the alleged agreement was made or even what, precisely, the agreement was." *Id. at 719*. That is, the Court cannot discern what the agreement was or when it was confected; there is no description of how or under what terms the agreement was reached, nor is there a mention of the extent of the agreement. See *id. at 721* (noting that "[s]uch vague conspiracy claims rarely pass muster under *Rule 8* and Twombly") (collecting cases). UHS also argues that it does not need to establish that LSU Health Shreveport communicated with Willis-Knighton on each of its decisions, as LSU Health Shreveport was aware of the overall threat. While it is true that an express agreement on every detail is not required, it is equally true that the law demands more than what is alleged here. There still must be an agreement to a scheme and an agreement to work together to further a common goal. UHS's complaint has failed to satisfy that standard.

As to the alleged starvation of referrals used by Willis-Knighton to threaten non compliant physicians, UHS claims this "threat" was contained within Elrod's book, which was generally available to those in the relevant healthcare market who wanted to read it.[7] The allegation itself lacks **[**33]** context and contour. Even if the book was generally available in the marketplace, UHS alleges no fact from which to infer that LSU Health Shreveport, as an entity, knew of Elrod's statements, knew of the practice generally, felt threatened by it, and felt threatened **[*595]** enough to engage in a conspiracy. Without additional factual context, this allegation is too specious to withstand scrutiny.

As to Elrod's 2017 deposition testimony, his statement does not demonstrate any conspiracy or agreement between Willis-Knighton and LSU Health Shreveport. It is a factual statement, not wholly untrue, provided in a vacuum without any surrounding context. Even when viewed in light of UHS's other allegations, it fails to demonstrate any meeting of the minds or agreement to coerce LSU Health Shreveport into refusing cooperation with UHS.

Finally, UHS argues that LSU Health Shreveport's refusals to cooperate are each discrete overt acts taken in furtherance of the conspiracy. UHS contends that Dr. Ghali's statement—that entering into a narrow insurance network with Blue Cross would have angered Elrod—is evidence of an overt act taken in furtherance of the conspiracy. ***HN15***[] An overt act is an act taken in furtherance **[**34]** of a conspiracy only so long as there is, in fact, a conspiracy in existence; otherwise, the act is just an act. Again, UHS has used a broad brush to paint all unfavorable decisions as ones caused by a conspiracy against it. To the contrary, broad brushes and generalized theories of long-standing coercion cannot withstand *Rule 12(b)(6)* scrutiny.

UHS insists the only reason LSU Health Shreveport would decline its opportunities is if it was coerced by Willis-Knighton because, according to UHS, the decisions were against LSU Health Shreveport's best interests. UHS's case can be summed up thusly there must have been an unlawful agreement to conspire against and harm UHS because UHS cannot otherwise understand why LSU Health Shreveport would not have jumped at the chance to implement all of UHS's good ideas. Yet, LSU Health Shreveport was entitled to decline business endeavors that would jeopardize its relationship with a donor without running afoul of antitrust laws. Indeed, "one might refrain from taking an otherwise profitable step because someone else has the power to make it unacceptably costly . . . such inaction serves the decisionmaker's long-run interest, taking the third party's power into **[**35]** account." *In re Pool Prod. Distrib. Mkt. Antitrust Litig., 988 F. Supp. 2d at 718* (quoting 6 Phillip Areeda & Herbert Hovencamp, ***Antitrust Law*** ? 1415c (3d ed. 2010)). These allegations, without more, fall short of establishing a conspiracy between Willis-Knighton and LSU Health Shreveport, in which both entities agreed to work together to restrain UHS's ability to compete in the marketplace.

The gravamen of UHS's case is that Willis-Knighton threatened LSU Health Shreveport, LSU Health Shreveport felt threatened and thus agreed to Willis-Knighton's demands, and LSU Health Shreveport refused to cooperate with UHS. Unfortunately, UHS has committed a logical fallacy by (1) observing past behavior by Willis-Knighton, (2)

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[7] The Court notes that in the 2015 case, it concluded that Willis-Knighton's control of physician referrals was not anticompetitive under *Section 2* of the Sherman Act because it did not lack competition on the merits. *BRFHH Shreveport, LLC v. Willis Knighton Med. Ctr., 176 F. Supp. 3d 606, 625-26 (W.D. La. 2016)*. That is, the practice had a rational business purpose (treatment of more patients) and Willis-Knighton could not have accomplished the acts without the consent and participation of consumers. *Id. at 625*.

observing a current unfavorable situation with LSU Health Shreveport, and (3) deducing that LSU Health Shreveport's behavior must have been caused by Willis-Knighton. Put in the familiar A + B = C equation, with "A" being Willis-Knighton's "ruthless" competition and "C" being LSU Health Shreveport's rejection of additional joint endeavors, UHS's complaint is missing "B"—that is, the other element that plausibly supports the inference that Willis-Knighton *caused* LSU Health Shreveport's behavior. Under Monsanto, there must be a meeting of the **[**36]** minds. ***HN16***[] The Supreme Court has defined that as something more than mere acquiescence. "A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." **[*596]** *Monsanto, 465 U.S. at 761*. The manufacturer can announce its decision in advance and "refuse to deal with those who fail to comply." Id. The downstream entity "is free to acquiesce" in the demand "in order to avoid termination." Id. A conspiracy requires "more than a showing that the distributor conformed . . . . It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." *Monsanto, 465 U.S. at 764 n.9*.

UHS is required to sufficiently plead an agreement, a meeting of the minds. ***HN17***[] "Absent any agreement, there is no *Section 1* claim, because an anticompetitive agreement is the *sine qua non* of a *Section 1* violation." *In re Pool Prod. Distrib. Mkt. Antitrust Litig., 988 F. Supp. 2d at 708*. Here, what led to LSU Health Shreveport's decision not to engage in additional joint endeavors is sheer speculation. There are insufficient allegations to plausibly suggest that Willis-Knighton actually threatened LSU Health Shreveport and, there is even less to suggest that LSU Health Shreveport entered into an unlawful conspiracy **[**37]** with Willis-Knighton to comply with its demands.

In sum, notably absent from UHS's complaint is the critical linkage between Willis-Knighton and LSU Health Shreveport, in terms of communications, timing, intent, and conduct. Like Twombly, UHS's complaint is rife with "legal conclusions resting on the prior allegations." *Twombly, 550 U.S. at 564*. UHS argues that it is entitled to reasonable inferences, which ostensibly should result in a plausible showing of a conspiracy to restrain competition. ***HN18***[] However, a plaintiff must first allege a fact from which the inferential leap can be made. An inference cannot exist without the underlying premise. In the law, these premises must take the form of nonspeculative allegations of fact. Without those, no reasonable inferences may be drawn at all. See *Marucci Sports, 751 F.3d at 375* (explaining that when the complaint "presents various conclusory allegations that support one of many inferential possibilities," it falls short of Twombly's pleading standards.). The Court finds that UHS has failed to sufficiently plead a claim under *Section 1* of the Sherman Act, and therefore this claim shall be dismissed with prejudice.

IV. *Section 2* of the Sherman Act

HN19[] *Section 2* of the Sherman Act prohibits the monopolization or attempted monopolization **[**38]** of any trade or commerce.[8] *15 U.S.C. § 2*. In contrast to *Section 1*, *Section 2* of the Sherman Act "covers both concerted and independent action, but only if that action monopolizes or threatens actual monopolization, a category that is narrower than restraint of trade." *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 190, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* (internal citations and quotations omitted). A defendant is liable for monopolization under *Section 2* when it (1) possesses monopoly power[9] and (2) achieves **[*597]** or maintains its monopoly power through anticompetitive conduct. See *15 U.S.C. § 2*; *Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, 540*

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[8] UHS has alleged both monopolization and attempted monopolization in violation of *Section 2*. These claims are indistinguishable for the purposes of evaluating Willis-Knighton's dismissal arguments. Because anticompetitive conduct is an element of both, *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*, the viability of either claim is dependent upon UHS's ability to sufficiently plead anticompetitive conduct.

[9] ***HN20***[] To establish *Section 2* violations asserting monopolization, a plaintiff must define the relevant market. *Doctor's Hosp., 123 F.3d at 311*. The Court assumes for present purposes that the healthcare market in the Shreveport-Bossier City area is a relevant antitrust market.

U.S. 398, 407-08, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004); Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 522 (5th Cir. 1999) (the monopolist must have "acquired or maintained that power wilfully, as distinguished from the power having arisen and continued by growth produced by the development of a superior product, business acumen, or historic accident.") (citing United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)).

A. Anticompetitive Conduct

As to the first element, Willis-Knighton's pleadings do not address, and thus do not challenge, whether it possesses monopoly power. As such, this Court will assume arguendo that UHS has successfully alleged facts demonstrating that Willis-Knighton possesses monopoly power.

Willis-Knighton instead focuses on the second element, arguing that UHS's complaint has failed to sufficiently plead anticompetitive conduct. ***HN21***[] The necessity of proving anticompetitive conduct, in addition **[**39]** to monopoly power, reflects federal courts' judgment that in the short term, the monopolist's ability to charge above-market prices invites more, rather than less, competition. *Trinko, 540 U.S. at 407* ("The opportunity to charge monopoly prices . . . induces risk taking that produces innovation and economic growth."). Thus, while the definition of anticompetitive conduct[10] has many accepted permutations, the essence of the conduct that it makes actionable is the achievement or maintenance of monopoly power by means other than competition on the merits. See *Stearns Airport Equip., 170 F.3d at 522* (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)* ("If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as [anticompetitive].")); see also *United States v. Microsoft Corp., 253 F.3d 34, 58-59, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (to be condemned as anticompetitive under *Section 2*, the conduct "must harm the competitive process and thereby harm consumers."). In the Fifth Circuit, proving anticompetitive conduct also "[g]enerally" requires "some sign that the monopolist engaged in behavior that—examined without reference to its effects on competitors—is economically irrational." *Stearns Airport Equip. Co., 170 F.3d at 523*. Hence, UHS must allege exclusionary conduct to survive the instant motion. ***HN22***[] Under Twombly, UHS's complaint must plead facts that, when viewed **[**40]** together, make anticompetitive conduct plausible. See *Twombly, 550 U.S. at 555*; *Assoc. Radio Serv. Co., 624 F.2d at 1356*.

HN24[] The key factor in the inquiry is "the proffered business justification for the act. If the conduct has no rational business purpose other than its adverse effects on competitors, an inference that it is exclusionary is supported." *Clean Water Opportunities, Inc. v. Willamette Valley Co., 759 F. App'x 244, 248 (5th Cir. 2019)* (quoting *Stearns Airport Equip. Co., 170 F.3d at 522*). Nonetheless, as the Fifth Circuit has cautioned, "not all unfair conduct—even by a monopolist and a fortiori by one who is not—fits **[*598]** within the prohibition of *§ 2*. Conduct must not only be inconsistent with competition on the merits, it must also have the potential for making a significant contribution to monopoly power." *Taylor Pub. Co., 216 F.3d at 475-76* (quoting 3A Areeda & Hovencamp ¶806d, at 331). The rationality of the defendant's business decision is a significant, yet not dispositive, factor in ascertaining whether conduct is exclusionary. *Clean Water Opportunities, 759 F. App'x 248*. Under Stearns, courts are also to consider whether the exclusionary conduct required the active approval of the consumer or whether there was the potential existence of bribery or threats that tainted an otherwise independent business decision. See *Stearns Airport Equip., 170 F.3d at 524-27*.

In the instant case, UHS's efforts to allege anticompetitive conduct under *Section 2* fall short for the same reason its *Section 1* claim failed. In **[**41]** short, its claim hinges on speculation and subjective beliefs, not facts and the reasonable inferences to be drawn therefrom. Setting aside UHS's bare allegations, legal conclusions, and speculation, the lack of actual facts in the complaint makes it nearly impossible to define what Willis-Knighton even did that is deemed exclusionary. Several years before the antitrust violations allegedly occurred, Willis-Knighton told its Board members that it would not fund a competitor. Three to four years later, Yick stated that Willis-Knighton

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[10] ***HN23***[] Courts also label anticompetitive conduct exclusionary conduct, predatory conduct, and improper conduct. See *Taylor Pub. Co. v. Jostens, Inc., 216 F.3d 465, 475 n.2 (5th Cir. 2000)* ("We use the terms 'predatory' and 'exclusionary' interchangeably . . . .").

conceptually agreed to provide the hospital with funding. Prior to and during this time was the pervasive, long-term threat of a referral starvation. Despite these allegations, the complaint fails to enunciate or describe any acts taken by Willis-Knighton that this Court could use to dissect whether Willis-Knighton acted anticompetitively, or rather, whether this was just business—unfair, tortious, or otherwise. ***HN25***[] There is, in fact, a great distinction between antitrust activity and victorious, if unrelenting, business practices.[11] Indeed, "[c]ompetition, even the maintenance of monopoly, through superior business acumen is allowed under *section 2*." *Stearns Airport Equip., 170 F.3d at 527*.

UHS argues that **[**42]** Willis-Knighton's insistence or demand that LSU Health Shreveport's "medical staff not cooperate with the hospital with which it primarily works" cannot be deemed competition on the merits for antitrust purposes. In doing so, it repeats its familiar refrain that Willis-Knighton's actions were designed to limit UHS's competitive abilities. Nonetheless, reurging a conclusory allegation, without more, does not make the allegation plausible. The pleading woes that plagued UHS's *Section 1* claim similarly doom its *Section 2* claim. UHS's theories are dependent upon a sufficient showing of a threat, or coercion, or even an insistence, all of which lack a plausible showing in the complaint.

Even assuming UHS had sufficiently pleaded a threat or demand regarding Willis-Knighton's donations, Willis-Knighton contends that its business decisions are not anticompetitive. That is, any business would refrain from donating to another if the donee intended to help a competitor harm the donor. UHS counters that "when **[*599]** that 'harm' is simple competition, an action taken to preclude it is classic exclusionary conduct." Record Document 27 at 26. The distinction UHS fails to account for is that an action *taken* to *prevent* competition **[**43]** is different than an action *not taken* because it would *assist* or subsidize the competition. Despite many statements implying the contrary, UHS eventually concedes that the antitrust laws do not require Willis-Knighton to subsidize its own competition. Id. at 29. Nonetheless, UHS avers that an "antitrust violation arose when Willis-Knighton indicated that it would only provide funds *contingent* on *anticompetitive* actions." Id. (emphasis in original). But here again, the complaint lacks sufficient allegations to plausibly suggest both the contingent nature of the funding, as well as the anticompetitive actions Willis-Knighton allegedly took. The complaint fails to contain the requisite material to nudge UHS's claim over the line from conceivable to plausible as demanded by Twombly. For these reasons, the Court concludes that UHS's complaint has failed to sufficiently allege anticompetitive conduct, and thus its claim under *Section 2* of the Sherman Act must fail. This claim shall be dismissed with prejudice.

V. Immunity Arguments

Willis-Knighton has also challenged UHS's complaint on immunity grounds, arguing the shield of both the Noerr-Pennington Doctrine as well as the State Action Doctrine. Because **[**44]** the Court finds both *Section 1* and *Section 2* claims were insufficiently pleaded and cannot survive the motion to dismiss, it need not address Willis-Knighton's remaining contentions.

Conclusion

The Court does not render its decision today based on a disbelief or skepticism of UHS's allegations. Indeed, *Rule 12(b)(6)* does not countenance such a dismissal on those grounds. Rather, taking the factual allegations as true and making all reasonable inferences in favor of UHS, the Court is nonetheless constrained to find that the complaint has failed to plausibly state a claim for relief. For these reasons, Willis-Knighton's motion to dismiss

[11] ***HN26***[] As the Fifth Circuit instructed, the "distinction between unfair conduct and anticompetitive conduct is critical to maintain because the antitrust laws 'do not create a federal law of unfair competition or purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.' " *Retractable Techs., 842 F.3d at 892-93* (quoting *Brooke Grp. Ltd., 509 U.S. at 225*) (internal marks omitted). The Supreme Court has stressed that "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." *Brooke Grp., 509 U.S. at 225*.

[Record Document 20] is hereby **GRANTED**. UHS's antitrust violations against Willis-Knighton are **dismissed with prejudice**.

A judgment consistent with the terms of this Memorandum Ruling shall issue herewith.

THUS DONE AND SIGNED this 27th day of September, 2021.

/s/ Elizabeth Erny Foote

ELIZABETH ERNY FOOTE

UNITED STATES DISTRICT JUDGE

Ddmb, Inc. v. Visa, Inc.

United States District Court for the Eastern District of New York

September 27, 2021, Decided; September 27, 2021, Filed

05-MD-1720 (MKB)

Reporter

2021 U.S. Dist. LEXIS 249783 *; 2021 WL 6221326

DDMB, INC. d/b/a EMPORIUM ARCADE BAR; DDMB 2, LLC d/b/a EMPORIUM LOGAN SQUARE; BOSS DENTAL CARE; RUNCENTRAL, LLC; CMP CONSULTING SERV., INC.; GENERIC DEPOT 3, INC. d/b/a PRESCRIPTION DEPOT; and PUREONE, LLC d/b/a SALON PURE, Plaintiffs, v. VISA, INC.; MASTERCARD INCORPORATED; MASTERCARD INTERNATIONAL INCORPORATED; BANK OF AMERICA, N.A.; BA MERCHANT SERVICES LLC (f/k/a DEFENDANT NATIONAL PROCESSING, INC.); BANK OF AMERICA CORPORATION; BARCLAYS BANK PLC; BARCLAYS BANK DELAWARE; BARCLAYS FINANCIAL CORP.; CAPITAL ONE BANK, (USA), N.A.; CAPITAL ONE F.S.B.; CAPITAL ONE FINANCIAL CORPORATION; CHASE BANK USA, N.A.; CHASE MANHATTAN BANK USA, N.A.; CHASE PAYMENTECH SOLUTIONS, LLC; JPMORGAN CHASE BANK, N.A.; JPMORGAN CHASE & CO.; CITIBANK (SOUTH DAKOTA), N.A.; CITIBANK N.A.; CITIGROUP, INC.; CITICORP; and WELLS FARGO & COMPANY, Defendants.

Prior History: *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 398 F. Supp. 2d 1356, 2005 U.S. Dist. LEXIS 25950 (J.P.M.L., Oct. 19, 2005)*

Core Terms

merchants, class member, injunctive relief, class action, class certification, settlement, class representative, Plaintiffs', equitable relief, Defendants', opt-out, certification, proposed class, injunctive, courts, adequacy, opt out, interchange, mandatory, rights, cohesion, certify, ascertainability, damages, notice, due process, commonality, cases, claim for damages, honor-all-cards

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN1[] **Class Actions, Certification of Classes**

Fed. R. Civ. P. 23 sets forth a two-step process for certification as a class action. First, the plaintiff must satisfy the four prerequisites set forth in *Rule 23(a)*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Preponderance of Evidence

HN2[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23 does not set forth a mere pleading standard. The party seeking class certification bears the burden of demonstrating compliance with Rule 23's prerequisites by a preponderance of the evidence. The Second Circuit has emphasized that Rule 23 should be given liberal rather than restrictive construction, and it seems beyond peradventure that the Second Circuit's general preference is for granting rather than denying class certification.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Notice of Class Action > Content of Notice > Opt Out Provisions

HN3[] Class Actions, Certification of Classes

The Second Circuit has stated that the expansion of a class after a judgment on liability raises the specter of one-way intervention. The one-way intervention problem arises when a decision on certification of an opt-out class is deferred until after a decision on the merits, which enables potential class members to "wait on the sidelines" for a merits determination and then choose to remain in or opt out of the class once certified in a way that benefits them.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN4[] Class Actions, Certification of Classes

In general, issues relating to class certification should be decided before a decision on the merits is rendered.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN5[] Class Actions, Certification of Classes

A defendant can waive any objection to a decision on the merits prior to, or simultaneous with, a decision on class certification. This waiver can be express or implied through the defendant's motion for summary judgment before class certification.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN6[] Prerequisites for Class Action, Numerosity

In order to proceed as a class action, the class must be so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). Numerosity is presumed at a level of forty members. Although there is no magic number of class members needed to satisfy numerosity, numerosity is generally presumed at a level of 40 or more members.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN7[] Prerequisites for Class Action, Commonality

Under *Fed. R. Civ. P. 23(a)(2)*, there must be questions of law or fact common to the class. *Fed. R. Civ. P. 23(a)(2)*. A question is common if it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. It is not enough to raise questions at such a high level of generality that they become common to the class. Instead, plaintiffs must demonstrate the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the case.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN8[] **Prerequisites for Class Action, Commonality**

The claims for relief need not be identical for them to be common; instead, *Fed. R. Civ. P. 23(a)(2)* simply requires that there be issues whose resolution will affect all or a significant number of the putative class members. Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question. Even a single common question will suffice to prove commonality.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN9[] **Class Actions, Certification of Classes**

Courts both within and outside of this Circuit have routinely certified classes including future class members when any equitable relief to which the class would be entitled would be of the sort that would affect present and future claimants in the same way.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN10[] **Conspiracy to Monopolize, Elements**

The commonality inquiry focuses on whether questions exist that would need to be determined on a classwide basis, regardless of how each merchant was individually affected and whether the answers to these questions would drive the resolution of this litigation. Courts have found that commonality exists when the plaintiffs' injuries derive from a unitary course of conduct by a single system, even when there are differing individual circumstances of class members. Courts in this Circuit have noted that numerous courts have held that allegations concerning the existence, scope, and efficacy of an alleged antitrust conspiracy present important common questions sufficient to satisfy the commonality requirement of *Fed. R. Civ. P. 23(a)(2)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN11[] **Prerequisites for Class Action, Commonality**

The typicality prong of *Fed. R. Civ. P. 23(a)(3)* requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. *Fed. R. Civ. P. 23(a)(3)*. The typicality requirement is satisfied when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability. The commonality and typicality requirements often tend to merge into one another, so that similar considerations animate analysis of both.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN12[] Prerequisites for Class Action, Adequacy of Representation

Fed. R. Civ. P. 23(a)(4) provides that a class action is only appropriate if the representative parties will fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)(4)*. The purpose is to uncover conflicts of interest between named parties and the class they seek to represent. Determination of adequacy typically entails inquiry as to whether: (1) plaintiff's interests are antagonistic to the interest of other members of the class, and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN13[] Prerequisites for Class Action, Adequacy of Representation

The analysis of whether a class representative is adequate is twofold: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN14[] Prerequisites for Class Action, Adequacy of Representation

Courts assessing the adequacy of class representatives generally find adequacy when the class representatives allege restraint of trade and monopolization and when, despite factual differences in how the class members are situated, the class representatives are similarly incentivized to prove the defendants' liability under ***antitrust law***.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN15[] Class Members, Absent Members

Fed. R. Civ. P. 23 has procedural safeguards that will allow class members to object to the injunctive relief provided in any settlement. *Fed. R. Civ. P. 23(e)(5)*.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN16[] Preclusion of Judgments, Res Judicata

The doctrine of res judicata, or claim preclusion, holds that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN17[] Preclusion of Judgments, Res Judicata

While the exception developed in Cooper applies to claim preclusion, issues actually litigated in an earlier class action may still preclude litigation of the same issues in a subsequent individual action.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN18[] Class Actions, Certification of Classes

The Supreme Court held that *Fed. R. Civ. P. 23(b)(2)* does not authorize class certification when each class member would be entitled to an individualized award of monetary damages and noted that combining individualized and classwide relief is inconsistent with *Rule 23(b)(2)*.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Civil Procedure > ... > Notice of Class Action > Content of Notice > Opt Out Provisions

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN19[] Class Members, Absent Members

Claims for monetary relief cannot be certified as part of a mandatory *Fed. R. Civ. P. 23(b)(2)* class because class members could be precluded from asserting their compensatory damages claims without having had notice and an opportunity to opt out.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN20[] Prerequisites for Class Action, Adequacy of Representation

Absent parties are bound by a decree so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Civil Procedure > ... > Notice of Class Action > Content of Notice > Opt Out Provisions

HN21[] Prerequisites for Class Action, Adequacy of Representation

The Second Circuit has similarly stated that the lack of the ability to opt out in a *Rule 23(b)(2)* class does not violate due process as long as the other *Fed. R. Civ. P. 23* requirements including adequacy of representation are satisfied.

Civil Procedure > Parties > Intervention > Conditional Right to Intervene

HN22 [] **Intervention, Conditional Right to Intervene**

In mandatory *Fed. R. Civ. P. 23(b)(2)* classes, class members are entitled to voice their concerns with the court prior to final approval and voice replaces exit as the operable means of class member involvement.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

HN23 [] **Prerequisites for Class Action, Adequacy of Representation**

Whether a close relationship with class counsel renders a named plaintiff inadequate is a fact-intensive inquiry. Courts have long found that a familial (or any other) relationship creates a conflict if it gives the class representative an interest in the fees class counsel might recover. To determine whether the relationship between the class representative and class counsel is inappropriate, courts consider: (1) the closeness and extent of the relationship, (2) whether the related attorney's relationship and role in the litigation have been disclosed, (3) whether attorneys' fees will greatly exceed the class representative's recovery, and (4) the extent of the related attorney's involvement in the litigation.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN24 [] **Prerequisites for Class Action, Adequacy of Representation**

To satisfy the adequacy of representation requirement as to class counsel, a court must determine whether they are qualified, experienced and generally able to conduct the litigation.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN25 [] **Class Actions, Certification of Classes**

Fed. R. Civ. P. 23(a) contains an implied requirement of ascertainability. The ascertainability requirement asks district courts to consider whether a proposed class is defined using objective criteria that establish a membership with definite boundaries.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN26 [] **Class Actions, Certification of Classes**

The class definition, including the class period, must be consistent with the alleged liability theory.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN27[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23(b)(2) provides for certification of a class seeking equitable relief if the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief is appropriate respecting the class as a whole.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN28[] Prerequisites for Class Action, Adequacy of Representation

Where class-wide injunctive or declaratory relief is sought in a (b)(2) class action for an alleged group harm, there is a presumption of cohesion and unity between absent class members and the class representatives such that adequate representation will generally safeguard absent class members' interests and thereby satisfy the strictures of due process. This presumption of cohesion and unity continues where incidental damages are also sought because entitlement to such damages does not vary based on the subjective considerations of each class member's claim, but flows directly from a finding of liability on the claims for class-wide injunctive and declaratory relief.

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

HN29[] Injunctions, Permanent Injunctions

The cohesiveness element merely requires that plaintiffs' legal injuries be similar enough that they all can be remedied with a single indivisible injunction.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN30[] Class Actions, Certification of Classes

Courts certifying antitrust-focused putative equitable relief classes have found that they meet the Fed. R. Civ. P. 23(b)(2) requirements.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN31[] Class Actions, Certification of Classes

Differences between the extent of harm suffered by each class member do not make Fed. R. Civ. P. 23(b)(2) certification inappropriate.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Notice of Class Action > Content of Notice > Opt Out Provisions

Civil Procedure > Special Proceedings > Class Actions > Voluntary Dismissals

HN32[] **Class Actions, Certification of Classes**

Under *Fed. R. Civ. P. 23* neither notice nor an opportunity to opt out is required for classes certified pursuant to *Rule 23(b)(2)*. *Fed. R. Civ. P. 23(c)*.

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For Plaintiffs in civil action Seaway Gas & Petroleum, Inc. v. Visa U.S.A., Inc. et al 05-cv-4728-JG-JO, Plaintiff: Jeffrey M Norton, LEAD ATTORNEY, Newman Ferrara LLP, New York, NY; Bart D. Cohen, LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA; Christopher M. Burke, PRO HAC VICE, Scott & Scott LLP, San Diego, CA; Donald A. Broggi, Scott & Scott, LLC., San Diego, CA; Edmund W. Searby, **[*5]** Mark V. Jackowski, Walter W. Noss, Scott & Scott, LLC, Chagrin Falls, OH; Kristen Anderson, Coughlin Stoia Geller Rudman & Robbins LLP, San Diego, CA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; Thomas M. Campbell, Smith Campbell, LLP, New York, NY;, Smith Campbell, LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Raley's v. Visa U.S.A. Inc. et al 05-cv-4799 JG-JO, Plaintiff: Thomas M. Campbell, Smith Campbell, LLP, New York, NY; Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; David P. Germaine, Joseph Michael Vanek, PRO HAC VICE, Vanek Vickers & Masini, P.C., Chicago, IL; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action East Goshen Pharmacy, Inc. v. Visa U.S.A., Inc. 05-cv-5073 JG-JO, Plaintiff: Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; Jay S. Cohen, **[*6]** Spector, Roseman & Kodroff, P.C., Philadelphia, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Patrick A. Klingman, Shepherd Finkelman Miller & Shah, LLC, Chester, CT; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; Thomas M. Campbell, Smith Campbell, LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action National Grocers Association et al v. Visa U.S.A., Inc. et al 05-cv- 5207 JG-JO, Plaintiff: K. Craig Wildfang, LEAD ATTORNEY, Robins Kaplan L.L.P., Minneapolis, MN; Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; Jeffrey Isaac Shinder, Kerin E. Coughlin, Constantine Cannon LLP, New York, NY; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; Ronald A. Bloch, Kalik Lewin, Bethesda, MD; Thomas M. Campbell, Smith Campbell, LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action American Booksellers Association v. Visa U.S.A., Inc. et al 05-cv-5319 JG-JO, Plaintiff: K. Craig Wildfang, LEAD ATTORNEY, Robins Kaplan **[*7]** L.L.P., Minneapolis, MN; Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; Thomas M. Campbell, Smith Campbell, LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Rookies, Inc. v. Visa U.S.A., Inc. 05-CV-5069 JG-JO, Plaintiff: Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Jasperson v. Visa U.S.A., Inc. 05-cv-5070 JG-JO, Plaintiff: Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; Brian N. Toder, Chestnut & Cambronne, P.A.,Minneapolis, MN; Jeffrey D. Bores, Karl Cambronne, Stewart C. Loper, Chestnut & Cambronne, P.A., Minneapolis, MN; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny **[*8]** Nachwalter, P.A., Miami, FL.

For Plaintiffs in Civil action Animal Land, Inc. v. Visa U.S.A., Inc 05-cv-5074 JG-JO, Plaintiff: Mark Reinhardt, LEAD ATTORNEY, Reinhardt Wendorf & Blanchfield, St. Paul, MN; Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; Craig Gordon Harley, Chitwood Harley Harnes, LLP, Atlanta, GA; Dean Martin Solomon, Levitt & Kaizer, New York, NY; Gary B. Friedman, Friedman Law Group LLP, New York, NY; James M. Wilson, Jr., Faruqi & Faruqi, LLP, New York, NY; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Noah Shube, New York, NY; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL; Yeshimebet Abebe, Chitwood Harley Harnes LLP, Atlanta, GA.

For Plaintiffs in civil action Bonte Wafflerie, LLC v. Visa U.S.A., Inc. 05-cv-5083 JG-JO, Plaintiff: Robert S. Kitchenoff, LEAD ATTORNEY, Weinstein Kitchenoff & Asher; Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Patricia I. Avery, Wolf Popper LLP, New York, NY; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, **[*9]** NY; Robert D. Greenbaum, Robert D. Greenbaum & Associates LLC, Philadelphia, PA; Steven A. Asher, Weinstein Kitchenoff & Asher, Philadelphia, PA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Broken Ground, Inc. v. Visa U.S.A., Inc. 05-cv-5082 JG-JO, Plaintiff: Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William J. Ban, Barrack, Rodos & Bacine, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Baltimore Avenue Foods, LLC v. Visa U.S.A., Inc. 05-cv-5080 JG-JO, Plaintiff: Jason S. Cowart, LEAD ATTORNEY, Pomerantz Haudek Block Grossman & Gross LLP, New York, NY; Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Fairmont Orthopedics & Sports Medicine, PA v. Visa U.S.A., **[*10]** Inc. 05-cv-5076 JG JO, Plaintiff: Jason S. Cowart, LEAD ATTORNEY, Pomerantz Haudek Block Grossman & Gross LLP, New York, NY; Jason S. Kilene, LEAD ATTORNEY, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN; Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; Dennis Stewart, Hulett Harper Stewart LLP, San Diego, CA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Tabu Salon & Spa, Inc. v. Visa U.S.A., Inc. 05-cv-5072 JG-JO, Plaintiff: H. Laddie Montague, LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA; Michael J. Kane, LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA; Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Merrill G. Davidoff, Beger & Montague, P.C., Philadelphia, PA; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Lakeshore Interiors v. Visa U.S.A., Inc. **[*11]** 05-cv-5081JG JO, Plaintiff: Carmen B. Copher, Charles N. Nauen, Karen Hanson Riebel, Rachel J. Christiansen, Richard A. Lockridge, William A. Gengler, LEAD ATTORNEYS, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Darla Jo Boggs, LEAD ATTORNEY, Lockridge Grindal Nauen P.L.L.P., Minneappolis, MN; W. Joseph Bruckner, LEAD ATTORNEY, PRO HAC VICE, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Parkway Corp. v. Visa U.S.A., Inc. 05-cv-5077 JG-JO, Plaintiff: Hadley P Roeltgen, Robert J. LaRocca, LEAD ATTORNEYS, Joanne Zack, Kate Reznick, Kohn Swift & Graf, Philadelphia, PA; Jason L. Solotaroff, LEAD ATTORNEY, Giskan Solotaroff Anderson & Stewart LLP, New York, NY; Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; Joshua D. Snyder, PRO HAC VICE, Michael J. Boni, Boni Zack & Snyder LLC, Bala Cynwyd, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; **[*12]** Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; Theresa J Henson, PRO HAC VICE, Boni & Zack LLC, Bala Cynwyd, PA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action NuCity Publications, Inc. v. Visa U.S.A., Inc. 05-cv-5075 JG-JO, Plaintiff: Bonny E. Sweeney, Hausfeld LLP, San Francisco, CA; Christopher M. Burke, LEAD ATTORNEY, PRO HAC VICE, Scott & Scott LLP, San Diego, CA; Jason S. Cowart, LEAD ATTORNEY, Pomerantz Haudek Block Grossman & Gross LLP, New York, NY; Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; Dennis Stewart, Hulett Harper Stewart LLP, San Diego, CA; Donald L. Perelman, Fine, Kaplan and Black, R.P.C., Philadelphia, PA; Joseph

Goldberg, Freedman Boyd Daniels Hollander, Goldberg & Cline, P.A., Albuquerque, NM; Leslie Hurst, Lerach Coughlin, et al., San Diego, CA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; Thomas G. Wilhelm, Lerach Coughlin, et al., San Diego, CA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Hyman v. VISA International Service **[*13]** Association, Inc. 05-cv-5866 JG-JO, Plaintiffs in civil actionPhotos Etc. Corp. v. Visa U.S.A., Inc. 05-cv-5071JG-JO, Plaintiffs in civil action Dr. Roy Hyman, et al v. Visa International Service Association, Inc., et al . 05-cv-5866 JG-JO, Plaintiffs: Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Lee et al v. Visa U.S.A. Inc. et al 05-cv-3800 JG-JO, Plaintiff: Jerald M. Stein, LEAD ATTORNEY, Law Office of Jerald M. Stein, New York, NY; Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Resnick Amsterdam & Leshner P.C. v. Visa U.S.A., Inc. et al 05-cv-3924 JG-JO, Plaintiff: Jason S. Cowart, LEAD ATTORNEY, Pomerantz Haudek Block Grossman & Gross LLP, New York, NY; Ann D. White, Ann D. White **[*14]** Law Office, Jenkintown, PA; Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Hy-Vee, Inc. v. Visa U.S.A., Inc. et al 05-cv-3925-JG-JO, Plaintiff: M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Meijer, Inc. et al v. Visa U.S.A. Inc. et al 05-cv-4131-JG-JO, Plaintiff: Linda P. Nussbaum, LEAD ATTORNEY, Nussbaum Law Group, PC, New York, NY; David P. Germaine, PRO HAC VICE, Vanek Vickers & Masini, P.C., Chicago, IL; Joseph Michael Vanek, PRO HAC VICE, Vanek, Vickers & Masini, P.C., Chicago, IL; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; Robert N. Kaplan, Kaplan, Kilsheimer & Fox, LLP, New York, NY; **[*15]** William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Lepkowski v. Mastercard International Incorporated et al 05-cv-4974 JG-JO, Plaintiff: Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; Tracey L. Kitzman, Friedman Law Group, LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Kroger Co. v. Visa U.S.A., Inc. 05-cv-5078 JG-JO, Plaintiff: William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL. Barry L. Refsin, Hangley Aronchick Segal & Pudlin, Philadelphia, PA; Eric Bloom, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY.

For Plaintiffs in civil action Fitlife Health Systems of Arcadia, Inc. v. Mastercard International Incorporated et al 05-cv-5153 JG-JO, Plaintiff: Bart D. Cohen, Berger & Montague, P.C., **[*16]** Philadelphia, PA; Francis J. Balint, Bonnett Fairbourn Friedman & Balint, P.C., Phoenix, AZ; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY.

For Plaintiffs in civil action Harris Stationers, Inc., et al. v. Visa International Service Association, et al. 05-cv-5868 JG-JO, Plaintiff: Joseph R. Saveri, LEAD ATTORNEY, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; Daniel M. Bradley, Richardson, Patrick, Westbrook & Brickman, LLC, Charleston, SC; Daniel O. Myers, Richardson, Patrick, Westbrook & Brickman, LLC, Mount Pleasant, SC; Hector Daniel Geribon, Lieff Cabraser Heimann & Bernstein, LLP, New York, NY; Kimberly Keevers

Palmer, Richardson, Patrick, Westbrook & Brickman, LLC, Charleston, SC; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Performance Labs, Inc. v. American Express Travel Related Services Co., Inc., et al. 05-cv-5869 **[*17]** JG-JO, Plaintiff: Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; Jonathan J. Lerner, Starr, Gern, Davison & Rubin, P.C., Roseland, NJ; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Discount Optics, Inc., et al. v. Visa U.S.A., Inc., et al. 05-cv-5870 JG-JO, Plaintiff: Jason S. Hartley, LEAD ATTORNEY, PRO HAC VICE, Hartley LLP, San Diego, CA; Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action LDC, Inc. v. Visa U.S.A., Inc., et al 05-cv-5871 JG-JO, Plaintiff: Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; Dennis Stewart, Hulett Harper Stewart LLP, San Diego, CA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, **[*18]** PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Leeber Cohen, M.D. v. Visa U.S.A., Inc., et al. 05-cv-5878 JG-JO, Plaintiff: Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; Bernard Persky, Robins Kaplan LLP, New York, NY; Douglas Thompson, Finkelstein Thompson LLP, Washington, DC; Gregory Scott Asciolla, Labaton Sucharow, New York, NY; Hilary K Scherrer, Hausfeld LLP, Washington, DC; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; Richard M. Volin, Finkelstein, Thompson, & Loughran, Washington, DC; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action G.E.S. Bakery, Inc. v. Visa U.S.A., Inc., et al. 05-cv-5879 JG-JO, Plaintiffs in Twisted Spoke v. Visa U.S.A., Inc., et al. 05-cv-5881 JG-JO, Plaintiffs in civil action 518 Restaurant Corp. v. American Express Travel Related Services Co., Inc., et al. 05-cv-5884 JG-JO, Plaintiffs in civil action JGSA, Inc. v. Visa U.S.A., Inc., et al. 05-cv-5885 JG-JO, Plaintiffs: Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; M. Tayari Garrett, Robins, Kaplan, **[*19]** Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Connecticut Food Association, Inc., et al. v. Visa U.S.A., Inc., et al. 05-cv-5880 JG-JO, Plaintiff: Joe R. Whatley, Jr., LEAD ATTORNEY, Whatley Drake & Kallas LLC, New York, NY; Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; Charles S. Hellman, Dubner, Hartley & O'Connor LLC, New York, NY; J. Douglas Richards, Pomerantz Haudek Block Grossman & Gross LLP, New York, NY; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Michael M. Buchman, Motley Rice LLC, New York, NY; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; Richard P. Rouco, Quinn Connor Weaver Davies & Rouco, Birmingham, AL; Ryan G. Kriger, Milberg Weiss Bershad & Schulman LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Lombardo Bros., Inc. v. Visa U.S.A., Inc. 05-5882 JG-JO, Plaintiffs in civil action Abdallah Bishara, etc. v. Visa U.S.A., Inc. 05-cv-5883 JG-JO, Plaintiffs: Bart D. Cohen, Berger **[*20]** & Montague, P.C., Philadelphia, PA; Dianne M. Nast, Erin Burns, NastLaw LLC, Philadelphia, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action The Kroger Co., et al. v. MasterCard Inc., et al., 06-cv-0039 JG-JO, Plaintiff: William Jay Blechman, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL. Barry L. Refsin, Hangley Aronchick Segal & Pudlin, Philadelphia, PA; Erin Burns, NastLaw LLC, Philadelphia, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY.

For Plaintiffs in civil action Rite Aid Corporation et al. v. Visa U.S.A., Inc. et al. 05-cv-5352 JG-JO, Plaintiff: Ashely M. Chan, Hangley Aronchick Segal & Pudlin, Philadelphia, PA; Barry L. Refsin, Hangley Aronchick Segal & Pudlin, Philadelphia, PA; Erin Burns, NastLaw LLC, Philadelphia, PA; Jason L. Reimer, PRO HAC VICE, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; Kenneth G. Walsh, Kirby McInerney LLP, New York, NY; M. Tayari Garrett, **[*21]** Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; Steve D. Shadowen, PRO HAC VICE, Hilliard & Shadowen LLP, Austin, TX; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Fringe, Inc. v. Visa, U.S.A., Inc et al 05-cv-4194 JG-JO, Plaintiff: Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; Jayne A. Goldstein, PRO HAC VICE, Shepherd Finkelman Miller & Shah LLP, Fort Lauderdale, FL; Lee Albert, Mager & Goldstein LLP, Philadelphia, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Bi-Lo, LLC. et al v. Visa U.S.A., Inc. et al 06-cv-2532 JG-JO; Plaintiffs in civil action Bi-Lo, LLC. et al v. Mastercard Incorporated et al 06-cv-2534 JG-JO, Plaintiffs: Ashely M. Chan, Hangley Aronchick Segal & Pudlin, Philadelphia, PA; Barry L. Refsin, Hangley Aronchick Segal & Pudlin, Philadelphia, PA; Erin Burns, NastLaw LLC, Philadelphia, PA; Jason L. Reimer, PRO HAC VICE, Hangley **[*22]** Aronchick Segal & Pudlin, Harrisburg, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; Steve D. Shadowen, PRO HAC VICE, Hilliard & Shadowen LLP, Austin, TX; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action 06-cv-5583, Esdacy, INC. v. Visa USA, INC. et al, Plaintiff: Angus Macaulay Lawton, Jonathan Craig Smith, LEAD ATTORNEYS, Joyce Law Firm, Northgate Office Building, Charleston, SC; Bart D. Cohen, Berger & Montague, P.C., Philadelphia, PA; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For QVC, Inc., Plaintiff: L. Webb Campbell, II, Sherrard & Roe PLC, Nashville, TN; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL; Phillip F. Cramer, Sherrard & Roe PLC, Nashville, TN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, **[*23]** FL.

For Payless ShoeSource, Payless Shoe Source, Inc., Plaintiff: J. Douglas Richards, LEAD ATTORNEY, Pomerantz Haudek Block Grossman & Gross LLP, New York, NY; Michael M. Buchman, LEAD ATTORNEY, Motley Rice LLC, New York, NY; Geoffrey Holmes Kozen, Robins Kaplan LLP, Minneapolis, MN; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; Michelle Catherine Zolnoski, Motley Rice LLC, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For GMRI, Inc., Plaintiff: K. Craig Wildfang, LEAD ATTORNEY, Robins Kaplan L.L.P., Minneapolis, MN; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Capital Audio Electronics, Inc., Plaintiff: Christopher J McDonald, LEAD ATTORNEY, Labaton Sucharow LLP, New York, NY; Jay L. Himes, LEAD ATTORNEY, Labaton Sucharow LLP, New York, NY; Morissa Robin Falk, LEAD ATTORNEY, Labaton Sucharow, New York, NY; Bruce H. Levinson, Law Offices of Bruce Levinson, New York, NY; Geoffrey Holmes Kozen, Robins Kaplan LLP, Minneapolis, MN; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; William Jay **[*24]** Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL; William V. Reiss, Robins Kaplan LLP, New York, NY.

For NATSO, Inc., Plaintiff: Adam Owen Glist, Constantine Cannon LLP, New York, NY; David Balto, Law Offices of David Balto, Washington, DC; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY; Kerin E. Coughlin, Constantine Cannon LLP, New York, NY; M. Tayari Garrett, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action BKS. v. Visa U.S.A., Inc. et al 09-cv-2264-JG-JO, Plaintiff: Carroll H. Ingram, LEAD ATTORNEY, INGRAM & ASSOCIATES, Hattiesburg, MS; Jennifer Ingram Wilkinson, PRO HAC VICE, Ingram

Wilkinson, PLLC, Hattiesburg, MS; John Corlew, PRO HAC VICE, Corlew, Munford & Smith, PLLC, Jackson, MS; John F Hawkins, PRO HAC VICE, Hawkins Gibson, PLLC, Jackson, MS.

For Plaintiffs in civil action Gulfside Casino Partnership. v. Visa U.S.A., Inc. et al 09-cv-03225 JG-JO, Plaintiff: Jennifer Ingram Wilkinson, Ingram Wilkinson, PLLC.

For Keith Superstores, BKS, INC., BKS of LA, Inc. d/b/a KEITH SUPERSTORES, and KEITHCO PETROLEUM, INC., Keithco Petroleum, Inc., BKS, INC., **[*25]** BKS of LA, Inc. d/b/a KEITH SUPERSTORES, and KEITHCO PETROLEUM, INC., Plaintiffs: John F Hawkins, PRO HAC VICE, Hawkins Gibson, PLLC, Jackson, MS.

For National Community Pharmacists Association, National Cooperative Grocers Association, Plaintiffs: Daniel Hume, Kirby McInerney LLP, New York, NY; David E. Kovel, Kirby McInerney LLP, New York, NY; Eric Citron, Goldstein & Russell P.C., Bethesda, MD; Kerin E. Coughlin, Constantine Cannon LLP, New York, NY; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY; Meghan Joan Summers, Kirby McInerney LLP, New York, NY; Thomas Goldstein, Goldstein & Russell, P.C., Bethesda, MD.

For Coborn's Incorporated, D'Agostino Supermarkets, Affiliated Foods Midwest, Plaintiffs: Adam Owen Glist, Constantine Cannon LLP, New York, NY; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NYl Kerin E. Coughlin, Constantine Cannon LLP, New York, NY.

For Robersons Fine Jewelry, Inc., Plaintiff: Jerrold S. Parker, Parker & Waichman, LLC, Great Neck, NY.

For Gielen Enterprises,Inc., Rice Palace,Inc., Tobacco Plus,Inc., Plaintiffs: Arun Srinivas Subramanian, LEAD ATTORNEY, Susman Godfrey LLP, New York, NY.

For Plaintiffs in Delta Airlines Inc et al v. Visa **[*26]** Inc et al, 1:13-cv-04766-JG-JO, Plaintiff: Richard E. Norman, Crowley Norman LLP, Houston, TX.

For Cox Communications, Inc., Cox Enterprises, Inc., Cox Media Group LLC, G6 Hospitality LLC, Plaintiffs: Brian R Strange, LEAD ATTORNEY, PRO HAC VICE, Strange and Carpenter, Los Angeles, CA; Keith L Butler, LEAD ATTORNEY, PRO HAC VICE, Strange and Carpenter, Los Angeles, CA.

For Live Nation Entertainment Inc, Manheim Inc, Motel 6 Operating LP, Plaintiffs: Brian R Strange, LEAD ATTORNEY, PRO HAC VICE, Strange and Carpenter, Los Angeles, CA; Keith L Butler, LEAD ATTORNEY, PRO HAC VICE, Strange and Carpenter, Los Angeles, CA.

For Manheim Incs, Plaintiff: Brian R Strange, LEAD ATTORNEY, PRO HAC VICE, Strange and Carpenter, Los Angeles, CA.

For For E-Z Mart Stores, Inc., Jacksons Food Stores, Inc./PacWest Energy LLC, Kum & Go, L.C., Sheetz, Inc., Susser Holdings Corporation, The Pantry, Inc., Plaintiffs: Donald R. Hall, Jr., Frederic S. Fox, LEAD ATTORNEYS, Kaplan Fox & Kilsheimer LLP, New York, NY; Donald Matt Mattson Keil, LEAD ATTORNEY, PRO HAC VICE, Keil & Goodson PA, Texarkana, AR; George L McWilliams, LEAD ATTORNEY, Texarkana, TX; John C Goodson, LEAD ATTORNEY, Keil & Goodson PA, Texarkana, **[*27]** AR; Matthew Powers McCahill, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer, LLP, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox, LLP, New York, NY.

For Plaintiffs in Target Corporation, et al. v. Visa Inc., et al., 13-cv-03477, Plaintiff: Amanda McMurray Roe, PRO HAC VICE, Vorys, Sater, Seymour and Pease LLP, Cleveland, OH; James A. Wilson, Kimberly Weber Herlihy, Vorys, Sater, Seymour and Pease, LLP (Columbus), Columbus, OH.

Plaintiffs in Civil Action Target Corporation, et al. v. Visa Inc. et al., 13-cv-4442, Plaintiff, Pro se.

For Plaintiffs in Civil Action Target Corporation, et al. v. Visa Inc. et al., 13-cv-4442, Plaintiff: James D. Thomas Vorys, Sater, Seymour and Pease LLP, Columbus, OH.

For DSW, Inc., Plaintiff: Jason A. Zweig, Hagens Berman Sobol Shapiro LLP, New York, NY.

Jetblue Airways Corporation, Plaintiff, Pro se.

Plaintiffs in Civil Action 7-Eleven Inc., et al. v. Visa Inc. et al, 1:13-cv-05746-JG-JO, Plaintiff, Pro se.

For Sunoco, Inc. (R&M), Plaintiff: Arthur Christopher Young, LEAD ATTORNEY, Pepper Hamilton LLP, Philadelphia, PA; Edwin M. Buffmire, LEAD ATTORNEY, PRO HAC VICE, Jackson Walker LLP, Dallas, TX; Robert Hickok, LEAD ATTORNEY, **[*28]** PRO HAC VICE, Pepper Hamilton, LLP, Philadelphia, PA; Stephanie L. Jonaitis, LEAD ATTORNEY, Pepper Hamilton LLP, Princeton, NJ; Timothy S. Jenkins, LEAD ATTORNEY, PRO HAC VICE, Jessica S. Russell, Pepper Hamilton LLP, Philadelphia, PA; Sarah S. Rabinovici, Pepper Hamilton LLP, New York, NY.

Minnesota Twins LLC, Plaintiff, Pro se.

For CHS Inc., Crystal Rock LLC, Leons Transmission Service, Inc, Traditions, Ltd, Plaintiffs: Bonny E. Sweeney, Hausfeld LLP, San Francisco, CA; H. Laddie Montague, Berger & Montague, P.C., Philadelphia, PA; K. Craig Wildfang, Robins Kaplan L.L.P., Minneapolis, MN; Geoffrey Holmes Kozen, Robins Kaplan LLP, Minneapolis, MN.

Leons Transmission Service, Inc, Plaintiff, Pro se.

For Einstein Noah Restaurant Group, Inc., Furniture Row BC, Inc., Furniture Row, LLC, Plaintiffs: George L McWilliams, LEAD ATTORNEY, PRO HAC VICE, Texarkana, TX.

For Google Inc., Plaintiff: David T Moran Jackson Walker, LEAD ATTORNEY, PRO HAC VICE, Dallas, TX.

For Google Payment Corporation, Plaintiff: David T Moran, LEAD ATTORNEY, PRO HAC VICE, Jackson Walker, Dallas, TX.

For Bass Pro Group, LLC, American Sportsman Holdings Co., Bass Pro Outdoor World, LLC, Bass Pro Shops White River Conference **[*29]** & Education Center, LLC, BPIP, LLC, BPS Direct, LLC, Big Cedar, LLC, Fryingpan River Ranch, LLC, Islamorada Fish Company Kansas, LLC, Islamorada Fish Company Texas, LLC, Islamorada Fish Company, LLC, Sportman's Distribution Co. of GA, LLC, Sportsman's Specialty Group, LLC, TMBC Corp. of Canada, Tracker Marine Financial Services, LLC, Tracker Marine Retail, LLC, Tracker Marine, LLC, Travis Boats & Motors Baton Rouge, LLC, Charming Charlie LLC, City of Scottsdale, Starving Students, Inc., Crocs Retail, LLC, Crocs, Inc., East Coast Waffles, Inc., Ethan Allen Global, Inc., Ethan Allen Interiors, Inc., Ethan Allen Miami, LLC, Ethan Allen Operations, Inc., Ethan Allen Realty, LLC, Ethan Allen Retail, Inc., Ethan Allen.com, Inc., Fury, Inc., Grand America Hotel Company, Crab Addison, Inc., BHTT Entertainment, Inc., BHTT Private Club - Plano TX, Board of Trustees of the University of Arkansas acting for University of Arkansas, Fayetteville, Bite, Inc., Jibbitz, LLC, Lake Avenue Associates, Inc., Love's Travel Stops & Country Stores, Inc., Lucky Brand Dungarees Stores, Inc., Little America Hotel Company, Little America Hotels and Resorts Inc., Lizzy Mae, Inc., Ethan Allen (Canada) Inc., Manor **[*30]** House, Inc., Joe's Crab Shack - Abingdon MD, Inc., Joe's Crab Shack - Alabama Private Club, Inc., Joe's Crab Shack - Anne Arundel MC, Inc., Joe's Crab Shack - Hunt Valley MD, Inc., Joe's Crab Shack - Kansas, Inc., Joe's Crab Shack - Maryland, Inc., Joe's Crab Shack - Texas Inc., Joe's Crab Shack -Redondo Beach, Inc., JCS Monmouth Mall - NJ, LLC, Mid South Waffles, Inc., Midwest Waffles, Inc., Ignite Restaurant Group, Inc., Ignite Restaurants - New Jersey, Inc., Scandinavian Airlines System Denmark-Norway-Sweden, Scandinavian Airlines of North America Inc., Sinclair Oil Corporation, Snowbasin Resort Company, Plaintiffs: Richard E. Norman, LEAD ATTORNEY, PRO HAC VICE, Crowley Norman LLP, Houston, TX.

For Stuart Weitzman Holdings, LLC, Stuart Weitzman IP, LLC, Sun Valley Company, Sportsman's Specialty Group, LLC, Stuart Weitzman Retail Stores, LLC, Stuart Weitzman, LLC, New West Jeanswear Holding LLC formerly known as Jones Holding Inc., Nine West Development LLC formerly known as Nine West Development Corporation, Nine West Holdings, Ocean Minded, Inc., One Jeanswear Group, Inc., Ozark Waffles, LLC, Jones Distribution Corporation, Jones Investment Co., Inc.,, Jones Management Service **[*31]** Company, TMBC, LLC, Tiffany and Company doing business as Tiffany & Co., Twin Liquors, LP, Waffle House, Inc., Westgate Hotel Company, William-Sonoma Inc., Ross Dress for Less, Inc., 1-800 Contacts, Inc. doing business as Glasses.com doing business as South Valley Optical, Brown - Thompson General Partnership d/b/a 7-Eleven Stores,, Cleveland State University, D&H Company, Dodge Brothers, Inc. (also known as Dodge Brothers), Dodge Oil Company, Dodge Oil Company of Arkansas, Dodge Oil Company of Mississippi, East Coast Oil Company, GES Inc., dba Food Giant, Giant Oil Company of Kentucky, Giant Oil Company of Mississippi, Go Oil Company, Inc., H&D Oil Company, Inc., Henry Oil Company of Tennessee, Kent State University, National Restaurants Management, Inc., North Mississippi Oil Company, Ohio University, Park Oil Company, Perfection Oil Company, Progressive Oil Company, Quality Oil Company, Royal Oil Company, Savings Carolina Division, Savings Oil Company, Savings, Alabama Division, Inc., Savings, Inc., The University of Akron, The University of Toledo, YSU Bookstore, Youngstown State University, Plaintiffs: Richard E. Norman, LEAD ATTORNEY, PRO HAC VICE, Crowley Norman LLP, Houston, **[*32]** TX.

For Electronic Payment Systems, LLC, Plaintiff: Scotty P. Krob, Krob Law Office, LLC, LEAD ATTORNEY, PRO HAC VICE, Greenwood Village, CO.

For Brookstone Company, Inc., Brookstone Holdings Corp., Brookstone Stores, Inc., Plaintiffs: Keith L Butler, LEAD ATTORNEY, PRO HAC VICE, Strange and Carpenter, Los Angeles, CA.

For Tedeschi Food Shops, Inc., Plaintiff: James Michael Evangelista, LEAD ATTORNEY, Evangelista Worley LLC, Atlanta, GA; James Michael Evangelista, Harris Penn Lowry LLP, Atlanta, GA.

For Bravo Foods, CFL Pizza, Plaintiffs: Brent O. Hatch, Shaunda L. McNeill, LEAD ATTORNEYS, HATCH JAMES & DODGE, SALT LAKE CITY, UT.

For CGS Sales, Captain Development Co, Cary Oil, Casey's General Stores, Cusick Corporation, Delta Sonic Carwash Systems, Epping Forest Yacht Club, GT Petroleum, Gate Fuel Service, Gate Petroleum Company, High Plains Pizza, North American Financial Group, Ponte Vedra Corporation, Ponte Vedra Lodge, River Club, The, Stinker Stores, CTC LLC Diamond Jim's, CTC LLP Crossroads Travel Center, Captain Development Co, Carolina Pizza Co, Crossroads Cafe, DC's Eastgate, DHCC LLC, DJ Casinos, Great Lakes Convenience, HN LLC, Hi-Noon Petroleum, MRC Hi-Noon, MTG Managment, **[*33]** Mackinaw Food Services, Michigan Pizza Service, Northfield Restaurant, Peru Pizza, Pester Marketing, TTM Montana LLC, TriConn, Triple S Oil, doing business as Mr. Gas, Virginia Pizza, Plaintiffs: Brent O. Hatch, LEAD ATTORNEY, HATCH JAMES & DODGE, SALT LAKE CITY, UT; Shaunda L. McNeill, LEAD ATTORNEY, HATCH JAMES & DODGE, SALT LAKE CITY, UT.

For Casey's Marketing Company, Casey's Retail Company, Casey's Services Company, Plaintiffs: Brent O. Hatch, LEAD ATTORNEY, HATCH JAMES & DODGE, SALT LAKE CITY, UT; Shaunda L. McNeill, LEAD ATTORNEY, HATCH JAMES & DODGE, SALT LAKE CITY, UT; James Michael Evangelista, Harris Penn Lowry LLP, Atlanta, GA.

For Emerald City Pizza, J.D. Streett & Company, Kath Fuel Oil Service, Las Vegas Pizza, Pizza Hut of Southeast Kansas, Slidell Oil, Space Age Fuel, Spokane Valley Pizza, TB of America, By-Lo Oil, CNH Food, Canton Pizza, Capital Pizza Huts, Capital Pizza Huts of Vermont, Capital Pizza of New Hampshire, Columbiana Pizza, Craig Food Stores, Dash In Food Stores, Delmarva Oil, Downs Energy, Elyria Pizza, Fastrip Oil, Flyers Energy, G.E. Junghans Discount Liquor, Geuga Pizza, Golden Dollar, HJB Convenience, Heart of Texas Pizza, Herdrich Petroleum, J&J Golf, **[*34]** JAG Convenience, JNH Food, Jaco Hill Company, Jamieson Hill Company, Kocomo Pizza, Lacombe Chevron Travel Center, Lawrence Oil, Leonard E Belcher Inc, Liberty Pizza, M2R, Mission Trail Oil, Mountain View Pizza, NJ Capital Furnishings, North Coast Pizza, Oklahoma Magic, Painesville Pizza, Pete's of Erie, Plaid Pantries, Plaintiffs: Brent O. Hatch, LEAD ATTORNEY, HATCH JAMES & DODGE, SALT LAKE CITY, UT; Shaunda L. McNeill, LEAD ATTORNEY, HATCH JAMES & DODGE, SALT LAKE CITY, UT.

For Pliska Golf, Pliska Investments, Popingo's Convenience Stores, Potomac Energy Holdings, RKS Ventures, Redding Oil, Reid Companies, Reid Petroleum, Reid Stores, Robinson Oil, SMO, Salem Pizza, Schmitt Sales, Seaside Pizza, Shop Quik Stores, Sky of Jenks, Slidell Oil, Southern Maryland Oil, Space Age Fuel, Speedie Mart, Speedy Q Markets, Spencer Companies, Tri Star Marketing, Trico Pizza, Valley Petroleum, WK Capital Enterprises, Wallis Oil Company, Wallis Petroleum, Wayne Pizza, Wayne Pizza of Ohio, Wills Group, The, Plaintiffs: Brent O. Hatch, LEAD ATTORNEY, HATCH JAMES & DODGE, SALT LAKE CITY, UT; Shaunda L. McNeill, LEAD ATTORNEY, HATCH JAMES & DODGE, SALT LAKE CITY, UT.

For Jetro Cash & Carry, Plaintiff: **[*35]** Daniel Hume, Kirby McInerney LLP, New York, NY; David E. Kovel, Kirby McInerney LLP, New York, NY; Eric Citron, Goldstein & Russell P.C., Bethesda, MD; Meghan Joan Summers, Kirby McInerney LLP, New York, NY.

For National Association of Truck Stop Operators, Plaintiff: Daniel Hume, Kirby McInerney LLP, New York, NY; David E. Kovel, Kirby McInerney LLP, New York, NY; Eric Citron, Goldstein & Russell P.C., Bethesda, MD; Meghan Joan Summers, Kirby McInerney LLP, New York, NY; Thomas Goldstein, Goldstein & Russell, P.C., Bethesda, MD.

For National Grocers Association, Plaintiff: Daniel Hume, Kirby McInerney LLP, New York, NY; David E. Kovel, Kirby McInerney LLP, New York, NY; Eric Citron, Goldstein & Russell P.C., Bethesda, MD; Meghan Joan Summers, Kirby McInerney LLP, New York, NY; Thomas Goldstein, Goldstein & Russell, P.C., Bethesda, MD.

For Calloway Oil Company, E-Z Stop Foodmarts, Inc., Plaintiff: James Michael Evangelista, Harris Penn Lowry LLP, Atlanta, GA.

For New Prime Inc., Plaintiff: Justin Collins, LEAD ATTORNEY, PRO HAC VICE, Prime Inc., Springfield, MO.

For Aloha Petroleum, LTD, Plaintiff: Edwin M. Buffmire, LEAD ATTORNEY, PRO HAC VICE, Jackson Walker LLP, Dallas, TX; Robert Hickok, **[*36]** LEAD ATTORNEY, PRO HAC VICE, Pepper Hamilton, LLP, Philadelphia, PA; Jessica S. Russell, Timothy S. Jenkins, LEAD ATTORNEY, PRO HAC VICE, Pepper Hamilton LLP, Philadelphia, PA.

For CMP Consulting Serv., Inc., Plaintiff: Daniel Lawrence Berger, LEAD ATTORNEY, Grant & Eisenhofer P.A., New York, NY; Deborah A. Elman, LEAD ATTORNEY, Grant & Eisenhofer P.A., New York, NY; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE.

For DDMB 2, LLC d/b/a Emporium Logan Square, Plaintiff: Daniel Lawrence Berger, LEAD ATTORNEY, Grant & Eisenhofer P.A., New York, NY; Deborah A. Elman, LEAD ATTORNEY, Grant & Eisenhofer P.A., New York, NY; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE; Steven A. Kanner, FREED KANNER LONDON & MILLEN LLC, Bannockburn, IL.

For DDMB, Inc. d/b/a Emporium Arcade Bar, Plaintiff: Daniel Lawrence Berger, LEAD ATTORNEY, Grant & Eisenhofer P.A., New York, NY; Deborah A. Elman, LEAD ATTORNEY, Grant & Eisenhofer P.A., New York, NY; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE; Steven A. Kanner, FREED KANNER LONDON & MILLEN LLC, Bannockburn, IL.

For Generic Depot 3, Inc. d/b/a Prescription Depot, Plaintiff: Daniel Lawrence Berger, LEAD ATTORNEY, Grant & **[*37]** Eisenhofer P.A., New York, NY; Deborah A. Elman, LEAD ATTORNEY, Grant & Eisenhofer P.A., New York, NY; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE.

For PureOne, LLC d/b/a Salon Pure, Town Kitchen, LLC d/b/a Town Kitchen & Bar, Plaintiff: Daniel Lawrence Berger, Deborah A. Elman, LEAD ATTORNEYS, Grant & Eisenhofer P.A., New York, NY; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE.

For Runcentral, LLC, Plaintiff: Daniel Lawrence Berger, Deborah A. Elman, LEAD ATTORNEYS, Grant & Eisenhofer P.A., New York, NY; Kevin B. Love, Hanzman Criden Love, P.A., Miami, FL; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE.

Breaux Mart Supermarkets, Inc., Plaintiff, Pro se.

Champagne's Quality Foods, Inc., Plaintiff, Pro se.

Claiborne Fresh Market, LLC, Plaintiff, Pro se.

Coleman Oil Company, LLC, Plaintiff, Pro se.

Franks Supermaket #3, Plaintiff, Pro se.

Franks Supermarket #2, Inc., Plaintiff, Pro se.

Franks Supermarket #3, Inc., doing business as, Franks Supermaket #5, Plaintiff, Pro se.

Franks Supermarket #4, Inc., Plaintiff, Pro se.

Harrison Fresh Market, LLC, Plaintiff, Pro se.

Kenilworth Supermarket, Inc., Plaintiff, Pro se.

Longview Enterprises, Inc., Plaintiff, Pro se. **[*38]**

M L Robert II, LLC, Plaintiff, Pro se.

M Robert Enterprises, Inc., Plaintiff, Pro se.

Mackenthun's Supermarkets, Inc., Plaintiff, Pro se.

Marketfare Annunciation, LLC, Plaintiff, Pro se.

Marketfare Canal, LLC, Plaintiff, Pro se.

Marketfare N Broad, LLC, Plaintiff, Pro se.

Marketfare St. Claude, LLC, Plaintiff, Pro se.

Matherne's LLC, Plaintiff, Pro se.

Matherne's Supermarket at Riverlands, LLC, Plaintiff, Pro se.

Potash Bros., Inc., Plaintiff, Pro se.

Potash-Hancock, Inc., Plaintiff, Pro se.

Sandburg Supermart, Inc., Plaintiff, Pro se.

Sopranos Supermarkets, LLC, Plaintiff, Pro se.

Stepherson Inc., Plaintiff, Pro se.

Supermarket Operations, Inc., Plaintiff, Pro se.

Techau's, Inc., Plaintiff, Pro se.

For Barry's Cut Rate Stores Inc., Plaintiff: Daniel Lawrence Berger, Deborah A. Elman, LEAD ATTORNEYS, Grant & Eisenhofer P.A., New York, NY; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE; Steven A. Kanner, FREED KANNER LONDON & MILLEN LLC, Bannockburn, IL.

For Equitable Relief Class, Plaintiff: Hugh Sandler, Nussbaum Law Group, P.C., New York, NY; Michael J. Freed, Freed Kanner London & Millen LLC, Bannockburn, IL.

For Grove Liquors LLC, Palero Food Corp. and Cagueyes Food Corp., Strouk Group **[*39]** LLC, Plaintiff: Armen Zohrabian, LEAD ATTORNEY, Robbins Geller Rudman and Dowd LLP, San Francisco, CA; John William Devine, LEAD ATTORNEY, Lawrence Dean Goodman, Devine Goodman Rasco WattsFitzGerald LLP, Coral Gables, FL; Lonnie Anthony Browne, Thomas E. Egler, LEAD ATTORNEYS, Robbins Geller Rudman and Dowd LLP, San Diego, CA; Robert J Kuntz, Jr., LEAD ATTORNEY, Devine Goodman Rasco Watts-FitzGerald, LLP, Coral Gables, Fl.

For Herc Rentals Inc., Royal Caribbean Cruises LTD., Hertz Corporation, Plaintiff: Robert D.W. Landon, III, LEAD ATTORNEY, KENNY NACHWALTER, P.A., Miami, FL; Joshua Barton Gray, Kenny Nachwalter, P.A., Washington, DC.

For Hertz Corporation, Herc Rentals Inc., Royal Caribbean Cruises LTD., Plaintiff: Robert D.W. Landon, III, LEAD ATTORNEY, KENNY NACHWALTER, P.A., Miami, FL.

For Broadway Grill, Inc., Plaintiff: Anne Marie Murphy, Joseph W. Cotchett, Mark Cotton Molumphy, LEAD ATTORNEYS, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Nancy L. Fineman, LEAD ATTORNEY, PRO HAC VICE, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Alexander E. Barnett, Cotchett, Pitre & McCarthy, LLP, New York, NY.

Kohlberg Kravis & Roberts Co., Plaintiff, Pro se.

For Luby's Fuddruckers Restaurants, **[*40]** LLC, Plaintiff: David Edwards Wynne, Scott G. Burdine, LEAD ATTORNEYS, Burdine Wynne LLP, Houston, TX; Kenneth R. Wynne, LEAD ATTORNEY, PRO HAC VICE, Burdine Wynne LLP, Houston, TX.

Luby's Inc., Plaintiff, Pro se.

For Expedia, Inc., Natm Buying Corporation, Plaintiff: Joseph Michael Vanek, LEAD ATTORNEY, PRO HAC VICE, Vanek, Vickers & Masini, P.C., Chicago, IL.

For Tractor Supply Company, Plaintiff: Joseph Michael Vanek, LEAD ATTORNEY, PRO HAC VICE, Vanek, Vickers & Masini, P.C., Chicago, IL.

Oneota Community Food Co-op, Intervenor Plaintiff, Pro se.

For Defendants in civil action Jetro Holding, Inc. et al v. Visa U.S.A., Inc. et al 05-cv-4520 JG-JO, Defendants in civil actionNational Association of Convenience Stores et al v. Visa U.S.A., Inc. et al 05-cv-4521 JG-JO, Defendants: Lawrence B. Friedman, LEAD ATTORNEY, Cleary Gottlieb Steen & Hamilton LLP, New York, NY; Mark E. Tully, LEAD ATTORNEY, Goodwin Procter, LLP, Boston, MA; Michael Kelly, LEAD ATTORNEY, Lord Bissell & Brook LLP, Chicago, IL; Patricia A. Sullivan, LEAD ATTORNEY, Edwards Angell Palmer & Dodge LLP, Providence, RI; Peter Edward Greene, LEAD ATTORNEY, Cyrus Amir-Mokri, Peter S. Julian, Skadden, Arps, Slate, Meagher & Flom **[*41]** LLP, Four Times Square, New York, NY; William Harry Rooney, LEAD ATTORNEY, Willkie Farr & Gallagher LLP, New York, NY; Ali Stoeppelwerth, Wilmer Cutler Pickering Hale and Dorr, Washington, DC; Alicia Batts, Dickstein Shapiro, Washington, DC; Andrew J. McDonald, Pullman & Comley, LLC, Stamford, CT; Ann-Marie Lucianoc, Dickstein Shapiro LLP, Washington, DC; Brian A. Herman, Morgan, Lewis & Bockuis, LLP, New York, NY; Christopher R. Lipsett, Wilmer Cutler Pickering Hale and Dorr, New York, NY; David Sapir Lesser, Wilmer Cutler Pickering Hale & Dorr, LLP, New York, NY; Douglas Melamed, Washington, Dc, WA; Eric H. Grush, Gary R. Carney, Jr., Robert C. Mason; Erica Fenby, PRO HAC VICE, Alston & Bird LLP, Atlanta, GA; Florence Amanda Crisp, Edwards Angell Palmer & Dodge, Providence, RI; Harold Stephen Harris, Robert Donald Carroll, Alston & Bird LLP, Atlanta, GA; James T. Shearin, Pullman & Comley, LLC, Bridgeport, CT; James M. Sulentic, Jodi Trulove, John M. Majoras, John P. Passarelli, Kutak Rock LLP, Omaha, NE; Jonathan B. Orleans, Pullman & Comley LLC, Bridgeport, CT; Joseph W. Clark, Jones Day, Washington, DC; Joseph N. Froehlich, Locke Lord LLP, New York, NY; Kara Kennedy, Keila D. **[*42]** Ravelo, Alston & Bird LLP, Atlanta, GA; Kenneth A. Gallo, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton & Garrison, LLP, Washington, DC; Lisl J. Dunlop, Shearman & Sterling, New York, NY; Mark P. Ladner, Morrison & Foerster, New York, NY; Matthew Stephen Freimuth, Michael Edward Johnson, Willkie Farr & Gallagher LLP, New York, NY; Michael R. Lazerwitz, Cleary Gottlieb Steen & Hamilton, Washington, DC; Michael B. Miller, Morrison & Foerster LLP, New York, NY; Naeemah Clark, Nicolas W. Steenland, Alston & Bird LLP, Atlanta, GA; Richard P. Jeffries, Richard J. Leveridge, Kutak Rock LLP, Omaha, NE; Teresa T. Bonder, Alston & Bird, LLP, Atlanta, GA; Valerie C. Williams, ALSTON & BIRD LLP, UNITE, Atlanta, GA; William Kolasky, Washington, DC, WA.

For Defendants in civil action Supervalu Inc. v. Visa U.S.A. Inc. et al 05-cv-4650 JG-JO, Defendants in civil action Publix, Supermarkets, Inc. v. Visa U.S.A. Inc. et al 05-cv-4677-JG-JO, Defendants in civil action Seaway Gas & Petroleum, Inc. v. Visa U.S.A., Inc. et al 05-cv-4728 JG-JO, Defendants in civil action Raley's v. Visa, U.S.A. Inc. et al 05-cv-4799-JG-JO, Defendants in civil action East Goshen, Pharmacy, Inc. v. Visa U.S.A., Inc 05-cv-5073-JG-JO, **[*43]** Defendants: Michael Kelly, LEAD ATTORNEY, Lord Bissell & Brook LLP, Chicago, IL; Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Wesley Railey Powell, LEAD ATTORNEY, Keila D. Ravelo, Matthew Stephen Freimuth, Willkie Farr & Gallagher LLP, New York, NY; Alicia Batts; Ann-Marie Lucianoc, Dickstein Shapiro LLP, Washington, DC; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garison, LLP, New York, NY; Jodi Trulove, Dickstein Shapiro, Washington, DC; Joseph N. Froehlich, Locke Lord LLP, New York, NY; Kenneth A. Gallo, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton & Garrison, LLP, Washington, DC; Richard J. Leveridge, Dickstein Shapiro LLP, Washington, DC; Robert C. Mason, Arnold & Porter Kaye Scholer LLP, New York, NY.

For Defendants iin civil action National Grocers Association et al v. Visa U.S.A., Inc. et al 05-cv-5207 JG-JO, Defendants in civil action American, Booksellers Association v. Visa U.S.A., Inc. et al 05-cv-5319 JG-JO, Defendant: Mark E. Tully, LEAD ATTORNEY, Goodwin Procter, LLP, Boston, MA; Michael Kelly, LEAD ATTORNEY, Lord Bissell & Brook LLP, Chicago, IL; Patricia A. Sullivan, LEAD ATTORNEY, Edwards Angell Palmer & Dodge **[*44]** LLP, Providence, RI; Peter Edward Greene, LEAD ATTORNEY, Cyrus Amir-Mokri, Peter S. Julian, Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, NY; William Harry Rooney, LEAD ATTORNEY, Willkie Farr & Gallagher LLP, New York, NY; Ali Stoeppelwerth, Wilmer Cutler Pickering Hale and Dorr, Washington, DC; Alicia Batts, Dickstein Shapiro, Washington, DC; Andrew J. McDonald, Pullman &

Comley, LLC, Stamford, CT; Ann-Marie Lucianoc, Dickstein Shapiro LLP, Washington, DC; Brian A. Herman, Morgan, Lewis & Bockuis, LLP, New York, NY; Christopher R. Lipsett, Wilmer Cutler Pickering Hale and Dorr, New York, NY; David Sapir Lesser, Wilmer Cutler Pickering Hale & Dorr, LLP, New York, NY; Douglas Melamed, Washington, Dc, WA; Eric H. Grush, Gary R. Carney, Jr., Robert C. Mason; Erica Fenby, PRO HAC VICE, Alston & Bird LLP, Atlanta, GA; Florence Amanda Crisp, Edwards Angell Palmer & Dodge, Providence, RI; Harold Stephen Harris, Robert Donald Carroll, Alston & Bird LLP, Atlanta, GA; James T. Shearin, Pullman & Comley, LLC, Bridgeport, CT; James M. Sulentic, Jodi Trulove, John M. Majoras, John P. Passarelli, Kutak Rock LLP, Omaha, NE; Jonathan B. Orleans, Pullman & Comley LLC, Bridgeport, **[*45]** CT; Joseph W. Clark, Jones Day, Washington, DC; Joseph N. Froehlich, Locke Lord LLP, New York, NY; Kara Kennedy, Keila D. Ravelo, Alston & Bird LLP, Atlanta, GA; Kenneth A. Gallo, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton & Garrison, LLP, Washington, DC; Lisl J. Dunlop, Shearman & Sterling, New York, NY; Mark P. Ladner, Morrison & Foerster, New York, NY; Matthew Stephen Freimuth, Michael Edward Johnson, Willkie Farr & Gallagher LLP, New York, NY; Michael R. Lazerwitz, Cleary Gottlieb Steen & Hamilton, Washington, DC; Michael B. Miller, Morrison & Foerster LLP, New York, NY; Naeemah Clark, Nicolas W. Steenland, Alston & Bird LLP, Atlanta, GA; Richard P. Jeffries, Richard J. Leveridge, Kutak Rock LLP, Omaha, NE; Teresa T. Bonder, Alston & Bird, LLP, Atlanta, GA; Valerie C. Williams, ALSTON & BIRD LLP, UNITE, Atlanta, GA; William Kolasky, Washington, DC, WA.

For Defendants in civil action Rookies, Inc. v. Visa U.S.A., Inc. 05-cv-5069-JG-JO, Defendants in civil action Animal Land, Inc. v. Visa U.S.A., Inc. 05-cv-5074-JG-JO, Defendants: Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, NY; Wesley Railey Powell, LEAD ATTORNEY, Keila **[*46]** D. Ravelo, Matthew Stephen Freimuth, Willkie Farr & Gallagher LLP, New York, NY; Robert C. Mason, Arnold & Porter Kaye Scholer LLP, New York, NY.

For Defendants in civil action Bonte Wafflerie, LLC v. Visa U.S.A., Inc. 05-cv-5083 JG-JO, Defendants in civil action Broken Ground, Inc. v. Visa U.S.A., Inc. 05-cv-5082 JG-JO, Defendants in civil action Baltimore Avenue Foods, LLC v. Visa U.S.A., Inc. 05-cv-5080 JG-JO, Defendants in civil action Fairmont Orthopedics & Sports Medicine, PA v. Visa U.S.A., Inc. 05-cv-5076-JG-JO, Defendants in civil action Tabu Salon & Spa, Inc. v. Visa U.S.A., Inc. 05-cv-5072 -JG-JO, Defendants in civil action Lakeshore Interiors v. Visa U.S.A., Inc. 05-cv-5081 JG-JO, Defendants in civil action Parkway Corp. v. Visa U.S.A., Inc. 05-cv-5077-JG-JO, Defendants in civil action NuCity Publications, Inc. v. Visa U.S.A., Inc. 05-cv-5070-JG-JO, Defendants in civil action Hyman v. VISA International Service Association, Inc. 05-cv-5866 JG -JO, Defendants: Michael Kelly, LEAD ATTORNEY, Lord Bissell & Brook LLP, Chicago, IL; Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, NY; Alicia Batts, Dickstein Shapiro, Washington, **[*47]** DC; Ann-Marie Lucianoc, Richard J. Leveridge, Dickstein Shapiro LLP, Washington, DC; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garison LLP, New York, NY; Jodi Trulove, Dickstein Shapiro, Washington, DC; Keila D. Ravelo, Willkie Farr & Gallagher LLP, New York, NY; Kenneth A. Gallo, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Matthew Stephen Freimuth, Willkie Farr & Gallagher LLP, New York, NY.

For Defendants in civil action Lee et al v. Visa U.S.A. Inc. et al 05-cv-03800, Defendants in civil action Resnick Amsterdam & Leshner P.C. v. Visa U.S. A, Inc. et al, 05-cv-3924 JG-JO, Defendants in civil action Hy-Vee, Inc. v. Visa U.S.A., Inc. et al 05-cv-03925 JG-JO, Defendants: Michael Kelly, LEAD ATTORNEY, Lord Bissell & Brook LLP, Chicago, IL; Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, NY; Alicia Batts, Dickstein Shapiro, Washington, DC; Ann-Marie Lucianoc, Richard J. Leveridge, Dickstein Shapiro LLP, Washington, DC; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garison LLP, New York, NY; Jodi Trulove, Dickstein Shapiro, Washington, DC; Keila D. Ravelo, Willkie Farr & Gallagher **[*48]** LLP, New York, NY; Kenneth A. Gallo, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Matthew Stephen Freimuth, Willkie Farr & Gallagher LLP, New York, NY.

For Defendants in civil action Meijer, Inc. et al v. Visa U.S.A. Inc. et al 05-cv-4131 JG-JO, Defendants in civil action Kroger Co. v. Visa U.S.A., Inc. 05-cv-5078 JG-JO, Defendants in civil action Rite Aid Corporation et al. v. Visa U.S.A., Inc. et al. 05-cv-5352 JG-JO, Defendants: Michael Kelly, LEAD ATTORNEY, Lord Bissell & Brook LLP, Chicago, IL; Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, NY; Alicia Batts, Dickstein Shapiro, Washington, DC; Ann-Marie Lucianoc, Richard J. Leveridge, Dickstein Shapiro LLP, Washington, DC; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garison LLP, New

York, NY; Jodi Trulove, Dickstein Shapiro, Washington, DC; Robert C. Mason, Arnold & Porter Kaye Scholer LLP, New York, NY.

For Defendants in civil action Lepkowski v. Mastercard International Incorporated et al 05-cv-4974-JG-JO, Defendant: Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, NY; Gary **[*49]** R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garison LLP, New York, NY; Jonathan Mitchell Jacobson, Wilson Sonsini Goodrich & Rosati. PC, New York, NY; Keila D. Ravelo, Willkie Farr & Gallagher LLP, New York, NY; Matthew Stephen Freimuth, Willkie Farr & Gallagher LLP, New York, NY; Paul W. Bartel, II, Davis, Polk and Wardwell, New York, NY; Sammi Malek, Baker & Hostetler LLP New York, NY.

For Defendants in civil action Photos Etc. Corp. v. Visa U.S.A., Inc. 05-cv-5071-JG-JO, Defendant: Craig A. Raabe, LEAD ATTORNEY, Robinson & Cole LLP, Hartford, CT; Mark E. Tully, Goodwin Procter, LLP, LEAD ATTORNEY, Exchange Place, Boston, MA; Michael Kelly, LEAD ATTORNEY, Lord Bissell & Brook LLP, Chicago, IL; Patricia A. Sullivan, LEAD ATTORNEY, Edwards Angell Palmer & Dodge LLP, Providence, RI; Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, NY; Washington, DC; Alicia Batts, Dickstein Shapiro, Washington, DC; Andrew J. McDonald, Pullman & Comley, LLC, Stamford, CT; Ann-Marie Lucianoc, Dickstein Shapiro LLP, Washington, DC; Christopher R. Lipsett, Wilmer Cutler Pickering Hale and Dorr, New York, NY; Cyrus Amir-Mokri, Skadden Arps Slate **[*50]** Meagher & Flom LLP, New York, NY; David Sapir Lesser, Wilmer Cutler Pickering Hale & Dorr, LLP, New York, NY; Douglas Melamed, Washington, Dc, WA; Eric H. Grush, Sidley Austin LLP, Chicago, IL; Erica Fenby, PRO HAC VICE, Harold Stephen Harris, Kara Kennedy, Naeemah Clark, Alston & Bird LLP, Atlanta, GA; Florence Amanda Crisp, Edwards Angell Palmer & Dodge, Providence, RI; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garison LLP, New York, NY; James M. Sulentic, Richard P. Jeffries, Kutak Rock LLP, Omaha, NE; Jodi Trulove, Dickstein Shapiro, Washington, DC; Jonathan B. Orleans, Pullman & Comley LLC, Bridgeport, CT; Joseph W. Clark, Jones Day, Washington, DC; Lisl J. Dunlop, Shearman & Sterling, New York, NY; Michael Edward Johnson, Nicolas W. Steenland, Alston & Bird LLP, New York, NY; Michael R. Lazerwitz, Cleary Gottlieb Steen & Hamilton, Washington, DC; Michael B. Miller, Morrison & Foerster LLP, New York, NY; Peter S. Julian, Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, NY; Richard J. Leveridge, Dickstein Shapiro LLP, Washington, DC; Robert Donald Carroll, Goodwin Procter LLP, Exchange Place, Boston, MA; Teresa T. Bonder, Valerie C. Williams, Alston **[*51]** & Bird, LLP, Atlanta, GA; William Kolasky, Washington, DC, WA.

For Defendants in civil case Fitlife Health Systems of Arcadia, Inc. v. Mastercard International Incorporated et a 05-cv-5153 JG -JO, Defendant: Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, NY; Alicia Batts, Dickstein Shapiro, Washington, DC; Ann-Marie Lucianoc, Richard J. Leveridge, Dickstein Shapiro LLP, Washington, DC; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garison LLP, New York, NY; Keila D. Ravelo, Willkie Farr & Gallagher LLP, New York, NY; Kenneth A. Gallo, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Matthew Stephen Freimuth, Willkie Farr & Gallagher LLP, New York, NY.

For Defendants in civil action The Kroger Co., et al. v. MasterCard Inc., et al., 06-cv-0039 JG-JO, Defendant: Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, NY; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garison LLP, New York, NY; Keila D. Ravelo, Willkie Farr & Gallagher LLP, New York, NY; Matthew Stephen Freimuth, Willkie Farr & Gallagher LLP, New York, NY.

For Defendants in **[*52]** civil action Harris Stationers, Inc., et al. v. Visa International Service Association, et al. 05-cv-5868 JG-JO, Defendant: Joshua N. Holian, LEAD ATTORNEY, Latham & Watkins, San Francisco, CA; Michael Kelly, LEAD ATTORNEY, Lord Bissell & Brook LLP, Chicago, IL; Michael R. Lazerwitz, Cleary Gottlieb Steen & Hamilton, Washington, DC; Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, NY; Alicia Batts, Dickstein Shapiro, Washington, DC; Alicia Batts, Dickstein Shapiro, Washington, DC; Eric H. Grush, Sidley Austin LLP, Chicago, IL; Erica Fenby, PRO HAC VICE, Harold Stephen Harris, Kara Kennedy, Naeemah Clark, Alston & Bird LLP, Atlanta, GA; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garison LLP, New York, NY; Joseph W. Clark, Jones Day, Washington, DC; Lisl J. Dunlop, Shearman & Sterling, New York, NY; Kara Kennedy, Naeemah Clark, Alston & Bird LLP, Atlanta, GA; Keila D. Ravelo, Willkie Farr & Gallagher LLP, New York, NY; Matthew Stephen Freimuth, Willkie Farr & Gallagher LLP, New York, NY; Michael Edward Johnson, Nicolas W. Steenland, Alston & Bird LLP, New York, NY; Michael B. Miller, Morrison &

Foerster LLP, New York, **[*53]** NY; Naeemah Clark, Alston & Bird LLP, Atlanta, GA; Nicolas W. Steenland, Alston & Bird LLP, New York, NY; Richard P. Jeffries, Kutak Rock LLP, Omaha, NE; Teresa T. Bonder, Valerie C. Williams, Alston & Bird, LLP, Atlanta, GA.

For Defendants in civil action Dr. Roy Hyman, et al. v. Visa International Service Association, Inc., et al. 05-cv-5866, Defendant: Michael Kelly, LEAD ATTORNEY, Lord Bissell & Brook LLP, Chicago, IL; Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, NY; Alicia Batts, Dickstein Shapiro, Washington, DC; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garison LLP, New York, NY; Joseph W. Clark, Jones Day, Washington, DC; Jodi Trulove, Dickstein Shapiro, Washington, DC; Keila D. Ravelo, Willkie Farr & Gallagher LLP, New York, NY; Matthew Stephen Freimuth, Willkie Farr & Gallagher LLP, New York, NY; Michael B. Miller, Morrison & Foerster LLP, New York, NY.

For Defendants in civil action Performace Labs, Inc. v. American Express Travel Related Services Co., Inc., et al 05-cv-5869 JG-JO, Defendant: Michael Kelly, LEAD ATTORNEY, Lord Bissell & Brook LLP, Chicago, IL; Peter Edward Greene, LEAD ATTORNEY, Skadden, **[*54]** Arps, Slate, Meagher & Flom LLP, New York, NY; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garison, LLP, New York, NY; Keila D. Ravelo, Matthew Stephen Freimuth, Willkie Farr & Gallagher LLP, New York, NY.

For Defendants in civil action Discount Optics, Inc., et al. v. Visa U.S.A., Inc., et al. 05-cv-5870 JG-JO, Defendants in civil action LDC, Inc. v. Visa U.S.A., Inc. et al. 05-cv-5871 JG-JO, Defendants in civil action G.E.S. Bakery, Inc. v. Visa U.S.A., Inc,. et al. 05-cv-5879 JG-JO, Defendants in civil action Leeber Cohen, M.D. v. Visa U.S.A., Inc., et al. 05-cv-5878 JG-JO, Defendants: Michael Kelly, LEAD ATTORNEY, Lord Bissell & Brook LLP, Chicago, IL; Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Alicia Batts, Dickstein Shapiro, Washington, DC; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garison, LLP, New York, NY; Keila D. Ravelo, Matthew Stephen Freimuth, Willkie Farr & Gallagher LLP, New York, NY.

For Defendants in civil action Connecticut Food Association, Inc., et al. v. Visa U.S.A., Inc., et al 05-cv-5880 JG-JO, Defendant: Michael Kelly, LEAD ATTORNEY, Lord Bissell & Brook LLP, Chicago, IL; Peter Edward Greene, **[*55]** LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Alicia Batts, Dickstein Shapiro, Washington, DC; Eric H. Grush, Sidley Austin LLP, Chicago, IL; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garison, LLP, New York, NY; Keila D. Ravelo, Matthew Stephen Freimuth, Willkie Farr & Gallagher LLP, New York, NY; Michael B. Miller, Morrison & Foerster LLP, New York, NY.

For Defendants in civil action Twisted Spoke v. Visa U.S.A., Inc., et al. 05-cv-5881 JG-JO, Defendants in civil action JGSA, Inc. v. Visa U.S.A., Inc., et al 05-cv-5885, Defendants: Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garison, LLP, New York, NY; Keila D. Ravelo, Matthew Stephen Freimuth, Willkie Farr & Gallagher LLP, New York, NY.

For Defendants in civil action Lombardo Bros., Inc. v. Visa U.S.A., Inc. 05-cv-5882 JG-JO, Defendants in civil action Abdallah Bishara, etc. v. Visa U.S.A., Inc. 05-cv-5883 JG-JO, Defendants: Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garison, LLP, New York, NY.

For **[*56]** Defendants in civil action 518 Restaurant Corp. v. American Express Travel Related Services Co., et al. 05-cv-5884 JG-JO, Defendant: Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Keila D. Ravelo, Matthew Stephen Freimuth, Willkie Farr & Gallagher LLP, New York, NY.

For Defendants in civil action Fringe, Inc. v. Visa, U.S.A., Inc. et al 05-cv-4194 JG-JO, Defendant: Michael Kelly, LEAD ATTORNEY, Lord Bissell & Brook LLP, Chicago, IL; Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garison, LLP, New York, NY.

For HSBC Bank USA, N.A., Defendant: David Sapir Lesser, Wilmer Cutler Pickering Hale & Dorr, LLP, New York, NY; Perry Lange, Wilmer Cutler Pickering Hale and Dorr, Washington, DC; William J. Perlstein, WilmerHale, Washington, DC.

For Capital One Bank, Defendant: Abby Faith Rudzin, Andrew J. Frackman, Edward D. Hassi, Peter Clemens Herrick, LEAD ATTORNEYS, Kenneth T. Murata, O'Melveny & Myers LLP, New York, NY; John Zavitsanos, LEAD

ATTORNEY, PRO HAC VICE, Ahmad Zavitsanos et al, Houston, TX; Jordan Lyn Warshauer, LEAD ATTORNEY, PRO HAC VICE, **[*57]** Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing P.C., Houston, TX.

For Capital One F S B, Defendant: Abby Faith Rudzin, Andrew J. Frackman, Edward D. Hassi, Peter Clemens Herrick, LEAD ATTORNEYS, Kenneth T. Murata, O'Melveny & Myers LLP, New York, NY.

For Capital One Financial Corp, Defendant: Abby Faith Rudzin, Andrew J. Frackman, Edward D. Hassi, Peter Clemens Herrick, LEAD ATTORNEYS, Kenneth T. Murata, O'Melveny & Myers LLP, New York, NY; Jamie Alan Aycock, LEAD ATTORNEY, AZA, Houston, TX; John Zavitsanos, LEAD ATTORNEY, PRO HAC VICE, Ahmad Zavitsanos et al, Houston, TX.

For Wells Fargo & Company, Defendant: Allyson M. Maltas, LEAD ATTORNEY, Andrew Howard Warren, Latham & Watkins LLP, Washington, DC; Charles Bedford Hampton, LEAD ATTORNEY, PRO HAC VICE, McGuireWoods LLP, Houston, TX; Gregory S. Seador, LEAD ATTORNEY, Eric J. McCarthy, Latham & Watkins, Washington, DC; Norman W. Kee, LEAD ATTORNEY, Benjamin R. Rossen, Patterson Belknap Webb & Tyler, New York, NY; Peter Abraham Nelson, LEAD ATTORNEY, Patterson Belknap Webb & Tyler LLP, New York City, NY; Robert P. LoBue, LEAD ATTORNEY, Patterson, Belknap, Webb & Tyler LLP, New York, NY; Vivian Ruth Mills Storm, William F. Cavanaugh, LEAD **[*58]** ATTORNEYS, Terra Hittson, Patterson Belknap Webb & Tyler LLP, New York, NY; Erica T. Grossman, Holly Tate, Joshua N. Holian, Latham & Watkins, San Francisco, CA; Jason D. Cruise, PRO HAC VICE. Latham & Watkins, LLP, Washington, DC.

For National City Bank of Kentucky, Defendant: Frederick N. Egler, LEAD ATTORNEY, PRO HAC VICE, Reed Smith, Pittsburgh, PA.

For National City Corporation, Defendant: Frederick N. Egler, LEAD ATTORNEY, PRO HAC VICE, Reed Smith, Pittsburgh, PA.

For Mastercard Incorporated, Defendant: Donna M. Ioffredo, LEAD ATTORNEY, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Gary R. Carney, LEAD ATTORNEY, Paul Weiss Rifkind Wharton & Garrison, LLP-NY, New York, NY; Kenneth A. Gallo, LEAD ATTORNEY, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton & Garrison, LLP, Washington, DC; Tynan Buthod, LEAD ATTORNEY, PRO HAC VICE, Baker Botts LLP, Houston, TX; Alex Michael Hyman, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY; Bruce Alan Birenboim, Paul, Weiss, Rifkind, Wharton & Garrison, New York, NY; Craig Benson, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garison, LLP, New **[*59]** York, NY; Heather C. Milligan, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Jarred A. Klorfein, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Kelly Dodge Garcia, Paul, Weiss, Rifkind,Wharton & Garrison LLP, New York, NY; Lina Dagnew, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Michelle Katherine Parikh, Paul Weiss RIfkind Wharton & Garrison LLP, Washington, DC; Paul Eric Chaffin, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Robert Joseph O'Loughlin, III, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY; Keila D. Ravelo, Willkie Farr & Gallagher LLP, New York, NY; Robert Charles Port, LEAD ATTORNEY, Gaslowitz Frankel LLC, Atlanta, GA; Andrew Corydon Finch, Paul Weiss Rifkind Wharton & Garrison 1285 Avenue of the Americas, New York, NY; Danielle M. Aguirre, Paul Weiss Rifkind Wharton Garrison LLP 1615 L Street, Nw, Washington, DC; Karen L Berenthal, Facebook, Inc., Washington, DC; Sarah Ripa, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY; Zachary Dietert, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY; Matthew Duff Turner, Armstrong Teasdale LLP-JCMO.

For Mastercard International Incorporated, **[*60]** Defendant: Donna M. Ioffredo, LEAD ATTORNEY, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Gary R. Carney, LEAD ATTORNEY, Paul Weiss Rifkind Wharton & Garrison, LLP-NY, New York, NY; Kenneth A. Gallo, LEAD ATTORNEY, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton & Garrison, LLP, Washington, DC; Robert Charles Port, LEAD ATTORNEY, Gaslowitz Frankel LLC, Atlanta, GA; Tynan Buthod, LEAD ATTORNEY, PRO HAC VICE, Baker Botts LLP, Houston, TX; Alex Michael Hyman, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY; Bruce Alan Birenboim, Paul, Weiss, Rifkind, Wharton & Garrison, New York, NY; Craig Benson, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garison, LLP, New York, NY; Heather C. Milligan, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Jarred A. Klorfein, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Kelly Dodge Garcia, Paul, Weiss, Rifkind,Wharton &

Garrison LLP, New York, NY; Lina Dagnew, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Michelle Katherine Parikh, Paul Weiss RIfkind Wharton & Garrison LLP, Washington, DC; Paul Eric Chaffin, **[*61]** Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Robert Joseph O'Loughlin, III, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY; Sarah Ripa, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY; Zachary Dietert, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY; Matthew Duff Turner, Armstrong Teasdale LLP-JCMO.

For HSBC Finance Corporation, Defendant: David Sapir Lesser, Wilmer Cutler Pickering Hale & Dorr, LLP, New York, NY; Perry Lange, Wilmer Cutler Pickering Hale and Dorr, Washington, DC; Steven F. Molo, MoloLamken LLP.

For HSBC North America Holdings, Inc, Defendant: David Sapir Lesser, Wilmer Cutler Pickering Hale & Dorr, LLP, New York, NY; Perry Lange, Wilmer Cutler Pickering Hale and Dorr, Washington, DC; William J. Perlstein, WilmerHale, Washington, DC.

For Citibank N A, Defendant: Benjamin R. Nagin, LEAD ATTORNEY, Sidley Austin LLP, New York, NY; Ada Asante Davis, Sidley Austin LLP, New York, NY; David Graham, Sidley Austin Brown & Wood LLP, Chicago, IL; Eamon Paul Joyce, Sidley Austin LLP, New York, NY; Samuel Sung-Ook Choi, Sidley Austin LLP, New York, NY; Thomas Andrew Paskowitz, Sidley Austin LLP, New York, NY.

For Citicorp, Defendant: **[*62]** Benjamin R. Nagin, LEAD ATTORNEY, Sidley Austin LLP, New York, NY; Ada Asante Davis, Sidley Austin LLP, New York, NY; Eamon Paul Joyce, Sidley Austin LLP, New York, NY; Samuel Sung-Ook Choi, Sidley Austin LLP, New York, NY; Thomas Andrew Paskowitz, Sidley Austin LLP, New York, NY.

For Chase Bank USA, N.A., Defendant: Noelle M Reed, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Houston, TX; Peter Edward Greene, LEAD ATTORNEY, Boris Bershteyn, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Cyrus Amir-Mokri, Skadden Arps Slate Meagher & Flom LLP, New York, NY; Kamali P Willett, Skadden Arps Slate Meagher & Flom, New York, NY; Linda Wong Cenedella, Skadden Arps, New York, NY.

For JP Morgan Chase & Co., Defendant: Noelle M Reed, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Houston, TX; Peter Edward Greene, LEAD ATTORNEY, Boris Bershteyn, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Cyrus Amir-Mokri, Skadden Arps Slate Meagher & Flom LLP, New York, NY; Kamali P Willett, Skadden Arps Slate Meagher & Flom, New York, NY; Linda Wong Cenedella, Skadden Arps, New York, NY; Michael Y Scudder, Skadden, Arps, Slate, Meagher & Flom LLP, Chicago, IL.

For Fifth **[*63]** Third Bancorp, Defendant: Eliot Fielding Turner, LEAD ATTORNEY, PRO HAC VICE, Norton Rose Fulbright US LLP, Houston, TX; Patrick F. Fischer, LEAD ATTORNEY, Charles M. Miller, Joseph M. Callow, Trenton B. Douthett,, Keating Muething & Klekamp PLL, Cincinnati, OH; Benjamin G. Stewart, Keating Muething & Klekamp, PLL, Cincinnati, OH; Brenna L. Penrose, Keating Muething & Klekamp PLL, Cinncinnati, OH; Drew M. Hicks, Richard L. Creighton, Keating Muething & Klekamp, Cincinnati, OH.

For Bank Of America, N.A., Defendant: Adam James Hunt, LEAD ATTORNEY, Michael B. Miller, Morrison & Foerster LLP, New York, NY; Cameron Andrew Tepfer, Jeffrey K. Rosenberg, Mark P. Ladner, Robert James Baehr, LEAD ATTORNEYS, Morrison & Foerster, New York, NY.

For Visa International Service Association, Blair Eden Kaminsky, LEAD ATTORNEY, Demian Alexander Ordway, Michael Shuster, Richard J. Holwell, Holwell Shuster & Goldberg LLP, New York, NY; Charles Conrow Murphy, Jr., Ellen G. Schlossberg, LEAD ATTORNEYS, PRO HAC VICE, Vaughan & Murphy, Atlanta, GA; Jayme Alyse Jonat, Robert J. Morrow, LEAD ATTORNEYS, Holwell Shuster Goldberg LLP, New York, NY; Jennifer A. Kenedy, LEAD ATTORNEY, P. Russell Perdew, Lord Bissell **[*64]** & Brook, Chicago, IL; Lee L. Kaplan, LEAD ATTORNEY, PRO HAC VICE, Smyser Kaplan & Veselka, LLP, Houston, NY; Mark R. Merley, LEAD ATTORNEY, PRO HAC VICE, Arnold & Porter LLP, Washington, DC; Robert John Vizas, LEAD ATTORNEY, Arnold and Porter LLP, San Francisco, CA; Sharon D. Mayo, LEAD ATTORNEY, PRO HAC VICE, Arnold & Porter Kaye Scholer LLP, San Francisco, CA; Zachary Adam Kerner, LEAD ATTORNEY, Holwell Shuster & Goldberg, New York, NY; Edward C. Fitzpatrick, Randall A. Hack, Lord, Bissell & Brook LLP, Chicago, IL; Karen Otto, Arnold & Porter LLP, Washington, DC; Laura J. Butte, Arnold & Porter Kaye Scholer, Washington, DC; Leigh-Anne St. Charles, PRO HAC VICE, Arnold & Porter LLP, Washington, DC; Michael J. Gaertner, Locke, Lord, Bissell & Liddell, LLP, Chicago, IL; Robert S. Jones, Rosemary Szanyi, Arnold & Porter Kaye Scholer LLP, Washington, DC; Robert C. Mason, Arnold & Porter Kaye Scholer LLP, New York, NY; Ron Ghatan, Arnold & Porter LLP, Washington, DC.

For Visa U.S.A. Inc., Defendant: Blair Eden Kaminsky, LEAD ATTORNEY, Demian Alexander Ordway, Michael Shuster, Holwell Shuster & Goldberg LLP, New York, NY; Jayme Alyse Jonat, Robert J. Morrow, LEAD ATTORNEYS, Holwell Shuster **[*65]** Goldberg LLP, New York, NY; Lee L. Kaplan, LEAD ATTORNEY, PRO HAC VICE, Smyser Kaplan & Veselka, LLP, Houston, NY; Mark R. Merley, LEAD ATTORNEY, PRO HAC VICE, Robert S. Jones, Rosemary Szanyi, Arnold & Porter Kaye Scholer LLP, Washington, DC; Robert C. Mason, LEAD ATTORNEY, Arnold & Porter Kaye Scholer LLP, New York, NY; Robert John Vizas, LEAD ATTORNEY, Arnold and Porter LLP, San Francisco, CA; Sharon D. Mayo, LEAD ATTORNEY, PRO HAC VICE, Arnold & Porter Kaye Scholer LLP, San Francisco, CA; Zachary Adam Kerner, LEAD ATTORNEY, Holwell Shuster & Goldberg, New York, NY; Anthony D. Boccanfuso, Arnold & Porter, New York, NY; Karen Otto, Leigh-Anne St. Charles, Ron Ghatan, Arnold & Porter LLP, Washington, DC; Laura J. Butte, Arnold & Porter Kaye Scholer, Washington, DC; Richard J. Holwell, Holwell Shuster & Goldberg LLP, New York, NY.

For Bank of America Corporation, Defendant: Adam James Hunt, LEAD ATTORNEY, Michael B. Miller, Morrison & Foerster LLP, New York, NY; Cameron Andrew Tepfer, Jeffrey K. Rosenberg, Mark P. Ladner, Robert James Baehr, LEAD ATTORNEYS, Morrison & Foerster, New York, NY; Eliot Fielding Turner, LEAD ATTORNEY, PRO HAC VICE, Norton Rose Fulbright US LLP, Houston, TX; **[*66]** Layne E. Kruse, LEAD ATTORNEY, PRO HAC VICE, Fulbright & Jaworski LLP, Houston, TX.

For Texas Independent Bancshares, Inc., Defendant: Dennis R Bettison, LEAD ATTORNEY, PRO HAC VICE, Bettison Doyle et al, Galveston, TX; Adam S. Mocciolo, Pullman & Comley, LLC, Bridgeport, CT; Robert M. Frost, Zeldes, Needle & Cooper, P.C., Bridgeport, CT.

For First National Bank of Omaha, Defendant: Eliot Fielding Turner, LEAD ATTORNEY, PRO HAC VICE, Norton Rose Fulbright US LLP, Houston, TX.

For Barclays Financial Corp., Defendant: James P. Tallon, Shearman & Sterling, New York, NY; Nicholas Maurice Menasche, Shearman & Sterling LLP, New York, NY.

For Chase Paymentech Solutions, LLC, Defendant: Kamali P Willett, Skadden Arps Slate Meagher & Flom, New York, NY.

For Wachovia Bank, NA., Wachovia Corporation, Defendants: Norman W. Kee, Peter Abraham Nelson, LEAD ATTORNEYS, Patterson Belknap Webb & Tyler, New York, NY; Robert P. LoBue, Vivian Ruth Mills Storm, LEAD ATTORNEYS, Terra Hittson, Patterson, Belknap, Webb & Tyler LLP, New York, NY.

For Discover Financial Services, Defendant: Dana Lynn Cook-Milligan, Winston and Strawn LLP, San Francisco, CA; Elizabeth P Papez, Winston and Strawn LLP, Washington, DC; **[*67]** Eva W. Cole, Jeffrey L. Kessler, Johanna Rae Hudgens, Winston & Strawn LLP, New York, NY; James Franklin Herbison, Winston and Strawn LLP, Chicago, IL; Sean D. Meenan, PRO HAC VICE, Jeanifer Ellen Parsigian, Winston and Strawn, San Francisco, CA.

For Unlimited Vacations and Cruises Inc, Top Gun Wrecker, Orange County Bldg Materials, Bishop, Defendants: John Jacob Pentz, III, LEAD ATTORNEY, John J. Pentz, Esq., Sudbury, MA.

For Daviss Donuts and Deli, Defendant: John Jacob Pentz, III, LEAD ATTORNEY, PRO HAC VICE, John J. Pentz, Esq., Sudbury, MA.

For Lane Courkamp, Permier Enterprises Group, Defendants: Daniel L. Brown, Sheppard, Mullin, Richter & Hampton, New York, NY.

For Class Action Recovery Service, Defendant: Dennis M. Campbell, LEAD ATTORNEY, PRO HAC VICE, Mershon, Sawyer, Johnston, Dunwody & Cody, Miami, FL.

For Refund Recovery Services, LLC, Defendant: Robert M. Gardner, PRO HAC VICE, Gardner Law Office, Burnsville, MN.

For Electronic Payment Systems, LLC, Electronic Payment Systems, LLC, Defendants: Scotty P. Krob, LEAD ATTORNEY, PRO HAC VICE, Krob Law Office, LLC, Greenwood Village, CO.

For Jonbro, Defendant: Brent O. Hatch, Shaunda L. McNeill, LEAD ATTORNEYS, HATCH JAMES & DODGE, **[*68]** SALT LAKE CITY, UT.

For Visa Europe Limited, Visa Europe Services Inc., Defendants: James R. Warnot, Jr., LEAD ATTORNEY, Linklaters LLP, New York, NY; Demian Alexander Ordway, Holwell Shuster & Goldberg LLP; Robert C. Mason, Arnold & Porter Kaye Scholer LLP.

For Visa Inc., Defendant: Blair Eden Kaminsky, Demian Alexander Ordway, LEAD ATTORNEYS, Holwell Shuster & Goldberg LLP, New York, NY; Jayme Alyse Jonat, Robert J. Morrow, LEAD ATTORNEYS, Holwell Shuster Goldberg LLP, New York, NY; Lee L. Kaplan, LEAD ATTORNEY, PRO HAC VICE, Smyser Kaplan & Veselka, LLP, Houston, NY; Mark R. Merley, LEAD ATTORNEY, Leigh-Anne St. Charles, PRO HAC VICE, Karen Otto, Ron Ghatan, Arnold & Porter LLP, Washington, DC; Robert John Vizas, LEAD ATTORNEY, Arnold and Porter LLP, San Francisco, CA; Sharon D. Mayo, LEAD ATTORNEY, PRO HAC VICE, Arnold & Porter Kaye Scholer LLP, San Francisco, CA; Zachary Adam Kerner, LEAD ATTORNEY, Holwell Shuster & Goldberg, New York, NY; Laura J. Butte, Arnold & Porter Kaye Scholer, Washington, DC; Robert S. Jones, Rosemary Szanyi, Arnold & Porter Kaye Scholer LLP, Washington, DC; Robert C. Mason, Arnold & Porter Kaye Scholer LLP, New York, NY.

For Capital One Bank, (USA), N.A., **[*69]** Defendant: Abby Faith Rudzin, Andrew J. Frackman, LEAD ATTORNEYS, O'Melveny & Myers LLP, New York, NY; Jamie Alan Aycock, LEAD ATTORNEY, AZA, Houston, TX; John Zavitsanos, LEAD ATTORNEY, PRO HAC VICE, Ahmad Zavitsanos et al, Houston, TX; Jordan Lyn Warshauer, LEAD ATTORNEY, PRO HAC VICE, Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing P.C., Houston, TX.

For Chase Manhattan Bank USA, N.A., Defendant: Kamali P Willett, Skadden Arps Slate Meagher & Flom, New York, NY.

For Citibank (South Dakota), N.A., Defendant: David Graham, Sidley Austin Brown & Wood LLP, Chicago, IL.

For JP Morgan Chase Bank, N.A., Defendant: Noelle M Reed, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Houston, TX; Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Kamali P Willett, Skadden Arps Slate Meagher & Flom, New York, NY.

For Barclays Bank Delaware, Defendant: Brent Lockhart Brown, LEAD ATTORNEY, PRO HAC VICE, Cotten Schmidt Abbott LLP, Fort Worth, TX; Brian Calandra, James Tallon, LEAD ATTORNEYS, PRO HAC VICE, Shearman & Sterling LLP, New York, NY; Christopher Lanzalotto, LEAD ATTORNEY, PRO HAC VICE, Sherman & Sterling LLP, New York, NY.

For BA Merchant Services **[*70]** LLC, formerly known as National Processing, Inc, Defendant: Adam James Hunt, LEAD ATTORNEY, Morrison & Foerster LLP, New York, NY; Cameron Andrew Tepfer, Mark P. Ladner, Robert James Baehr, LEAD ATTORNEYS, Morrison & Foerster, New York, NY; Eliot Fielding Turner, LEAD ATTORNEY, PRO HAC VICE, Norton Rose Fulbright US LLP, Houston, TX; Layne E. Kruse, LEAD ATTORNEY, PRO HAC VICE, Fulbright & Jaworski LLP, Houston, TX.

For MBNA America Bank, N.A., Defendant: Adam James Hunt, LEAD ATTORNEY, Morrison & Foerster LLP, New York, NY; Cameron Andrew Tepfer, Mark P. Ladner, Robert James Baehr, LEAD ATTORNEYS, Morrison & Foerster, New York, NY.

For HSBC Finance Corporation, HSBC North America Holdings Inc, Defendants: Bradley C Weber, Roger Brian Cowie, LEAD ATTORNEYS, PRO HAC VICE, Locke Lord LLP, Dallas, TX; David Sapir Lesser, LEAD ATTORNEY, PRO HAC VICE, Wilmer Cutler Pickering Hale & Dorr, LLP, New York, NY; Perry A Lange, LEAD ATTORNEY, PRO HAC VICE, Wilmer Hale, Washington, DC.

For PNC Financial Services Group, Inc., Defendants: Bruce Allen Blefeld, LEAD ATTORNEY, PRO HAC VICE, Reed Smith LLP, Houston, TX; Edward William Duffy, LEAD ATTORNEY, PRO HAC VICE, ReedSmith LLP, Houston, TX; Frederick **[*71]** N. Egler, LEAD ATTORNEY, PRO HAC VICE, Reed Smith, Pittsburgh, PA.

For Suntrust Bank, Defendant: Jared M Slade, LEAD ATTORNEY, PRO HAC VICE, Alson Bird LLP, Dallas, TX; Nicolas W. Steenland, Alston & Bird LLP, New York, NY.

For Suntrust Banks Inc, Defendant: Jared M Slade, LEAD ATTORNEY, PRO HAC VICE, Alson Bird LLP, Dallas, TX.

For Wells Fargo Bank N.A., Defendant: Robert P. LoBue, Patterson, Belknap, Webb & Tyler LLP, New York, NY.

For Wells Fargo Merchant Services, LLC, Defendant: Charles Bedford Hampton, LEAD ATTORNEY, PRO HAC VICE, McGuireWoods LLP, Houston, TX.

For Visa Inc., Respondent: Blair Eden Kaminsky, LEAD ATTORNEY, Demian Alexander Ordway, Holwell Shuster & Goldberg LLP, New York, NY; Daniel M. Meyers, LEAD ATTORNEY, Arnold & Porter Kaye Scholer LLP, Chicago, IL; Nina Rachel Kanovitch, LEAD ATTORNEY, Holwell Shuster & Goldberg, New York, NY.

For Discover, ThirdParty Defendant: Matthew L. Cantor, LEAD ATTORNEY, Constantine Cannon, P.C., New York, NY.

MNZ Inc, Interpleader, Pro se.

HealthSource Pharmacy III B Inc., Interested Party, Pro se.

HealthSource Pharmacy III Inc., Interested Party, Pro se.

HealthSource Pharmacy II Inc., Interested Party, Pro se.

HealthSource Pharmacy Inc., **[*72]** Interested Party, Pro se.

Johnson Family Pharmacy, Interested Party, Pro se.

Home Convalescent Aids, Inc., Interested Party, Pro se.

Peace Pharmacy, Interested Party, Pro se.

Citizens Pharmacy, Interested Party, Pro se.

Fort Thomas Drug Center, Interested Party, Pro se.

Rocky Mountain Pharmacy of Estes Park, Interested Party, Pro se.

Hieber's Pharmacy, Interested Party, Pro se.

Newts Pharmacy LLC, Interested Party, Pro se.

Turner Drug, Interested Party, Pro se.

Shannon Hills Pharmacy, Interested Party, Pro se.

Faulkenberg Harth, Interested Party, Pro se.

Medical Towers Pharmacy, Interested Party, Pro se.

Downtown Drug, Interested Party, Pro se.

Monument Pharmacy, Inc., Interested Party, Pro se.

Jack's Market Pharmacy, Interested Party, Pro se.

Hayden Family Pharmacy, P.C., Interested Party, Pro se.

WHJ Enterprises, Interested Party, Pro se.

Arrochar Pharmacy, Interested Party, Pro se.

J&J Pharmacy, Interested Party, Pro se.

DJH, Inc., Interested Party, Pro se.

Kiowa County Pharmacy, LLC, Interested Party, Pro se.

Interested Party Abeldt's Gaslight Pharmacy, Pro se.

Abeldt's Gaslight Pharmacy, Interested Party, Pro se.

Charlie's Drug, Inc., Interested Party, Interested Party, Pro se.

Thornville Pharmacy, Interested **[*73]** Party, Pro se.

Emporium Pharmacy, Interested Party, Pro se.

Hillcrest Pharmacy, Interested Party, Pro se.

Anson Plaza Pharmacy, Interested Party, Pro se.

The Drug Store, Interested Party, Pro se.

Jim & Phil's Family Pharmacy LTD., Interested Party, Pro se.

Victory Tampa Medical Pharmacy, Interested Party, Pro se.

Medicap Pharmacy 8209, Interested Party, Pro se.

Northern Truck Equipment Corp. (Rapid City), Interested Party, Pro se.

Larimore Drug and Gift, Interested Party, Pro se.

RG Drug Corp, Interested Party, Pro se.

Portes Pharmacy, Inc., Interested Party, Pro se.

Douglas & Ogden Medical Center Pharmacy Inc., Interested Party, Pro se.

Olde Towne Pharmacy, Interested Party, Pro se.

Oakdale Pharmacy, Interested Party, Pro se.

Todds Discount Drugs, Interested Party, Pro se.

Lo Cost Pharmacy, Interested Party, Pro se.

Stoll's Pharmacy, Inc., DeBlaquiere Ent. Inc., doing business as White Cross Pharmacy, Interested Party, Pro se.

Soldotna Professional Pharmacy, Interested Party, Pro se.

Medicine Plus, Interested Party, Pro se.

Maddox Drugs, Interested Party, Pro se.

Kiefer Inc. D.B.A. Watson's City Drug, Interested Party, Pro se.

Park Plaza Pharmacy, Inc., Interested Party, Pro se.

Blende Drug Inc., Interested **[*74]** Party, Pro se.

Clinic Drug, Inc., Interested Party, Pro se.

St Bernard Drugs #2 LLC, Interested Party, Pro se.

The Apothecary, Interested Party, Pro se.

Almadad Inc. DBA / Bronx Pharmacy, Interested Party, Pro se.

Kelley Drug & Selections, Interested Party, Pro se.

A & H Stores, Inc., Interested Party, Pro se.

Frankenrose Restaurants, Inc., Interested Party, Pro se.

Golden Rock Pharmacy, Interested Party, Pro se.

Medicap Pharmacy, Interested Party, Pro se.

Village Drug Shop of Athens Inc., Interested Party, Pro se.

Elm Plaza Pharmacy, Interested Party, Pro se.

Mt. Olympus Compounding, Interested Party, Pro se.

Reliable Discount Pharmacy, Interested Party, Pro se.

Millers of Wyckoff, Inc., Interested Party, Pro se.

Sellersville Pharmacy, Interested Party, Pro se.

Chads Payless Pharmacy, Inc., Interested Party, Pro se.

Super Saver Pharmacy #4, LLC, Interested Party, Pro se.

Super Saver Pharmacy #3, LLC, Interested Party, Pro se.

Super Saver Pharmacy #2, LLC, Interested Party, Pro se.

Super Saver Pharmacy LLC, Interested Party, Pro se.

Camacho Pharmacy Supply, Inc., Interested Party, Pro se.

B. Green & Company, Inc., Interested Party, Pro se.

Estherville Drug, Inc. DBA Estherville Snyder Drug, Interested Party, **[*75]** Pro se.

Carrollwood Pharmacy, Interested Party, Pro se.

E Street Discount Pharmacy, Interested Party, Pro se.

Noble Pharmacy, Interested Party, Pro se.

Cottrill's Pharmacy, Inc., Interested Party, Pro se.

Union City Pharmacy, Interested Party, Pro se.

Medical Pharmacy & Supply, Interested Party, Pro se.

Waverly Pharmacy, Interested Party, Pro se.

Marengo Community Pharmacy, Inc., Interested Party, Pro se.

Rider Pharmacy, Interested Party, Pro se.

Quincy Pharmacy, Interested Party, Pro se.

Harvard Family Physicians Pharmacy, Interested Party, Pro se.

Hoffman Drug-True Value, Interested Party, Pro se.

RP Healthcare, Inc., Interested Party, Pro se.

VM Pharmacy, Interested Party, Pro se.

Evans Pharmacy, Interested Party, Pro se.

BPRS, Inc. dba Avenue Pharmacy, Interested Party, Pro se.

Sooner Pharmacy of Davis, Inc., Interested Party, Pro se.

USave Pharmacy, Interested Party, Pro se.

Plateau Drugs, Inc., Interested Party, Pro se.

Bissell Pharmacy, Interested Party, Pro se.

Valley Mission Homecare Pharmacy, Interested Party, Pro se.

Bird's Hill Pharmacy, Inc., Interested Party, Pro se.

Duncan's Pharmacy, Inc., Interested Party, Pro se.

E&M Pharmacy, Interested Party, Pro se.

Anthony Pharmacy, Interested Party, **[*76]** Pro se.

M&M Pharmacy Corp dba Continental Drugs, Interested Party, Pro se.

Wilson Pharmacy, Interested Party, Pro se.

Concord Pharmacy, Inc., Interested Party, Pro se.

Bridges & James, Inc., DBA, Wannamaker Drug, Interested Party, Pro se.

Sherry's Discount Drug, Interested Party, Pro se.

RPB Pharmacy, Inc., DBA Pharmahealth Pharmacy, Interested Party, Pro se.

Pharmahealth Heuthorn, Inc., Interested Party, Pro se.

Pharmahealth Long Term Care, Inc., Interested Party, Pro se.

Seitz Drug Company, Inc., Interested Party, Pro se.

P&S Pharmacy LLC dba Wurtsboro Pharmacy, Interested Party, Pro se.

McLoud Clinic Pharmacy, Interested Party, Pro se.

Mark's Family Pharmacy, Interested Party, Pro se.

Minooka Pharmacy, Inc., Interested Party, Pro se.

Seeley Swan Pharmacy, Interested Party, Pro se.

Parkhill Pharmacy, Inc. dba, Lopez Island Pharmacy, Interested Party, Pro se.

Turtle Lake Rexall Drug, Interested Party, Pro se.

Osborn Drugs, Inc., Interested Party, Pro se.

Hayen Pharmacies, P.A. dba Paul's Pharmacy, Interested Party, Pro se.

Millersburg Pharmacy, Inc., Interested Party, Pro se.

Perry Drug, Inc., Interested Party, Pro se.

Liberty Drug, Interested Party, Pro se.

Pharmacy Services, Inc., Interested Party, Pro **[*77]** se.

Greenville Drug Store, Inc., Interested Party, Pro se.

Family Pharmacy & Med Serv International, Interested Party, Pro se.

Standard Pharmacy, Interested Party, Pro se.

Standard Pharmacy @ HealthFirst, Interested Party, Pro se.

Paris Apothecary, LLC, Interested Party, Pro se.

Johnson Drug aka Johnson Compounding and Wellness Center, Interested Party, Pro se.

Apothecare Pharmacy LLC, Interested Party, Pro se.

Lamas Drug, Inc. DBA Barre Family Pharmacy, Interested Party, Pro se.

Acton Pharmacy, Inc., Interested Party, Pro se.

Towne Pharmacy of Rincon, LLC, Interested Party, Pro se.

Perham Health Retail Pharmacy, Interested Party, Pro se.

Loris Drug Store, Inc., Interested Party, Pro se.

Adams Pharmacy, Inc., Interested Party, Pro se.

Headrick's Drug Store, Interested Party, Pro se.

Malheur Drug, Inc., Interested Party, Pro se.

Great Oak Pharmacy, Interested Party, Pro se.

Thompson Pharmacy & Medical, Interested Party, Pro se.

Lexar Corporation, Interested Party, Pro se.

Scepter Pharmacy, Interested Party, Pro se.

Focus Respiratory, Inc., Interested Party, Pro se.

Headland Discount Pharmacy, Interested Party, Pro se.

Hartig Drug Company, Inc., Interested Party, Pro se.

Doganieros Pharmacy Inc., Interested **[*78]** Party, Pro se.

Marshland Pharmacy, Inc., Interested Party, Pro se.

Tuttle's Pharmacy, Inc., Interested Party, Pro se.

Professional Pharmacy LLC, Interested Party, Pro se.

Prescription Center LLC, Interested Party, Pro se.

North Pole Prescription Lab. Inc., Interested Party, Pro se.

Peak Pharmacy Inc., Interested Party, Pro se.

Mifflintown Pharmacy Inc., Interested Party, Pro se.

Dollex Pharmacy, Interested Party, Pro se.

Dunes Family Pharmacy Inc., Interested Party, Pro se.

Roberds Pharmacy, Interested Party, Pro se.

East End Pharmacy, Inc., Interested Party, Pro se.

Hankinson Drug, Inc., Interested Party, Pro se.

J.E. Pierce Apothecary and Compound, Interested Party, Pro se.

Weatherly Area Community Pharmacy, Interested Party, Pro se.

Nash Drugs, Inc., Interested Party, Pro se.

Matthewson Drug Co., Interested Party, Pro se.

City Drug Co, Interested Party, Pro se.

MedPark Pharmacy, Inc., Interested Party, Pro se.

Tanglewood Pharmacy, Inc., Interested Party, Pro se.

RJT Pharmacy, Inc. DBA The Medicine Shoppe #0500, Interested Party, Pro se.

Gateway Pharmacy, Interested Party, Pro se.

Family Pharmacy of Dover, LLC, Interested Party, Pro se.

The Compounding Shoppe, Interested Party, Pro se.

The Medicine Shoppe, **[*79]** Interested Party, Pro se.

Wood Pharmacy, Interested Party, Pro se.

Mill Run Community Pharmacy, Interested Party, Pro se.

Jonestown Pharmacy, Interested Party, Pro se.

Healthlink Pharmacy, Interested Party, Pro se.

Pharma LLC DBA Sebring Pharmacy, Interested Party, Pro se.

Fisherville Pharmacy, LLC, Interested Party, Pro se.

Bucklow Pharmacy, Inc., Interested Party, Pro se.

Immediate Pharmaceutical Services, Inc., Interested Party, Pro se.

Towne Drugs Inc., Interested Party, Pro se.

Discount Drug Mart, Inc., Interested Party, Pro se.

Star Medical Center Pharmacy, Interested Party, Pro se.

Holst Pharmacy d/b/a The Medicine Store, Interested Party, Pro se.

Krittenbrink Pharmacy, Interested Party, Pro se.

Pharm-A-Save Inc., Interested Party, Pro se.

Sumpter Pharmacy, Inc., Interested Party, Pro se.

Medicap Pharmacy, Interested Party, Pro se.

Pineland Pharmacy, Interested Party, Pro se.

Yorkville Drugstore, Interested Party, Pro se.

Ider Discount Drugs, Inc., Interested Party, Pro se.

Donlon Healthmart Pharmacy, Interested Party, Pro se.

R&M Drugs, Interested Party, Pro se.

Hawco, Inc. dba Ver Helst Drug Center, Interested Party, Pro se.

West Pointe Pharmacy, Interested Party, Pro se.

Minersville Pharmacy, Interested **[*80]** Party, Pro se.

Orange Pharmacy, Interested Party, Pro se.

Kansas Pharmacy LLC, Interested Party, Pro se.

Catoosa Family Pharmacy, LLC, Interested Party, Pro se.

Four Star Drug of Bethany, Inc., Interested Party, Pro se.

Trumm Drug, Inc., Interested Party, Pro se.

Lindsay Drug Co., Inc., Interested Party, Pro se.

Elliott Plaza Pharmacy, LLC, Interested Party, Pro se.

Valley Pharmacy, Interested Party, Pro se.

Inola Drug Inc., Interested Party, Pro se.

Family Drug, Interested Party, Pro se.

Bouvier Pharmacy Inc., Interested Party, Pro se.

Brown's Main Street Pharmacy, Inc., Interested Party, Pro se.

Langston Drug Store, Interested Party, Pro se.

Ron's Pharmacy, Inc., Interested Party, Pro se.

WPR Food Enterprises, LLC, Interested Party, Pro se.

Lawson Pharmacy, Interested Party, Pro se.

Powell Foods of 104th Street, LLC, Interested Party, Pro se.

Los Ebanos Pharmacies and Home Health Care, Inc., Interested Party, Pro se.

Robert Fox Inc, Interested Party, Pro se.

Wilderness Center Pharmacy Inc., Interested Party, Pro se.

Doctors Park Pharmacy, Interested Party, Pro se.

Louis Morgan Drugs No. 5 Inc., Interested Party, Pro se.

Vet's Oil Company Inc, Interested Party, Pro se.

Kems Pharmacy/optiMed Pharmacy/D&C **[*81]** enterprise Inc., Interested Party, Pro se.

Elkton Family Pharmacy, Interested Party, Pro se.

MJKL Enterprises, MJKL Enterprises Midwest, Pizza Revolucion, and Frontier Star, Interested Party, Pro se.

Clayton Hometown Pharmacy, Interested Party, Pro se.

Patient Care Pharmacy, Interested Party, Pro se.

Stop-N-Go Foodmart, Interested Party, Pro se.

Elmer Hometown Pharmacy, Interested Party, Pro se.

Lindberg Pharmacy, Interested Party, Pro se.

Lindenwold Hometown Pharmacy, Interested Party, Pro se.

Trader Gus Shell, Interested Party, Pro se.

Central Avenue Pharmacy Inc., Interested Party, Pro se.

Matlack Hometown Pharmacy, Interested Party, Pro se.

Riverside Hometown Pharmacy, Interested Party, Pro se.

Buy For Less Discount Pharmacy dba Sheridan Express Pharmacy, Interested Party, Pro se.

Spruce Mountain Pharmacy, Interested Party, Pro se.

Byard-Mercer Pharmacy, Interested Party, Pro se.

Community Pharmacy, Inc., Interested Party, Pro se.

Total Care Pharmacy, Interested Party, Pro se.

Glenview Apothecary Inc., Interested Party, Pro se.

The Medicine Shoppe, Interested Party, Pro se.

Dairyland Depot, Interested Party, Pro se.

Jordan Pharmacy Inc., Interested Party, Pro se.

Medicine Shoppe and Washington Healthmart **[*82]** Medford Food Co-op, Interested Party, Pro se.

Gore Green County Drug, Inc., Interested Party, Pro se.

The Medicine Shoppe, Interested Party, Pro se.

Nicson, Inc. and Abrams BP, Inc., Interested Party, Pro se.

Family Pharmacy of Chester LLC dba Victor Drugs Healthmart, Interested Party, Pro se.

Prairie Drug, Interested Party, Pro se.

Westpark Discount Pharmacy, Interested Party, Pro se.

The Country Squire Disc. Pharmacy, Inc., Interested Party, Pro se.

Mike Biehl D.B.A. Golden Sands Mini Mart, Interested Party, Pro se.

City Limits C-Store, Interested Party, Pro se.

Glen Ed Pharmacy, Interested Party, Pro se.

Trilogy Health Care, LLC, Interested Party, Pro se.

Upper Darby Pharmacy, Interested Party, Pro se.

Double Quick Inc., Gresham Service Stations and Tobacco Quick, Interested Party, Pro se.

Coleman Oil Company, Interested Party, Pro se.

Vanderheyden Enterprise LLC, Interested Party, Pro se.

S&K Med Pharmacy, Interested Party, Pro se.

M.W.S. Enterprises, Inc., Interested Party, Pro se.

Jon's Drug Inc., Interested Party, Pro se.

Peakside Pharmacy Care Center, Interested Party, Pro se.

Thompson Oconto Enterprises Inc., Interested Party, Pro se.

Nord's Pharmacy & Gifts Inc., Interested Party, Pro se.

Gresham **[*83]** Petroleum Co., Gresham McPherson Oil Co., Quick 7 Star, Triple Stop, One Stop Market, Windham Service Station, and Byrd Service Station, Interested Party, Pro se.

Kidd Healthmart Drug Co., Inc., Interested Party, Pro se.

Pilot Travel Centus LLC, Interested Party, Pro se.

R&Q Corporation, Interested Party, Pro se.

MTG Management Inc, Interested Party, Pro se.

Lawrence Drug Inc., Interested Party, Pro se.

Kidsmeds Pharmacy, Interested Party, Pro se.

Dundee Pharmacy, Interested Party, Pro se.

R&R Health Care Solutions, Inc., Interested Party, Pro se.

Salem Crossroads Apothecary, Interested Party, Pro se.

Jeffrey P. Biddle Inc. dba Village Pharmacy, Interested Party, Pro se.

Investing Associates Inc., Interested Party, Pro se.

Keystone Pharmacy, Interested Party, Pro se.

Meadow Valley Pharmacy, Interested Party, Pro se.

Golden Cove Pharmacy, Interested Party, Pro se.

Quick Check Convenience Store, Inc., Interested Party, Pro se.

Tunkhannock Compounding Center, Interested Party, Pro se.

Pill Box Inc., Interested Party, Pro se.

Quick Check Corp., Interested Party, Pro se.

Kirk's Pharmacy, Inc., Interested Party, Pro se.

Winola Pharmacy, Interested Party, Pro se.

Kirk's Pharmacy at Sunrise, Interested Party, **[*84]** Pro se.

Konicki Pharmacy, Interested Party, Pro se.

Steaks N Stuff Lincoln, Interested Party, Pro se.

IDM Pharmacy/Dollar Maven, Interested Party, Pro se.

Kirk's Pharmacy at Hartland, Interested Party, Pro se.

Towne Drugs Inc., Interested Party, Pro se.

Country Yankee Grocer, Interested Party, Pro se.

Goody Koontz Drug Store Inc., Interested Party, Pro se.

Yorkville Drugstore, Interested Party, Pro se.

Getman-Apothecary Shoppe, Interested Party, Pro se.

Pharmacy World Inc., Interested Party, Pro se.

FMS Pharmacy, Interested Party, Pro se.

Leon's Medical Clinic Pharmacy, Interested Party, Pro se.

By-Lo Oil Co., Speedy Q Markets, Inc. Craig Food Stores, Inc. and Lawrence Oil Co., Interested Party, Pro se.

English Plaza Pharmacy, Interested Party, Pro se.

Shop-N-Go, Interested Party, Pro se.

Montevallo Drug, Interested Party, Pro se.

Brighton-Eggert Pharmacy, Interested Party, Pro se.

RTTF Enterprises, Interested Party, Pro se.

Northern Bedford Pharmacy, Interested Party, Pro se.

Brabham Oil Co., Inc., Interested Party, Pro se.

J&S Professional Pharmacy, Inc., Interested Party, Pro se.

Hampton Allied Pharmacy, Interested Party, Pro se.

Esco Drug Co., Interested Party, Pro se.

North Scranton CFM LLC, Interested **[*85]** Party, Pro se.

Little Five Points Pharmacy Inc., Interested Party, Pro se.

Galva Pharmacy, Interested Party, Pro se.

Thrifty Drug Stores, Inc., Interested Party, Pro se.

Nebraska Grocery Industry Association, Inc., Interested Party, Pro se.

Southall Pharmacy, PLLC, Interested Party, Pro se.

Dusini Drug Inc., Interested Party, Pro se.

Bull City Homebrew, Interested Party, Pro se.

Foster's Eastside Pharmacy, Interested Party, Pro se.

Hartig Drug Company, Inc., Interested Party, Pro se.

Corner Pharmacy, LLC, Interested Party, Pro se.

Madison Pharmacy, Interested Party, Pro se.

Curtis Convenience Stores, Inc., Interested Party, Pro se.

Reed's Family Pharmacy, Interested Party, Pro se.

Island Pharmacy, Interested Party, Pro se.

Liebe Drug Inc., Interested Party, Pro se.

Suburban Pharmacy, Interested Party, Pro se.

Speedy Car Wash, LLC, Interested Party, Pro se.

Pharmacy Center, Interested Party, Pro se.

Thrifty Way Pharmacy of St. Martinville, Interested Party, Pro se.

Mission Trail Oil Co., Interested Party, Pro se.

Robinson Oil Corp., Interested Party, Pro se.

Schmidt Oil Co., Inc., Interested Party, Pro se.

Fabulous Freddy's, Interested Party, Pro se.

Northwest Petroleum, LP, Interested Party, Pro se.

Braker **[*86]** Park, LP, Interested Party, Pro se.

Farmacia CDT Cayey, Interested Party, Pro se.

M & D Star Drug Inc., Interested Party, Pro se.

LeeMak 529, LLC, Interested Party, Pro se.

LeeMak Jarrell, LLC, Interested Party, Pro se.

LeeMak Normandy, LLC, Interested Party, Pro se.

LeeMak Lakeline, LLC, Interested Party, Pro se.

LeeMak Teravista, LLC, Interested Party, Pro se.

Westbrook Park Pharmacy, Interested Party, Pro se.

Galeton Drug, Interested Party, Pro se.

LeeMak St John, LLC, Interested Party, Pro se.

LeeMak Wilson, LLC, Interested Party, Pro se.

Corkreans The Pharmacist, Interested Party, Pro se.

LeeMak Beechnut, LLC, Interested Party, Pro se.

Canby Drug & Gifts, Interested Party, Pro se.

Weick's Pharmacy, Interested Party, Pro se.

North Dallas Petroleum, LP, Interested Party, Pro se.

Hideg Pharmacy Inc., Interested Party, Pro se.

Toms One Stop, Interested Party, Pro se.

Main Street Apothecary, Interested Party, Pro se.

LB Metcalf, Inc, Interested Party, Pro se.

Bolton's Pharmacy II, Inc, Interested Party, Pro se.

Old Corner Drug, Interested Party, Pro se.

Island Drug, Interested Party, Pro se.

David Michael Foods Inc, Interested Party, Pro se.

Minersville Pharmacy, Interested Party, Pro se.

Jeffrey Michael Foods **[*87]** Inc, Interested Party, Pro se.

William Michael Foods Inc, Interested Party, Pro se.

Ken's Pharmacy, Interested Party, Pro se.

Cynthia D Lee Enterprises Inc, Interested Party, Pro se.

OrangeSubway Inc., Interested Party, Pro se.

Stilwell Pharmacy, Interested Party, Pro se.

Hometown Subways, LLC, Interested Party, Pro se.

Medic Pharmacy, Interested Party, Pro se.

Johnston Drug, Inc., Interested Party, Pro se.

Randy's Pharmacy, Inc., Interested Party, Pro se.

C & B Warehouse Distributing, Inc., Interested Party, Pro se.

The Corner Drug Store, Interested Party, Pro se.

P & P Marketplace dba Pump & Pantry, Interested Party, Pro se.

Hospital Pharmacy, Inc., Interested Party, Pro se.

Trag Industries Incorporated, Interested Party, Pro se.

Linden Drug Co., Inc., Interested Party, Pro se.

Hometown subways, LLC, Interested Party, Pro se.

Doyle's Drug, Interested Party, Pro se.

Redinger Pharmacy, Interested Party, Pro se.

Trinity & Zamora Investments Inc, Interested Party, Pro se.

Dunaway's Imperial Pharmacy, Interested Party, Pro se.

Ike's 25th Street Exxon, Interested Party, Pro se.

Ike's Airport Garage, Interested Party, Pro se.

Zitomer - Z Chemists - Thriftway Far Rockaway Drug, Interested Party, Pro se.

Ikes Airport **[*88]** Sunoco, Interested Party, Pro se.

Friends Pharmacy, Inc., Interested Party, Pro se.

Ike's Shell, Interested Party, Pro se.

Valley Pharmacy, Interested Party, Pro se.

Five J's Service CO LLC, Interested Party, Pro se.

Bob Johnson's Pharmacy, Interested Party, Pro se.

Subway #14951, Interested Party, Pro se.

Tahoka Drug, Interested Party, Pro se.

Ross Fogg Fuel Oil Company, Interested Party, Pro se.

Prescriptions Compunding Pharmacy, Interested Party, Pro se.

Hoagies, Inc. dba Subway, Interested Party, Pro se.

Budny Humidifier, Interested Party, Pro se.

Eagle Petroleum, Interested Party, Pro se.

Budny Fuel Oil Company, Interested Party, Pro se.

Hometown Subways, LLC, Interested Party, Pro se.

JW Pierson Co, Interested Party, Pro se.

Super Subways Inc, Interested Party, Pro se.

Mazzo Oil, Interested Party, Pro se.

Vatterman's Sand Point Pharmacy, Interested Party, Pro se.

GMD Services, Inc., Interested Party, Pro se.

Theraderm, Inc., Interested Party, Pro se.

Deull Fuel Company, Interested Party, Pro se.

Z-Stop Drugs, Inc., Interested Party, Pro se.

Lakeview Pharmacy, Interested Party, Pro se.

LeMars Subway Inc., Interested Party, Pro se.

Foulk's Service Inc, Interested Party, Pro se.

Smith Drug, PLLC, Interested **[*89]** Party, Pro se.

TMB Corporation, Interested Party, Pro se.

jada prooperties, Interested Party, Pro se.

Hominy Rexall, Inc., Interested Party, Pro se.

Jasland, Inc dba Subway Sandwich Shop, Interested Party, Pro se.

Merwin Long Term Care, Inc., Interested Party, Pro se.

V & P Inc, Interested Party, Pro se.

Rushville Pharmacy, Interested Party, Pro se.

Puckett Discount Pharmacy, Interested Party, Pro se.

marty inc dba subway, Interested Party, Pro se.

WB Drug, Interested Party, Pro se.

marty inc dba subway, Interested Party, Pro se.

South Miami Pharmacy, Inc., Interested Party, Pro se.

South Miami Pharmacy II, Inc., Interested Party, Pro se.

South Miami Pharmacy Compounding, LLC, Interested Party, Pro se.

Hutton Pharmacy, Interested Party, Pro se.

Payne Family Pharmacy, Interested Party, Pro se.

Greenwood-Stearns Enterprises, Interested Party, Pro se.

GDK Enterprises, Inc., Interested Party, Pro se.

Harvard Family Physicians Pharmacy, Interested Party, Pro se.

SVG Enterprises Inc, Interested Party, Pro se.

Subway of Ozarks Eldon, Interested Party, Pro se.

Martin's Pharmacy, Interested Party, Pro se.

Quick Meds Express Pharmacy, Interested Party, Pro se.

Subco Enterprises Inc, Interested Party, Pro se.

Martin's **[*90]** Pharmacy in Piggly Wiggly, Interested Party, Pro se.

Medicap Pharmacy, Interested Party, Pro se.

nchise Owner, Interested Party, Pro se.

Eichelberger Subs Inc., Interested Party, Pro se.

Medicap Pharmacy #8011, Interested Party, Pro se.

Spurgeon's 66 Service, Interested Party, Pro se.

Medicap Pharmacy #8036, Interested Party, Pro se.

VCM Inc., Interested Party, Pro se.

Oberlin Subway Inc, Interested Party, Pro se.

Medicap Pharmacy #8043, Interested Party, Pro se.

Clairmont Development, Inc dba Subway #23607, Interested Party, Pro se.

Bomber, Inc. DBA Subway, Interested Party, Pro se.

Medicap Pharmacy #8052, Interested Party, Pro se.

Medicap Pharmacy #8057, Interested Party, Pro se.

Clairmont Capital Corp dba Subway #23529, Interested Party, Pro se.

subway, Interested Party, Pro se.

Lo Cost Pharmacy, Interested Party, Pro se.

NB Subs, LLC, Interested Party, Pro se.

Lo Cost Pharmacy, Interested Party, Pro se.

Getzville Subs, LLC, Interested Party, Pro se.

Blount Discount Pharmacy, Inc., Interested Party, Pro se.

Medicap Pharmacy #8287, Interested Party, Pro se.

DeBlaquiere Ent. Inc. doing business as White Cross Pharmacy, Interested Party, Pro se.

Terrence J McMorrow dba Subway, Interested Party, Pro se.

Mullins **[*91]** Pharmacy, Interested Party, Pro se.

Sioux Falls Subway, Inc., Interested Party, Pro se.

Leier Investments, Inc. DBA Subway Sandwiches, Interested Party, Pro se.

Joslyn's Food Center, Interested Party, Pro se.

RCM Subs, Inc., Interested Party, Pro se.

F & M Morton Co, Interested Party, Pro se.

D. Gigme, Inc., Interested Party, Pro se.

Sherman Enterprises Inc., Interested Party, Pro se.

Terrence McMorrow dba Subway, Interested Party, Pro se.

North Coast Subway Inc., Interested Party, Pro se.

J A Hoover Associates Inc, Interested Party, Pro se.

Discover Subway Inc., Interested Party, Pro se.

Dinero Inc, Interested Party, Pro se.

SharJen Inc. d/b/a Subway, Interested Party, Pro se.

JL Subs Inc, Interested Party, Pro se.

Scott County Pharmacy, Inc., Interested Party, Pro se.

Newport Subway Inc, Interested Party, Pro se.

Nicholasville Pharmacy Services Inc., Interested Party, Pro se.

North Bernen Pharmacy, Interested Party, Pro se.

Subway stores 228089 and 39268, Interested Party, Pro se.

Kenmar Pharmacy Inc., Interested Party, Pro se.

Poole's Pharmacy Inc., Interested Party, Pro se.

T&M Pharmacy, Inc., Interested Party, Pro se.

Five Rivers Subs Inc, Interested Party, Pro se.

E&L Subway Sandwich Shop Inc., Interested **[*92]** Party, Pro se.

Howell Mill Pharmacy, Inc., Interested Party, Pro se.

Eagleridge Subs Inc., Interested Party, Pro se.

Moore Pharmacy, Interested Party, Pro se.

Murphy Subs Inc., Interested Party, Pro se.

Moden-Giroux Inc. dba Thee Barker Store, Interested Party, Pro se.

Subway #27630, Interested Party, Pro se.

Massachusetts Independent Pharmacists Association, Interested Party, Pro se.

Summit Park Pharmacy Inc., Interested Party, Pro se.

Keyes Drug, Inc., Interested Party, Pro se.

West Pueblo Subs Inc., Interested Party, Pro se.

Lockport Pharmacy Inc. dba Lockport Home Medical Equipment, Interested Party, Pro se.

Gibsons Pharmacy / Medical Arts Pharmacy, Interested Party, Pro se.

Moden-Giroux Inc. dba Transit Hill Pharmacy, Interested Party, Pro se.

Great Oak Pharmacy, Interested Party, Pro se.

Rosenkrans Pharmacy Inc. dba Hilton Family Pharmacy, Interested Party, Pro se.

MNZ Inc, Interested Party, Pro se.

Rosenkrans Pharmacy Inc. dba Oakfield Family Pharmacy, Interested Party, Pro se.

Pueblo Subway Inc., Interested Party, Pro se.

Rosenkrans Pharmacy Inc., Interested Party, Pro se.

Hipp Drug, Interested Party, Pro se.

Hyde Druge Store, Interested Party, Pro se.

D & G Duncan Ent. Inc., Interested Party, Pro **[*93]** se.

Tura's Pharmacy Inc., Interested Party, Pro se.

KRSNA Inc., Interested Party, Pro se.

Letourneau's Pharmacy Inc., Interested Party, Pro se.

Cayucos Pharmacy, Interested Party, Pro se.

Keystone Pharmacy Alliance, Interested Party, Pro se.

Thorson LLC dba Subway, Interested Party, Pro se.

Bridges & James Inc. dba Wannamaker Drug, Interested Party, Pro se.

Subway #36165, Inc., Interested Party, Pro se.

R&S Drug Stores, Inc., Interested Party, Pro se.

TDC Enterprises, LP, Interested Party, Pro se.

Pasadena Pharmacy, Interested Party, Pro se.

Satdad Subway, Interested Party, Pro se.

Sai Subway, Interested Party, Pro se.

Motihera Inc., Interested Party, Pro se.

Bragdon & Company Inc, Interested Party, Pro se.

SKV Inc, Interested Party, Pro se.

GM Towers, Inc, Interested Party, Pro se.

Highhouse Oil Co., Inc., Interested Party, Pro se.

Riggs Oil Company, Interested Party, Pro se.

Vandegrift Investment Corp., Interested Party, Pro se.

Convenient Food Mart #175, Inc., Interested Party, Pro se.

FEBE Brothers, Ltd., Interested Party, Pro se.

Genaud Drugs LLC, Interested Party, Pro se.

MH Commonwealth, Inc., Interested Party, Pro se.

Denville Sub LLC, Interested Party, Pro se.

Haledon Sub LLC, Interested Party, Pro **[*94]** se.

The Learning Tree, LLC, Interested Party, Pro se.

Yorkville Drugstore, Interested Party, Pro se.

Cochran Brothers Co., Interested Party, Pro se.

Towne Drugs, Inc., Interested Party, Pro se.

Woolpets, LLC, Interested Party, Pro se.

Indeliclae LLC dba Ebenezer Books, Interested Party, Pro se.

Northgate Cinema, Inc., Interested Party, Pro se.

Kwik Chek Food Stores, Inc., Interested Party, Pro se.

Pennsylvania Toy Academy & Party Shop, Inc., Interested Party, Pro se.

Wymore Superette, Interested Party, Pro se.

Lowry's Books, Interested Party, Pro se.

Wymore Liquor LLC, Interested Party, Pro se.

Cusick Corporation, Interested Party, Pro se.

Vintners Distributors, Inc., Interested Party, Pro se.

Midwest Petroleum Company, Interested Party, Pro se.

Nakash Enterprises, LLC, Interested Party, Pro se.

Panama Mainstreet Corp., Interested Party, Pro se.

Dougs Hometown Foods, Interested Party, Pro se.

Stompin Grounds Plus, Inc. dba Aunt Bea's Pantry, Interested Party, Pro se.

Doc's Deli'licious, Interested Party, Pro se.

Collamer Stop & Shop, Interested Party, Pro se.

Jimmy Kwik Store, Interested Party, Pro se.

Citgo Quick Mart, Interested Party, Pro se.

Mason Corporation, Interested Party, Pro se.

Westhall Inc., Interested **[*95]** Party, Pro se.

Dragon's Toy Box LLC, Interested Party, Pro se.

GPMS Inc. dba Wind Up Here, Interested Party, Pro se.

Clark's Pharmacy, Interested Party, Pro se.

Pedretti, Inc., Interested Party, Pro se.

Dabblers LLC, Interested Party, Pro se.

Sperring Enterprises Inc. dba Burlingame Valero, Interested Party, Pro se.

Family Rexall Drug, Interested Party, Pro se.

Thomas Myers, Interested Party, Pro se.

Hollin Hall Automotive Services, Inc., Interested Party, Pro se.

Parker's, Interested Party, Pro se.

Don Ritter Group - Ritter Express Pharmacy, Interested Party, Pro se.

TSP Enterprises LLC dba Dorsett Mobil, Interested Party, Pro se.

Just Imagine Toys, Interested Party, Pro se.

Mabardy Oil Inc. Salisbury Mini Mart Inc., Seabrok One Stop, Inc., Interested Party, Pro se.

Steaks N' Stuff PI, Interested Party, Pro se.

Book House of Stuyveant Plaza, Inc., Interested Party, Pro se.

Pester Marketing, Interested Party, Pro se.

Moody Book Corporation, Interested Party, Pro se.

kiddywampus, Interested Party, Pro se.

Thompson Oconto Enterprises, Inc., Interested Party, Pro se.

Stevenson's Hi-Pointe Standard Service Inc., Interested Party, Pro se.

Clifford's Pet Specialties, Interested Party, Pro se.

More Than Convenience, **[*96]** Interested Party, Pro se.

Kay Jays Doll Shoppe, Interested Party, Pro se.

Calico cat Toy Shoppe, Interested Party, Pro se.

Nutfield Trading, LLC dba Troy Country Store, Interested Party, Pro se.

Sutton Superette, LLC, Interested Party, Pro se.

Buddy's Mini-Marts, Interested Party, Pro se.

Wayside South LLC, Interested Party, Pro se.

Children's World Uniform Supply, Interested Party, Pro se.

Integrity Auto, Interested Party, Pro se.

Wayside, Inc., Interested Party, Pro se.

Captus LLc dba Earth Explorer Toys, Interested Party, Pro se.

Mazen Owydat, Interested Party, Pro se.

Inter Island Petroleum, Inc., Interested Party, Pro se.

Melrose Pharmacy, Interested Party, Pro se.

Flowerama, Interested Party, Pro se.

Play Clothes, LLC, Interested Party, Pro se.

Home Oil Company, LLC, Interested Party, Pro se.

Ports Petroleum Co., Interested Party, Pro se.

Steve's Madhouse Market Inc., Interested Party, Pro se.

Meeks Mart, Interested Party, Pro se.

Driver Heating Oil, Inc, Interested Party, Pro se.

Pyramid Books, Interested Party, Pro se.

E & S Service LLC dba Community Exxon, Interested Party, Pro se.

Waters Auto Centers Inc. dba McCausland Auto Center & dba Kirkwood Service Center, Interested Party, Pro se.

Degen Properties, **[*97]** Inc., Interested Party, Pro se.

Texas Trail Market, Interested Party, Pro se.

Swarthmore College Bookstore, Interested Party, Pro se.

Franchisee 7-Eleven, Interested Party, Pro se.

Medicap Pharmacy, Interested Party, Pro se.

Citgo Quik Mart, Interested Party, Pro se.

In Gathering, Inc., Interested Party, Pro se.

PL Squared, Inc., Interested Party, Pro se.

For Little Pub Holdings, LLC, Interested Party: Sherli Shamtoub, PRO HAC VICE, Brownstein Hyatt Farber Schreck, LLP, Los Angeles, CA.

City of De Pere, Interested Party, Pro se.

Hansen's AutoCare, Inc., Interested Party, Pro se.

Dollar General Corporation, Interested Party, Pro se.

For Dollar General Corporation, Interested Party: Joseph Michael Vanek, LEAD ATTORNEY, PRO HAC VICE,Vanek, Vickers & Masini, P.C., Chicago, IL.

The Trading Post LLC, Interested Party, Pro se.

Tommy Bahama Group, Inc., Interested Party, Pro se.

The Association of Kentucky Fried Chicken Franchisees, Inc., Interested Party, Pro se.

Sugartown Worldwide LLC, Interested Party, Pro se.

Oxford Industries, Inc., Interested Party, Pro se.

Sheetz, Inc., Interested Party, Pro se.

Waffle House, Inc., Interested Party, Pro se.

Ozark Waffles, LLC, Interested Party, Pro se.

East Coast Waffles, **[*98]** Inc., Interested Party, Pro se.

Mid South Waffles, Inc., Interested Party, Pro se.

Midwest Waffles, Inc., Interested Party, Pro se.

Pizzoli LLC, Interested Party, Pro se.

Pilot Travel Centers LLC, Interested Party, Pro se.

National Association of Convenience Stores, Interested Party, Pro se.

Vegas Tapas LLC, DBA Stripburger, Interested Party, Pro se.

C.N. Brown Company, Interested Party, Pro se.

Tommy Bahama R&R Holdings, Inc., Interested Party, Pro se.

Northbrook Seafood LLC, Interested Party, Pro se.

Melcar, Inc., Interested Party, Pro se.

Petterino's LLC, Interested Party, Pro se.

Eiffel Tower LLC, Interested Party, Pro se.

Vegas Tapas LLC, Interested Party, Pro se.

One Fin, Inc., Interested Party, Pro se.

Water Tower Place Restaurants LP, Interested Party, Pro se.

Hough Petroleum Corp., Interested Party, Pro se.

Bob Brandi Stations, Inc., Interested Party, Pro se.

Eat in the Mall Too, Inc., Interested Party, Pro se.

Tucci of Arizona, LP, Interested Party, Pro se.

Reston Canteen LLC, Interested Party, Pro se.

Labone, Inc. DBA Tucci Benucch, Interested Party, Pro se.

Labone Limited Partnership, Interested Party, Pro se.

Dearborn Hubbard LLC, Interested Party, Pro se.

Tucci of Minnesota, Inc., Interested **[*99]** Party, Pro se.

Joe's Stone Crab of Chicago LLC, Interested Party, Pro se.

Joe's of Las Vegas LLC, Interested Party, Pro se.

Phase One LLC, Interested Party, Pro se.

Make It Special LLC, Interested Party, Pro se.

Shaw's Schaumburg LLC, Interested Party, Pro se.

Vegas Tapas LLC, DBA Stripburger, Interested Party, Pro se.

LGO Santa Monica LLC, Interested Party, Pro se.

L. Woods LLC, Interested Party, Pro se.

M Street Kitchen LLC, Interested Party, Pro se.

Lettuce Entertain You Enterprises, Inc., Interested Party, Pro se.

Lettuce Entertain You Enterprises, Inc. DBA Lettuce Frequent Diner's Club, Interested Party, Pro se.

Lettuce Wine Club LLC, DBA Lettuce Wine Cellars, Interested Party, Pro se.

OVS LLC, DBA M Burger Ontario, Interested Party, Pro se.

M Burger Thompson LLC, DBA M Burger Thompson, Interested Party, Pro se.

Just B'Claws, Inc., Interested Party, Pro se.

M Street Kitchen LLC, DBA M Street Kitchen, Interested Party, Pro se.

Just B'Claws, Inc., DBA Shaw's Crab House - Chicago, Interested Party, Pro se.

Jessica's High Ceilings, Inc., Interested Party, Pro se.

The Crepe Stand LLC, DBA Magic Pan Crepe Stand, Interested Party, Pro se.

Magic Pan Northbrook LLC, DBA Magic Pan Crepe Stand, Interested Party, **[*100]** Pro se.

Osteria Wheeling LLC, Interested Party, Pro se.

Magic Pan - Ridgedale LLC, DBA Magic Pan Crepe Stand - Ridgedale, Interested Party, Pro se.

Kremeworks Hawaii LLC, Interested Party, Pro se.

Kremeworks Oregon LLC, Interested Party, Pro se.

Mon Ami Bethesda LLC, DBA Mon Ami Gabi - Bethesda, Interested Party, Pro se.

Kremeworks Oregon LLC, DBA Krispy Kreme- Clackamas, Interested Party, Pro se.

Kremeworks Oregon LLC, DBA Krispy Kreme- Beaverton, Interested Party, Pro se.

La Creme, Inc., DBA Mon Ami Gabi - Chicago, Interested Party, Pro se.

Mon Ami Bethesda LLC, DBA Mon Ami Gabi - Bethesda, Interested Party, Pro se.

Mon Ami Gabi Development LLC, DBA Mon Ami Gabi - Oakbrook, Interested Party, Pro se.

Mon Ami Reston LLC, DBA Mon Ami Gabi - Reston, Interested Party, Pro se.

NFG Salem, LLC, Interested Party, Pro se.

NFG Portland, LLC, Interested Party, Pro se.

NFG Seattle, LLC, Interested Party, Pro se.

French Cafe LLC, DBA Mon Ami Gabi, Interested Party, Pro se.

Seal Pizza, LLC, Interested Party, Pro se.

Nacional LLC, DBA NACIONAL 27, Interested Party, Pro se.

OVS LLC, DBA OSTERIA VIA STATO/PIZZARIA, Interested Party, Pro se.

EMB State LP, DBA PAPAGUS - CHICAGO, Interested Party, Pro se.

Papagus Oakbrook, **[*101]** Inc., DBA PAPAGUS - OAKBROOK, Interested Party, Pro se.

Petterino's LLC, DBA PETTERINO'S, Interested Party, Pro se.

Oak Brook Seafood LLC, DBA REEL CLUB, Interested Party, Pro se.

Lettuce Entertain You Enterprises, Inc., DBA RJ GRUNTS, Interested Party, Pro se.

River North Italian LLC, DBA RPM ITALIAN, Interested Party, Pro se.

Wildfire Eden Prairie LLC, DBA WILDFIRE - EDEN PRAIRIE, Interested Party, Pro se.

Wildfire Glenview LLC, DBA WILDFIRE - GLENVIEW, Interested Party, Pro se.

Wildfire, Inc., DBA WILDFIRE - LINCOLNSHIRE, Interested Party, Pro se.

Wildfire, Inc., DBA WILDFIRE - OAK BROOK, Interested Party, Pro se.

Wildfire Schaumburg LLC, DBA WILDFIRE - SCHAUMBURG, Interested Party, Pro se.

Wildfire Tysons LLC, DBA WILDFIRE - TYSON, Interested Party, Pro se.

Wow Bao Jackson LLC, DBA WOW BAO - JACKSON, Interested Party, Pro se.

Wow Bao Jackson LLC, DBA WOW BAO WIRELESS - JACKSON, Interested Party, Pro se.

Wow Bao 225 LLC, DBA WOW BAO-MICHIGAN, Interested Party, Pro se.

Wow Bao State Lake LLC, DBA WOW BAO - STATE AND LAKE, Interested Party, Pro se.

Wow Bao Buns LLC, DBA WOW BAO - WATERTOWER, Interested Party, Pro se.

Kremeworks Washington LLC, DBA KRISPY KREME - ISSAQUAH, Interested Party, Pro se. **[*102]**

Kremeworks Washington LLC, DBA KRISPY KREME - SPOKANE, Interested Party, Pro se.

Kremeworks Washington LLC, DBA KRISPY KREME - NORTH SEATTLE, Interested Party, Pro se.

Kremeworks Washington LLC, DBA KRISPY KREME - SODO, Interested Party, Pro se.

Kremeworks Washington LLC, DBA KRISPY KREME - BURLINGTON, Interested Party, Pro se.

Kremeworks Washington LLC, DBA KRISPY KREME - TACOMA, Interested Party, Pro se.

Kremeworks Washington LLC, DBA KRISPY KREME - PUYALLUP, Interested Party, Pro se.

Payson Professional Management Corp., Interested Party, Pro se.

MCL Main & Alma Restaurant, LLC, Interested Party, Pro se.

Citgo Quik Mart, Interested Party, Pro se.

Christina Wallerstein, Interested Party, Pro se.

MCL Catalina Restaurant, Inc., Interested Party, Pro se.

Tucson Restaurants, Inc., Interested Party, Pro se.

MCL Tucson Alvernon Restaurant, Inc., Interested Party, Pro se.

Lincoln Skyline Deli, Interested Party, Pro se.

MCL Gilbert Road Restaurants, LLC, Interested Party, Pro se.

MCL Happy Valley Restaurant, LLC, Interested Party, Pro se.

MCL Camp Verde Restaurant, LLC, Interested Party, Pro se.

Showtop Restaurants, Inc., Interested Party, Pro se.

MCL River & LaCholla Restaurant, LLC, Interested Party, Pro **[*103]** se.

Cumberland Farms, Inc & Gulf Oil Limited Partnership, Interested Party, Pro se.

MCL Country Club Restaurant, LLC, Interested Party, Pro se.

MCL Prescott Restaurants, LLC, Interested Party, Pro se.

MCL Enterprises, Inc., Interested Party, Pro se.

MCL Whiteriver Restaurant, LLC, Interested Party, Pro se.

Watermark Donut Company DBA Dunkin Donuts, Interested Party, Pro se.

Epstein Porter 2, LLC DBA Dunkin Donuts, Interested Party, Pro se.

Epstein Porter 1, LLC DBA Dunkin Donuts, Interested Party, Pro se.

David Michael's Salon, LLC, Interested Party, Pro se.

Zuri, Inc. DBA Dunkin Donuts / Baskin Robbins, Interested Party, Pro se.

Division "L" DBA Dunkin Donuts, Interested Party, Pro se.

Western "L" DBA Dunkin Donuts, Interested Party, Pro se.

Jordan Pizza, LLC, Interested Party, Pro se.

Dakota Direct Furniture, LLC, Interested Party, Pro se.

Maverik, Inc., Interested Party, Pro se.

Equilon Enterprises LLC, Interested Party, Pro se.

Motiva Enterprises LLCEquilon Enterprises LLC, Interested Party: Charles Babcock, PRO HAC VICE, Jackson Walker LLP, Houston, TX.

Motiva Enterprises LLC, Interested Party, Pro se.

For Motiva Enterprises LLC, Interested Party: Charles Babcock, PRO HAC VICE, Jackson Walker LLP, **[*104]** Houston, TX.

Shimurima II, Inc., Interested Party, Pro se.

Shimurima, Inc., Interested Party, Pro se.

Gourmet Catalog Inc., Interested Party, Pro se.

Old Warsaw Restaurant, Interested Party, Pro se.

Swarovski, Interested Party, Pro se.

For Managed Care Advisory Group, Inc., Interested Party: Joe R. Whatley, Jr., LEAD ATTORNEY, Patrick J. Sheehan, Whatley Drake & Kallas LLC, New York, NY.

For Heartland Payment Systems, Inc., Interested Party: Jason Brown, Ropes & Gray LLP, New York, NY; Seth C. Harrington, Ropes & Gray LLP, Boston, MA.

For Global Payments Inc., Interested Party: John Felix Cambria, LEAD ATTORNEY, Alston and Bird, New York, NY.

For Settlement Recovery Group, LLC, Interested Party: Neil S. Binder, LEAD ATTORNEY, Binder & Schwartz LLP, New York, NY.

For Spectrum Settlement Recovery LLC, Interested Party: Eric L. Lewis, Lewis Baach PLLC, Washington, DC.

For Listed Entities, Interested Party: Deborah E. Arbabi, PRO HAC VICE, Daniel A. Sasse Crowell & Moring LLP, Irvine, CA; Kelly T. Currie, Crowell & Moring, LLP, New York, NY.

For Class Action Recovery Services, Interested Party: Dennis M. Campbell, LEAD ATTORNEY, Mershon, Sawyer, Johnston, Dunwody & Cody, Miami, FL.

For Claims Compensation **[*105]** Bureau, LLC, Interested Party: Brian Dale Graifman, LEAD ATTORNEY, Borah, Goldstein, Altschuler, Nahins & Goidstein, P.C., New York, NY; Howard B. Sirota, LEAD ATTORNEY, Howard B. Sirota, Hollywood, FL.

For Manor Capital Recovery, LLC, Interested Party: Mark G. Trigg, LEAD ATTORNEY, PRO HAC VICE, Greenberg Traurig, LLP, Atlanta, GA.

For Stephen Greiner, Interested Party: Stephen William Greiner, LEAD ATTORNEY, Willkie Farr & Gallagher LLP, New York, NY.

For Gary Friedman, Interested Party: Gary B. Friedman, LEAD ATTORNEY, Friedman Law Group LLP, New York, NY; Samuel Issacharoff, Samuel Issacharoff, Esq., New York, NY; Theresa Trzaskoma, Brune & Richard LLP, New York, NY.

For Willkie Farr & Gallagher LLP, Interested Party: Robert J. Jossen, LEAD ATTORNEY, Swidler, Berlin, Shereff & Friedman, LLP, New York, NY.

For PNC Bank National Association, Interested Party: Frederick N. Egler, LEAD ATTORNEY, PRO HAC VICE, Reed Smith, Pittsburgh, PA; Jennifer P Snyder, Dilworth Paxson LLP, Philadelphia, PA.

For Carlison Transportation, Inc., Interested Party: Frederic S. Fox, LEAD ATTORNEY, Kaplan Fox & Kilsheimer LLP, New York, NY; Hae Sung Nam, Kaplan, Kilsheimer & Fox, LLP, New York, NY.

For Boss Dental **[*106]** Care PLLC, Interested Party: Anne Kristin Fornecker, LEAD ATTORNEY, Hilliard Munoz Gonzales LLP, Corpus Christi, TX; Bart D. Cohen, LEAD ATTORNEY Berger & Montague, P.C., Philadelphia, PA; Donald S. Nation, LEAD ATTORNEY, PRO HAC VICE, Hilliard & Shadowen LLP, Austin, TX; Linda P. Nussbaum, LEAD ATTORNEY, Nussbaum Law Group, PC, New York, NY; Matthew C. Weiner, LEAD ATTORNEY, PRO HAC VICE, Hilliard & Shadowen LLP, Austin, TX; Steve D. Shadowen, LEAD ATTORNEY, PRO HAC VICE, Hilliard & Shadowen LLP, Austin, TX; Brian M. Hogan, PRO HAC VICE, Freed Kanner London & Millen LLC, Bannockburn, IL; Daniel Lawrence Berger, Deborah A. Elman, Robert G. Eisler, Grant & Eisenhofer P.A., New York, NY; Michael J. Freed, PRO HAC VICE, Freed Kanner London & Millen LLC, Bannockburn, IL; Robert J. Wozniak, Freed Kanner London & Millen LLC, Bannockburn, IL.

For rue21, Inc., Interested Party: Carter Hoel, Meyer Darragh Buckler Bebenek & Eck, PLLC, Pittsburgh, PA.

For Tavern Hospitality Group Holdings, LLC d/b/a Tavern Hospitality Group, Interested Party: Sherli Shamtoub, PRO HAC VICE, Brownstein Hyatt Farber Schreck, LLP, Los Angeles, CA.

For rue21, Inc., Interested Party: Edward G. Brandenstein, Paul Robinson, **[*107]** Meyer Darragh Buckler Bebenek & Eck, P.L.L.C., Pittsburgh, PA.

For Financial Recovery Strategies, Inc., Interested Party: Eric Todd Kanefsky, LEAD ATTORNEY, Calcagni & Kanefsky, UNITED STA, Newark, NJ.

For Cardtronics USA, Inc., Interested Party: Douglas P. Lobel, LEAD ATTORNEY, Cooley LLP, Reston, VA.

For The Clearing House Payments Company L.L.C. ("TCH"), Interested Party: Mary Gail Gearns, Richard S. Taffet, LEAD ATTORNEYS, Morgan Lewis & Bokius LLP, New York, NY.

For McKinsey & Company, Amicus: Marion Brenda Cooper, Drinker Biddle & Reath, Florham Park, NJ.

For ATMIA, ATMIA, Amicus: Anthony Joseph Staltari, LEAD ATTORNEY, Manatt, Phelps & Phillips, LLP, New York, NY; Benjamin G. Shatz, LEAD ATTORNEY, Manatt, Phelps & Phillips, LLP, Los Angeles, CA.

For Paypal, Inc., Amicus: Francis Michael Curran, LEAD ATTORNEY, McCormick & O'Brien, LLP, New York, NY.

For Amici Objecting States, Amici Objecting States, Amicus: Robert Lee Hubbard, New York Attorney General's Office, Attorney General's Office, New York, NY.

For Verifone, Inc., Subpoenaed third part, Material Witness: Karen P. Anderson, LEAD ATTORNEY, VeriFone, Inc., San Jose, CA.

For Mary Watson, Intervenor: David E. Kovel Kirby McInerney **[*108]** LLP, New York, NY.

For Keila Ravelo, Intervenor: Lawrence S. Lustberg, LEAD ATTORNEY, Jake F. Goodman, Gibbons, P.C., Newark, NJ; Steven H. Sadow, Steven H. Sadow, P.C., Atlanta, GA.

For Auriemma Consulting Group, Inc., Objector: Lita B. Wright, Storch Amini & Munves, P.C., New York, NY.

For A & D Wine Corp and other Objectors, Objector: Jerrold S. Parker, LEAD ATTORNEY, Parker & Waichman, LLC, Great Neck, NY.

For Home Depot U.S.A., Inc., Objector: Alicia K. Cobb, LEAD ATTORNEY, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, LLP-WA, Seattle, WA; Benjamin W. Thorpe, LEAD ATTORNEY, Bondurant, Mixson & Elmore, LLP, Atlanta, GA; Deborah K. Brown, LEAD ATTORNEY, Quinn Emanuel, New York, NY; Frank M. Lowrey, Ronan P. Doherty, LEAD ATTORNEYS, PRO HAC VICE, Bondurant Mixson & Elmore, LLP, Atlanta, GA; Steig David Olson, LEAD ATTORNEY, Quinn Emanuel Urquhart & Sullivan LLP, New York, NY; Stephen R. Neuwirth, LEAD ATTORNEY, Quinn Emanuel Urquhart & Sullivan, New York, NY.

For American Express Co., Objector: Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY; Rory Ann Leraris, LEAD ATTORNEY, Cravath Swaine & Moore LLP, New York, NY Eric Brenner, Boies, Schiller & Flexner **[*109]** LLP, New York, NY.

For American Eagle Outfitters, Inc., Objector: Jeanne Lahiff, LEAD ATTORNEY, Imbesi Law P.C., New York, NY; Richard Todd Victoria, LEAD ATTORNEY, Gordon & Rees LLP, Pittsburgh, PA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY.

For First Data Corporation, First Data Government Solutions, First Data Merchant Services Corporation, TASQ Technology, Inc., TRS Recovery Services Inc., Telecheck Services Inc., Landers McClarty Ford Chrysler Dodge Jeep, Landers McClarty Nissan, Landers McCLarty Dodge Chrysler Jeep, Landers Dodge Chrysler Jeep, Tri-Lakes Motors, Burleson Nissan, Bel Air Honda, Landers McClarty Toyota Scion, Nissan of Fort Worth, Landers McClarty Chevrolet, Landers McClarty Huntsville Dodge Chrysler Jeep, Mercedes Benz of Huntsville, Landers McClarty Nissan of Huntsville, Landers McClarty Subaru, Lees Summit Dodge Chrysler Jeep Ram, Lees Summit Nissan, Olathe Dodge Chrysler Jeep, Waxahachie Dodge Chrysler Jeep, Waxahachie Ford-Mercury, Landers Harley-Davidson Hot Springs, Landers Harley-Davidson Little Rock, Lander Harley-Davidson Conway, Landers Auto Group No. 1 d/b/a The Boutique at Landers Toyota, Landers Chrysler Jeep Dodge, LLC, Landers Chrysler **[*110]** Dodge Jeep d/b/a Landers Pre-Owned, Landers Chrysler Dodge Jeep d/b/a Landers Suzuki, A&D Wine Corp., A&Z Restaurant Corp., 105 Degrees, LLC, The Pantry Restaurant Group, LLC, PPT Inc., d/b/a Graffitis Restaurant, Sansoles Tanning Salon, Greenhaws, Inc., Dons Pharmacy, Incorporated, Gossett Motor Cars, Inc.- Tennessee, Gossett Motor Cars, Inc. - Georgia, JB Cook, LLC d/b/a Downtown Oil & Lube, Storage World Limited Partnership, LLC, Leisure Landing RV Park, Pinnacle Valley Liquor Store, Inc., Landers Brothers Auto No. 2, LLC f/d/b/a Landers Buick Pine Bluff, Landers Brothers Auto No. 3, LLC f/d/b/a Landers Hyundai Pine Bluff, Landers Brothers Auto No. 4, LLC f/d/b/a Landers Honda Jonesboro, Landers Brothers Auto No. 5, LLC f/d/b/a Landers Chrysler Dodge Jeep Pine Bluff, Objectors: Jason A. Yurasek, Perkins Coie LLP, San Francisco, CA.

For Landers Auto Group No. 1 d/b/a Landers Scion, Objector: Jerrold S. Parker, Parker & Waichman, LLC, Great Neck, NY; Jonathan Watson Cuneo, Cuneo, Gilbert & LaDuca LLP, Washington, DC.

For Landers Auto Group No. 1 d/b/a Landers Toyota, Objector: Benjamin David Elga, Cuneo Gilbert and LaDuca LLP, Brooklyn, NY; Jerrold S. Parker, Parker & Waichman, LLC, **[*111]** Great Neck, NY; Jonathan Watson Cuneo, Cuneo, Gilbert & LaDuca LLP, Washington, DC; Peter Gil-Montllor, Cuneo, Gilbert & LaDuca LLP, Brooklyn, NY.

For Landers Brothers Auto Group, Inc. f/d/b/a Landers Honda Pine Bluff, The Tennis Shoppe, Inc., The Grady Corporation (Bentonville Location) d/b/a Whole Hog Barbeque, The Grady Corporation II (Fayetteville Location) d/b/a Whole Hog Barbeque, Coulson Oil Company, Diamond State Oil, LLC, Superstop Stores, LLC, PetroPlus, LLC, Port Cities Oil, LLC, New Mercury, LLC, New Vista, LLC, New Neptune, LLC SVI Security Solutions, Objectors: Jerrold S. Parker, Parker & Waichman, LLC, Great Neck, NY.

For National ATM Council, Inc., ATMs Of The South, Inc., Business Resource Group, Inc., Cabe & Cato, Inc., Just Atms, Inc., Wash Water Solutions, Inc., ATM Bankcard Services, Inc., Meiners Development Company of Lee's Summit, Missouri, LLC, Mills-Tel Corp., Scot Gardner d/b/a SJI, Selman Telecommunications Investment Group, LLC, Turnkey ATM Solutions, LLC, Trinity Holdings Ltd., Inc. T & T Communications Inc. & Randall N. Bro d/b/a T & B Investments, Objectors: Don Allen Resnikoff, Washington, DC.

For Target Corporation, Macy's, Inc., J.C. Penney Corporation, **[*112]** Inc., Big Lots Stores, Inc., Ascena Retail Group, Inc., Objectors: Michael J. Canter, LEAD ATTORNEY, James D. Thomas, Kenneth J. Rubin, Mitchell A. Tobias, Nina I. Webb-Lawton, Robert N. Webner, Timothy B. McGranor, Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Alycia Nadine Broz, PRO HAC VICE, Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Douglas Robert Matthews, Vorys, Sater, Seymour and Pease, LLP, Columbus, OH; Gregory Alan Clarick, Isaac Berkman Zaur, Nicole L. Gueron, Clarick Gueron Reisbaum LLP, New York, NY; James A. Wilson, Kimberly Weber Herlihy, Vorys, Sater, Seymour and Pease, LLP (Columbus), Columbus, OH.

For The Gap, Inc., Dillard's, Inc., Objectors: Gregory Alan Clarick, Isaac Berkman Zaur, Nicole L. Gueron, Clarick Gueron Reisbaum LLP, New York, NY; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY.

For Limited Brands, Inc., Objector: Gregory Alan Clarick, Isaac Berkman Zaur, Nicole L. Gueron, Clarick Gueron Reisbaum LLP, New York, NY.

For The Neiman Marcus Group, Inc., Objector: Gregory Alan Clarick, Isaac Berkman Zaur, Nicole L. Gueron, Clarick Gueron Reisbaum LLP, New York, NY.

For Abercrombie & Fitch Co., Saks Incorporated, Chico's FAS, Inc., American **[*113]** Signature, Inc., Objectors: Michael J. Canter, LEAD ATTORNEY, Douglas Robert Matthews, James A. Wilson, Kenneth J. Rubin, Kimberly Weber Herlihy, Mitchell A. Tobias, Nina I. Webb-Lawton, Robert N. Webner, Timothy B. McGranor, Vorys, Sater, Seymour and Pease, Columbus, OH; Alycia Nadine Broz, PRO HAC VICE, Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Gregory Alan Clarick, Isaac Berkman Zaur, Clarick Gueron Reisbaum LLP, New York, NY; James D. Thomas, Vorys, Sater, Seymour and Pease LLP, Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Nicole L. Gueron, Clarick Gueron Reisbaum LLP, New York, NY.

For Bob Evans Farms, Inc., CKE Restaurants, Inc., Papa John's International, Inc., Boscov's Department Store, LLC, American Booksellers Association, National Association of College Stores, Objectors: Gregory Alan Clarick, Isaac Berkman Zaur, Clarick Gueron Reisbaum LLP, New York, NY; Nicole L. Gueron, Clarick Gueron Reisbaum LLP, New York, NY.

For National Retail Federation, Objector: Andrew G. Celli, Jr, LEAD ATTORNEY, Adam R. Pulver, Emery, Celli, Brinckerhoff & Abady LLP, New York, NY. Diane Lee Houk, Emery Celli Brinckerhoff & Abady LLP, New York, NY; Gregory Alan Clarick, Isaac Berkman **[*114]** Zaur, Nicole L. Gueron, Clarick Gueron Reisbaum LLP, New York, NY.

For Valuevision Media, Inc., Royal Caribbean Cruises LTD., Objectors: Cheryl L. Davis, Menaker & Herrmann LLP, New York, NY.

For American Express Travel Related Services Company, Inc., Objector: Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY; Rory Ann Leraris, LEAD ATTORNEY, Cravath Swaine & Moore LLP, New York, NY; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY.

For Travel Impressions, Ltd., American Express Publishing Corp., Objectors: Philip C. Korologos, LEAD ATTORNEY, Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY.

For U.S. Public Research Interest Group, Objector: Robert L. Begleiter, Schlam, Stone & Dolan, LLP, New York, NY.

For Kevan McLaughlin, Objector: John W. Davis, LEAD ATTORNEY, PRO HAC VICE, Law Office of John W. Davis, San Diego, CA.

For office depot, Objector: Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY.

For Discover Financial Services, Objector: William H. Pratt, LEAD ATTORNEY, Kirkland & Ellis, New York, NY. Jennifer M. Selendy, Quinn Emanuel Urquhart & Sullivan LLP, New York, NY.

For The City of Oakland, California, Academy, Ltd., **[*115]** Aldo US Inc., Barnes & Nobles, Inc, Best Buy Enterprise Services, Inc., BJ's Wholesale Club, Inc., Carter's, Inc., Costco Wholesale Corporation, Crate & Barrel Holdings, Inc., Darden Restaurants, Inc., David's Bridal, Inc., Dillard's, Inc., General Nutrition Corporation, Genesco Inc., The Gymboree Corporation, Ikea North America Services, LLC, J. Crew Group, Inc., Kwik Trip, Inc., Lowe's Companies, Inc., Michaels Stores, Inc., National Railroad Passenger Corporation (Amtrak), Nike, Inc., Panera, LLC, Petco Animal Supplies, Inc., Petsmart, Inc., RaceTrac Petroleum, Inc., Sears Holdings Corporation, Starbucks Corporation, Thermo Fisher Scientific Inc., The Wendy's Company, The Wet Seal, Inc., Alon USA Energy, Inc., Recreational Equipment, Inc., Cardtronics, Inc., Family Dollar, Inc., Objectors: Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY.

For 7-Eleven Inc., Objector: David Alan Scupp, Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY.

For Retail Industry Leaders Association, Objector: David G. Trachtenberg, LEAD ATTORNEY, Trachtenberg Rodes & Friedberg LLP, New York, NY; Michael C Rakower, LEAD ATTORNEY, Rakower Lupkin PLLC, New York, NY; Andrew G. Celli, Jr, **[*116]** Emery, Celli, Brinckerhoff & Abady LLP, New York, NY; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY.

For Wal-Mart Stores, Inc., Objector: Drew Hansen, LEAD ATTORNEY, PRO HAC VICE, Susman Godfrey L.L.P., Seattle, WA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY; John D. Comerford, Dowd Bennett LLP, Saint Louis, MO.

For Roundy's Supermarkets, Inc., Objector: William Jay Blechman, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY; Joshua Barton Gray, Kenny Nachwalter, P.A., Washington, DC.

For Einstein Noah Restaurant Group, Inc., Objector: Michiko Brown, LEAD ATTORNEY, Wheeler Trigg O'Donnell, Denver, CO; John M. Vaught, Kelly A. Laudenslager, Michael D. Alper, Wheeler Trigg O'Donnell LLP, Denver, CO.

For Barnes & Noble College Booksellers, LLC, Drury Hotels Company, LLC, Marathon Petroleum Company LP, Speedway LLC, Martin's Super Markets, Inc., Objectors: Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY.

For WellPoint, Inc., Objector: Robert N. Webner, Kenneth J. Rubin, Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Isaac Berkman Zaur, Clarick Gueron Reisbaum LLP, New York, NY.

For Bon-Ton **[*117]** Stores, Inc., Kohl's Corporation, L Brands, Inc., Luxottica U.S. Holdings Corp., Office Depot, Inc., OfficeMax Incorporated, Staples, Inc., TJX Companies, Inc., Objectors: Michael J. Canter, LEAD ATTORNEY, Alycia Nadine Broz, James D. Thomas, Kenneth J. Rubin, Mitchell A. Tobias, Nina I. Webb-Lawton, Robert N. Webner, Timothy B. McGranor, Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Douglas Robert Matthews, James A. Wilson, Kimberly Weber Herlihy, Vorys, Sater, Seymour and Pease, LLP (Columbus), Columbus, OH; Gregory Alan Clarick, Isaac Berkman Zaur, Nicole L. Gueron, Clarick Gueron Reisbaum LLP, New York, NY.

For The Iron Barley Restaurant, Objector: Steve A. Miller, LEAD ATTORNEY, Steve A. Miller, P.C., Denver, CO.

For SuperTest Service Stations of IN, Inc., Objector: Christopher Braun, Tonya Bond, PRO HAC VICE, Plews Shadley Racher & Braun LLP, Indianapolis, IN.

For 1001 Property Solutions LLC, Temple Eagle Partners LLC, Objectors: David Stein, LEAD ATTORNEY, Samuel & Stein, New York, NY.

For Fiesta Restaurant Group, Inc., Objector: Sanford H. Greenberg, LEAD ATTORNEY, Greenberg Freeman LLP, New York, NY.

For P.C. Richard & Son, Inc., YUM! Brands, Inc., HMSHost Corporation, Objectors: **[*118]** Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY.

For Auto Europe Holdings, Inc., Hertz UK Limited, Objectors: Brian A. Ratner, Hausfeld LLP, Washington, DC.

For Blue Cross Blue Shield entities, Objector: Wendy H. Schwartz, LEAD ATTORNEY, Binder & Schwartz LLP, New York, NY; Adam P. Feinberg, Anthony F. Shelley, Miller & Chevalier Chartered, Washington, DC.

For Barneys New York, Boston Market Corporation, Objectors: Cheryl L. Davis, Menaker & Herrmann LLP, New York, NY.

For The Egg Store, Objectors: Roger J. Maldonado, Balber Pickard Battistoni Maldonado & Van, Der Tuin, PC, New York, NY.

For T-Mobile USA, Inc., Objectors: Arun Srinivas Subramanian, Susman Godfrey LLP, New York, NY.

For Hermes of Paris, Inc., 99 Only Stores, Smart & Final Holdings, Inc., Objectors: Alyse Fiori Stach, LEAD ATTORNEY, Proskauer Rose LLP, New York, NY; Jonathan Peter Shaub, LEAD ATTORNEY, Prokauer Rose, New York, NY; Matthew Jared Skinner, LEAD ATTORNEY, Prookauer Rose LLP, New York, NY.

For Metropolitan Transportation Authority, Objector: Daniel Louis Russo, Helene Fromm, Metropolitan Transportation Authority, New York, NY.

For City of New York, Objector: Amy Nkemka Okereke, LEAD ATTORNEY, New York **[*119]** City Law Department, Office of the Corporation Counsel, Affirmative Litigation Division, New York, NY; Melanie C.T. Ash, LEAD ATTORNEY, New York City Law Department, New York, NY.

For Jon M Zimmerman, Objector: Joshua R. Furman, LEAD ATTORNEY, Joshua R. Furman Law Corp., Sherman Oaks, CA.

For DFS Services, LLC, Discover Home Loans, Inc., Discover Bank, Objectors: William H. Pratt, LEAD ATTORNEY, Kirkland & Ellis, New York, NY; Jennifer M. Selendy, Quinn Emanuel Urquhart & Sullivan LLP, New York, NY.

MILK JUG, Objector, Pro se.

Market Street Fast Serv Inc, Objector, Pro se.

For Buc-ee's Ltd, Objector: William R. H. Merrill, Susman Godfrey LLP (TX), Houston, TX.

For R&M Objectors, Objector: Jerrold S. Parker, Parker & Waichman, LLC, Great Neck, NY.

For Falls Auto Gallery dba Falls Car Collection, Objector: Sam P. Cannata, LEAD ATTORNEY, Cannata Phillips LPA, Cleveland, OH.

For Temple Eagle Partners LLC, Objector: David Stein, LEAD ATTORNEY, Samuel & Stein, New York, NY.

For Serve Virtual Enterprises, Inc, Amex Assurance Company, Accertify, Inc, ANCA 7 LLC, doing business as Vente Privee, USA, Objectors: Donald L. Flexner, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner

LLP, New York, NY; **[*120]** Eric Brenner, John Francis LaSalle, Philip C. Korologos, LEAD ATTORNEYS, Boies, Schiller & Flexner LLP, New York, NY.

For State of Arizona, State of California, Objectors: Robert Lee Hubbard, LEAD ATTORNEY, New York Attorney General's Office, New York, NY.

Judges: MARGO K. BRODIE, United States District Judge.

Opinion by: MARGO K. BRODIE

Opinion

MEMORANDUM & ORDER

MARGO K. BRODIE, United States District Judge:

A putative *Rule 23(b)(2)* class of millions of merchants commenced this antitrust action under the Clayton Act, *15 U.S.C. § 16*, to prevent and restrain violations of the *Sherman Act, 15 U.S.C. §§ 1* and *2*, and the *California Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq.*, seeking equitable relief against Defendants Visa, Inc. ("Visa") and Mastercard[1] networks (together, the "Network Defendants"), as well as various issuing and acquiring banks ("Bank Defendants").[2] *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 986 F. Supp. 2d 207, 213, 223 (E.D.N.Y. 2013)* (*Interchange Fees I*), *rev'd and vacated*, *827 F.3d 223 (2d Cir. 2016)* (*Interchange Fees II*); (Equitable Relief Class Action Compl ("Compl.")., Docket **[*122]** Entry No. 6892.) Plaintiffs seek to represent a class of merchants that accept Visa-and Mastercard-branded cards as forms of payment, and they allege that Defendants engage in anticompetitive conduct that harms competition and imposes supracompetitive and collectively fixed fees on the merchants. (Compl. ¶ 4.)

Currently before the Court is the putative *Rule 23(b)(2)* equitable relief class plaintiffs' ("Plaintiffs" or "*Rule 23(b)(2)* Class Plaintiffs")[3] motion for class certification, seeking to certify a class under *Rule 23(a)* and *Rule 23(b)(2) of the Federal Rules of Civil Procedure*. (*See* Pls.' Mot. for Class Certification ("Pls.' Mot."), Docket Entry No. 8444; Pls.' Mem. in Supp. of Pls.' Mot. ("Pls.' Mem."), Docket Entry No. 8447.) Direct Action Plaintiffs,[4] Grubhub Plaintiffs,[5] and Intervenors the Merchant Trade Groups and Walmart, Inc.[6] oppose certification of a mandatory class.[7] Defendants do not oppose class certification but argue that the class should be certified without opt-out rights. (*See* Defs.' Reply to Class Certification Opp'n ("Defs.' Reply"), Docket Entry No. 8460.)

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[1] Defendants Mastercard Incorporated and Mastercard International Incorporated are collectively referred to as "Mastercard."

[2] Defendants Bank of America, N.A.; BA Merchant Services LLC (f/k/a Defendant National Processing, Inc.); Bank of America Corporation; Barclays Bank plc; Barclays Bank Delaware; Barclays Financial Corp.; Capital One Bank, (USA), N.A.; Capital One F.S.B.; Capital One Financial Corporation; Chase Bank USA, N.A.; Chase Manhattan Bank USA, N.A.; ChasePaymentech Solutions, LLC; JP Morgan Chase Bank, N.A.; JPMorgan Chase & Co.; Citibank (South Dakota), N.A.; Citibank N.A.; Citigroup, Inc.; Citicorp; and Wells Fargo & Company are collectively referred to as the "Bank Defendants."

[3] Documents and filings refer to the *Rule 23(b)(2)* action in a variety of ways. In the multidistrict litigation ("MDL"), the *Rule 23(b)(2)* action has proceeded as *Barry's Cut Rate Stores Inc. v. Visa, Inc.*, No. 05-MD-1720. In addition, the action has sometimes been referred to as "*Barry's*" and the class referred to as the "equitable relief class" or the "injunctive relief class." Because the *Rule 23(b)(2)* Plaintiffs seek both declaratory and injunctive relief, and because Barry's Cut Rate Stores Inc. is no longer a party to this action, the Court uses the terms "*Rule 23(b)(2)*" and "equitable relief" to refer to the action, as opposed to "*Barry's*" and "injunctive relief" action.

[4] For purposes of this Memorandum and Order, "Direct Action Plaintiffs" collectively refers to the Target Plaintiffs, the 7-Eleven Plaintiffs, and Home Depot. The Target Plaintiffs and 7-Eleven Plaintiffs in turn are comprised of many other merchants, as described in their respective complaints. (*See* Target Pls.' Second Am. Compl., Docket Entry No. 7117); Sixth Am. Compl., *7-Eleven, Inc. v. Visa Inc.*, No. 13-CV-5746 (E.D.N.Y. Apr. 30, 2020), Docket Entry No. 180; (*see also* Decl. of Jeffrey I. Shinder in Supp. of Direct Action Pls.' Class Certification Opp'n ("Shinder Decl.") ¶ 3, Docket Entry No. 8451 (listing the Direct Action Plaintiffs)).

[5] "Grubhub Plaintiffs" refers to the seven companies described in the Grubhub Plaintiffs' operative Complaint. (*See* Grubhub Pls.' Am. Compl. ¶ 1, Docket Entry No. 7906.)

[6] On June 28, 2021, the Court granted Intervenors' motion for permissive intervention pursuant to *Rule 24 of the Federal Rules of Civil Procedure* for the limited purpose of opposing the *Rule 23(b)(2)* Class Plaintiffs' motion for class certification. (*See* Mem. and Order dated June 28, 2021, Docket Entry No. 8605.) "Merchant Trade Groups" refers to the National Retail Federation (the "NRF") and the Retail Industry Leaders Association (the "RILA"). (*See id.* at 2.)

[7] (*See* Direct Action Pls.' Mem. in Opp'n to Pls.' Mot. ("Direct Action Pls.' Opp'n"), Docket Entry No. 8450; Grubhub Pls.' Mem. in Opp'n to Pls.' Mot. ("Grubhub Pls.' Opp'n"), Docket Entry No. 8454; Walmart's Mem. in Opp'n to Pls.' Mot. ("Walmart's Opp'n"), Docket Entry No. 8465; Merchant Trade Groups Mem. in Opp'n to Pls.' Mot. ("Merchant Trade Groups' Opp'n"), Docket Entry No. 8468-1.) The CenturyLink Plaintiffs, as described in their respective complaint, (*see* CenturyLink Pls.' Second Am. Compl., Docket Entry No. 7874), join in the Direct Action Plaintiffs' opposition to Plaintiffs' motion, (*see* CenturyLink Pls.' Notice of Joinder, Docket Entry No. 8475).

For the reasons set forth below, the Court grants Plaintiffs' motion for class certification **[*123]** in part and denies it in part.

I. Background

The Court assumes familiarity with the facts and extensive procedural history as set forth in prior decisions. *See* *Interchange Fees II, 827 F.3d at 223*; *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig. (Interchange Fees IV), No. 05-MD-1720, 2019 U.S. Dist. LEXIS 217583, 2019 WL 6875472 (E.D.N.Y. Dec. 16, 2019)*; *Barry's Cut Rate Stores Inc. v. Visa, Inc., No. 05-MD-1720, 2019 U.S. Dist. LEXIS 205335, 2019 WL 7584728 (E.D.N.Y. Nov. 20, 2019)*; *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig. (Interchange Fees III), 330 F.R.D. 11 (E.D.N.Y. 2019)*; *Interchange Fees I, 986 F. Supp. 2d at 213*; (*see also* Compl.). The Court therefore provides only a summary of the relevant facts and procedural history.

a. Prior settlement approval and class certification

On November 27, 2012, Judge John Gleeson granted preliminary approval of a jointly submitted class settlement agreement (the "2013 Settlement Agreement"). *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2012 WL 12929536, at *1 (E.D.N.Y. Nov. 27, 2012). Judge Gleeson also provisionally certified two separate classes for settlement purposes only: (1) a mandatory *Rule 23(b)(2)* settlement class seeking equitable relief, from which class members could not opt out, and (2) a *Rule 23(b)(3)* class seeking damages, from which class members could opt out.[8] *See id.* at *1-2. After issuance of notice to the class and an allotted period for putative class members to object to or opt out of the settlement, on April 11, 2013, the parties moved for final approval of the settlement. (Notice of Mot. and Mot. for Class Pls.' Final Approval of Settlement, Docket Entry No. 2111.)

After holding a fairness hearing on September 12, 2013, Judge Gleeson granted final approval of the 2013 Settlement Agreement **[*124]** on December 13, 2013.[9] *See* *Interchange Fees I, 986 F. Supp. 2d at 213, 240*. Under the terms of the 2013 Settlement Agreement, the Defendants agreed to pay a cash award of $7.25 billion, before reductions for opt-outs and other expenses, to the *Rule 23(b)(3)* class members, and to implement reforms of the Defendants' rules and practices to settle the claims of the *Rule 23(b)(2)* class members.[10] *Id. at 213, 217*.

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[8] Under *Rule 23*, members of a class certified under *Rule 23(b)(3)* are afforded "opt-out" rights, or the right to exclude themselves from the class. *Fed. R. Civ. P. 23(c)(2)(B)(v)*.

[9] To assist with his determination, Judge Gleeson appointed an economic and legal expert, Dr. Alan O. Sykes of New York University School of Law, to aid the court in weighing the settlement agreement and accompanying expert reports because "[t]he proponents of the settlement disagree[d] strongly with the objectors over the economic value of the proposed settlement to the class members, and specifically over the benefits of the proposed rules changes to the merchant class." *See* *Interchange Fees I, 986 F. Supp. 2d at 218*. Dr. Sykes filed his written analysis with the court on August 28, 2013. (Report from Ct. Appointed Expert Professor Alan O. Sykes, Docket Entry No. 5965.)

[10] The reforms included, among other things, "Visa and MasterCard rule modifications to permit merchants to surcharge on Visa- or MasterCard-branded credit card transactions at both the brand and product levels"; "[a]n obligation on the part of Visa and MasterCard to negotiate interchange fees in good faith with merchant buying groups"; "[a]uthorization for merchants that operate multiple businesses under different 'trade names' or 'banners' to accept Visa and/or MasterCard at fewer than all of its businesses"; and "[t]he locking-in of the reforms in the Durbin Amendment [of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010] and the [United States Department of Justice ("DOJ")] consent decree with Visa and MasterCard, even if those reforms are repealed or otherwise undone." *Interchange Fees I, 986 F. Supp. 2d at 217*. The Durbin Amendment "limited the interchange fee that issuing banks could charge for debit card purchases, and allowed merchants to discount debit card purchases relative to credit card purchases." *Interchange Fees II, 827 F.3d at 229*. In the DOJ consent decree, "after an investigation assisted by the information developed by the [P]laintiffs," and following lawsuits that the DOJ initiated against Visa, Mastercard, and American Express in 2010, *Interchange Fees I, 986 F. Supp. 2d at 215*, "Visa and

b. The Second Circuit's reversal

On June 30, 2016, the Second Circuit vacated the settlement and remanded for further proceedings. *Interchange Fees II, 827 F.3d at 240*. Objectors to the settlement and plaintiffs that chose to opt out of the class prior to final approval argued on appeal that the "class action was improperly certified and that the settlement was unreasonable and inadequate." *Id. at 227*. The Second Circuit agreed that the class was improperly certified and held that the class certification requirement of adequate representation under *Rule 23(a)(4)* had not been satisfied.[11] *Id.* The Court found that an inherent conflict of interest existed because a single set of counsel represented both the (b)(2) and (b)(3) class interests. *See id. at 233-35*.

Because of the conflict, the Court concluded that "members of the (b)(2) class were inadequately represented." *Id. at 231*. Relying on Supreme Court precedent, the Second Circuit held **[*125]** that settlement classes that consist of holders of present claims, such as the (b)(3) class seeking monetary relief for *past* harm, and holders of future claims, such as the (b)(2) class seeking injunctive relief to reform current and *future* rules and policies of the Defendants, must be divided "into homogenous subclasses . . . with separate representation." *Id. at 234* (quoting *Ortiz v. Fibreboard Corp., 527 U.S. 815, 856, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)*).

The Second Circuit also found that the issues stemming from unitary representation were exacerbated by the inability of members of the (b)(2) class to opt out of the settlement or from their release of claims against Defendants. *See id. at 231, 234*; *id. at 241* (Leval, J., concurring). The Court expressed further concern that the injunctive relief secured for the (b)(2) class would not apply uniformly to benefit all (b)(2) class members. *See id. at 238*. For example, the Court noted that (b)(2) merchants that operated in certain states would be prohibited from surcharging costs to customers at the point of sale, as permitted under the 2013 Settlement Agreement, while merchants that operated in other states would not be prohibited from doing so. *See id. at 230-31* (noting that "[t]he incremental value and utility of [surcharging] relief is limited, however, because many **[*126]** states, including New York, California, and Texas, prohibit surcharging as a matter of state law"); *id. at 238-39* ("A significant proportion of merchants in the (b)(2) class are either legally or commercially unable to obtain incremental benefit from the primary relief . . . and class counsel knew at the time the Settlement Agreement was entered into that this relief was virtually worthless to vast numbers of class members.").[12] Despite these significant concerns, the Second Circuit did not abrogate Judge Gleeson's analysis in its entirety, and the majority of its concerns were circumscribed to representation and relief afforded to the (b)(2) injunctive class.

c. Relevant subsequent proceedings

MasterCard agreed to remove their rules prohibiting merchants from product-level discounting of credit and debit cards," *id.; see also Interchange Fees II, 827 F.3d at 229* ("[P]ursuant to a consent decree with the Department of Justice in 2011, Visa and Mastercard agreed to permit merchants to discount transactions to steer consumers away from credit cards use. None of these developments affected the honor-all-cards or no-surcharging rules, or the existence of a default interchange fee.").

[11] In particular, the Second Circuit found that unitary representation of the classes violated *Rule 23(a)(4)* — the class certification requirement that representative parties adequately protect the interests of the class — and the Due Process Clause, which requires that named plaintiffs in a class action adequately protect the interests of absent class members. *Interchange Fees II, 827 F.3d at 228, 231*.

[12] The Court notes that the landscape of state no-surcharging laws is changing. For example, in 2017, the Supreme Court held that a New York state statute that prohibited merchants from imposing a surcharge on customers using credit cards regulated speech, and the court remanded the matter to the Second Circuit to determine whether such speech regulation violates the *First Amendment*. *See Expressions Hair Design v. Schneiderman, 581 U.S. ---, 137 S. Ct. 1144, 1146 (Mar. 29, 2017)*. In addressing a similar California statute, in 2018, the Ninth Circuit held that the statute violated *First Amendment* commercial free speech rights. *Italian Colors Rest. v. Becerra, 878 F.3d 1165, 1179 (9th Cir. 2018)*. Also in 2018, a federal district court in Texas relied on *Expressions Hair Design* to hold that the state's anti-surcharge statute was unconstitutional as applied to the merchants in the case. *See Rowell v. Paxton, 336 F. Supp. 3d 724, 732 (W.D. Tex. 2018)*.

After remand, on August 11, 2016, the Court held a case management conference to discuss, among other items, the Second Circuit's decision.[13] (*See* Min. Entry dated Aug. 11, 2016, Docket Entry No. 6654.) In order to address the Second Circuit's concerns regarding unitary representation of the classes, on November 30, 2016, pursuant to *Rule 23(g)(3)*, the Court appointed two separate groups of interim co-lead counsel to represent (1) merchants seeking certification under *Rule 23(b)(2)* for equitable relief, and (2) merchants seeking **[*127]** certification under *Rule 23(b)(3)* for monetary damages.[14] Interim Class Counsel Order 1; *see also In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720, 2017 U.S. Dist. LEXIS 160045, 2017 WL 4325812, at *4 (E.D.N.Y. Sept. 27, 2017)* (discussing Interim Class Counsel Order). The Court appointed the Nussbaum Law Group, P.C., Hilliard & Shadowen LLP, Freed Kanner London & Millen LLC, and Grant & Eisenhofer P.A. ("Class Counsel") to serve as interim *Rule 23(b)(2)* Class Counsel for the merchants seeking equitable relief, and appointed Robins Kaplan LLP, Berger & Montague P.C., and Robbins Geller Rudman & Dowd LLP (the "Robins Group") to serve as interim *Rule 23(b)(3)* class counsel for the merchants seeking damages relief — the same three firms that represented the entire consolidated class in the proceedings before Judge Gleeson.[15] (*See* Interim Class Counsel Order 1.)

d. Class Plaintiffs' allegations

On March 31, 2017, *Rule 23(b)(2)* Class Counsel filed a complaint on behalf of the *Rule 23(b)(2)* representative class plaintiffs and a putative *Rule 23(b)(2)* class. (Compl.) The *Rule 23(b)(2)* Plaintiffs challenge "Defendants' collusive and anticompetitive practices . . . [that] harm[] competition and impose[] upon Plaintiffs and Class Members supracompetitive, exorbitant, and collectively-fixed prices" in violation of *Sections 1* and *2* of the Sherman Act, and the California Cartwright Act. (*Id.* ¶¶ 4-5.) Plaintiffs bring their **[*128]** claims under *Section 16* of the Clayton Act, seeking equitable relief "to prevent and restrain violations" of the Sherman Act and California Cartwright Act. (*Id.* ¶ 6.)

The seven named Plaintiffs are merchants that accept payment by Visa-and Mastercard-branded cards.[16] (*See id.* ¶¶ 10-18.) The named Plaintiffs are comprised of two "combination bar and videogame arcade[s]" with their principal places of business in Chicago, Illinois; "a family dental practice that also engages in the retail selling of dental supplies" with its principal place of business in Corpus Christi, Texas; a "business internet service provider" with its principal place of business in Coral Gables, Florida; a "business information technology support provider" with its principal place of business in Miami, Florida; a pharmacy with its principal place of business in Tamarac, Florida; and a beauty salon with its principal place of business in Flowery Branch, Georgia. (*Id.* ¶¶ 11-15, 17-18.)

Plaintiffs allege that Defendants (1) impose supracompetitive interchange fees on Visa and Mastercard transactions and (2) facilitate these anticompetitive practices by forcing merchants to abide by anti-steering and other restraints.[17] (*See id.*) Plaintiffs **[*129]** also allege that this anticompetitive behavior causes antitrust injury common

[13] On December 14, 2014, the litigation was reassigned from Judge Gleeson to the undersigned. (Judicial Panel on Multidistrict Litigation Order Reassigning Case, Docket Entry No. 6359.)

[14] Magistrate Judge James Orenstein, who managed discovery and other matters in this litigation for many years, decided the Class Counsel motions. (Mem. and Order dated Nov. 30, 2016 ("Interim Class Counsel Order") 1, Docket Entry No. 6754.)

[15] In September of 2018, the (b)(3) class jointly filed for preliminary approval of a proposed settlement, and in January of 2019, the Court preliminarily approved the proposed settlement. *See Interchange Fees III, 330 F.R.D. 11, 11 (E.D.N.Y. 2019)*. In June of 2019, the (b)(3) class plaintiffs filed a motion for final approval of the settlement, and in December of 2019, the Court granted the motion for final approval. *See Interchange Fees IV, 2019 U.S. Dist. LEXIS 217583, 2019 WL 6875472, at *36*. The final approval order is currently on appeal to the Second Circuit.

[16] Barry's Cut Rate Stores, Inc. and Town Kitchen, LLC d/b/a Town Kitchen & Bar were initially part of the original nine proposed class representatives, (*see* Compl.), but they dismissed their claims in March of 2018, (*see* Stipulation and Order of Dismissal, Docket Entry No. 7171).

to Plaintiffs and putative class members and will continue to cause harm unless enjoined. (*See id.* ¶ 19.) Plaintiffs contend that "[e]ven after litigation, legislation, and regulation forced needed reforms on the Defendants and technology threatened to disrupt Visa and MasterCard's dominant position in the marketplace, the Defendants used their market power to continue to restrain competition." (*Id.* ¶ 1.) In addition, although the rule changes resulting from the Durbin Amendment, the DOJ consent decree, and the 2013 Settlement Agreement "were steps in the right direction for [m]erchants," Plaintiffs continue to suffer antitrust injury due to current anti-steering restraints, "and as a result of the continuing effects of decades of enforcement of the [n]o-[s]urcharge [r]ule and the prior versions of the restraints." (*Id.* ¶ 165.)

Plaintiffs seek declaratory and injunctive relief against all Defendants. They request a declaratory judgment, pursuant to *Rule 57 of the Federal Rules of Civil Procedure* and *28 U.S.C. § 2201(a)*, declaring that Defendants' conduct is unlawful as alleged in the Complaint, (*id.* ¶ 426), and further request that the Court enjoin and restrain the **[*130]** wrongful conduct alleged in the Complaint, pursuant to *Section 16* of the Clayton Act, (*id.* ¶ 428).

As to all Defendants, including Bank Defendants, Plaintiffs request, among other things, that the Court: "[d]eclare, adjudge, and decree that Defendants have committed the violations of the federal and state antitrust laws" alleged in the Complaint; "[o]rder that Defendants, their directors, officers, employees, agents, successors, members, and all persons in active concert and participation with them be enjoined and restrained from, in any manner, directly or indirectly, committing the violations of the Cartwright and Sherman Acts"; and "[g]rant further relief as is necessary to correct for the anticompetitive market effects caused by Defendants' unlawful conduct." (*Id.* at 106-07.)

In April of 2019, the Bank Defendants moved to dismiss the *Rule 23(b)(2)* Plaintiffs' Complaint. (*See* Bank Defs.' Mot. to Dismiss, Docket Entry No. 7399.) In November of 2019, the Court denied the motion, finding that Plaintiffs had Article III standing and that they alleged an ongoing antitrust conspiracy. *See Barry's Cut Rate Stores Inc., 2019 U.S. Dist. LEXIS 205335, 2019 WL 7584728, at *34*.

e. *Rule 23(b)(2)* Plaintiffs' motion for class certification

On May 4, 2021, Plaintiffs filed their fully briefed motion for certification of a *Rule 23(b)(2)* class. **[*131]** [18] (Pls.' Mot.) In their motion for class certification, Plaintiffs seek to certify the following equitable relief class under *Rule 23(a)* and *Rule 23(b)(2)*:

> All persons, businesses, and other entities (referred to herein as "Merchants") that accept Visa and/or Mastercard Credit and/or Debit cards in the United States at any time during the period between December 18, 2020 and 8 years after the date of entry of Final Judgment in this case.

(Pls.' Mem. 5.) Plaintiffs argue that they satisfy the requirements of *Rule 23(a)* because the proposed class is sufficiently numerous, legal and factual issues are common to all class members, the named Plaintiffs' claims are typical of class members' claims, and Plaintiffs and co-counsel will fairly and adequately represent the class. (*See Id.* at 23-32.) Plaintiffs also argue that they satisfy the requirements of *Rule 23(b)(2)* because Defendants'

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[17] The challenged network rules and restraints include the default interchange fees, no-surcharge rules, honor-all-cards rules, no-discount rules, no-bypass rule, and Visa and Mastercard's discrimination rules, (*see* Pls.' Mem. 2 n.5), are sometimes referred to as the "Restraints" or "Anti-Steering Restraints" for purposes of this Memorandum and Order. The Restraints have been described at length in previous decisions. *See Barry's Cut Rate Stores Inc., 2019 U.S. Dist. LEXIS 205335, 2019 WL 7584728, at *2-12*; *Interchange Fees II, 827 F.3d at 228-29*; *Interchange Fees I, 986 F. Supp. 2d at 213-15*.

[18] In December of 2020, *Rule 23(b)(2)* Plaintiffs, Direct Action Plaintiffs, and Defendants filed several fully briefed motions for summary judgment, as well as several *Daubert* motions. (*See* Defs.' Notice of Mot. for Summ. J., Docket Entry No. 8067; Target Pls.' Notice of Mot. for Partial Summ. J., Docket Entry No. 8097; Pls.' Notice of Mot. for Partial Summ. J., Docket Entry No. 8150; Elgin Pl.'s Notice of Mot. for Partial Summ. J., Docket Entry No. 8178; 7-Eleven Pls.' and Home Depot Pls.' Notice of Mot. for Partial Summ. J., Docket Entry No. 8184.) The Court addresses the order in which the motions will be decided in Section II.b *infra*.

imposition and enforcement of the interchange fee, honor-all-cards rules, and no-surcharge rules apply to each member of the class, market definitions and market power can be evaluated on a classwide basis and would apply to all members of the class, and Plaintiffs seek classwide relief. (*See id.* at 32-45.) Finally, Plaintiffs argue that the class should **[*132]** be certified as a mandatory class because non-opt-out classes are the default in *Rule 23(b)(2)* classes. (*See id.* at 46-50.)

f. Opposition to Plaintiffs' motion for class certification

i. Direct Action Plaintiffs' opposition

Direct Action Plaintiffs oppose Plaintiffs' motion for class certification and argue that the class should not be certified as proposed. (*See* Direct Action Pls.' Opp'n.) Direct Action Plaintiffs argue that certification of a class without opt-out rights violates due process by risking the preclusion of individualized damages claims and violates due process and *Rule 23* by extinguishing valuable injunctive relief claims. (*See id.* at 6-16.) They further argue that the proposed class lacks cohesion and is not adequately represented. (*See id.* at 16-23.) In addition, they contend that the constitutional and *Rule 23* issues with the proposed class can be cured by allowing members of the putative *Rule 23(b)(2)* class to opt out or by redefining the proposed class to "exclude the Direct Action Plaintiffs and other entities who opted out of the *Rule 23(b)(3)* settlement." (*See id.* at 23-25.)

ii. Grubhub Plaintiffs' opposition

Like Direct Action Plaintiffs, Grubhub Plaintiffs also oppose certification of a mandatory class. **[*133]** (*See* Grubhub Pls.' Opp'n.) Grubhub Plaintiffs argue that the (b)(2) class, as proposed, is not cohesive because the Grubub Plaintiffs are "distinct from the vast majority of putative class members" and that the putative class would not adequately represent them because there are "conflicts of interest between named parties and the class they seek to represent." (*Id.* at 9-13.) Grubhub Plaintiffs further argue that certification of the class as defined would violate due process and that "[t]he due process, cohesion, and adequacy of representation issues" can be solved by affording opt-out rights to the Grubhub Plaintiffs "and other entities that opted out of the *Rule 23(b)(3)* settlement." (*Id.* at 13-18.)

iii. Intervenors' opposition

Intervenors Walmart and the Merchant Trade Groups also oppose Plaintiffs' class certification motion. (*See* Walmart Opp'n; Merchant Trade Groups' Opp'n.) Walmart argues that the proposed class lacks adequacy of representation because the *Rule 23(b)(2)* Plaintiffs will "undermine the interests of many absent class members" including Walmart and lacks cohesion because Plaintiffs "will not seek an injunction that benefits the entire class." (Walmart Opp'n 9-20.) Walmart further argues that **[*134]** the Court should either deny class certification, grant Walmart an opt-out right, or exclude Walmart from the class. (*Id.* at 20-22.)

Merchant Trade Groups argue that the class certified should not include future class member merchants because their claims are too hypothetical and speculative, and because including future class members would raise due process concerns as well as invite litigation for years to come since future class members will need to ask a court whether they were adequately represented by this litigation. (Merchant Trade Groups' Opp'n 18-26.) In addition, Merchant Trade Groups contend that Plaintiffs fail to satisfy the commonality and ascertainability requirements as to future merchants because the credit-and debit-card industry is rapidly changing and Plaintiffs have not justified an eight-year temporal limitation. (*See id.* at 18-22, 24-26; Merchant Trade Groups' Resp. to Defs.' Reply and Pls.' Reply ("Merchant Trade Groups' Sur-Reply") 5-9, Docket Entry No. 8479.) Like the other parties who oppose certification of a mandatory class, Merchant Trade Groups argue that the Court should allow merchants to opt out of the (b)(2) class because not all Plaintiffs seek the **[*135]** same injunctive relief, merchants encompassed by the broad proposed class are different from the named class representatives in size and structure, and opt-out rights are the traditional "escape valve" for intra-class disputes. (Merchant Trade Groups' Opp'n 7-18.)

iv. Defendants' position

Defendants do not oppose class certification as Plaintiffs define it but argue that the Court "should not certify the *Rule 23(b)(2)* class and allow opt-outs or carve outs from the class, or exclude the future merchants from the class as the opponents of class certification . . . suggest." (Defs.' Reply 1.) Defendants contend that opt-outs should not be permitted because *Rule 23* does not provide for opt-outs from a *Rule 23(b)(2)* class, neither due process nor the potential for collateral estoppel require that opt-out rights be provided, and none of the cases cited by the class certification opponents support the exercise of the Court's discretion to provide opt-out rights. (*See id.* at 9-17.) In addition, Defendants argue that the Court should not redefine the class to carve out any class members from the proposed class definition for the same reason. (*See id.* at 17-18.) Finally, Defendants argue that the Court should not exclude future **[*136]** class members from the proposed class because the challenged network rules and equitable relief sought would apply generally to future merchants and because there is "no legitimate basis" to exclude them. (*See id.* at 18-23.)

II. Discussion

a. Standard of review

HN1[] *Rule 23 of the Federal Rules of Civil Procedure* sets forth a two-step process for certification as a class action. First, the plaintiff must satisfy the four prerequisites set forth in *Rule 23(a)*:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); *Kurtz v. Costco Wholesale Corp., 818 F. App'x 57, 60 (2d Cir. 2020)* ("To proceed with a class action, a plaintiff must satisfy four prerequisites under *Rule 23*: numerosity, commonality, typicality, and adequacy." (citing *Fed. R. Civ. P. 23(a)*)). The class must also satisfy the implied requirement of ascertainability under *Rule 23(a)*. *See* *In re Petrobras Sec., 862 F.3d 250, 266 (2d Cir. 2017)*; *de* *Lacour v. Colgate-Palmolive Co., 338 F.R.D. 324, 334 (S.D.N.Y. Apr. 23, 2021)* ("[T]he Second Circuit has recognized that *Rule 23* contains 'an implied requirement' that a class be "ascertainable." (quoting *In re Petrobras Sec., 862 F.3d at 260*)). In addition to satisfying the *Rule 23(a)* requirements, the proposed class must also qualify "under one of **[*137]** three subsection *Rule 23(b)* categories." *Bruce E. Katz, M.D., P.C. v. Pro. Billing Collections, LLC, No. 20-CV-3043, 2021 U.S. Dist. LEXIS 111188, 2021 WL 2418387, at *2 (S.D.N.Y. June 14, 2021)*; *see also* *Fed. R. Civ. P. 23(b)*; *Sykes v. Mel S. Harris & Assocs. LLC, 780 F.3d 70, 80 (2d Cir. 2015)* ("Beyond these prerequisites, *Rule 23(b)* provides additional considerations for a district court to consider prior to the certification of a class.").

"*Rule 23* ***HN2***[] does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*. "The party seeking class certification bears the burden of demonstrating compliance with *Rule 23*'s prerequisites by a preponderance of the evidence." *Kurtz, 818 F. App'x at 60* (citing *Miami Grp. v. Vivendi, S.A. (In re Vivendi, S.A. Sec. Litig.), 838 F.3d 223, 264 (2d Cir. 2016)*); *Batalla Vidal v. Wolf, 501 F. Supp. 3d 117, 134 (E.D.N.Y. 2020)* (same). "The Second Circuit has emphasized that *Rule 23* should be given liberal rather than restrictive construction, and it seems beyond peradventure that the Second Circuit's general preference is for granting rather than denying class certification." *Espinoza v. 953 Assocs. LLC, 280 F.R.D. 113, 124 (S.D.N.Y. 2011)* (quoting *Gortat v. Capala Bros., Inc., 257 F.R.D. 353, 361 (E.D.N.Y. 2009)*, *aff'd*, *568 F. App'x 78 (2d Cir. 2014)*); *see also* *Newkirk v. Pierre, No. 19-CV-4283, 2020 U.S. Dist. LEXIS 155539, 2020 WL 5035930, at *5 (E.D.N.Y. Aug. 26, 2020)* ("[T]he Second Circuit has emphasized that *Rule 23* should be given a 'liberal rather than restrictive construction.'" (quoting *Marisol A. v. Giuliani, 126 F.3d 372, 375 (2d Cir. 1997)*)). "The district court is afforded broad discretion in class certification questions because it is often in the best position to assess the propriety of the class action." *Zivkovic v. Laura Christy LLC, 329 F.R.D. 61, 68 (S.D.N.Y. 2018)* (citing *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd., 262 F.3d 134, 139 (2d Cir. 2001)*).

b. Sequence of deciding the pending motions

Because there are several pending motions in this MDL, the Court first addresses the sequence in which it intends to decide the instant motions.

Defendants argue that the Court should **[*138]** decide Plaintiffs' motion for class certification and the issue of whether opt-outs and exclusions will be permitted before it decides the pending motions for summary judgment and *Daubert* motions. (*See* Defs.' Letter Mot. for Hearing on Case Mgmt. ("Defs.' Case Mgmt. Letter"), Docket Entry No. 8425.) In support, Defendants argue that deciding the motions for summary judgment will raise an issue the Second Circuit has referred to as the "one-way intervention" problem. (*Id.* at 2 (citing *Brecher v. Republic of Argentina, 806 F.3d 22, 26 (2d Cir. 2015)*).) Defendants contend that if a decision on certification of an opt-out class is deferred until after summary judgment, potential class members could wait "for a merits determination, and then, depending on the Court's judgment, choose to remain in or opt out of the class (once certified) in the way that benefits them." (*Id.*) To prevent this problem, Defendants argue that the "'ordinary' rule in this Circuit is that a 'court's decision on the merits' should 'not occur before or simultaneous with a decision on class certification.'" (*Id.* (quoting *Cuzco v. Orion Builders, Inc., 262 F.R.D. 325, 335-36 (S.D.N.Y. 2009)*).) Defendants assert that while the one-way intervention issue does not usually arise "in the context of a typical mandatory *Rule 23(b)(2)* class from which exclusions are **[*139]** not permitted," the objectors' proposal to allow opt-outs from the class raises the risk of a one-way intervention issue. (*Id.*) In addition, Defendants contend that resolving the class certification motions first would "facilitate the efficient and fair resolution of the remaining actions in the MDL" because it would "clarify for the parties in the remaining actions . . . the range of remedies available" and because it would resolve the "relatively discrete legal issues" presented at the class certification stage before addressing the complex summary judgment motions and motions in limine. (*Id.* at 2-3.)

Direct Action Plaintiffs argue that the Court should not delay resolving the summary judgment motions until resolution of Plaintiffs' motion for class certification. (*See* Pls.' Resp. to Defs.' Case Mgmt. Letter, Docket Entry No. 8427.) In support, Direct Action Plaintiffs argue that (1) there is no risk of the one-way intervention problem and (2) in any event, Defendants waived any one-way intervention argument. (*See id.* at 2.) Direct Action Plaintiffs argue that there is no one-way intervention problem because they have done the opposite of sitting on the sidelines to wait for a merits **[*140]** determination and instead have proactively litigated their cases by opting out of the *Rule 23(b)(3)* settlement and fully briefing their own summary judgment and *Daubert* motions. (*Id.* at 1.) As to the majority of other merchants, Direct Action Plaintiffs contend that there is no meaningful risk of one-way intervention because all merchants that remained in the (b)(3) settlement released "any and all manner of claims," including claims for damages and for injunctive, declaratory, or other equitable relief except as sought through the proposed (b)(2) class, except for the 675 merchants who opted out. (*Id.* at 2 (quoting Final Approval Order ¶ 16, Docket Entry No. 7818).) Therefore, Direct Action Plaintiffs argue that only the limited set of merchants who opted out and have not settled their claims could pursue individual claims for equitable relief should an opt-out right in any certified (b)(2) class be provided. (*See id.*) In addition, Direct Action Plaintiffs argue that Defendants waived their one-way intervention argument because they (1) agreed that a summary judgment motion by the Plaintiffs could be submitted in advance of their class certification motion, (2) moved for summary judgment against **[*141]** all Plaintiffs including Direct Action Plaintiffs and the *Rule 23(b)(2)* Plaintiffs before class certification was briefed, and (3) decided not to oppose the motion for certification of the (b)(2) class. (*See id.* at 2-3.) Direct Action Plaintiffs argue that Defendants' conduct reinforces waiver because they agreed to twelve extensions of the class certification motions, and, as a result of these extensions, the class certification motion was served after the parties moved for summary judgment. (*See id.* at 3.) Direct Action Plaintiffs state that with each extension request, they repeatedly expressed concern that the Defendants would use repeated delays of the (b)(2) class certification motion to delay the decision on summary judgment. (*See id.* at 4.)

HN3[] The Second Circuit has stated that "[t]he expansion of [a] class after a judgment on liability . . . raises the specter of one-way intervention." Brecher, 806 F.3d at 26. The one-way intervention problem arises when a decision on certification of an opt-out class is deferred until after a decision on the merits, which enables potential class members to "wait[] on the sidelines" for a merits determination and then choose to remain in or opt out of the class once certified in **[*142]** a way that benefits them. *See id.* (quoting Amati v. City of Woodstock, 176 F.3d 952, 957 (7th Cir. 1999)). As the Second Circuit has observed, "Rule 23 was substantially amended in 1966, in part to prevent prejudice to defendants that can arise when a determination of class certification is postponed until after trial." Philip Morris Inc. v. Nat'l Asbestos Workers Med. Fund, 214 F.3d 132, 134 (2d Cir. 2000) (per curiam). The advisory committee note to Rule 23(c)(3) highlights this concern:

> Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening *before* the determination of liability, courts have held or intimated that class members might be permitted to intervene *after* a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. . . . Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment; *see also* Weissman v. Collecto, Inc., No. 17-CV-4402, 2019 U.S. Dist. LEXIS 8600, 2019 WL 254035, at *9 (E.D.N.Y. Jan. 17, 2019) ("The prejudice that Congress sought to address through the 1966 amendments arose from a practice called 'one-way intervention,' **[*143]** in which 'absent class members in a spurious action were permitted [to] intervene after a favorable judgment, while at the same time they were not bound by an unfavorable decision.'" (alteration in original) (quoting Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 n.2 (2d Cir. 1968)). HN4[] Accordingly, courts within the Second Circuit and other circuit courts have held that "in general, issues relating to class certification should be decided before a decision on the merits is rendered." Mendez v. Radec Corp., 260 F.R.D. 38, 44 (W.D.N.Y. 2009); *see also* Bertrand v. Maram, 495 F.3d 452, 455 (7th Cir. 2007) ("Class-action status must be [decided] . . . early to clarify who will be bound by the decision."); Weissman, 2019 U.S. Dist. LEXIS 8600, 2019 WL 254035, at *9 ("Given concerns about one-way intervention, 'issues relating to class certification should' generally 'be decided before a decision on the merits is rendered.'" (quoting Mendez, 260 F.R.D. at 44)); Kurtz v. Kimberly-Clark Corp., 321 F.R.D. 482, 507 (E.D.N.Y. 2017) (describing "deciding class certification prior to deciding summary judgment" as the "traditional route" and holding motion for summary judgment in abeyance because the parties had not conducted "sufficient discovery" to decide the summary judgment motions); In re Cablevision Consumer Litig., No. 10-CV-4992, 2014 U.S. Dist. LEXIS 44983, 2014 WL 1330546, at *16 (E.D.N.Y. Mar. 31, 2014) (deciding class certification before deciding the plaintiffs' motion for summary judgment and granting the plaintiffs "leave to re-file the motion after the class has received notice consistent with Rule 23 and has been provided with an **[*144]** opportunity to opt out of the suit"); Cuzco, 262 F.R.D. at 335 (declining to decide both the plaintiffs' and the defendants' cross-motions for summary judgment at the same time as certifying a Rule 23(b)(3) class and stating that "[a] court's decision on the merits, however, should ordinarily not occur before or simultaneous with a decision on class certification" (citing Philip Morris Inc., 214 F.3d at 135)).

HN5[] However, courts in the Second Circuit have recognized that there is "authority that a defendant can waive any objection to a decision on the merits prior to, or simultaneous with, a decision on class certification." Mendez, 260 F.R.D. at 45; *see also* Curtin v. United Airlines, Inc., 275 F.3d 88, 93, 348 U.S. App. D.C. 309 (D.C. Cir. 2001) ("[W]here the merits of the plaintiffs' claims can be readily resolved on summary judgment, where the defendant seeks an early disposition of those claims, and where the plaintiffs are not prejudiced thereby, a district court does not abuse its discretion by resolving the merits before considering the question of class certification."); Schweizer v. Trans Union Corp., 136 F.3d 233, 239 (2d Cir. 1998) ("The decision to award summary judgment before acting on class certification [is] well within the discretion of the trial court."); Cowen v. Bank United of Texas, FSB, 70 F.3d 937, 941 (7th Cir. 1995) (finding that the defendant may elect to seek summary judgment prior to decision on class certification as a "way to try to knock . . . off [the action] at low **[*145]** cost," by disqualifying the named plaintiffs as proper class representatives, in order to moot the question whether to certify the suit as a class action); Weissman, 2019 U.S. Dist. LEXIS 8600, 2019 WL 254035, at *9 (quoting Mendez, 260 F.R.D. at 45); Bitzko v. Weltman, Weinberg & Reis Co., LPA, No. 17-CV-458, 2019 U.S. Dist. LEXIS 161495, 2019 WL 4602329, at *11 (N.D.N.Y. Sept. 23, 2019) ("Courts in the Second Circuit and elsewhere have recognized that 'a defendant can waive any objection to a decision on the merits prior to, or simultaneous with, a decision on class certification.' This waiver can be express or implied through the defendant's motion for summary [judgment] before class certification." (citation omitted) (quoting Mendez, 260 F.R.D. at 45));[19] Reynolds v. Barrett, 741 F. Supp. 2d 416, 424-25 (W.D.N.Y. 2010), *aff'd*, 685 F.3d 193 (2d Cir. 2012) (quoting Mendez, 260 F.R.D. at 45); Vega v. Credit Bureau Enters., No. 02-CV-1550, 2005 U.S. Dist. LEXIS 4927, 2005 WL 711657, at *10 (E.D.N.Y. 2005) (granting simultaneous motions for class certification and summary judgment). Courts that have decided summary judgment either before or simultaneously with class action motions have generally done so when the defendants moved for summary judgment as opposed to the plaintiffs. *See, e.g.,* Weissman, 2019 U.S. Dist. LEXIS 8600, 2019 WL 254035, at *9 (finding that when the defendant moved for summary judgment and "[i]n light of [the] [d]efendant's unambiguous decision to not oppose [the] [p]laintiff's motion for class certification, . . . [the] [d]efendant has waived any objection to the [c]ourt's disposition of its motion for summary judgment simultaneously with [the] [p]laintiff's motion for class certification"); **[*146]** Mendez, 260 F.R.D. at 48 ("[D]efendants have the right — should they choose to exercise it — to have class certification issues decided first, before any decision on the merits of the plaintiffs' claims. Defendants here never invoked that right, however. As stated, they thereby implicitly waived that right."); Reynolds, 741 F. Supp. 2d at 425 (finding that the defendants "implicitly waived any right they may have had to have class certification issues decided first" when the defendants moved for summary judgment).

Rule 23(b)(2) Plaintiffs, Direct Action Plaintiffs, and Defendants all moved for summary judgment before the class certification motion was fully briefed. (*See* Pls.' Notice of Mot. for Partial Summ. J.; Target Pls.' Notice of Mot. for Partial Summ. J.; Elgin Pl.'s Notice of Mot. for Partial Summ. J.; 7-Eleven Pls.' and Home Depot Pls.' Notice of Mot. for Partial Summ. J.; Defs.' Notice of Mot. for Summ. J.) However, a central issue briefed in the class certification papers concerns whether parties will be permitted to opt out from the Rule 23(b)(2) class. While Plaintiffs seek certification of a mandatory class pursuant to Rule 23(b)(2), (*see* Pls.' Mem. 6), Direct Action Plaintiffs seek opt-out rights and argue that a mandatory class would threaten the individualized **[*147]** monetary claims of class members who are pursuing damages claims, (*see* Direct Action Pls.' Opp'n). Defendants do not oppose certification of the Rule 23(b)(2) class but argue that the Court should not permit opt-outs from the proposed class. (*See* Defs.' Reply.) Both Intervenors oppose certification of a mandatory class and seek opt-out rights. (*See* Merchant Trade Groups' Sur-Reply,; Letter Joining Direct Action Pls.' and Merchant Trade Group's Sur-Replies, Docket Entry No. 8480.) In view of the arguments concerning opt-out rights and the potential for an ensuing one-way intervention problem, the Court decides the class certification motion before considering the summary judgment motions.[20]

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[19] The defendants in Bitzko v. Weltman, Weinberg & Reis Co., LPA, requested that the court decide the class certification motion before deciding the pending summary judgment motions. No. 17-CV-458, 2019 U.S. Dist. LEXIS 161495, 2019 WL 4602329, at *11 (N.D.N.Y. Sept. 23, 2019).

[20] The Court acknowledges that there are also several pending *Daubert* motions filed by the parties. "Although '[t]he Supreme Court has not definitively ruled on the extent to which a district court must undertake a *Daubert* analysis at the class certification stage,' it has 'offered limited dicta suggesting that a *Daubert* analysis may be required at least in some circumstances.'" In re Foreign Exch. Benchmark Rates Antitrust Litig., 407 F. Supp. 3d 422, 429 (S.D.N.Y. Sept. 3, 2019) (alteration in original) (quoting In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 129 (2d Cir. 2013)). Similarly, "the Second Circuit has not resolved whether and to what extent *Daubert* applies at the class certification stage." Royal Park Invs. SA/NV v. U.S. Bank Nat'l Ass'n, 324 F. Supp. 3d 387, 393 (S.D.N.Y. 2018) (citing In re LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 470 (S.D.N.Y. 2018) (collecting cases)). "Despite this lack of clarity, courts in the Second Circuit regularly 'subject expert testimony to *Daubert*'s rigorous standards insofar as that testimony is relevant to the Rule 23 class certification analysis.'" Bowling v. Johnson & Johnson, No. 17-CV-3982, 2019 U.S. Dist. LEXIS 67795, 2019 WL 1760162, at *7 (S.D.N.Y. Apr. 22, 2019) (quoting Scott v. Chipotle Mexican Grill, Inc., 315 F.R.D. 33, 55 (S.D.N.Y. 2016)); *see also* In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig., No. 18-MD-2819, 2020 U.S. Dist. LEXIS 82723, 2020 WL 2280144, at *2 (E.D.N.Y. May 5, 2020) (same). "In these instances, the 'scope of the *Daubert* analysis is cabined by its purpose at this stage: the inquiry is limited to whether or not the expert reports are admissible to establish the requirements of Rule 23.'" Bowling, 2019 U.S. Dist. LEXIS 67795, 2019 WL 1760162, at *7 (quoting Chen-Oster v. Goldman, Sachs & Co., 114 F. Supp. 3d 110, 115 (S.D.N.Y. 2015)). "In other words, '[t]he question is not . . . whether a jury at trial should be permitted to rely on [the expert's] report to find facts as to

c. *Rule 23(a)* requirements

The Court first addresses the explicit *Rule 23(a)* requirements of numerosity, commonality, typicality, and adequacy, and then addresses the implied factor of ascertainability.

i. Numerosity

Plaintiffs argue that the numerosity requirement is met because the proposed class is "comprised of millions of [m]erchants throughout the United **[*148]** States who accept Defendants' [p]ayment [c]ards" and the numerosity requirement is "generally . . . satisfied when a proposed class includes over [forty] members." (Pls.' Mem. 25 (first citing *Consol. Raid Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995)*; and then citing *B & R Supermarket, Inc. v. Mastercard Int'l, Inc. (B & R Supermarket I), No. 17-CV-2738, 2018 U.S. Dist. LEXIS 42547, 2018 WL 1335355, at *36 (E.D.N.Y. 2018)*).)

No party argues that Plaintiffs do not satisfy the numerosity requirement.

HN6[] In order to proceed as a class action, the class must be "so numerous that joinder of all members is impracticable." *Fed. R. Civ. P. 23(a)(1)*. "[N]umerosity is presumed at a level of [forty] members." *Consol. Rail Corp., 47 F.3d at 483*; *see also* *Jin v. Shanghai Original, Inc., 990 F.3d 251, 263 n.20 (2d Cir. 2021)* (stating that "[a]lthough there is no magic number of class members needed to satisfy numerosity, . . . numerosity is generally 'presumed at a level of 40 [or more] members'" (second alteration in original) (quoting *Consol. Rail Corp., 47 F.3d at 483*)).

Plaintiffs satisfy the numerosity requirement because the putative class consists of "millions of [m]erchants." (Pls.' Mem. 25; Compl. ¶ 4.); *Interchange Fees III, 330 F.R.D. at 51* (finding that class met numerosity requirement when the proposed class consisted of "millions of merchants").

ii. Commonality

Plaintiffs argue that they satisfy the commonality requirement because they "allege a conspiracy that affects the entire class." (Pls.' Mem. 26.) Plaintiffs identify several questions that they argue are common questions to the entire class: **[*149]** (1) whether Defendants conspired to impose the Restraints on class members, (2) whether Defendants conspired to possess or exercise market power or monopoly power, (3) whether the Restraints imposed by Defendants facilitated their alleged price-fixing arrangements, (4) whether the alleged conspiracies continued after the networks' reorganizations and IPOs, (5) whether Network Defendants exercise market power or monopoly

liability, but rather whether [the court] may utilize it in deciding whether the requisites of *Rule 23* have been met.'" *Ge Dandong v. Pinnacle Performance Ltd., No. 10-CV-8086, 2013 U.S. Dist. LEXIS 150259, 2013 WL 5658790, at *13 (S.D.N.Y. Oct. 17, 2013)* (alterations in original) (quoting *In re Visa Check/Mastermoney Antitrust Litig., 192 F.R.D. 68, 77 (E.D.N.Y. 2000)*, *aff'd sub nom.* *In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124 (2d Cir. 2001)*, *abrogated on other grounds by* *In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006)*). Defendants have filed *Daubert* motions to challenge the expert opinions of Professor

Defendants have filed *Daubert* motions to challenge the expert opinions of Professor Dennis W. Carlton and Dr. Joseph E. Stiglitz, the reports of whom Plaintiffs reference in support of their motion for class certification. (*See* Defs.' Mot. to Exclude Pls.' Expert Dennis W. Carlton, Docket Entry No. 8086; Defs.' Mot. to Exclude Pls.' Expert Joseph E. Stiglitz, Docket Entry No. 8075.) However, Defendants did not oppose Plaintiffs' motion for class certification, and the Court therefore infers that Defendants seek exclusion of Professor Carlton's and Dr. Stiglitz's opinions as to liability on summary judgment only and not for class certification purposes. Accordingly, the Court declines to assess whether the opinions of Professor Carlton and Dr. Stiglitz are admissible to establish the requirements of *Rule 23* before deciding the class certification motions. *See* *In re Foreign Exch. Benchmark Rates Antitrust Litig., 407 F. Supp. 3d at 429* (applying "a *Daubert* analysis *to the extent that [the] [d]efendant seeks to exclude* testimony relevant to class certification" (emphasis added)).

power that was willfully acquired and/or maintained, (6) whether class members are threatened with further injury by overcharges as a result of the Restraints, and (7) what the appropriate relief should be to remedy the conduct alleged. (*Id.* at 26-27.)

Merchant Trade Groups argue that Plaintiffs do not satisfy the commonality prong because Plaintiffs seek to certify a class including merchants "that accept Visa and/or Mastercard [c]redit and/or [d]ebit cards . . . [eight] years after the date of entry of [f]inal [j]udgment in this case." (Merchant Trade Groups' Opp'n 18.) Merchant Trade Groups argue that future merchants do not have common questions of law or fact as current merchants because Plaintiffs are not challenging a specific policy or practice that will affect **[*150]** future class members in a predictable and identical manner; instead, Merchant Trade Groups contend that Plaintiffs challenge "a range of anti-competitive policies and practices" that affect merchants differently and future merchants are not a narrow, clearly defined, predictable group. (*Id.* at 20-21.) In addition, Merchant Trade Groups argue that future merchants "should have the right to decide for themselves whether to challenge [Defendants'] rules as they are applied to new forms of payment and new technologies" amid an ever-changing payment industry that has seen the rise of new payment systems such as Venmo and its competitors. (*Id.* at 21.) Accordingly, Merchant Trade Groups argue that the commonality prong is not satisfied if future merchants are included in the class definition because "post-judgment changes in the governing law or factual circumstances surrounding the dispute may cause the interests of present and future class members to diverge." (*Id.* at 22 (quoting Elizabeth R. Kaczynski, Note, *The Inclusion of Future Class Members in Rule 23(b)(2) Class Actions*, *85 Colum. L. Rev. 397, 412 (1985)*).)

Defendants do not oppose certification but argue that Merchant Trade Groups' argument as to future merchants is unavailing **[*151]** because "the Visa and Mastercard network rules would apply generally to all merchants that accept Visa or Mastercard credit or debit cards, including future merchants, . . . regardless of changes in how consumers may make other types of payment in the future." (Defs.' Reply 22-23.) Defendants contend that courts routinely certify classes including future merchants, including in antitrust actions, and including future merchants would allow for "definitive resolution of the [D]efendants' challenged conduct going forward." (*Id.* at 20.)

HN7[] Under *Rule 23(a)(2)*, there must be "questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)(2)*; *see also* *Brown v. Kelly, 609 F.3d 467, 475 (2d Cir. 2010)* ("The commonality requirement is met if there is a common question of law or fact shared by the class."). A question is common if it is "capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes, 564 U.S. at 350*. It is not enough to raise questions at such a high level of generality that they become common to the class. *Id.* Instead, plaintiffs must demonstrate "the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution" of the case. **[*152]** *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, *84 N.Y.U. L. Rev. 97, 132 (2009)*); *Bruce E. Katz, M.D., P.C., 2021 U.S. Dist. LEXIS 111188, 2021 WL 2418387, at *3* (same). ***HN8***[] "The claims for relief need not be identical for them to be common"; instead, "*Rule 23(a)(2)* simply requires that there be issues whose resolution will affect all or a significant number of the putative class members. 'Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question.'" *Johnson v. Nextel Commc'ns Inc., 780 F.3d 128, 137 (2d Cir. 2015)* (citations omitted) (quoting *Suchanek v. Sturm Foods, Inc., 764 F.3d 750 756 (7th Cir. 2014)*). "[E]ven a single [common] question will" suffice to prove commonality. *Dukes, 564 U.S. at 359* (second alteration in original); *de Lacour, 338 F.R.D. at 336* (quoting *Dukes, 564 U.S. at 359*).

Plaintiffs satisfy the commonality requirement. Plaintiffs' overarching claims are that Defendants conspired to fix prices and impose supracompetitive interchange fees on merchants that accept Visa and Mastercard debit and credit cards, and that they facilitated these anticompetitive practices by forcing merchants to abide by the Restraints therefore preventing merchants from protecting themselves. (*See* Compl. ¶¶ 4-5, 364-428.) Unlike other cases in which the parties failed to demonstrate commonality because the challenged practices consisted of context-specific decisions rather than a uniform **[*153]** policy, *see, e.g.,* *Dukes, 564 U.S. at 355* ("The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's 'policy' of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action . . . ."); *Dobson v. Hartford Fin. Servs. Grp. Inc., 342 F. App'x*

706, 709 (2d Cir. 2009) (denying class certification on commonality grounds when the claims of each of the 24,000 putative class members would "invariably turn on whether [the benefits provider's] delay was 'reasonable' in each set of particular circumstances"); Callari v. Blackman Plumbing Supply, Inc., 307 F.R.D. 67, 76 (E.D.N.Y. 2015) (finding no commonality when there was no evidence that the challenged employment policy applied to all class members), Class Plaintiffs point to specific policies and rules that they allege cause uniform harm to the putative class, such as the setting of default interchange fees, honor-all-card rules, and anti-steering restraints, (Compl. ¶¶ 320-322).

Although a single common question is sufficient, Plaintiffs identify several questions that are common to the putative class and that would generate common answers, such as whether Defendants conspired to impose the Restraints, whether Network Defendants **[*154]** exercise market power or monopoly power that was willfully acquired and/or maintained, and whether the Restraints imposed by Defendants facilitated their alleged price-fixing arrangements. (*See* Pls.' Mem. 26-27); *see also* Dial Corp. v. News Corp., 314 F.R.D. 108, 113 (S.D.N.Y. 2015) ("[T]here are several questions common to the class and capable of resolution through common proof, including: (1) [the defendant's] liability under the Sherman Act and the Clayton Act; (2) the definitions of the relevant geographic and product markets; and (3) [the defendant's] market power in the relevant market. And the majority of [the defendant's] alleged predatory conduct involves its dealings with competitors and retailers, not the putative class members. This suggests that resolution is capable through common proof for the class."), *amended*, No. 13-CV-6802, 2016 U.S. Dist. LEXIS 22831, 2016 WL 690895 (S.D.N.Y. Feb. 9, 2016); Meredith Corp. v. SESAC, LLC, 87 F. Supp. 3d 650, 659 (S.D.N.Y. 2015) ("[T]here are a number of questions of fact and law in this case, relevant to either plaintiffs' [section] 1 or [section] 2 [Sherman Act] claims or both, that are common to the proposed class. These include: whether [the defendant] and its key affiliates engaged in an unlawful agreement to fix prices; how the relevant product market is to be defined; whether [the defendant] has monopoly power in that market; whether [the defendant's] licensing practices **[*155]** constitute exclusionary conduct; whether [the defendant's] conduct, if found unlawful, caused cognizable injury to class members; whether plaintiffs and members of the class are entitled to injunctive relief; and the appropriate measures of damages sustained."); In re Vitamin C Antitrust Litig., 279 F.R.D. 90, 110-11 (E.D.N.Y. 2012) ("The most significant question posed by the [i]njunction [c]lass is the same question posed by the [d]amages [c]lass: did the defendants' price-fixing agreement cause an artificial increase in the market price of vitamin C? The answer to this question will be generally applicable to all members of the [i]njunction [c]lass."); Leider v. Ralfe, No. 01-CV-3137, 2003 U.S. Dist. LEXIS 21159, 2003 WL 24571746, at *9 (S.D.N.Y. Mar. 4, 2003) ("[W]hether there was a conspiracy between [the defendants] and its sightholders to harm [the defendants'] competitors plainly presents a question common to the class."), *report and recommendation adopted in part*, 2003 U.S. Dist. LEXIS 18270, 2003 WL 22339305 (S.D.N.Y. Oct. 10, 2003). These questions are the same as or similar to questions posed to the (b)(3) damages class, which this Court certified, are common to all members of the putative class, and, at trial, would require resolution on a classwide basis despite any differences in how each individual merchant was affected. *See* Interchange Fees III, 330 F.R.D. at 52-53 (finding commonality as to the (b)(3) class in this MDL because questions of whether Defendants **[*156]** "collectively fixed and set interchange fees in violation of ***antitrust law***, . . . collectively imposed anti-steering rules that disincentivized merchants from steering paying customers to other payment methods, thereby protecting Defendants from competitive pressure to lower interchange fees[,] and . . . continued the alleged behavior after becoming publicly[] owned corporations" needed to be determined on a classwide basis).

Merchant Trade Groups' argument that future merchants do not have common questions of law or fact with the current merchants is unavailing at the class certification stage of this litigation. ***HN9***[] Courts both within and outside of this Circuit have routinely certified classes including future class members when "any equitable relief to which the class would be entitled would be of the sort that would affect present and future claimants in the same way."[21] Latino Officers Ass'n City of N.Y. v. City of New York, 209 F.R.D. 79, 90 n.87 (S.D.N.Y. 2002); Duprey v.

[21] The two cases cited by the Merchant Trade Groups to support excluding future merchants from the proposed class concern standing and numerosity, and do not defeat commonality. In *In re Currency Conversion Fee Antitrust Litigation*, a case concerning an alleged price-fixing conspiracy of foreign currency conversion fees, the court declined to include "cardholders whose first foreign exchange transaction occurred after the addition of the arbitration clause to their cardholder agreement"

Conn. Dep't of Motor Vehicles, 191 F.R.D. 329, 338 (D. Conn. 2000) ("It is not at all uncommon for a class to include future members, who may generally avail themselves of the same relief available to class members who have already sustained damages."); Sykes, 780 F.3d at 75 (affirming certification of injunctive relief class pursuant to Rule 23(b)(2) comprised of "all persons who have been or will be sued by the **[*157]** . . . defendants . . . assert[ing] claims under [RICO]" (first alteration in original)); Marisol A., 126 F.3d at 375 (affirming certification of "[a]ll children who are or will be in the custody of the New York City Administration for Children's Services ('ACS'), and those children who, while not in the custody of ACS, are or will be at risk of neglect or abuse and whose status is or should be known to ACS"); Robinson v. N.Y.C. Transit Auth., No. 19-CV-1404, 2020 U.S. Dist. LEXIS 159927, 2020 WL 5884055, at *1 (S.D.N.Y. Aug. 31, 2020) (recommending certification of a Rule 23(b)(2) class including "all persons against whom [the defendant] has obtained or will obtain a default judgment in a New York State court"), *report and recommendation adopted*, 2020 U.S. Dist. LEXIS 180623, 2020 WL 5814189 (S.D.N.Y. Sept. 30, 2020); Butler v. Suffolk County, 289 F.R.D. 80, 103 (E.D.N.Y. 2013) (certifying equitable relief class "comprised of all persons who, now or at any time in the future, are or will be detainees or prisoners in the custody of the Suffolk County Sheriff's Department"); *see also* Roy v. County of Los Angeles, No. 12-CV-9012, 2016 U.S. Dist. LEXIS 186634, 2016 WL 5219468, at *14 (C.D. Cal. Sept. 9, 2016) (rejecting argument that there was no commonality or typicality because the proposed class included both "current and future individuals" who are or will be in the defendants' custody on the basis of an immigration hold and their claims were "too broad and not yet ripe" and stating that "including 'future class members in a class is not itself unusual or objectionable'" and that "[w]hen the future **[*158]** persons referenced become members of the class, their claims will necessarily be ripe" (quoting *Rodriguez v. Hayes, 591 F.3d 1105, 1118 (9th Cir. 2010)*), *aff'd sub nom.* Gonzalez v. U.S. Immigr. & Customs Enf't, 975 F.3d 788 (9th Cir. 2020); Roshandel v. Chertoff, 554 F. Supp. 2d 1194, 1203 (W.D. Wash. 2008), *amended in part*, 2008 U.S. Dist. LEXIS 124708, 2008 WL 2275558 (W.D. Wash. June 3, 2008) ("Because all [the] [p]laintiffs, whether present or future members of the class, challenge the legality of the same government program, they inherently share common issues.").

HN10[] As this Court has recognized, the commonality inquiry focuses on whether questions exist that "would need to be determined on a classwide basis, regardless of how each merchant was individually affected" and whether the answers to these questions would drive the resolution of this litigation. Interchange Fees III, 330 F.R.D. at 53. Courts have found that commonality exists when the plaintiffs' "injuries derive from a unitary course of conduct by a single system," even when there are "differing 'individual circumstances of class members.'" Kurtz, 321 F.R.D. at 530 (quoting *Ebin v. Kangadis Food Inc., 297 F.R.D. 561, 571-72 (S.D.N.Y. 2014)*). Courts in this Circuit have noted that "[n]umerous courts have held that allegations concerning the existence, scope, and efficacy of an alleged antitrust conspiracy present important common questions sufficient to satisfy the **[*159]** commonality requirement of Rule 23(a)(2)." In re Platinum & Palladium Commodities Litig., No. 10-CV-3617, 2014 U.S. Dist. LEXIS 96457, 2014 WL 3500655, at *9 (S.D.N.Y. July 15, 2014) (quoting In re NASDAQ Mkt.-Makers Antitrust Litig., 169 F.R.D. 493, 509 (S.D.N.Y. 1996) (collecting cases)); *see also* Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 107 (2d Cir. 2007) (finding that the commonality prong was satisfied when the injury alleged in the complaint concerned "overcharges paid to a horizontal price-fixing conspiracy" and stating that "[b]ecause each class member allegedly suffered the same type of injury, the legal question of whether such an injury is 'of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful' is a common one" (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct.

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because "there was no cognizable injury when this action commenced." 229 F.R.D. 57, 63 (S.D.N.Y. 2005), *appeal granted, order amended*, 2005 U.S. Dist. LEXIS 16130, 2005 WL 1871012 (S.D.N.Y. Aug. 9, 2005). In *Scott v. University of Delaware*, a class action discrimination suit, the Third Circuit held that the class should have been decertified because future faculty members could not satisfy the numerosity requirement. 601 F.2d 76, 89 (3d Cir. 1979), *abrogated on other grounds by* EF Operating Corp. v. Am. Bldgs., 993 F.2d 1046 (3d Cir. 1993). The Third Circuit held that the "class of future faculty members is simply ephemeral on the facts of this case" because it was "constructed on the hypothesis that the [u]niversity will hire black[] [faculty members] . . . and then discriminate against them by refusing to renew employment contracts or by denying promotion or tenure solely on the basis of race." *Id.* Unlike the class members in those cases, the putative class member merchants face "imminent threat of injury," In re Currency Conversion Fee Antitrust Litig., 229 F.R.D. at 63, arising from the Defendants' alleged anticompetitive conduct as long as they accept Visa and Mastercard credit and debit cards should they not be included in the injunctive relief class.

690, 50 L. Ed. 2d 701 (1977))); Meredith Corp., 87 F. Supp. 3d at 659-60 ("In general, 'monopolization claims are contingent upon a showing of monopoly power and an examination of the manner in which such power was acquired or maintained. These issues, along with others, are questions that are undoubtedly common to all the members of the putative class.'" (quoting In re Buspirone Patent & Antitrust Litig., 210 F.R.D. 43, 57 (S.D.N.Y. 2002))).

Many of the questions identified by Plaintiffs focus on Defendants' conduct in implementing the Restraints which have caused or will cause the same general antitrust injury to both present and future merchants — despite any differences in how future merchants are specifically impacted amid any changes in the credit or debit card industry. *See* Batalla Vidal, 501 F. Supp. 3d at 133 (certifying a Rule 23(b)(2) class challenging the **[*160]** Wolf Memorandum and consisting of individuals "who are or will be *prima facie* eligible for deferred action under the terms of the [Deferred Action] program" because "[a]s long as the Wolf Memorandum remains in effect, [c]lass members who are otherwise eligible for [Deferred Action] but have not yet applied share the same kind of 'distinct and palpable' injury with the named plaintiffs who happen to have already applied for [Deferred Action] and had their applications stalled or rejected"); Newkirk, 2020 U.S. Dist. LEXIS 155539, 2020 WL 5035930, at *8, *12 (certifying a class of individuals with disabilities who "have applied for or will apply for" benefits through the Suffolk County Department of Social Services and stating that "'the disparate impact of a challenged policy or regulation does not defeat class certification,' particularly 'where . . . plaintiffs request declaratory and injunctive relief against a defendant engaging in a common course of conduct toward them, and there is therefore no need for individualized determinations of the propriety of injunctive relief'" (quoting R. A-G ex rel. R.B. v. Buffalo City Sch. Dist. Bd. of Educ., No. 12-CV-960, 2013 U.S. Dist. LEXIS 93924, 2013 WL 3354424, at *10 (W.D.N.Y. July 3, 2013), *aff'd*, 569 F. App'x 41 (2d Cir. 2014))); *see also* Floyd v. City of New York, 283 F.R.D. 153, 160, 173 (S.D.N.Y. 2012) (certifying class of individuals who "have been, or in the future **[*161]** will be" unlawfully stopped in violation of the Fourth and Fourteenth Amendment and stating that "even after *Wal—Mart*, Rule 23(b)(2) suits remain appropriate mechanisms for obtaining injunctive relief in cases where a centralized policy is alleged to impact a large class of plaintiffs, even when the magnitude (and existence) of the impact may vary by class member").

The questions that Plaintiffs raise are fundamental to both the outcome of the case, and would generate common answers that would assist in determining the resolution of Plaintiffs' claims. Accordingly, Plaintiffs satisfy the Rule 23(a)(2) commonality requirement.

iii. Typicality

Plaintiffs argue that the typicality requirement is satisfied because their claims "stem from the same course of conduct (Defendants' conspiracy to impose the Restraints on all Merchants)," are based on the same legal theories of violations of the Sherman, Clayton, and Cartwright Acts, and "will be proven by the same evidence (documents and testimony reflecting Defendants' agreement and its anticompetitive impact on the Class)." (Pls.' Mem. 28.) Plaintiffs contend that the proposed class representatives will "seek to prove that Defendants' conduct resulted in all Class members being injured or threatened **[*162]** with injury in violation of the antitrust laws and will seek equitable relief for that conduct." (*See id.*)

Merchant Trade Groups argue that typicality is not satisfied as to future merchants because Plaintiffs fail to explain how the class representatives' claims are typical of future merchants' claims. (Merchant Trade Groups' Opp'n 18-19.) In support, Merchant Trade Groups contend that "market conditions and merchant relationships with Defendants will only continue to evolve in unknown ways," which will make determining typicality as to future merchants difficult. (*Id.* at 19.) Neither Merchant Trade Groups nor any other party object to typicality as to non-future-merchant class members.

HN11[] The typicality prong of Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The typicality requirement "is satisfied when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." Shahriar v. Smith & Wollensky Rest. Grp., Inc., 659 F.3d 234, 252 (2d Cir. 2011) (quoting Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993)); In re Flag Telecom Holdings, Ltd. Sec. Litig., 574 F.3d 29, 35 (2d Cir. 2009). "The commonality and typicality requirements often 'tend to merge into one another, so that similar considerations animate analysis' of both." **[*163]** Brown, 609 F.3d at 475 (quoting Marisol A., 126 F.3d at 376); *see also* Sykes, 780 F.3d at 84 n.2 ("[I]n certain 'context[s] . . . "[t]he commonality and typicality requirements of Rule 23(a) tend to merge."'" (second and third alterations in original) (quoting Dukes, 564 U.S. at 349 n.5)). "The purpose of typicality is to ensure that class representatives 'have the incentive to prove all the elements of the cause of action which would be presented by the individual members of the class were they initiating individualized actions.'" Floyd, 283 F.R.D. at175 (quoting In re NASDAQ Mkt.-Makers Antitrust Litig., 169 F.R.D. at 510). "Since the claims only need to share the same essential characteristics, and need not be identical, the typicality requirement is not highly demanding." In re Platinum & Palladium Commodities Litig., 2014 U.S. Dist. LEXIS 96457, 2014 WL 3500655, at *9 (quoting *Bolanos v. Norwegian Cruise Lines Ltd., 212 F.R.D. 144, 155 (S.D.N.Y. 2002)*).

Plaintiffs allege, on behalf of the putative class, that they were harmed by the same course of events — Defendants' unlawful price fixing of interchange fees and implementation of the Restraints which have restricted trade. *See* In re Air Cargo Shipping Servs. Antitrust Litig., No. 06-MD-1175, 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at *31 (E.D.N.Y. Oct. 15, 2014) ("Here, the plaintiffs allege that the defendants engaged in a global conspiracy to fix prices, so it is nearly tautological that the class representatives will rely on the same factual and legal arguments to establish the defendants' liability."), *report and recommendation adopted*, 2015 U.S. Dist. LEXIS 90402, 2015 WL 5093503 (E.D.N.Y. July 10, 2015); In re NASDAQ Mkt.-Makers Antitrust Litig., 169 F.R.D. at 511 ("In antitrust disputes, [s]ince the representative parties need [to] prove a **[*164]** conspiracy, its effectuation, and damages therefrom — precisely what the absentees must prove to recover — the representative claims can hardly be considered atypical." (alteration in original) (quoting In re Sugar Indus. Antitrust Litig., 73 F.R.D. 322, 336 (E.D. Pa. 1976))). Plaintiffs all currently operate businesses that continue to accept payment by Visa and Mastercard credit and debit cards. (*See* Compl. ¶¶ 10-18.) Although the Class Plaintiffs represent an array of different interests, they seek redress for the same type of harms due to the same course of conduct.[22]

For the same reasons as those discussed regarding commonality, the Court finds that the inclusion of future merchants in the class does not destroy typicality. *See* Dukes, 564 U.S. at 350 n.5 ("We have previously stated in this context that '[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157-58 n.13, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982))); Sykes, 780 F.3d at 80 (same). Future merchants would face the same harm from the same course of events **[*165]** as those challenged by Plaintiffs by virtue of accepting Visa and Mastercard credit and debit cards. That there might be some differences surrounding the credit- and debit-card market does not defeat typicality. *See* Robidoux, 987 F.2d at 936-37 ("When it is alleged that the

[22] To the extent that any party challenges typicality on the grounds that Plaintiffs, as mostly small, single-location retailers, differ in size and structure from other class members, (*see* Direct Action Pls.' Opp'n 20-21 (describing the factual differences between the class representatives and the class members); Merchant Trade Groups' Opp'n 5-6, 13-14 (same)), the Court notes that such an argument is not sufficient to defeat typicality, which focuses on the factual and legal arguments that would be made to prove liability. *See* Meredith Corp. v. SESAC, LLC, 87 F. Supp. 3d 650, 660 (S.D.N.Y. 2015) (finding typicality requirement satisfied although "conceivably not all class members may be similarly situated as to damages," because "as to liability, the claims of the named plaintiffs here are typical of those of the class" and "[t]o prevail, each would be required to show that [the defendant's] practices with respect to the blanket licenses violated § 1 or § 2 of the Sherman Act, and effectively forced class members to accept a . . . blanket license with an artificially high price"); Dial Corp. v. News Corp., 314 F.R.D. 108, 114 (S.D.N.Y. 2015) (rejecting the defendant's argument that the class representatives' claims are not typical of the rest of the class because the class representatives differed in when they purchased in-store promotion services and their geographic range of marketing), *amended*, No. 13-CV-6802, 2016 U.S. Dist. LEXIS 22831, 2016 WL 690895 (S.D.N.Y. Feb. 9, 2016); In re Vitamin C Antitrust Litig., 279 F.R.D. 90, 111 (E.D.N.Y. 2012) ("A putative class representative need not be a heavy-weight in its industry to satisfy the typicality prong; the relevant inquiry is simply whether absent class members' interests are advanced by the prosecution of the representative's claim.").

same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims."); *Latino Officers Ass'n City of N.Y., 209 F.R.D. at 89* (finding typicality satisfied as to future claimants because typicality "does not require that the factual background of each named plaintiff's claim be identical to that of all class members; rather, it requires that the disputed issue of law or fact 'occupy essentially the same degree of centrality to the named plaintiff's claims as to that of other members of the proposed class'" (quoting *Caridad v. Metro-N. Commuter R.R., 191 F.3d 283, 293 (2d Cir. 1999)*)); *Messier v. Southbury Training Sch., 183 F.R.D. 350, 356 (D. Conn. 1998)* ("[A] (b)(2) class may include future members who stand to benefit from a favorable outcome in the case.").

Accordingly, Plaintiffs satisfy the *Rule 23(a)(3)* typicality requirement.

iv. Adequate representation

HN12[] *Rule 23(a)(4)* provides that a class action is only appropriate if "the representative parties will fairly and adequately protect **[*166]** the interests of the class." *Fed. R. Civ. P. 23(a)(4)*. The purpose is to "uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 625 (1997)*; *In re Patriot Nat'l, Inc. Sec. Litig., 828 F. App'x 760, 764 (2d Cir. 2020)* (quoting *Amchem, 521 U.S. at 625*). "Determination of adequacy typically 'entails inquiry as to whether: (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation.'" *Cordes & Co. Fin. Servs., Inc., 502 F.3d at 99* (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 60 (2d Cir. 2000)*); *see also* *Irvin v. Harris, 944 F.3d 63, 70 (2d Cir. 2019)* ("[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." (quoting *Dukes, 564 U.S. at 348-49*)). "[C]onflicts which are merely 'speculative . . . should be disregarded at the class certification stage.'" *In re Vitamin C Antitrust Litig., 279 F.R.D. at 102* (quoting *In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 145 (2d Cir. 2001)*, *abrogated on other grounds by* *In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006)*); *see also* *Kurtz, 818 F. App'x at 60* ("While a conflict of interest between the named plaintiff and absent class members can render the former an inadequate representative under certain circumstances, the 'conflict must be "fundamental" to violate *Rule 23(a)(4)*.'" (quoting *In re Literary Works in Elec. Databases Copyright Litig., 654 F.3d 242, 249 (2d Cir. 2011)*)). The Court separately discusses the adequacy of the class representatives and class counsel.

In its review of the prior unitary settlement approval, the Second Circuit concluded "that class members of the (b)(2) class were inadequately **[*167]** represented in violation of both *Rule 23(a)(4)* and the Due Process Clause." *Interchange Fees II, 827 F.3d at 231*. The Second Circuit held that the "class representatives had interests antagonistic to those of some of the class members they were representing," because the (b)(3) damages class "would want to maximize cash compensation for past harm," while the (b)(2) injunctive class "would want to maximize restraints on network rules to prevent harm in the future," and thus, "[t]he class counsel and class representatives who negotiated and entered into the Settlement Agreement were in the position to trade diminution of (b)(2) relief for increase of (b)(3) relief." *Id. at 233-34* (holding that the Supreme Court's decisions in *Amchem, 521 U.S. at 591* and *Ortiz, 527 U.S. 815*, which manifested tension on essential allocation decisions between present and future claimants, require separate representation when a class can be divided between members that hold present claims, and members that hold future claims). In addition, the Second Circuit noted that the issue of unitary representation was exacerbated "because the members of the worse-off (b)(2) class could not opt out." *Id. at 234*. The Second Circuit declined to decide "whether providing these class members with opt out rights would be a sufficient 'structural assurance **[*168]** of fair and adequate representation,' to overcome the lack of separate class counsel and representative." *Id.* (quoting *Amchem, 521 U.S. at 627*).

The Second Circuit further held that the "bargain that was struck between relief and release on behalf of absent class members" did not comport with due process because the bargain was "so unreasonable that it evidence[d] inadequate representation." *Id. at 236*. The Second Circuit held that the relief provided to the (b)(2) class in the unitary settlement was insufficient because "[t]he most consequential relief afforded the (b)(2) class was the ability to surcharge Visa-and MasterCard-branded credit cards at both the brand and product levels," which did not provide meaningful relief to merchants that "accept American Express or operate in states that prohibit surcharging . . . and merchants that begin business after July 20, 2021," the date that injunctive relief expired under the settlement, "gain no benefit at all." *Id. at 230, 238*. The Second Circuit stated that more beneficial relief might consist of "remedies that affected the default interchange fee or honor-all-cards rule." *Id.* In addition, the Second Circuit held that the release was "exceptionally broad" when it "permanently immunize[d] **[*169]** the defendants from any claims that any plaintiff may have now, or will have in the future, that arise out of, *e.g.*, the honor-all-cards and default interchange rules." *Id. at 239*.

In his concurrence, Judge Leval raised the issue of "one class of [p]laintiffs accept[ing] substantial payments from the Defendants" and in return "compel[ling] Plaintiffs in another class . . . to give up forever their potentially valid claims, without ever having an opportunity to reject the settlement by opting out of the class." *Id. at 240* (Leval, J., concurring). Relying on the Supreme Court's decisions in *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)* and *Dukes, 564 U.S. at 338*, Judge Leval stated that due process was violated because all future merchants' that will accept Defendants' cards are precluded from bringing claims "for relief from allegedly illegal conduct" while having no ability to opt out of the settlement. *Id. at 241-42* (Leval, J., concurring).

The structural defect of unitary representation no longer exists — the (b)(2) and (b)(3) classes now have separate class counsel, with the Robins Group serving as *Rule 23(b)(3)* Class Counsel and Hilliard & Shadowen LLP, Grant & Eisenhofer, P.A., Freed Kanner London & Millen, LLP, and the Nussbaum Law Group, P.C. serving as interim Class Counsel for the putative **[*170]** *Rule 23(b)(2)* Class. (*See* Interim Class Counsel Order.) The (b)(2) and *(b)(3)* classes also now have separate class representatives. (*See* Compl. ¶ 2; *Rule 23(b)(3)* Third Consolidated Am. Class Action Compl. ¶ 2, Docket Entry No. 7123.)

For these and the following reasons, the Court finds that the bifurcation of the (b)(2) and (b)(3) classes and their Class Counsel sufficiently addresses the Second Circuit's concerns.[23] The Court finds that the class representatives — with the exception of DDMB and DDMB2 and Class Counsel adequately represent the class.

1. Adequacy of class representatives

Plaintiffs argue that the class representatives adequately represent the class because their interests and injuries are the same as those of the class. (*See* Pls.' Mem. 29.) In support, Plaintiffs argue that they have the same interests in prosecuting their claims because all Plaintiffs "are subject to the same Restraints," "are challenging the same underlying conduct," and "are asserting the same legal claims . . . and . . . seek to enjoin the same conduct." (*Id.*) Plaintiffs contend that "[t]he prospect that Plaintiffs' preferences as to injunctive relief may differ from those of other class members[] has no bearing" at the class certification **[*171]** stage of the litigation because it is speculative and premature. (*Id.* at 30.) Plaintiffs also argue that any equitable relief secured via verdict or settlement "will serve only as a baseline for all [m]erchants going forward" because "[e]very [m]erchant will remain free to seek to negotiate additional relief specific to themselves and their own business needs." (*Id.* at 30-31.)

Direct Action Plaintiffs, Grubhub Plaintiffs, Merchant Trade Groups, and Walmart (collectively, "Opponents") oppose class certification on adequacy of representation grounds. They contend that Plaintiffs do not adequately represent the proposed class because (1) they want to prioritize different forms of injunctive relief than some of the merchants in the putative class, (2) a mandatory *Rule 23(b)(2)* class would impermissibly alter the rights of merchants seeking money damages via claim and issue preclusion, (3) class representatives are incentivized to trade away the claims of class members pursuing individual damages claims in exchange for relief that benefits the rest of the equitable relief class, and (4) future merchants may be differently situated in the future and would have no opportunity to be heard before being bound **[*172]** to a judgment. (*See* Direct Action Pls.' Opp'n; Grubhub Pls.' Opp'n; Merchant Trade Groups' Opp'n; Walmart Opp'n.) Direct Action Plaintiffs also imply that there is an adequacy issue because of

[23] For the reasons stated in Section II.c.iv.1.E, the Court declines to reach the issue of whether future merchants are adequately represented in this class.

relationships between Class Counsel and class representatives. (*See* Direct Action Pls.' Opp'n 20 n.15.) The Court addresses each category of arguments in turn below.

HN13[] The analysis of whether a class representative is adequate "is twofold: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members." *Denney v. Deutsche Bank AG, 443 F.3d 253, 268 (2d Cir. 2006)*; *see also In re Patriot Nat'l, Inc. Sec. Litig., 828 F. App'x at 764* ("In considering *Rule 23(a)(4)*'s adequacy requirement, the primary factors are whether the class representatives have any 'interests antagonistic to the interests of other class members' and whether the representatives 'have an interest in vigorously pursuing the claims of the class.'" (quoting *Denney, 443 F.3d at 268*)). "To assure vigorous prosecution, courts consider whether the class representative has adequate incentive to pursue the class's claim, and whether some difference between the class representative and some class members might undermine that incentive." *Interchange Fees II, 827 F.3d at 231* (citing *Robinson v. Metro-N. Commuter R.R., 267 F.3d 147, 170 (2d Cir. 2001)*, *abrogated on other grounds* ***[*173]*** *by Wal-Mart Stores, Inc. v. Duke, 564 U.S. 338 (2011)*). In addition to the adequate representation requirement of *Rule 23(a)(4)*, "[t]he Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members."[24] *Id.* (quoting *Shutts, 472 U.S. at 812*); *see also Irvin, 944 F.3d at 71* (quoting *Shutts, 472 U.S. at 812*).

A. The named *Rule 23(b)(2)* Class Plaintiffs suffer the same injury as the putative class members and have an interest in vigorous pursuit of the claims

HN14[] Courts assessing the adequacy of class representatives generally find adequacy when the class representatives allege restraint of trade and monopolization and when, despite factual differences in how the class members are situated, the class representatives are similarly incentivized to prove the defendants' liability under ***antitrust law***. *See In re Auction Houses Antitrust Litig., 193 F.R.D. 162, 165 (S.D.N.Y. 2000)* (rejecting argument that the class was inadequately represented because it consisted of both buyers and sellers of auction items when "[b]oth buyers and sellers who have used defendants' services allegedly have been impacted by the artificial inflation of both buyers' and sellers' commissions pursuant to the conspiracy"); *In re Playmobil Antitrust Litig., 35 F. Supp. 2d 231, 243 (E.D.N.Y. 1998)* ("Where **[*174]** the plaintiffs have alleged a single conspiracy to artificially inflate prices, a representative plaintiff may satisfy the adequacy requirement without having purchased products from all of the defendants, having bought all of the affected products or having made purchases throughout the entire class period. The crucial inquiry is . . . whether each plaintiff has sufficient incentive to present evidence that will establish the existence of the alleged conspiracy and its effect on the prices of the products purchased by the putative class member." (quoting *In re Industrial Diamonds Antitrust Litig., 167 F.R.D. 374, 381 (S.D.N.Y. 1996)*));

[24] The Court is not aware of any case discussing whether the adequacy of representation requirement under the Due Process Clause is coextensive with *Rule 23(a)(4)*. *See* 1 Newberg on Class Actions § 3:51 (5th ed.) ("[N]o court has ever considered the specific question of whether the constitutional requirement of adequate representation for preclusion purposes is less exacting than *Rule 23*'s requirement of adequate representation for certification purposes."); William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, *82 N.Y.U. L. Rev. 790, 810 & n.79 (2007)* ("[A]re all of the aspects of *Rule 23* — including *(a)(4)* and *(g)* and all of their subparts, interpretations, and subsequent fairness hearing assessments — necessarily a part of the Constitution's demand for adequacy? Remarkably, the answer is that there is no answer. No court or commentator has ever scrutinized the question; all just assume an equivalence."); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, *1999 Sup. Ct. Rev. 337, 373* ("There is no reason to believe . . . the concept of adequate representation present in the rules is anything other than the level of constitutional protection of absent class member interests necessary to deem their virtual participation in litigation fundamentally fair."). Because the parties address adequacy of representation under *Rule 23(a)(4)* and under the Due Process Clause interchangeably and there is no authority to the contrary, and because Second Circuit jurisprudence does not appear to draw any distinction between adequacy under the Due Process Clause and *Rule 23*, *see, e.g.*, *Interchange Fees II, 827 F.3d at 236* ("Part of the due process inquiry (and part of the *Rule 23(a)* class certification requirements) involves assessing adequacy of representation and intra-class conflicts." (quoting *Stephenson v. Dow Chem. Co., 273 F.3d 249, 260 (2d Cir. 2001)*, *aff'd in part and vacated in part*, *539 U.S. 111, 123 S. Ct. 2161, 156 L. Ed. 2d 106 (2003)*)), the Court assumes the two requirements are equivalent and addresses them together.

see also [In re Vitamins Antitrust Litig., 209 F.R.D. 251, 262 (D.D.C. 2002)] ("[A]s to the vitamin products class, plaintiffs have alleged that defendants have participated in a unitary overarching conspiracy which encompassed a number of identified vitamins. . . . It is irrelevant to this prerequisite that the representatives have not purchased all products because their incentive to produce evidence as to the entire conspiracy will be the same." (citing *In re Linerboard Antitrust Litig., 203 F.R.D. 197, 208 n.8 (E.D. Pa. 2001)*)).

The proposed *Rule 23(b)(2)* putative class consists of a group of merchants that accept Visa-and/or Mastercard-branded cards from December 18, 2020, until eight years after the date of entry of final judgment. (*See* Pls.' Mem. 5.) The *Rule 23(b)(2)* Class Plaintiffs **[*175]** seek to challenge the same allegedly unlawful conduct that they claim has harmed them — Defendants' (1) imposition of supracompetitive interchange fees on Visa and Mastercard transactions, and (2) facilitation of these anticompetitive practices by forcing merchants to abide by the Restraints. (*Id.* ¶¶ 11-15, 17-18.) This alleged harm applies to all members of the putative class, making Plaintiffs similarly incentivized as class members to vigorously litigate and prove Defendants' liability. *See In re Patriot Nat'l, Inc. Sec. Litig., 828 F. App'x at 764* (finding that the lead plaintiffs had an interest in vigorously pursuing Exchange Act and Delaware state law claims when "[a]ll of the lead plaintiffs and every shareholder had an Exchange Act claim" and therefore were "sufficiently motivated to recover as much as possible for each class member"); *Lawrence v. NYC Med. Prac., P.C., No. 18-CV-8649,2021 U.S. Dist. LEXIS 96763, 2021 WL 2026229, at *10 (S.D.N.Y. May 20, 2021)* (finding the adequacy requirement satisfied when the class representatives "have substantially the same claims against [the] [d]efendants" and stating that "[b]ecause they share their claims with absent class members, the [c]ourt concludes that these representatives are capable of vigorously pursuing the claims of the class"); *Rosenfeld v. Lenich, No. 18-CV-6720, 2021 U.S. Dist. LEXIS 26950, 2021 WL 508339, at *4 (E.D.N.Y. Feb. 11, 2021)* (finding the adequacy requirement satisfied when "[e]ach class member **[*176]** . . . suffered the same type of alleged injury" and there were no conflicts that "conflict with those of the putative class members").

B. The type of relief sought by Plaintiffs is not antagonistic to the putative class members

Direct Action Plaintiffs argue that Plaintiffs' interests in injunctive relief "differ in size and scope from those of the five remaining proposed class representatives, who are owned and operated by just a handful of individuals." (Direct Action Pls.' Opp'n 20.) In support, Direct Action Plaintiffs contend that Plaintiffs are all "very small businesses . . . with limited payment capabilities" whereas Direct Action Plaintiffs "include some of the largest merchants in the United States" who operate "thousands of locations in multiple states, have substantial e-commerce operations, with sophisticated digital and contactless payment capabilities that include EMV chip terminals." (*Id.* at 20-21.) Direct Action Plaintiffs argue that Plaintiffs' expert reports demonstrate that they are prioritizing surcharging relief as opposed to relief from rules like the honor-all-cards rules because Plaintiffs "did not retain experts in mobile payments or EMV technology," and Plaintiffs' **[*177]** class certification expert Dr. Keith Leffler conceded merchants "who are directly affected by restraints relating to PIN debit, EMV, and [h]onor [a]ll [w]allets have a greater interest in obtaining equitable relief with respect to those restraints than do merchants that are not affected by them at all." (*Id.* (citing Report of Keith Leffler ("Leffler Report"), Docket Entry No. 8474-3).) In addition, Direct Action Plaintiffs contend that Plaintiffs seek injunctive relief that would actively harm them by "prevent[ing] bilateral negotiations[] [and] placing them instead under ongoing Court control." (Direct Action Pls.' Sur-Reply 10.) In support, Direct Action Plaintiffs argue that the injunctive relief sought by Plaintiffs will reopen prior settlements entered into by other merchants and will place the Court "in the role of supplanting individual merchant competition with central control." (Direct Action Pls.' Opp'n 14.)

Grubhub Plaintiffs argue that the remedy proposed by Plaintiffs' expert Dr. Joseph E. Stiglitz creates a conflict of interest because Plaintiffs want to "restrain the ability of 'premium merchants' like the Grubhub Plaintiffs [from] us[ing] their negotiating leverage to **[*178]** reach agreements" with Defendants and would "invite other class members to challenge any contracts the Grubhub Plaintiffs might negotiate." (Grubhub Pls.' Opp'n 12.) Grubhub Plaintiffs also highlight the differences between themselves and Plaintiffs, stating that the class representatives are "differently situated than large merchants that have different business models[] and that the [Defendants'] rules and practices affect them differently as a result." (*Id.* at 5.) In support, Grubhub Plaintiffs rely on deposition testimony by class representatives stating that Visa's "all-outlets practice[25] . . . is not important to RunCentral[] which has no other brands or locations," and from the owner of two bars operated by DDMB Inc. and DDMB2 LLC who stated that "those businesses have no complaint about the Visa and Mastercard [h]onor [a]ll [c]ards rules." (*Id.*)

Walmart argues that Plaintiffs will "undermine merchants' interests in eliminating anticompetitive conduct, and in particular Defendants' [honor-all-cards] rules" because Plaintiffs "have little actual interest in rolling[] back these rules." (Walmart Opp'n 10-11.) In support, Walmart cites to a 2016 filing in which class counsel "informed **[*179]** the Court that they only sought to eliminate [honor-all-cards] rules in just a few states (ones that prohibit surcharging)." (*Id.* at 11 (citing Resp. in Supp. of Appl. for Appointment as Co-Lead Counsel for Equitable Relief Class 6, Docket Entry No. 6695).) Walmart contends that Plaintiffs will "put insufficient energy into challenging Defendants' [honor-all-cards] rules once their class is certified." (*Id.*) Walmart contends that the submissions of Plaintiffs' experts confirm their view of Plaintiffs' relief priorities because (1) Plaintiffs' expert Professor Dennis W. Carlton "proposed leaving the [honor-all-cards] rules in place generally, so long as no-surcharge rules are struck down," (Walmart Suppl. Opp'n 3 (citing Dep. of Professor Dennis W. Carlton ("Carlton Dep.") 141:9-18, annexed to Decl. of Paul H. Schoeman in Supp. of Walmart's Suppl. Opp'n ("Schoeman Suppl. Opp'n Decl.") as Ex. B, Docket Entry No. 8621)), (2) Dr. Leffler acknowledged during his deposition that different merchants prioritize different relief, (*id.* at 3-4 (citing Dep. of Dr. Keith Leffler ("Leffler Dep.") 90:23-91:4, annexed to Schoeman Suppl. Opp'n Decl. as Ex. C, Docket Entry No. 8621-1)), and (3) several **[*180]** experts including Dr. Stiglitz "argue[d] that the Court should monitor commercial agreements reached by 'leading' or 'premium' merchants . . . [to] assess whether these 'special deals' would be detrimental to the interests of other class members," (*id.* 4 (first citing Stiglitz Report ¶¶ 166, 177, annexed to Schoeman Suppl. Opp'n Decl. as Ex. D, Docket Entry No. 8621-2; and then citing Leffler Dep. 74:7-13)). Finally, Walmart contends that Plaintiffs will seek relief that will hamper large merchants' ability to negotiate their own deals directly with Defendants. (*Id.* at 6-7.)

Merchant Trade Groups argue that "[t]here is troubling indicia" that Plaintiffs' value injunctive relief focused on surcharging whereas many other merchants within the class "have already made clear in their objection to the 2013 (b)(2) [s]ettlement and subsequent appeal" that "Defendants' antitrust violations cannot be remediated for Merchant Trade Groups or the merchant community more broadly unless the [h]onor-all-[c]ards and default interchange rules are eliminated." (Merchant Trade Groups' Opp'n 11.) In response to Plaintiffs' argument that Merchant Trade Groups' are speculating about relief priorities, Merchant **[*181]** Trade Groups argue that (1) Plaintiffs' class certification brief "cites no evidence about" the honor-all-cards and default interchange rules, (2) one class representative "revealed that it is not personally interested" in relief from the honor-all-cards rule at all, and (3) all three of Plaintiffs' expert reports "focus on Defendants' no-surcharging rules — both in their analyses of Defendants' liability and in their injunctive relief — and give short shrift to Defendants' [h]onor-all-[c]ards and default interchange rules." (Merchant Trade Groups' Suppl. Opp'n 5-6.)

In response, Plaintiffs argue that (1) there is no conflict as to the injunctive relief sought because Plaintiffs seek relief "as to all of the Restraints, including the [h]onor [a]ll [c]ards and [d]efault [i]nterchange rules, with the objective of creating a more competitive market for all merchants," (2) there is no authority suggesting that all class members must have suffered "the same exact injury in the exact same way," and (3) the potential need for court monitoring does not create a conflict within the class because "[i]t is common for courts to retain jurisdiction to ensure compliance with their decrees" and such **[*182]** monitoring is needed because Network Defendants' market power will not be immediately eliminated as a result of any injunctive relief obtained. (Pls.' Reply Mem. in Supp. Pls.' Mot. ("Pls.' Reply") 10-11, 15-18, Docket Entry No. 8457); *see also* Pls.' Reply to Merchant Trade Groups' and Walmart's Suppl. Opp'n ("Pls.' Suppl. Reply") 2-6, Docket Entry No. 8631 ("[T]he 'honor-all-wallets' rule . . . is an application of the [honor-all-cards] rule to mobile devices.").) First, Plaintiffs argue that there is no conflict as to the type of relief sought because they are seeking relief as to all Restraints. (*See* Pls.' Reply 15-16; Pls.' Suppl. Reply 3.) Plaintiffs contend that while they did not retain a separate expert to "address the mobile-wallets issue, there was no need to" as Dr. Stiglitz had already "dissected the [h]onor [a]ll [c]ards rule in details, including its application to not only mobile wallets but also all new emerging technologies." (Pls.' Reply 16 (citing Expert Report of Joseph E. Stiglitz

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[25] Visa's all-outlets practice requires that "an entity that accepts Visa at one location to accept the cards at all locations in order to qualify for a better interchange tier." (Grubhub Pls.' Opp'n 5.)

("Stiglitz Report") ¶ 121, annexed to Pls.' Notice of Service as Ex. 2, Docket Entry No. 8474-2).) Next, Plaintiffs argue that "a disagreement about the proper scope of relief is not **[*183]** a basis for denying certification." (*Id.* at 16.) Finally, Plaintiffs contend that Direct Action Plaintiffs distort Dr. Leffler's deposition testimony who "innocuously testified that selective agreements *could* be inconsistent with relief ordered by the Court" and other parties will necessarily be impacted by the outcome of the (b)(2) class because of the nature of how injunctive relief operates. (*Id.* at 12-13.) In addition, Plaintiffs argue that any discussion of remedies is premature as "the Court will determine the scope of the equitable relief based on its liability findings and further remedy proceedings" and the class will have an opportunity to "object to relief that they deem adverse to their interests." (*Id.* at 13.)

Opponents' arguments that Plaintiffs seek a different type of injunctive relief are not sufficient to establish a conflict between the class representatives and the class members that defeats adequacy of representation. Despite Opponents' contentions that Plaintiffs are primarily focused on obtaining surcharging relief, Plaintiffs' complaint challenges several of the Restraints that Opponents claim they are not seeking to eliminate, including the honor-all-cards rules **[*184]** and the default interchange fees, as violations of ***antitrust law***. (*See* Pls.' Mem 2 n.5; Compl. ¶¶ 94, 113, 139-40, 144, 155-56, 216, 288-99, 364-428.) Opponents point to quotes from Plaintiffs' expert reports to support their arguments, but in other parts of their reports the experts also opine that the honor-all-cards and default interchange rules are anticompetitive and suggest eliminating them to some extent. For example, in his recommendations as to potential injunctive relief, Dr. Stiglitz recommended "[e]liminating all restraints on non-price steering," "[e]liminating Visa and Mastercard default interchange fees for large banks," and "[e]liminating the [h]onor-[a]ll-[c]ards rule for large banks," and included the honor-all-cards rules and default interchange rates in his list of "current significant Visa and Mastercard" restraints. (*See* Stiglitz Report ¶¶ 7, 37.) While Opponents correctly state that Dr. Stiglitz suggests in his report that the honor-all-cards rule be eliminated in states where surcharging is not permitted, he also states that "[t]he [h]onor-[a]ll-[c]ards [r]ule has anticompetitive impact beyond the states not allowing merchants to charge for high-cost credit **[*185]** card use" and that eliminating the rule would result in driving down issuing banks' profits. (*Id.* ¶¶ 134-135.) Professor Carlton's reports offer a less strict perspective toward the honor-all-cards rules, though he also suggests eliminating the honor-all-cards rules in certain states. At one point in his report, he states that the honor-all-cards rules should be eliminated "[i]n states that prohibit surcharging," (Report of Prof. Dennis W. Carlton ("Carlton Report") ¶ 8, annexed to Pls.' Notice of Service as Ex. 1, Docket Entry No. 8474-1), and in the remedies section of the report, he states that "[i]n states where surcharging is restricted by law, competition would be improved if the [h]onor [a]ll [c]ards rules were relaxed," (*id.* ¶ 111). In addition, both experts suggest that applications of the honor-all-cards rules such as the honor-all-wallets rule[26] should not be permitted in order to allow more competition. (*See* Carlton Report ¶ 115 ("As an example of potential future behavior that the Court may wish to address, tying of credit and debit was disallowed as part of the *Visa/MasterMoney* litigation. Competition would be protected if similar tying related to new payment methods or **[*186]** technologies were disallowed, lest Visa and Mastercard again use their market power in credit (and now debit) to gain market power over a new payment method." (footnote omitted)).)

While Plaintiffs' Complaint and expert reports thus far demonstrate a desire to eliminate the honor-all-cards and default interchange rules in some capacity, the Court declines to make any judgments at this stage of the litigation as to Plaintiffs' injunctive relief priorities based on the existing expert reports. As Plaintiffs contend, on April 18, 2019, the Court directed that:

> The parties' expert reports are not required at this time, or until further order of the Court, to include expert recitations and opinions directed at the scope and form of any appropriate injunctive relief. In the event of a subsequent finding of liability, the parties shall confer regarding a schedule for the serving of expert reports directed at the scope and form of any proposed injunctive relief and report to the Court within twenty-eight days following any such liability determination.

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[26] The honor-all-wallets rules are an application of the honor-all-cards rules to payments made via mobile devices. (*See* Pls.' Suppl. Reply 4 ("[T]he 'honor-all-wallets' rule . . . is an application of the [honor-all-cards] rule to mobile devices."); Compl. ¶ 295 ("Visa and MasterCard have also construed and applied their [h]onor [a]ll [c]ards rules to become '[h]onor [a]ll [d]evices' rules. Specifically, Visa and MasterCard rules require Merchants to accept all devices set up to transact through a Visa or MasterCard network to the extent the Merchant accepts payments using communications technology employed by the device. This results in a Merchant having limited ability to refuse or condition acceptance of payments from digital wallets.").)

(Order dated Apr. 18, 2019.) Accordingly, expert reports at this stage of the litigation do not conclusively address "the scope and form of **[*187]** any appropriate injunctive relief" and any conflicts as to the form of injunctive relief are speculative.[27] *See* Denney, 443 F.3d at 268 ("A conflict or potential conflict alone will not, however, necessarily defeat class certification — the conflict must be 'fundamental.'" (quoting In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d at 145)); Zhang v. Ichiban Grp., LLC, No. 17-CV-148, 2021 U.S. Dist. LEXIS 136308, 2021 WL 3030052, at *5 (N.D.N.Y. May 21, 2021), *reconsideration denied*, 2021 U.S. Dist. LEXIS 117446, 2021 WL 3030038 (N.D.N.Y. June 23, 2021) ("A conflict of interest between the parties and the class they seek to represent 'must be fundamental, and speculative conflict should be disregarded at the class certification stage.'" (quoting Sykes, 285 F.R.D. at 287)); In re Vitamin C Antitrust Litig., 279 F.R.D. at 102 ("[C]onflicts which are merely speculative . . . should be disregarded at the class certification stage.").

Moreover, even if Plaintiffs' do have a different perspective on the specific form of injunctive relief, courts considering the issue routinely hold that different perspectives as to the appropriate form of injunctive relief or as to litigation strategy do not constitute a conflict sufficient to defeat adequacy of representation. *See* In re Yahoo Mail Litig., 308 F.R.D. 577, 596 (N.D. Cal. 2015) (finding that "the relief that [the] [p]laintiffs seek does not conflict with the interests of proposed class members" when the plaintiffs sought to shut down email scanning and the defendant contended that such actions would result in a less secure email experience, **[*188]** and holding that "[a] difference of opinion about the propriety of the specific relief sought in a class action among potential class members is not sufficient to defeat certification" (quoting Californians for Disability Rts., Inc. v. California Dep't of Transp., 249 F.R.D. 334, 348 (N.D. Cal. 2008))); Keepseagle v. Vilsack, 102 F. Supp. 3d 205, 214 (D.D.C. 2015) (denying motion to modify class settlement and stating that "class representatives do not become inadequate merely because other class members disagree with their strategic decisions"); Californians for Disability Rts., Inc., 249 F.R.D. at 348 ("A difference of opinion about the propriety of the specific relief sought in a class action among potential class members is not sufficient to defeat certification."); In re J.P. Morgan Chase Cash Balance Litig., 242 F.R.D. 265, 275 (S.D.N.Y. 2007) (finding that the alleged ERISA violation "affects former and current employees equally" and stating that "[w]hile current employees may prefer the cash balance formula for various reasons . . . [the] preference for a different remedy does not preclude class certification"), *amended*, 255 F.R.D. 130 (S.D.N.Y. 2009); Richards v. FleetBoston Fin. Corp., 235 F.R.D. 165, 172 (D. Conn. 2006) ("Even if the court could assume at this stage in the litigation that class members do prefer a lump-sum distribution, a question it does not decide, this conclusion would go only toward the question of which remedy class members would seek, which does not affect the viability of the class at this stage in the litigation. . . . The question of remedies **[*189]** is not appropriate for resolution at this stage in the litigation, and the court is not required to impose the particular remedy requested by [the plaintiff] even if she prevails on the merits of her claims."); *see also* In re Motor Fuel Temperature Sales Pracs. Litig., 271 F.R.D. 221, 233 (D. Kan. 2010) (finding the class representatives adequate in a Rule 23(b)(2) class action despite the fact that some class members might oppose the requested injunctive relief because the injunction need only benefit the class as a whole and because "[c]lass actions are not forbidden in every case in which class members may disagree"). For example, in *In re Visa Check/MasterMoney Antitrust Litigation*, the Second Circuit rejected the defendants' arguments that class representatives were inadequate because they advanced an alternative theory for calculating the plaintiffs' damages. 280 F.3d at 144.[28] The Second Circuit stated that the

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[27] Direct Action Plaintiffs contend that Plaintiffs propose a plan to have the Court monitor agreements reached between a merchant and Defendants argue that this plan violates the Rules Enabling Act because it "seeks to abridge the Direct Action Plaintiffs' substantive rights and prohibit[s] them from continuing to litigate their own claims for past and future damages[] or reach[ing] individual settlements resolving those claims." (Direct Action Pls.' Opp'n 14.) Walmart contends that Plaintiffs will "likely seek an injunction that effectively prevent[] merchants from trying to use what bargaining power they have to secure lower interchange rates for themselves." (Walmart's Opp'n 8; Walmart's Suppl. Opp'n 4-5.) For the same reasons discussed above, the Court finds these arguments regarding the propriety of any proposed injunctive relief premature.

[28] The Second Circuit later abrogated Visa Check/MasterMoney on other grounds. *See* In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 32, 42 (2d Cir. 2006), *decision clarified on denial of reh'g sub nom.* In re Initial Pub. Offering Sec. Litig., 483 F.3d 70 (2d Cir. 2007). The abrogation concerned the proper standard for demonstrating compliance with Rule 23's requirements on a motion for class certification and "disavowed the suggestion . . . that an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed." *Id.*

different theories did not create a fundamental conflict because "[a]ll class members, regardless of their debt/credit proportion, wish to prove that the debit card fees would be significantly lower" without the challenged practice, and because "[e]very member also has an interest in establishing the hypothetical, 'untied' price as low as possible in order to maximize recovery of **[*190]** damages. *Id. at 144*. In addition, the *Visa Check/MasterMoney* court noted that speculative conflict "should be disregarded at the class certification stage." *Id. at 146*. Had the class representatives sought a different form of relief entirely — that is, monetary damages versus equitable relief, it may have raised an issue of inadequate representation. *See, e.g.*, *Dickens v. GC Servs. Ltd. P'ship, 706 F. App'x 529, 535-36 (11th Cir. 2017)* (noting that in a past Eleventh Circuit case the court found inadequate representation when a class sought primarily injunctive relief when damages were a more appropriate form of relief, stating that "there is a conflict between the named plaintiff and absent class members where the class representative seeks only a form of relief that might not be of the utmost importance to absent class members," and holding that there is no reason to deem the plaintiff an inadequate representative when the plaintiff sought injunctive relief and there was only a "remote possibility that some class members may have suffered actual damages"); *see also* 1 Newberg on Class Actions § 3:59 ("[W]hen a class includes members whose claims are for a different type of relief than the claims of the putative class representatives, it is possible that the differences create a conflict of interest **[*191]** disabling the representative from adequately representing the entire class."). ***HN15***[] Moreover, *Rule 23* has procedural safeguards that will allow class members to object to the injunctive relief provided in any settlement. *See* *Fed. R. Civ. P. 23(e)(5)* ("Any class member may object to the [settlement] proposal . . . .").

The cases Opponents cite to the contrary are inapposite. Several of the cases are cited in support of Opponents' speculative arguments regarding the form of the injunctive relief sought by Plaintiffs. For example, Walmart cites *Wexler v. AT&T Corp.* for the proposition that "[a] proposed representative may be . . . inadequate if, for example, they . . . would otherwise permit a settlement on terms less favorable to absent class members." (Walmart Opp'n 10 n.12 (citing *Wexler v. AT&T Corp., No. 15-CV-686, 2019 U.S. Dist. LEXIS 172108, 2019 WL 4874746, at *2 (E.D.N.Y. Sept. 30, 2019)*).) However, for the reasons discussed above, the Court finds discussion of the specific type of injunctive relief Plaintiffs intend to seek premature at this stage of the litigation. Walmart also suggests that the Court should broadly apply *Interchange Fees II* and hold that adequacy is lacking when groups within a class seek conflicting forms of relief, (*see* Walmart Opp'n 10 ("The Second Circuit has already **[*192]** warned, in this very MDL, that adequacy is lacking where different groups seek conflicting forms of relief, incentivizing class counsel to trade away one group's interests for the other's and settle on terms that disfavor certain class members.")), however, the Second Circuit did not reach such a conclusion in *Interchange Fees II*. The Second Circuit found that adequacy was lacking due to the unitary representation of the damages and equitable relief class by the same class counsel. *See* *Interchange Fees II, 827 F.3d at 234* ("Unitary representation of separate classes that claim distinct, competing, and conflicting relief create unacceptable incentives for *counsel* to trade benefits to one class for benefits to the other in order somehow to reach a settlement." (emphasis added)). While the Second Circuit emphasized the importance of obtaining greater injunctive relief than just primarily the ability to surcharge, the Court addressed this issue in the context of inadequate class counsel and an "unreasonable tradeoff between relief and release that demonstrates their representation did not comply with due process." *Id. at 238-40* ("This is not a matter of certain merchants (e.g., those based in New York and those that accept American Express) **[*193]** arguing that class counsel did not bargain for their preferred form of relief, did not press certain claims more forcefully, or did not seek certain changes to the network rule books more zealously. This is a matter of class counsel trading the claims of many merchants for relief they cannot use: they actually received nothing.").

Accordingly, the Court finds that Opponents' arguments regarding their preferred injunctive relief are premature and speculative and do not create a fundamental conflict that precludes a finding of adequacy of representation.

C. The risk of claim and issue preclusion does not create a fundamental conflict between class representatives and putative class members

Direct Action Plaintiffs argue that the proposed class violates due process because their claims for damages are property interests protected by the Due Process Clause and certifying a mandatory class would "put class members at risk of having [their] individual damages claims precluded" because an "adverse judgment against a mandatory class could collaterally estop class members from pursuing their individual damages claims." (Direct Action Pls.' Opp'n 6-8 (first citing Shutts, 472 U.S. at 812; and then citing Dukes, 564 U.S. at 363).) Direct Action Plaintiffs contend **[*194]** that the Second Circuit's decision in *Interchange Fees II* prevents certification of a mandatory equitable relief class when doing so would "jeopardize the compensatory damages claims of individual class members, including because of the risk of collateral estoppel." (*Id.* at 7 (citing Interchange Fees II, 827 F.3d at 364).) In response to Plaintiffs' argument that due process only protects their property right in their claim "when a mandatory (b)(2) class seeks both injunctive *and* monetary relief," Direct Action Plaintiffs contend that nothing in Dukes supports that argument, (Direct Action Pls.' Sur-Reply 2-3), and their individual damages claims are nevertheless at risk because Plaintiffs' claims for equitable relief raise the same issues and "require[] proof of Defendants' *liability* for engaging in anticompetitive restraints," (Direct Action Pls.' Opp'n 8-9).

Grubhub Plaintiffs raise a similar argument. (*See* Grubhub Pls.' Opp'n 13.) Grubhub Plaintiffs contend that their claims are protected by the Due Process Clause and will be precluded should they be collaterally estopped by an adverse judgment against the class. (*Id.*)

In response, Plaintiffs argue that the collateral estoppel argument is meritless as it is speculative and premature. (Pls.' **[*195]** Reply.) In support, Plaintiffs argue that the "'potential preclusion' argument would prevent any court from certifying a mandatory (b)(2) class if any class member had a related claim for damages" and courts have "continued to certify and endorse the certification of (b)(2) classes including members that also maintain damages claims." (*Id.* at 7.) Plaintiffs distinguish the cases cited by Opponents and argue that those cases were decided in other contexts that have no bearing on the instant motion. (*See id.* at 8 (noting that the cases were decided in the context of class certification for a class predominantly for money damages or had damages claims compromised by the terms of a release).)

Defendants argue that due process is not implicated by certification of a mandatory class because Plaintiffs seek certification of a Rule 23(b)(2) class that seeks neither "monetary relief" nor even "'incidental' monetary relief" because the Rule 23(b)(3) settlement "separately addressed all other claims for relief, and notice and opt-out rights were provided to members of that class." (Defs.' Reply 11.) In response to Opponents' arguments regarding Dukes, Defendants contend that Dukes is inapposite because it concerned certification **[*196]** of a Rule 23(b)(2) class that sought injunctive relief and backpay and "the monetary relief [was] not incidental to" the injunctive relief sought. (*Id.* (quoting Dukes, 564 U.S. at 360).) In addition, Defendants argue that the potential for collateral estoppel does not violate due process because if that were the case, "courts typically would be required to provide opt-out rights to a Rule 23(b)(2) class." (*Id.* at 12.)

Opponents' claim preclusion argument is unpersuasive. ***HN16***[] "The doctrine of res judicata, or claim preclusion, holds that 'a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" In re Motors Liquidation Co., 943 F.3d 125, 130 (2d Cir. 2019) (quoting Monahan v. N.Y.C. Dep't of Corr., 214 F.3d 275, 284 (2d Cir. 2000)); In re Vitamin C Antitrust Litig., 279 F.R.D. at 114 ("[A] final judgment on the merits generally precludes a plaintiff from bringing a new lawsuit raising issues that could have been litigated in the first suit, but were not." (citing *Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1076 (E.D.N.Y. 2006)*)). However, class action judgments are an exception to the general rule: "[P]articipation in a Rule 23(b)(2) class seeking injunctive relief does not ordinarily preclude absent class members from bringing their non-litigated claims in subsequent lawsuits." In re Vitamin C Antitrust Litig., 279 F.R.D. at 114. The United States Supreme Court's decision in *Cooper v. Federal Reserve Bank of Richmond* is widely cited **[*197]** as the source of this principle. *See* id. at 114-15 ("This exception to the general claim-splitting rule has its origin in a puzzling Supreme Court decision from 1984." (citing Cooper v. Fed. Reserve Bank, 467 U.S. 867, 880, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984))); *see also* Hernandez v. J.P. Morgan Chase Bank N.A., No. 14-CV-24254, 2016 U.S. Dist. LEXIS 95966, 2016 WL 3982496, at *13 (S.D. Fla. July 22, 2016) (quoting Cooper, 467 U.S. at 880); Gonzalez v. City of New York, 396 F. Supp. 2d 411, 420 (S.D.N.Y. 2005) (finding that the plaintiffs' failure to promote claim was not barred by a previous class action judgment (quoting Cooper, 467 U.S. at 880)); *see also* 6 Newberg on Class Actions § 18:17 ("The Supreme Court's 1984 decision . . . is the leading case in which a court refused to bar individual claims that arose out of the same factual predicate as claims that had been resolved by a prior class suit, though the specific facts of that case are somewhat unique and beguiling."). Cooper involved an individual suit which alleged racial discrimination following an earlier class action in which the court found no pattern and practice of discrimination. *Cooper, 467 U.S. at 867*. While the earlier class action resulted in a judgment for the defendant and the plaintiff had not opted out of the class, the Supreme Court held that the plaintiff's subsequent discrimination claim was not barred by the prior class action because there might be individual discrimination despite the lack of a "pattern and practice of discrimination" as concluded in the class action. *Id. at 880*. The **[*198]** *Cooper* court stated that the class action judgment:

> *(1)* bars the class members from bringing another class action against the [defendant] alleging a pattern or practice of discrimination for the relevant time period and (2) precludes the class members in any other litigation with the [defendant] from relitigating the question whether the [defendant] engaged in a pattern and practice of discrimination against black employees during the relevant time period. The judgment is not, however, dispositive of the individual claims the . . . petitioners have alleged in their separate action. . . . The class-action device was intended to establish a procedure for the adjudication of common questions of law or fact. If the [defendant's] theory were adopted, it would be tantamount to requiring that every member of the class be permitted to intervene to litigate the merits of his individual claim.

Id. at 880.

Courts have since relied on *Cooper* as an exception to the general rules of preclusion in the class-action context. *See* *In re Vitamin C Antitrust Litig., 279 F.R.D. at 114* ("Although *Cooper* did not announce any bright-line rules, some courts have cited this case for the sweeping proposition that 'a class action judgment . . . binds the class members as to matters actually litigated **[*199]** but does not resolve any claim based on individual circumstances that was not addressed in the class action.'" (quoting *Cameron v. Tomes, 990 F.2d 14, 17 (1st Cir. 1993)*)); *see also* *In re AXA Equitable Life Ins. Co. COI Litig., No. 16-CV-740, 2020 U.S. Dist. LEXIS 145948, 2020 WL 4694172, at *4 n.2 (S.D.N.Y. Aug. 13, 2020)* ("[S]ome courts have held that inclusion in a mandatory class does not bar a class member from later asserting a claim for money damages arising out of the same transaction."); *Adkins v. Morgan Stanley, 307 F.R.D. 119, 141 (S.D.N.Y. 2015)* (citing *Cooper* and stating that "while absent class members risk losing on the merits and being precluded from separately asserting, for example, a claim that [the defendant] is culpable for their loans, if the class were to win on the merits they would be able to pursue separate claims for damages"), *aff'd*, *656 F. App'x 555 (2d Cir. 2016)*; *In re TFT-LCD (Flat Panel) Antitrust Litig., No. 07-MD-1827, 2012 U.S. Dist. LEXIS 11369, 2012 WL 273883, at *1-2 (N.D. Cal. Jan. 30, 2012)* ("'In the Ninth Circuit, 'the general rule is that a class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damages claims by class members, even if based on the same events.' . . . The rationale for this rule — which has typically been applied in the Title VII context — is that claims for monetary damages typically rely upon different facts than claims for injunctive relief." (first quoting *Hiser v. Franklin, 94 F.3d 1287, 1291 (9th Cir. 1996)*; and then citing *Cooper, 467 U.S. at 891*)); *see also* *Akootchook v. United States, 271 F.3d 1160, 1165 (9th Cir. 2001)* ("If all class members had to bring their own individual claims in addition to the common class claims, it would **[*200]** destroy the efficiency of having class actions and reduce the benefit of joining such a suit."). In *Hiser v. Franklin*, for example, the Ninth Circuit rejected the argument that a state-court class-action judgment precluded a second suit seeking individual damages. *94 F.3d at 1291*. The Ninth Circuit stated that "the general rule is that a class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damage claims by class members, even if based on the same events" and noted that "every federal court of appeals that has considered the question" has reached the same conclusion. *Hiser, 94 F.3d at 1291* (citing *Cooper, 467 U.S. at 880* and collecting cases). Circuit courts that have considered the issue have reached the same conclusion, although some of their holdings are arguably limited to the prisoners' conditions of confinement context. *See* *Frank v. United Airlines, Inc., 216 F.3d 845, 851-52 (2000)* (limiting the preclusive effect of a *Rule 23(b)(2)* sex-discrimination class-action by holding that the absence of a right to opt out in the earlier case made preclusion unavailable); *Fortner v. Thomas, 983 F.2d 1024, 1031 (11th Cir. 1993)* ("It is clear that a prisoner's claim for monetary damages or other particularized relief is not barred if the class representative sought only declaratory and injunctive relief, even if the prisoner is a member of a **[*201]** pending class action."); *Norris v. Slothouber, 718 F.2d 1116, 1117, 231 U.S. App. D.C. 78 (D.C. Cir. 1983)* (per curiam) ("A suit for damages is not precluded by reason of the plaintiff's membership in a class for which no monetary relief is sought."); *Crowder v. Lash, 687 F.2d 996, 1011 (7th Cir. 1982)* ("Contrary to defendant's apprehensions, application of collateral estoppel to bar relitigation of issues determined in [the previous class action] will not automatically establish defendant's liability for damages here. Even if the conditions under which [the plaintiff] was confined are held to constitute cruel and unusual punishment as a matter of law, issues of personal responsibility and good faith on the part of these defendants remain to be litigated.").

Although the Second Circuit has not addressed the issue, the Court agrees with the courts that have found that membership in an equitable relief class does not bar subsequent individual suits for damages and finds that Opponents are not inadequately represented on this basis. The class certification decision in *In re Vitamin C Antitrust Litigation* is instructive.[29] *279 F.R.D. at 90*. In that case, which involved alleged violations of ***antitrust law***, the court certified a mandatory injunctive relief class of direct and indirect purchasers of vitamin C. *Id. at 116*. The defendants argued that **[*202]** the class was not adequately represented because the class only sought injunctive relief as to the indirect purchasers and failed to pursue damages, and "principles of res judicata [would] bar the indirect purchasers from bringing [their damages] claims in the future." *Id. at 114*. The court rejected the defendants' arguments, holding that "membership in th[e] *Rule 23(b)(2)* class does not bar the indirect purchasers' subsequent claims for damages." *Id. at 115*. The court disagreed with other courts that "refuse to certify a class which [seeks] injunctive relief but exclude[s] some class members' damages claims." *Id. at 115* (citing *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 209 F.R.D. 323, 340 (S.D.N.Y. 2002)*). The court noted that *Rule 23(b)(3)* requires notice and an opportunity to opt out whereas *Rule 23(b)(2)* does not require that a district court afford the same protections to class members because *Rule 23(b)(2)* class actions are only certified if "broad, class-wide injunctive or declaratory relief is necessary to redress a group-wide injury." *Id. at 115* (quoting *Robinson, 267 F.3d at 162*). Damages claims, which "usually require individualized analyses of class members' circumstances," therefore "tend to destroy class certification under *Rule 23(b)(2)*." *Id.* While the court stated that only a subsequent court could determine the res judicata effect of the judgment, it also explicitly reserved **[*203]** "the right of the indirect purchasers to maintain their damages claims in subsequent proceedings notwithstanding their participation in the [i]njunction [c]lass" and found this approach "sufficient to extinguish [the] defendants' claim-splitting concerns for the purpose of class certification." *Id. at 116*.

Similarly, the Court finds that the class representatives do not inadequately represent Opponents because Opponents' membership in the (b)(2) class will not preclude any individual damages claims. *See J.B. v. Onondaga County, 401 F. Supp. 3d 320, 333 n.4 (N.D.N.Y. 2019)* (following *In re Vitamin C Antitrust Litigation* and rejecting the argument that the class representative was inadequately representing the class because he sought only injunctive relief when other class members had potential claims for damages); *Ackerman v. Coca-Cola Co., No. 09-CV-395, 2013 U.S. Dist. LEXIS 184232, 2013 WL 7044866, at *17 n.29 (E.D.N.Y. July 18, 2013)* (certifying *Rule 23(b)(2)* class and stating that "participation in a *Rule 23(b)(2)* class seeking injunctive relief does not preclude absent class members from bringing their non-litigated damages claims in subsequent lawsuits" (citing *In re Vitamin C Antitrust Litig., 279 F.R.D. at 114*)); *In re Paulsboro Derailment Cases, No. 12-CV-7586, 2014 U.S. Dist. LEXIS 115542, 2014 WL 4162790, at *15 (D.N.J. Aug. 20, 2014)* ("It is clear that 'participation in a *Rule 23(b)(2)* class seeking injunctive relief does not ordinarily preclude absent class members from bringing their non-litigated claims in subsequent lawsuits.'" (quoting *In re Vitamin C Antitrust Litig., 279 F.R.D. at 114*)). **[*204]** To find otherwise would essentially render *Rule 23(b)(2)* classes impossible to certify when there are also monetary damages at stake. *See In re Vitamin C Antitrust Litig., 279 F.R.D. at 116* ("[T]he *In re MTBE* court's approach has been criticized as saying, in effect, 'I know that you have proposed a class action that may be properly maintainable, but I won't allow you to proceed because I must protect the absentees from the possibility that a subsequent court might misapply my judgment.' This is an unacceptable result." (citation omitted) (quoting Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, *105 Colum. L. Rev. 717, 745 (2005)*)); 6 Newberg on Class Actions § 18:18 ("Relying on the claim splitting concern alone would be an overbroad approach as it would tend to render the injunctive class action somewhat impossible to pursue. In any case in which the class seeks only declaratory and

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[29] The Court notes that while the antitrust claims in *In re Vitamin C Antitrust Litigation* were later dismissed by the Second Circuit on international comity grounds, the court's class certification decision was not before the Second Circuit on appeal. *See In re Vitamin C Antitrust Litig., 8 F.4th 136, 143 (2d Cir. 2021)* ("[W]e hold that principles of international comity required the district court to dismiss this action.").

injunctive relief, there may always be a possibility of monetary damages, but that possibility alone should not foreclose the injunctive class action.").

In addition to the claim preclusion argument, Opponents attempt to advance a slightly different but related theory — that they are inadequately represented because their rights as to their monetary claims will be impermissibly altered **[*205]** or circumscribed by their membership in a *Rule 23(b)(2)* mandatory class via issue preclusion. ***HN17***[] While the exception developed in *Cooper* applies to claim preclusion, issues actually litigated in an earlier class action may still preclude litigation of the same issues in a subsequent individual action. *See Cholakyan v. Mercedes-Benz, USA, LLC, 281 F.R.D. 534, 565 (C.D. Cal. 2012)* ("While *Cooper* indicates that under some circumstances individual damages claims remain available to class members even after an adverse judgment in a *Rule 23(b)(2)* class action, the [Supreme] Court clearly stated that a plaintiff could not relitigate the exact question that was adjudicated in the prior litigation."); *Van Gorder v. Lira, No. 08-CV-281, 2010 U.S. Dist. LEXIS 30587, 2010 WL 1235328, at *7-8 (N.D.N.Y. Mar. 15, 2010)* (finding certain issues precluded by a previous *23(b)(3)* class action when the requirements for issue preclusion were satisfied and the plaintiff received notice and an opportunity to opt out but failed to do so), *report and recommendation adopted*, *2010 U.S. Dist. LEXIS 30584, 2010 WL 1235283 (N.D.N.Y. Mar. 30, 2010)*. Although the Court acknowledges that issue preclusion may impact litigation of particular issues in their individual damages claims, the Court does not find that this effect would render Opponents inadequately represented by the *Rule 23(b)(2)* class.

Direct Action Plaintiffs and Grubhub Plaintiffs imply that the Court should read *Dukes* broadly for the proposition that certifying equitable **[*206]** relief classes could interfere with money damages claims. (*See* Direct Action Pls.' Opp'n 7-8; Grubhub Pls.' Opp'n 13-14.) The Court declines to do so. In *Dukes*, the Supreme Court held that a *Rule 23(b)(2)* class could not be certified for lack of commonality under *Rule 23(a)(2)* and the equitable relief test under *Rule 23(b)(2)*. *See Dukes, 564 U.S. at 342*. The plaintiffs sought both individual monetary claims for backpay and injunctive relief under *Rule 23(b)(2)*. *Id. at 360-63*. ***HN18***[] The Supreme Court held that *Rule 23(b)(2)* "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages" and noted that combining individualized and classwide relief is inconsistent with *Rule 23(b)(2)*. *Id. at 360-61*. In rejecting the respondents' arguments that their backpay claims were properly certified under *Rule 23(b)(2)*, the Supreme Court found that those claims did "not 'predominate' over [the respondents'] requests for injunctive and declaratory relief." *Id. at 363*. The *Dukes* court stated that adopting a predominance test under *Rule 23(b)(2)* would incentivize class representatives to intentionally not include monetary claims so that those claims do not predominate over the claims for injunctive relief. *Id. at 364*. In *Dukes*, for example, the named plaintiffs "declined to include employees' claims for compensatory damages in **[*207]** their complaint" in addition to the backpay claims — a strategy that "made it more likely that monetary relief would not 'predominate.'" *Id.* In doing so, the Supreme Court noted that including the backpay claims created the possibility "that individual class members' compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from." *Id.* The Court went on to state that:

> If it were determined, for example, that a particular class member is not entitled to backpay because her denial of increased pay or a promotion was *not* the product of discrimination, that employee might be collaterally estopped from independently seeking compensatory damages based on that same denial. That possibility underscores the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives' or go it alone — a choice *Rule 23(b)(2)* does not ensure that they have.

Id.

Direct Action Plaintiffs and Grubhub Plaintiffs cite this language in their briefs to suggest that the Supreme Court took issue with certification of a *Rule 23(b)(2)* class because of the potential collateral estoppel effects generally. (*See* Direct Action Pls.' Opp'n **[*208]** 7-8 (stating that the Supreme Court "held that certifying a mandatory equitable relief class would violate due process if doing so could jeopardize the compensatory damages claims of individual class members, including because of the risk of collateral estoppel"); Grubhub Opp'n 13-14.) However, the Supreme Court was concerned with the preclusive effects that could arise as a result of splitting individual claims for monetary damages by including only some of the individual claims *within* the *Rule 23(b)(2)* class. *See*

Cholakyan, 281 F.R.D. at 565 ("While defendant would have the court read Dukes broadly, as another court recognized, there 'the Supreme Court focused on the problems that would arise if individualized relief were allowed in a (b)(2) class. This focus confirms what common sense suggests: a Rule 23(b)(2) judgment, with its one-size-fits-all approach and its limited procedural protections, will not preclude later claims for individualized relief.'" (quoting In re TFT-LCD (Flat Panel) Antitrust Litig., 2012 U.S. Dist. LEXIS 11369, 2012 WL 273883, at *2)). **HN19**[] The Court therefore reads Dukes to hold that claims for monetary relief cannot be certified *as part of* a mandatory Rule 23(b)(2) class because class members could be precluded from asserting their compensatory damages claims without having had notice and an opportunity to opt out — not that (b)(2) **[*209]** classes generally create a collateral estoppel risk as to damages claims as Opponents suggest.

Direct Action Plaintiffs also attempt to find support for their argument in Judge Leval's concurrence in *Interchange Fees II*. (*See* Direct Action Pls.' Opp'n 7-8 (stating that Judge Leval's concurrence in *Interchange Fees II* contended that "Dukes stands for the principle that 'a class may not even be certified because of the risk that adjudication of its rights might violate the due process rights of its members by forcibly depriving them of claims'" (quoting Interchange Fees II, 827 F.3d at 241 (Leval, J., concurring)).) However, this argument reads Judge Leval's concurrence more broadly than the Court does. In *Interchange Fees II*, Judge Leval found "the broad release of the Defendants" "particularly troublesome" because it "binds in perpetuity . . . all merchants who in the future will accept Visa and Mastercard, including those not yet in existence, who will never receive any part of the money." *Id.* Judge Leval found it impermissible that "[o]ne class of Plaintiffs receives money as compensation for the Defendants' arguable past violations, and in return gives up the future rights of *others*." *Id.* In support, Judge Leval stated **[*210]** that Dukes held that "claims for monetary relief cannot be certified under Rule 23(b)(2) . . . because of the possibility that 'individual class members' compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from.'" *Id.* (quoting Dukes, 564 U.S. at 364). Judge Leval went on to state:

> If a class may not even be certified because of the risk that adjudication of its rights might violate the due process rights of its members by forcibly depriving them of claims, then necessarily an adjudication of a class's rights that in fact forcibly deprives the members of their claims is also unacceptable. Because the terms of this settlement preclude all future merchants that will accept the Defendants' cards (the (b)(2) class) from bringing claims without their having had an opportunity to opt out (or even object), the Supreme Court's rulings in Shutts and Dukes make clear that a court cannot accept it.

Id. at 241-42. The Court understands Judge Leval's concurrence to find that a class or settlement class may not be certified if it confiscates money damages claims without notice and the opportunity to opt out. The issue for Judge Leval was the broad *release* contained in the settlement, and he relied on Shutts and Dukes, both **[*211]** cases involving impermissible confiscation of money damages claims without notice and an opportunity to opt out. The Court does not understand Judge Leval to imply that mere membership in a mandatory (b)(2) class risks confiscating damages claims and violates due process.

While the cases cited by Direct Action Plaintiffs indicate that some courts have expressed hesitation in certifying an equitable relief class when individual damages claims are at stake for fear that issue preclusion may hinder or burden litigation of individual damages claims in a subsequent suit, the Court finds these cases distinguishable because they involved claims for money or money-adjacent claims within a (b)(2) class. In Cholakyan, the court noted its concern as to "whether individual claims for money damages [would] be compromised if a mandatory Rule 23(b)(2) class is certified and plaintiffs lose on the merits" and concluded that "the state of the law on this subject is at best unsettled." 281 F.R.D. at 564-65. However, the court ultimately "stop[ped] short of a finding that [plaintiff] and counsel are inadequate," stating that there were "other grounds . . . more than sufficient to support the denial of class certification" as the plaintiff failed **[*212]** to satisfy the Rule 23(a) requirements of commonality and typicality and the Rule 23(b)(2) requirement. Id. at 565. In addition, the Cholakyan court found that the plaintiff improperly sought injunctive relief to create a reimbursement program "to avoid the need to comply with Rule 23(b)(3) while preserving the possibility that some class members will be able to obtain monetary relief" and that none of the remedies sought by plaintiff would "result in classwide relief." Id. at 559-60. Similarly, in Rouse v. Caruso, the court noted that "while a class action would not preclude any member from pursuing an individual damages claim, it could have the effect of precluding him from establishing certain issues upon which the success of the claim depends" and therefore would "create[] the possibility . . . that individual class members' compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from." No. 06-CV-10961, 2013 U.S. Dist. LEXIS 19946, 2013 WL 588916, at *6 n.3 (E.D. Mich. Jan. 7, 2013) (alteration in original) (quoting Dukes, 564 U.S. at 364), *report and recommendation adopted*, 2013 U.S. Dist. LEXIS 19209, 2013 WL 569638 (E.D. Mich. Feb. 13, 2013). The *Rouse* court found that the plaintiffs' claims "are the type that are ordinarily resolved through actions seeking damages, and rulings in the case contrary to plaintiffs' positions could have the effect of precluding a subsequent damages **[*213]** action by an individual plaintiff." 2013 U.S. Dist. LEXIS 19946, [WL] at *6. However, the court decided the case on other grounds, finding that a Rule 23(b)(2) class was not proper because the plaintiffs' claims challenged the adequacy of medical care and "include[d] individualized claims for monetary relief," which "belong in Rule 23(b)(3)."[30] *Id.* (quoting Dukes, 564 U.S. at 362).

In re Skelaxin (Metaxalone) Antitrust Litigation presents a closer call. 299 F.R.D. 555 (E.D. Tenn. 2014). In that case, the court denied certification of an injunctive relief class comprised of end payors for a type of drug on several grounds. Id. at 577-79. First, the court found that it was "unclear whether an injunction class of [e]nd [p]ayors [was] necessary or appropriate in this case" because the primary relief sought was monetary, and that the proposed class was unascertainable. Id. at 577-78. In addition to these concerns, the court was troubled by the possible "preclusive effect of an injunction-only class action on class members' ability to bring subsequent damages claims." Id. at 578. While the court noted that some courts, including the Sixth Circuit, "have held that claim-splitting does not apply to class actions and that 'the general rule is that a class action suit seeking only declaratory **[*214]** and injunctive relief does not bar subsequent individual damage[s] claims by class members, even if based on the same events,'" *id.* (quoting Hiser, 94 F.3d at 1287), the court went on to note that "even if such a judgment did not have a claim preclusive effect, it might still prevent relitigation of a number of issues in subsequent actions," *id.* (first citing In re MTBE Prods. Liab. Litig., 209 F.R.D. at 339-40 n.25; and then citing Dukes, 564 U.S. at 363). In articulating its "reservations about the possible preclusive effect" of an injunctive relief class such that "absent class members may be collaterally estopped from relitigating some [of the] issues in a damages action," the court relied on Dukes as demonstrating a "concern regarding the preclusive effect of a primarily injunction-based class." Id. at 579. However, for the reasons discussed above, the Court declines to adopt such a broad reading of Dukes and ultimately disagrees with the reasoning set forth in *Skelaxin*.

All of the cases cited by Direct Action Plaintiffs and Grubhub Plaintiffs involved class certification motions that failed for multiple reasons — no court relied solely on their concerns about issue preclusion to find the class representatives inadequate. *See* Cholakyan, 281 F.R.D. at 559-65; In re Skelaxin (Metaxalone) Antitrust Litig., 299 F.R.D. at 577-79; Rouse, 2013 U.S. Dist. LEXIS 19946, 2013 WL 588916, at *6; Slamon, 2020 U.S. Dist. LEXIS 87149, 2020 WL 2525961, at *16-17; *see also* 6 Newberg on Class Actions § 18:18 ("Most of the courts **[*215]** denying class certification outright have coupled their claim splitting concerns with other concerns about the proposed class action."). In addition, the decisions suggesting inadequacy of representation involved class representatives who were attempting to shoehorn damages claims into Rule 23(b)(2) class actions — an approach clearly prohibited by Shutts and *Dukes. See* Cholakyan, 281 F.R.D. at 559-65 (noting that the plaintiff improperly sought injunctive relief to create a reimbursement program "to avoid the need to comply with Rule 23(b)(3) while preserving the possibility that some class members will be able to obtain monetary relief"); Rouse, 2013 U.S. Dist. LEXIS 19946, 2013 WL 588916, at *6 (finding that a Rule 23(b)(2) class was not proper because the plaintiffs' claims challenged the adequacy of medical care and "include[d] individualized claims for monetary relief," which "belong in Rule 23(b)(3)"); Slamon, 2020 U.S. Dist. LEXIS 87149, 2020 WL 2525961, at *16-17 (finding that the

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[30] The other cases cited by Direct Action Plaintiffs are similarly distinguishable. In *Slamon v. Carrizo (Marcellus) LLC*, while the court stated that "the individual lease holders must have the right to opt-out, and the absence of the ability to do so severely prejudice[d] their rights and also risk[ed] subjecting them, without their consent, to the doctrines of issue preclusion and collateral estoppel," the court also found that the injunctive relief sought "relate[d] predominantly to money damages" and failed the test set forth in Rule 23(b)(2). No. 16-CV-2187, 2020 U.S. Dist. LEXIS 87149, 2020 WL 2525961, at *16 (M.D. Pa. May 18, 2020). *Richardson v. L'Oreal USA, Inc.* is inapposite because that case involved certification of a (b)(2) settlement class in which the settlement released "class-wide damages claims, but not individual damages claims," which the court found was improper under Rule 23(b)(2) under Shutts and Dukes. 991 F. Supp. 2d 181, 198-99 (D.D.C. 2013).

injunctive relief sought predominantly involved damages claims). The Court does not find that any such improprieties exist in the context of the instant *Rule 23(b)(2)* class that would raise adequacy of representation concerns. To the contrary, the Court finds that class representatives' interests are aligned with absent class members' interests to maximize the equitable relief sought. *See* *Adkins, 307 F.R.D. at 141* ("[W]hile absent class members **[*216]** risk losing on the merits and being precluded from separately asserting, for example, a claim that [the defendant] is culpable for their loans, if the class were to win on the merits they would be able to pursue separate claims for damages. Because the putative class representatives have not needlessly compromised the ability of the class to secure its relief, [the defendants'] argument that they are inadequate class representatives on that basis is unpersuasive."). Moreover, to find that a *Rule 23(b)(2)* class cannot be certified when it might collaterally estop litigation of issues in damages claims would essentially render *Rule 23(b)(2)* classes impossible to pursue. *See* 6 Newberg on Class Actions § 18:18 ("Relying on the claim splitting concern alone would be an overbroad approach as it would tend to render the injunctive class action somewhat impossible to pursue. In any case in which the class seeks only declaratory and injunctive relief, there may always be a possibility of monetary damages, but that possibility alone should not foreclose the injunctive class action."). As Plaintiffs accurately note, courts in the Second Circuit continue to certify equitable relief classes including members that are simultaneously **[*217]** pursuing damages claims. *See* *Sykes v. Mel Harris & Assocs., LLC, 285 F.R.D. 279, 293 (S.D.N.Y. 2012)* ("That plaintiffs are seeking substantial monetary damages is of no concern given the [c]ourt's certification of separate *Rule 23(b)(2)* and *(b)(3)* classes addressing equitable relief and damages, respectively."), *aff'd sub nom.* *Sykes v. Mel S. Harris & Assocs. LLC, 780 F.3d 70 (2d Cir. 2015)*.

Because the Court is not aware of a case mandating such a result and to imply such a requirement would render (b)(2) classes nearly impossible to pursue, the Court finds that the potential for issue preclusion against absent class members pursuing damages claims does not preclude class certification on adequate representation grounds.

D. Class representatives do not improperly confiscate Opponents' injunctive relief claims or jeopardize any individual damages claims

Direct Action Plaintiffs' arguments fall into two groups: (1) that *Rule 23(b)(2)* Plaintiffs improperly confiscate their equitable relief claims and (2) that their damages claims are compromised because *Rule 23(b)(2)* Plaintiffs are members of the settlement class. (*See* Direct Action Pls.' Opp'n 11-18.) First, Direct Action Plaintiffs argue that the proposed class violates due process because a mandatory class would "confiscate [their] claims for injunctive *remedies*," "turn[] them over to putative class counsel who **[*218]** have adverse interests," and diminish their damages claims' value in order to "'monetize' injunctive claims that belong to the Direct Action Plaintiffs for the benefit of the remainder of the class." (*Id.* at 11 (citing Pls.' Mem. 48-49).) In support, Direct Action Plaintiffs argue that Plaintiffs intend to "exploit" their claims "for the benefit of other merchants," (Direct Action Pls.' Sur-Reply 8 & n.7), and could conceivably "allow class counsel to agree to a release that sacrifices some part of [their] claims to induce Defendants to settle with the class," which would create "perverse incentives for class representatives to place at risk potentially valid claims for monetary relief," (Direct Action Pls.' Opp'n 18 (quoting *Dukes, 564 U.S. at 364*)). Next, Direct Action Plaintiffs contend that there is a conflict of representation because class representatives have "no incentive to protect [Direct Action Plaintiffs'] damages and equitable relief claims." (*Id.* at 18.) In support of this argument, Direct Action Plaintiffs contend that as members of the (b)(3) settlement class, the class representatives have "no further interest in obtaining monetary relief" which creates a "dichotomy in interests." (*Id.* **[*219]**) In further support, Direct Action Plaintiffs assert that equitable relief class counsel has already justified "trading of claims in the name of a purported 'duty to maximize the claim's value on behalf of *all* Merchants'" by stating in their brief that "[a]llowing opt-outs would permit an individual Merchant to gain financially based on the benefit that a legal claim would provide to other Merchants." (*Id.* (quoting Pls.' Mem. 49).)

Similarly, Grubhub Plaintiffs argue that there is a conflict of interest because (1) Plaintiffs are attempting to use Grubhub Plaintiffs' "*individual* injunctive claims that were preserved when [they] opted out of the *Rule 23(b)(3)* class" as a "collective asset" and (2) Plaintiffs are incentivized to trade benefits from one set of class members for benefits for the other class members because Plaintiffs want to use Grubhub Plaintiffs' claims to "maximize the claim's value on behalf of *all* Merchants who have the claim." (Grubhub Pls.' Opp'n 12-13 (quoting Pls.' Mem. 49).)

Walmart argues that Plaintiffs may trade away other merchants' interests in exchange for obtaining relief from the no-surcharging rule. (Walmart Opp'n 11.) In support, Walmart argues that Prof. Carlton's and Dr. Leffler's testimonies "highlight[] the [Plaintiffs'] incentives to trade away the injunctive relief many other merchants need." (Walmart Suppl. Opp'n 4.)

In response, Plaintiffs argue that **[*220]** there is no conflict between (b)(3) class opt outs and the (b)(2) class. (*See* Pls.' Reply.) Plaintiffs argue that there is no internal class conflict with merchants that opted out of the damages settlement because Plaintiffs "have no ability to compromise or impair *any* merchants' damages claims." (*Id.* at 15.)

Opponents' arguments implicate adequacy of both the class representatives and class counsel, and the Court finds that there is no fundamental conflict as to either.[31] The gravamen of Opponents' trading-of-claims arguments are twofold: (1) that their claims for equitable relief are confiscated by virtue of their membership in a mandatory class, and (2) that their individual damages claims will be compromised because class counsel and class representatives will leverage those claims to receive their desired form of injunctive relief.

The Court does not find that mere membership in a mandatory class violates due process or improperly confiscates Opponents' claims. Direct Action Plaintiffs argue that "forcing an entity into a mandatory class action shatters the bundle of property rights represented by a legal claim [which] obliterate[es] an individual's constitutional 'right not **[*221]** to have someone else assert that claim without the claimholder's consent.'" (*See* Direct Action Pls.' Opp'n 11 n.6 (quoting Ryan C. Williams, *Due Process, Class Action Opt Outs & the Right Not to Sue*, *115 Colum. L. Rev. 599, 630 (2015)*).) While the Supreme Court in *Shutts* stated that "a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs," and held that due process requires notice and an opportunity to opt out, the court explicitly stated that its holding does not apply to *Rule 23(b)(1)* and *23(b)(2)* class actions. *See* *Shutts, 472 U.S. at 807, 811 n.3* ("Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief."). ***HN20***[] In addition, in *Shutts*, the Supreme Court endorsed its view articulated in *Hansberry v. Lee* that "absent parties [are] bound by [a] decree so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest." *Id. at 808* (citing *Hansberry v. Lee, 311 U.S. 32, 41, 61 S. Ct. 115, 85 L. Ed. 22 (1940)*). The Supreme Court has since reiterated the limited nature of its holding in *Shutts*. *See* *Dukes, 564 U.S. at 362-63* ("The procedural protections attending the (b)(3) class — predominance, superiority, **[*222]** mandatory notice, and the right to opt out — are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*. . . . In the context of a class action predominantly for money damages we have held that absence of notice and opt out violates due process." (citing *Shutts, 472 U.S. at 812*)); *Ortiz, 527 U.S. at 848 n.24* ("In *Shutts*, as an important caveat to our holding, we made clear that we were only examining the procedural protections attendant on binding out-of-state class members whose claims were 'wholly or predominately for money judgments.'" (quoting *Shutts, 472 U.S. at 811 n.3*)); 1 McLaughlin on Class Actions § 2:42 (17th ed.) ("While some litigants in the decade after *Shutts* sought to argue that its holding also extended to actions primarily seeking equitable relief, the Supreme Court's guidance has been limited and carefully worded."). ***HN21***[] The Second Circuit has similarly stated that the lack of the ability to opt out in a *Rule 23(b)(2)* class does not violate due process as long as the other *Rule 23* requirements including adequacy of representation are satisfied. *See* *Robinson, 267 F.3d at 165* ("Where class-wide injunctive or declaratory relief is sought in a (b)(2) class action for an alleged group harm, there is a presumption of cohesion and unity **[*223]** between absent class members and the class representatives such that adequate representation will generally safeguard absent class members' interests and thereby satisfy the strictures of due process."). In view of the existing precedent which suggests that mandatory *Rule 23(b)(2)* classes do not violate due process, and in the absence of compelling case law to the contrary, the Court declines to reach an opposite conclusion.

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[31] The parties' arguments regarding whether there is a risk that class representatives and counsel will trade claims also address whether the Court should permit opt-out rights. The Court addresses the opt-out arguments in Section II.e *infra*.

The Court also finds that the inclusion of class members pursuing individual damages claims does not create a fundamental conflict. In support of their argument that class representatives and Class Counsel will be incentivized to trade away their claims, Direct Action Plaintiffs and Grubhub Plaintiffs cite to *Dukes* and *Interchange Fees II*, arguing that those cases concerned similar circumstances. (*See* Direct Action Pls.' Opp'n 18-19; Grubhub Pls.' Opp'n 13.) However, *Dukes* and *Interchange Fees II* are inapposite. Direct Action Plaintiffs cite to *Dukes* for the proposition that "the vast majority of the putative *Rule 23(b)(2)* class . . . have no further interest in obtaining monetary relief because they did not opt out of the *Rule 23(b)(3)* class settlement of monetary claims" and "[t]his dichotomy in interests create **[*224]** the same 'perverse incentives for class representatives to place at risk potentially valid claims for monetary relief' that so troubled the Supreme Court in *Dukes*." (*See* Direct Action Pls.' Opp'n 18 (quoting *Dukes, 564 U.S. at 364*).) However, as discussed above, the *Dukes* court was concerned that adopting a predominance test under *Rule 23(b)(2)* would incentivize class representatives to not include monetary claims in their complaint so that those claims do not predominate over the claims for injunctive relief, not that class members separately pursuing damages claims outside of the class would create a conflict to defeat adequacy of representation. *See* *Dukes, 564 U.S. at 364* ("Respondents' predominance test, moreover, creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief."). Similarly, in *Interchange Fees II*, the Second Circuit was concerned with "[u]nitary representation of separate classes that claim distinct, competing, and conflicting relief" which would "create unacceptable incentives for counsel to trade benefits to one class for benefits to the other in order somehow to reach a settlement." *Interchange Fees II, 827 F.3d at 234*. However, the fundamental conflict identified by the Second Circuit no longer exists. Each **[*225]** class — the *Rule 23(b)(2)* class and the *Rule 23(b)(3)* class — are represented by separate counsel and are no longer "in the position to trade diminution of (b)(2) relief for increase of (b)(3) relief." *Id.* Moreover, the *Rule 23(b)(2)* representatives and class counsel are only seeking equitable relief and they have no authority to trade away Direct Action Plaintiffs' or Grubhub Plaintiffs' damages claims as they are represented by their own counsel. Because the classes have been separated and there is no overlap between the named representative Class Plaintiffs in the (b)(2) classes and the plaintiffs seeking their own damages claims, the issue of unitary representation is not present here.[32]

Direct Action Plaintiffs, Grubhub Plaintiffs, and Walmart argue that Plaintiffs' desire to include them in the class is equal to Plaintiffs seeking to monetize Opponents' claims and gain "financially based on the benefit that a legal claim would provide to other Merchants." (Direct Action Pls.' Opp'n 18; *see also* Grubhub Pls.' Opp'n 15 ("[T]he putative class wants to 'monetize' the injunctive claims of the Grubhub Plaintiffs *for itself*."); Walmart **[*226]** Opp'n 11 ("The [Plaintiffs'] motion betrays how they see absent class members' claims as bargaining chips they can use to strengthen their negotiating leverage.").) However, to the extent that Direct Action Plaintiffs, Grubhub Plaintiffs, and Walmart contend that Plaintiffs improperly seek to include their claims to maximize the equitable relief award, the Court does not find that a strategic attempt to certify the broadest equitable relief class possible to maximize the potential success of settlement negotiations constitutes a fundamental class conflict. *See* *Bayshore Ford Truck Sales, Inc. v. Ford Motor Co., No. 99-CV-741, 2006 U.S. Dist. LEXIS 64264, 2006 WL 3371690, at *4 (D.N.J. Nov. 17, 2006)* ("[T]here [is] strength in numbers, and the [c]ourt can not [sic] find error with [the] [p]laintiffs' strategic

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[32] The other cases cited by Opponents are similarly inapposite. For example, in *In re Literary Works in Electronic Databases Copyright Litigation*, the Second Circuit held that there was a fundamental conflict sufficient to preclude adequacy of representation when there were three subclasses and each subclass's "interests diverge[d] as to the distribution of that recovery because each category of claim [was] of different strength and therefore command[ed] a different settlement value. Named plaintiffs who hold other combinations of claims had no incentive to maximize the recovery for Category C-only plaintiffs, whose claims were lowest in settlement value but eclipsed all others in quantity." *654 F.3d 242, 254 (2d Cir. 2011)*. Like *Dukes* and *Interchange Fees II*, the court found that the "interests of Category C-only plaintiffs could be protected only by the formation of a subclass and the advocacy of independent counsel." *Id.* Accordingly, *Literary Works* did not address whether class counsel might be incentivized or empowered to trade away claims that are not included within the class's suit. Similarly, Opponents take the language in *Cholakyan* out of context. (*See* Direct Action Plaintiffs' Opp'n 19; Grubhub Pls.' Opp'n 13.) In that case, while the court spoke of concerns that the class representative and his counsel were "willing potentially to sacrifice individual class members' right to pursue the recovery of monetary damages," the court addressed such conflicts in the context of claim splitting and preclusion, not as to whether class representatives and counsel would make improper tradeoffs with claims pursued by parties outside of the class. *See* *Cholakyan, 281 F.R.D. at 565*.

attempt to maximize their bargaining power against [the defendant], by pursuing their claims as a unified group, so long as the requirements of *Fed. R. Civ. P. 23(a)(1)* are satisfied, which the [c]ourt finds that they are."), *aff'd*, *541 F. App'x 181 (3d Cir. 2013)*.

Accordingly, the Court finds that permitting a mandatory class under *Rule 23(b)(2)* does not violate due process and that Opponents' individual damages claims will not be compromised by class counsel and class representatives leveraging those claims to receive the most comprehensive equitable relief to the entire class's benefit. **[*227]**

E. The Court declines to reach the issue of whether future merchants are adequately represented by the class representatives

Direct Action Plaintiffs argue that the inclusion of future merchants also violates adequacy of representation because "it is impossible to conclude that future merchants, who may not exist for years to come, share those interests," and further argue that the proposed class "contains the same tension between current and future merchants as the prior settlement that was invalidated." (Direct Action Pls.' Opp'n 22.)

Merchant Trade Groups argue that the inclusion of future merchants violates due process because future merchants would be unable to opt out and would have "no opportunity to be heard before entry of a final judgment that could bind them in perpetuity." (Merchant Trade Groups' Opp'n 23-24; Merchant Trade Groups Sur-Reply 5-6.) In addition, Merchant Trade Groups contend that including future merchants will create more litigation in years to come because future merchants will challenge whether they were adequately represented in this litigation such that they should be precluded from bringing future claims. (Merchant Trade Groups' Opp'n 24-25.) Merchant Trade **[*228]** Groups state that they "have no objection to future class members receiving whatever injunctive relief this case ultimately provides," but "including them in the certified class in order to preclude or release their post-judgment claims would be improper and raise due process concerns." (*Id.* at 19.)

Plaintiffs argue that they adequately represent future merchants because "Defendants' Restraints *apply generally* to the class" and to exclude them from the class would mean they "face the risk of having to litigate their entitlement to relief ordered in this case." (Pls.' Suppl. Reply 9.) Plaintiffs contend that there is no conflict between present and future merchants because "[i]t is well settled that 'a (b)(2) class may include future members who stand to benefit from a favorable outcome in the case" and arguments concerning "release of claims by future merchants as part of any settlement in this litigation is premature." (*See* Pls.' Reply 18-19; Pls.' Suppl. Reply 8-9.)

Defendants argue that the Court should not exclude future class members from the proposed class because there is "no legitimate basis" to exclude them. (*See* Defs.' Reply 18-23.) Defendants contend that the Second Circuit's **[*229]** concerns in *Interchange Fees II* are inapplicable because "the Second Circuit's decision did not take issue with the inclusion of future merchants in the *Rule 23(b)(2)* settlement class, as long as the future merchants could avail themselves of the injunctive relief obtained in the settlement." (*Id.* at 21.) Defendants also assert that Judge Leval's concerns in his concurrence regarding the ability of future merchants to opt out are inapplicable at this stage of the litigation because "[t]he Court can address whether any settlement with the proposed *Rule 23(b)(2)* class . . . raises a similar release concern if and when the parties settle and the Court decides whether to approve the settlement." (*Id.*)

Because the Court declines to include future merchants in the class on ascertainability grounds, *see infra* Section II.c.v, the Court need not decide whether such merchants are adequately represented. However, the Court notes that the issue of whether future merchants should be included in the class is far from clear.

As discussed in Section II.c.ii *supra*, courts routinely certify equitable relief classes including future class members. As Plaintiffs contend, the challenged Restraints have been in effect for the duration **[*230]** of this nearly two-decade litigation and there is no indication that voluntary changes are on the horizon. Accordingly, future merchants suffer a threat of imminent injury if the Restraints are found to violate ***antitrust law***. *See* *R.F.M. v. Nielsen, 365 F. Supp. 3d 350, 369 (S.D.N.Y. 2019)* ("Courts regularly approve classes involving future members when those members face a threat of imminent injury." (first citing *Abdi v. Duke, 323 F.R.D. 131, 137-38 (W.D.N.Y. 2017)*; and then citing *Butler, 289 F.R.D. at 99*)). The class representatives are incentivized to prove Defendants' liability under ***antitrust law*** and should they prevail or reach a settlement, as Merchant Trade Groups concede, future merchants stand to benefit from any ensuing equitable relief. (*See* Merchant Trade Groups' Opp'n 19 (clarifying that they do not object to future merchants receiving any injunctive relief obtained by the class).)

In addition, the Court does not believe the inclusion of future merchants in the *Rule 23(b)(2)* class suffers from the same deficiencies that plagued the classes in *Interchange Fees II* or *Amchem*. In *Interchange Fees II*, the Second Circuit held that the substance of the bargain struck evidenced inadequate representation because the merchants who came into being after the equitable relief ended were "bound to an exceptionally broad [indefinite] **[*231]** release . . . but [were] guaranteed nothing." *827 F.3d at 238-39*. The Second Circuit did not express concern over future merchants' inclusion in the class generally. *See* *id. at 239* ("As in *Literary Works*, we conclude that such arbitrary harsher treatment of class members is indicative of inadequate representation."). Similarly, Judge Leval in his concurrence expressed concern over the broad release which subjected members of the (b)(2) class, including future merchants, to "give up forever their potentially valid claims, without ever having an opportunity to reject the settlement by opting out of the class." *Id. at 240* (Leval, J., concurring). However, for the reasons discussed above, the class is no longer subject to unitary representation and therefore future merchants are not at risk that their claims will be traded away for relief that does not serve their interests. *See* Section II.c.iv.1.D *supra*.

In addition, the Supreme Court's decision in *Amchem* is factually inapposite to this case. In *Amchem*, the Supreme Court held that there was a conflict between class members presently suffering asbestos-related injuries and members who had not yet manifested an injury. *Amchem, 521 U.S. at 626*. The Supreme Court held that a single class representative could not adequately represent **[*232]** both groups of class members because presently injured members were incentivized to seek "generous immediate payments" and those who might suffer an injury in the future were incentivized to seek "an ample, inflation-protected fund for the future." *Id.* These allocation-related tensions are not present in the instant case — both present and future merchants will benefit from injunctive relief curbing or eliminating the Restraints. *See* *L.V.M. v. Lloyd, 318 F. Supp. 3d 601, 616 n.9 (S.D.N.Y. 2018)* ("Notwithstanding the limited size of the hypothetical class, the class action would be superior to joinder . . . because all plaintiffs challenge a policy that affects them uniformly; the putative class members do not have sufficient means to bring lawsuits; and the requested injunctive relief would impact all future class members.").

However, the court's decision in *Meachem v. Wing, 227 F.R.D. 232 (S.D.N.Y. 2005)* gives the Court pause. In that case, the plaintiffs sought to certify a settlement class of current and future recipients of public assistance benefits. *Id. at 234*. The court relied on *Amchem* and refused to include class members who "may become benefit-eligible" in the future in the *Rule 23(b)(2)* class because "[f]uture eligible persons would be subject to the claim preclusive effects of the settlement but would not **[*233]** have received meaningful notice or the opportunity to be heard prior to the approval of th[e] settlement." *Id.* While the facts of *Meachem* are distinct because it involved a settlement that "'release[d]' and 'forever discharge[d]' equitable claims . . . that could have been asserted in this action," *id. at 237*, the Court is concerned about binding future merchants who cannot receive notice of any potential settlement. ***HN22***[] Indeed, in mandatory *Rule 23(b)(2)* classes, class members are "entitled to voice their concerns with the court prior to final approval" and "'voice' replaces 'exit' as the operable means of class member involvement." 2 Newberg on Class Actions § 4:26.

In addition, the Court is not persuaded that the inclusion of future merchants is necessary to provide relief to those merchants. If warranted, the Court could order prospective relief that benefits future class members regardless of whether they are included in the instant class. *See* Kaczynski, *85 Colum. L. Rev., at 410* ("If the plaintiff class prevails, an award of injunctive or declaratory relief can be shaped so as to inure to the benefit of the future members whether or not they are certified."). *But see* 2 Newberg on Class Actions § 4:26 ("[T]here is some relationship between **[*234]** the scope of the class and the scale of the remedy.").

Accordingly, while the Court need not reach the issue of whether future merchants are adequately represented by class representatives, the Court notes that should Plaintiffs move to modify the class definition to include future merchants, they should also address the issues raised in this Memorandum and Order regarding the adequacy of their representation.

F. Class representatives DDMB and DDMB2 are conflicted due to their relationship with class counsel

Although not explicitly raised as an adequacy of representation issue, Direct Action Plaintiffs allude to close relationships between class counsel and class representatives. (*See* Direct Action Pls.' Opp'n 20 n.15.) Accordingly, the Court addresses whether there is an adequacy of representation issue arising from these relationships.

Direct Action Plaintiffs state that "[a]ll five [representative businesses] have pre-existing personal, family, or business relationships with Class Counsel, who asked them to join this litigation." (*Id.*) In support, Direct Action Plaintiffs contend that Arthur Boss, Jr. of Boss Dental "plays tennis with class counsel Mr. Hilliard"; Douglas Marks of DDMB, **[*235]** Inc. d/b/a/ Emporium Arcade Bar and DDMB 2, LLC d/b/a Emporium Logan Square is a "co-investor in [a] cannabis dispensary with class counsel Mr. Kanner"; Pure One's manager "is related to class co-counsel Mr. Love"; RunCentral/CMP has a "long-term business relationship with Mr. Love's firm, which pays them $1500 [a] month"; and Generic Depot's owner "has a personal relationship with Mr. Love." (*Id.*)

Plaintiffs do not address the relationships between class representatives and Class Counsel. (*See* Pls.' Mem.; Pls.' Reply; Pls.' Suppl. Reply.)

HN23[] "[W]hether a close relationship with class counsel renders a named plaintiff inadequate is a fact-intensive inquiry." *In re LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 565 (S.D.N.Y. 2018)* (citing *Malchman v. Davis, 761 F.2d 893, 900 n.2 (2d Cir. 1985)*). "[C]ourts have long found that a familial (or any other) relationship creates a conflict if it gives the class representative an interest in the fees class counsel might recover." *Wexler v. AT & T Corp., 323 F.R.D. 128, 130 (E.D.N.Y. 2018)*. To determine whether the relationship between the class representative and class counsel is inappropriate, courts consider (1) "the closeness and extent of the relationship," (2) "whether the related attorney's relationship and role in the litigation have been disclosed," (3) "whether attorneys' fees will greatly exceed the class representative's **[*236]** recovery," and (4) "the extent of the related attorney's involvement in the litigation." *In re LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d at 565*; *see also* *Aliano v. CVS Pharmacy, Inc., No. 16-CV-2624, 2018 U.S. Dist. LEXIS 85986, 2018 WL 3625336, at *5 (E.D.N.Y. May 21, 2018)* ("Before disqualifying a representative plaintiff, though, courts consider factors such as the closeness of the relationship and the degree to which it has been disclosed. . . . Most significantly, a [c]ourt will consider whether the value a class member may recover is eclipsed by the benefit that plaintiff expects from an ongoing relationship with class counsel.").

First, the Court finds that Direct Action Plaintiffs overstate the role of counsel Kevin Love. Love was not included in the Interim Class Counsel Order, (*see* Interim Class Counsel Order), and only later appeared in this litigation as counsel of record for RunCentral LLC — one of the putative (b)(2) class representatives, (*see* Kevin Love Notice of Appearance, Docket Entry No. 6870 ("Kevin B. Love of Criden & Love, P.A. hereby appears as counsel of record for Plaintiff RunCentral LLC.")). Neither Love nor his firm is included as class counsel seeking appointment as co-lead class counsel in the instant class certification motion. (*See* Pls.' Mem. 31-32.) Accordingly, the Court need not assess the propriety of Love's contacts **[*237]** with the class representatives.

Next, the Court examines the relationships between class representatives and Hilliard and Kanner, who are seeking to be appointed as co-lead class counsel. (*See id.*) First, the Court finds that Hilliard's casual relationship with Arthur Boss, Jr. of Boss Dental, one of the class representatives, does not render class counsel inadequate. In his deposition, Boss testified that he knows Hilliard "from tennis" and that he plays tennis approximately three times a week. (*See* Dep. of Arthur Boss, Jr. 205:18-19, 206:2-5, annexed to Shinder Decl. as Ex. I, Docket Entry No. 8452.) This relationship does not rise to the level of inadequate representation because the relationship is casual and does not indicate that Boss Dental will stand to benefit from any attorneys' fees awarded to Hilliard. *Compare* *Langan v. Johnson & Johnson Cons. Cos., Nos. 13-CV-1470, 13-CV-1471, 2017 U.S. Dist. LEXIS 35703, 2017 WL 985640, at *13 (D. Conn. Mar. 13, 2017)* (finding that a pre-existing non-intimate, nonfinancial relationship between the named plaintiff and class counsel did not create a "fundamental conflict" with the other class members and stating that the "plaintiff and class counsel are not intimate friends and have no apparent financial relationship outside of this case"), *vacated and remanded on other grounds*, **[*238]** *897 F.3d 88 (2d Cir. 2018)*, *and* *In re Currency Conversion Fee Antitrust Litig., 230 F.R.D. 303, 309 (S.D.N.Y. 2004)* (finding the adequacy requirement met even where class representative was "close personal friend of his attorney"), *with* *In re LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d at 566* (finding corporate class representative to be inadequate when its CEO's son was receiving fifteen percent of interim class counsel's fee award). *See also* *Foley v. Student Assistance Corp., 336 F.R.D. 445, 449 & n.6 (E.D. Wis. 2020)* ("Courts have found a conflict of interest that defeats adequate representation is present where familial ties exist between class counsel and the named representative or long-standing, non-familial relationships are intermingled with financial, business, or professional interests. District courts outside of this circuit have found that friendship alone is not enough to create a disqualifying conflict of interest." (collecting cases)); *Holt v. Noble House Hotels & Resort, LTD, No. 17-CV-2246, 2018 U.S. Dist. LEXIS 177940, 2018 WL 5004996, at *7 (S.D. Cal. Oct. 16, 2018)* (finding that the plaintiff and class counsel's "friendship does not have the same potential for conflicts of interest" when no "financial, familial, or other potentially conflicting relationship beyond friendship" was identified).

However, Kanner's relationship with Douglas Marks of DDMB, Inc. d/b/a/ Emporium Arcade Bar and DDMB 2, LLC d/b/a Emporium Logan Square presents a conflict. The court's decision in *In re Discovery Zone Securities Litigation, 169 F.R.D. 104 (N.D. Ill. 1996)*, is instructive. In that case, the court found that proposed class **[*239]** representatives who served as their counsel's stockbrokers inadequately represented the class because they constituted "sufficiently close business relationships . . . [and] create a possible conflict of interest." *Id. at 109*. The court found that because there was a "*possibility* of receiving more investment business from class counsel," the plaintiffs had "more incentive to maximize fees for the attorneys than to ensure adequate recovery for the class." *Id.* (emphasis added). The court noted that the "appearance of impropriety" was the "primary 'factor mandating judicial inquiry,'" *id.* (quoting *Susman v. Lincoln Am. Corp., 561 F.2d 86, 93 (2d Cir. 1977)*), and that while it was not suggesting that "the representatives and class counsel would turn appearance into reality," the court deemed it "proper to eliminate any possible conflict of interest," *id.* In his deposition, Marks stated that Kanner is "a small investor in one of [his] companies" called Modern Cannabis. (*See* Dep. of Douglas Marks 271:18-272:4, annexed to Shinder Decl. as Ex. J, Docket Entry No. 8452.) Although Marks could not recall specifically when Kanner invested, he testified that he believes "[t]he investment was made in . . . .2015," after he joined this litigation, and that the investment **[*240]** was "in no way related" to his participation in the instant suit. (*See id.* 272:13-23.) Because Kanner has invested in Mark's company, Mark stands to potentially benefit from any attorneys' fees secured by Kanner and could act in his own interest instead of the interest of the class as a whole. *See* *In re IMAX Sec. Litig., 272 F.R.D. 138, 156-57 & n.86 (S.D.N.Y. 2010)* (finding that "the close business and personal relationship between [the class representative] and [class counsel], and the incentives for [class counsel] to receive additional investments from [the class representative], as well as goodwill, are sufficient to warrant a finding of inadequacy under the circumstances of this case"); *see also* *6A Fed. Proc. § 12:145* ("[I]t is inappropriate for counsel to represent a class where there is a relationship between counsel and a potential class member who is heavily involved in the litigation and would directly benefit from any counsel fees as a result of the litigation.").

Because there is a wealth of other merchants who can serve as class representatives and five other class representatives in this litigation, the Court dismisses DDMB and DDMB2 as class representatives and allows Kanner to remain as Class Counsel. *See* *In re Discovery Zone Sec. Litig., 169 F.R.D. at 109* ("Under these circumstances, the [c]ourt deems it **[*241]** proper to eliminate any possible conflict of interest between the named plaintiffs and the class by dismissing [the conflicted plaintiffs] as class representatives.").

2. Adequacy of counsel

Plaintiffs argue that Hilliard & Shadowen LLP, Grant & Eisenhofer, P.A., Freed Kanner London & Millen LLP, and Nussbaum Law Group, P.C. are adequate to represent the *Rule 23(b)(2)* class because they are "experienced in prosecuting antitrust cases and complex class actions to successful resolutions," and have "vigorously pursued the litigation on behalf of the Class [and] engaged in extensive investigation, fact discovery, motion practice, engagement with experts[,] and complex settlement discussions." (Pls.' Mem. 31-32.) Specifically, Plaintiffs argue that three of the attorneys who currently represent them "spent several years representing other plaintiffs in this proceeding prior to their appointment in this case" as interim class counsel. (*See id.* at 31.)

No party opposes appointment of these four firms as counsel for the Rule 23(b)(2) class.

HN24[] To satisfy the adequacy of representation requirement as to class counsel, a court must "determin[e] whether they are 'qualified, experienced and generally able to conduct the litigation.'" **[*242]** Vargas v. Cap. One Fin. Advisors, 559 F. App'x 22, 26 (2d Cir. 2014) (quoting In re Joint E. & S. Dist. Asbestos Litig., 78 F.3d 764, 778 (2d Cir. 1996)); Sharpe v. A.W. Concentrate Co. & Keurig Dr. Pepper, Inc., No. 19-CV-768, 2021 U.S. Dist. LEXIS 160177, 2021 WL 3721392, at *5 (E.D.N.Y. July 23, 2021) (stating that "class counsel must be 'qualified, experienced, and generally able to conduct the litigation'" (quoting In re Kind LLC "Healthy & All Nat." Litig., 337 F.R.D. 581, 596 (S.D.N.Y. 2021))); Xiao Ling Chen v. XpresSpa at Terminal 4 JFK LLC, No. 15-CV-1347, 2019 U.S. Dist. LEXIS 195988, 2019 WL 5792315, at *7 (E.D.N.Y. Aug. 20, 2019) (same).

The Court finds class counsel adequate to represent the Rule (23)(b)(2) class. Proposed class counsel are experienced and competent lawyers who will be able to conduct this litigation. Hilliard & Shadowen LLP, Grant & Eisenhofer, P.A., Freed Kanner London & Millen LLP, and Nussbaum Law Group, P.C. have extensive experience litigating antitrust actions and class actions in federal courts. (*See* Appl. of Steve Shadowen, Michael Freed, and Robert Eisler for Appointment as Class Counsel, Docket Entry No. 6673 (detailing counsel's experience with previous antitrust class actions); Nussbaum's Mem. in Supp. of Nussbaum's Mot. to Appoint Counsel 7-14, Docket Entry No. 6669-1 (detailing Nussbaum's experience in antitrust litigation and collecting cases in which Nussbaum has served as co-lead class counsel); Decl. of Linda P. Nussbaum in Supp. of Nussbaum's Mot. to Appoint Counsel, Docket Entry No. 6669-2); *see also* In re Lidoderm Antitrust Litig., No. 14-MD-2521, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *9 n.4 (N.D. Cal. Feb. 21, 2017) (appointing Hilliard & Shadowen LLP as class counsel in antitrust suit and stating that Hilliard & Shadowen LLP and other firms "have ably and vigorously **[*243]** litigated this case, and nothing has occurred to undermine [the court's] initial determination of their experience and adequacy"); In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-MD-2503, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *12 n.13 (D. Mass. Oct. 16, 2017) (appointing Hilliard & Shadowen LLP as class counsel in antitrust suit and stating that they "have adequately prosecuted the interests of the class since the Court ordered them as interim co-lead counsel"); *In re Auto. Parts Antitrust Litig.*, No. 12-MD-02311, 2017 WL 469734, at *2 (E.D. Mich. Jan. 4, 2017) (appointing Freed Kanner London & Millen LLP as class counsel in antitrust class action); *Allan v. Realcomp II, Ltd.*, No. 10-CV-14046, 2013 WL 12333444, at *11 (E.D. Mich. Mar. 30, 2013) (same); In re Pfizer Inc. Sec. Litig., 282 F.R.D. 38, 47 (S.D.N.Y. 2012) (appointing Grant & Eisenhofer, P.A. as class counsel and stating that it is "an experienced class action law firm").

As Judge Orenstein noted in the Interim Class Counsel Order, these firms "have been steeped in this litigation since its inception, and have demonstrated their ability to work cooperatively with each other, with the court, and with numerous non-lead counsel representing plaintiffs with very significant interests in this litigation." (Interim Class Counsel Order 6.) Since the Court appointed them interim Class Counsel, they have filed the operative Rule 23(b)(2) class Complaint, successfully defended against the Bank Defendants' motion to dismiss, conducted extensive discovery, briefed opposition to Intervenors' motions to intervene, pursued the instant **[*244]** motion for class certification, and briefed summary judgment and *Daubert* motions in addition to defending against Defendants' summary judgment and *Daubert* motions. *See* In re Pfizer Inc. Sec. Litig., 282 F.R.D. at 47 (finding class counsel adequate when it "devoted considerable resources to this case since it was first filed, and has effectively protected the interests of [the] [p]laintiffs and the putative class" including successfully "oppos[ing] [the] [d]efendants' motion to dismiss . . . , prevail[ing] on a motion for leave to amend the complaint, appear[ing] before the [c]ourt in a five-day *Daubert* hearing, and conduct[ing] extensive discovery"); In re Sadia, S.A. Sec. Litig., 269 F.R.D. 298, 310 (S.D.N.Y. 2010) (finding the adequacy prong satisfied when lead counsel had "been intimately involved in prosecuting [the] action from its beginning stages, including investigating the claims, filing an amended complaint, successfully defending a motion to dismiss [and] pursuing the current class action certification").

No other objections have been raised to the adequacy of the proposed class counsel aside from the arguments concerning whether counsel will trade away the claims of parties pursuing their individual damages claims. These arguments were already addressed in Section II.c.iv.1.D *supra* ***[*245]*** . Accordingly, the Court finds representation by Hilliard & Shadowen LLP, Grant & Eisenhofer, P.A., Freed Kanner London & Millen LLP, and Nussbaum Law Group, P.C. to be adequate under Rule 23(a)(4).

v. Ascertainability

Plaintiffs argue that they satisfy the ascertainability requirement because the proposed class "is defined using the objective and readily verifiable criterion of whether [m]erchants have accepted Visa-and/or Mastercard-branded cards during a definite period of time." (Pls.' Mem. 32.) In support of their request for an eight-year period to include future merchants, Plaintiffs argue that "the eight-year period is not random, but reflects the anticipated length of any decree ordered in the case." (Pls.' Suppl. Reply 6-7.) Plaintiffs state that the injunctive relief obtained in the 2013 Settlement Agreement "was to last between eight and nine years" and that settlement was invalidated because it "released certain claims *in perpetuity* notwithstanding that the injunction terminated after eight to nine years." (*Id.* at 7 (citing *Interchange Fees II, 827 F.3d at 239*).) In addition, Plaintiffs argue that the "*same* Restraints *will continue* to generally apply *to every future* merchant unless they are enjoined as a result of this **[*246]** litigation." (*Id.* at 6-7.)

Merchant Trade Groups argue that Plaintiffs do not satisfy the ascertainability requirement as to the future merchants because they "fail to offer a single reason, much less any argument, for why future merchants should be included at all," (Merchant Trade Groups' Opp'n 21), and have not justified the eight-year temporal limitation on the class definition or "attempted to 'substantiate[]' the relationship between their proposed liability theory and their proposed class end date," (Merchant Trade Groups' Sur-Reply 8-9 (citing *B & R Supermarket, Inc. v. Mastercard Int'l, Inc. (B & R Supermarket II), No. 17-CV-2738, 2020 U.S. Dist. LEXIS 248650, 2021 WL 234550, at *15 (E.D.N.Y. Jan. 19, 2021)*).) In support, Merchant Trade Groups note that the *Rule 23(b)(3)* settlement in this MDL only released claims that accrued within five years of the settlement date and argue that Plaintiffs have not "explained why they now propose to bind merchants with a mandatory class period *longer* than the release period for the *non-mandatory* class approved in 2019." (*Id.* at 8 n.7.)

HN25[] *Rule 23(a)* contains an implied requirement of ascertainability. *In re Petrobras Sec., 862 F.3d at 266* ("'Most . . . circuit courts of appeals have recognized that *Rule 23* contains an implicit threshold requirement that the members of a proposed class be readily identifiable,' often characterized as 'an "ascertainability" requirement.'" **[*247]** (quoting *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc., 821 F.3d 992, 995 (8th Cir. 2016)*)). Unlike other circuits, the Second Circuit does not have a "heightened" requirement of ascertainability — it requires only that a "class be defined using objective criteria that establish a membership with definite boundaries," and does not require "administrative feasibility" of identifying each class member based on that objective criteria. *Id.* (distinguishing the Second Circuit's approach to ascertainability from the circuits with a heightened ascertainability requirement); *see also* *Langan v. Johnson & Johnson Cons. Cos., 897 F.3d 88, 91 n.2 (2d Cir. 2018)* (stating that *In re Petrobras Securities* rejected "the argument that proposed classes must be 'administratively feasible' and [held] that the class was 'clearly objective' and 'sufficiently definite'" where it identified the class by "'subject matter, timing, and location,' which made it 'objectively possible' to ascertain members" (quoting *In re Petrobras Sec., 862 F.3d at 267-70*)); *Porter v. MooreGroup Corp., No. 17-CV-7405, 2021 U.S. Dist. LEXIS 151187, 2021 WL 3524159, at *3 (E.D.N.Y Aug. 11, 2021)* ("To be ascertainable, the class must be 'readily identifiable, such that the court can determine who is in the class and, thus, bound by the ruling.'" (quoting *Charron v. Pinnacle Grp. N.Y. LLC, 269 F.R.D. 221, 229 (S.D.N.Y. 2010)*)); *Wang v. Tesla, Inc., 338 F.R.D. 428, 2021 WL 3160795, at *7 (E.D.N.Y. July 26, 2021)* ("A class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each **[*248]** case." (quoting *Brecher, 806 F.3d at 24-25*)); *Scott v. Quay, 338 F.R.D. 178, 186 (E.D.N.Y. 2021)* (stating that meeting the ascertainability requirement is "not a heavy burden because the requirement is 'designed only to prevent the certification of a class whose membership is truly indeterminable'" (quoting *Ebin, 297 F.R.D. at 567*)). "The ascertainability requirement, as defined in this Circuit, asks district courts to consider whether a proposed class is defined using objective criteria that establish a membership with definite boundaries." *In re Petrobras Sec., 862 F.3d at 269*; *Wang, 338 F.R.D. 428, 2021 WL 3160795, at *7* ("[A] class must be 'defined by objective criteria' so that it will not be necessary to hold 'a mini-hearing on the merits of each case.'" (quoting *Brecher, 806 F.3d at 24*)).

As a threshold matter, the Court notes that it is unclear whether the implied requirement of ascertainability applies to class actions under *Rule 23(b)(2)*. *See* *Plaintiffs #1-21 v. County of Suffolk, No. 15-CV-2431, 2021 U.S. Dist. LEXIS 48462, 2021 WL 1255011, at *16 (E.D.N.Y. Mar. 12, 2021)* (stating that "[i]t is not even clear 'that the implied requirement of definiteness should apply to Rule 23(b)(2) class actions at all'" (quoting Davis v. City of New York, 296 F.R.D. 158, 166 n.50 (S.D.N.Y. 2013))), *report and recommendation adopted*, 2021 U.S. Dist. LEXIS 66273, 2021 WL 1254408 (E.D.N.Y. Apr. 5, 2021); Westchester Indep. Living Ctr., Inc. v. State Univ. of N.Y., Purchase Coll., 331 F.R.D. 279, 299 (S.D.N.Y. 2019) ("As a threshold matter, '[i]t is not clear that the ascertainability requirement applies to Rule 23(b)(2) class actions . . . as notice is not obligatory and the relief sought is injunctive rather than compensatory.'" (quoting Brooklyn Ctr. for Indep. of the Diasbled v. Bloomberg, 290 F.R.D. 409, 418 (S.D.N.Y. 2012))); **[*249]** *see also* 1 Newberg on Class Actions § 3:7 (describing the ambiguity as to whether there is a definiteness requirement under Rule 23(b)(2) and stating that the First, Third, Sixth, and Tenth Circuits have declined to imply such a requirement as it pertains to equitable relief classes). Some courts applying the standard to Rule 23(b)(2) classes apply a relaxed version of the ascertainability test. *See, e.g.,* Newkirk, 2020 U.S. Dist. LEXIS 155539, 2020 WL 5035930, at *11 ("In the context of a motion to certify a Rule 23(b)(2) class, the ascertainability requirement is less critical because 'a chief objective of this rule is to provide broad injunctive relief to "large and amorphous" classes not capable of certification under Rule 23(b)(3).'" (quoting In re Vitamin C Antitrust Litig., 279 F.R.D. at 116)); 1 Newberg on Class Actions § 3:7 (stating that "[r]ather than strictly apply, or simply ignore, the definiteness requirement, some courts have taken a more flexible approach" and collecting cases).

However, Second Circuit decisions in the Rule 23(b)(3) context that address ascertainability do not make any distinctions on the applicability of the ascertainability requirement based on the type of class being certified. *See* In re Petrobras Sec., 862 F.3d at 264-65 (referring only to the "Rule 23" requirement of ascertainability); Brecher, 806 F.3d at 24 ("Like our sister Circuits, we have recognized an 'implied requirement of ascertainability' **[*250]** in Rule 23 of the Federal Rules of Civil Procedure." (quoting In re Pub. Offerings Secs. Litig., 471 F.3d 24, 32 (2d Cir. 2006))). In addition, district courts within the Second Circuit have applied the ascertainability requirement to Rule 23(b)(2) classes. *See* Wang, 338 F.R.D. 428, 2021 WL 3160795, at *7 (finding that putative Rule 23(b)(2) and 23(b)(3) classes were not ascertainable as "[d]etermining whether a particular individual fit within the class definition would require a hearing"); Plaintiffs #1-21, 2021 U.S. Dist. LEXIS 48462, 2021 WL 1255011, at *10 (applying the ascertainability requirement to a Rule 23(b)(2) class and concluding that the class is ascertainable because the proposed class is "defined using objective criteria" and has "definite boundaries" (quoting Petrobras, 862 F.3d at 266)); Newkirk, 2020 U.S. Dist. LEXIS 155539, 2020 WL 5035930, at *11 (concluding that the ascertainability requirement was satisfied as to a Rule 23(b)(2) class); Batalla Vidal, 501 F. Supp. 3d at 136 (same); Westchester Indep. Living Ctr., Inc., 331 F.R.D. at 299 (finding that "[e]ven if ascertainability is required," the class met the requirement). Accordingly, the Court assesses ascertainability as to the Rule 23(b)(2) class.

The Court finds that the proposed class is sufficiently defined as to current merchants but is insufficiently defined as to future merchants. The Court's recent decisions in *B & R Supermarket v. Mastercard Int'l Inc.* are instructive. *See* B & R Supermarket I, 2018 U.S. Dist. LEXIS 42547, 2018 WL 1335355, at *13; B & R Supermarket II, 2020 U.S. Dist. LEXIS 248650, 2021 WL 234550, at *4. **HN26**[] In B & R Supermarket I, the Court held that the class definition, including the class period, must be consistent with the alleged liability theory. *See* B & R Supermarket I, 2018 U.S. Dist. LEXIS 42547, 2018 WL 1335355, at *12; *see also* Comcast Corp. v. Behrend, 569 U.S. 27, 38, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)[33] (requiring alignment of the proposed liability theory **[*251]** and the proposed methodology for damages); In re Petrobras Sec., 862 F.3d at 259[34] (discussing temporal limitation and its

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[33] In *Comcast*, the plaintiffs presented four theories of antitrust liability, with a damages model that calculated damages for the entire class based on all four theories. *Comcast Corp. v. Behrend*, 569 U.S. 27, 32, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013). The district court accepted only one of the liability theories, rejecting the other three. *Id.* However, the plaintiffs' calculation method for damages did not isolate damages for each of the four theories, and the district court refused to review the inconsistency between the sole liability theory and the damages methodology, which was based on all four liability theories, on the grounds that doing so would require reaching the merits of the claims. *Id.* The Supreme Court held that because the court approved only one of the four antitrust liability theories, the plaintiffs could not rely on a model that included damages for all four antitrust theories. *Id.* at 37. Thus, the Court understands *Comcast* to require courts to ensure consistency between the liability theory and damages proposed by the putative class. Although *Comcast* did not focus on class definition, it is relevant to the question of class boundaries because the Supreme Court reasoned that only damages that can be attributed to the defendant's misconduct should be considered. *Id.* at 38 ("Prices whose level above what an expert deems 'competitive' has been caused by factors unrelated to an accepted theory of antitrust harm are not 'anticompetitive' in any sense relevant here.").

relationship to the plaintiffs' reliance on the defendants' statements, in the context of a securities action, where reliance is one of the liability elements); *Pinnacle Grp. N.Y. LLC, 269 F.R.D. at 228* (modifying class definition in *Rule 23(b)(2)* class to ensure sufficient relationship between the definition and the claims alleged). The Court found that the plaintiffs' original class end date of "until the anticompetitive conduct ceases" and four proposed alternative end dates were unascertainable because the plaintiffs failed to "propose a class period that bears a relationship to [their] proposed liability theory" and "some of [the alternatives] appear[ed] completely arbitrary." *B & R Supermarket I, 2018 U.S. Dist. LEXIS 42547, 2018 WL 1335355, at *11, *13*. In a later decision in the case deciding the plaintiffs' renewed motion for class certification, the Court found the plaintiffs' proposed class with an end date two years after the challenged policy went into effect ascertainable because the end date for the proposed class period "align[ed] with their theory of liability" of when merchants would have been able to avoid chargebacks for two years but for the defendants' conduct, and because the proposed class definition was **[*252]** sufficiently substantiated. *See B & R Supermarket II, 2020 U.S. Dist. LEXIS 248650, 2021 WL 234550 at *16-17*.

In this case, Plaintiffs use the objective criteria of merchants that have accepted Visa-and/or Mastercard-branded cards to identify class members. (*See* Pls.' Mem. 5); *see also Interchange Fees III, 330 F.R.D. at 54* (finding that the proposed class was ascertainable because it used objective criteria of merchants' acceptance of Visa- and/or Mastercard-branded cards). However, Plaintiffs have failed to demonstrate why a class period running through eight years "after the date of entry of [f]inal [j]udgment in this case" is sufficiently objective or substantiated. (*See* Pls.' Mem. 5.) As Merchant Trade Groups correctly argue, (*see* Merchant Trade Groups' Sur-Reply 8-9), Plaintiffs offer no basis for including future merchants specifically for up to eight years after the entry of final judgment in the class other than that the period represents the length of time they expect the anticipated relief to last and that the Department of Justice's Antitrust Division generally limits "any behavioral relief stemming from consent decrees to ten years," (*see generally* Pls.' Mem.; Pls.' Suppl. Reply 6-9 & n.24). In contrast to Plaintiffs' proposed definition as to the *Rule 23(b)(2)* class, **[*253]** the Court notes that the settlement class certified as to the *Rule 23(b)(3)* class in this MDL only releases claims that accrue "no later than five years after the [s]ettlement [f]inal [d]ate." *Interchange Fees IV, 2019 U.S. Dist. LEXIS 217583, 2019 WL 6875472, at *23*. While Plaintiffs need not align the dates for released claims as to both classes, Plaintiffs must ensure that the date for inclusion of future class members is not arbitrary as "[t]he party seeking class certification bears the burden of demonstrating compliance with *Rule 23*'s prerequisites by a preponderance of the evidence." *Kurtz, 818 F. App'x at 60* (citing *In re Vivendi, S.A. Sec. Litig., 838 F.3d at 264*); *Batalla Vidal, 501 F. Supp. 3d at 134*; *see also B & R Supermarket I, 2018 U.S. Dist. LEXIS 42547, 2018 WL 1335355, at *13*. Accordingly, the Court finds that the proposed class is ascertainable as to current merchants but not ascertainable as to future merchants.

The Court recognizes that it has authority to modify a proposed class definition or consider a renewed motion for certification pursuant to *Rule 23(c)(1)(C)*, and exercises its discretion to carve out an appropriate class from the overbroad class proposed by Plaintiffs. *In re Initial Pub. Offering Sec. Litig., 483 F.3d 70, 73 (2d Cir. 2007)* ("District courts have ample discretion to consider (or to decline to consider) a revised class certification motion after an initial denial. . . . Some district courts have explicitly reserved authority to revise a class certification ruling by denying certification 'without **[*254]** prejudice.'" (collecting cases)); *see Sicav v. James Jun Wang, No. 12-CV-6682, 2015 U.S. Dist. LEXIS 6815, 2015 WL 268855, at *7 (S.D.N.Y. Jan. 21, 2015)* (inviting plaintiffs to renew their motion for certification for the second time after denial); *Charron, 269 F.R.D. at 229* ("A 'district court "is not bound by the class definition proposed in the complaint,"' and is empowered to carve out an appropriate class." (quoting *Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp., 993 F.2d 11, 14 (2d Cir. 1993)*)).

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[34] *In re Petrobras Securities* was a securities class action brought by Petrobras shareholders alleging that Petrobras made misleading statements that impacted the price of shares. 862 F.3d 250 (2d Cir. 2017). The Second Circuit noted that the class definition was temporally limited to securities purchases made "before Petrobras made generally available to its security holders an earnings statement covering a period of at least twelve months beginning after the effective date of the offerings," and that such limitation was appropriate "given the absence of any allegation that Plaintiffs relied on any such earnings statement." *Id.* at 259-60.

The Court redefines the *Rule 23(b)(2)* class to adopt the class definition set forth in Plaintiffs moving papers excluding merchants eight years after the date of entry of final judgment in this case. The Court therefore certifies a class consisting of "[a]ll persons, businesses, and other entities (referred to herein as 'Merchants') that accept Visa and/or Mastercard [c]redit and/or [d]ebit cards in the United States at any time during the period between December 18, 2020" and "the date of entry of Final Judgment in this case." (Pls.' Mem. 5.) Plaintiffs may seek to modify the proposed definition of the class to include future merchants at any time, so long as they substantiate the time period that applies to future merchants.

d. *Rule 23(b)(2)* requirements

Plaintiffs argue that they satisfy the *Rule 23(b)(2)* requirements because the class would "generally benefit from equitable relief prohibiting Defendants' conduct." (*See* Pls.' Mem. 32-46.) **[*255]** Plaintiffs contend that (1) by imposing and enforcing the Restraints — including the default interchange fees, the honor-all-cards rules, and the no-surcharge rules — Defendants have acted on grounds that apply generally to the class, (2) market definitions and market power can be evaluated on a classwide basis and would apply to all members of the class, (3) the merchants have "no viable business alternative to transacting with Defendants due to Defendants' market power," and (4) they seek classwide relief that will benefit all class members. (*Id.* at 33.) In support, Plaintiffs rely on Dr. Leffler's class certification report, in which he explains that "Defendants' anticompetitive conduct affects all Plaintiffs and [c]lass members, and that Defendants' conspiracy injured virtually all [m]erchants." (*Id.*) As to the interchange fees, Plaintiffs argue that "individually negotiated [i]nterchange [f]ees are extremely rare due to the Restraints, and because there is little or no incentive for an issuing bank to implement a fee lower than the default for the overwhelming majority of [m]erchants," and even if a merchant does negotiate their own fees, "it could only marginally raise the usage **[*256]** of that issuer's cards, as it would still be precluded from refusing other issuers' cards or using other steering mechanisms precluded by the Restraints." (*Id.* at 35.) As to the honor-all-cards rules, Plaintiffs argue that these rules "disincentivize[] the [i]ssuing [b]anks from negotiating [i]nterchange [f]ees lower than the default interchange rate" which results in the default interchange fee "becom[ing] a fixed rate that applies to almost every transaction." (*Id.* at 36.) As to the no-surcharge rules, Plaintiffs argue that Defendants "insulate themselves from any competitive threat because when cardholders select which card to use in making a purchase, the [n]o [s]urcharge rules guarantee[] that the consumer makes this selection without regard to the card's [t]otal [p]rice," which results in merchants "bear[ing] the costs of the transaction, robbed of the ability to steer the cardholder to a lower cost of payment." (*Id.* at 38.) Finally, Plaintiffs argue that they seek classwide relief that will be "effective market-wide," and the fact that "members may differ in their willingness and/or ability to take full advantage of such relief does not negate the value of that relief." (*Id.* ***[*257]*** at 45.) In addition, Plaintiffs contend that "all prior reforms to the Defendants' Restraints" including the Durbin Amendment and the Department of Justice consent decree "have applied market-wide, without variation based on the identity of the [m]erchant or any other individual basis." (*Id.* at 46.)

Opponents argue that "[c]ohesion is a prerequisite for a mandatory (b)(2) class," that Plaintiffs fail to meet the "required unity of interests, called 'cohesion,'" under *Rule 23(b)(2)*, and that *Rule 23(b)(2)* requires "greater cohesiveness" than that required under *Rule 23(b)(3)*. (*See* Direct Action Pls.' Opp'n 16 (citing *In re St. Jude Med., 425 F.3d 1116, 1121 (8th Cir. 2005)*); Direct Action Pls.' Sur-Reply 8-10; *see also* Grubhub Pls.' Opp'n 9-10; Walmart's Opp'n 14-15.)

Opponents' arguments that Plaintiffs do not meet *Rule 23(b)(2)*'s requirements repeat their arguments in the adequacy of representation context that Plaintiffs seek a different type of injunctive relief and that this relief is not in their interests. (*See* Direct Action Pls.' Opp'n 16-17, 19-22; Direct Action Pls.' Sur-Reply 8-10; Grubhub Pls.' Opp'n 9-11; Walmart's Opp'n 14-20; Merchant Trade Groups' Opp'n 10-15.) They argue that "Plaintiffs seek injunctive relief that is adverse" to their interests and that "these cases do not **[*258]** challenge one central practice or rule that harms all class members in the same way." (Direct Action Pls.' Opp'n 19-20; *see also* Grubhub Pls.' Opp'n (stating that they opted out of the *Rule 23(b)(3)* class and are pursuing relief "shaped to their own, individual interests and business models").) Direct Action Plaintiffs and Grubhub Plaintiffs contend that "these cases challenge a mix of complex rules and practices that affect merchants differently[] and are perceived and valued differently by different class members." (Direct Action Pls.' Opp'n 20; Grubhub Pls.' Opp'n 9-10 (arguing that the Grubhub Plaintiffs are "larger merchants that have different interests, and different capabilities, than small merchants").) In addition, Direct Action Plaintiffs argue that because they "seek to bar enforcement" of the honor-all-cards and default interchange fee rules, while Plaintiffs will prioritize surcharging relief, the *Rule 23(b)(2)* requirement is not satisfied. (Direct Action Pls.' Opp'n 21; Direct Action Pls.' Sur-Reply 9-10.)

In addition to reiterating the same arguments as Direct Action Plaintiffs and Grubhub Plaintiffs regarding the form of relief, Walmart argues that (1) "not all of Visa and Mastercard's network **[*259]** rules apply to every merchant," (2) Plaintiffs failed to "articulate how a specific injunction will benefit every class member," and (3) Plaintiffs have not shown that "a single injunction can offer meaningful 'classwide relief' to every merchant that uses Visa and Mastercard payment cards" and the Court should "infer that there is no such uniform remedy and deny class certification accordingly." (Walmart's Opp'n 16-18.)

Merchant Trade Groups contend that all merchants would not necessarily want the same injunctive relief.[35] (*See* Merchant Trade Groups' Opp'n 9-10.) In support, Merchant Trade Groups argue that "Visa's and Mastercard's rulebooks span thousands of pages" and "[a] plaintiff could well resolve this case through other injunctive changes" because "there are multiple potential injunctive resolutions of this case." (*Id.* at 10.)

In response to Opponents' arguments that *Rule 23(b)(2)* imposes an additional requirement of cohesion, Plaintiffs argue that (1) cohesion, as formulated by Opponents, is not expressly required by the text of *Rule 23(b)(2)* and if it were, "it is shorthand for the need for generally applicable class-wide injunctive relief," and (2) any cohesiveness element "merely requires that plaintiffs' **[*260]** legal injuries be similar enough that they all can be remedied with a single 'indivisible' injunction." (Pls.' Reply 14-16 (quoting *Houser v. Pritzker, 28 F. Supp. 3d 222, 250 (S.D.N.Y. 2014)*).) Plaintiffs contend that because the "entire market is subject to substantially the same 'mix of complex rules'" a class under *Rule 23(b)(2)* is a "practical and legal necessity, regardless of each class member's individual circumstance." (*Id.* at 17-18.)

HN27[] *Rule 23(b)(2)* provides for certification of a class seeking equitable relief "if 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole.'" *Sykes, 780 F.3d at 80* (quoting *Fed. R. Civ. P. 23(b)(2)*); *In re Kind LLC "Healthy & All Nat." Litig., 337 F.R.D. 581, 609 (S.D.N.Y. 2021)* ("*Rule 23(b)(2)* provides for class certification when 'the party opposing the class has refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief.'" (quoting *Fed R. Civ. P. 23(b)(2)*)). "The Supreme Court has clarified that certification of a class for injunctive relief is only appropriate where 'a single injunction . . . would provide relief to each member of the class.'" *Sykes, 780 F.3d at 97* (quoting *Dukes, 564 U.S. at 360*); *see also* *Berni v. Barilla S.p.A., 964 F.3d 141, 146 (2d Cir. 2020)* ("[T]he Supreme Court has counseled that '*Rule 23(b)(2)* applies only when a single injunction or declaratory judgment would provide relief to each member **[*261]** of the class.' Put another way, a class may not be certified under *Rule 23(b)(2)* if any class member's injury is not remediable by the injunctive or declaratory relief sought." (quoting *Dukes, 564 U.S. at 360*)). However, the Second Circuit has explained the Supreme Court's holding in *Dukes* as "simply emphasiz[ing] that in a class action certified under *Rule 23(b)(2)*, 'each individual class member' is not 'entitled to a *different* injunction.'" *Amara v. CIGNA Corp., 775 F.3d 510, 522 (2d Cir. 2014)* (quoting *Dukes, 564 U.S. at 360-61*); *see also* *Sykes, 780 F.3d at 97* (quoting *Amara, 775 F.3d at 522*); *Plaintiffs #1-21, 2021 U.S. Dist. LEXIS 48462, 2021 WL 1255011, at *17* (same).

The Court first assesses whether there is a cohesiveness requirement under *Rule 23(b)(2)* and then addresses whether the class meets the requirements of *Rule 23(b)(2)*.

i. The Court declines to impose a cohesiveness requirement

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[35] Although Merchant Trade Groups make their arguments in the context of requesting opt-out rights and not arguing that Plaintiffs do not satisfy *Rule 23(b)(2)*, (*see* Merchant Trade Groups' Opp'n 9-10), the Court finds their arguments relevant for the *Rule 23(b)(2)* inquiry.

The Court declines to read an additional "cohesiveness" requirement into Rule 23(b)(2). The Court acknowledges that existing jurisprudence on this issue is mixed, with some courts imposing cohesiveness as an additional requirement and others declining to do so. *See* Westchester Indep. Living Ctr., Inc., 331 F.R.D. at 301 ("Some courts require that plaintiffs seeking to certify a Rule 23(b)(2) class 'must demonstrate that the class is "cohesive,"' but it is not entirely clear how this differs from the commonality requirement found in Rule 23(a) . . . ." (quoting Laumann v. Nat'l Hockey League, 105 F. Supp. 3d 384, 395 (S.D.N.Y. 2015))). *Compare* Brooks v. Roberts, 251 F. Supp. 3d 401, 420 (N.D.N.Y. 2017) (stating that Rule 23(b)(2) class plaintiffs "must demonstrate the class is 'cohesive'"), **[*262]** *and* Barnes v. Am. Tobacco Co., 161 F.3d 127, 143 (3d Cir. 1998) ("While 23(b)(2) class actions have no predominance or superiority requirements, it is well established that the class claims must be cohesive. Discussing the requirements for 23(b)(2) classes in Wetzel v. Liberty Mutual Insurance Company, 508 F.2d 239 (3d Cir.1975), we noted, '[b]y its very nature, a (b)(2) class must be cohesive as to those claims tried in the class action. . . . Because of the cohesive nature of the class, Rule 23(c)(3) contemplates that all members of the class will be bound."), *with* Senne v. Kansas City Royals Baseball Corp., 934 F.3d 918, 938-39 (9th Cir. 2019) ("[T]he district court erred in imposing a 'cohesiveness' requirement for the proposed Rule 23(b)(2) class. Although we have never explicitly addressed whether 'cohesiveness' is required under Rule 23(b)(2), courts that have imposed such a test treat it similarly to Rule 23(b)(3)'s predominance inquiry — something we have previously rejected in no uncertain terms." (citing Newberg on Class Actions)), *and* Kurtz, 321 F.R.D. at 540 (stating that the "additional case law interpretive requirements" of cohesion and necessity "are unjustified in light of the detailed legislative attention to Rule 23, which does not contain them," but finding that they were nevertheless satisfied "because the defendants, through their labeling practices, 'acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding **[*263]** declaratory relief is appropriate respecting the class as a whole'" (quoting Fed. R. Civ. P. 23(b)(2))).

The Second Circuit has not addressed whether there is a cohesiveness requirement under Rule 23(b)(2). However, in the few decisions using the word "cohesion" when discussing a Rule 23(b)(2) class, the Second Circuit has suggested that "cohesion" is merely a descriptor for classes meeting Rule 23(b)(2)'s requirements. For example, in *Handschu v. Special Services Division*, the Second Circuit stated that "[b]ecause of the common interests of all its members, a Rule 23(b)(2) class seeking declaratory and injunctive relief is cohesive by nature." 787 F.2d 828, 833 (2d Cir. 1986). Similarly, in *Robinson v. Metro-North Commuter Railroad Co.*, the Second Circuit stated:

> ***HN28***[] Where class-wide injunctive or declaratory relief is sought in a (b)(2) class action for an alleged group harm, there is a presumption of cohesion and unity between absent class members and the class representatives such that adequate representation will generally safeguard absent class members' interests and thereby satisfy the strictures of due process. This presumption of cohesion and unity continues where incidental damages are also sought because entitlement to such damages does not vary based on the subjective considerations **[*264]** of each class member's claim, but "flow[s] directly from a finding of liability on the . . . claims for class-wide injunctive and declaratory relief."

267 F.3d at 165 (alteration in original) (citation omitted) (quoting Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998)). The language in Robinson suggests that cohesion is inherent in a properly certified Rule 23(b)(2) class action because class members' claims are inherently intertwined and relief to anyone in the group would be relief to the group as a whole. *See* Berry v. Schulman, 807 F.3d 600, 608 (4th Cir. 2015) ("[B]ecause of the group nature of the harm alleged and the broad character of the relief sought, the (b)(2) class is, by its very nature, assumed to be a homogenous and cohesive group." (alteration in original) (quoting Allison, 151 F.3d at 413)); *see also* 2 Newberg on Class Actions § 4:33 ("Courts that adopt a cohesiveness requirement are essentially using it as a means of measuring whether the class's interests are in fact so intertwined."). This view is consistent with the Supreme Court's holding in Dukes in which it reiterated that the additional procedural protections afforded to Rule 23(b)(3) classes do not apply to Rule 23(b)(2) classes because of the nature of equitable relief classes:

> The procedural protections attending the (b)(3) class — predominance, superiority, mandatory notice, and the right to **[*265]** opt out — are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*. When a class seeks an indivisible injunction benefiting all its members at once, there is no reason to undertake a case-specific inquiry into whether class

> issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident.

Dukes, 564 U.S. at 362-63. The Supreme Court also stated that "[t]he key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted — the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." Id. at 360 (quoting Nagareda, 84 N.Y.U. L. Rev., at 132). In addition, courts imposing a cohesion requirement appear to undertake the same analysis as courts that look only to the text of Rule 23(b)(2). *See, e.g.*, T.R. v. Sch. Dist. of Phila., No. 15-CV-4782, 2019 U.S. Dist. LEXIS 66002, 2019 WL 1745737, at *21 (E.D. Pa. Apr. 18, 2019) ("For a court to find a class cohesive, it must find that the 'class's claims are common ones and that adjudication of the case will not devolve into consideration of myriad individual issues.' 'In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member **[*266]** of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant.'" (citation omitted) (first quoting Newberg on Class Actions § 4:34; and then quoting Dukes, 564 U.S. at 360)), *aff'd*, 4 F.4th 179 (3d Cir. 2021); In re St. Jude Med., Inc., 425 F.3d 1116, 1122 (8th Cir. 2005) ("At base, the (b)(2) class is distinguished from the (b)(3) class by class cohesiveness . . . . Injuries remedied through (b)(2) actions are really group, as opposed to individual injuries.").

HN29[] Accordingly, to the extent "cohesion" is required in Rule 23(b)(2) class actions, the Court understands it to refer to the requirements of Rule 23(b)(2) itself, rather than an additional requirement beyond the rule's text.[36] *See Houser, 28 F. Supp. 3d at 250* ("The cohesiveness element merely requires that plaintiffs' legal injuries be similar enough that they all can be remedied with a single 'indivisible' injunction." (citing Barnes, 161 F.3d at 143 n.18)).

ii. The class meets the requirements of Rule 23(b)(2)

The Court finds that the class meets the requirements of Rule 23(b)(2). Plaintiffs have met their burden to demonstrate that the challenged Restraints apply to all merchants and therefore relief would be effected on a classwide basis.

First, the Court finds that equitable relief under Rule 23(b)(2) is appropriate because Defendants **[*267]** have acted on grounds generally applicable to the class. Defendants' alleged anticompetitive conduct via the Restraints affects all Plaintiffs and class members and the class would generally benefit from equitable relief prohibiting Defendants' challenged conduct. For example, Plaintiffs allege that Visa has "established complex 'default' [i]nterchange [f]ee schedules" which "apply on every transaction, except for where they have been 'customized where Member [Banks] have set their own financial terms for the [i]nterchange of a Visa [t]ransaction or Visa has entered into business agreements to promote acceptance and [c]ard usage." (Compl. ¶¶ 86, 90 (third alteration in original).) Plaintiffs allege that Mastercard's interchange fees operate in a similar manner. (*See id.* ¶ 87.) In his report, Dr. Leffler notes that the default interchange fees "become[] the de facto price charged by all issuing banks" (Leffler Report ¶ 29 (quoting Stiglitz Report ¶ 136)), because "there is no benefit to an issuer setting a merchant price lower than the maximum allowed price which is the default interchange." (*id.*; Pls.' Mem. 35). Dr. Leffler states that same is true of the honor-all-cards rule which **[*268]** impairs merchant competition by preventing merchants from "selectively accept[ing] an issuer's payment cards." (Leffler Report ¶ 28.) Dr. Leffler stated that the Restraints "work together to reinforce Visa and Mastercard's control over the pricing to merchants and make it virtually impossible for merchants to exert any leverage to obtain substantially more favorable prices or terms." (*Id.* ¶ 38.) These effects do not occur on an individual merchant basis — they apply generally to all merchants in the class.

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[36] The Court notes that in approving the 2013 Settlement Agreement, Judge Gleeson held that "the class is sufficiently cohesive to warrant Rule 23(b)(2) relief in this case." *See* Interchange Fees I, 986 F. Supp. 2d at 239. However, Judge Gleeson appeared to use the word "cohesive" in the same manner that this Court interprets it — to describe a class that meets the requirements of Rule 23(b)(2) because "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole." *Id.* (quoting Fed. R. Civ. P. 23(b)(2)).

Second, the Court finds that equitable relief is appropriate because such relief would apply to and benefit the class as a whole. Courts contemplating equitable relief for similar alleged anticompetitive rules have held that such relief is appropriate to be effected classwide. The district court's decision in *In re Visa Check/Mastermoney Antitrust Litigation* is instructive. 192 F.R.D. 68, 78 (E.D.N.Y. 2000), *aff'd sub nom.* In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124 (2d Cir. 2001). In that case, the plaintiffs sought to challenge alleged tying arrangement "rules issued by defendants Visa and MasterCard that require[d] stores accepting [the] defendants' credit cards to also accept their debit cards." Id. at 71. Although the court ultimately certified the class under Rule 23(b)(3), the court also **[*269]** concluded that "the action may be maintained under Rule 23(b)(2)" because "[t]he 'honor all cards' rule is 'generally applicable' to all members of the class, and the request for an injunction ending it is central to the plaintiffs suit." Id. at 88; *see also* In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d at 146-47 (declining to discuss certification under Rule 23(b)(2) because the class was certified under Rule 23(b)(3)).

Similarly, in *Interchange Fees I*, Judge Gleeson held that certification of a Rule 23(b)(2) settlement class was warranted because "[t]he network rules regimes that gave rise to this case applied generally to every merchant accepting Visa or MasterCard credit cards, and the injunctive relief in the proposed settlement" did as well. 986 F. Supp. 2d at 239. Judge Gleeson noted that "all merchants have the same interest in being able to inform cardholders at the point of sale of the acceptance costs of their credit cards and to either steer them to lower-cost alternatives or recoup the cost of acceptance." *Id.* While the Second Circuit vacated and remanded that decision on other grounds regarding adequacy of representation and due process, it did not hold that meaningful equitable relief was not possible for the entire class. Interchange Fees II, 827 F.3d at 238-40. Instead, the Second Circuit identified two schisms in the 2013 Rule 23(b)(2) settlement class **[*270]** — merchants that accept American Express or operate in states that prohibit surcharging and merchants that began business after the expiration of the provided injunctive relief — and found that the relief provided for in the settlement did not go far enough. *Id.* The Second Circuit noted that "[a]lternative forms of relief might have conferred a real and palpable benefit, such as remedies that affected the default interchange fee or honor-all-cards rule." Id. at 238. Plaintiffs' example of the 2011 Department of Justice settlement as a form of classwide relief is similarly persuasive. In that settlement, Visa and Mastercard were prevented from "offering discounts or expressing a preference for particular forms of payment" and required to "modify their rules in specific ways that applied to all [m]erchants." (*See* Pls.' Mem. 33); Final Judgment, *United States v. Am. Express*, No. 10-CV-4496 (E.D.N.Y. July 20, 2011), Docket Entry No. 143.

Moreover, the advisory committee notes to Rule 23 contemplate the use of equitable relief classes in antitrust cases. *See* Fed. R. Civ. P. 23 advisory committee notes to the 1966 Amendments ("Thus an action looking to specific or declaratory relief could be brought by a numerous class of **[*271]** purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential."). ***HN30***[] Courts certifying antitrust-focused putative equitable relief classes have found that they meet the Rule 23(b)(2) requirements. *See* In re Universal Serv. Fund Tel. Billing Pracs. Litig., 219 F.R.D. 661, 679-81 (D. Kan. 2004) (certifying a (b)(2) class in addition to a (b)(3) damages class in an antitrust class action where defendants were allegedly engaged in horizontal price-fixing, and continued anti-competitive behavior, in the absence of an injunction, could possibly dwarf plaintiffs' damages claims); In re NASDAQ Mkt.-Makers Antitrust Litig., 169 F.R.D. at 516 (certifying a (b)(2) class despite the availability of treble damages under the antitrust statute because of the possibility that the defendants' alleged conspiracy would continue to inflate the spreads on securities in the absence of appropriate equitable relief).

The Court recognizes that merchants are likely impacted in a variety of ways by the Restraints. As Opponents argue, the class consists of merchants large and small, with multiple locations or single locations, and with different business plans and perspectives. **[*272]** However, Plaintiffs seek to challenge the total anticompetitive effect resulting from the Restraints, including how the Restraints interact with each other to create an overall anticompetitive environment, which Plaintiffs allege has the total effect of "limit[ing] merchants' ability to incentivize their customers to choose payment means that result in lower costs to the merchants and lower total prices for the transactions." (Leffler Report ¶ 4.) ***HN31***[] Differences in how each individual merchant is affected do not negate the fact that Defendants have acted on grounds generally applicable to the class and that each merchant in the class stands to benefit from equitable relief from the Restraints. *See* In re Vitamin C Antitrust Litig., 279 F.R.D. at

117 (stating that "[d]ifferences between the extent of harm suffered by each class member do not make Rule 23(b)(2) certification inappropriate" and finding that the defendants' "price-fixing conduct [was] alleged to have caused every class member to purchased vitamin C at an artificially increased price" which was "sufficient 'common impact' to warrant certification under Rule 23(b)(2)"); Latino Officers Ass'n City of N.Y., 209 F.R.D. at 92 (certifying a 23(b)(2) class where "the actions complained of allegedly were taken on grounds generally applicable to the proposed class, even **[*273]** if not every member actually felt the brunt of the actions"); *see also* DG ex rel. Stricklin v. Devaughn, 594 F.3d 1188, 1201 (10th Cir. 2010) ("Rule 23(b)(2) does not require [n]amed [p]laintiffs to prove [the] controverted policies or practices actually harm or impose a risk of harm upon every class member at the class certification stage. . . . [C]ertification is appropriate even if the defendant's action or inaction 'has taken effect or is threatened only as to one or a few members of the class, provided it is based on *grounds* which have general application to the class.' That a class possibly or even likely includes persons unharmed by a defendant's conduct should not preclude certification." (quoting Fed. R. Civ. P. 23(b)(2) advisory committee note to 1966 amendment)); Lyon v. U.S. Immigr. & Customs Enf't, 171 F. Supp. 3d 961, 983-85 (N.D. Cal. 2016) (holding that immigration detainees who claimed violation of procedural due process and sought class certification under Rule 23(b)(2) presented "substantial undisputed evidence of prejudice suffered by the class as a whole based on conduct which applies generally to the class," even if the plaintiffs did "not demonstrate every member of the class ha[d] suffered from an adverse effect on the outcome of their renewal hearing"); In re J.P. Morgan Chase Cash Balance Litig., 242 F.R.D. at 276 (certifying a Rule 23(b)(2) class because "[i]f [p]laintiffs prevail on the merits and [the defendant's] [p]lan is **[*274]** found to violate ERISA[], any injunctive or declaratory relief ordered would be applicable to the entire class"), *amended*, 255 F.R.D. 130 (S.D.N.Y. 2009); Richards, 235 F.R.D. at 174 ("The defendants argue that some putative class members would not want the injunctive relief that [the plaintiff] seeks because it would disadvantage them financially to revert to coverage under the [t]raditional [p]lan terms. However, the court may infer from the complaint and plan documents that all of the putative class members would benefit from at least some injunctive relief if the plaintiff prevails."); 2 Newberg on Class Actions § 4:28 ("While the Rule looks for grounds that 'apply generally' to the class, it is well-settled that the defendant's conduct described in the complaint need not be directed or damaging to every member of the class."). In addition, as Plaintiffs contend, merchants may continue to "negotiate additional relief specific to themselves and their own business needs" as the relief provided will serve as a baseline, but not a ceiling for relief to merchants. (*See* Pls.' Mem. 30-31.)

The cases cited by Opponents do not persuade the Court that Rule 23(b)(2) is not satisfied. For example, in *M.D. ex rel. Stukenberg v. Perry*, the Fifth Circuit held that **[*275]** the proposed class did not satisfy Rule 23(b)(2) because the class included "claims for individualized injunctive relief." *675 F.3d 832 (5th Cir. 2012)*. However, the requested injunctive relief in that case was to formulate "'special expert panels to review the cases' of all individual class members in certain subgroups of the class to determine whether their 'services' or 'permanency' needs were 'being adequately addressed and, if not, to implement appropriate remedial steps to seek and secure permanency." *Id. at 846-47*. This relief was essentially crafting individualized injunctive-type relief, which is distinct from ordering changes, modifications, or the repeal altogether of the Restraints as to the entire merchant class. *Id.* Similarly, in *In re Managerial, Professional & Technical Employees*, a multidistrict antitrust action challenging the defendants' alleged exchange of detailed salary information, the plaintiffs sought to "stop [d]efendants from sharing compensation information concerning all members of the [p]roposed [c]lass." No. 02-CV-2924, 2006 U.S. Dist. LEXIS 249, 2006 WL 38937, at *9 (D.N.J. Jan. 5, 2006). The court held that "enjoining that conduct would not provide relief generally applicable to the class because it would have potentially conflicting effects on different members" and could potentially **[*276]** benefit employees in a job market where the defendants do not exercise market power. 2006 U.S. Dist. LEXIS 249, [WL] at *9. The Court does not find that the relief proposed by Plaintiffs — eliminating the Restraints — has the potential to harm the class. Opponents cite no cases, and this Court is aware of none, that indicate that perpetuating the Restraints could be beneficial to any merchant.

Accordingly, the Court finds that the requirements of Rule 23(b)(2) are satisfied.

e. The Court declines to grant opt-out rights

Plaintiffs argue that the Court should certify a mandatory *Rule 23(b)(2)* class. (Pls.' Mem. 46-50.) They contend that the Supreme Court's decision in *Dukes* "reaffirmed the default rule" that *Rule 23(b)(2)* classes are mandatory classes because the rule "provides no opportunity for . . . (b)(2) class members to opt out." (*Id.* at 46 (quoting *Dukes, 564 U.S. at 361-62*).) Plaintiffs argue that "Second Circuit courts deviate from the Supreme Court's proscription against opt-outs under *Rule 23(b)(2)* only when the class seeks 'injunctive relief *and* significant monetary damages." (*Id.* at 47 (quoting *Madden v. Midland Funding, LLC, 237 F. Supp. 3d 130, 159 (S.D.N.Y. 2017)*).) In support, Plaintiffs rely on Dr. Leffler's report, which states that "disallowing opt-outs prevents free-riding by individual [m]erchants, thereby ensuring fairness and increasing the value of **[*277]** the injunctive-relief claim to *all* [m]erchants." (*Id.* at 48.) Plaintiffs contend that if merchants are allowed to opt out, they may "*threaten* to seek to obtain additional/different equitable relief from the Defendants" and would "monetize the value of that claim *solely for [themselves]* in a settlement," which would result in Defendants paying "substantially less to the class in the form of effective injunctive relief." (*Id.* at 48-49.) Because "[a]llowing opt-outs would permit an individual [m]erchant to gain financially based on the benefit that a legal claim would provide to other [m]erchants," and "that individual monetization of a collective asset significantly diminishes its overall value," Plaintiffs contend that the Court should not grant opt-out rights to the class. (*Id.* at 49.) In addition, Plaintiffs argue that *Rule 23*'s settlement approval process guarantees that class members will be heard as to whether any relief is insufficient. (*Id.*) Finally, Plaintiffs contend that a mandatory class "is a practical and legal necessity to bring market-wide equitable relief to this litigation." (Pls.' Reply 20.)

Direct Action Plaintiffs and Grubhub Plaintiffs argue that the Court should allow **[*278]** opt-out rights or redefine the class to exclude them because they are pursuing their own damages claims and excluding them from the class would cure inadequate representation and due process violations. (Direct Action Pls.' Opp'n 23-25; Grubhub Pls.' Opp'n 16-18.) First, Direct Action Plaintiffs and Grubhub Plaintiffs contend that the Court has the discretion under *Rule 23(b)(2)* to permit opt-outs from the *Rule 23(b)(2)* class when doing so would create a "just result." (Direct Action Pls.' Opp'n 23-24; Grubhub Pls.' Opp'n 16-17.) In support, Direct Action Plaintiffs point to *In re Visa Check/MasterMoney Antitrust Litigation*, in which the Second Circuit "avoided the question of whether certification was proper under *Rule 23(b)(2)* by affirming only under *Rule 23(b)(3)* to guarantee mandatory notice and opt-out rights." (Direct Action Pls.' Opp'n 24.) Direct Action Plaintiffs contend that "none of the dire predictions . . . about what would happen if opt-out rights are provided . . . [were] borne out in that case" because "there were a limited number of opt-outs, their claims were resolved individually, and the class achieved complete injunctive relief in a negotiated settlement." (*Id.*) Grubhub Plaintiffs similarly argue that granting opt-out **[*279]** rights "would provide them with that required right to decide" if they want to "'tie their fates to the class representatives' or go it alone." (Grubhub Pls.' Opp'n 16.) In the alternative, Direct Action Plaintiffs and Grubhub Plaintiffs argue that the Court should "exercise its authority to redefine the class to exclude" them from the class. (Direct Action Pls.' Opp'n 24-25; Grubhub Pls.' 17-18.)

Merchant Trade Groups argue that the Court should not certify a mandatory class because (1) all class members do not seek the same injunctive relief, (2) the merchants encompassed by the proposed class are different, will not be affected by injunctive relief in the same manner, and "should be permitted to make their own business decisions about what's best for them, their employees, and their customers without being bound by the judgments of *other* businesses about what is best for *them*," and (3) opt-out rights are the traditional escape valve for intra-class disputes. (Merchant Trade Groups' Opp'n 7-17.) Walmart argues that the Court should permit it to opt out of the class because "cohesion is lacking" and also argues that any such opt-out right should not be limited to merchants pursuing **[*280]** individual damages claims. (Walmart Opp'n 20-22.)

In response to Opponents' arguments, Defendants argue that the Court should certify a mandatory class. (*See* Defs' Reply 9-17.) Defendants argue that (1) *Rule 23* does not provide for opt-outs from a *Rule 23(b)(2)* class, (2) Opponents do not provide a legitimate basis for the Court to permit opt outs because due process and adequacy of representation are satisfied, and (3) the Court should not permit opt-out rights as a matter of discretion because the *Rule 23(b)(2)* class seeks only equitable relief and diversity of opinion as to the proper injunctive relief does not warrant granting opt out rights. (*Id.*) In addition, Defendants contend that the Court should not permit opt-out rights because to do so would "undermine the Rule's purpose of providing 'final injunctive relief.'" (*Id.* at 17-18.)

HN32[] Under Rule 23 of the Federal Rules of Civil Procedure, neither notice nor an opportunity to opt out is required for classes certified pursuant to Rule 23(b)(2).[37] *See* Fed. R. Civ. P. 23(c) ("For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class."); *see also* Dukes, 564 U.S. at 361-62 (stating that Rule 23 "provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the [d]istrict [c]ourt to afford them notice of the action."); Batalla Vidal, 501 F. Supp. 3d at 137 ("[T]he [g]overnment **[*281]** is correct that Rule 23(b)(2) does not require district courts to give notice or the opportunity for class members to opt out . . . ."). While "the right of a class member to opt-out in Rule 23(b)(1) and (b)(2) actions is not obvious on the face of the rule . . ., 'the language of Rule 23 is sufficiently flexible to afford district courts discretion to grant opt-out rights in (b)(1) and (b)(2) class actions.'" McReynolds v. Richards-Cantave, 588 F.3d 790, 800 (2d Cir. 2009) (quoting Eubanks v. Billington, 110 F.3d 87, 94, 324 U.S. App. D.C. 41 (D.C. Cir. 1997)); Batalla Vidal, 501 F. Supp. 3d at 137 (quoting McReynolds, 588 F.3d at 800); Biediger v. Quinnipiac Univ., No. 09-CV-621, 2010 U.S. Dist. LEXIS 50044, 2010 WL 2017773, at *7 (D. Conn. May 20, 2010) ("[A]ny members who do not want to be represented in the [Rule 23(b)(2)] class, or who believe they are erroneously included in the class, may opt out if they so choose." (citing McReynolds, 588 F.3d at 800)).

The Court declines to grant an opt-out right from the Rule 23(b)(2) class. For the reasons stated in Sections II.c.iv and II.d *supra*, the Court finds that the proposed class satisfies the adequacy of representation requirement of Rule 23(a)(4) and the Due Process Clause, as well as the equitable relief requirement of Rule 23(b)(2). As Defendants correctly argue, the "adequate representation that a court finds in certifying a Rule 23(b)(2) class obviates the need for permitting opt-outs from the class; in the absence of adequate representation, certification is simply denied." (Defs.' Reply 10.) Indeed, the Court is not aware of a case, and Opponents cite none, that suggest that a court can cure inadequate **[*282]** representation by providing opt-out rights. The Court is left with Opponents' arguments that it should use its discretion to permit opt-out rights.

The cases cited by Opponents in support of their arguments for an opt-out right demonstrate that many courts that have granted the ability to opt out in Rule 23(b)(2) classes have generally done so when monetary damages are being pursued in the same class.[38] *See, e.g.,* Lemon v. Int'l Union of Operating Eng'rs, Loc. No. 139, 216 F.3d 577, 580-81 (7th Cir. 2000) (remanding certification of Rule 23(b)(2) class for the court to consider its options, including providing opt-out rights, when the plaintiffs "sued for both equitable relief and monetary damages to remedy alleged violations of Title VII" and "each class member in actions for money damages is entitled as a matter of due process to personal notice and an opportunity to opt out of the class action"); In re Monumental Life Ins. Co., 365 F.3d 408, 417 (5th Cir. 2004) ("[T]here is no absolute right of opt-out in a rule 23(b)(2) class, 'even where monetary relief is sought and made available.' Under our precedent, should the class be certified on remand, class members must be provided adequate notice, and the district court should consider the possibility of opt-out rights." (first citing Penson v. Terminal Transp. Co., 634 F.2d 989, 994 (5th Cir. 1979; and then citing Kincade v. Gen. Tire & Rubber Co., 635 F.2d 501, 505-07 (5th Cir. 1981))); Eubanks, 110 F.3d at 96 ("[W]hen a (b)(2) class seeks monetary as well as injunctive or declaratory **[*283]** relief the district court may exercise discretion in at least two ways. The court may conclude that the assumption of cohesiveness for purposes of injunctive relief that justifies certification as a (b)(2) class is unjustified as to claims that individual class members may have for monetary damages. . . . Alternatively, the court may conclude that the claims of particular class members are unique or sufficiently distinct from the claims of the class as a whole, and that opt-outs should be permitted on a selective basis."); In re Universal Serv. Fund Tel. Billing Pracs. Litig., 219 F.R.D. at 681 (certifying a Rule 23(b)(2) class but noting that the court will "exercise its discretionary authority pursuant to Rule 23(d)(2) and 23(d)(5) and provide the conspiracy class members with

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[37] The Court notes that Rule 23(e) requires that (b)(2) class members receive notice of any proposed settlement and Rule 23(h) requires that (b)(2) class members receive notice of any claim for an attorneys' fees award. *See* Fed. R. Civ. P. 23(e), (h).

[38] Another case cited by Merchant Trade Groups is similarly unpersuasive. In *Friedman v. California State Employees Association*, the court provided opt-out rights to a Rule 23(b)(2) class for members who "object[ed] to the portion of the action pertaining to the challenge to the constitutionality" of a statute because "some fair share fee payers [were] happy to pay their fair share of union dues to cover the benefits of collective bargaining and [did] not want the statute to be overturned." No. CV-S000101, 2000 U.S. Dist. LEXIS 7049, 2000 WL 288468, at *8 (E.D. Cal. Mar. 15, 2000). The Court finds the facts of this case inapposite because in the instant litigation, no merchant is seeking opt-out rights to uphold the Restraints.

notice and opt-out rights equally insofar as that class is certified under *Rule 23(b)(2)* and *Rule 23(b)(3)*" when "the monetary damages aspect of the conspiracy claim [was] certainly significant, but the injunctive relief aspect [was] also potentially significant"); *see also* *Charron, 269 F.R.D. at 237* ("Where, as here, a class seeks injunctive relief and significant monetary damages, due process concerns militate strongly against maintaining a mandatory (b)(2) class action without the procedural safeguards of notice and the opportunity to opt-out that are provided **[*284]** to members of a(b)(3) damages class.").

Due to the nature of the relief being sought, all merchants — regardless of whether they would choose to opt out of the class or not — would benefit from the equitable relief provided. *See* *J.D. v. Azar, 925 F.3d 1291, 1319, 441 U.S. App. D.C. 224 (D.C. Cir. 2019)* ("[I]n a (b)(2) case, an 'injunction prohibiting a defendant's action against "the class as a whole" would halt the action *regardless* [of] *whether some of those affected might have withdrawn from the suit if given the option*.'" (quoting *Richards v. Delta Air Lines, Inc., 453 F.3d 525, 530, 372 U.S. App. D.C. 53 (D.C. Cir. 2006)*)); *Messier, 183 F.R.D. at 356* ("[O]pting out of a (b)(2) action for injunctive relief has little practical value or effect. Even class members who opted out could not avoid the effects of the judgment." (collecting cases)). In *Dukes*, the Supreme Court emphasized the "indivisible nature" of the relief provided in *Rule 23(b)(2)* actions, stating that "[t]he key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted — the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Dukes, 564 U.S. at 360* (quoting Nagareda, *84 N.Y.U. L. Rev., at 132*). In addition, although the court in *In re Visa Check/Mastermoney Litigation* ultimately only certified the **[*285]** class under *Rule 23(b)(3)*, in holding that the class could also be certified under *Rule 23(b)(2)*, the district court noted that it was inclined to "provide opt-out rights only as to the damages section." *192 F.R.D. at 89*. The circumstances contemplated by the Supreme Court in *Dukes* are present in the case at hand — Plaintiffs seek equitable relief from the bundle of Restraints that together result in the supracompetitive interchange fees. Accordingly, equitable relief — should Plaintiffs prevail or reach a settlement — that tackles these Restraints is proper as to all merchants, not just those who are represented by class counsel.

Concerns about opt-outs resulting in contradictory equitable relief and disincentivizing settlement[39] weigh in favor of denying opt-out rights. *See* *Berry, 807 F.3d at 613* ("What is being sought is a blanket right to opt out of a *Rule 23(b)(2)* settlement that provides purely injunctive relief . . . . That such a rule would discourage settlement seems undeniable; defendants . . . surely will not agree to settlements like this one if they cannot buy something approaching global peace."); *Van Gemert v. Boeing Co., 590 F.2d 433, 439 n.14 (2d Cir. 1978)* ("[C]lass actions certified under *Rule 23(b)(2)* . . . do not contain an opt-out privilege. This reflects the conclusion of those who drafted the Rules that individual choice **[*286]** should be subordinated to the interests of the class as a whole to avoid inconsistent judgments or prejudice to absent class members. Because class certification represents a judicial determination that the absentees are adequately represented, it would frustrate the Rule if we were to require an investigation into each plaintiff's willingness to accept the benefits of the litigation."), *aff'd*, *444 U.S. 472, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980)*. In addition, as Dr. Leffler noted in his report, permitting opt-outs can decrease the efficiency of the class action:

> if the class wins, the opt-out wins; if the class loses, the opt-out does not lose. Therefore, because a merchant would get the benefit from a class win at trial but retain the right to re-address liability if the class loses, there is necessarily a positive expected net value from opting out. Hence, if the case is expected to go to trial, merchants will perceive a positive value of opting out as compared to remaining in the class. In effect, by opting out[,] a merchant can free ride on the benefits of a trial win but avoid the cost of a trial loss. Class action cases lower the costs of litigation reducing the dissipation of society's resources. If merchants are incented to **[*287]** opt out of the Class to free ride on the Class result and filing their own case, the benefits of a class action are undermined.

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[39] While the Court is mindful of the Second Circuit's warning that litigation peace does not warrant certification of an unlawful class, *see* *Interchange Fees II, 827 F.3d at 240* ("[T]he benefits of litigation peace do not outweigh class members' due process right to adequate representation."), the Court considers potential obstacles to settlement because it is satisfied that the representation is adequate under *Rule 23(a)(4)* and the Due Process Clause.

(Leffler Report ¶ 67.) The Court is persuaded by Dr. Leffler's warning and does not wish to incentivize free riding on the class action while detracting from the benefits of the class mechanism.

Accordingly, the Court declines to grant opt-out rights to members of the Rule 23(b)(2) class.[40]

f. Appointment of class counsel

When a district court certifies a class, it must appoint class counsel. In doing so, a court must consider:

> (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

For the reasons set forth in Section II.c.iv.2 *supra*, the Court finds that to date, Class Counsel have fairly and adequately represented the putative class in accordance with *Rule 23(g)*. Accordingly, the Court appoints Hilliard & Shadowen LLP, Grant & Eisenhofer, P.A., Freed Kanner London & Millen LLP, **[*288]** and Nussbaum Law Group, P.C. to serve as co-lead *Rule 23(b)(2)* Class Counsel.

III. Conclusion

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[40] Direct Action Plaintiffs' remaining arguments that their inclusion in a mandatory class violates their constitutional rights are similarly meritless. Direct Action Plaintiffs argue that (1) "[c]ertification of mandatory classes implicates *Seventh Amendment* jury trial rights" because "[w]hen cases involve legal and equitable claims that share common factual issues, the *Seventh Amendment* requires a jury trial on the legal claims first," and (2) forcing them to participate in a mandatory class "would violate their due process right to choose their own counsel, and their *First Amendment* rights to free speech and freedom of association by requiring them to be represented by counsel they did not choose." (Direct Action Pls.' Opp'n 10.)

In response, Plaintiffs argue that "[i]t is black-letter law that the application of collateral estoppel does not implicate the *Seventh Amendment*" and the *First Amendment* arguments are "overblown at best" with Direct Action Plaintiffs citing "no case holding that such rights are impaired by certifying a mandatory (b)(2) class." (Pls.' Reply 9-10 & n.15.) Defendants similarly contend that any resulting collateral estoppel as a result of the Court's determination does not violate the *Seventh Amendment* because the *Seventh Amendment* only requires a jury trial when claims for damages and injunctive relief are tried in the same action. (Defs.' Reply 13-14.)

The Court agrees with *Rule 23(b)(2)* Plaintiffs and Defendants that certification of a mandatory class does not violate the right to a jury trial for parties pursuing individual damages claims. The Supreme Court has held that "an equitable determination can have collateral estoppel effect in a subsequent legal action and . . . this estoppel does not violate the *Seventh Amendment*." *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 335, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)*; *Falbaum v. Pomerantz, 19 F. App'x 10, 12-13 (2d Cir. 2001)* (stating that in *Parklane Hoisery*, "the Supreme Court held that the *Seventh Amendment* did not prevent the application of collateral estoppel to a second action even though the first action was determined by a judge" when there were "two separate actions as is the case here").

Direct Action Plaintiffs' *First Amendment* argument is similarly unavailing. Direct Action Plaintiffs cite no case, and this Court is aware of none, concluding that mandatory actions under *Rule 23(b)(2)* implicate free speech and freedom of association. *See Ayers v. Thompson, 358 F.3d 356, 376 (5th Cir. 2004)* (rejecting the appellants' argument that denying them opt-out rights raises a *First Amendment* issue and stating that they "provide no authority for the proposition that denying them the right to opt out of a *Rule 23(b)(2)* class violates the *First Amendment*"). However, should Direct Action Plaintiffs wish to litigate this issue, they should address it in a more comprehensive manner than just providing a single sentence and footnote in their motion papers.

For the foregoing reasons, the Court grants Plaintiffs' motion for class certification in part and denies it in part. The Court certifies a *Rule 23(b)(2)* class consisting of all persons, businesses, and other entities that accept Visa and/or Mastercard credit and/or debit cards in the United States at any time during the period between December 18, 2020 and the date of entry of Final Judgment in this case. The Court dismisses DDMB and DDMB2 as class representatives. The Court appoints Hilliard & Shadowen LLP, Grant & Eisenhofer, P.A., Freed Kanner London & Millen LLP, and Nussbaum Law Group, P.C. to serve as co-lead *Rule 23(b)(2)* Class Counsel.

Dated: September 27, 2021

Brooklyn, New York

SO ORDERED:

/s/ MKB

MARGO K. BRODIE

United States District Judge

Intel Corp. v. Seven Networks

United States District Court for the Northern District of California

September 28, 2021, Decided; October 7, 2021, Filed

Case No. 19-cv-07651-EMC

Reporter

562 F. Supp. 3d 454 *; 2021 U.S. Dist. LEXIS 213108 **; 2021 WL 5066113

INTEL CORPORATION, et al., Plaintiffs, v. SEVEN NETWORKS, LLC, Defendant.

Subsequent History: Motion granted by *Intel Corp. v. Fortress Inv. Group Llc, 2021 U.S. Dist. LEXIS 213110 (N.D. Cal., Oct. 6, 2021)*

Core Terms

patents, aggregation, markets, complementary, substitutes, pricing, supracompetitive, allegations, anti-SLAPP, anticompetitive, infringement, assertions, effects, output, protected activity, parties, suits, patent infringement, right of petition, antitrust claim, market power, free speech, target, cause of action, complements, royalties, serial, motion to dismiss, relevant market, antitrust

LexisNexis® Headnotes

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

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

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

Fed. R. Civ. P. 8(a)(2) requires a complaint to include a short and plain statement of the claim showing that the pleader is entitled to relief. A complaint that fails to meet this standard may be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). To overcome a Rule 12(b)(6) motion to dismiss, a plaintiff's factual allegations in the complaint must suggest that the claim has at least a plausible chance of success. The court accepts factual allegations in the complaint as true and construes the pleadings in the light most favorable to the nonmoving party. But allegations in a complaint may not simply recite the elements of a cause of action and must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.

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

HN2[] **Relevant Market, Product Market Definition**

A product market is generally about substitutes, not complements. For example, the Ninth Circuit has stated that a product market encompasses the product at issue as well as all economic substitutes for the product. The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN3[] **Attempts to Monopolize, Elements**

Anticompetitive effects can be shown through either direct evidence or indirect evidence. Direct evidence of anticompetitive effects would be actual detrimental effects, such as reduced output, increased prices, or decreased quality in the relevant market. For indirect evidence, a plaintiff would need to show the defendant's market power, plus some evidence that the defendant's conduct harms competition.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN4[] **Fundamental Freedoms, Freedom to Petition**

"SLAPP" stands for strategic lawsuit against public participation. California has an anti-SLAPP statute designed to allow early dismissal of meritless cases aimed at chilling expression or the right to petition through costly, time-consuming litigation.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN5[] **Freedom of Speech, Strategic Lawsuits Against Public Participation**

The analysis of an anti-SLAPP motion under Cal. Code Civ. Proc. § 425.16(b)(1) proceeds in two steps. At step one, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. When a claim is mixed, meaning that it is based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at the first step. Only if the court determines that relief is sought based on protected activity does it reach the second step. At step two, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated.

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

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN6[] **Motions to Dismiss, Failure to State Claim**

Federal district courts review anti-SLAPP motions to strike under different standards depending on the motion's basis. When an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district court should apply the Fed. R. Civ. P. 12(b)(6) standard and consider whether a claim is properly stated. When an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the Fed. R. Civ. P. 56 standard applies. If the plaintiff ultimately fails to meet its burden at the second step, the claim based on protected activity is stricken and allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing.

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

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

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

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN7[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

The first part of the anti-SLAPP inquiry under California law is substantially the same as the inquiry into whether the Noerr-Pennington doctrine applies; in the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech.

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For Fair Standards Alliance, Amicus: Anna Tryon Pletcher, O'Melveny & Myers LLP, San Francisco, CA; Ian T. Simmons, O'Melveny & Myers LLP, Washington, DC; Matt T Schock, PRO HAC VICE, Kristin R. Marshall, O'Melveny and Myers LLP, Washington DC, DC.

For United States, Amicus: Andrew N. DeLaney, LEAD ATTORNEY, U.S. Department of Justice, Antitrust Division, Washington, DC.

Judges: EDWARD M. CHEN, United States District Judge.

Opinion by: EDWARD M. CHEN

Opinion

[*457] **PUBLIC/REFILING**

ORDER GRANTING IN PART [2] AND DENYING IN PART DEFENDANTS' JOINT MOTION TO DISMISS AND TO STRIKE PLAINTIFFS' SECOND AMENDED COMPLAINT**

Docket No. 244

The above-referenced case is an antitrust case. The current operative complaint is the second amended complaint ("SAC"). The plaintiffs named in the caption of the SAC are Intel Corporation and Apple Inc. The defendants named in the caption are:

(1) Fortress Investment Group LLC and Fortress Credit Co. LLC ("Fortress");
(2) Uniloc 2017 LLC, Uniloc USA, Inc., and Uniloc Luxembourg S.A.R.L. ("Uniloc");
(3) VLSI Technology LLC ("VLSI");
(4) INVT SPE LLC and Inventergy Global, Inc. ("INVT"); and
(5) IXI IP, LLC ("IXI").

The parameters of the SAC, however have shifted because, on June 21, 2021, Apple dismissed its claims against all of the defendants.[1] *See* Docket No. 263 (notice of voluntary dismissal). The Court asked the remaining parties to meet and confer to determine how Apple's dismissal impacted the instant case. The remaining parties agreed that, in light of Apple's dismissal, "Intel currently only has claims" against Fortress and VLSI.[2] Docket No. 273 (St. at 1). Thus, at present, the Court now has an antitrust case brought by Intel only against Fortress and VLSI only. **[**3]**

Currently pending before the Court is (1) a joint motion to dismiss and strike the SAC and (2) INVT's supplemental brief. Having considered the parties' briefs and the oral argument of counsel, as well as the amicus briefs that were filed, the Court hereby **GRANTS** the motion to dismiss but **DENIES** the anti-SLAPP motion.

I. IMPACT OF APPLE'S DISMISSAL

As indicated above, the Court asked the parties (other than Apple) to meet and confer to discuss how Apple's dismissal impacted the instant case. The parties agreed that, because of the dismissal, the only plaintiff remaining was Intel and that the only defendants remaining were Fortress **[*458]** and VLSI. The parties also agreed that, because of the dismissal, five of the nine product markets identified in the SAC were no longer at issue. *See generally* Docket No. 273 (St. at 1).

The parties, however, do have a few disputes in need of judicial resolution.

- **Product markets**. For the five product markets that are no longer at issue, Intel asks that claims based on these product markets be dismissed without prejudice; all of the defendants ask for a dismissal with prejudice. Both parties assert that their respective position is supported by the Court's prior **[**4]** order of January 6, 2021. *See* Docket No. 229 (Order at 15). In that order, the Court noted that, for several product markets, Plaintiffs admitted that Defendants had not yet asserted patents in those markets and further failed to explain why there was a threat that Defendants would assert such patents — and against Plaintiffs specifically. The Court thus found that Plaintiffs lacked standing to assert antitrust claims based on the product markets. The dismissal of the claims based on the product markets was *with* prejudice because Plaintiffs did not provide any indication that they were capable of curing the deficiency on standing. However, the Court's ruling did not "bar Plaintiffs from initiating a new suit (including but not limited to a suit for declaratory relief) should circumstances change." Docket No. 229 (Order at 15). Consistent with the Court's January 6 order, the dismissal of the claims based on the five product markets shall be with prejudice; however, that does not bar Intel from initiating a new action should circumstances change.

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[1] All of the defendants, except one, were dismissed with prejudice. VLSI was dismissed without prejudice.

[2] This is because only VLSI has sued Intel for patent infringement. .

• **Defendants**. Similar to above, Intel asks that the defendants who will be dismissed from the case (namely, Uniloc, INVT, and IXI) be dismissed **[**5]** without prejudice. Those defendants ask for a dismissal with prejudice. Consistent with the above, the Court dismisses with prejudice, but this does not bar Intel from initiating a new action should circumstances change.

II. FACTUAL & PROCEDURAL BACKGROUND

In the SAC, Intel alleges as follows.

"PAE" stands for patent assertion entity. PAEs are companies that "aggressively pursue meritless [patent infringement] litigation." SAC ¶ 2. Over the years, "PAEs have evolved," most notably, "partnering with investment firms to fuel their litigation." SAC ¶ 6.

> Having deep-pocketed investment firms standing behind them has made PAEs only more aggressive. Indeed, to meet the expectations of their new investors for high returns, PAEs must act ever more aggressively. These new investors are content to incur loss after loss so long as they have the chance to hit a windfall reward that will justify their investment. Patent assertion thus becomes simply a numbers game disassociated from the merits of the underlying patents, with PAEs and their investors betting that serial assertions with aggressive demands will strike a jackpot eventually making up for many other losses.

SAC ¶ 7.

Fortress is an investment **[**6]** firm that has partnered with PAEs. *See* SAC ¶ 8. Fortress has a "web of PAEs that [it either] owns or controls." SAC ¶ 9. "Fortress has used its stable of PAEs to aggregate a massive . . . portfolio of patents." SAC ¶ 9. **[*459]** That portfolio includes patents that are substitutes for each other (as well as complements). SAC ¶¶ 9, 41. "When patents are aggregated as Fortress has done, the dynamics for determining whether to assert a patent change and the options available to the target of the assertion also change." SAC ¶ 40.

For example:

> When the patents were held by their original owners, there was competition and a prospective licensee could choose between competing options (or forgo those options and design its product in a different way), which had the effect of promoting competition and restraining royalties. But now, with the patents under the control of Fortress, the prospect of competition or redesigning products is improperly diminished or disappears. Fortress and its PAEs can thus threaten a target with the serial risk that the only or next best alternative design to an asserted patent is also subject to a patent claim by one of Fortress's PAEs.

SAC ¶ 41; *see also* SAC ¶ 12 (noting that, **[**7]** before aggregation, the patents were owned by sophisticated companies that were willing to assert patents and had experience with asserting patents, but the owners did not assert the patents because the patents "had insufficient expected value to make the assertions worth the costs"); SAC ¶ 44 (alleging that the aggregation of substitute patents harms "competition in the same way as any merger or combination of competitors that lessens competition").

As another example:

> Before aggregation, there would be no incentive to assert [weak] patents because there would be no expectation of a positive return from asserting a weak patent because the patent could be expected to be proven invalid, not infringed, or unenforceable in litigation, or would be easily designed around, including because there were alternatives available in the market. But, after aggregation and the elimination of competitive alternatives, assertion of weak patents as part of a wave of assertions against a target generates economic value even if many of those assertions are defeated in litigation. By increasing the volume of assertions a target faces, Fortress and its PAEs cause targets to deploy licensing and litigation **[**8]** resources less efficiently and thereby increase the value of litigation to Fortress and its PAEs. In particular, Fortress and its PAEs increase the likelihood that a weak patent will slip through litigation and be found infringed, valid, and enforceable when it should not be. Further, this strategy creates incentives for targets to settle with Fortress-backed PAEs for amounts that exceed the value (if any) of their patents to put an end to this risk. In this

> manner, Fortress's patent aggregation enables the use of weak patents to force targets to pay undeserved and inflated royalties.

SAC ¶ 42.

Intel acknowledges that "[t]here is nothing inherently illegal with owning many patents or obtaining those patents through acquisition" but maintains that there is illegality where, *e.g.*, licensing is not "based on the intrinsic value of those patents." SAC ¶ 52; *see also* SAC ¶ 53 (alleging that Defendants "extort supracompetitive royalties unrelated to the value (if any) of the Fortress-controlled patents").

There are four markets at issue in this case where Defendants have aggregated patents. Those "patent markets" are as follows.

- The market for patents for preventing stalls for cache misses. **[**9]** *See* SAC ¶ 248.

[*460] • The market for patents for arbitrating multiple requests to access a memory bus. *See* SAC ¶ 283.

- The market for patents for third-party device authorization through limitation of information exchanged. *See* SAC ¶ 303.

- The market for patents for MOSFET channel fabrication. *See* SAC ¶ 390.

Based on, *inter alia*, the above allegations, Intel has asserted the following causes of action against Fortress and/or VLSI[3] :

(1) An agreement to restrain competition in patent licensing, in violation of *§ 1* of the *Sherman Act (against Fortress only, not VLSI)*.

(2) Unlawful asset acquisitions, in violation of *§ 7* of the *Clayton Act*.

(3) Unfair competition, in violation of *California Business & Professions Code § 17200*.[4]

III. DISCUSSION

A. Legal Standard

HN1[] *Federal Rule of Civil Procedure 8(a)(2)* requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. A complaint that fails to meet this standard may be dismissed pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. *See* *Fed. R. Civ. P. 12(b)(6)*. To overcome a *Rule 12(b)(6)* motion to dismiss after the Supreme Court's decisions in *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*, and *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, a plaintiff's "factual allegations [in the complaint] 'must . . . suggest that the claim has at least a plausible chance of success.'" *Levitt v. Yelp! Inc., 765 F.3d 1123, 1135 (9th Cir. 2014)*. The court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable **[**10]** to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)*. But "allegations in a complaint . . . may not simply recite the elements of a cause of action [and] must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Levitt, 765 F.3d at 1135* (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

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[3] Per the SAC, Fortress formed VLSI in 2016 and caused the transfer of patents to the company. *See* SAC ¶ 74. VLSI obtained some of its patents from a third party, NXP/Freescale, via a Patent Purchase and Cooperation Agreement. *See* SAC ¶ 76.

[4] This claim is derivative of the federal antitrust claims. *See* SAC ¶ 465 (alleging that Defendants engaged in unfair competition "by violating the Sherman and Clayton Acts").

alleged." *Iqbal, 556 U.S. at 678*. "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted).

In the pending motion, Defendants make arguments that are similar to those made in their prior 12(b)(6) motions - *e.g.*, failure to allege product market, market power, and antitrust injury as well as failure to allege a *§ 1* claim specifically and a *§ 7* claim specifically.

B. Product Markets

In its prior order, the Court noted that,

> [a]lthough "market definition is a deeply fact-intensive inquiry, [and] courts hesitate **[*461]** to grant motions to dismiss for failure to plead a relevant product market," a product market must **[**11]** still be plausible. Here, the Court concludes that many, although not all, of the markets claimed by Plaintiffs are not plausibly stated because, facially, they are still overbroad.

Docket No. 229 (Order at 16). The markets as then pled by Plaintiffs were overbroad because they covered a general technical field rather than just a specific function within that field. *See* Docket No. 229 (Order at 17-19).

In the pending motion, Defendants assert that the four patents markets at issue, even as re-pled, are still not plausible.

For example, Defendants contend that "the new markets contain the exact same patents as the markets that the Court dismissed." Mot. at 9. But the fact that the new markets contain the exact same patents as before is not, in and of itself, problematic per se. It is possible that the exact same patents do not cover a general technical field but rather a specific function within that field. As now more narrowly defined, the posited markets appear to be defined with sufficient specificity to be plausible.

The bigger problem with the new markets is that Intel claims that the markets are made up of both substitute patents *and* complementary patents. *See, e.g.*, SAC ¶ 255. ***HN2***[] But **[**12]** a product market is generally about substitutes, not complements. For example, the Ninth Circuit has stated that a product market "encompass[es] the product at issue as well as all economic substitutes for the product." *Newcal Indus., Inc. v. Ikon Office Soln., 513 F.3d 1038, 1045 (9th Cir. 2008)*. The court has also noted: "'The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.'" *Id.*; *see also* *Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 469, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (indicating that cross-elasticity of demand refers to "the extent to which consumers will change their consumption of one product in response to a price change in another"). The Areeda & Hovenkamp antitrust treatise similarly underscores that a product market is made up of substitute goods, not complements, even going so far as to say that "[g]rouping complementary goods into the same market" is "economic nonsense" and would

> undermin[e] the rationale for the policy against monopolization or collusion in the first place. One "monopolizes" a market by reducing output, and once certain output is removed from the market, the remaining output experiences increased demand and a rise in prices. Thus a monopolist might monopolize the market for gasoline **[**13]** by reducing output from the competitive level of, say, 1,000,000 barrels, to a monopoly level of 700,000, with the result that demand intensifies for that which remains and the market clearing price rises. No such result obtains when one aggregates complementary goods into the same market. For example, grouping gasoline and tires into a "market" suggests that an output decrease in gasoline would permit an increase in tire prices. In fact, it will do just the opposite.

2B Areeda & Hovenkamp, ***Antitrust Law*** ¶ 565a.

Admittedly, there are cases in which courts have held that commercial realities weigh in favor of putting what might appear to be different products or services into a single market. *See* *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285-86, 201 L. Ed. 2d 678 (2018)* (stating that "courts should 'combin[e]' different products or services into 'a single **[*462]** market' when 'that combination reflects commercial realities'"; thus, holding that "courts must include both sides of the platform — merchants and cardholders — when defining the credit-card market"); *Image Tech. Servs. v. Eastman Kodak Co., 125 F.3d 1195, 1203-04 (9th Cir. 1997)* (rejecting Kodak's argument that, "because no two parts are interchangeable, the relevant markets for parts consist of the market for each individual part for Kodak photocopiers and each single part for Kodak **[**14]** micrographics equipment"; "[c]onsideration of the 'commercial realities' in the markets for Kodak parts compels the use of an 'all parts' market theory" - "[a]s the relevant market for service 'from the Kodak equipment owner's perspective is composed of only those companies that service Kodak machines,' the relevant market for parts from the equipment owners' and service providers' perspective is composed of 'all parts' that are designed to meet Kodak photocopier and micrographics equipment specifications"). And arguably, there could be commercial realities such that complementary patents should be considered part of the same market as substitute patents - *e.g.*, where a complementary patent is essential to a combination with a subject patent to make the product and there are no substitutes for that complementary patent. But here, Intel has not shown with any specificity that commercial realities require that any of the markets at issue should be made up of both substitute patents and complementary ones identified in the SAC — this in spite of the fact that patents and their utility are publicly available information and nothing suggests Intel does not have information to make such **[**15]** allegations. *See also* Areeda & Hovenkamp, ***Antitrust Law*** ¶ 565a (asserting that "many 'commercial realities' describe a particular market situation, and their invocation should not become an after-the-fact rationalization for a conclusion that is *completely inconsistent with the economic rationale for defining markets*") (emphasis added). Instead, Intel has simply included certain complementary patents without any specific explanation of their essentiality or substitutability in the market.

Perhaps in the attempt to get around this problem, Intel claims that the complementary patents are "possibly substitutes." *E.g.*, SAC ¶ 255 (addressing market for patents for preventing stalls for cache misses). But that the patents are *possibly* substitute patents is not the same thing as saying that the patents are *plausibly* substitutes. At the 12(b)(6) phase, possibility is not good enough; plausibility is required. In addition, Defendants are correct in arguing that *Staley v. Gilead Sciences, Inc., No. 19-cv-02573-EMC, 2020 U.S. Dist. LEXIS 167071 (N.D. Cal. July 29, 2020)*, is of no help to Intel because that case presented a different situation. In *Staley*, the plaintiffs pled *facts* demonstrating that "cART drugs sometimes may be complements for one another but other times may be substitutes. *See* FACC ¶ 402 **[**16]** (alleging that the HHS Guidelines have recommended regimens that include NRTIs and third agents together, as well as regimens that include third agents and no NRTIs - *i.e.*, NRTIs and third agents sometimes are complements but other times may be substitutes)." *Id.* at *28. Here, Intel has not pled any specific facts to suggest that the complementary patents could plausibly be substitutes as well. *Compare* Areeda & Hovenkamp ¶ 565b (noting that "[a] few things capable of being used in variable proportions may function as both complements and substitutes" - *e.g.*, "[w]hile aftermarket parts and the labors of a service technician are complementary goods, they may act as substitutes when the technician has **[*463]** a choice between using more labor or a new part").

Because the Court considers only substitute patents count for the markets, and not complementary patents (or patents that are "possibly substitutes"), Intel's claim of unlawful patent aggregation is more limited in nature that what is suggested on the face of the pleading. Quite simply, there are few patents that Defendants have allegedly aggregated.

• **Market for patents for preventing stalls for cache misses**. Intel has identified only two **[**17]** substitute patents: the '437 patent (held by Uniloc) and the '009 patent (held by VLSI). The five complementary patents identified by Intel — including the '331 patent and the '014 patent — are not part of the market. *See* SAC ¶ 255.

• **Market for patents for arbitrating multiple requests to access a memory bus**. Intel has identified only two substitute patents: the '687 patent (held by Uniloc) and the '983 patent (held by VLSI). The one complementary patent identified by Intel is not part of the market. *See* SAC ¶ 290.

• **Market for patents for third-party device authorization through limitation of information exchanged**. Intel has identified seven substitute patents: the '242, and '620 patents (held by INVT); the '395 patent (held by Seven); the '633 patent (held by VLSI); and the '976, '907 patent, and '616 patents (held by Uniloc). The ten complementary patents identified by Intel are not part of the market. *See* SAC ¶ 320.

- **Market for patents for MOSFET channel fabrication**. Intel has identified five substitute patents: the '452, '319, '232, and '149 patents (held by Uniloc); and the '303 patent (held by VLSI). There are no complementary patents identified.

Moreover, for the first patent market (preventing stalls for cache misses), Intel has not been sued for infringement of either of the substitute patents. Although Intel has been sued for infringement **[**18]** of the '014 patent (No. C17-5671 BLF (N.D. Cal.)) and the '331 patent (No. C-18-0966 (D. Del.)), those patents are complementary patents only. Intel thus lacks standing to bring any antitrust claim with respect to the first market. The Court dismisses all claims against Defendants based on the first patent market.

Finally, the Court notes that, for some of the markets, Defendants have argued that the alleged patent substitutes are not, in fact, substitutes. Also, Defendants have argued that, even if there is functional substitutability, Intel must still show economic substitutability. For purposes of this order, the Court need not address these arguments but assumes in Intel's favor that Defendants have simply raised factual disputes that cannot be resolved at the *12(b)(6)* phase. As discussed below, the problem for Intel is that, even with these assumptions, its antitrust claims fail.

C. Market Power

In its prior orders, the Court indicated that Plaintiffs' antitrust claims, as pled, turned on anticompetitive effects resulting from the alleged patent aggregation. *See, e.g.*, *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284, 201 L. Ed. 2d 678 (2018)* (noting that, in a *§ 1* claim, under the rule of reason, a plaintiff "has the initial burden to prove that the challenged restraint has a substantial **[**19]** anticompetitive effect that harms consumers in the relevant market"); *15 U.S.C. § 18* (providing that, in a *§ 7* claim, "no person . . . shall acquire the whole or any part of the **[*464]** assets of another person . . . , where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly"). ***HN3***[] Anticompetitive effects can be shown through either direct evidence or indirect evidence. Direct evidence of anticompetitive effects would be "'*actual* detrimental effects, such as reduced output, increased prices, or decreased quality in the relevant market.'" Docket No. 229 (Order at 5) (emphasis in original). For indirect evidence, a plaintiff would need to show the defendant's market power, plus some evidence that the defendant's conduct harms competition. *See* Docket No. 229 (Order at 20); *see also* Docket No. 229 (Order at 19) (noting that market power is simply a way to assess whether a defendant's conduct has anticompetitive effects).

The Court previously held that Plaintiffs had failed to adequately allege anticompetitive effects. It noted that, even if supracompetitive pricing by **[**20]** itself, would be sufficient to show anticompetitive effects (*i.e.*, without an additional showing of restricted output), "Plaintiffs [did] not plausibly show[] that Defendants extracted supracompetitive royalties as a result of their aggregation [of patents]." Docket No. 22 (Order at 24).

In the pending motion, Defendants contend that Intel has stilled failed to show supracompetitive pricing, let alone supracompetitive pricing resulting from patent aggregation. Defendants also argue that, for Intel to rely on direct evidence anticompetitive effects, it must demonstrate not only supracompetitive pricing but also restricted output. The Court agrees with Defendants that Intel has, in the SAC, failed to allege supracompetitive pricing tied to patent aggregation.

In so holding, the Court does not take issue with the general theory being put forward by Intel - *i.e.*, that aggregation of substitute patents could, in theory, harm "competition in the same way as any merger or combination of competitors that lessens competition." SAC ¶ 44. The narrative told by the operative complaint, in principle, is compelling. It is not hard to imagine that a person or entity could accrue market power by obtaining **[**21]** a dominant share of substitute patents and threaten a barrage approach to litigation wherein an imperfect civil justice system may yield an erroneous outcome, thus allowing legally unjustified leverage over licensees, a result which could well constitute an unreasonable restraint of trade. The Court also acknowledges that this case is still at the early stages of proceeding *- 12(b)(6)* - and not summary judgment. *Cf.* *Starr v. Baca, 652 F.3d 1202, 1217 (9th Cir. 2011)* (stating that, "[i]f there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under *Rule 12(b)(6)*[;] [p]laintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is implausible"). The problem for Intel is that the SAC lacks sufficient facts to demonstrate the narrative has been carried out against the company, at least at this juncture.

The Court acknowledges, as Intel argues, that the allegations in the SAC should be considered holistically. The holistic pictured painted by Intel includes the following:

• In spite of any competitive constraints (such as those identified in ¶ 49 of the prior **[**22]** first amended complaint), the prior owners of the patents at issue were willing to bring patent infringement suits — including against companies comparable to Intel **[*465]** (or Apple). However, the prior owners declined to bring infringement suits based on the patents at issue because it was not economically worthwhile (*i.e.*, comparing costs to benefits).

• When the patents at issue were transferred to the PAEs and then Fortress aggregated the patents by virtue of its control over the PAEs, the situation changed. Now the PAEs brought infringement suits based on the patents at issue. Moreover, the PAEs made astronomical demands for the alleged infringement, asking for billions in damages even though the cost of acquiring the patents paled by comparison. Even if the comparisons might not be a *precise* match (*e.g.*, Intel would compare a litigation demand made for one group of patents with the acquisition price of another group of patents, and the only overlap between the two groups would be one of the patents at issue), it can still be inferred from the large differential in price that there was significant price inflation for any given patent. And Intel *was* able to do a more specific price comparison **[**23]** for one patent — the '331 patent. [TEXT REDACTED BY THE COURT].[5] *See* SAC ¶ 274.

If the Court credits the allegations above,[6] the allegations may tend to show that supracompetitive prices were being charged for the patents at issue. Notably, that inference requires a number of inferential leaps not free of alternative explanations; thus, even if a reasonable inference of supracompetitive pricing could be drawn, Intel's showing is not compelling. But even if Intel may be deemed to have made a sufficient showing of plausibility under *Rule 12(b)(6)*, the critical question is whether Intel has plausibly shown that the supracompetitive prices were the *result of patent aggregation*. Here, the Court finds Intel has not made such a showing. There are several reasons.

As an example, for the '331 patent (which the Court notes is actually a complementary patent in the first market), VLSI's damages expert opined that a reasonable royalty for that patent alone would be approximately [TEXT REDACTED BY THE COURT]; however, there is no allegation in the SAC that the expert reached that valuation *taking into account the fact that VLSI had aggregated substitutes for the '331 patent*. *See* SAC ¶ 274 [TEXT REDACTED BY THE COURT] (emphasis added). The increase **[**24]** in value could have been based on development in technology and the market independent of any aggregation.

More generally, although it is *possible* that the supracompetitive prices for the patents were due, if only in part, to patent aggregation, Intel must show plausibility, not mere possibility under *Iqbal*/*Twombly*. The problem for Intel is that the holistic picture painted in the SAC weighs against this plausibility. For example, for the second market (for arbitrating multiple requests to access a memory bus), Intel has identified only two substitute patents that were aggregated: one held by Uniloc and the other held by VLSI. Given that Fortress and the *two* PAEs aggregated only *two* substitute patents, it is implausible **[*466]** that it was the aggregation that enabled them to charge supracompetitive prices — at least, where no other information is alleged about how many substitute patents are in the market or that these two patents are key to products in the market - *i.e.*, they constitute the "crown jewels" in the field. The Court has no idea how critical these two substitute patents are and what alternative substitutes exist. Although the third and fourth markets involve aggregation of more patents — **[**25]** seven and five, respectively —

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[5] Intel has argued (and alleged) that it could have brought more (and better) comparisons if Defendants had agreed to let Intel use confidential information it obtained from the patent infringement lawsuits brought by the PAEs. Although the Court is not without some sympathy for Intel, it also notes that Intel could have brought antitrust counterclaims in those suits — where it could have used that confidential information without issue.

[6] The Court acknowledges Defendants' argument that the comparison involving the '331 patent is not apt because *See* Mot. at 20-21 [TEXT REDACTED BY THE COURT]

the aggregation is still quite limited in scope,[7] and, again, there is a complete absence of any allegations about mere essentiality and their functional and economic importance. Notably, Intel was not without ability to make those allegations. Although Intel has asserted that Defendants have obscured from the public what patents they own or have control over, Intel should still be able to explain why the patents that it knows Defendants have aggregated are, *e.g.*, the "crown jewels" of the field. In the prior order dismissing the first complaint, the Court specifically invited Intel (and Apple) to include such allegations. *See* Docket No. 229 (Order at 25) (stating that "[t]he ability to extract a supracompetitive royalty is easier to infer if Defendants held the crown jewels, but no such allegation is made in the FAC"). At the hearing on the instant motion, despite the repeated invitation of the Court to elaborate on the qualitative allegations that would support an inference of supracompetitive prices *being the result* of aggregation, Intel stated that it would stand on its current complaint. Such qualitative information, while not necessarily the *sine* ***[**26]*** *qua non* of market power, is material here where the showing of supracompetive pricing is itself less than compelling.

Furthermore, to the extent Intel's patent aggregation theory involves Defendants' assertion of those patents against others - *e.g.*, in serial patent infringement litigation — here, Intel's claim of serial litigation with respect to the markets at issue is premature:

• For the second patent market (arbitrating multiple requests to access a memory bus), Intel has been sued for infringement of the '983 patent in two cases (No. C-19-0426 (D. Del.) and No. C-19-0256 (W.D. Tex.). The two cases, however, are not true "serial" cases because VLSI dismissed the Delaware suit approximately a month after initiating it and chose to bring three suits (including No. C-19-0256) in Texas instead. Intel has not yet been sued for the other substitute patent in the market (*i.e.*, the '687 patent).
• For the third patent market (third-party device authorization through limitation of information exchanged), Intel has been sued for infringement of the '633 patent (No. C-18-0966 (D. Del.). Intel has not been sued for any of the other six substitute patents.

• For the fourth patent market (for MOSFET channel fabrication), Intel **[**27]** has been sued for infringement of the '303 patent (No. C-17-5671 (N.D. Cal.). Intel has not been sued for any of the other four substitute patents.

In short, Intel has not alleged sufficient facts establishing it has been subject to the unreasonable restraint of trade in the form of serial suits strategically brought to extract **[*467]** compensation not reflective of the merits or that it has been faced with the dilemma of being confronted with an aggregated portfolio of patents leaving it with no viable alternatives in a particular market.

Because the Court concludes that Intel has failed to allege that supracompetitive pricing was a result of the patent aggregation, Intel's antitrust claims are hereby dismissed. As Intel also made clear at the hearing that it would stand on the allegations made in the SAC, the dismissal is with prejudice. The Court need not address Defendants' remaining arguments, including but not limited to whether Intel must show restricted output in addition to supracompetitive pricing to establish direct evidence of anticompetitive effects.

D. Anti-SLAPP Motion

Previously, the Court declined to address arguments specific to Plaintiffs' UCL claim because the claim was derivative of **[**28]** the federal antitrust claims. *See* Docket No. 187 (Order at 34). However, Defendants make clear in the pending motion that, if the Court rules against Intel, then it must address their anti-SLAPP motion with respect to the UCL claim because, if that motion is successful, they can be awarded their fees.

HN4[] "SLAPP" stands for strategic lawsuit against public participation. California has an "anti-SLAPP" statute designed "'to allow early dismissal of meritless . . . cases aimed at chilling expression [or the right to petition] through costly, time-consuming litigation." *Verizon Del., Inc. v. Covad Comms. Co., 3i77 F.3d 1081, 1090 (9th Cir. 2004)*. The statute provides in relevant part as follows: "A cause of action against a person arising from any act of

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[7] The third market involves alleged aggregation by just four PAEs: INVT, Seven, VLSI, and Uniloc. The fourth market involves alleged aggregation by two PAEs only: Uniloc and VLSI.

that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." *Cal. Code Civ. Proc. § 425.16(b)(1)*.

> ***HN5***[] "The analysis of an anti-SLAPP motion proceeds in two steps." At step one, "the court decides whether the defendant has made a threshold showing that the **[**29]** challenged cause of action is one arising from protected activity." When a claim is mixed, meaning that it is based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at the first step. Only if the Court determines that relief is sought based on protected activity [**14] does it reach the second step.
>
> At step two, "the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." ***HN6***[] The Court "will review anti-SLAPP motions to strike under different standards depending on the motion's basis." "[W]hen an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district court should apply the *Federal Rule of Civil Procedure 12(b)(6)* standard and consider whether a claim is properly stated." . . .
>
> "[W]hen an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the *Federal Rule of Civil Procedure 56* standard will apply." . . .
>
> If the plaintiff ultimately fails to meet its burden at the second step, the claim based on protected activity is stricken and "[a]llegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a **[**30]** distinct claim on which the plaintiff has shown a probability of prevailing."

[*468] *Ramachandran v. City of Los Altos, 359 F. Supp. 3d 801, 810-11 (N.D. Cal. 2019)*.

The critical threshold issue in the instant case is whether Defendants have shown that the UCL/antitrust claim arises from protected activity (*i.e.*, the filing of patent infringement lawsuits). Defendants acknowledge that the Court previously held that Plaintiffs' lawsuit was "not covered by the *Noerr-Pennington* doctrine," Reply at 24 - *i.e.*, because the heart of the suit was about the aggregation of patents, and the patent infringement suits were, in effect, secondary. *See* Docket No. 187 (Order at 26) (stating that, under *Noerr-Pennington*, "liability cannot be predicated on petitioning activity but if a defendant engages in anticompetitive conduct which does not constitute petitioning activity, it cannot immunize itself from liability for litigation-related damages if it asserts or tries to assert its unwarranted accumulation of market power through litigation"). But Defendants argue that

> the question of whether Intel's suit is covered by California's Anti-SLAPP statute presents a separate and distinct legal question. Moreover, "the protections afforded by the Anti-SLAPP statute are not coextensive with the **[**31]** categories of conduct or speech protected by the *First Amendment*." Thus, "courts determining whether conduct is protected under the anti-SLAPP statute look not to *First Amendment* law," but to the text of the statute.

Reply at 24.

Defendants' argument, however, is without merit. The text of the anti-SLAPP statute is as follows: "A cause of action against a person arising from any act of that person *in furtherance of the person's right of petition or free speech* under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike . . . ." *Cal. Code Civ. Proc. § 425.16(b)(1)* (emphasis added). *Section 425.16(e)* provides:

> As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement **[**32]** or writing made in a place open to the public or a public forum in connection with an issue of

> public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Id. § 425.16(e).

In light of the text above, the Court's *Noerr-Pennington* analysis equally applies here. ***HN7***[] There is no basis, in this context, to apply a different interpretation of what constitutes protected activity.[8] *See* Select Portfolio Servicing v. Valentino, 875 F. Supp. 2d 975, 988 (N.D. Cal. 2012) (stating that "[t]he first part of the anti-SLAPP inquiry is substantially the same as the inquiry into whether the *Noerr-Pennington* doctrine applies"; "'[i]n the anti-SLAPP context, the critical point is whether **[*469]** the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech'"). The "true" conduct that Intel claims is anticompetitive is the aggregation of patents; that is not an act in furtherance of the right of petition or free speech, as defined in § 425.16(e). *See* Equilon Enters. v. Consumer Cause, Inc., 29 Cal. 4th 53, 66, 124 Cal. Rptr. 2d 507, 52 P.3d 685 (2002) (stating that "the act underlying the plaintiff's cause or the act which forms the basis for the plaintiff's cause of action must *itself* have been an **[**33]** act in furtherance of the right of petition or free speech") (internal quotation marks omitted).

Implicitly recognizing this problem, Defendants contend that there is an independent reason why the "'arising from' prong is . . . satisfied": "Intel is seeking to enjoin Defendants' protected infringement suits, which amounts to a prior restraint on Defendants' protected activity." Reply at 24. *See, e.g.*, Equilon, 29 Cal. 4th at 67 n.4 (noting that Equilon sought "injunctive relief that expressly would restrict Consumer Cause's exercise of petition rights"). But it is not clear from the SAC that Intel is seeking to enjoin any patent infringement suits per se. Certainly, the prayer for relief in the SAC does not refer to such relief. *See* SAC, Prayer ¶¶ (a), (c) (asking *in general terms* that "Defendants' unlawful conduct be declared [an antitrust] violation" and that an order be issued "directing the termination of the anticompetitive conduct and injunctive relief that restores competition to the markets at issue"). Defendants suggest that Intel must be seeking such relief because, in its opposition, it refers to "Defendants' patent aggregation *and assertion* scheme." Opp'n at 40 (emphasis added). But this **[**34]** mere reference to patent assertion does not clearly establish that Intel is seeking an injunction that would bar Defendants from filing patent **infringement lawsuits**.

IV. CONCLUSION

For the foregoing reasons, the Court grants Defendants' motion to dismiss (with prejudice) but denies its anti-SLAPP motion to strike.

The Clerk of the Court is ordered to enter a final judgment in accordance with the above and close the file in the case.

The Clerk of the Court is also instructed to file under seal Part III of this order - at least on a temporary basis. The parties are ordered to meet and confer to determine which portions of Part III need to be filed under seal. The request to seal should be narrowly tailored and should be supported by a declaration. The sealing request shall be filed within a week of the date of this order.

This order disposes of Docket No. 244.

IT IS SO ORDERED.

Dated: September 28, 2021

/s/ Edward M. Chen

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[8] Defendants do not contend that the California constitution applies a standard different from *Noerr-Pennington*.

EDWARD M. CHEN

United States District Judge

Simons v. Signature

Superior Court of California, County of Los Angeles

September 29, 2021, Decided; September 29, 2021, Filed

20STCV38728

Reporter

2021 Cal. Super. LEXIS 41886 *

JORDAN SIMONS, et al. v. SIGNATURE ESTATE & INVESTMENT ADVISORS, LLC., A DELAWARE LIMITED LIABILITY PARTNERSHIP, et al.

Core Terms

cause of action, demurrer, unauthorized practice of law, grounds, leave to amend, demur, tortious interference, probate, inheritance, sustain a demurrer, motion to strike, disruption, appears, unfair, unfair business practice, business practice, allegations, purported, prospective economic advantage, lack standing, sustaining, defects, confer, reasonable possibility, grant leave to amend, third party, benefits, damages, notice, fails

Counsel: **[*1]** For Plaintiff(s): Joshua Furman.

For Defendant(s): David Samani; Wendy May Thomas.

Judges: Honorable Dennis J. Landin, Judge.

Opinion by: Dennis J. Landin

Opinion

Judge: Honorable Dennis J. Landin

Judicial Assistant: J. Clavero

Courtroom Assistant: A. Alba

CSR: None

ERM: None

Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Joshua Furman (by Video Appearance)

For Defendant(s): David Samani (by Video Appearance); Wendy May Thomas (by Video Appearance)

NATURE OF PROCEEDINGS: Hearing on Demurrer - without Motion to Strike (Defendant Citadel Law Corporation and Daniel Hayes) (1676); Hearing on Demurrer - with Motion to Strike (CCP 430.10) re First Amended Complaint (Defendants Signature Estate & Investment Advisors, LLC and Jennifer Kim)

The Court issues a tentative ruling this morning which is posted on the Court's website.

The matter is called for hearing.

The Court hears oral argument on the above-captioned demurrers.

After hearing oral argument, the Court adopts the tentative ruling of the Court as the Order of the Court as follows:

Background

On October 8, 2020, Plaintiffs Jordan Simons ("Jordan") and Benjamin Simons ("Benjamin")[1] (collectively, "Plaintiffs") commenced this action against Defendants Signature Estate & Investment **[*2]** Advisors LLC ("Signature"), Jennifer Kim ("Kim"), Citadel Law Corporation ("Citadel"), and Daniel C. Hales ("Hales") (collectively, "Defendants") for:

(1) Legal Malpractice;

(2) Breach of Fiduciary Duty;

(3) Negligence;

(4) Unfair Business Practice; and

(5) Unauthorized Practice of Law.

On April 29, 2021, the Court sustained Defendants' demurrers and denied the motions to strike as moot. The Court also granted Plaintiffs leave to amend.

On May 21, 2021, Plaintiffs filed their First Amended Complaint ("FAC") against Defendants for:

(1) Unfair Business Practice;

(2) Unauthorized Practice of Law;

(3) Tortious Interference with Contract; and

(4) Tortious Interference with Prospective Economic Advantage.

Plaintiffs' allegations are summarized as follows. Kim is a financial advisor and licensed insurance broker that specializes in estate planning. She is a senior partner with Signature. FAC, ¶ 4. Citadel is a law firm, and Hale is the attorney responsible for Citadel's practice of law. Id. at ¶ 6. In 2019, Kim and Hales offered and provided estate planning services to Plaintiffs' father, Herbert Joseph Simmons ("Decedent"). Decedent signed off on an estate plan on June 20, 2019. Id. at ¶ 35. However, **[*3]** "the terms of the purported 2019 estate plan were inherently problematic, demonstrated ethical breaches, and below with [sic] the standard of care." Id. at ¶ 39. For example, the terms differed substantially from Decedent's previous 2012 trust, such that Plaintiffs were disinherited; neither Hales nor anyone at Citadel advised Decedent concerning the terms of the 2019 trust; and Kim advised Decedent to sign the trust without counsel or explanation. Id. at ¶¶ 36-37, 40-45. Jordan is currently challenging the purported 2019 trust in probate court. Id. at ¶¶ 47-48.

On June 18, 2021, Signature and Kim (collectively, "Signature Defendants") filed a demurrer to the FAC and motion to strike. Plaintiffs filed oppositions on September 15, 2021. Signature Defendants have not filed replies.

On June 21, 2021, Citadel and Hales (collectively, "Citadel Defendants") filed a demurrer to the FAC. Plaintiffs filed an opposition on September 15, 2021, and Citadel Defendants filed a reply on September 21, 2021.

The Court considers the moving, opposing, and reply papers and rules as follows.

Meet and Confer Efforts

Before filing a demurrer, the demurring party is required to meet and confer in person or telephonically **[*4]** with the party who filed the pleading demurred to for the purposes of determining whether an agreement can be reached through a filing of an amended pleading that would resolve the objections to be raised in the demurrer. *CCP § 430.41*. A demurring party shall file a declaration concerning the meet and confer. Id., *(a)(3)*.) "Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." Id., *(a)(4)*.

Similarly, before filing a motion to strike, the moving party is required to meet and confer with the party who filed the pleading that is subject to the motion to strike for the purposes of determining whether an agreement can be reached through a filing of an amended pleading that would resolve the objections to be raised in the motion to strike. *CCP § 435.5 (a)*. A moving party shall file a declaration concerning the meet and confer. Id., *(a)(3)*.

The Court finds that Defendants have satisfied the meet and confer requirement. Thomas Decl. ¶¶ 2-7, Exh. A-B [Signature Defendants]; Samani Decl., ¶ 2 [Citadel Defendants].

Requests for Judicial Notice

Signature Defendants

Signature Defendants request judicial notice of (1) Plaintiffs' Complaint in this action; (2) the **[*5]** Court's order sustaining Defendants' demurrer to the Complaint; (3) Plaintiffs' FAC; and (4) Jordan's Petition for Instructions to Confirm Validity of 2012 Trust and Invalidity of Revocation thereof, filed on November 14, 2019 in probate court (Case No. 19STPB10782) ("Jordan's Probate Petition"). RJN, Exh. 1-4.

The Court GRANTS the request, but not as to any hearsay. *Evid. Code § 452(d)*.

Citadel Defendants

Citadel Defendants request judicial notice of (1) Jordan's Probate Petition; (2) the Petition to Transfer Title to the Real and Personal Property Held in the Name of Herbert Joseph Simons to Sharon Louise Alfers, Surviving Trustee of the Simons Alfers Family Trust, Dated June 20, 2019, Pursuant to Probate Code § 850, filed on October 8, 2019 in the matter styled In re the Matter of the Simons-Alfers Family Trust, Dated June 20, 2019 (Case No. 19STPB09591); (3) the Case Summary for the matter styled In the Matter of The Herbert Joseph Simons Living Trust, Dated October 16, 2012 (Case No.19STPB10782); (4) the Case Summary for Case No. 19STPB09591; and (5) the Court's order sustaining Defendants' demurrer to the Complaint in this action. RJN, Exh. 1-5

The Court GRANTS the request, but not as to any hearsay. *Evid. Code § 452(d)*.

Legal Standards **[*6]**

Demurrer

A demurrer tests the sufficiency of the pleading at issue as a matter of law. *City of Chula Vista v. County of San Diego (1994) 23 Cal.App.4th 1713, 1719*. A demurrer may be sustained where the complaint fails to state facts sufficient to constitute a cause of action. *CCP § 430.10(e)*. The ultimate facts alleged in the complaint must be deemed true, as well as all facts that may be implied or inferred from those expressly alleged. *Marshall v. Gibson, Dunn & Crutcher (1995) 37 Cal.App.4th 1397, 1403*; see also *Shields v. County of San Diego (1984) 155 Cal.App.3d 103, 133* ("On demurrer, pleadings are read liberally and allegations contained therein are assumed to be true.") However, the Court does not assume the truth of allegations expressing conclusions of law or allegations contradicted by the exhibits to the complaint or by matters of which judicial notice may be taken. *Vance v. Villa Park Mobilehome Estates (1995) 36 Cal.App.4th 698, 709*.

If the demurrer is sustained, plaintiff "has the burden of proving the possibility of cure by amendment." *Czajkowski v. Haskell & White, LLP (2012) 208 Cal.App.4th 166, 173* (citing *Grinzi v. San Diego Hospice Corp. (2004) 120 Cal.App.4th 72, 78-79*.) Leave to amend must be allowed where there is a reasonable possibility of successfully stating a cause of action. *Schulz v. Neovi Data Corp. (2007) 152 Cal.App.4th 86, 92*.

Motion to Strike

The court may, upon a motion, or at any time in its discretion, and upon terms it deems proper, strike any irrelevant, false, or improper matter inserted in any pleading. *CCP § 436(a)*. The court may also strike all or any part of any pleading not drawn or filed in conformity with the laws of **[*7]** this state, a court rule, or an order of the court. *CCP § 436(b)*.

Signature Defendants' Demurrer

Signature Defendants demur to the first, second, third, and fourth causes of action on grounds that they fail to state facts sufficient.

Scope of Leave to Amend (Third COA: Tortious Interference with Contract; Fourth COA: Tortious Interference with Prospective Economic Advantage)

Signature Defendants demur to the third and fourth causes of action on grounds that Plaintiffs did not have leave of court to allege these new causes of action.

"Generally, where a court grants leave to amend after sustaining a demurrer, the scope of permissible amendment is limited to the cause(s) of action to which the demurrer has been sustained. …" (Edmon & Karnow, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2016) ¶ 6:635.5; see *Harris v. Wachovia Mortgage, FSB (2010) 185 Cal.App.4th 1018, 1023*.)

The general rule does not apply if the new cause of action directly responds to the court's reason for sustaining the earlier demurrer. See *Patrick v. Alacer Corp. (2008) 167 Cal.App.4th 995, 1015*; see also *Rope v. Auto-Chlor System of Washington, Inc. (2013) 220 Cal.App.4th 635, 654* (overruled by statute on other grounds)

In its April 29, 2021 order sustaining Defendants' demurrer, the Court found that Plaintiffs had not alleged any duty owed to them by Defendants. The Court then granted Plaintiffs leave **[*8]** to amend to properly allege duty. April 29, 2021 Order.

Plaintiffs concede and the Court agrees that these are new claims. However, these claims are based on the same general set of facts. Compare Compl., ¶¶ 10-48 with FAC, ¶¶ 10-48. Additionally, the gist of them continues to be that Defendants disrupted the benefits to Plaintiffs under the 2012 trust, and Defendants acted negligently and engaged in the unauthorized practice of law. Compare Compl., ¶¶ 49-66 with FAC, ¶¶ 61-73.

Accordingly, the Court finds that these new causes of action attempt to address the defects noted in the Court's April 29, 2021 order.

The Court OVERRULES the demurrer on this ground.

First COA: Unfair Business Practices

Signature Defendants demur on grounds that (1) Plaintiffs lack standing, as previously held by the Court in its April 29, 2021 order, because they were not clients; (2) Plaintiffs do not have a private cause of action to assert unauthorized practice of law; and (3) Plaintiffs fail to allege an injury-in-fact because their expected future inheritance is conjectural.

"The [Unfair Competition Law] prohibits, and provides civil remedies for, unfair competition, which it defines as 'any unlawful, unfair **[*9]** or fraudulent business act or practice.'" *Daniels v. Select Portfolio Servicing, Inc. (2016) 246*

Cal.App.4th 1150, 1186 (quoting Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 320). "A plaintiff may pursue a UCL action in order to obtain either (1) injunctive relief, the primary form of relief available under the UCL, or (2) restitution as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." Ibid (quoting Jenkins v. JP Morgan Chase Bank (2013) 216 Cal.App.4th 497, 520 (disapproved on other grounds) (emphasis in original; internal quotations omitted).

"An unlawful business practice or act is an act or practice, committed pursuant to business activity, that is at the same time forbidden by law." Klein v. Earth Elements, Inc. (1997) 59 Cal.App.4th 965, 969.) "A business practice is unfair within the meaning of the UCL if it violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." McKell v. Washington Mutual, Inc. (2006) 142 Cal.App.4th 1457, 1473.) When the UCL claim is brought against a competitor, the "unfair" prong of the statute "means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." **[*10]** Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 187.) "[A]ny finding of unfairness to competitors under section 17200 [must] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." Id. at 186-187. Lastly, "[a] fraudulent business practice under section 17200 'is not based upon proof of the common law tort of deceit or deception, but is instead premised on whether the public is likely to be deceived.'" Pastoria v. Nationwide Ins. (2003) 112 Cal.App.4th 1490, 1498. Stated another way, "[i]n order to state a cause of action under the fraud prong of [section 17200] a plaintiff need not show that he or others were actually deceived or confused by the conduct or business practice in question." Ibid.

Plaintiffs allege as follows.

"Defendants have engaged in unfair business practices under Business & Professions Code, section 17200, et seq., because they have entered into a joint enterprise for the unauthorized practice of law and deception of clients who think they are engaging legitimate legal services. Defendants' business practices as stated herein are unlawful, unfair, or fraudulent.

As a result of Defendants' unfair business practices Plaintiffs lost their inheritance and supportive funds from their father Herbert, which funds should be paid by Defendants as restitution."

FAC, ¶¶ 53-54.

The first issue is whether Plaintiffs have standing. As discussed **[*11]** below, the answer is no.

[P]rivate standing is limited to any person who has suffered injury in fact and has lost money or property as a result of unfair competition [Citation.] The intent of this change was to confine standing to those actually injured by a defendant's business practices and to curtail the prior practice of filing suits on behalf of clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant…. [Citation.]

While the voters clearly intended to restrict UCL standing, they just as plainly preserved standing for those who had had business dealings with a defendant and had lost money or property as a result of the defendant's unfair business practices. [Citation.]"

Clayworth v. Pfizer, Inc. (2010) 49 Cal.4th 758, 788 (internal quotations and citations omitted).

Here, Plaintiffs did not use Signature Defendants' services; rather, Decedent did.

Thus, Plaintiffs do not have standing to sue Signature Defendants for unlawful business practices

The Court need not address the parties' remaining arguments.

The Court SUSTAINS the demurrer to this cause of action without leave to amend. Plaintiffs were previously granted leave to amend; they failed **[*12]** to cure the defects noted in the Complaint; and in opposition, Plaintiffs have not shown a reasonable possibility of stating a successful claim.

Second COA: Unauthorized Practice of Law

Signature Defendants demur on grounds that (1) there is no private, civil cause of action for the unauthorized practice of law; (2) Plaintiffs lack standing because they were not Signature Defendants' clients; (3) and Plaintiffs' allegations do not support a claim that Signature Defendants engaged in the unauthorized practice of law.

Business and Professions Code section 6125 states that "[n]o person shall practice law in California unless the person is an active licensee of the State Bar." *Section 6125* "does not create any private causes of action against someone who is practicing law without a license." 76 Ops.Cal.Atty.Gen. 193 (1993) at *1[2]; See also *Ross v. Creel Printing & Publishing Co. (2002) 100 Cal.App.4th 736, 746* (There is no independent cause of action for the breach of a disciplinary rule"). However, "a violation of *section 6125* may form the basis for a cause of action under some other statute or legal theory." Ops.Cal.Atty.Gen, supra, at *1. For example, "[a] private cause of action based on a violation of *section 6125* has been recognized where negligent work by the unlicensed practitioner has caused a private party to suffer loss." Id. at *2; see *Biakanja v. Irving (1958) 49 Cal.2d 647*.

In opposition, **[*13]** it appears that Plaintiffs argue that Signature Defendants owed them a duty as intended beneficiaries of legal services. (Opp., 8:4-17.)

Attorney "[l]iability to testamentary beneficiaries not in privity is not, however, automatic." *Bucquet v. Livingston (1976) 57 Cal.App.3d 914, 921*. Whether an attorney owes a duty to a nonclient beneficiary "is a matter of policy and involves the balancing of various factors." *Lucas v. Hamm (1961) 56 Cal.2d 583, 588*.

"[T]he testator's intent to benefit the plaintiff is a prerequisite to the imposition of a duty on the attorney to the plaintiff." *Paul v. Patton (2015) 235 Cal.App.4th 1088, 1098*. Liability to a third party will not be imposed "where there is a substantial question about whether the third party was in fact the decedent's intended beneficiary, or where it appears that a rule imposing liability might interfere with the attorney's ethical duties to his client or impose an undue burden on the profession." *Boranian v. Clark (2004) 123 Cal.App.4th 1012*. Where a doubt exists as to whether the plaintiff was the decedent's intended beneficiary, no duty exists. Id.

Here, Plaintiffs have not alleged Decedent's unambiguous intent to benefit Plaintiffs through the 2019 estate plan. See FAC, ¶ 48; Signature Defendants' RJN, Exh. 4. As there is a question about whether Plaintiffs were in fact Decedent's intended beneficiaries, Signature **[*14]** Defendants cannot be held accountable to Plaintiffs. *Chang v. Lederman (2009) 172 Cal.App.4th 67, 82* ("when the claim…is that a will or trust, although properly executed and free of other legal defects, did not accurately express the testator's intent, no duty or liability to the nonclient potential beneficiary has been recognized"); *Boranian, supra, 123 Cal.App.4th at 1019* (the primary duty is owed to the testator-client, and the attorney's paramount obligation is to serve and carry out the intention of the testator").

Thus, Plaintiffs do not have standing to sue Signature Defendants for the unauthorized practice of law.

The Court need not address the parties' remaining arguments.

The Court SUSTAINS the demurrer to this cause of action without leave to amend. Plaintiffs were previously granted leave to amend; they failed to cure the defects noted in the Complaint; and in opposition, Plaintiffs have not shown a reasonable possibility of stating a successful claim.

Third COA: Tortious Interference with Contract

Signature Defendants demur on grounds that (1) the 2019 trust is not a contract; (2) even if it was a contract, Plaintiffs lack standing to sue Signature Defendants; (3) Decedent's testamentary intent caused the disruption of the 2012 trust, not Signature Defendants' **[*15]** conduct; and (4) the cause of action is not recognized in the context of expected inheritance.

"The elements of an action for tortious interference are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Hahn v. Diaz-Barba (2011) 194 Cal.App.4th 1177, 1196* (internal quotations and citation omitted).

Plaintiffs allege as follows. The 2012 trust is a contract. FAC, ¶¶ 63-64. Signature Defendants knew of the 2012 trust, and they intentionally acted to disrupt Plaintiffs' benefits under the trust by engaging in the unauthorized practice of law. FAC, ¶¶ 64-65. As a result, Plaintiffs were damaged. FAC, ¶¶ 66-67.

The first issue is whether Plaintiffs may base their cause of action on a trust to which they are beneficiaries. As discussed below, the answer is no.

"The rules governing the respective rights of action of trustees and beneficiaries of express trusts are not the same as those generally applicable to promisees and third party beneficiaries. (4 Witkin, Cal.Procedure, Pleading, supra, § 117, **[*16]** at p. 153.) The California Supreme Court has stated that "Section 1559 of the Civil Code, providing that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it, has no application to [a] case where a trust has been created in favor of such third person. Such trust is governed by the provisions of the code with reference to trusts." (*National Bank v. Exchange Nat. Bank (1921) 186 Cal. 172, 180, 199 P. 1*.)"

Saks v. Damon Raike & Co. (1992) 7 Cal.App.4th 419, 430-431; See also *Estate of Giraldin (2012) 55 Cal.4th 1058, 1066* (a "beneficiaries' interest in [property of the settlor] is merely potential and can evaporate in a moment at the whim of the [settlor]" (internal quotations and citations omitted)).

Though Plaintiffs do not seek to enforce the 2012 trust, the Court finds Saks and Estate of Giraldin instructive. Plaintiffs are allegedly beneficiaries under the 2012 trust. Their recovery under their cause of action depends on the validity of the 2012 trust. As of now, it is unknown whether the 2012 trust is valid, as that issue is being litigated in a concurrent probate action. FAC, ¶ 48; Signature Defendants' RJN, Exh. 4. This Court declines to determine whether the 2012 trust is valid. *Saks, supra, 7 Cal.App.4th at 431* ("The Probate Code clearly manifests the Legislature's intent to vest the exclusive subject matter jurisdiction **[*17]** for all proceedings concerning the internal affairs of trusts in the probate department, and establishes the specific remedies and procedures for trust beneficiaries").

Accordingly, the Court finds that Plaintiffs have not shown the existence of a valid contract.

The Court need not address the parties' remaining arguments.

The Court SUSTAINS the demurrer to this cause of action. In an abundance of caution, the Court grants Plaintiffs 20 days' leave to amend.

Fourth COA: Tortious Interference with Prospective Economic Advantage

Signature Defendants demur on grounds that (1) Plaintiffs should have alleged intentional interference with expected inheritance ("IIEI"); (2) Plaintiffs' claim for IIEI fails because Plaintiffs failed to allege any independent wrongful conduct, among other things; (3) Plaintiffs have an adequate remedy in probate court; and (4) Plaintiffs' claim for tortious interference with prospective economic advantage fails because Plaintiffs have not alleged proximate cause, among other things.

The elements of¿intentional¿interference with prospective¿business¿advantage are (1) economic relationship between the plaintiff and third party, (2) probability of future economic benefit **[*18]** to the plaintiff, 3) defendant's knowledge of the relationship, (4) defendant's intentional acts designed to disrupt the relationship, (5) defendant engaged in an independently wrongful act in disrupting the relationship beyond just inducing disruption of economic advantage, (6) actual disruption of the relationship; and (7) economic harm to the plaintiff caused by the acts.¿Sole Energy Co. v.¿Petrominerals¿Corp.¿(2005) 128¿Cal.App. 4th 212, 241.)¿"'[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.'¿[Citation.]" *Edwards v. Arthur Andersen LLP¿(2008) 44 Cal.4th 937, 944*.

For the same reasons discussed above, the Court finds that Plaintiffs have not shown the existence of an economic relationship. *Saks, supra, 7 Cal.App.4th at 431*; *Estate of Giraldin, supra, 55 Cal.4th at 1066*.

It appears that Plaintiffs seek relief for Signature Defendants' purported interference with Plaintiffs' expected inheritance under the 2012 trust.

The elements for intentional interference with expectation of inheritance are: "(1) an expectation of receiving an inheritance; (2) intentional interference with that expectancy by a third party; (3) the interference was independently wrongful or tortious; (4) there was a reasonable certainty that, but for the interference, the plaintiff would **[*19]** have received the inheritance; and (5) damages.

[Citation.] Most states prohibit an interference action when the plaintiff already has an adequate probate remedy. [Citation.] *Beckwith v. Dahl (2012) 205 Cal.App.4th 1039, 1050* (internal citations omitted).

Plaintiffs allege as follows.

"Defendants knew of the 2012 trust because, at a minimum, it was provided to Kim and

Hales and Citadel are in privity with Kim and Signature as to the services provided to Herbert. Defendants knew that the 2012 trust provided probable future economic benefits or advantages to Plaintiffs because they had the trust instrument, and knew that if the 2012 trust was revoked or replaced that Plaintiffs' probable future economic benefits or advantages under the instrument would be lost in whole or in part.

Defendants acted negligently and negligently per se by engaging in the unauthorized practice of law and aiding and abetting the unauthorized practice of law in preparing the new purported trust in 2019 and, as to Kim and Signature, advising Herbert to execute a revocation of the 2012 trust."

FAC, ¶¶ 70-71.

Plaintiffs' cause of action is premised on Signature Defendants' purported unauthorized practice of law. As discussed above, Plaintiffs have failed to establish **[*20]** that cause of action. Additionally, it appears that Plaintiffs have an adequate probate remedy. If Plaintiffs are successful in the concurrent probate action, then Plaintiffs' inheritance under the 2012 trust will be restored.

Accordingly, the Court finds that Plaintiffs have not stated facts sufficient to state a claim.

The Court need not address the parties' remaining arguments.

The Court SUSTAINS the demurrer to this cause of action. In an abundance of caution, the Court grants Plaintiffs 20 days' leave to amend.

Signature Defendants' Motion to Strike

Signature Defendants move to strike allegations of exemplary damages against Signature Defendants on grounds that the allegations are factually insufficient to state a claim for punitive damages.

In light of the Court's ruling on Signature Defendants' demurrer, the Court DENIES the motion to strike as moot.

Citadel Defendants' Demurrer

Citadel Defendants demur to the first, second, third, and fourth causes of action on grounds that they fail to state facts sufficient.

First COA: Unfair Business Practices

Citadel Defendants demur to this cause of action on grounds that (1) Citadel Defendants owed Plaintiffs no duty; and (2) Plaintiffs lack standing **[*21]** to pursue their claim.

For the same reasons discussed in its ruling on Signature Defendants' demurrer, the Court finds that Plaintiffs lack standing to bring for their claim against Citadel Defendants. *Clayworth v. Pfizer, Inc. (2010) 49 Cal.4th 758, 788*.

The Court need not address the parties' remaining arguments.

The Court SUSTAINS the demurrer to this cause of action without leave to amend. Plaintiffs were previously granted leave to amend; they failed to cure the defects noted in the Complaint; and in opposition, Plaintiffs have not shown a reasonable possibility of stating a successful claim.

Second COA: Unauthorized Practice of Law

Citadel Defendants demur to this cause of action on grounds that (1) Hales in an active licensee of the State Bar; (2) *Business & Professions Code section 6127* is not applicable to Citadel; and (3) Plaintiffs lack standing to pursue a claim under this section.

In opposition, Plaintiffs argue that Citadel Defendants are liable under the theory of "aiding and abetting."

"Liability may … be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other **[*22]** in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." [Citation.]' [Citation.]" *Austin B. v. Escondido Union School District (2007) 149 Cal.App.4th 860, 879*.) However, "[m]ere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting. [Citation.] 'As a general rule, one owes no duty to control the conduct of another …' [Citation.]" *Fiol v. Doellstedt (1996) 50 Cal.App.4th 1318, 1326*.

As discussed in the ruling on Signature Defendants' demurrer, Plaintiffs have not alleged a duty. *Paul v. Patton (2015) 235 Cal.App.4th 1088, 1098*; *Boranian v. Clark (2004) 123 Cal.App.4th 1012*.

In opposition, Plaintiffs also argue that the claim concerns Defendants' criminal conduct, not Decedents' intent.

The Court disagrees. The gist of Plaintiffs' action is that Defendants interfered with Plaintiffs' inheritance under the 2012 trust. Such interference is actionable if it contradicts Decedents' true intent. In other words, there is no liability if Defendants executed the 2019 trust under Decedents' instructions. See *Barefoot v. Jennings (2020) 8 Cal.5th 822, 826* ("The primary duty of a court in construing a trust is to give effect to the settlor's intentions").

Thus, Plaintiffs' cause of action fails.

The Court need not address the parties' remaining arguments.

The Court SUSTAINS the demurrer to this cause of action without leave **[*23]** to amend. Plaintiffs were previously granted leave to amend; they failed to cure the defects noted in the Complaint; and in opposition, Plaintiffs have not shown a reasonable possibility of stating a successful claim.

Third COA: Tortious Interference with Contract; Fourth COA: Tortious Interference with Prospective Economic Advantage

Citadel Defendants demur to these causes of action on grounds that (1) Plaintiffs' causes of action are really for IIEI; (2) Plaintiffs' IIEI claim fails because Plaintiffs have a possible remedy in probate court; (3) Citadel Defendants are not strangers to the to the purported contract or relationship; (4) Plaintiffs have not alleged an independently wrongful act; and (5) Plaintiffs cannot allege resulting damages.

For the same reasons discussed in its ruling on Signature Defendants' demurrer, the Court finds that Plaintiffs' causes of action for tortious interference with contract and tortious interference with prospective economic advantage fail. *Saks v. Damon Raike & Co. (1992) 7 Cal.App.4th 419, 430-431*; See also Estate of Giraldin (2012) 55 Cal.4th 1058, 1066

As discussed in that ruling, it appears that Plaintiffs seek relief for Signature Defendants' purported interference with Plaintiffs' expected inheritance **[*24]** under the 2012 trust.

For the same reasons discussed in that ruling, and contrary to Plaintiffs' arguments, the Court finds that Plaintiffs' cause of action for IIEI fails. *Beckwith v. Dahl (2012) 205 Cal.App.4th 1039, 1050*.

Accordingly, the Court finds that Plaintiffs have not stated facts sufficient to state a claim.

The Court need not address the parties' remaining arguments.

The Court SUSTAINS the demurrer to this cause of action. In an abundance of caution, the Court grants Plaintiffs 20 days' leave to amend.

Conclusion

The Court SUSTAINS Defendants' demurrers to the first and second causes of action without leave to amend.

The Court SUSTAINS Defendants' demurrer to the third and fourth causes of action with 20 days' leave to amend.

The Court DENIES Signature Defendants' motion to strike as moot.

[1] The Court refers to the parties' first names for clarity and means no disrespect.

[2] Although an official interpretation of statute by the Attorney General is not controlling, it is entitled to great respect. *Thorning v. Hollister School Dist. (1992) 11 Cal.App.4th 1598, 1604*; *Napa Valley Educators' Assn. v. Napa Valley Unified School Dist. (1987) 194 Cal.App.3d 243, 251*; *Lucas v. Board of Trustees (1971) 18 Cal.App.3d 988, 991-92*.

Notice is waived.

Stromberg v. Qualcomm Inc.

United States Court of Appeals for the Ninth Circuit

September 21, 2021, Resubmitted, San Francisco, California; September 29, 2021, Decided; September 29, 2021, Filed

No. 19-15159

Reporter

14 F.4th 1059 *; 2021 U.S. App. LEXIS 29395 **

KAREN STROMBERG; SAMUEL ROECKER; THOMAS LAMMEL; MARY GALLOWAY; DANIELLE LAGRAVE; THOMAS MCMAHON; BOARDSPORTS SCHOOL LLC; PATRICK BENAD; LINDSEY CARR; RENEE ACOSTA; PATRICIA BURNESS; CAROL HARRIS; ROBERT LINKS; NICHELLE LYONS; NUALA VIGNOLES; RACHEL L. MILLER; JOHN WILLIAM KIEFER III; MATTHEW MITCHELL; SUSAN GONZALEZ-PENDER; TERESE RUSSELL; SARAH KEY; DALIA ZATLIN; BETH CRANDALL; CLARISSA SIMON; KENDALL MARTIN; RODRIGO SAPLA; REBECCA DAVIS; THOMAS MCMANUS; KIMBERLY SCAVONE; MELISSA JU; CHRIS THOMPSON; MARTHA COUNTESS; KAREN HOOD; JAIME MARTIN; ADRIAN ESTEBAN; JEFFREY DAVIS; ERICSSON BROADBENT; PAUL SCOTT ERVIN; CARALYN TADA; NAGORE MILES; BETHANY RISING; JIYING SPENCER; DAYAN CRUTCHER; CATHERINE SCHMIDLIN; ALLISON TRIPP; LINDSAY SMITH; KATIE SMITH; KIRSTEN LUENZ; LAUREL VENER; STEPHEN JUDGE; SETH SALENGER; SCOTT HANSEN; JOSEPH KOVACEVICH; MICHELLE REYNOLDS; GEORGE MARUT; JANET ACKERMAN; ALAN SCHLAIKJER; LORI LANDES; JOYCE GRANTZ; GABRIELLE KURDT; JOHN SOLAK; TODD ESPINOSA; ANDREW WESTLEY; LAURA HALLAHAN; MARY C. MCDEVITT; PADRAIC J. BRENNAN; JASON SCHWARTZ; SUZANNE BLOCK; KEVIN CALERO; CARLO ENDOZO CARINGAL; IAN CARSON; ANDRE CRUZ; LUCAS RANGEL FERREIRA; MASOOD JAVAHERIAN; DAVID KOPLOVITZ; BRIAN LETULLE; DEIRDRE MCELHANEY; CARMEN MINON; ERICA MINON; GABRIEL MINON; BETSY SANTIAGO; JAVIER SANTIAGO; PETER YEE; ALICIA HADNETT; DANIEL CARROLL; DEBRA GRASL; AMANDA NEWSOME; DAVID KREUZER; ARMANDO HERRERA; EDEN WAGNER; NEIL WAGNER; ALLAN ROTMAN; SHARI COLE; PHILLIP JAMES ZACHARIAS; MARY BETH CUMMINS; GUY SNOWDY; CYNTHIA BAMBINI; GRANT HAUSCHILD; DAVID FLOYD; KIM COUGHLIN; BRANDON FULLER; LISA PATNODE; NINA BARTOSHEVICH; LEONIDAS MIRAS; JAMES CLARK, Plaintiffs-Appellees and JORDIE BORNSTEIN; CORDT BYRNE; ELLIOT CARTER; JEFF CIOTTI; DWIGHT DICKERSON; MATTHEW CHRISTIANSON; LOGAN GRIESEMER; RYAN HART; WILLIAM HORTON; STEVE KRUG; GAIL MARGOLIS; KATE MORTENSEN; ALYSSA NEE; CHRISTOPHER WHALEN; STEPHAN FARID WOZNIAK; CHRISTOPHER ZAYAS-BAZAN; DAVID CARNEY; JULIE EWALD; TOM PARKIN; BRIAN DEPPERSCHMIDT; BRANDON STEELE; KYLE WEBER; CRAIG HOUSENICK; RYAN MARGULIS; RICHARD RIZZO; GUY DIETRICH; JEFFREY M. KURZON; SUSAN NAGY; NICOLAS YOUSIF; SCOTT FREDERICK; CHARLES POON; ANDREA HOGAN; TINA HEIM; MONICA MORROW; MARK CARDILLO; ALLISON SHIPP; MICHELLE MACKAY; COLLEEN SPARKE; JANET SILVERNESS; MELANIE BARCLAY; TIFFANY RINGO; HALLIE LINGO; CRYSTAL HOHENTHANER; DANIEL K. BRENDTRO; DANIEL DELIER; PAUL NELSON; CATHERINE KADERAVEK; KAREN CARLET; DAVID WARING; LEON THEODORE LIPKA III, Plaintiffs, v. QUALCOMM INCORPORATED, Defendant-Appellant.

Prior History: [1]** Appeal from the United States District Court for the Northern District of California. D.C. No. 5:17-md-02773-LHK. Lucy H. Koh, District Judge, Presiding. Argued and Submitted December 2, 2019. Submission Withdrawn March 3, 2020.

In re Qualcomm Antitrust Litig., 328 F.R.D. 280, 2018 U.S. Dist. LEXIS 168484, 2018 WL 4680214 (N.D. Cal., Sept. 27, 2018)

Disposition: VACATED AND REMANDED.

Core Terms

district court, antitrust, non-repealer, choice of law, purchasers, damages, consumers, license, predominance, cellphones, indirect, class certification, state law, Sherman Act, residents, patents, certification, violations, in-state, anti trust law, class action, class member, practices, suppliers, vacate, governmental interest, place of wrong, anticompetitive, injunctive, commerce

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

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

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

HN1[] **Sherman Act, Claims**

Sections 1 and *2* of the Sherman Act are particularly important to the preservation of economic freedom and the United States' free-enterprise system. *Section 1* prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. *15 U.S.C.S. § 1*. *Section 2* also makes it illegal to monopolize any part of the trade or commerce among the several States. *15 U.S.C.S. § 2*. Direct purchasers—meaning those who buy the relevant product directly from the alleged antitrust violator—can bring antitrust suits for treble damages under the Sherman Act. *15 U.S.C.S. § 15*. But the United States Supreme Court has long held that indirect purchasers—meaning those who purchase the relevant product through middlemen—are barred from seeking damages for alleged Sherman Act violations.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Torts > Business Torts > Unfair Business Practices > Remedies

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN2[] **Remedies, Damages**

California's Cartwright Act, though modeled after the Sherman Act, permits indirect purchasers to bring antitrust claims and recover treble damages. Cal. Bus. & Prof. Code § 16700 et seq.

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

Torts > Business Torts > Unfair Business Practices > Elements

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

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

HN3[] State Regulation, Claims

California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 et seq., generally prohibits any unlawful, unfair or fraudulent conduct. § 17200. The UCL borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN4[] Standards of Review, Abuse of Discretion

The appellate court reviews the district court's class certification rulings for abuse of discretion and review for clear error any findings of fact the district court relied upon in its certification order. A district court abuses its discretion where it commits an error of law, relies on an improper factor, omits a substantial factor, or engages in a clear error of judgment in weighing the correct mix of factors. A district court's choice of law determination is reviewed de novo, but its underlying factual findings are reviewed for clear error.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN5[] Prerequisites for Class Action, Adequacy of Representation

Fed. R. Civ. P. 23 governs class certification. The party seeking class certification has the burden of affirmatively demonstrating that the class meets the requirements of Rule 23. As a threshold matter, a class must first meet the four requirements of Rule 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation.

In addition to *Rule 23(a)*'s requirements, the class must meet the requirements of at least one of the three different types of classes set forth in *Rule 23(b)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN6[] **Prerequisites for Class Action, Maintainability**

Under *Fed. R. Civ. P. 23(b)(3)*, a court must find that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. This inquiry focuses on the relationship between the common and individual issues' and tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN7[] **Class Actions, Certification of Classes**

Fed. R. Civ. P. 23(b)(2) requires that the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. *Rule 23(b)(2)* requirements are unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN8[] **Class Actions, Certification of Classes**

Understanding which law will apply before making a predominance determination for purposes of class certification is important when there are variations in applicable state law. Variances in state law can overwhelm common issues and preclude predominance for a single nationwide class. To determine which laws will apply and consequently whether *Fed. R. Civ. P. 23(b)(3)* predominance can be met, courts must conduct a choice of law analysis.

Civil Procedure > Special Proceedings > Class Actions

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

HN9[] Special Proceedings, Class Actions

When state claims are brought, federal courts apply the choice of law rules of the forum state. Under California's choice of law rules, the class action proponent bears the initial burden to show that application of California law is constitutional on the basis that California has significant contact or significant aggregation of contacts' to the claims of each class member. Once the class action proponent makes this showing, the burden shifts to the other side to demonstrate that foreign law, rather than California law, should apply to class claims.

Civil Procedure > Special Proceedings > Class Actions

Torts > Procedural Matters > Conflict of Law > Governmental Interests

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Governmental Interests

HN10[] Special Proceedings, Class Actions

California law cannot apply to class claims if the interests of other states outweigh California's interest. To make this determination, courts use California's three-step governmental interest test. First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Finally, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state, and then ultimately applies the law of the state whose interest would be the more impaired if its law were not applied.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Governmental Interests

HN11[] Choice of Law, Governmental Interests

Federalism provides that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders. Every state has an interest in having its law applied to its resident claimants. Thus, states may permissibly differ on the extent to which they will tolerate a degree of lessened protection for consumers to create a more favorable business climate for the companies that the state seeks to attract to do business in the state. Likewise, each state has an interest in balancing the products and prices offered to consumers with the legal protections afforded to them as well as an interest in being able to assure individuals and commercial entities operating within its territory that applicable limitations on liability set forth in the jurisdiction's law will be available to those individuals and businesses in the event they are faced with litigation in the future.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

Torts > Procedural Matters > Conflict of Law > Place of Injury

HN12[] Choice of Law, Significant Relationships

California recognizes that with respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest and the place of the wrong is said to be the state where the last event necessary to make the actor liable occurred.

Antitrust & Trade Law > Sherman Act > Claims

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

HN13[] **Sherman Act, Claims**

The antitrust laws, including the Sherman Act, were enacted for the protection of competition, and actual or alleged harms to customers and consumers outside the relevant markets are beyond the scope of ***antitrust law***.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

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

HN14[] **Remedies, Damages**

The Illinois Brick Court listed three reasons for barring indirect-purchaser suits: (1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Choice of Law

Governments > Courts > Authority to Adjudicate

HN15[] **Federal & State Interrelationships, Choice of Law**

Federalism forbids a court from evaluating their underlying wisdom or inserting the court's own preference into choice of law analysis.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

HN16[] **Remedies, Damages**

The California Supreme Court has explained that the Cartwright Act weighs the goal of deterring antitrust violations over concerns that plaintiffs may receive a windfall.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN17[] **Commerce Clause, Dormant Commerce Clause**

The relevant state interest is not confined to protecting only a resident company from excessive liability. Rather, a state's adherence to Illinois Brick may reflect a policy decision calibrating liability to foster commerce in the state. Thus, non-repealer states have an interest in furthering that policy by shielding out-of-state businesses from what the state may consider to be excessive litigation through applying its law to transactions within its borders.

Torts > Procedural Matters > Conflict of Law > Place of Injury

HN18[] **Conflict of Law, Place of Injury**

The place of the wrong is the state where the last event necessary to make the actor liable occurred.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Governmental Interests

HN19[] **Choice of Law, Governmental Interests**

The place of the wrong, while not always controlling, remains a relevant consideration in California's governmental interest test. With respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN20[] **Class Actions, Certification of Classes**

Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the *Fed. R. Civ. P. 23* prerequisites for class certification are satisfied.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN21[] **Class Actions, Certification of Classes**

A class's ability to meet *Fed. R. Civ. P. 23(b)(2)* requirements does not require an examination of the viability or bases of the class members' claims for relief.

Summary:

SUMMARY[**]

Antitrust / Class Certification

The panel vacated the district court's order certifying a nationwide indirect purchaser class in an antitrust multi-district litigation seeking injunctive and monetary relief under *§§ 1* and *2 of the Sherman Act* and California law against Qualcomm Incorporated, and remanded for reconsideration of the plaintiffs' claims given *FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020)* (holding that Qualcomm's modem chip licensing practices did not violate the

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

Sherman Act, and there was nothing to be enjoined because its exclusive dealing agreements with Apple did not substantially foreclose competition and were terminated years ago).

The plaintiffs, consumers who bought cellphones, alleged that Qualcomm maintained a monopoly in modem chips, harming consumers because the amount attributable to an allegedly excessive royalty was passed through the distribution chain to consumers in the form of higher prices or reduced quality in cellphones. The district court certified **[**2]** a damages class under *Fed. R. Civ. P. 23(b)(3)* and an injunctive relief class under *Rule 23(b)(2)*.

Vacating the *Rule 23(b)(3)* class certification order, the panel held that the class was erroneously certified under a faulty choice of law analysis because differences in relevant state laws swamped predominance. The panel held that California's choice of law rules precluded the district court's certification of the nationwide *Rule 23(b)(3)* class because other states' laws, beyond California's Cartwright Act, should apply. As a result, common issues of law did not predominate in the class as certified.

The panel vacated the *Rule 23(b)(2)* class certification order in light of *FTC v. Qualcomm*.

The panel instructed that on remand, the district court should address in the first instance the effect of *FTC v. Qualcomm* on class certification, particularly on the classes' ability to meet the threshold requirements of *Rule 23(a)* as well as the viability of plaintiffs' claims to move forward.

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Judges: Before: Eugene E. Siler* , Jay S. Bybee, and Ryan D. Nelson, Circuit Judges. Opinion by Judge R. Nelson.

Opinion by: Ryan D. Nelson

Opinion

[*1063] R. NELSON, Circuit Judge:

Qualcomm Incorporated seeks interlocutory review of the district court's order certifying a nationwide class of up to 250 million class members in an antitrust multi-district litigation raising claims under the Sherman Act and California state law. Because the district court erred in its choice of law analysis and in light of *FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020)*, we vacate the class certification order. On remand, the district court should reconsider the viability of Plaintiffs' **[**6]** claims given *FTC v. Qualcomm*.

I

A

With its principal place of business in California, Qualcomm is a global leader in cellular technology. Over the years, Qualcomm has contributed notable technological innovations to modern cellular communication standards and holds thousands of cellular patents.

Some of Qualcomm's patents are standard essential patents ("SEPs") covering technology that international standard-setting organizations ("SSOs") incorporated into cellular communication standards, such as 3G CDMA or 4G LTE. SSOs "are global collaborations of industry participants that establish technical specifications to ensure that products from different manufacturers are compatible with each other." *FTC v. Qualcomm, 969 F.3d at 982-83* (internal quotation marks and citations omitted). Manufacturers and suppliers must use technology covered in Qualcomm's SEPs if they want to practice 3G CDMA or 4G LTE standards. Thus, a manufacturer or supplier wanting to comply with 3G CDMA or 4G LTE standards will infringe on Qualcomm's SEPs unless they license those SEPs.

Before incorporating patented technology into a standard, SSOs require that patent holders commit to license their SEPs on fair, reasonable, and non-discriminatory ("FRAND") **[**7]** terms. FRAND commitments safeguard against abuses like "patent holdup," through which a SEP holder demands excessive royalties from suppliers and manufacturers of standard-compliant products and services. *See* *Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 876 (9th Cir. 2012)* (citation omitted).

Qualcomm licenses its cellular patent portfolio, including its SEPs, to original equipment manufacturers ("OEMs") with products, like cellphones, that incorporate Qualcomm's patented technologies. Though Qualcomm licenses its patents at the level of completed cellphone devices, it does not license its patents at the level of any given

* The Honorable Eugene E. Siler Jr., Senior United States Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

cellphone component. When Qualcomm licenses its patents, it receives a royalty that is typically 5% of the device's wholesale net selling price.

Besides licensing technology, Qualcomm also designs and sells semiconductor devices known as modem chips ("chips") to OEMs. Chips enable cellphones to connect with cellular networks as well as provide other functions. Qualcomm is the leading supplier of CDMA and premium LTE chips worldwide.

B

In a separate action brought in January 2017, the Federal Trade Commission ("FTC") sued Qualcomm, alleging that **[*1064]** Qualcomm engaged in unfair methods of competition in violation of the Federal Trade Commission **[**8]** Act ("FTCA") and the Sherman Act. Afterward, many follow-on consumer antitrust class actions were filed against Qualcomm, generally alleging that Qualcomm's conduct violated federal and state antitrust and consumer protection laws based on similar claims of anti-competitive conduct. The Judicial Panel on Multidistrict Litigation centralized these consumer class actions as a consolidated class action in the United States District Court for the Northern District of California before the same judge presiding over the separate FTC action.

Plaintiffs in this multidistrict litigation are consumers who bought cellphones and allege that Qualcomm maintained a monopoly in chips by: (1) engaging in a "no-license-no-chips" policy by which Qualcomm sold chips only to OEMs that paid above-FRAND royalty rates to license Qualcomm's SEPs; (2) refusing to license its SEPs to rival chip suppliers; and (3) entering into exclusive dealing arrangements with Apple that prevented rival chip suppliers from competing with Qualcomm to supply Apple's chip demand. Plaintiffs contend these practices harmed consumers because the amount attributable to the allegedly excessive royalty—the amount above the FRAND royalty—was **[**9]** passed through the distribution chain to consumers in the form of higher prices or reduced quality in cellphones.

Plaintiffs seek injunctive and monetary relief against Qualcomm, asserting violations of Sections 1 and 2 of the Sherman Act as well as California's Cartwright Act and Unfair Competition Law ("UCL").

HN1[] Sections 1 and 2 of the Sherman Act are "particularly 'important to the preservation of economic freedom and our free-enterprise system.'" *FTC v. Qualcomm, 969 F.3d at 988* (quoting *United States v. Topco Assocs., Inc., 405 U.S. 596, 610, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*). Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Section 2 also makes it illegal to "monopolize any part of the trade or commerce among the several States." *Id.* § 2. Direct purchasers—meaning those who buy the relevant product directly from the alleged antitrust violator—can bring antitrust suits for treble damages under the Sherman Act. *See id.* § 15. But the Supreme Court has long held that indirect purchasers—meaning those who purchase the relevant product through middlemen—are barred from seeking damages for alleged Sherman Act violations. *See* *Ill. Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. Here, Plaintiffs are "indirect purchasers who are two or more steps removed from [Qualcomm] in a distribution chain" and thus cannot seek damages **[**10]** for the alleged Sherman Act violations. *See* *Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520, 203 L. Ed. 2d 802 (2019)* (emphasis omitted).

After the Supreme Court's *Illinois Brick* decision, many states enacted *Illinois Brick* repealer laws, authorizing indirect purchasers to bring antitrust damages suits under state laws. For instance, **HN2**[] California's Cartwright Act, though modeled after the Sherman Act, permits indirect purchasers to bring antitrust claims and recover treble damages. *Cal. Bus. & Prof. Code § 16700 et seq.* Currently, thirty-five states and the District of Columbia effectively repealed *Illinois Brick* (known as "repealer states") in one form or another, but fifteen states have not (known as "non-repealer states"). *See* Practical Law Antitrust, *State Illinois Brick Repealer Laws Chart*, Westlaw, https://bit.ly/3foROqr.

[*1065] **HN3**[] In addition to the Sherman Act and California's Cartwright Act, Plaintiffs brought a claim under California's UCL, *Cal. Bus. & Prof. Code § 17200 et seq.*, which generally prohibits any "unlawful, unfair or fraudulent" conduct. *Id.* § 17200. Plaintiffs' UCL claim is based on the Sherman and Cartwright Act violations. *See* *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 539-40 (Cal.*

1999) (explaining that the UCL "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable" (internal quotation marks and citation omitted)). **[**11]** Because neither party identified any material difference between the federal and state claims beyond the availability of damages, the district court generally treated Plaintiffs' state law claims together with the federal claims.

C

Plaintiffs sought certification under *Federal Rule of Civil Procedure 23* ("*Rule 23*") for an indirect purchaser class comprising "[a]ll natural persons and entities in the United States who purchased, paid for, and/or provided reimbursement for some or all of the purchase price for all UMTS, CDMA (including CDMAone and cdma2000) and/or LTE cellular phones . . . for their own use and not for resale from February 11, 2001 . . . ." This class would number between 232.8 and 250 million people, and the lower bound on damages to the consumer class was estimated as $4.84 billion. Opposing class certification, Qualcomm argued that (1) Plaintiffs provided no model that could prove antitrust impact using common evidence on a class-wide basis; (2) the proposed class's size and heterogeneity violated due process, was unmanageable, and therefore not superior; and (3) indirect purchasers in non-repealer states lack standing to seek antitrust damages.

The district court certified Plaintiffs' class under *Rule 23(b)(2)* and *(b)(3)*. Because **[**12]** the Cartwright Act mirrors federal ***antitrust law***, Plaintiffs' UCL claim is premised at least in part upon the Sherman and Cartwright Act violations, and the parties did not identify any material differences between the federal and state claims, the district court treated Plaintiffs' federal and state law claims together when certifying the class. After concluding that the proposed class satisfied the requirements of *Rule 23(a)*, the district court held that the proposed class satisfied *Rule 23(b)(3)*'s predominance and superiority requirements. As to predominance, the district court concluded that common questions predominate overall and as to the elements of the federal antitrust claim—particularly, as to antitrust violation, antitrust impact, and damages.

The district court also concluded that Plaintiffs can seek damages on behalf of the entire nationwide class under the Cartwright Act. In so concluding, the district court applied California's choice of law rules and determined that California has sufficient contacts with the claims of each class member. The district court then applied California's three-step governmental interest test to determine whether other state law, besides California law, should apply. **[**13]** Applying that test, the district court first concluded that non-repealer states' antitrust laws were materially different from California's Cartwright Act on the issue of damages recovery. The district court then determined that California has an interest in applying its law to this case because Qualcomm is a California business and the Cartwright Act (by allowing damages recovery) benefits consumers. But, according to the district court, non-repealer states have no interest in applying their laws here because non-repealer laws disadvantage resident consumers and are not intended to protect out-of-state businesses. **[*1066]** As a result, the district court held that California's Cartwright Act applied to the nationwide class, allowing the consumer class to sue for antitrust damages under *Rule 23(b)(3)*.

Besides certifying the class under *Rule 23(b)(3)*, the district court certified a *Rule 23(b)(2)* injunctive relief class. According to the district court, the class satisfied *23(b)(2)*'s requirements because Qualcomm's allegedly anticompetitive conduct—*i.e.*, the practices to be enjoined—are generally applicable to the whole class.

Qualcomm seeks interlocutory review under *Rule 23(f)* of the district court's class certification order. On appeal, Qualcomm challenges **[**14]** the district court's finding of *Rule 23(b)(3)* predominance, arguing that antitrust impact cannot be shown by common evidence, the class improperly includes millions of iPhone purchasers suffering no antitrust impact, and California law cannot apply to the nationwide class. Qualcomm also argues that the class is unmanageable and not a superior method of adjudicating the claims as required by *Rule 23(b)(3)* and that the class failed to meet *Rule 23(b)(2)*'s requirements for injunctive relief.

After this case was submitted, this court issued its opinion in *FTC v. Qualcomm, 969 F.3d 974*. We directed the parties to file supplemental briefs addressing the effect of that decision, if any, on this case. Qualcomm urges us to remand to the district court with instructions to dismiss because *FTC v. Qualcomm* means that Plaintiffs lack any viable foundation for their claims. Plaintiffs argue that *FTC v. Qualcomm* does not affect this *Rule 23(f)* interlocutory appeal and that the impact, if any, of *FTC v. Qualcomm* on Plaintiffs' claims requires further development before this court can weigh in.

II

HN4[] We review the district court's class certification rulings for abuse of discretion and "review for clear error any findings of fact the district court relied upon in its certification **[**15]** order." *Senne v. Kan. City Royals Baseball Corp., 934 F.3d 918, 926 (9th Cir. 2019)*. "A district court abuses its discretion where it commits an error of law, relies on an improper factor, omits a substantial factor, or engages in a clear error of judgment in weighing the correct mix of factors." *Id.* (citing *Stockwell v. City & Cnty. of San Francisco, 749 F.3d 1107, 1113 (9th Cir. 2014)*). A district court's choice of law determination is reviewed de novo, but its underlying factual findings are reviewed for clear error. *Zinser v. Accufix Rsch. Inst., Inc., 253 F.3d 1180, 1187 (9th Cir. 2001)*, *amended* *273 F.3d 1266 (9th Cir. 2001)*.

III

HN5[] *Rule 23* governs class certification. "The party seeking class certification has the burden of affirmatively demonstrating that the class meets the requirements of *[Rule] 23*." *Mazza v. Am. Honda Motor Co., 666 F.3d 581, 588 (9th Cir. 2012)* (citing *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*). As a threshold matter, a class must first meet the four requirements of *Rule 23(a)*: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *Senne, 934 F.3d at 927*. In addition to *Rule 23(a)*'s requirements, the class must meet the requirements of at least one of the "three different types of classes" set forth in *Rule 23(b)*. *Id.* (quoting *Leyva v. Medline Indus., Inc., 716 F.3d 510, 512 (9th Cir. 2013)*). On appeal, Qualcomm does not contest that Plaintiffs met *Rule 23(a)*'s requirements; rather, it contests class certification under *Rule 23(b)(3)* and *(b)(2)*. **[*1067]** **HN6**[] Under *Rule 23(b)(3)*, a court must find that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available **[**16]** methods for fairly and efficiently adjudicating the controversy." This "inquiry focuses on 'the relationship between the common and individual issues' and 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 944 (9th Cir. 2009)* (quoting *Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022 (9th Cir. 1998)*).

HN7[] *Rule 23(b)(2)*, however, requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Rule 23(b)(2)* "requirements are unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." *Parsons v. Ryan, 754 F.3d 657, 688 (9th Cir. 2014)* (citing *Rodriguez v. Hayes, 591 F.3d 1105, 1125 (9th Cir. 2010)*).

Qualcomm asserts that the class did not meet the requirements of *Rule 23(b)(2)* and *(b)(3)*. Even though Qualcomm raises various *23(b)(3)* predominance arguments on appeal, we hold that the *23(b)(3)* class was erroneously certified under a faulty choice of law analysis because differences in relevant state laws swamp predominance. Therefore, we vacate the *23(b)(3)* class certification order. We also vacate the *23(b)(2)* class certification order in light of *FTC v. Qualcomm*. On remand, the district court should **[**17]** address in the first instance the effect of *FTC v. Qualcomm* on certification, particularly on the *23(b)(3)* and *(b)(2)* classes' ability to meet the threshold requirements of *Rule 23(a)* as well as the viability of Plaintiffs' claims to move forward. [1]

A

After considering Qualcomm's various arguments, we hold that most fundamentally the district court failed to properly analyze California's choice of law rules to determine the applicable state laws. When properly analyzed,

[1] Because we vacate and remand the *23(b)(2)* class so the district court can reconsider certification given *FTC v. Qualcomm*, we need not reach Qualcomm's argument that the 23(b)(2) class failed to meet the *Rule 23(b)(2)* cohesiveness requirement, which—as Qualcomm later concedes in its reply brief—we rejected in *Senne, 934 F.3d 918*.

California's choice of law rules preclude the district court's certification of the 23(b)(3) class because the laws of other states—beyond California's Cartwright Act—should apply. As a result, common issues of law do not predominate in the class as currently certified.

HN8[] "Understanding which law will apply before making a predominance determination is important when there are variations in applicable state law." *Zinser, 253 F.3d at 1189*. "[V]ariances in state law [can] overwhelm common issues and preclude predominance for a single nationwide class." *Mazza, 666 F.3d at 596*. To determine which laws will apply and consequently whether *23(b)(3)* predominance can be met, courts must conduct a choice of law analysis.

HN9[] When state claims are brought, federal courts apply the choice of law rules **[**18]** of the forum state—here, California. *See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)*. Under California's choice of law rules, the class action proponent bears the initial burden to show that application of California law is constitutional **[*1068]** on the basis that California has "'significant contact or significant aggregation of contacts' to the claims of each class member." *Mazza, 666 F.3d at 589-90* (quoting *Wash. Mut. Bank v. Superior Court, 24 Cal. 4th 906, 103 Cal. Rptr. 2d 320, 15 P.3d 1071, 1081 (Cal. 2001)* (citations omitted)). "Once the class action proponent makes this showing, the burden shifts to the other side to demonstrate 'that foreign law, rather than California law, should apply to class claims.'" *Mazza, 666 F.3d at 590* (quoting *Wash. Mut. Bank, 15 P.3d at 1081*).

HN10[] California law cannot apply to the class claims if the interests of other states outweigh California's interest. *Mazza, 666 F.3d at 590*. To make this determination, courts use California's three-step governmental interest test. *Id.* "First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different." *Chen v. Los Angeles Truck Ctrs., LLC, 7 Cal. 5th 862, 249 Cal. Rptr. 3d 594, 444 P.3d 727, 730 (Cal. 2019)* (citations omitted). "Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists." *Id. at 730-31* (citations omitted). Finally, **[**19]** "if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state, and then ultimately applies the law of the state whose interest would be the more impaired if its law were not applied." *Id. at 731* (internal quotation marks and citations omitted).

As an initial matter, the district court correctly concluded that California has a constitutionally sufficient aggregation of contacts to the claims of each class member. Qualcomm's principal place of business is in California; the class includes residents of California as well as indirect purchasers who bought cellphones in California; and Qualcomm made business decisions and negotiated licenses related to its allegedly anticompetitive conduct in California. *See Mazza, 666 F.3d at 590* (citing *Clothesrigger, Inc. v. GTE Corp., 191 Cal. App. 3d 605, 236 Cal. Rptr. 605, 612-13 (Ct. App. 1987)*). Qualcomm does not dispute there are sufficient contacts in California. Instead, it argues that the district court misapplied the three-step governmental interest test in making its predominance determination. We agree.

1

There is no dispute that **[**20]** material differences exist between California's Cartwright Act and the antitrust laws of other states. Non-repealer states do not allow indirect purchasers to bring antitrust damages suits, while repealer states—like California—do. *See supra* Section I.B. This difference is material because it "will spell the difference between the success and failure of a claim." *Mazza, 666 F.3d at 591*. But the district court erred in its analysis at the first step because it overlooked variations in the antitrust laws of *Illinois Brick*-repealer states. Even among the repealer states, there are significant variations in the scope of repealer laws. For instance, state repealer laws vary as to the type of law the repeal applies to; [2] who can **[*1069]** sue for damages; [3] and the amount or type of damages indirect purchasers can recover. [4] Thus, the district court failed to "determine[] . . . the relevant law of each of the potentially affected jurisdictions," as required under California's governmental interest test. *Mazza, 666 F.3d at 590* (citation omitted).

2

The district court also erroneously concluded that "while California has an interest in applying its law, other states have no interest in applying their laws to the current dispute." *In re Qualcomm Antitrust Litig., 328 F.R.D. 280, 313 (N.D. Cal. 2018)*. True, as **[**21]** the district court noted, California has an interest in applying its law to regulate and deter Qualcomm (a resident California corporation) from allegedly unlawful business activities in California. But other states, including non-repealer states, have an interest in how their markets are managed and how best to enforce antitrust violations and regulate commerce in their states.

This court has not yet addressed California choice of law analysis in the antitrust context. *Cf. AT & T Mobility LLC v. AU Optronics Corp., 707 F.3d 1106 (9th Cir. 2013)* (addressing only the constitutional limits of choice of law analysis in an antitrust case, not California choice of law rules themselves). But we have addressed California choice of law rules in the tort context, *Mazza, 666 F.3d 581*, and labor context, *Senne, 934 F.3d 918*.

Turning to the tort context in *Mazza*, Honda, a California corporation, appealed the district court's certification of a nationwide 23(b)(3) class of consumers who alleged misrepresentation in connection with their purchase of certain vehicles. *666 F.3d at 587*. This court held that the district court abused its discretion in certifying a class under California law containing class members who purchased or leased vehicles in different jurisdictions with materially different consumer protection laws. **[**22]** *Id. at 590*. In so doing, we turned to California's governmental interest test. *Id. at 590-94*.

First, we concluded that California law materially differed from some of the laws of the forty-three other jurisdictions. *Id. at 591*.

Second, because the vehicle sales at issue took place in forty-four different jurisdictions, we held that each state has a strong interest in applying its own consumer protection laws to those transactions. *Id. at 592*. ***HN11***[] We explained that federalism provides that "each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *Id. at 591* (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003)*). "[E]very state has an interest in having its law applied to its resident **[*1070]** claimants." *Mazza, 666 F.3d at 592* (alteration in original) (citation omitted). We thus concluded that "states may permissibly differ on the extent to which they will tolerate a degree of lessened protection for consumers to create a more favorable business climate for the companies that the state seeks to attract to do business in the state." *Id.* Likewise, each state has an interest in balancing the products and prices offered to

[2] Florida, Massachusetts, Missouri, and New Hampshire limit the repeal to consumer protection statutes. *See Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100, 108 (Fla. Dist. Ct. App. 1996)*; *Ciardi v. F. Hoffmann-La Roche, Ltd., 436 Mass. 53, 762 N.E.2d 303, 312 (Mass. 2002)*; *In re Lithium Ion Batteries Antitrust Litig., No. 13-MD-2420 YGR, 2014 U.S. Dist. LEXIS 141358, 2014 WL 4955377, at *19 (N.D. Cal. Oct. 2, 2014)* (quoting *Gibbons v. J. Nuckolls, Inc., 216 S.W.3d 667, 669 (Mo. 2007)*); *LaChance v. U.S. Smokeless Tobacco Co., 156 N.H. 88, 931 A.2d 571, 582 (N.H. 2007)*.

[3] Though Illinois allows indirect purchaser recovery, it precludes class actions brought by indirect purchasers. *740 Ill. Comp. Stat. Ann. 10/7*. And, as another example, Alaska, Arkansas, Colorado, and Idaho limit indirect purchaser claims to suits brought by the state attorney general. *See Alaska Stat. Ann. § 45.50.577(i)*; *Ark. Code Ann. § 4-75-315(b)*; *Colo. Rev. Stat. Ann. § 6-4-111(2)*; *Idaho Code Ann. § 48-108(2)*.

[4] For instance, Hawaii only permits indirect purchaser suits for compensatory damages. *Haw. Rev. Stat. Ann. § 480-13(a)(1)*. Minnesota, New York, Rhode Island, South Dakota, and Vermont either encourage or require that courts take steps necessary to avoid duplicative recovery. *Minn. Stat. Ann. § 325D.57*; *N.Y. Gen. Bus. Law § 340(6)*; *6 R.I. Gen. Laws § 6-36-7(d)*; *S.D. Codified Laws § 37-1-33*; *Vt. Stat. Ann. tit. 9 § 2465(b)*.

consumers with the legal protections afforded to them as well as an interest in "being able to assure individuals and commercial entities operating **[**23]** within its territory that applicable limitations on liability set forth in the jurisdiction's law will be available to those individuals and businesses in the event they are faced with litigation in the future." *Id. at 592-93* (quoting *McCann v. Foster Wheeler LLC, 48 Cal. 4th 68, 105 Cal. Rptr. 3d 378, 225 P.3d 516, 534 (Cal. 2010)*).

Third, we held that the district court did not adequately recognize that each foreign state has an interest in applying its law to transactions within its borders and that foreign states would be impaired in their ability to calibrate liability to foster commerce if California law were applied to the entire class. *Mazza, 666 F.3d at 593*. The district court improperly elevated state interest in consumer protection to a superordinate level while giving too little weight to each state's interest in promoting business—the exact type of outcome the *Class Action Fairness Act of 2005* ("CAFA") intended to avoid. *Id.* (citing Findings, *CAFA § 2(a)(4), Pub. L. 109-2, 119 Stat. 4, 5 (2005)*). CAFA's key purpose was to correct the problem of "false federalism" in which courts faced with interstate class actions dictate the substantive law of other states by applying their own laws to other states. *Mazza, 666 F.3d at 593* (quoting S. Rep. No. 109-14, at 61 (2005), 2005 U.S.C.C.A.N. 3, 57).

HN12[] In *Mazza*, we explained California recognizes that "with respect to regulating or affecting conduct within its borders, **[**24]** the place of the wrong has the predominant interest" and the "place of the wrong" is said "to be the state where the last event necessary to make the actor liable occurred." *666 F.3d at 593* (internal quotation marks and citations omitted). We noted that "the last events necessary for liability as to the foreign class members—communication of the advertisements to the claimants and their reliance thereon in purchasing vehicles—took place in the various foreign states, not in California." *Id. at 594*. Thus, the foreign states had a strong interest in applying their laws to transactions between their citizens and corporations doing business within their state. *Id.* Further, California's interest in applying its law to residents of foreign states was attenuated. *Id.* California did not need to apply its law to acts taking place in other states where vehicles were purchased or leased to achieve its interest in regulating those who do business within its state. *Id.* As a result, the *Mazza* court vacated the class certification order, concluding that "each class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place." *Id.*

In the labor **[**25]** context in *Senne*, minor league baseball players brought a class action alleging wage and hour violations under the *Fair Labor Standards Act ("FLSA")* and California, Arizona, and Florida law. *934 F.3d at 925*. As relevant here, the district court certified a California class under *Rule 23(b)(3)* but denied certification for the proposed Arizona and Florida *23(b)(3)* classes. *Id. at 926*. On appeal, we used California's three-step governmental interest test to determine which laws should apply to the proposed classes. *Id. at 928*. We first held that California **[*1071]** law should apply to the 23(b)(3) California class for work performed in California. *Id. at 930-31*.

We also reversed the district court's determination that choice of law considerations defeated predominance and adequacy requirements for the proposed Arizona and Florida *23(b)(3)* classes. *Id. at 933*. We held that Arizona law should govern the Arizona class for work performed in Arizona, and Florida law should govern the Florida class for work performed in Florida. *Id. at 937*. In so holding, we relied on the California choice of law principle, often used in tort actions, that a state ordinarily has the predominant interest in regulating conduct within its own borders. *Id. at 936-37* (citing *Mazza, 666 F.3d at 591-92*; *State Farm, 538 U.S. at 422*; *McCann, 225 P.3d at 534*). Arizona and Florida wage and hour laws, when applied to work performed in-state, promotes the states' **[**26]** chosen balance between protecting workers and fostering a hospitable business environment within their states. *Senne, 934 F.3d at 937*.

Though this court has not addressed California's choice of law rules in the antitrust context, we recently outlined important antitrust principles in *FTC v. Qualcomm, 969 F.3d 974*. There, the FTC sued Qualcomm alleging violations of *Section 5 of the FTCA*, *15 U.S.C. § 45 et seq.*, and *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*. *Id. at 986*. According to the FTC, Qualcomm violated these statutes by engaging in anticompetitive conduct—the same conduct complained of by Plaintiffs here—namely that Qualcomm: (1) engaged in a "no-license-no-chips" policy by which Qualcomm sold chips only to OEMs that paid above-FRAND royalty rates to license Qualcomm's SEPs; (2) refused to license its SEPs to rival chip suppliers; and (3) entered into exclusive dealing arrangements with Apple that prevented rival chip suppliers from competing with Qualcomm to supply Apple's chip demand. *See id. at 984-86*. After a ten-day bench trial, the district court ordered a permanent, worldwide injunction prohibiting Qualcomm's core business practices and concluded that "Qualcomm's licensing practices are an unreasonable restraint of trade under *§ 1* of the Sherman Act and exclusionary conduct under *§ 2* of the Sherman Act." **[**27]** *Id. at 986-87* (quoting *FTC v. Qualcomm Inc., 411 F. Supp. 3d 658, 812 (N.D. Cal. 2019)*).

On appeal, this court reversed the district court and vacated its injunction. *FTC v. Qualcomm, 969 F.3d at 1005*. We held that Qualcomm's licensing practices did not violate the Sherman Act, and the exclusive dealing agreements with Apple did not substantially foreclose competition and were terminated years ago; thus, "there is nothing to be enjoined." *Id.* We explained that (1) "Qualcomm's practice of licensing its SEPs exclusively at the OEM level does not amount to anticompetitive conduct in violation of *§ 2*, as Qualcomm is under no antitrust duty to license rival chip suppliers," and "[t]o the extent Qualcomm has breached any of its FRAND commitments, a conclusion we need not and do not reach, the remedy for such a breach lies in contract and patent law;" (2) "Qualcomm's patent-licensing royalties and 'no license, no chips' policy do not impose an anticompetitive surcharge on rivals' modem chip sales;" rather, "these aspects of Qualcomm's business model are 'chip-supplier neutral' and do not undermine competition in the relevant antitrust markets;" and (3) "Qualcomm's 2011 and 2013 agreements with Apple have not had the actual or practical effect of substantially foreclosing competition in the CDMA modem **[**28]** chip market." *Id.* ***HN13***[] Underlying much of this court's holding in *FTC v. Qualcomm* is the principle that "the antitrust laws, including the Sherman Act, were enacted for the protection of competition," and "actual or **[*1072]** alleged harms to customers and consumers outside the relevant markets are beyond the scope of ***antitrust law***." [5] *Id. at 993* (cleaned up) (internal quotation marks and citations omitted).

Here, we have an antitrust case and examine the relevant state interests considering antitrust principles. Given those principles, there is no basis for concluding that only California has an interest. Non-repealer states' *Illinois Brick* laws are designed to regulate antitrust enforcement by allocating recoverable antitrust damages in a way those states think best promotes market competition. In other words, the relevant interests are not simply about the benefit or harm to resident consumers or liability to resident antitrust defendants; rather the relevant interests are about harm to the competitive process and in-state business activity.

HN14[] As the Supreme Court explained in *Apple, 139 S. Ct. at 1524*, "[t]he *Illinois Brick* Court listed three reasons for barring indirect-purchaser suits: (1) facilitating more effective enforcement **[**29]** of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants." These reasons underlie non-repealer states' interests in having their laws apply here.

Allowing non-repealer states to apply their laws to class members purchasing cellphones in-state furthers those states' determinations of how to "facilitat[e] more effective enforcement of antitrust laws." *See id.* The decision to bar indirect purchaser damages recovery is a policy choice regarding how a state wants antitrust laws to be enforced within its borders so competition and business can be best promoted in the state. Non-repealer laws reflect the state calculation that antitrust enforcement is best served by having indirect purchasers realize the benefit of antitrust enforcement outside of court processes. For instance, even if barred from suing for antitrust damages, indirect purchasers in non-repealer states can realize the benefit of antitrust enforcement when direct purchasers recover antitrust damages and factor that recovery into their pricing and business activity in-state, which can then be passed through to consumers in the market.

Applying non-repealer **[**30]** laws to in-state cellphone purchases would also further state interests in reducing the risk that transactions within their borders expose businesses to excessive and "complicated" antitrust litigation with "duplicative damages" recovery. *Id.* By lowering this risk, non-repealer states can attract more business in-state from entities like Qualcomm (and those who do business with Qualcomm) by creating a more favorable business

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[5] We recognize that the relevant market was "the market for CDMA modem chips and the market for premium LTE modem chips," not the "much larger market of cellular services generally." *FTC v. Qualcomm, 989 F.3d at 992* (internal quotation marks and citation omitted). Nevertheless, the point remains that antitrust differs from tort law because antitrust is designed to protect competition rather than protect the actual plaintiffs or defendants.

environment. Non-repealer laws can be understood as choosing to run the risk of under-deterring antitrust violators over overcompensating plaintiffs and complicating antitrust enforcement; meanwhile repealer laws, like the Cartwright Act, take the opposite approach. [6] ***HN15***[] While the district court may disagree with non-repealer states' chosen priorities, federalism forbids a court from "evaluating their underlying **[*1073]** wisdom" or inserting the court's own preference into choice of law analysis. *Mazza, 666 F.3d at 593*. Because non-repealer states have a clear interest in applying their laws to class members who purchased cellphones in their state, the district court erred in concluding that only California has an interest.

To the extent that, for choice of law purposes, this antitrust case can be **[**31]** understood as a "tort-like suit[]," *AT&T Mobility, 707 F.3d at 1112*, the district court still erred in concluding non-repealer states have no interest under *Mazza*.

According to the district court, non-repealer laws are designed to protect only in-state businesses from excessive antitrust liability and thus non-repealer states have no interest here because the sole defendant is an out-of-state business. ***HN17***[] Under *Mazza*, however, the relevant state interest is not confined to protecting only a resident company from excessive liability. *666 F.3d at 593*. Rather, a state's adherence to *Illinois Brick* may reflect a policy decision "calibrat[ing] liability to foster commerce" in the state. *Id.* Thus, non-repealer states have an interest in furthering that policy by "shielding out-of-state businesses from what the state may consider to be excessive litigation" through "applying its law to transactions within its borders." *Id. at 592-93*.

The district court also reasoned that non-repealer states have no interest because the indirect purchaser bar does not "benefit" their residents. In doing so, the district court distinguished non-repealer states' interests at issue (disadvantaging residents by barring damages) from those foreign state interests recognized **[**32]** in *Mazza* (benefitting residents by imposing liability on out-of-state businesses). *Id. at 591-93*. But that reasoning ignores that residents can still benefit from their state's non-repealer laws, which "calibrate liability" to benefit in-state commerce, leading to "increase in commerce and jobs" and avoiding "higher prices for consumers or a decrease in product availability." *See id. at 592-93*.

Even though it grounded most of its choice of law analysis in the tort context, the district court failed to evaluate state interests as the "place of the wrong." *Id. at 593* (quoting *Hernandez v. Burger, 102 Cal. App. 3d 795, 162 Cal. Rptr. 564, 568 (Ct. App. 1980)*). ***HN18***[] The place of the wrong is "the state where the last event necessary to make the actor liable occurred." *Mazza, 666 F.3d at 593* (citations omitted). In the *Mazza* class action—where purchasers claimed Honda misrepresented information while marketing vehicles—the last events necessary for liability were the "communication of the advertisements to the claimants and their reliance thereon in purchasing vehicles." *Id. at 594*. In other words, the place of wrong was "the jurisdiction in which the transaction took place." *Id.* Here, the nationwide class consists of downstream consumers—individuals who bought cellphones from various retailers located throughout the fifty states. The last **[**33]** events giving rise to liability would be the consumer's purchase of the cellphone, and thus the "place of wrong" would be the state where the consumer bought the cellphone. In most instances for non-California residents, this would have occurred outside of California.

HN19[] The place of the wrong, while not always controlling, "remains a relevant consideration" in California's governmental interest test. *Hernandez, 162 Cal. Rptr. at 568*. "[W]ith respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest." *Mazza, 666 F.3d at 593* (quoting *Hernandez, 162 Cal. Rptr. at 568*). Here, *Illinois Brick* laws regulate antitrust enforcement to affect conduct consistent with the state's interest in promoting commerce. **[*1074]** In other words, even under the tort choice of law principles, non-repealer states have a strong interest in applying their state laws to Plaintiffs' claims. Regardless of whether the district court approaches step two under antitrust or tort principles, it erred by dismissing non-repealer states' interest in applying their laws to in-state cellphone purchases.

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[6] ***HN16***[] The California Supreme Court has explained that the Cartwright Act weighs "[t]he goal of deterring antitrust violations" over "concerns that [plaintiffs] may receive a windfall." *Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 111 Cal. Rptr. 3d 666, 233 P.3d 1066, 1081-83 (Cal. 2010)*.

3

Because it held that only California had an interest, the district court failed to determine which states' interests would be more impaired if their policies were **[**34]** subordinated to another state's law, as required under the third step of the governmental interest test. This was error.

As discussed above, non-repealer states have a strong interest in applying their laws to those consumers who bought cellphones in-state. Likewise, California's interest is attenuated where its law is applied to consumers purchasing cellphones in non-repealer states. By applying California law to the nationwide class of indirect purchasers, the district court improperly impaired non-repealer state policy by allowing California to set antitrust enforcement policy for the entire country. This is the "false federalism" that CAFA intended to correct. *See* *Mazza, 666 F.3d at 593* (citing Findings, *CAFA § 2(a)(4)*; *Pub. L. No. 109-2, 119 Stat. 4, 5 (2005)* (noting that courts "making judgments that impose their view of the law on other States and bind the rights of the residents of those States" is an "abuse[ ]" of class actions)). Here, more than one state's law should apply to the 23(b)(3) class. *Mazza, 666 F.3d at 594* (noting the "false premise that one state's law must be chosen to apply to all 44 jurisdictions"). The non-repealer laws should control those purchases occurring in non-repealer states and class members with purchases in non-repealer states should be carved **[**35]** out of the 23(b)(3) class. Even among the repealer states, the various state laws are hardly uniform. Thus, it is not clear that a single class of all repealer state Plaintiffs could be certified under *Rule 23(b)(3)*. That said, the district court should reach that question in the first instance after reconducting its choice of law analysis starting at step one. We thus vacate and remand the *23(b)(3)* class on choice of law grounds.

B

As for the 23(b)(2) class, the district court did not specify which claims that class would be entitled to pursue for injunctive relief. But the identified variations in state law regarding when indirect purchasers can sue for antitrust damages are not implicated in the 23(b)(2) class. Nonetheless, we also vacate the 23(b)(2) class so that on remand the district court can reconsider certification of the entire class given this court's *FTC v. Qualcomm* decision, particularly in light of the threshold requirements of *Rule 23(a)*.

Qualcomm argues that *FTC v. Qualcomm* requires that we remand with instructions to dismiss. According to Qualcomm, that decision bars Plaintiffs from showing, based on their liability theories, that Qualcomm's conduct harmed competition in the relevant markets. But **[**36]** *FTC v. Qualcomm*'s effect remains unclear because neither party adequately addressed the central focus of our *Rule 23(f)* review—that is, how the decision affects the class's ability to meet *Rule 23*'s certification requirements.

This case and *FTC v. Qualcomm* have overlapping facts and claims, and many of our conclusions in *FTC v. Qualcomm* were conclusions of law. Thus, *FTC v. Qualcomm* likely has preclusive effect on many issues raised by Plaintiffs in this case. Ultimately, however, we are not reviewing a motion to dismiss or motion for summary judgment. Rather, our jurisdiction **[*1075]** in this interlocutory appeal is limited to class certification under *Rule 23(f)*. [7] ***HN20***[] "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the *Rule 23* prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 133 S. Ct. 1184, 1194-95, 185 L. Ed. 2d 308 (2013)*.

In their supplemental briefs, the parties narrowly focused on *FTC v. Qualcomm*'s effect on the class's ability to meet *Rule 23(b)(3)*'s predominance requirement. But before we can address *FTC v. Qualcomm*'s effect on *Rule 23(b)(3)*

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[7] This distinction commands the scope of our review. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 457, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016)* ("When, as here, 'the concern about the proposed class is not that it exhibits some fatal dissimilarity but, rather, a fatal similarity—[an alleged] failure of proof as to an element of the plaintiffs' cause of action—courts should engage that question as a matter of summary judgment, not class certification.'" (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, *84 N.Y.U. L. Rev. 97, 107 (2009)*)).

requirements, we must determine what state law or laws will apply to the 23(b)(3) class. That analysis ultimately must await **[**37]** the district court's new choice of law analysis on remand. *See supra* Section III.A.

Moreover, neither party addressed whether *FTC v. Qualcomm* affects Plaintiffs' ability to meet other class certification requirements, like *Rule 23(a)(2)*'s commonality requirement. *See* *Dukes, 564 U.S. at 352, 359* (concluding that "proof of commonality necessarily overlaps with respondents' merits contention" and that the employee class could not be certified because it failed to meet *Rule 23(a)(2)*'s commonality requirement by not offering significant proof that the employer operated under a general policy of discrimination); *Senne, 934 F.3d at 927* ("Class certification is proper only if the trial court has concluded, after a 'rigorous analysis,' that *Rule 23(a)* has been satisfied." (citations omitted)). Likewise, neither party fully addressed the effect of *FTC v. Qualcomm* on the 23(b)(2) class. Qualcomm mentioned that the 23(b)(2) class could not be certified after *FTC v. Qualcomm* because the Apple agreements were terminated years ago and the remaining ongoing conduct was held not to be anticompetitive. ***HN21***[] But we have held that the class's ability to meet *Rule 23(b)(2)* requirements "does not require an examination of the viability or bases of the class members' claims for relief." *See* *Parsons, 754 F.3d at 688* (citations omitted). **[**38]** Thus, *FTC v. Qualcomm*'s effect on *23(b)(2)* certification requirements remains another open question to be considered on remand.

We concluded in *FTC v. Qualcomm* that Qualcomm's SEP licensing practices, the same practices complained of here, are lawful and not anticompetitive. *969 F.3d at 1005*. Because Plaintiffs' arguments in this case overlap with those brought in *FTC v. Qualcomm*, there would have to be some extraordinary difference for Plaintiffs' claims here to not fail as a matter of law—for instance, differences between Sherman Act claims brought by the government versus private parties, differences between Sherman Act analysis and other state laws that might apply, or difference in Plaintiffs' ability to meet their burden of proof under the rule of reason. *See id.*

* * *

While *FTC v. Qualcomm* may well warrant dismissal of Plaintiffs' claims, that issue is not presently before us on interlocutory appeal. Thus, we vacate the 23(b)(2) class and remand with instructions for the district court to reconsider certification of the entire class given *FTC v. Qualcomm*. If the district court determines that *FTC* ***[*1076]*** *v. Qualcomm* defeats the class on *Rule 23(a)* grounds—a threshold requirement before turning to *Rule 23(b)*—that would eliminate **[**39]** the need to reconduct the choice of law analysis for the 23(b)(3) class. *See supra* Section II.A. If the class meets *Rule 23(a)*'s requirements, then the district court should determine the effect of *FTC v. Qualcomm* on the 23(b)(2) class and, after it has reconducted its choice of law analysis and determined what state law applies to the class, the effect on the 23(b)(3) class.

VACATED AND REMANDED.

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Blenheim Capital Holdings v. Lockheed Martin Corp.

United States District Court for the Eastern District of Virginia, Alexandria Division

September 30, 2021, Decided; September 30, 2021, Filed

Civil Action No. 1:20-cv-1608

Reporter
2021 U.S. Dist. LEXIS 198334 *

BLENHEIM CAPITAL HOLDINGS LTD., ET. AL., Plaintiffs, v. LOCKHEED MARTIN CORPORATION, ET AL., Defendants.

Subsequent History: Affirmed by *Blenheim Capital Holdings Ltd. v. Lockheed Martin Corp., 2022 U.S. App. LEXIS 31511 (4th Cir. Va., Nov. 15, 2022)*

Core Terms

commercial activity, satellite, antitrust claim, domestic, offset, import, antitrust, commerce, military, Sherman Act, allegations, effects, four year, sovereign, gravamen, foreign sovereign immunities, statute of limitations, competitor, purchaser, asserts, powers, remote, subject matter jurisdiction, expropriation, exercises, Space, cases

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN1[] **Sherman Act, Defenses**

A federal antitrust claim shall be forever barred unless commenced within four years after the cause of action accrued. 15 U.S.C.S. § 15b. The same four year statute of limitations applies to claims brought under Virginia's state ***antitrust law***. Va. Code Ann. § 59.1-9.14. The four year statute of limitations period begins to run when the cause of action accrues, which generally begins when a defendant commits an act that causes economic harm to a plaintiff. In other words, discovery of the injury, not discovery of the other elements of a claim, is what starts the clock.

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

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

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

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

HN2[] **International Aspects, Commerce With Foreign Nations**

The Sherman Act is a federal antitrust statute that prohibits activities that restrict interstate commerce and competition in the marketplace. It provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal. 15 U.S.C.S. § 1.

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

International Law > Authority to Regulate > Anticompetitive Activities

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

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN3[] **International Aspects, Commerce With Foreign Nations**

The Sherman Act is limited somewhat by the Foreign Trade Antitrust Improvements Act of 1982, which excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury. It does so by setting forth a general rule stating that the Sherman Act shall not apply to conduct involving trade or commerce with foreign nations. It then creates exceptions to the general rule, applicable where (roughly speaking) the conduct significantly harms imports, domestic commerce, or American exporters. So, generally, the Sherman Act does not reach foreign antitrust injuries. However, the U.S. may still have jurisdiction over an antitrust claim regarding foreign commerce where one of two exceptions applies: (1) the domestic effects exception or (2) the import exception.

Antitrust & Trade Law > Sherman Act > Claims

International Law > Authority to Regulate > Anticompetitive Activities

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

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN4[] **Sherman Act, Claims**

The domestic effects exception to the foreign commerce antitrust exception applies when anticompetitive conduct: (1) has a direct, substantial, and reasonably foreseeable effect on domestic commerce, and (2) such effect gives rise to a Sherman Act claim. This exception does not apply when a claim rests solely on foreign harm. The domestic effect of any anti-competitive conduct must be direct, substantial, and reasonably foreseeable. 15 U.S.C.S. § 6a. The Seventh Circuit has explained: Just as tort law cuts off recovery for those whose injuries are too remote from the cause of an injury, so does the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) exclude from the Sherman Act foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce.

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

International Law > Authority to Regulate > Anticompetitive Activities

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

HN5[] **International Aspects, Commerce With Foreign Nations**

The import exception to the general rule abrogating the Sherman Act's applicability to foreign commerce states that the Sherman Act applies to a defendant's conduct abroad that constitutes, includes, or has as a necessary consequence the movement of goods into this country. Notably, conduct does not involve import commerce if it has no direct or immediate consequence for domestic markets and is intended merely to have a domestic impact in the future. Nothing in the text of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) otherwise suggests intent-based analysis.

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

International Law > Authority to Regulate > Anticompetitive Activities

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN6[] **International Aspects, Commerce With Foreign Nations**

The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) cuts off recovery for foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce. As the Fourth Circuit has stated, the antitrust laws were not intended as a vehicle for converting business tort claims into antitrust causes of action.

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > Construction & Interpretation

International Law > ... > Exceptions > Commercial Activities > Nexus With Cause of Action

International Law > ... > Exceptions > Commercial Activities > Substantial Contacts

International Law > ... > Exceptions > Commercial Activities > Direct Effects

International Law > ... > Foreign Sovereign Immunities Act > Jurisdiction > Subject Matter Jurisdiction

HN7[] **Foreign Sovereign Immunities Act, Construction & Interpretation**

The Foreign Sovereign Immunities Act (FSIA) provides that federal courts have original jurisdiction over all claims against a foreign state in which the state is not entitled to sovereign immunity. 28 U.S.C.S. § 1330(a). However, a foreign state shall not be immune from the jurisdiction of courts of the United States in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state. 28 U.S.C.S. § 1605(a)(2). This has been referred to as the commercial activity exception to the FSIA.

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > Burdens of Proof

International Law > ... > Exceptions > Commercial Activities > Nexus With Cause of Action

International Law > ... > Exceptions > Commercial Activities > Substantial Contacts

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > Construction & Interpretation

International Law > ... > Exceptions > Commercial Activities > Direct Effects

HN8[] **Foreign Sovereign Immunities Act, Burdens of Proof**

The commercial activity exception to the Foreign Sovereign Immunities Act (FSIA) has been tailored by the Supreme Court. The Court has held that where the conduct constituting the gravamen of the plaintiffs suit occurs abroad, the commercial activity exception to the FSIA does not apply. The Court does not apply an element by element analysis, but instead zeroes in on the core of the plaintiffs suit to identify the conduct that the suit was based upon. The Court has explained that "based upon" means those elements of a claim that, if proven, would entitle plaintiff to relief under his theory of the case. It requires more than a mere connection with-or relation to-the commercial activity.

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > Construction & Interpretation

International Law > ... > Exceptions > Commercial Activities > Nexus With Cause of Action

International Law > ... > Exceptions > Commercial Activities > Substantial Contacts

HN9[] **Foreign Sovereign Immunities Act, Construction & Interpretation**

The Supreme Court has limited the commercial activity exception to the Foreign Sovereign Immunities Act (FSIA) to those cases in which a state exercises only those powers that can be exercised by private citizens. Where a state exercises powers that are particular only to sovereigns, the commercial activity exception does not apply. The commercial activity exception concerns the type of actions engaged in by the government, rather than their purpose. 28 U.S.C.S. § 1603(d).

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > Construction & Interpretation

HN10[] **Foreign Sovereign Immunities Act, Construction & Interpretation**

A foreign sovereign engages in commercial activity only when it exercises those powers that can also be exercised by private citizens, and not when it employs powers that are particular to sovereigns.

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > Construction & Interpretation

International Law > ... > Foreign Sovereign Immunities Act > Exceptions > Expropriation

International Law > Foreign & International Immunity > Sovereign Immunity > Waivers

HN11[] **Foreign Sovereign Immunities Act, Construction & Interpretation**

The expropriation exception under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C.S. § 1605(a)(3), waives foreign sovereign immunity in cases asserting that rights in property were taken in violation of international law.

International Law > ... > Exceptions > Commercial Activities > Nexus With Cause of Action

HN12[] **Commercial Activities, Nexus With Cause of Action**

Commercial activity occurs in the United States if there is a substantial contact between the commercial activity and the United States.

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > Burdens of Proof

International Law > ... > Exceptions > Commercial Activities > Nexus With Cause of Action

International Law > ... > Exceptions > Commercial Activities > Substantial Contacts

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > Construction & Interpretation

International Law > ... > Exceptions > Commercial Activities > Direct Effects

HN13[] **Foreign Sovereign Immunities Act, Burdens of Proof**

Supreme Court case law is clear: where the conduct constituting the gravamen of the plaintiff's suit occurs abroad, the commercial activity exception to the Foreign Sovereign Immunities Act (FSIA) does not apply. The Supreme Court does not apply an element by element analysis, but instead zeroes in on the core of the plaintiff's suit to identify the conduct that the suit was based upon. The Supreme Court has also explained that "based upon" means those elements of a claim that, if proven, would entitle plaintiff to relief under his theory of the case. It requires more than a mere connection with-or relation to-the commercial activity. Finally, the commercial activity exception to the FSIA is limited to those cases in which a state exercises only those powers that can be exercised by private citizens. Where a state exercises powers that are particular only to sovereigns, the commercial activity exception does not apply.

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Judges: Liam O'Grady, United States District Judge.

Opinion by: Liam O'Grady

Opinion

ORDER

This matter comes before the Court on Defendant Lockheed Martin Corporation's Motion to Dismiss Plaintiffs' Amended Complaint, Dkt. 58, and on Defendant Airbus Defense Space and SAS's Motion to Dismiss Plaintiffs' Amended Complaint, Dkt. 66. The matter has been fully briefed, and the Court held a hearing on Wednesday, September 22, 2021. **[*2]** Based on the following analysis, both Motions to Dismiss are **GRANTED**.

I. BACKGROUND

A. The Parties

Plaintiff Blenheim Capital is a company based in Guernsey. Blenheim is an experienced broker in structuring offset agreements for defense trade transactions. Plaintiff Blenheim Holdings is the 100% owner of Blenheim Capital. Dkt. 53 at 7.

Defendant Lockheed Martin is a Maryland corporation. Lockheed is a global security and aerospace company serving both U.S. and international customers with defense, civil, and commercial products and services. It is one of the largest companies in the world. Dkt. 53 at 7.

Defendant Airbus Defense and Space SAS ("Airbus France") is a French company. It is a division of Airbus SE, a global leader in the defense and space industry. Dkt. 53 at 8.

Defendant Republic of South Korea ("South Korea") is a foreign sovereign state. Defendant Defense Acquisition Program Administration ("DAPA") is an executive agency of the South Korean government within the Ministry of National Defense. Dkt. 53 at 8. South Korea is a member of the Hague Convention and has not yet been served in this lawsuit.

B. Statement of Facts

In a Foreign Military Sale ("FMS"), a domestic producer sells **[*3]** military goods to a foreign government, using the U.S. Department of Defense ("DoD") as an intermediary. Often, as part of an FMS transaction, the foreign purchaser will require the domestic partner to provide the foreign government with an "offset." In an offset transaction, the domestic producer is required to directly provide the foreign purchaser with goods or services that partially "offset" the foreign government's procurement expenditures. Dkt. 76-1 at 23. Prior to the events at issue in this case, Plaintiff Blenheim had amassed significant experience in the field of offset agreements, having structured offset solutions for more than twenty multinational corporations, which satisfied approximately $18.5 billion in offset obligations. Dkt. 76-1 at 23.

In the 1990's, Lockheed developed the F-35 fighter jet. In 2011, South Korea announced an intent to enhance its stealth-fighter capabilities, and Lockheed thus had an opportunity to sell, via the FMS process, a fleet of F-35s to South Korea. Dkt. 76-1 at 24-25.

Lockheed engaged Blenheim to develop an offset offer - titled "Project Archer." In Project Archer, Blenheim developed an offset transaction whereby Lockheed Martin Overseas **[*4]** Corporation ("LMOC") would provide South Korea with a military satellite. LMOC would provide $150 million to Blenheim, which Blenheim would then use, in combination with financing, to procure three satellites. One of these satellites would be provided to South Korea to satisfy Lockheed's F-35 offset obligation. Blenheim would own the remaining two commercial satellites, and would sell their bandwidth for use in secure government communications. Dkt. 76-1 at 24. Blenheim expected this arrangement to result in excess of $500 million in profits. Dkt. 76-1 at 92.

Blenheim then conducted a bidding process to identify the optimal original equipment manufacturer ("OEM") partner for Project Archer. Ultimately, Blenheim selected Airbus England, an affiliate of Airbus SAS, as the OEM for Project Archer. On November 22, 2013, South Korea accepted Lockheed's bid, which included the Project Archer offset offer, to provide South Korea's new fighter jets. Dkt. 76-1 at 25. LMOC and Airbus England both signed contracts obligating them to participate in Project Archer. Dkt. 76-1 at 25.

Ultimately, Lockheed and Airbus SAS decided to cut Blenheim out of the deal. Dkt. 76-1 at 26. South Korea also began **[*5]** to pressure the Defendants into a direct-procurement, on the basis that it would accelerate receipt of the military satellite, and to offer inducements to Lockheed. Dkt. 76-1 at 29. On October 6, 2016, LMOC provided Blenheim with a purported "formal notice... of the immediate termination" of the contract ("the IBA") for cause. Dkt. 76-1 at 29. Lockheed, Airbus France, and South Korea proceeded with the military satellite procurement and worked to obtain the necessary approvals and permits from the Defense Security Cooperation Agency, the Federal Aviation Administration, and other government agencies to do so. Lockheed paid Airbus for the satellite and South Korea credited billions of dollars to Lockheed's offset obligation. Dkt. 53 at 43.

As Plaintiff Blenheim writes, "In the end, Lockheed, Airbus SAS, and South Korea all achieved their goals: Lockheed, at no additional cost to itself, offset its obligations to South Korea and kept a competitor out the market; Airbus SAS kept its sale of the military satellite and kept a competitor out of the market; and South Korea received its military satellite. Only Blenheim, the party that spent years of effort and significant resources on Project **[*6]** Archer, was left with nothing." Dkt. 76-1 at 30.

II. LEGAL STANDARD

In its Amended Complaint, Dkt. 53, Plaintiff Blenheim asserts two bases for subject matter jurisdiction pursuant to a federal question. First, Plaintiff Blenheim asserts that this Court has subject matter jurisdiction over claims against Defendants Lockheed and Airbus because Plaintiffs' claims for violations of *15 U.S.C. § 1* - the Sherman Act - arise under federal law. Dkt. 53 at 8. Second, Plaintiff Blenheim asserts that this Court has subject matter jurisdiction over claims against South Korea and South Korea's Defense Acquisition Program Administration (DAPA) pursuant to the Foreign Sovereign Immunities Act ("FSIA"). *Id.* Each of these bases for subject matter jurisdiction is addressed in turn.[1]

A. Plaintiffs' Antitrust Claim

Plaintiff Blenheim fails to adequately assert an antitrust claim for two reasons. First, the antitrust claim falls outside the four year statute of limitations period and, second, the antitrust claim is barred by the Foreign Trade Antitrust Improvements Act ("FTAIA").

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[1] Defendant Lockheed Martin Corporation's Motion to Dismiss, Dkt. 58, argues that this Court lacks subject matter jurisdiction under the Foreign Sovereign Immunity Act. Defendant Airbus SAS's Motion to Dismiss, Dkt. 66, argues that this Court lacks subject matter jurisdiction under the Sherman Act. Each Defendant adopts the other's arguments on these fronts.

1. Statute of Limitations on Plaintiffs' Antitrust Claim

HN1[] A federal antitrust claim "shall be forever barred unless commenced within four years after the cause **[*7]** of action accrued." *15 U.S.C. § 15b*. The same four year statute of limitations applies to claims brought under Virginia's state ***antitrust law***. *Va. Code Ann. § 59.1-9.14*.

The four year statute of limitations period begins to run when the cause of action accrues, which "generally [begins] when a defendant commits an act that causes economic harm to a plaintiff." *GO Comput., Inc. v. Microsoft Corp., 508 F.3d 170, 177 (4th Cir. 2007)* (citing *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*. In other words, "... discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Rotella v. Wood, 528 U.S. 549, 555, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000)*.

At the latest, Blenheim was aware of its alleged injury by October 6, 2016. This is the date on which Lockheed "provided Blenheim with a purported 'formal notice... of the immediate termination' of the IBA for cause," Dkt. 53 at 42, thereby causing economic injury to Blenheim.

Plaintiff Blenheim first filed its antitrust claim in the Amended Complaint on May 21, 2021. Dkt. 53. More than four years transpired between October 6, 2016 and May 21, 2021. Even Plaintiff Blenheim's original Complaint, Dkt. 1, which was filed on December 31, 2020 and which notably did not state an antitrust claim, also falls outside the four year statute of limitations period. Therefore, Blenheim is barred from bringing its antitrust claim under both federal and **[*8]** Virginia state law.

2. Plaintiffs' Substantive Antitrust Claim

In addition to being barred by the four year statute of limitations period on its antitrust claim, Plaintiff Blenheim fails to sufficiently allege an antitrust claim.

a. Legal Standard

Plaintiff Blenheim alleges antitrust violations against Defendants Lockheed and Airbus under *15 U.S.C. § 1* - the Sherman Act. ***HN2***[] The Sherman Act is a federal antitrust statute that prohibits activities that restrict interstate commerce and competition in the marketplace. It provides that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal." *15 U.S.C. § 1*.

HN3[] The Sherman Act is limited somewhat by the Foreign Trade Antitrust Improvements Act of 1982, which "excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury. It does so by setting forth a general rule stating that the Sherman Act 'shall not apply to conduct involving trade or commerce ... with foreign nations.' It then creates exceptions to the general rule, applicable where (roughly speaking) the conduct significantly harms imports, domestic commerce, or American exporters." *F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 158, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)* (internal citations omitted). So, generally, the Sherman Act does not reach foreign **[*9]** antitrust injuries. However, the U.S. may still have jurisdiction over an antitrust claim regarding foreign commerce where one of two exceptions applies: (1) the domestic effects exception or (2) the import exception.

HN4[] First, the domestic effects exception applies when anticompetitive conduct: "(1) has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce, and (2) 'such effect gives rise to a [Sherman Act] claim.'" *Id. at 159*. This exception does not apply when a claim rests solely on foreign harm. For example, in *F. Hoffman-La Roche Ltd v. Empagran S.A.*, the Supreme Court considered a price-fixing scheme that resulted in higher vitamin prices both in the United States and internationally. The Court explained that an international purchaser who suffered from higher prices was barred from bringing a Sherman Act claim under the FTAIA, while a

U.S. purchaser suffering the same harm could bring such a claim. *Id.* The Court signaled a hesitancy to apply American antitrust laws and remedies to a foreign plaintiff for conduct that occurred abroad, particularly when the foreign injury was deemed independent of any potential domestic injury. *Id. at 165*. The domestic effect of any anti-competitive conduct must **[*10]** be "direct, substantial, and reasonably foreseeable." *15 U.S.C. § 6a*. The Seventh Circuit has explained, "Just as tort law cuts off recovery for those whose injuries are too remote from the cause of an injury, so does the FTAIA exclude from the Sherman Act foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce." *Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 857 (7th Cir. 2012)* (cleaned up).

HN5[] Second, the import exception to the general rule abrogating the Sherman Act's applicability to foreign commerce states that "the Sherman Act applies to a defendant's conduct abroad that constitutes, includes, or has as a necessary consequence the movement of goods into this country." *Biocad JSC v. F. Hoffman-La Roche, 942 F.3d 88, 96 (2d Cir. 2019)*. Notably, "[c]onduct does not 'involve' import commerce if it has no direct or immediate consequence for domestic markets and is intended merely to have a domestic impact in the future. Nothing in the text of the FTAIA otherwise suggests intent-based analysis." *Id. at 97*.

Plaintiffs' antitrust claims are barred under the Foreign Trade Antitrust Improvements Act as Defendants' conduct meets neither the domestic effects exception nor the imports exception to the FTAIA. Plaintiffs' claim is too remote and too speculative to be considered an antitrust violation.

b. Discussion

In Plaintiffs' Amended **[*11]** Complaint, Plaintiffs color a number of Defendants' behaviors as anticompetitive. For example, Plaintiffs state that "Multiple Lockheed executives repeatedly expressed concern about the competitive impact of the transaction, including that through Project Archer, Lockheed was essentially funding a new competitor for Lockheed's own satellite division, LM Space." Dkt. 53 at 27. Plaintiffs further allege that, "Like the Lockheed officials... various Airbus officials grew concerned that Blenheim would become a competitor with Airbus France and its affiliates in the market for the sale and leasing of satellite capacity. It expressed such concerns on multiple occasions, including at a 2015 dinner attended by senior executives of Airbus France and Airbus England... An Airbus England official who was friendly to Blenheim, and supportive of Project Archer, told Blenheim's CEO to 'watch your back' because Airbus France officials were concerned with the competitive impact of providing the satellites to Blenheim." Dkt. 53 at 30.

More specifically, Plaintiffs allege an antitrust violation, stating that they "suffered an injury from a conspiracy that reduced output and eliminated a nascent competitor **[*12]** in the market for the sale of commercial satellite capacity, including but not limited to the X and Ka band satellite capacity in the region covered by MYGOVSAT." Dkt. 76-1 at 38. Plaintiffs allege that Defendant Airbus was a competitor and consumer in the market of selling or leasing capacity in X and Ka bands. Dkt. 76-1 at 39.

Defendants counter that Plaintiffs' antitrust claims are barred by the FTAIA. Defendants note that the Sherman Act protects against conspiracies to unreasonably restrain trade in the market, not the ending of a business relationship. Dkt. 67 at 33; *see* *Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 711 (4th Cir. 1991)*. Defendants note in particular that Plaintiffs' claims meet neither the import exception nor the domestic effects exception of the FTAIA. Defendants are correct in this assertion. Plaintiffs' claim is too remote and speculative to be properly considered an antitrust violation.

First, Defendants note that Plaintiffs' claims do not meet the import exception, as the purported market that Plaintiffs describe is entirely foreign. In Defendants' words: "Blenheim did not import anything to the United States; instead, Blenheim, based in Guernsey, contracted with a French and American company to build a satellite for South Korea." **[*13]** Blenheim alleges no conduct involving imports to the U.S. Dkt. 67 at 36.

Second, Defendants note that Plaintiffs' claims do not meet the domestic effects exception. Defendants note that Plaintiffs' plan to sell satellite capacity to Malaysia never extended beyond negotiations, and that there was never any effect on U.S. commerce. Dkt. 67 at 37. In Defendants' words: "The mere possibility that Blenheim eventually may have sold satellites to Malaysia, contracted with an unnamed satellite communications provider to use Malaysia's orbital positions, and participated in a constellation that could cover part of the U.S. 'is too remote and speculative' to fall within the purview of FTAIA." Dkt. 67 at 37.

Plaintiff Blenheim counters that, "Defendants base their argument on a misstatement of Blenheim's allegations... Instead, Blenheim alleges it intended to use Malaysia's orbital positions to lease and sell *satellite capacity* to other *third parties*... Moreover, Blenheim's allegations make clear that it was planning to combine coverage with another satellite provider to provide *global coverage*... This shows Blenheim would have been in the business of providing certain kinds of satellite capacity **[*14]** on a global basis, including in the United States - making the FTAIA inapplicable." Dkt. 76-1 at 49 (emphasis in original).

Ultimately, Plaintiff Blenheim's allegations here fail to meet either the import exception or the domestic effects exception of the FTAIA. They do not allege an "import." No good was ever imported into the United States. The fact that Plaintiffs intended to sell satellite capacity that might reach the United States does not suffice. *See* *Biocad JSC v. F. Hoffman-La Roche, 942 F.3d 88, 97 (2d Cir. 2019)*. Nor do Plaintiffs allege any "direct, substantial and reasonably foreseeable effect" as required under *15 U.S.C. § 6a*. Their claim is speculative, as Plaintiffs never actually provided satellite coverage. Even if they did, it is hard to fathom how such coverage could be considered a "direct" and "substantial" influence on United States commerce. ***HN6***[] The FTAIA cuts off recovery for "foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce." *Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 857 (7th Cir. 2012)* (cleaned up). As the Fourth Circuit has stated, "... the antitrust laws were not intended... as a vehicle for converting business tort claims into antitrust causes of action." *Oksanen v. Page Mem? Hosp., 945 F.2d 696, 711 (4th Cir. 1991)*. Here, Plaintiff Blenheim attempts to convert a business tort claim into an antitrust claim, **[*15]** but cannot do so.

B. Plaintiffs' Foreign Sovereign Immunities Act Claim

Plaintiffs fail to state a claim under the Foreign Sovereign Immunities Act ("FSIA"). The sale at issue in this case is a sovereign-to-sovereign transaction and does not fit the FSIA's "commercial activity" exception.

1. Legal Standard

HN7[] The Foreign Sovereign Immunities Act provides that federal courts have original jurisdiction over all claims against a foreign state in which the state is not entitled to sovereign immunity. *28 U.S.C. § 1330(a)*. However, "[a] foreign state shall *not* be immune from the jurisdiction of courts of the United States in any case ... in which the action is based upon a *commercial activity* carried on in the United States by the foreign state..." *28 U.S.C. § 1605(a)(2)* (emphasis added). This has been referred to as the "commercial activity" exception to the FSIA.

HN8[] The "commercial activity" exception to the FSIA has been tailored by the Supreme Court. The Court has held that where the conduct constituting the *gravamen* of the plaintiffs suit occurs abroad, the "commercial activity" exception to the FSIA does *not* apply. *OBB Personenverkehr AG v. Sachs, 577 U.S. 27, 136 S.Ct. 390, 193 L. Ed. 2d 269 (2015)*. The Court does not apply an element by element analysis, but instead zeroes in on the core of the plaintiffs suit to **[*16]** identify the conduct that the suit was "based upon." *Id.* The Court has explained that "based upon" means those elements of a claim that, if proven, would entitle plaintiff to relief under his theory of the case. It requires more than a mere connection with - or relation to - the commercial activity. *See* *Saudi Arabia v. Nelson, 507 U.S. 349, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993)*.

HN9[] The Supreme Court has also limited the "commercial activity" exception to the FSIA to those cases in which a state exercises only those powers that can be exercised by private citizens. Where a state exercises powers that are particular only to sovereigns, the commercial activity exception does not apply. *Id. See also* *Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992)* (explaining that when a foreign sovereign acts in the manner of a private player within a market, the actions are "commercial" within the meaning of the FSIA). The "commercial activity" exception concerns the *type* of actions engaged in by the government, rather than their purpose. *See* 28 U.S.C. § 1603(d); Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992).

2. Discussion

In this case, Plaintiffs assert that their claims against Defendant South Korea and South Korea's Defense Acquisition Program Administration (DAPA) are based on South Korea's commercial activity within the United States. Specifically, Plaintiffs allege that the funds that **[*17]** South Korea and DAPA provided to the U.S. Department of Defense for the purchase of a military satellite were passed to Lockheed, as the prime contractor, and then directly to Airbus; and that Blenheim was cut out of the deal. Dkt. 53.

In the Motion to Dismiss, Defendants counter that the "commercial activity" exception to the FSIA does not apply here. Defendants note, first, that the conduct alleged by Plaintiffs is not "commercial activity," and, second, the action is not "based on" commercial activity as the conduct alleged does not constitute the gravamen of the suit. Dkt. 59. Each of these assertions is considered in turn, below.

HN10[] First, Defendants note — correctly — that a foreign sovereign engages in "commercial activity" only when it exercises "those powers that can also be exercised by private citizens," and not when it employs powers that are particular to sovereigns. *See* France.com, Inc. v. French Republic, 992 F.3d 248, 252 (4th Cir. 2021). Defendants note that the Pentagon's Foreign Military Sales ("FMS") transactions alleged by Plaintiffs are exclusively between the U.S. government and a foreign government — here, South Korea. Private citizens in the marketplace could not participate in this transaction. Further, there was no privity of contract **[*18]** between the contractor and the foreign sovereign. *See* Dkt. 59.

Second, Defendants note that, even if South Korea's involvement in the FMS program could be deemed "commercial activity," Plaintiff Blenheim's claims against South Korea are not *"based upon"* that activity because they do not form the gravamen of Plaintiffs' suit for tortious interference of contract. Dkt, 59 at 23. "Based upon" means those claims that, if proven, would entitle Plaintiff to relief. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993). Here, the gravamen of Plaintiffs' claims is the tortious interference with contract by Defendants. The government-to-government FMS transaction does not form the basis of Plaintiffs' claims. *See* Dkt. 77.

Plaintiffs counter with two compelling - although nonbinding and distinguishable-cases defining "commercial activity": Simon v. Republic of Hungary, 443 F.Supp.3d 88 (D.D.C. 2020) and BAE Systems Technology v. Republic of Korea's Defense Acquisition Program Administration, 2016 U.S. Dist. LEXIS 146593, 2016 WL 6167914 (D. Md. 2016). Plaintiffs argue that both Simon and *BAE* hold that FMS transactions constitute "commercial activity" under the FSIA, and the types of military equipment sold in those cases are subject to the same or similar "FMS-only" restrictions as those referred to by Defendants. Dkt. 76-1 at 33. Plaintiffs further note that the offset transaction was not government-to-government, as the satellite offset never called for **[*19]** the satellite to be transferred to or from the U.S. government. Dkt. 76-1 at 33.

These cases are both nonbinding and distinguishable. In Simon, the United States District Court for the District of Columbia considered a class action brought by fourteen Hungarian Jewish survivors of the Hungarian Holocaust against the Republic of Hungary and the Hungarian state-owned railway (MAV) arising from Defendants' participation in and perpetration of the Holocaust. Plaintiffs sought restitution for property that was seized from them as part of Hungary's broader effort to eradicate the Jewish people. Simon v. Republic of Hungary, 443 F.Supp.3d 88, 92-94 (D.D.C. 2020). On remand, the Court held that the Plaintiffs' complaint "sufficiently alleges, in claims asserting genocidal takings of property from Hungarian Jews between 1941 and 1945, that each defendant, Hungary and MAV, commingled that expropriated property in the country's treasury and thereby continue to possess such property to sustain their commercial activities, including Hungary's debt offerings and military purchases in the United States..." Id. at 116. The Court further noted that Hungary and the railway engaged in commercial activity in the United States as required to satisfy the commercial-activity nexus element **[*20]** of the expropriation exception to sovereign immunity under the FSIA. *Id. at 109-110*. The present case has a starkly different factual background; moreover, the present case does not deal with the "expropriation exception" to sovereign immunity, as is at issue in *Simon*. ***HN11***[] As the Court in *Simon* notes, "the FSIA's expropriation exception, *28 U.S.C. § 1605(a)(3)*, 'waives foreign sovereign immunity in cases asserting that 'rights in property [were] taken in violation of international *law ...'"* *Id. at 99*. The Court held, specifically, that "Plaintiffs' allegations regarding Hungary's bond offerings and military equipment purchases are sufficient to meet the commercial activity prong of the expropriation exception. "*Id. at 107*. Moreover, as Defendants note,*" Simon* did not involve an FMS-Only transaction with equipment that is *not* available for purchase by private entities, as was the case here with the procurement of F-35 aircraft. *Simon* is therefore also distinguishable." Dkt. 77 at 9.

BAE Systems Technology v. Republic of Korea's Defense Acquisition Program Administration, 2016 U.S. Dist. LEXIS 146593, 2016 WL 6167914 (D. Md. 2016), is similarly non-binding and distinguishable. That case involved a contract dispute between BAE Systems and the Republic of Korea and its Defense Acquisition Program Administration (DAPA). The Court held that, "[at] its 'core,' this case is about whether or not South Korea has **[*21]** a viable breach of contract claim against BAE for its failure pay DAPA $43,250,000 due to the contractor's asserted failure to prevent the U.S. Government from increasing the price of the F-16 fleet upgrades that were the subject of an underlying FMS contract." *Id. 2016 U.S. Dist. LEXIS 146593, [WL] at *6*. ***HN12***[] The Court held that "commercial activity occurs 'in the United States' if there is a 'substantial contact' between the commercial activity and the United States." *Id. 2016 U.S. Dist. LEXIS 146593, [WL] at *5*. Unlike in *BAE*, in the present case, the commercial activity at issue is not the gravamen of Plaintiffs' suit; there is no "substantial contact" between the commercial activity and the United States. Moreover, as Defendants note, *BAE* does not actually hold that the FMS transaction was a commercial activity, and is therefore inapposite. Dkt. 77 at 9.

Ultimately, this Court is compelled to follow the precedent set by the U.S. Supreme Court. ***HN13***[] That case law is clear: where the conduct constituting the *gravamen* of the plaintiff's suit occurs abroad, the "commercial activity" exception to the FSIA does *not* apply. *See* *OBB Personenverkehr AG v. Sachs, 577 U.S. 27, 136 S.Ct. 390, 193 L. Ed. 2d 269 (2015)*. The Supreme Court does not apply an element by element analysis, but instead zeroes in on the core of the plaintiff's suit to identify the conduct that the suit **[*22]** was "based upon." *Id.* The Supreme Court has also explained that "based upon" means those elements of a claim that, if proven, would entitle plaintiff to relief under his theory of the case. It requires more than a mere connection with - or relation to - the commercial activity. *Saudi Arabia v. Nelson, 507 U.S. 349, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993)*. Finally, the "commercial activity" exception to the FSIA is limited to those cases in which a state exercises only those powers that can be exercised by private citizens. Where a state exercises powers that are particular only to sovereigns, the commercial activity exception does not apply. *Id. See also* *Republic of Argentina v. Weltover, 504 U.S. 607, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992)*.

Following the law as set forth by the Supreme Court, this Court finds that the transaction at issue here does not meet the "commercial activity" exception of the FSIA. The transaction was sovereign-to-sovereign, South Korea could not purchase the F-35 fighter jets through a direct commercial sale. Additionally, Plaintiff Blenheim fails to show that its claims are "based upon" the conduct alleged by South Korea. The "gravamen" of Blenheim's suit is tortious interference with contract between Lockheed and Airbus — not the commercial activity by South Korea.

III. CONCLUSION

As Plaintiff Blenheim has failed to allege **[*23]** an antitrust claim or a claim under the Foreign Sovereign Immunities Act, this Court lacks subject matter jurisdiction to hear this case. Therefore, Defendant Lockheed Martin Corporation's Motion to Dismiss Plaintiffs' Amended Complaint, Dkt, 58, and Defendant Airbus Defense Space and SAS's Motion to Dismiss Plaintiffs' Amended Complaint, Dkt. 66 are both hereby **GRANTED**. The Amended Complaint, Dkt. 53, is **DISMISSED**.

It is **SO ORDERED**.

September 30, 2021

Alexandria, Virginia

/s/ Liam O'Grady

Liam O'Grady

United States District Judge

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Four In One Co. v. SK Foods, L.P.

United States District Court for the Eastern District of California

September 30, 2021, Decided; September 30, 2021, Filed

No. 2:08-cv-3017 KJM JDP; No. 2:08-cv-03074- KJM-JDP; No. 2:09-cv-00027-KJM-JDP; No. 2:09-cv-00442 KJM JDP

Reporter

2021 U.S. Dist. LEXIS 189606 *; 2021 WL 4480737

Four In One Company, Inc., et al., Plaintiffs, v. SK Foods, L.P., et al., Defendants.Diversified Foods and Seasoning, Inc., et al., Plaintiffs, v. SK Foods, L.P., et al., Defendants.Bruce Foods Corporation., et al., Plaintiffs, v. SK Foods, L.P., et al., Defendants;Cliffstar Corporation., et al., Plaintiffs, v. SK Foods, L.P., et al., Defendants

Prior History: Bruce Foods Corp. v. Sk Foods, 2009 U.S. Dist. LEXIS 147787 (E.D. Cal., Mar. 11, 2009)

Core Terms

cy pres, funds, Foods, designee, Consolidated, settlement, tomato, antitrust, Consumer

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Judges: Kimberly J. Mueller, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: Kimberly J. Mueller

Opinion

ORDER

Plaintiffs Four in One Company, Inc., Bruce Foods Corporation, Cliffstar Corporation and Diversified Foods & Seasonings, Inc. are food product manufacturers that purchased processed tomato products from defendants, SK Foods L.P., Ingomar Packing Company, Los Gatos Tomato Products, Scott Salyer, Stuart Woolf and Greg Pruett. Consolidated Compl. ¶¶ 1-2, 9-12, ECF No. 113. Plaintiffs move **[*9]** for *cy pres* distribution of the remaining class funds, $8,766.85, to the Institute for Consumer Antitrust Studies at Loyola University Chicago School of Law (ICAS/Loyola) and dismissal of the action. Mem. In Support of *Cy Pres* Disbursement (Mem.), ECF No. 136.

Defendants did not file an opposition, and the court submitted the matter without a hearing. For the following reasons, the motion **is granted**.

I. BACKROUND

In 2009, another judge of this court issued an order consolidating the four above captioned cases. Consolidation Order (March 12, 2009), ECF No. 88. Plaintiffs then filed a consolidated complaint alleging defendants violated federal antitrust laws by conspiring to raise and fix the prices of a variety of processed tomato products. Consolidated Compl. ¶¶ 1-2. In January 2014, the court granted provisional certification of the settlement class and preliminarily approved class settlement. *See* Order (Jan. 2, 2014) at 1, ECF No. 222. Eight months later, the court granted plaintiffs' motion for final approval of the class settlement as to defendants Ingomar, Pruett, Woolf and Los Gatos. Order (Aug. 18, 2014), ECF No. 239. The class has received all funds from those settlements and **[*10]** the court entered final judgement against them. *Id.*

The actions against SK Foods, L.P. and Scott Salyer remained pending due to an ongoing bankruptcy action in the United States Bankruptcy Court for the Eastern District of California. Mem. at 2-3; *see also* Not. of Filing Bankruptcy, ECF No. 102. On November 20, 2020 the Chapter 11 Trustee for SK Foods filed a motion for approval of a distribution of unclaimed funds after the final distribution and entry of a final decree and closure of the bankruptcy case, which the Bankruptcy Court granted on December 30, 2020. Atty. Arthur N. Bailey, Jr. Decl. ¶ 5, ECF No. 314. Before closure of the bankruptcy case, in April 2015, class members began to receive pro rata shares from the distribution of these defendants' funds culminating recently with the final distribution in January 2021. *Id.* ¶ 6. Even more recently, plaintiffs were advised that $8,766.85 in uncashed checks remained in the class funds account. *Id.* ¶ 7.

Plaintiffs now move to resolve the pending claims against remaining defendants SK Foods, L. P, and Scott Salyer given the completion of the distribution of the class funds and termination of the bankruptcy action. Mem. at 3. Plaintiffs **[*11]** move to disburse the remaining funds to their proposed *cy pres* designee, ICAS. Mem. at 3-4. Additionally, plaintiffs move to dismiss the actions against remaining defendants, SK Foods, L.P. and Scott Salyer. Mem. at 1. Defendants do not oppose the motions.

II. LEGAL STANDARD

When a class action settlement results in unclaimed funds, the alternatives available are *cy pres* distribution, escheat to the government, or reversion to the defendants or the identified class members. *Six Mexican Workers v. Ariz. Citrus Growers, 904 F2d 1301, 1307 n.4 (9th Cir. 1990)* (also noting a fourth option is the pro rata distribution of the funds to located class members). "*Cy pres* provides a mechanism for distributing unclaimed funds to the next best class of beneficiaries." *In re Easysaver Rewards Litig., 906 F.3d 747, 760 (9th Cir. 2018)* (internal citations omitted). Where, as here, the original settlement did not provide for the *cy pres* designee, nothing appears to prevent the plaintiffs moving for such a designee in a separate motion.

"Not just any worthy" recipient will qualify, however. *Dennis v. Kellogg Co., 697 F.3d 858, 865 (9th Cir. 2012)*. There must be a "driving nexus between the plaintiff class and the *cy pres* beneficiary." *Id.* The *cy pres* distribution must "(1) address the objectives of the underlying statutes, (2) target the plaintiff class, or (3) provide reasonable certainty that any member **[*12]** will be benefitted." *Nachshin v. AOL, LLC, 663 F.3d 1034, 1040 (9th Cir. 2011)*.

III. ANALYSIS

The court finds that ICAS/Loyola's advocacy efforts align with the nature of the plaintiffs' lawsuit and the consumer protection objectives of the Sherman Act, *15 U.S.C. § 1*. Plaintiffs alleged defendants violated *Section 1* of the Sherman Act by conspiring "to fix prices, allocate customers, and rig bids for Processed Tomato Products, including tomato paste and diced tomatoes." Consolidated Compl. ¶ 87; *see* *15 U.S.C. § 1* ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."). Plaintiffs propose ICAS/Loyola as *cy pres* designee "because of its work on behalf of consumers in the area of ***antitrust law*** to protect the rights of individuals from the types of predatory behavior underlying the lawsuit." Mem. at 4. ICAS/Loyola is a "non-sectarian charitable organization" and "non-partisan, independent academic center that advocates for a more just, competitive, and consumer-friendly economy." Bailey Decl. ¶¶ 9-10.

Silent class members' interests will reasonably be benefitted by the distribution to ICAS/Loyola. Plaintiffs argue that ICAS/Loyola reflects the **[*13]** interests of the silent class members because "it has a nationwide reach sufficient to justify receipt of the *cy pres* award." Mem. at 5. The court agrees. ICAS/Loyola works on behalf of people such as the "[c]lass members in this case, who were consumers of commodities that were the subject of price-fixing agreements subject to antitrust liability." Bailey Decl. ¶ 9. University programs may be appropriate designees when the focus of the program aligns with the interests of a nationwide class. *See* *In re Easysaver Rewards Litigation, 906 F.3d at 761-62* (a university program focused on internet security and data privacy was an appropriate *cy pres* designee because its research would have far-reaching impact for a nationwide class injured by the mishandling of personal information). Likewise, ICAS/Loyola's research on creating a more just economy will benefit the silent, nationwide class impacted by alleged price fixing. Therefore, the organization is an appropriate *cy pres* designee due to the nexus between the class interests and the designee's interest.

Plaintiffs also request dismissal of the action against the remaining defendants, SK Foods, L.P. and Scott Salyer, under *Federal Rule Civil Procedure 41(a)(2)*. Mem. at 1. Given the conclusion of the bankruptcy proceedings against **[*14]** these defendants, the court grants this motion.

IV. CONCLUSION

The **motions are granted** as follows:

(1) The court grants the disbursement of the remaining class funds in the amount of $8,766.85 to the appropriate *cy pres* designee, the Institute for Consumer Antitrust Studies at Loyola University Chicago School of Law.

(2) The court dismisses on the merits and with prejudice the remaining causes of action against SK Foods, L.P. and Scott Salyer.

This order resolves ECF No. 313. This case is closed.

IT IS SO ORDERED.

DATED: September 30, 2021.

/s/ Kimberly J. Mueller

CHIEF UNITED STATES DISTRICT JUDGE

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Fund Liquidation Holdings LLC v. UBS AG

United States District Court for the Southern District of New York

September 30, 2021, Decided; September 30, 2021, Filed

15 Civ. 5844 (GBD)

Reporter

2021 U.S. Dist. LEXIS 189499 *; 2021 WL 4482826

FUND LIQUIDATION HOLDINGS LLC as assignee and successor-in-interest to Sonterra Capital Master Fund, Ltd., HAYMAN CAPITAL MASTER FUND, L.P., JAPAN MACRO OPPORTUNITIES MASTER FUND, L.P., and CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM, on behalf of themselves and all others similarly situated, Plaintiff, -against- UBS AG, UBS SECURITIES JAPAN CO. LTD., SOCIETE GENERALE SA, NATWEST GROUP PLC, NATWEST MARKETS PLC, NATWEST MARKETS SECURITIES, INC., BARCLAYS BANK PLC, BARCLAYS PLC, COOPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., LLOYDS BANKING GROUP PLC, LLOYDS BANK PLC, NEX INTERNATIONAL LIMITED, ICAP EUROPE LIMITED, TP ICAP PLC, BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., MERRILL LYNCH INTERNATIONAL, and JOHN DOES NOS. 1-50., Defendants

Subsequent History: Reconsideration denied by, Dismissed by, in part *Fund Liquidation Holdings LLC v. UBS AG, 2022 U.S. Dist. LEXIS 156453 (S.D.N.Y., Aug. 30, 2022)*

Prior History: *Sonterra Capital Master Fund, Ltd. v. UBS AG, 2017 U.S. Dist. LEXIS 38252 (S.D.N.Y., Mar. 10, 2017)*

Core Terms

Defendants', motion to dismiss, antitrust, personal jurisdiction, conspiracy, antitrust claim, manipulation, assigned, transactions, lack of personal jurisdiction, Traded, convey, lack of subject matter jurisdiction, allegations, Sherman Act, non-defendants, derivatives, instruments, contacts, domestic, extraterritorial, substituted, entities, damages, lawsuit, prices, cases, factual allegations, alleged conspiracy, speculative

Counsel: **[*1]** For Sonterra Capital Master Fund Ltd., Plaintiff: Geoffrey Milbank Horn, LEAD ATTORNEY, Christian Levis, Roland Raymond St. Louis, III, Sitso W. Bediako, Lowey Dannenberg P.C., White Plains, NY; Vincent Briganti, LEAD ATTORNEY, Lowey Dannenberg Cohen & Hart, P.C., White Plains, NY; Arthur R. Miller, New York, NY; Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Peter Anthony Barile, III, Peter Dexter St. Phillip, Jr, Raymond Peter Girnys, Lowey Dannenberg, P.C., White Plains, NY.

For California State Teachers' Retirement System, Plaintiff: Vincent Briganti, LEAD ATTORNEY, Lowey Dannenberg Cohen & Hart, P.C., White Plains, NY; Carl Hammarskjold, Berman Tabacco, San Francisco, CA; Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Patrick Thomas Egan, Berman DeValerio (MA), Boston, MA; Peter Anthony Barile, III, Lowey Dannenberg, P.C., White Plains, NY; Todd Seaver, PRO HAC VICE, Berman Tabacco, San Francisco, CA.

For Hayman Capital Master Fund, L.P., Plaintiff: Vincent Briganti, LEAD ATTORNEY, Lowey Dannenberg Cohen & Hart, P.C., White Plains, NY; Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Peter Anthony Barile, III, **[*2]** Lowey Dannenberg, P.C., White Plains, NY; Roland Raymond St. Louis, III, Lowey Dannenberg P.C., White Plains, NY.

For Japan Macro Opportunities Master Fund, L.P., Defendant: Vincent Briganti, LEAD ATTORNEY, Lowey Dannenberg Cohen & Hart, P.C., White Plains, NY; Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Peter Anthony Barile, III, Lowey Dannenberg, P.C., White Plains, NY.

For UBS AG, UBS Securities Japan Co., Ltd., Defendants: Lawrence Jay Zweifach, LEAD ATTORNEY, Eric Jonathan Stock, Jefferson Eliot Bell, Mark Adam Kirsch, Gibson, Dunn & Crutcher, LLP (NY), New York, NY; Leigh Mager Nathanson, King & Spalding LLP, New York, NY.

For Societe Generale S.A., Barclays PLC, Merrill Lynch International, NatWest Markets PLC, NatWest Markets Securities Japan Ltd., NatWest Markets Securities Inc., Cooperatieve Rabobank U.A., Defendants: Leigh Mager Nathanson, King & Spalding LLP, New York, NY.

For The Royal Bank of Scotland Group PLC, Defendant: David Sapir Lesser, Fraser Lee Hunter, Jr, Wilmer Cutler Pickering Hale & Dorr LLP (NYC), New York, NY; Jamie Stephen Dycus, Wilmer Cutler Pickering Hale and Dorr LLP (NYC), New York, NY;Leigh Mager Nathanson, King & Spalding **[*3]** LLP, New York, NY.

For BARCLAYS BANK PLC, Defendant: Leigh Mager Nathanson, Boies Schiller Flexner LLP, New York, NY.

For Lloyds Banking Group plc, Lloyds Bank PLC, Defendants: Marc Joel Gottridge, LEAD ATTORNEY, Benjamin Andrew Fleming, Lisa Jean Fried, Hogan Lovells US LLP (NYC), New York, NY; Kevin Timothy Baumann, Hogan Lovells US LLP (nyc), New York, NY; Leigh Mager Nathanson, Boies Schiller Flexner LLP, New York, NY.

For ICAP Europe Limited, Defendant: H. Rowan Gaither, IV, Shari A. Brandt, Richards Kibbe & Orbe LLP (NYC), New York, NY; Leigh Mager Nathanson, Boies Schiller Flexner LLP, New York, NY.

For Bank Of America Corporation, Bank of America N.A., Defendants: Arthur J. Burke, LEAD ATTORNEY, Davis Polk & Wardwell, New York, NY; Paul Steel Mishkin, LEAD ATTORNEY, Adam Gabor Mehes, Davis Polk & Wardwell LLP, New York, NY; Leigh Mager Nathanson, Boies Schiller Flexner LLP, New York, NY.

For NEX International Limited, TP ICAP PLC, Defendants: Andrew R. Podolin, LEAD ATTORNEY, Richards Kibbe & Orbe LLP, New York, NY; H. Rowan Gaither, IV, Shari A. Brandt, Richards Kibbe & Orbe LLP (NYC), New York, NY; Leigh Mager Nathanson, Boies Schiller Flexner LLP, New York, NY.

Judges: GEORGE B. DANIELS, **[*4]** United States District Judge.

Opinion by: GEORGE B. DANIELS

Opinion

MEMORANDUM DECISION AND ORDER

GEORGE B. DANIELS, United States District Judge:

Defendants (1) Bank of America Corporation, (2) Bank of America, N.A.; (3) Barclays plc; (4) Barclays Bank plc ("Barclays"); (5) Cooperatieve Rabobank U.A. (f/k/a Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A.); (6) Lloyds Banking Group plc; (7) Lloyds Bank plc; (8) Merrill Lynch International ("MLI"), (9) NatWest Markets plc (f/k/a The Royal Bank of Scotland plc) ("RES"), (10) NatWest Group plc (f/k/a The Royal Bank of Scotland Group plc), (11) NatWest Markets Securities Japan Ltd. (f/k/a RBS Securities Japan Limited), (12) Société Generale, (13) UBS AG ("UBS"), (14) UBS Securities Japan Co. Ltd., (15) NEX International Limited, (16) ICAP Europe Ltd., and (17) TP ICAP plc (collectively, "Defendants") move to dismiss Plaintiffs'[1] Second Amended Class Action Complaint ("Second Amended Complaint" or "SAC") (ECF No. 489) for lack of subject matter jurisdiction pursuant to *Federal*

[1] As detailed in the SAC, "Plaintiffs" include (1) Fund Liquidation Holdings LLC ("FLH") as assignee and successor-in-interest to Sonterra Capital Master Fund, Ltd., (2) Hayman Capital Master Fund, L.P. ("HCMF"), (3) Japan Macro Opportunities Master Fund, L.P. ("JMOF"), and (4) California State Teachers' Retirement System ("CalSTRS").

Rule of Civil Procedure ("FRCP") 12(b)(1), for lack of personal jurisdiction pursuant to FRCP 12(b)(2), and for failure to state a claim pursuant to FRCP 12(b)(6). (Not. Of Defs.' Mots. to Dismiss the SAC, (ECF No. 505).)[2]

Plaintiffs allege that from January **[*5]** 1, 2006 to June 30, 2011, Defendants conspired to fix prices and restrain trade in Yen LIBOR (the London Interbank Offered Rate for the Japanese Yen), and prices of Yen-LIBOR-based derivatives. (SAC ¶ 1.) Plaintiffs bring claims under the *Sherman Act, 15 U.S.C. § 1, et seq,* the *Racketeer Influenced and Corrupt Organizations Act ("RICO")*, *18 U.S.C. §§ 1961-1968*, and state law. *Id.*

Defendants' motion to dismiss Plaintiff Sonterra Capital Master Fund, Ltd. and Plaintiff Fund Liquidation Holding LLC ("FLH") for lack of subject matter jurisdiction is GRANTED. Defendants' motion to dismiss Plaintiffs Hayman Capital Master Fund, L.P., Japan Macro Opportunities Master Fund, L.P. (together, the "Hayman Funds") and California State Teachers' Retirement System ("CalSTRS"), for lack of subject matter jurisdiction is DENIED.

Defendants' motion to dismiss count one of the SAC for failure to state a claim is GRANTED as to all Defendants except RBS, Société Générale, UBS. Defendants motion to dismiss counts two and three of the SAC against all Defendants is GRANTED.

Defendants' motion to dismiss for lack of personal jurisdiction over RBS is GRANTED. This Court declines to exercise supplemental jurisdiction over Plaintiffs' remaining state law claims as to all Defendants except those claims by Plaintiff CalSTRS against **[*6]** Société Générale and UBS.

I. LEGAL STANDARDS

A. *Rule 12(b)(I)* Lack of Subject Matter Jurisdiction.

The proper procedural route to challenge standing is a motion under *Rule 12(b)(1)*. *All. For Envtl. Renewal, Inc. v. Pyramid Crossgates Co., 436 F.3d 82, 88 n.6 (2d Cir. 2006)*. "[O]nce the Defendants' motion to dismiss for lack of jurisdiction under *[Rule] 12(b)(1)* put[s] the Plaintiffs' Article III standing in issue, the District Court has leeway as to the procedure it wishes to follow." *All, For Envtl. Renewal, Inc. v. Pyramid Crossgates Co., 436 F.3d 82, 87-88 (2d Cir. 2006)* (citing *Gibbs v. Buck, 307 U.S. 66, 71-72, 59 S. Ct. 725, 83 L. Ed. 1111 (1939)*).

In deciding a motion to dismiss "pursuant to *Rule 12(b)(1)*, . . . the Court must accept as true all material factual allegations in the complaint, but should refrain from drawing any inferences in favor of the party asserting jurisdiction." *People United for Children, Inc. v. City of New York, 108 F. Supp. 2d 275, 283 (S.D.N.Y. 2000)* (citing *Atlantic Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd., 968 F.2d 196, 198 (2d Cir. 1992)*). "[U]nder *Rule 12(b)(1)*, [a court is] permitted to rely on non-conclusory, non-hearsay statements outside the pleadings . . . . " *M.E.S., Inc. v. Snell, 712 F.3d 666, 671 (2d Cir. 2013)*. The party invoking the benefit of federal jurisdiction bears the burden of establishing the existence of that jurisdiction. *Sharkey v. Quarantillo, 541 F.3d 75, 82-83 (2d Cir. 2008)* (internal citation omitted). Accordingly, "jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *APWU v. Potter, 343 F.3d 619, 623 (2d Cir. 2003)* (quoting *Shipping Fin. Servs. Corp. v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998)* (internal quotation marks omitted)).

Whether a plaintiff has standing relates to whether he is entitled to have a court decide the merits of a dispute. *See Rajamin v. Deutsche Bank Nat'l Trust Co., 757 F.3d 79, 84 (2d Cir. 2014)*. To **[*7]** have Article III standing, a plaintiff must show that (1) he has suffered an actual or imminent injury in fact, which is concrete and particularized; (2) there is a causal connection between the injury and the defendant's actions; and (3) it is likely that a favorable decision in the case will redress the injury. *See Lujan v, Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*.

[2] Given the lengthy procedural history and factual background, the Court assumes familiarity and only repeats the most salient aspects thereof to the instant motion.

B. *Rule 12(b)(2)* Lack of Personal Jurisdiction.

To survive a motion to dismiss for lack of personal jurisdiction under *Rule 12(b)(2)*, the plaintiff has the burden of making a *prima facie* showing that personal jurisdiction over the defendant exists. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 59 (2d Cir. 2012)*; *BWP Media USA Inc. v. Hollywood Fan Sites, LLC, 69 F. Supp. 3d 342, 349 (S.D.N.Y. 2014)* (plaintiff bears the burden of establishing personal jurisdiction on a motion to dismiss for lack of personal jurisdiction). In assessing personal jurisdiction on a *Rule 12(b)(2)* motion, the court is neither required to "draw argumentative inferences in the plaintiffs favor," *Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 507 (2d Cir. 1994)* (citation omitted), nor must it "accept as true a legal conclusion couched as a factual allegation." *Jazini v. Nissan Motor Co., Ltd, 148 F.3d 181, 185 (2d Cir. 1998)* (citation omitted).

C. *Rule 12(b)(6)* Failure to State a Claim

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). The plaintiff must demonstrate "more than a sheer possibility that a defendant **[*8]** has acted unlawfully"; stating a facially plausible claim requires the plaintiff to plead facts that enable the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The factual allegations pled must therefore "be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555* (citation omitted). A district court must first review a plaintiffs complaint to identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal, 556 U.S. at 679*. The court then considers whether the plaintiffs remaining well-pleaded factual allegations, assumed to be true, "plausibly give rise to an entitlement to relief." *Id.; see also Targum v. Citrin Cooperman & Co., No. 12 Civ. 6909 (SAS), 2013 U.S. Dist. LEXIS 164585, 2013 WL 6087400, at *3 (S.D.N. Y. Nov. 19, 2013)*. In deciding the *12(b)(6)* motion, the court must also draw all reasonable inferences in the non-moving party's favor. *See N.J. Carpenters Health Fund v. Royal Bank of Scot. Gip., PLC, 709 F.3d 109, 119-20 (2d Cir. 2013)*.

II. DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION IS GRANTED IN PART

A. Sonterra Lack Subject Matter Jurisdiction Because FLH is not a Real Party in Interest

Defendants first contend that, at the time the complaint was filed in this action, Sonterra "lacked Article III standing" because it was a dissolved entity. (Mem. of Law in Supp. of Defs.' Mot. to Dismiss **[*9]** the Second Am. Class Action Compl. for Lack of Subject Matter Jurisdiction and Failure to State a Claim ("Defs.' Br."), ECF No. 525, at 9-11.) Since the case was a legal nullity, Defendants argue, Plaintiffs cannot create subject matter jurisdiction by substituting FLH as plaintiff. *(Id.* at 13-14.)

In *Fund Liquidation Holdings LLC v. Bank of Am. Corp. ("SIBOR")*, the Second Circuit addressed whether Sonterra, also an original named plaintiff in that case, lacked Article III standing because of its pre-suit dissolution. *991 F.3d 370 (2d Cir. 2021)*. The Court held that, since Sonterra "did not legally exist" pursuant to Cayman Island law, it "lacked standing to sue" at the time it filed suit. *SIBOR, 991 F.3d at 384*. The same holding applies here. However, that alone does not warrant dismissal.

The *SIBOR* court held that Sonterra's defect in Article III standing could easily be resolved "so long as a party with standing to prosecute the specific claim in question exists at the time the pleading is filed." *Id. at 386*. The court explained that if FLH "(the real party in interest) is not named in the complaint, then it must ratify, join, or be substituted into the action within a reasonable time." *Id.* It is only when "the real party in interest either fails to materialize **[*10]** or lacks standing itself should the case be dismissed for want of subject-matter jurisdiction." Id. at 386.[3] If Sonterra effectively assigned its claims to FLH, there would be no Article III standing issue in this case.

Here, in the Asset Purchase Agreement dated August 3, 2021 ("APA"), Sonterra assigned, to Fund Liquidation Holdings, LLC, "all of [its] right, title and interest in all of the Assets," which are defined, in relevant part, as "all of [Sonterra's] right, title and interest in and to any and all Recovery Rights. . . ." (Exhibit A, ECF No. 527-1, Art. I § 1.1, Art. II.) "Recovery Rights" are defined as "all monetary, legal and other rights held by or accruing to [Sonterra] in respect of [any] Claim." *(id.* Art. II.) As relevant here, one subdivision of "Claims" is "Future Claims," which is defined as:

> any and all claims of [Sonterra] . related to the ownership of, or any transaction in, any Traded Securities . . . as to which no Case has been filed as of the date hereof, including, without limitation. any and all of the following: (i) any future class action lawsuit . . . or other lawsuits . . . (ii) any other future claims. . . .

First, Defendants contend that the APA did not effectively convey **[*11]** the "right to initiate or prosecute this lawsuit," because such a right must be express and the APA only transferred "the right to recover proceeds in connection with certain claims pre-dating the transfer or brought by other parties." (Defs.' Br. at 16; Reply Mem. of Law in Supp. of Defs.' Mot. to Dismiss the Second Am. Class Action Compl, ("Defs.' Reply"), ECF No. 547, at 10-11.) The APA, however, is not so limited. It assigns all of Sonterra's right, title and interest in all claims relating to its "ownership of, or any transaction in, any Traded Securities," necessarily including the right to initiate or prosecute those claims. The cases Defendants rely upon are inapposite. *See, e.g.,* *Cortlandt St. Recovery Corp. v. Deutsche Bank AG, London Branch, No. 12 Civ. 9351 (JPO), 2013 U.S. Dist. LEXIS 100741, 2013 WL 3762882, at *2 (S.D.N.Y. July 18, 2013)* (finding assignment insufficient where it did not indicate "what was assigned" or that "legal title to the claims at issue" was conveyed). Accordingly, Sonterra effectively assigned the right to initiate and prosecute a lawsuit pertaining to the claims conveyed.

Second, Defendants argue that the APA fails to assign Sonterra's antitrust and RICO claims because the APA does not contain a specific or unambiguous general assignment. (Defs.' Br. at 17-18.) "To effect a transfer of the right to bring an **[*12]** antitrust [or RICO] claim, the transferee must expressly assign the right to bring that cause of action, either by making specific reference to the [] claim or by making an unambiguous assignment of causes of action in a manner that would clearly encompass the antitrust [or RICO] claim," *DNAML Ply, Ltd. v. Apple Inc., No. 13 Civ. 6516 (DLC), 2015 U.S. Dist. LEXIS 168245, 2015 WL 9077075, at *3 (S.D.N.Y. Dec. 16, 2015)*. Here, the APA makes a general unambiguous assignment of Sonterra's antitrust and RICO claims. Indeed, Sonterra assigned "any and all claims .. related to the ownership of, or any transaction in, any Traded Securities," including claims that can be brought in "any future class action lawsuit," The cases Defendants cite support rather than conflict with this conclusion. *See* *Lerman v. Joyce Int'l, Inc., 10 F.3d 106, 112 (3d Cir. 1993)* (finding assignment sufficient to convey RICO claim where it referred to "legal causes of action or claims" by expressly assigning entity's "causes of action, [] claims and demands of whatsoever nature"); *DNAML, 2015 U.S. Dist. LEXIS 168245, 2015 WL 9077075, at *5* (finding assignment insufficient to convey antitrust claims where it only assigned entity's "business and assets" but made no reference to "claims of any kind"). The APA, like the assignment in *Lerman* and unlike that in *DNAML*, refers to legal claims,

Defendants' reliance on *Sonterra Cap. Master Fund, Lid. v. Barclays Bank PLC* ***[*13]*** *("GBP LIBOR")* and *Fund Liquidation Holdings LLC v. Citibank, N.A. ("SIBOR I")*, is misplaced. In each case, the court held that a conveyance of claims relating to future "securities class action lawsuit[s]" was insufficient to convey antitrust claims because such language evidenced an intention to convey causes of action "arising out of the securities laws" and could not be understood to "encompass antitrust claims." *GBP LIBOR, 403 F. Supp. 3d 257, 265 (S.D.N.Y. 2019)*; *SIBOR I*, 399 F. Supp, 3d 94, 103 (S.D.N.Y, 2019), *vacated and remanded sub nom.* *Fund Liquidation Holdings LLC v. Bank*

[3] Defendants also contend that Sonterra lacked standing because it assigned its claims prior to suit. *(Id.* at 11.) The Second Circuit, similarly, rejected this argument, reasoning that Sonterra's pre-suit assignment of its claims to FLH "does not pose a constitutional roadblock" to Article III standing. *SIBOR, 991 F.3d at 382*.

of Am. Corp., 991 F.3d 370 (2d Cir. 2021). Contrastingly, the APA in the present case conveys claims relating to "any future class action lawsuit" which can be understood as encompassing antitrust claims.[4]

Finally, Defendants contend that, even if the APA conveyed Sontena's antitrust and RICO claims, it did not convey such claims relating to FX derivatives. (Defs. Br, at 18.) On this point, Defendants are correct. The APA limits the claims assigned to only those relating to Sonterra's "ownership of, or any transaction in, any Traded Securities." (APA, at 3.) The APA defines "Traded Securities" as all "Securities," which "means any debt and/or equity securities of any kind, type or nature, including, without limitation, stock, bonds, options, puts, calls, swaps and **[*14]** similar instruments or rights." *(Id.* at 4.) While "Securities" is explicitly defined in the APA, the lower case "securities" is not and signifies that the parties intended this term to be interpreted using its plain meaning, which does not include FX derivatives. *See* Contant v. Bank of Am. Corp., No. 17 Civ. 3139 (LOS), 2018 U.S. Dist. LEXIS 183586, 2018 WL 5292126, at *9 (S.D.N.Y. Oct. 25, 2018) ("[A]lthough FX instruments are analogous to securities in some respects, Plaintiffs do not have recourse under federal securities . . . laws."). Thus, the APA only assigns those claims relating to Sonterra's ownership or transaction in securities. While Plaintiff is correct, the definition of "Securities" encompasses a wide variety of financial instruments, it encompasses securities and securities-adjacent instruments.

Plaintiffs further contend that the plain meaning of "securities" does not matter because the parties included FX transactions in the "Trade Data" provided by Sonterra, which evidences the parties' clear intent to include FX transactions in the definition of "Traded Securities." (Pls.' Opp'n at 16.) As Plaintiffs admit, however, the language of the APA is unambiguous and, thus, does not present a circumstance that would require this Court to look beyond the four corners of the agreement. The term "Traded **[*15]** Securities," as defined by the APA, makes clear that Sonterra only assigned its claims relating to its ownership or transaction in securities or securities adjacent instruments. Indeed, the definitions of "Traded Securities" and "Securities" make no reference or provide any other indication that either of terms should be interpreted with reference to any "Trade Data." On the other hand, the APA defines "Trade Data" as all "relevant information . . . relating to" transactions in securities and securities-adjacent instruments. (APA, Art. 11.) This definition further confirms the parties' intent to convey claims relating to securities. The Notices of Assignment attached as exhibits to the APA also confirm such an intent. It states that Sonterra assigned its rights in "any claims related to . . . securities of any kind, type or nature." (*Id.* at Ex. B.) Accordingly, the APA did not assign the claims at issue here to FLH.[5] Thus, FLH is not a real party in interest and Rule 17 does not permit its joinder in this action.

Thus, Defendants motion to dismiss Sonterra and FLH for lack of subject matter jurisdiction is granted.

B. Hayman Funds' Substitution [*16] Stands.

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[4] Defendants also cite GBP LIBOR and SIBOR I in support of their contention that the APA does not convey RICO claims. (Defs.' Br. at 18 n.19.) For the reasons explained, these cases are inapposite.

[5] Contrary to Plaintiffs' contention, *SIBOR* does not "fully support[]" FLH's substitution for Sonterra. (Letter, dated March 23, 2021, ECF No. 555.) In *Sibor*, the Second Circuit referenced the district court's preliminary determination regarding Sonterra's assignment to FLH. SIBOR, 991 F.3d at 392 (citing FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A. ("SIBOR I"), No. 16 Civ. 5263 (AKH), 2018 U.S. Dist. LEXIS 171999, 2018 WL 4830087, at *11-12 (S.D.N.Y. Oct. 4, 2018) (granting leave to amend the complaint after concluding that "[t]he documents 'appear' to show a full assignment")). The district court, however, did not fully address whether the APA effectively assigned the claims there because it dismissed Sonterra after finding it was not an efficient enforcer. *Fund Liquidation Holdings LLC v. Citibank NA.*, 399 F. Supp, 3d 94, 99 (S.D.N.Y. 2019), *vacated and remanded sub nom.* Fund Liquidation Holdings LLC v. Bank of Am. Corp., 991 F.3d 370 (2d Cir. 2021) (explaining that in *SIBOR I*, the court granted leave to amend and instructed Plaintiffs to "show how they got their assignment" and give an "interpretation"); *see also id.* at 104 (declining to address whether the effectivity of Sonterra's assignment because the court dismissed Sonterra's claims).

Defendants contend that because the original named Plaintiffs, Sonterra and Hayman Capital, did not have Article III standing, "this Court always lacked subject matter jurisdiction" and the Hayman Funds' substitution cannot "confer subject matter jurisdiction." (Defs.' Br. at 15.) The Hayman Funds, the real parties in interest existing at the time this suit was filed, sought to be substituted into this action filed by Hayman Capital, the investment advisor that brought this action on the funds' behalf. In accordance with *SIBOR*, Hayman Funds' substitution avoids dismissal of this case even though the original plaintiffs lacked Article III standing. Indeed, as the Second Circuit explained, "if we can alter the party in whose name a case must be prosecuted without offending Article III, it stands to reason that failing to initially name the correct party is not itself a constitutional problem," *SIBOR, 991 F.3d at 388*. Accordingly, the Hayman Funds were properly substituted under *Rule 17* and their "joinder . . . relates back to the 'original[ ] commence[ment]' of the suit," which is "consistent with the directive that standing must exist at the case's inception." *Id. at 389*.[6] Therefore, Defendants' motion to dismiss for lack of subject matter jurisdiction **[*17]** over Hayman Funds' claims is denied.[7]

III. DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' ANTITRUST CLAIM IS GRANTED IN PART

The SAC asserts that the Defendants conspired with each other to make false Yen LIBOR submissions in violation of *Section 1* of the Sherman Act. Defendants argue that this claim should be dismissed because (i) Plaintiffs lack antitrust standing because they are not efficient enforcers, (ii) the claim is barred by the *Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a*, and (iii) Plaintiffs fail to plausibly allege an antirust conspiracy. (Defs.' Br. at 28.)

A. Antitrust Standing.

To have standing to sue for an antitrust violation, a plaintiff must be an efficient enforcer which requires courts to consider: (1) the "directness or indirectness of the asserted injury," through evaluation of the "chain of causation" linking [plaintiffs] asserted injury and the Banks' alleged price-fixing; (2) the "existence of more direct victims of the alleged conspiracy"; (3) the extent to which [plaintiff's] damages claim is "highly speculative"; and (4) the importance of avoiding "either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages **[*18]** on the other." *Gelboim v. Bank of Am. Corp, 823 F.3d 759, 778 (2d Cir. 2016)* (quoting *Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters, 459 U.S. 519, 540-45, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*). "The efficient enforcer factors reflect a 'concern about whether the putative plaintiff is a proper party to perform the office of a private attorney general and thereby vindicate the public interest in antitrust enforcement.'" *Gelboim, 823 F.3d at 780*, "This test is not mechanical, and 'the weight to be given the various factors will necessarily vary with the circumstances of particular cases.'" *Sonterra Cap. Master Fund Ltd. v. Credit Suisse Grp. AG ("CHF LIBOR"), 277 F. Supp. 3d 521, 558 (S.D.N.Y. 2017)* (quoting *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 443 (2d Cir, 2005)*. Additionally, "[i]t is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing." *In re LIBOR-Based Fin. Instruments Antitrust Litig. ("LIBOR VI"), No. 11 MDL 2262 (NRB), 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *15 (S.D.N.Y. Dec. 20, 2016)* (citation omitted).

i. Directness of Causation of the Injury

"The first factor addresses the 'directness or indirectness of the asserted injury,' which 'requires evaluation of the chain of causation linking [plaintiff's] asserted injury and the [defendants'] alleged price-fixing.'" *Sonterra Cap.*

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[6] Defendants' contention that relation back is inapplicable because the present antitrust claim does not arise out of the conduct, transaction or occurrence of the original pleading is rejected. (Defs.' Br. at 23 n.26.)

[7] Given the Second Circuit's decision in *SIBOR*, this Court's reasoning regarding the Hayman Funds applies with equal weight to Plaintiff CalSTRS. Accordingly, Defendants' motion to dismiss CalSTRS for lack of subject matter jurisdiction is denied.

Master Fund, Ltd. v. Barclays Bank PLC ("GBP LIBOR"), 366 F. Supp. 3d 516, 532-33 (S.D.N.Y. 2018) (quoting Gelboim, 823 F.3d at 778). Defendants are correct that there is an attenuated chain of causation between Defendants' conduct and Plaintiffs' injuries. (Defs.' Br. at 29-30.) Consequently, this factor weighs against a finding of efficient enforcer status for Plaintiffs. Further, this factor weights heavily against CalSTRS's umbrella standing for its transactions with non-defendants. **[*19]** [8]

In *Gelboim* expressed concern over 'umbrella standing' which is asserted when "a plaintiff is injured by dealing with a non-defendant by virtue of a defendant's raising of prices in the market as a whole." GBP LIBOR, 366 F. Supp. 3d at 533 (citing Gelboim, 823 F.3d at 778). Such plaintiffs vastly extend the scope of antitrust liability. Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at *16. This concern is present here if plaintiffs are permitted to proceed on transactions entered with non-defendants. Gelboim, 823 F.3d at 779. Thus, while a plaintiff's status as a direct purchaser is not a requirement for antitrust standing, "'whether [p]laintiffs dealt directly or indirectly with [d]efendants, as well as the scope or the relevant market, are both relevant to the issue of causation,'" GBP LIBOR, 366 F. Supp. 3d at 533 (citing Gelboim, 823 F.3d at 778). In line with courts in this district, this Court draws "a line between plaintiffs who transacted directly with defendants and those who did not" because "the 'independent decision' of contracting parties to incorporate [Yen] LIBOR 'breaks the chain of causation between defendants' actions and a plaintiff's injury.'" Id. at 533 (quoting Sullivan, 2017 WL 685570, at *17, 2017 U.S. Dist. LEXIS 25756).

Plaintiffs contend that *Apple Inc. v. Pepper* forecloses "the invocation of the *Illinois Brick* 'indirect purchaser' doctrine." (Pls.' Br. at 30,); **[*20]** 139 S. Ct. 1514, 1520, 203 L. Ed. 2d 802 (2019). Plaintiffs misread that case. There, the Supreme Court upheld the *Illinois Brick* bright line rule and held that plaintiffs, as direct purchasers of Apple, were permitted to proceed with their antitrust claim. *Id* Here, CalSTRS's transaction with Barclays Capital Inc., a non-defendant, presents the same concerns outlined above regarding umbrella standing. It is not a direct purchaser of a Defendant. Plaintiff's attempt to employ the "single enterprise" liability discussed in Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984) fails. Under *Copperweld*, coordinated activity of related entities permits viewing the entities as a single enterprise. *Id.* Plaintiffs' complaint, however, is devoid of any allegation of coordinated activity. *See* In re LIBOR-Based Fin. Instruments Antitrust Litig., No. 11 MDL 2262 (NRB), 2019 U.S. Dist. LEXIS 49700, 2019 WL 1331830, at *38 (S.D.N.Y. Mar. 25, 2019) ("The independent decision of Panel Banks' subsidiaries and affiliates to sell LIBOR-based financial instruments did not further the plausibly pled conspiracy, the main objective of which was achieved when Panel Banks submitted allegedly suppressed LIBOR submissions.").

This factor weighs against antitrust standing for CalSTRS's claim pertaining to its transactions with non-defendants. Moreover, this factor weighs less strongly against Plaintiffs' standing to pursue its claims pertaining to transactions **[*21]** with Defendants.

ii. Existence of More Direct Victims

Under this second factor, whether Plaintiff is a consumer or competitor is not dispositive. "Like the plaintiffs in *Gelboium*, 'one peculiar feature of this case is that remote victims (who acquired LIBOR-based instruments from any of thousands of non-defendant banks) would be injured to the same extent and in the same way as direct customers of the Banks.'" GBP LIBOR, 366 F. Supp. 3d at 546 (quoting Gelboim, 823 F.3d at 779). Thus, in this efficient enforcer analysis, this factor is given diminished weight.

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[8] Defendants' reliance on *Laydon* is misplaced. There, the chain of causation was further attenuated by plaintiff's failure to "point to any direct, clearly traceable means by which Defendants' alleged manipulation of one benchmark led to a loss to him on contracts linked to an entirely separate benchmark." Laydon v. Mizuho Bank, Ltd., No. 12 Civ. 3419, 2014 U.S. Dist. LEXIS 46368, 2014 WL 1280464, at *9 (S.D.N.Y. Mar. 28, 2014). Likewise, *7 W. 57th Street Realty Co. v. Citigroup, Inc.* is inapposite because the bonds at issue there "were not actually tied to LIBOR" whereas here, Plaintiffs have alleged that Yen LIBOR is incorporated implicitly into their transactions through a complex formula involving a number of other causal factors. 771 F. App'x 498 (2d Cir. 2019). While these vaguely defined links present a hurdle for Plaintiffs to overcome regarding causation, this hurdle presents more of an issue for umbrella standing than for those claims against Defendants that Plaintiffs directly transacted with.

iii. Speculative Damages

"'[H]ighly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement.'" *GBP LIBOR, 366 F. Supp. 3d at 546* (quoting *Gelboim, 823 F.3d at 779*). "While 'some degree of uncertainty stems from the nature of **antitrust law**' and is permitted, plaintiffs must be able to allege that they could arrive at a just and reasonable estimate of damages." *Id.* (citation omitted). As Judge Broderick explained in *GBP LIBOR*, "'[a]s with most antitrust cases, to establish damages, [p]laintiffs will have to offer a reliable 'but-for' world. At a minimum, that 'but-for' world will require [p]laintiffs to establish (1) what an alternative Fix Price would have been absent collusion, and (2) the behavior of [Defendants] **[*22]** absent a Fix Price affected by collusion.'" *GBP LIBOR, 366 F. Supp. 3d at 546* (citation omitted). In evaluating whether damages are unduly speculative in price-fixing cases, considerations include (1) the extent to which the damages claim is conclusory in nature; (2) whether the injury is "so far down the chain of causation from defendants' actions that it would be impossible to untangle the impact of the fixed price from the impact of intervening market decisions," which relates to the causation factor; (3) whether external market factors affected the "relationship between the fixed price and the price that the plaintiffs ultimately paid;" and (4) whether "the non-fixed components of a transaction were heavily negotiated between the parties in relation to the fixed component." *GBP LIBOR, 366 F. Supp. 3d at 546* (quoting *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *17-18*).

As noted by other courts in this district, highly negotiated interest rate swaps likely absorb the effects of Yen LIBOR suppression and the negotiated components of FX forwards render the effect of Yen LIBOR manipulation speculative. *See* *GBP LIBOR, 366 F. Supp. 3d at 547*; *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *18*. This factor weighs against antitrust standing for CalSTRS's claim pertaining to its transactions with non-defendants. It weighs less strongly against Plaintiffs' standing to pursue its claims **[*23]** pertaining to transactions with Defendants.

iv. Duplicative Recovery and Complex Apportionment

"The final factor 'reflects a strong interest in keeping the scope of complex antitrust trials within judicially manageable limits.'" *GBP LIBOR, 366 F. Supp. 3d at 548* (quoting *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *23*). "It traditionally concerns the prospect of different groups of plaintiffs attempting to recover for the same exact injury." *Id.* (citation omitted). The conduct at issue here was the subject of numerous government and regulatory investigations and proceedings many of which appear to be ongoing, There is nothing before this Court demonstrating that any of the Plaintiffs have received payments as a result of those proceedings and there are various ways to protect against duplicate recoveries or apportionment issues in this action.

Thus, the Hayman Funds and CalSTRS are efficient enforcers and have antitrust standing to pursue an antitrust claim against those Defendants with whom they have transacted. CalSTRS lacks standing to pursue its antitrust claim involving transactions with non-defendants. Thus, that claim is dismissed.

B. Antitrust Conspiracy.[9]

The Plaintiffs plausibly allege antitrust claims against RBS, UBS, and Société Générale. "'In order to **[*24]** establish a conspiracy in violation of *§ 1* . . . proof of joint or concerted action is required; proof of unilateral action does not suffice.'" *CHF LIBOR, 277 F. Supp. 3d at 552* (quoting *Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 183 (2d Cir. 2012)*). "'Price-fixing conspiracies concentrate the power to set prices among the conspirators, including the power to control the market and to fix arbitrary and unreasonable prices.'" *GBP LIBOR, 366 F. Supp.*

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[9] In light of this Court's findings above regarding antitrust standing, this Court only examines whether Plaintiffs have sufficiently pleaded an antitrust conspiracy with regard to the following Defendants: RBS Plc, Société Générale, UBS AG, Merrill Lynch International, and Barclays Bank Plc.

3d at 549-50 (quoting Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at *23). "To allege a conspiracy sufficient to survive a motion to dismiss, a plaintiff must 'allege enough facts to support the inference that a conspiracy actually existed,' which can be done in two ways." CHF LIBOR, 277 F. Supp. 3d at 552 (quoting Mayor & City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013)).

"'First, a plaintiff may, of course, assert direct evidence that the defendants entered into an agreement in violation of the antitrust laws.' But because 'this type of 'smoking gun' can be hard to come by, especially at the pleading stage,' a complaint may instead 'present circumstantial facts supporting the inference that a conspiracy existed.'" CHF LIBOR, 277 F. Supp. 3d at 552 (citation omitted). "The line separating conspiracy from parallelism is indistinct, but may be crossed with allegations of interdependent conduct, accompanied by circumstantial evidence and plus factors. These plus factors include: (1) a common motive to conspire; (2) evidence that shows that **[*25]** the parallel acts were against the apparent individual economic self-interest of the alleged conspirators; and (3) evidence of a high level of interfirm communications." GBP LIBOR, 277 F. Supp. 3d at 552 (quoting Gelboim, 823 F.3d at 781). "'Collusion within a bank will not support a claim pursuant to section 1 of the Sherman Act." CHF LIBOR, 277 F. Supp. 3d at 552 (quoting LIBOR IV, 2016 U.S. Dist. LEXIS 175929, 2015 WL 4634541, at *39).

Moreover, "'the plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages such as a defense motion for summary judgment, or a trial.'" CHF LIBOR, 277 F. Supp. 3d at 553 (quoting Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 184 (2d Cir. 2012)). "Instead, '[b]ecause plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible,' and the 'choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion.'" CHF LIBOR, 277 F. Supp. 3d at 553 (quoting Anderson News, L.L.C., 680 F.3d at 184-85).

Plaintiffs plausibly allege an antitrust conspiracy to manipulate Yen LIBOR submissions and rates against Defendants RBS, UBS, and Société Générale.[10] Plaintiffs allege, in the form of regulatory findings, settlements and communications, that on multiple occasions these three Defendants participated **[*26]** in the manipulation of Yen LIBOR and inter-defendant collusion. (*See, e.g.*, Exhibit B-4, ECF No. 488-12, at 13 n.15 (CFTC finding regarding UBS and RBS's collusion to "manipulate[Yen LIBOR] rate"); SAC ¶ 5 (allegation that UBS self-reported manipulation of Yen-LIBOR-based derivative prices to the DOJ); *id.* ¶ 16 (alleging that Société Générale admitted in a CFTC settlement to Yen LIBOR manipulation); SAC ¶¶ 5, 13, 276, 524, 530-31, 605-06, 753-56, 762, 794-97, 847, 969.)

Defendants contend that Plaintiffs' conspiracy allegations fail because they are nothing more than actions by a discrete set of individuals that do not plausibly allege a "conspiracy spanning six years and involving 18 Defendants." (Defs.' Br. at 34.) Plaintiffs' allegations, however, sufficiently plead allegations demonstrating the

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[10] It is worth noting that the antitrust conspiracy as alleged—a sweeping, long running conspiracy to "make false submissions to the BBA designed to artificially suppress, inflate, maintain, or otherwise alter Yen-LIBOR"—is simply implausible when viewed as a whole. As Judge Stein explained, and as suggested in *Gelboim*, "it is harder to infer a conspiracy from individual acts of trader-based manipulation because large financial institutions are both buyers and sellers of derivative products, and thus any changes may well offset each other. But assuming that an upward or downward shift would provide a net increase in profit to a particular bank, one would need to further assume that the same shift would benefit each member of the conspiracy. Unless the banks are similarly situated in this respect, there would be no evident common motive to conspire. This particularly undermines the inference of a conspiracy when the simpler explanation is that the banks may have been independently engaging in intra-defendant manipulation by submitting false [Yen] LIBOR quotes through requests from their own traders to those in the same bank who submit the quote to the BBA." Sonterra Cap. Master Fund Ltd. v. Credit Suisse Grp. AG, 277 F. Supp. 3d 521, 555 (S.D.N.Y. 2017) ("*CHF LIBOR*"). The SAC offers no explanation why conspiracy, as alleged, would be plausible. Consequently, Plaintiffs may not "shoehorn each" Defendant into the conspiracy absent Defendant specific allegations of collusion. Alaska Dep't of Revenue, Treasury Div. v. Manku, No. 20-1759-CV, 2021 U.S. App. LEXIS 21219, 2021 WL 3027170, at *4 (2d Cir. July 19, 2021) ("*SSA Bonds*") (noting Plaintiffs' failure "to link each of the defendants individually to specific acts of anticompetitive conduct in furtherance of the conspiracy.")

conspiracy extended beyond "a discrete set of individuals." Even so, as explained, at this stage of the proceeding, it is not necessary to choose "between two plausible inferences that may be drawn from factual allegations." CHF LIBOR, 277 F. Supp. 3d at 553 (quoting Anderson News, L.L.C., 680 F.3d at 184-85). Moreover, issues regarding the conspiracy's scope can be raised at a later stage. Accordingly, Defendants' motion to dismiss Plaintiffs **[*27]** antitrust claim against UBS, RBS and Société Générale (the "Remaining Defendants") is denied.[11]

Plaintiffs do not plausibly allege that Merrill Lynch International participated in an antitrust conspiracy. Contrary to Plaintiffs' contention, "each defendant is entitled to know how he is alleged to have conspired, with whom and for what purpose. Mere generalizations as to any particular defendant—or even defendants as a group—are insufficient." CHF LIBOR, 277 F. Supp. 3d at 553 (quoting In re Zinc Antitrust Litig., 155 F.Supp.3d 337, 384 (S.D.N.Y. 2016). Plaintiffs refer this Court to only two paragraphs pertaining to MLI in its over 400-page SAC, neither of which indicate that any individual at MIA participated in any way in the conspiracy. The allegation that a trader agreed to participate in one TIBOR/LIBOR trade does not indicate an involvement in a lengthy conspiracy to manipulate Yen LIBOR. Accordingly, Plaintiffs' antitrust claim against Merrill Lynch is dismissed.

Moreover, Plaintiffs fail to plausibly plead Barclays Bank Plc's involvement in the alleged conspiracy. Sonterra Cap. Master Fund, Ltd v. Barclays Bank PLC, 366 F. Supp. 3d 516, 559 (S.D.N.Y. 2018) ("*GBP LIBOR*") (citing Concord Assocs., L.P. v. Entm't Props. Tr., No. 12 Civ. 1667(ER), 2013 U.S. Dist. LEXIS 186964, 2014 WL 1396524, at *24 (S.D.N.Y. Apr. 9, 2014) ("Group pleading, by which allegations are made against families of affiliated entities[,] is simply insufficient to withstand review on a motion to dismiss."); In re Digital Music Antitrust Litig, 812 F.Supp.2d 390, 417 (S.D.N.Y. 2011) (allegations **[*28]** of "direct involvement of the Parent Companies by way of generic references to 'defendants'" were insufficient)). Consequently, Plaintiffs' antirust claim against Barclays Bank Pic is likewise dismissed.

C. FTAIA.

"The FTAIA 'lays down a general rule placing all (non-import) activity involving foreign commerce outside the Sherman Act's reach.'" CHF LIBOR, 277 F. Supp. 3d at 568-69 (quoting *F.* Hoffmann-La Roche Ltd, v. Empagran S.A., 542 U.S. 155, 162, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)). "'It then brings such conduct back within the Sherman Act's reach provided that the conduct both (1) sufficiently affects American commerce, *i.e.*, it has a direct, substantial, and reasonably foreseeable effect on American domestic, import, or (certain) export commerce, and (2) has an effect of a kind that ***antitrust law*** considers harmful, *i.e.*, the 'effect' must 'give rise to a [Sherman Act] claim.'" CHF LIBOR, 277 F. Supp. 3d at 568-69 (quoting Empagran S.A., 542 U.S. at 162). "'[F]oreign anticompetitive conduct can have a statutorily required 'direct, substantial, and reasonably foreseeable effect' on U.S. domestic or import commerce even if the effect does not follow as an immediate consequence of the defendant's conduct, so long as there is a reasonably proximate causal nexus between the conduct and the effect.'" Id. at 569 (quoting Lotes Co., Ltd v. Hon Hai Precision Industry Co., 753 F.3d 395, 398 (2d Cir. 2014) (citation omitted)). "Tn adopting the FTAIA, Congress expressly endorsed **[*29]** an extraterritorial application of the Sherman Act.'" Id. at 569 (quoting Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at *22).

Defendants contend that the FTAIA bars Plaintiffs' antitrust claim because the conduct at issue here is entirely foreign conduct lacking a causal nexus to any domestic effect. (Defs.' Br. at 37.) Defendants heavily rely on this Court's decision in Laydon, in which the CEA and RICO claims there were dismissed as impermissibly extraterritorial. (Defs.' Br. at 38 (citing Laydon v. Mizuho Bank, Ltd., 2020 U.S. Dist. LEXIS 155979, 2020 WL

[11] Contrary to Defendants' contention, *SSA Bonds* does not lead to a dismissal of Plaintiffs' entire antitrust claim. There, the Second Circuit, affirmed the dismissal of an antitrust claim where plaintiffs alleged a "single, unitary super-desk" conspiracy involving "more than twenty entities . . . conspiring every day, nearly all day" in a "decentralized, opaque, and frenetic" secondary market for U.S. dollar-denominated supranational, sovereign, and agency bonds. While this Court questioned the plausibility of Plaintiffs' conspiracy as to *all* Defendants, unlike plaintiffs in *SSA Bonds*, Plaintiffs have sufficiently alleged collusion on a smaller scale and have not "explicitly refused to plead . . . a narrower antitrust conspiracy." SSA Bonds, 2021 U.S. App. LEXIS 21219, 2021 WL 3027170, at *2, *4.

5077186, at *2 (S.D.N.Y. Aug. 27, 2020) (*Laydon V*)).) That decision regarding the CEA and RICO claims in that case, does not inform the decision this Court must make here regarding the applicability of the FTAIA to Plaintiffs' antitrust claims, Indeed, unlike the claims in that case, the FTAIA does not bar Plaintiffs' antitrust claim here. Defendants' alleged manipulation of Yen LIBOR had a foreseeable effect on the Yen-LIBOR-based derivatives sold in the U.S. Contrary to Defendants' contention, the focus is not the Defendants' conduct but the effect in the U.S. and this Court follows the many decisions that have declined to invoke the FTAIA to bar antitrust claims relating to benchmark manipulation. CHF LIBOR, 277 F. Supp. 3d 521, 569 (S.D.N.Y. 2017) (noting the numerous decisions on this issue); *see also id.* ("There can be no serious dispute **[*30]** that the manipulation of a benchmark that is globally disseminated and serves as a pricing component of derivatives sold widely in the United States, as plaintiffs have plausibly alleged, would have a foreseeable effect within the United States."). Accordingly, Plaintiffs' antitrust claim is not barred by the FTAIA.

IV. DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' RICO CLAIMS IS GRANTED

Defendants contend that Plaintiffs' RICO claims predicated on wire fraud seek an impermissible "extraterritorial application of the RICO statute." (Defs.' Br. at 41.) "The Supreme Court in *RJR Nabisco, Inc. v. European Community*, established that private claims under RICO must overcome a presumption against extraterritoriality." GBP LIBOR, 366 F. Supp. 3d at 555 (*citing* RJR Nabisco, Inc. v. European Cmty., 579 U.S. 325, 136 S.Ct. 2090, 2100-02, 195 L.Ed.2d 476 (2016)). "A private plaintiff seeking extraterritorial application of RICO is subject to considerations that do not apply to criminal prosecutions under the statute,[12] and must specifically allege a domestic injury." GBP LIBOR, 366 F. Supp. 3d at 555 (citing RJR, 136 S. Ct. at 2106). "[T]he wire fraud statute does not have extraterritorial application and may not serve as a predicate act for a RICO claim premised on foreign-based activities." Sullivan v, Barclays PLC, No. 13 Civ. 2811 (PKC), 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at *33 (S.D.N.Y. Feb. 21, 2017). Accordingly, Plaintiffs must allege that the wire fraud was domestic in nature.

Here, Plaintiffs rely on (1) the use of "U.S. wires to send fraudulent trade confirmations . . . to U.S. counterparties," (2) receipt of funds from Plaintiffs through U.S. wires and employment of traders in the U.S. who traded in Yen-LIBOR-based derivatives in the U.S., (3) sending communications through the U.S., and (4) the activities of Thompson Reuters in connection with its services to publish the LIBOR fixes. (Pl.'s Op'n at 48-49.) Yet, those contacts have consistently been rejected as providing only a "minimal nexus to the United States. . . ." CHF LIBOR, 277 F. Supp. 3d at 581 (collecting cases). Plaintiffs' allegations regarding domestic conduct are almost entirely similar to those rejected in *Laydon*. As in *Laydon*, Plaintiffs' RICO claim is "based on the alleged actions of foreign and international institutions that submitted false information to the BBA." Laydon v. Mizuho Bank, Ltd., No. 12 Civ. 3419 (GBD), 2015 U.S. Dist. LEXIS 44126, 2015 WL 1515487, at *9 (S.D.N.Y. Mar. 31, 2015). As Judge Stein explained:

> [D]efendants are based abroad, their allegedly manipulated quotes were submitted from abroad to a banking association located abroad, and the [Yen] LIBOR rate at issue is the [Yen] LIBOR rate for a foreign currency. That the alleged goal of the conspiracy was to increase worldwide profits, including profits **[*32]** generated in the United States, cannot render "domestic" a scheme that was otherwise centered abroad. Nor can the fact that the [Yen] LIBOR fixes were distributed worldwide, including into the United States, or that defendants carried out their manipulation from abroad through servers that happened to route their communications in the United States. The Supreme Court doggedly underscored this point when it wrote that "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case."

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[12] Accordingly, Plaintiffs' reliance on various criminal cases to contend that their claims are not extraterritorial is misplaced, as this Court previously held in *Laydon. Laydon* ***[*31]*** *v. Mizuho Bank, Ltd.*, No. 12 Civ. 3419 (GBD), ECF No. 491, at 3 n.3 (S.D.N.Y. July 24, 2015) ("To be within the domestic reach of the wire fraud statute, is not the same as overcoming the presumption against extraterritoriality in the RICO context.") (internal quotation marks omitted).

CHF LIBOR, 277 F. Supp. 3d at 582 (citing Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010)). Accordingly, Plaintiffs' RICO claims are dismissed.[13]

V. DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' UNJUST ENRICHMENTCLAIM IS DENIED

As an initial matter, in light of this Court dismissal of Plaintiffs' federal claims against all Defendants other than RBS Plc, Société Générale, and UBS AG (the "Dismissed Defendants"), this Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims against the Dismissed Defendants.

As explained above, Plaintiffs have adequately pleaded the involvement of the Remaining Defendants in the alleged conspiracy. Defendants' contend that Plaintiff **[*33]** CalSTRS's unjust enrichment claim against the Remaining Defendants can only be raised in the absence of an actual agreement. (Defs.' Br. at 49-50.) "A plaintiff may proceed on the 'quasi-contract theory of unjust enrichment' only 'where the contract does not cover the dispute in issue.'" Dermis v. JP Morgan Chase & Co., 345 F. Supp. 3d 122, 193-94 (S.D.N.Y. 2018), adhered to on denial of reconsideration, No. 16 Civ. 6496 (LAK), 2018 U.S. Dist. LEXIS 215167, 2018 WL 6985207 (S.D.N.Y. Dec. 20, 2018). The SAC does not allege any information regarding the terms of CALSTRS's contracts with the Remaining Defendants. Plaintiff, however, contends that Defendants' "misconduct extended well beyond the terms of any underlying agreement." (Pls.' Opp'n at 52.) Since neither party has provided this Court with the relevant contractual terms, this Court cannot resolve this issue at this stage. Defendants' motion to dismiss Plaintiff CalSTRS's unjust enrichment claim against the Remaining Defendants is denied.

VI. DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING CLAIM ISGRANTED IN PART

This Court declines to exercise supplemental jurisdiction over Plaintiffs' implied covenant of good faith and fair dealing claim against Bank of America, Merrill Lynch, and Barclays. Thus, Defendants' motion to dismiss is granted.

[*34] Plaintiff CalSTRS asserts a claim for breach of the implied covenant of good faith and fair dealing against the Remaining Defendants.[14] "To state a claim for breach of contract, a plaintiff must allege: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from the breach." LIBOR IV, 2015 U.S. Dist. LEXIS 107225, 2015 WL 4634541, at *67 (citing Nat 'l Mkt. Share, Inc. v. Sterling Natl Bank, 392 F.3d 520, 525 (2d Cir.2004)). "'A covenant of good faith and fair dealing in the course of contract performance' is '[i]mplicit in all contracts,' and thus a breach of this implied covenant constitutes a breach of the contract." LIBOR IV, 2015 U.S. Dist. LEXIS 107225, 2015 WL 4634541, at *67 (citations omitted). "Specifically, implied in every contract is a promise that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" LIBOR IV, 2015 U.S. Dist. LEXIS 107225, 2015 WL 4634541, at *67 (citation omitted). CalSTRS has plausibly alleged that in allegedly manipulating Yen LIBOR, the Remaining Defendants interfered with its rights to enjoy maximum returns permitted "by market forces." Dennis v. JPMorgan Chase & Co., 345 F. Supp. 3d 122, 192 (S.D.N.Y. 2018). Defendants' remaining arguments are rejected for the reasons discussed above. Accordingly, Defendants' motion to dismiss CalSTRS's claim is denied.

VII. DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF PERSONALJURISDICTION IS GRANTED IN PART

Defendants move to dismiss for lack of personal jurisdiction. In light of the conclusions reached above, this Court will only determine whether the SAC adequately alleges personal jurisdiction over the Remaining Defendants.

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[13] Consequently, this Court need not address Defendants remaining arguments regarding these claims.

[14] The SAC does not allege which law governs CalSTRS's contracts with these Defendants but both patties cite New York law in their briefs.

"To make out a prima facie case of personal jurisdiction . . . plaintiffs must establish a statutory basis for personal jurisdiction and that the exercise of personal jurisdiction [ ] comport[s] with constitutional due process principles." Allianz Glob. Invs. GmbH v. Bank of Am, Corp., No. 18 Civ. 10364 (LGS) (SA), 2021 U.S. Dist. LEXIS 140918, 2021 WL 3192814, at *2 (S.D.N.Y. July 28, 2021).

Since Plaintiffs' claim arises under the Sherman Act, the "appropriate forum to consider for purposes of the minimum contacts analysis is the entire United States." *Id.* "'[S]everal courts in this district addressing federal claims with national service of process—including claims based on alleged LIBOR manipulation—have applied the 'national contacts' test.'" GBP LIBOR, 366 F. Supp. 3d at 562 (collecting **[*35]** cases).

There are two forms of personal jurisdiction, specific and general but only specific jurisdiction is claimed here. "'[S]pecific jurisdiction exists when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum.'" In re Mexican Gov't Bonds Antitrust Litig., 18 Civ. 2830 (JPO), 2020 U.S. Dist. LEXIS 224534, 2020 WL 7046837, at *2 (S.D.N.Y. Nov. 30, 2020) (quoting Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567-68 (2d Cir. 1996); Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1025, 209 L. Ed. 2d 225 (2021). "[T]here must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.'" Id. at 1025 (quoting Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco Cty., 137 S. Ct. 1773, 1780, 198 L. Ed. 2d 395 (2017)).

A court's authority to exercise specific personal jurisdiction over a defendant "depends on the defendant having such 'contacts' with the forum State that 'the maintenance of the suit' is 'reasonable, in the context of our federal system of government,' and 'does not offend traditional notions of fair play and substantial justice.'" *Id.* (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316-17, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). The due process analysis consists of two discrete components; "the 'minimum contacts' inquiry and the 'reasonableness' inquiry." Waldman v. Palestine Liberation Org., 835 F.3d 317, 331 (2d Cir. 2016); Chloe v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 164 (2d Cir. 2010).

Under the minimum contacts inquiry, the court "must determine whether the defendant has sufficient minimum contacts with the forum . . . to justify the court's exercise of personal **[*36]** jurisdiction." *Id.* (citing Int'l Shoe, 326 U.S. at 316). The defendant "must take 'some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State.'" Ford Motor Co., 141 S. Ct. at 1024-25 (quoting Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)). "The contacts must be the defendant's own choice and not 'random, isolated, or fortuitous.'" *Id.* (citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984)). A foreign defendant may also be subject to specific jurisdiction if "relevant conduct took place entirely outside the forum but that contact had in-forum effects harmful to the plaintiff." GBP LIBOR, 366 F. Supp. 3d at 562. It is not enough that effects be foreseeable. *Id.*

Once the court is satisfied that a defendant has sufficient contacts with the forum to justify the court's exercise of personal jurisdiction, "whether it is reasonable to exercise personal jurisdiction under the circumstances of the particular case." Chloe, 616 F.3d at 164 (quoting Int'l Shoe, 326 U.S. at 316). If the court determines that a defendant lacks the requisite contacts, it need not consider the second prong of the due process test. *See* Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568-69 (2d Cir. 1996) (quoting Donatelli v. Nat'l Hockey League, 893 F.2d 459, 465 (1st Cir. 1990)). "A plaintiff asserting specific personal jurisdiction 'must establish the court's jurisdiction with respect to *each* claim asserted.'" GBP LIBOR, 366 F. Supp. 3d at 562 (Sunward Elecs., Inc. v. McDonald, 362 F.3d 17, 24 (2d Cir. 2004)).

A. RBS is Dismissed for Lack of Personal Jurisdiction.

Defendants contend that Plaintiffs fail to sufficiently allege **[*37]** facts satisfying the venue provision of Section 12. (Mem. of Law in Supp. of the Foreign Bank Defs.' Mot. to Dismiss the Second Am. Class Action Compl. for Lack of Personal Jurisdiction ("Defs.' PJ Br."), ECF No. 513, at 36.) To satisfy the venue provision, the SAC must sufficiently allege that RBS "transacts] business" in the Southern District of New York. *See* *Dennis v. JPMorgan Chase & Co., 345 F. Supp. 3d 122, 198-99 (S.D.N.Y. 2018)* ("transact business" refers "to the practical, everyday business or commercial concept of doing business or carrying on business of any substantial character.") (internal quotation marks omitted). Plaintiffs fail to allege that RBS conducts business in this District of a substantial character. Accordingly, Plaintiff CalSTRS antitrust claim against RBS is dismissed, Likewise, Plaintiff CalSTRS's remaining state law claim against RBS is dismissed as this Court declines to exercise supplemental jurisdiction over that claim.[15]

B. Plaintiffs Sufficiently Allege Jurisdiction Against UBS and Socicte Generate.[16]

UBS and Societe Generate are each entities incorporated and headquartered abroad. *See* Decl. of Richard G. McCarty, ECF No. 521 If 8 (RBS headquartered and incorporated in the United Kingdom); Decl. of Dominique Bourrinet, ECF No. 522 ¶ 2 (Societe **[*38]** Generate incorporated and headquartered in France); Decl. of John Connors, ECF No. 523 ¶ 3 (UBS incorporated and headquartered in Switzerland). Plaintiff alleges that each Defendant traded with Plaintiff in the allegedly manipulated product and trade the same product with other U.S. parties. (SAC ¶¶ 156-60, 242.) Notably, both Defendants have U.S. trading desks or offices/branches where traders arrange and execute Yen-LIBOR-based derivatives. (SAC ¶¶ 5, 153-154, 197-198.) Each contact has a sufficient nexus to the conspiracy alleged here: conspiracy to manipulate Yen LIBOR in order to unlawfully profit or limit liabilities.

UBS and Societe Generate purposefully availed themselves of the forum and have failed to present a compelling case demonstrating that the exercise of jurisdiction here would be unreasonable and not comport with due process.

Finally, even if Defendants are correct that jurisdiction over the state law claims are only proper in California or Texas, this Court will exercise pendent personal jurisdiction since personal jurisdiction has been established regarding the Sherman Act claims. *GBP LIBOR, 366 F. Supp. 3d at 566* ("Having found that Plaintiffs have made a *prima facie* showing" of personal jurisdiction **[*39]** over the "Sherman Act claims" and "that the Sherman Act claims have a 'nucleus of pertinent facts in common' with the unjust enrichment claim, it is appropriate to exercise pendent personal jurisdiction.").

VIII. CONCLUSION

Defendants' motion to dismiss all claims by Plaintiffs Sonterra Capital Master Fund, Ltd. and Fund Liquidation Holding LLC for lack of subject matter jurisdiction is GRANTED. Defendants' motion to dismiss Plaintiffs Hayman Funds and CalSTRS for lack of subject matter jurisdiction is DENIED.

Defendants' motion to dismiss count one of the SAC failure to state a claim is GRANTED as to all Defendants except RBS, Société Générale and UBS. Defendants motion to dismiss counts two and three of the SAC against all Defendants is GRANTED.

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[15] Contrary to Plaintiffs' contention, "jurisdiction lies only in cases in which the venue provision of *Section 12*, not the general venue statute, is satisfied." *Dennis v. JPMorgan Chase & Co., 345 F. Supp. 3d 122, 198 (S.D.N.Y. 2018)*. Indeed, "the operative language for purposes of personal jurisdiction is found in the second half of the statute - that is, the service provision, which states that 'all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.' The Second Circuit has construed 'in such cases' in accordance with its plain language." Id. (citation omitted). Thus, the general venue statute is inapplicable.

[16] Defendants' contention that Plaintiffs' claims are time barred and thus, warrant dismissal, is rejected. (Defs.' Br. at 19.) The SAC adequately alleges that Plaintiff CalSTRS's claims were tolled by the fraudulent concealment doctrine. Plaintiff demonstrates that Defendants concealed the existence of its cause of action, that Plaintiff remained in ignorance and Plaintiffs ignorance was not attributable to lack of diligence.

Defendants' motion to dismiss for lack of personal jurisdiction over RBS is GRANTED. Defendants' motion to dismiss for lack of personal jurisdiction over Société Générale and UBS is DENIED.

This Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims except those claims by Plaintiff CalSTRS against Société Générale and UBS.

Plaintiffs' request for jurisdictional discovery is DENIED.

The Clerk of Clerk is instructed **[*40]** to close ECF No. 505 accordingly.

Dated: September 30, 2021

New York, New York

SO ORDERED:

/s/ George B. Daniels

GEORGE B. DANIELS

United States District Judge

Lucasys Inc. v. Powerplan, Inc.

United States District Court for the Northern District of Georgia, Atlanta Division

September 30, 2021, Decided; September 30, 2021, Filed

CIVIL ACTION NO. 1:20-cv-2987-AT

Reporter

576 F. Supp. 3d 1331 *; 2021 U.S. Dist. LEXIS 219702 **

LUCASYS INC., Plaintiff, v. POWERPLAN, INC., Defendant.

Subsequent History: Dismissed by, Without prejudice *Lucasys Inc. v. Powerplan, Inc., 2022 U.S. Dist. LEXIS 218231 (N.D. Ga., May 10, 2022)*

Core Terms

software, customers, alleges, Supplemental, contracts, deferred tax, antitrust, competitor, technological, markets, innovation, products, consumers, anticompetitive, mattresses, stranger, tortious interference, monopoly, prices, output, consulting, antitrust violation, preparedness, anti trust law, compete, trade secret, courts, entity, utility customer, visco-elastic

LexisNexis® Headnotes

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

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

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

A complaint should be dismissed under Fed. R. Civ. P. 12(b)(6) only where it appears that the facts alleged fail to state a plausible claim for relief. Fed. R. Civ. P. 12(b)(6). The plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. Fed. R. Civ. P. 8(a). In ruling on a motion to dismiss, the court must accept the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff.

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

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

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

A claim is plausible where the plaintiff alleges factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. A plaintiff is not required to provide detailed factual allegations to survive dismissal, but the obligation to provide the grounds' of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. The plausibility standard requires that a plaintiff allege sufficient facts to raise a reasonable expectation that discovery will reveal evidence that supports the plaintiff's claim. A complaint may survive a motion to dismiss for failure to state a claim even if it is improbable that a plaintiff would be able to prove those facts and even if the possibility of recovery is extremely remote and unlikely.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN3[] **Remedies, Damages**

A private plaintiff seeking damages under the antitrust laws must establish standing to sue. Antitrust standing requires more than the injury in fact and the case or controversy required by Article III of the Constitution. The doctrine of antitrust standing reflects prudential concerns and is designed to avoid burdening the courts with speculative or remote claims. Antitrust standing is best understood in a general sense as a search for the proper plaintiff to enforce the antitrust laws.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN4[] **Clayton Act, Claims**

A private plaintiff may bring a federal antitrust action through Section Four of the Clayton Act, 15 U.S.C.S. § 15(a), which creates a private right of action for any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor, and shall recover threefold the damages by him sustained. To recover treble damages under § 4 of the Clayton Act, a plaintiff must establish both that it has antitrust standing and that the defendant violated the antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN5[] **Standing, Clayton Act**

To determine whether a plaintiff has antitrust standing, courts in the Eleventh Circuit employ a two-prong test. Under this test, a plaintiff must establish that (1) it has suffered an antitrust injury and (2) it is an efficient enforcer of the antitrust laws. Under the second prong to determine whether the plaintiff is an efficient enforcer, courts consider the following factors: (1) the directness or indirectness of the asserted injury; (2) the remoteness of the injury; (3) whether other potential plaintiffs were better suited to vindicate the harm; (4) whether the damages were highly speculative; (5) the extent which the apportionment of damages was highly complex and would risk duplicative recoveries; and (6) whether the plaintiff would be able to efficiently and effectively enforce the judgment.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN6[] **Standing, Requirements**

Whether a plaintiff has antitrust standing under the two-prong injury and efficient enforcer test also involves consideration of causation, i.e., the nexus between the antitrust violation and the plaintiff's harm, as well as an assessment of whether the harm alleged is of the type for which Congress provides a remedy. Plainly relevant to a determination of whether a plaintiff suffered antitrust injury is the issue of preparedness to enter the market. (Thus, if plaintiff is deemed unprepared it has failed to establish one of the prerequisites of a private cause of action under the ***antitrust law***—a causal relationship between the antitrust violation alleged and the injury sustained) (cleaned up), (discussing preparedness requirement and explaining that in order to meet the second prong, the plaintiff must prove the existence of a competitor willing and able to enter the relevant market, but for the exclusionary conduct of the incumbent monopolist).

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN7[] **Private Actions, Sherman Act**

On the issue of preparedness, the Eleventh Circuit has explained that, in cases where a plaintiff seeks to recover for an antitrust injury that allegedly arises from the frustrated expansion of one's business into a new market, there are significant requirements for establishing an entitlement to recovery, Specifically, a plaintiff must demonstrate (1) an intention to enter the business and (2) a showing of preparedness to enter the business.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN8[] **Standing, Requirements**

While an antitrust plaintiff must establish intention and preparedness, it need not have an actual going business to establish private antitrust injury. Indeed, a defendant cannot benefit by the application of the standing doctrine from the fact that it is able to prevent the plaintiff from becoming a consumer of its product. As long as the plaintiff made a reasonable attempt to enter the market, Eleventh Circuit case law recognizes that the plaintiff has standing to contest antitrust violations which create barriers to that market. In the case of nascent competitors, the preparedness requirement allows courts to balance important concerns. A plaintiff who never entered a particular market but would have if not for an antitrust violation can undoubtedly challenge an antitrust violation in court. On the other hand, an overly permissive standing doctrine would allow mere bystanders who lack particularized injury to benefit from another party's antitrust violation.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN9[] **Standing, Requirements**

In evaluating whether an antitrust plaintiff has shown that it is prepared to enter the business, courts have considered: (1) the ability of the plaintiff to finance the business and to purchase the necessary facilities and equipment; (2) the consummation of contracts by the plaintiff; (3) affirmative action by the plaintiff to enter the business; and (4) the background and experience of the plaintiff in the prospective business.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN10[] **Standing, Requirements**

The degree to which a business must take affirmative steps is mitigated by the impact of the antitrust violation, which the court assumes to have occurred when analyzing standing. Thus, nascent competitors need not pay a courtroom entrance fee in the form of an expenditure of substantial resources in a clearly futile competitive gesture.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

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

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

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

HN11[] **Sherman Act, Claims**

Section 1 of the Sherman Act prohibits every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states. 15 U.S.C.S. § 1. The phrase "restraint of trade" is best read to mean undue restraint. Accordingly, § 1 is understood to outlaw only unreasonable restraints.

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

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

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

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

HN12[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Under 15 U.S.C.S. § 1, a small group of restraints are unreasonable per se because they always or almost always tend to restrict competition and decrease output. Restraints that are not unreasonable per se are judged under the rule of reason. The rule of reason requires courts to conduct a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition. In making this fact-specific assessment, the goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

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

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

HN13[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

To determine whether a restraint violates the rule of reason under 15 U.S.C.S. § 1, courts conduct a three-step, burden-shifting analysis. The plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If a plaintiff makes this showing, the burden shifts to the defendant to establish a procompetitive rationale for the restraint. If the defendant makes this showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

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

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN14[] **Sherman Act, Claims**

On the first step in the analysis of whether a restraint violates the rule of reason under 15 U.S.C.S. § 1, in alleging the anticompetitive effect of the defendant's conduct, an antitrust plaintiff must show harm to competition rather than to competitors. In other words, the anticompetitive effects are measured by their impact on the market rather than by their impact on competitors. The purpose of the Sherman Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.

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

HN15[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

To show an anticompetitive effect on the market, a plaintiff may either prove that the defendants' behavior had an actual detrimental effect on competition, or that the behavior had the potential for genuine adverse effects on competition.

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

HN16[] **Attempts to Monopolize, Elements**

A plaintiff can show anticompetitive effects on the market by direct evidence, such as reduced output, increased prices, or decreased quality in the relevant market, or through indirect evidence, for example, proof of market power plus some evidence that the challenged restraint harms competition.

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

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

HN17[] **Relevant Market, Geographic Market Definition**

In bringing claims under 15 U.S.C.S. § 1, a plaintiff must define both (1) a geographic market and (2) a production market. Although the parameters of a given market are questions of fact antitrust plaintiffs still must present enough information in their complaint to plausibly suggest the contours of the relevant geographic and product markets.

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

HN18[] **Relevant Market, Product Market Definition**

Defining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other.

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN19[] **Relevant Market, Geographic Market Definition**

A product market consists of products that have reasonable interchangeability for the purposes for which they are produced. A relevant product market can exist as a distinct subset of a larger product market. However, if customers view the products as substitutes, the products are part of the same market. Defining the relevant submarket is a fact-intensive endeavor, and courts consider a variety of factors, including industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. In light of this fact-intensive endeavor, a dismissal of an antitrust claim for failure to adequately plead the relevant market can be problematic.

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

HN20[] Relevant Market, Product Market Definition

In antitrust cases, defining the relevant market is a highly fact-intensive endeavor, and the proper market definition can sometimes be determined only after a factual inquiry into the commercial realities faced by consumers.

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > Tortious Interference With Business Relations

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > ... > Contracts > Intentional Interference > Elements

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

HN21[] Causes of Action, Tortious Interference With Business Relations

To state a claim for tortious interference with contract or business relations, a plaintiff must show: (1) improper action or wrongful conduct by the defendant without privilege; (2) that the defendant acted purposely and with malice with the intent to injure; (3) that the defendant induced a breach of contractual obligations or caused a party or third parties to discontinue or fail to enter into an anticipated business relationship with the plaintiff; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff.

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > ... > Contracts > Intentional Interference > Elements

HN22[] Intentional Interference, Elements

Under the first element for a tortious interference claim, acting without privilege means that the defendant was an intermeddler or stranger to the business relationship at issue. A defendant is not a stranger to the contract just because it is not a party to the contract. For example, where the alleged intermeddler is the agent for one of the parties and the meddling acts were done within the scope of agency duties, the agent is not a stranger to the contract. Third-party beneficiaries, whether intended or not, are not strangers to the contract.

Torts > ... > Contracts > Intentional Interference > Defenses

HN23[] Intentional Interference, Defenses

Where a defendant is an essential entity to another contract, he cannot be liable for tortious interference.

Contracts Law > Third Parties > Beneficiaries > Claims & Enforcement

Torts > ... > Contracts > Intentional Interference > Defenses

Contracts Law > ... > Beneficiaries > Types of Third Party Beneficiaries > Incidental Beneficiaries

Contracts Law > ... > Beneficiaries > Types of Third Party Beneficiaries > Intended Beneficiaries

HN24[] **Beneficiaries, Claims & Enforcement**

To qualify as an unintended third-party beneficiary, who cannot be sued for tortious interference, an individual or entity must have a legitimate and direct economic interest in the contract at issue. Put another way, if an entity does not have a legitimate and direct economic interest, it can be sued, absent other barriers. Further, a defendant does not become an unintended third-party beneficiary of a contract simply because he might receive some incidental benefit from performance of the agreement. Likewise, a fact pattern involving multiple contracts with related entities does not necessarily mean that those contracts are interwoven such that any involved party is immune from liability for tortious interference.

Torts > ... > Contracts > Intentional Interference > Defenses

HN25[] **Intentional Interference, Defenses**

Georgia Courts have acknowledged that tortious interference claims can be brought against competitors who are not otherwise deprived of stranger status for some other reason.

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Judges: Honorable Amy Totenberg, United States District Judge.

Opinion by: Amy Totenberg

Opinion

[*1337] **ORDER**

The story alleged in this antitrust case is one of David and Goliath. Plaintiff Lucasys Inc. **[**3]** ("Lucasys"), an up-and-coming, eager-to-innovate competitor, alleges that Defendant PowerPlan, Inc. ("PowerPlan") violated antitrust laws when it used its monopoly power in a primary software market to harm potential competitors and competition in a secondary, dependent consulting market with the aim of precluding those competitors from entering the primary market and competing with PowerPlan. As alleged, when PowerPlan learns of competitors (like Lucasys) seeking to step out of the secondary market into the primary software one, it squashes that competition by *inter alia* reaching out to customers and leveraging its monopoly power to coerce customers to stop working with the competitor (such as Lucasys). According to Lucasys, these anticompetitive actions (1) ensure that no nascent competitor will ever be able to grow to compete with PowerPlan in the primary software market and (2) harm consumers in all markets by stifling innovation, depriving consumers of their choice of product or service provider, reducing the output of current or prospective technology and software products, and increasing prices.

Defendant PowerPlan moves to dismiss Lucasys' antitrust claims and tortious interference **[**4]** claims under state law. [Doc. 18.] Because the Complaint's allegations are sufficient at this stage to support the asserted antitrust violations and state law tortious interference claims, PowerPlan's Motion is **DENIED**.

I. Background

The Parties, Industry, and Markets

Defendant PowerPlan is the leading provider of utility management software for investor-owned rate-regulated utilities around the country. (Compl. ¶ 6.) Plaintiff Lucasys is a small start-up tax consulting and software development company that provides data consulting and deferred tax solutions to rate-regulated utilities. (*Id.* ¶ 5.)

In 1994, PowerPlan developed software specially built for the industry of rate-regulated utilities that allows utilities to store, access, analyze, and compute their data in connection with industry-specific operational, accounting, regulatory, and tax needs. (*Id.* ¶¶ 7, 11.) PowerPlan's software is a single centralized database with different "modules" and "suites" that perform different functions, for example, related to computing income tax or property tax, or assisting with lease accounting or "rate case management." (*Id.* ¶¶ 9, 10.) The software is industry-specific in that much of these functions **[**5]** revolve around certain fixed assets unique to the industry of rate-regulated utilities. (*Id.* ¶ 7.)

After PowerPlan created this software in 1994, utility after utility bought in. By the late 2000s, PowerPlan had acquired its only competitor and was thus the only company offering a full suite of utility management software. (*Id.* ¶ 11.) Today, 99 percent of utilities use PowerPlan's software—indeed, large utilities *must* use PowerPlan's software because of the scale and complexity of their data. (*Id.* ¶ 12.)

According to the Complaint, PowerPlan, sitting atop this throne of monopoly power in the Utility Management Software Market ("Utility Software Market"), stopped innovating or updating its software to meet customers' needs. (*Id.* ¶ 13.) One alleged significant problem with PowerPlan's **[*1338]** software is that it is built on an outdated coding language. (*Id.* ¶ 14.) For this reason, the customer utilities' data, housed in the PowerPlan software, cannot simply be exported to make calculations elsewhere. (*Id.* ¶ 23.) And because there are no alternative products, customers are forced to continue to purchase the PowerPlan software. (*Id.*) Moreover, the Utility Software Market has high barriers to entry **[**6]** in that it would require both significant capital and ongoing access to consumer data (which is housed in PowerPlan's software). (*Id.* ¶¶ 106, 69.) Customers also face extremely high switching costs because their data is locked into PowerPlan software and any change would involve significant implementation costs, disruptions/risks to business and accounting processes, employee retraining, audit concerns, and regulatory concerns and risks. (*Id.* ¶ 70.)

Over time, utility customers discovered that PowerPlan's software was not able to meet their needs and therefore began hiring consultants to fill the gaps by writing custom code extensions, providing data-consulting services, integrating their PowerPlan data with other applications to accomplish tasks the PowerPlan software could not, and other band-aid solutions. (*Id.* ¶ 15.) By the early 2010s, a market for these supplemental services existed; now, utilities typically pay hundreds of thousands or even millions of dollars every 3-5 years for these supplemental services. (*Id.* ¶¶ 16-17.) Currently, there are about ten companies competing in this Supplemental Management Service Market ("Supplemental Market"), including Lucasys and PowerPlan. **[**7]** (*Id.* ¶ 79.) As alleged, PowerPlan is largely content with the *status quo* of the Supplemental Market, even though it lacks a monopoly in this market, because (1) PowerPlan takes in additional revenue by providing services in this secondary market and (2) the availability of this market reduces pressure to invest substantial money into updating its obsolete utility management software. (*Id.* ¶ 18.)

Lucasys also alleges, in addition or in the alternative, a third "separate or sub-market" specifically related to "deferred tax solutions" for utilities (the "Deferred Tax Market"). (*Id.* ¶ 81.) Lucasys alleges that this is a market for consulting services and technology solutions to assist utility customers with cleansing and remediating their data to allow them to calculate tax positions associated with changes in the tax code at scale. (*Id.*) Only three firms compete in this sub-market—Lucasys, PowerPlan, and a firm called Regulated Capital Consultants. (*Id.* ¶ 82.) This market/sub-market arose after the passage of a 2017 tax law that reduced the tax rate for utilities. (*Id.* ¶ 21.) Because rate-regulated utilities must share beneficial tax changes with the public ratepayers based on complicated **[**8]** state and federal regulations, often varying by jurisdiction, each utility requires services to evaluate its data in light of the tax changes and the relevant regulatory requirements to determine rates. (*Id.* ¶¶ 22-23.)

Lucasys Enters the Scene

Lucasys was founded in 2018 by three former PowerPlan employees — who left PowerPlan in 2013, 2014, and 2015 and worked elsewhere before founding Lucasys. (*Id.* ¶ 28.) The founders' goal in establishing Lucasys was to provide services and software related to deferred tax as well as long-term software and technology to replace consulting services. (*Id.*) Currently, Lucasys provides both consulting services and technological solutions, and expects to develop Software-As-A-Service ("SAAS") tools to automate certain processes and reduce the need for manual data assessment in both the Supplemental Services Market and the Deferred Tax Market. (*Id.* ¶ 29.) So far, Lucasys has created three technological products: (1) a **[*1339]** cloud-based software for tax computations; (2) a business automation tool to automatically transmit data between sources; and (3) a toolkit with several applications for calculations and data-related tasks. (*Id.* ¶ 30.) Lucasys plans to build **[**9]** on these technological innovations to compete more broadly with PowerPlan in the Utility Software Market and ultimately provide an alternative full-suite product. (*Id.* ¶ 31.)

PowerPlan's Anticompetitive Acts

As alleged, after learning that Lucasys was not only offering consulting services but also software and technological products, PowerPlan sought to eliminate the threat posed by Lucasys' technological innovation. PowerPlan learned about Lucasys when both companies were bidding on a contract with American Electric Power Service Corporation ("AEP"). AEP offered a contract for a company to build a full software suite around taxes—one that would have replaced or expanded upon PowerPlan's existing tax suites. (*Id.* ¶ 35, 53.) When PowerPlan discovered that AEP had awarded the contract to Lucasys, it sought to intimidate both Lucasys and AEP with threatened legal action related to trade secret violations. (*Id.* ¶ 38-42.)

First, PowerPlan sent a demand letter to Lucasys claiming that Lucasys had misappropriated unspecified trade secrets. (*Id.* ¶ 38.) PowerPlan also demanded that Lucasys not only cease-and-desist efforts to design, develop, market, and sell software but also cease-and-desist **[**10]** consulting for all PowerPlan customers *unless* it stopped creating new software. (*Id.* ¶ 41.) Lucasys alleges that these claims were made in bad faith and solely as an attempt to block Lucasys from offering or providing services to utility customers because Lucasys, in developing technological and software tools, is a competitive threat to PowerPlan's monopoly. (*Id.* ¶ 40.) Providing a carrot to accompany the stick, PowerPlan also proposed to Lucasys an allegedly unlawful market-allocation agreement under which PowerPlan would "be open" to Lucasys competing with it for consulting services as long as it discontinued its software development. (*Id.* ¶ 42.)

In addition to contacting Lucasys, PowerPlan also directly contacted AEP, the utility that had awarded the software development contract to Lucasys. In letters send to AEP, PowerPlan stated that

> It is PowerPlan's understanding that Lucasys has been developing software **that directly competes with our software**, and recently started marketing and **seeking to sell that software to our customer base**. As I am sure you can understand, to protect our trade secrets and other intellectual property, we cannot permit Lucasys to have access to our confidential **[**11]** and proprietary software through our customers **while Lucasys simultaneously develops, markets, and sells the same kind of software to the same customer base in direct competition with us**. This creates an intolerable risk for us—and you—that Lucasys may continue or begin to misuse or misappropriate our confidential information and trade secrets and unfairly use them to develop, market, and sell its competing software.

(Doc. 18-3, December 2019 Letter; *see also*, Compl. ¶ 54) (emphasis added.) Later, PowerPlan sent a second letter to AEP, reiterating that

> Lucasys offers ... **software solutions that compete with PowerPlan software**. To protect our intellectual property, including trade secrets, we cannot permit our customers to provide Lucasys with access to our proprietary software and associated confidential information while Lucasys is simultaneously developing, marketing, and selling competitive software to those same customers...

[*1340] (Doc. 18-2, July 2020 Letter; Compl. ¶ 54) (emphasis added.) In the Complaint, Lucasys asserts that, not only are these allegations of trade secret violations entirely unfounded, but that neither Lucasys nor any other third party *can* obtain proprietary information **[**12]** simply by accessing customer data through PowerPlan's software (where the data is housed). (Compl. ¶ 54.)[1] As a result of PowerPlan's letters, AEP narrowed the scope of its contract with Lucasys to services only, rather than the development of software products. (*Id.*)

Lucasys alleges that PowerPlan similarly coerced other customers, including Liberty Utilities and NextEra, to terminate its contracts with Lucasys, including one contract that involved the implementation of Lucasys Copilot product, discussed *supra*. (*Id.* ¶¶ 47-51.) Lucasys also asserts that PowerPlan has engaged in similar tactics — asserting baseless trade secrets claims to squelch nascent competition — with other competitors in the past that have threatened its monopoly on software. For example, PowerPlan also sought to restrain Regulated Capital Consultants ("RCC") because PowerPlan saw RCC's custom code editing as a threat. (*Id.* ¶¶ 44, 61.) In addition, the Complaint alleges that PowerPlan directly and/or implicitly threatens to cancel software license agreements or withhold software support from customers who work with Lucasys or other technology-providing competitors. (*Id.* ¶ 56.) According to Plaintiff, PowerPlan intends **[**13]** to send letters to all of its customers telling them not to do business with Lucasys. (*Id.* ¶ 58.)

As alleged, not only has Lucasys lost out on contracts, but it has been blocked from building business relationships with other utilities because of PowerPlan's actions. This foreclosure has inhibited Lucasys' ability to obtain important data reflecting customer's needs, develop that data to accomplish business objectives, and raise revenue—all of which will allow it to create new software to better compete with PowerPlan's. (*Id.* ¶ 60.) Because of the high barriers to entry and high switching costs, the most likely avenue for competition with PowerPlan's software is through the Supplemental Market; however, if any potential software competitor is squashed before it can grow, no company will ever be able to compete with PowerPlan's software monopoly. (*Id.* ¶ 62.)

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[1] As noted above, the Complaint alleges that some data cannot simply be extracted from the PowerPlan software because the software is so obsolete and uses an old coding language. (Compl. ¶ 23.)

Resultant Harm

According to Lucasys, PowerPlan's anticompetitive action — aimed at perpetuating its monopoly — has harmed competition in the Utility Software Market by (1) precluding any company from entering that market and competing with it and (2) quelling innovation, thereby keeping utility customers "in the technology of the dark **[**14]** ages of the 1990s for their utility management needs." (*Id.* ¶¶ 84, 88, 89.) PowerPlan's conduct has also harmed competition in the Supplemental and Deferred Tax Markets by allegedly (1) reducing choices available to utility customers by blocking any software component in the aftermarket; (2) raising prices in the markets because software components would allow for automation, which is cheaper than continuing to use manual labor; (3) decreasing the quality of products in the markets; and (4) generally reducing outputs in these markets. (*Id.* ¶ 85, 88.)

Asserted Claims

Based on the above allegations, Plaintiff alleges five counts of antitrust violations under *Sections 1* and *2* of the *Sherman Act*, *15 U.S.C §§ 1-2*. Counts I and II are brought under *Section 2* for unlawfully **[*1341]** maintaining a monopoly through negative tying and refusal to supply customers with their own data if they work with Lucasys. Counts III, IV, and V are brought under *Section 1* for unlawful agreements to restrain trade via negative tying, a concerted refusal to deal with Lucasys, and *de facto* exclusive dealing provisions in contracts with utilities. Count VI alleges a violation of the Georgia Fair Business Practices Act. Counts VII and VIII allege claims for tortious interference **[**15]** with contract and business, respectively. Finally, Counts IX and X allege claims of defamation *per se* and defamation.

Lucasys seeks treble damages as to the antitrust claims, actual damages for the state law claims, and permanent injunctive relief.

II. Legal Standard

HN1[] A complaint should be dismissed under *Rule 12(b)(6)* only where it appears that the facts alleged fail to state a "plausible" claim for relief. *Bell Atlantic v. Twombly, 550 U.S. 544, 555-556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *Fed. R. Civ. P. 12(b)(6)*. The plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. *See* *Erickson v. Pardus, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (citing *Bell Atlantic v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*); *Fed. R. Civ. P. 8(a)*. In ruling on a motion to dismiss, the court must accept the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. *See* *Hill v. White, 321 F.3d 1334, 1335 (11th Cir. 2003)*.

HN2[] A claim is plausible where the plaintiff alleges factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. A plaintiff is not required to provide "detailed factual allegations" to survive dismissal, but the "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555*. The plausibility standard **[**16]** requires that a plaintiff allege sufficient facts "to raise a reasonable expectation that discovery will reveal evidence" that supports the plaintiff's claim. *Id. at 556*. A complaint may survive a motion to dismiss for failure to state a claim even if it is "improbable" that a plaintiff would be able to prove those facts and even if the possibility of recovery is extremely "remote and unlikely." *Id.*

III. Discussion

A. Antitrust Standing Regarding the Utility Software Market

PowerPlan first argues that Lucasys cannot maintain any antitrust claims related to the Utility Software Market because it lacks standing to bring claims based on conduct in this market. (Motion to Dismiss Brief ("Mot."), Doc. 18-1 at 10-13.)

HN3[] "A private plaintiff seeking damages under the antitrust laws must establish standing to sue." *Sunbeam Tel. Corp. v. Nielsen Media Research, Inc., 711 F.3d 1264, 170 (11th Cir. 2013)* (quoting *Fla. Seed. Co., Inc. v. Monsanto Co., 105 F.3d 1372, 1374 (11th Cir. 1997)*). "Antitrust standing requires more than the 'injury in fact' and the 'case or controversy' required by Article III of the Constitution." *Fla. Seed Co., 105 F.3d at 1374* (citing *Todorov v. DHC Healthcare Auth., 921 F.2d 1438, 1448 (11th Cir. 1991)*). "The doctrine of antitrust standing reflects prudential concerns and is designed to avoid burdening the courts with speculative or remote claims." *Sunbeam, 711 F.3d at 1270* (citing *Associated Gen. Contractors of Cal., Inc. v. **[*1342]** Cal. State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*). "Antitrust standing is best understood in a general sense as a search for the proper plaintiff to enforce the **[**17]** antitrust laws." *Todorov, 921 F.2d at 1448*.

HN4[] A private plaintiff may bring a federal antitrust action through Section Four of the Clayton Act, *15 U.S.C. § 15(a)*, which creates a private right of action for "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ..., and shall recover threefold the damages by him sustained." *Sunbeam, 711 F.3d at 1270* (citing *15 U.S.C. § 15(a)*); *see also, Palmyra Park Hosp. Inc. v. Phoebe Putney Memorial Hosp., 604 F.3d 1291, 1298 (11th Cir. 2010)*. To recover treble damages under *§ 4* of the Clayton Act, a plaintiff must establish both that it has antitrust standing and that the defendant violated the antitrust laws. *Sunbeam, 711 F.3d at 1271* (citing *Levine v. Cen. Fl. Med. Affiliates, 72 F.3d 1538, 1545 (11th Cir. 1996)*).

HN5[] To determine whether a plaintiff has antitrust standing, courts in the Eleventh Circuit employ a two-prong test. *Sunbeam, 711 F.3d at 1271*; *Palmyra Park Hosp., 604 F.3d at 1299*. Under this test, a plaintiff must establish that (1) it has suffered an antitrust injury and (2) it is an "efficient enforcer" of the antitrust laws. *Sunbeam, 711 F.3d at 1271*; *Palmyra Park Hosp., 604 F.3d at 1299* ("We employ a two-prong test for antitrust standing under *§ 4* of the Clayton Act: first, the plaintiff must have alleged an antitrust injury; and second, the plaintiff must be an efficient enforcer of the antitrust laws."); *Florida Seed Co., 105 F.3d at 1374*. Under the second prong to determine whether the plaintiff is an "efficient enforcer," courts consider the following factors:

> (1) the directness or indirectness of the asserted **[**18]** injury; (2) the remoteness of the injury; (3) whether other potential plaintiffs were better suited to vindicate the harm; (4) whether the damages were highly speculative; (5) the extent which the apportionment of damages was highly complex and would risk duplicative recoveries; and (6) whether the plaintiff would be able to efficiently and effectively enforce the judgment.

Sunbeam, 711 F.3d at 1271 (citing *Associated Gen. Contractors, 103 S.Ct. at 908-912*; *Todorov, 921 F.2d at 1451-52*.)

HN6[] Whether a plaintiff has antitrust standing under the two-prong test also involves consideration of causation, *i.e.*, the nexus between the antitrust violation and the plaintiff's harm, as well as an assessment of whether the harm alleged is of the type for which Congress provides a remedy. *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110 n.5, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* ("Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."). "[P]lainly relevant to a determination of whether" a plaintiff suffered antitrust injury is the issue of preparedness to enter the market. *Cable Holdings of Ga., Inc. v. Home Video, Inc., 825 F.2d 1559, 1651 (11th Cir. 1987)* ("Thus, if [plaintiff] is deemed unprepared it has failed to establish one of the prerequisites of a private cause of action under the ***antitrust law***—a causal relationship between the antitrust **[**19]** violation alleged and the injury sustained") (cleaned up); *see also, Sunbeam, 711 F.3d at 1272-73* (discussing preparedness requirement and explaining that "in order to meet the second prong, the plaintiff must prove the existence of a competitor willing and able to enter the relevant market, but for the **[*1343]** exclusionary conduct of the incumbent monopolist").

HN7[] On this issue of preparedness, the Eleventh Circuit has explained that, in cases where a plaintiff "seeks to recover for an antitrust injury that allegedly arises from the frustrated expansion of one's business into a new market, there are significant requirements for establishing an entitlement to recovery," Cable Holdings, 825 F.2d at 1562. Specifically, a plaintiff must demonstrate "(1) an intention to enter the business and (2) a showing of preparedness to enter the business." *Id.* (citing Hayes v. Solomon, 597 F.2d 958, 973 (5th Cir. 1979), *cert. denied*, *444 U.S. 1078 (1980)*[2]; Heatransfer Copr. v. Volkswagenwerk, A.G., 553 F.2d 964, 988 n.20 (5th Cir. 1977), *cert. denied*, *434 U.S. 1087 (1978)*; Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 723 (11th Cir. 1984)); *see also,* Sanger Ins. Agency v. HUB Intern., Ltd., 802 F.3d 732, 738 (5th Cir. 2013). Absent a showing of both intention and preparedness to enter the business, "it cannot fairly be concluded that the antitrust violation was the cause of the failure to expand." Cable Holdings, 825 F.2d at 1562; *see also,* Gas Utilities Co. of Ala. v. S. Nat. Gas Co., 996 F.2d 282, 283 (11th Cir. 1993) ("The law clearly requires a showing of an intention and preparedness to enter the business to give a plaintiff a cause of action for being foreclosed from the market."). **[**20]**

HN8[] While an antitrust plaintiff must establish intention and preparedness, it "need not have an actual going business to establish private antitrust injury." Hayes, 597 F.2d at 973. ("Recovery can be had for a wrongfully frustrated attempt to enter a business."); Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1572 (11th Cir. 1991) ("Our circuit has recognized, in a related context, that an attempt to enter a market coupled with a showing of preparedness is sufficient to establish an injury in fact, which is one of the bases of standing.") Indeed,

> a defendant cannot benefit by the application of the standing doctrine from the fact that it is able to prevent the plaintiff from becoming a consumer of its product. As long as the plaintiff made a reasonable attempt to enter the market, our Circuit's case law recognizes that the plaintiff has standing to contest antitrust violations which create barriers to that market.

Thompson, 934 F.2d at 1572 (assessing preparedness where plaintiff sought to become consumer, rather than competitor, in monopolized market). In the case of "nascent competitors," the preparedness requirement allows courts to balance important concerns:

> [o]n the one hand, a plaintiff who never entered a particular market but would have if not for an antitrust violation can undoubtedly **[**21]** challenge an antitrust violation in court. In fact, such firms may become prime targets for antitrust violations, because "early exclusion may be far cheaper than ruining or disciplining a recent entrant who has become established." Areeda & Hovencamp, ***ANTITRUST LAW***, ¶ 349a, at 258 (4th ed. 2014). Too restrictive a view of standing would immunize incumbents from antitrust scrutiny when they only aim their efforts at new entrants (who may pose the primary threat to monopolists). On the other hand, an overly permissive standing doctrine would allow mere bystanders who lack particularized injury **[*1344]** to benefit from another party's antitrust violation.

Sanger, supra, 802 F.3d at 737.

HN9[] In evaluating whether an antitrust plaintiff has shown that it is prepared to enter the business, courts have considered: (1) the ability of the plaintiff to finance the business and to purchase the necessary facilities and equipment; (2) the consummation of contracts by the plaintiff; (3) affirmative action by the plaintiff to enter the business; and (4) the background and experience of the plaintiff in the prospective business. Hayes, 597 F.2d at 973 (citing Martin v. Phillips Petroleum Co., 365 F.2d 629, 633-34 (5th Cir. 1966)).

In the present case, PowerPlan argues that Lucasys fails to plead that it was prepared to enter the Utility **[**22]** Management Software Market, primarily because Lucasys does not allege that it has a substitute software product to sell in this market. (Mot. at 12) ("In the absence of a concrete product to sell in the alleged UMS Market, Lucasys is fundamentally unprepared to enter the market, and lacks standing to assert its monopolization claims in the UMS Market.")

Countering, Plaintiff Lucasys points out that PlowerPlan cites no authority holding, *or even suggesting*, that an antitrust plaintiff must have a complete substitute product to have antitrust standing. (Pl. Resp. at 10) (also citing

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[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Thompson, 934 F.2d at 1572) ("As long as the plaintiff made a reasonable attempt to enter the market, our Circuit's case law recognizes that the plaintiff has standing to contest antitrust violations which create barriers to that market); Martin, 365 F.2d at 633 ("There are numerous decisions stating that one need not have an actual going business to obtain standing, but an attempt to enter a business is sufficient.")). Further, Plaintiff Lucasys relies on the antitrust principle that "[i]mperfect substitutes create competitive pressures within markets," and that Lucasys' nascent software substitutes inspired PowerPlan's attempts to squish the threat of **[**23]** any entity seeking to compete in the software arena. (Pl. Resp. at 12-13) (citing Phillip E. Areeda (late) & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* ¶ 756b6 (4th ed. 2020 Cum. Supp. 2013-2019) ("[T]he availability of the imperfect substitute tends to put a ceiling on the monopolist's price.")

In its Complaint, Lucasys acknowledges that it has "not yet developed a software product that could be fully substituted for PowerPlan's Utility Management Software." (Compl. ¶ 43.) However, Lucasys has taken affirmative action in developing various types of software and technology that "fills in gaps" where PowerPlan's software is deficient (*id.*). For example, Lucasys has developed cloud-based software that "makes deferred tax computations based on the 2018 federal tax changes as applied to a customer's data"—a task that PowerPlan's PowerTax software cannot accomplish. (*Id.* ¶ 30a.) Lucasys has also developed a business process automation tool called Copilot that allows customers to configure steps between different data sources which, because it is automated, will save hundreds of thousands of dollars a year since it does not rely on the performance **[**24]** of manual tasks. (*Id.* ¶ 30b.) Further, Lucasys has developed a toolkit that contains applications that allow a customer utility to calculate lease payments, conduct audit computations, and complete other data-related tasks in an automated way. (*Id.* ¶ 30c.)

Lucasys alleges that, absent PowerPlan's anticompetitive conduct, it will be able to begin competing more broadly with PowerPlan in the Utility Software Market, build more software solutions, and eventually create a replacement for PowerPlan's overall utility management software suite. **[*1345]** (*Id.* ¶ 31.) As a plan for expansion, Lucasys asserts that it has and will continue to create new software in the context of specific contracts with individual customers (utilities), earn revenue from those contracts, use that revenue to further develop the software solutions, and then deploy those solutions more broadly in the Utility Software Market. (*Id.* ¶¶ 32, 60.)[3]

As an example, Lucasys cites a situation in which a utility, American Electric Power Service Corporation ("AEP"), sought proposals for technological development and consulting services for a full software suite around deferred taxes that would have replaced and expanded upon **[**25]** PowerTax, one of PowerPlan's existing software suites. (*Id.* ¶¶ 35, 36.) Both PowerPlan and Lucasys submitted bids and AEP ultimately awarded the contract to Lucasys. (*Id.* ¶¶ 36, 53.) After learning that Lucasys was developing its own software and thus entering the software development market, PowerPlan coerced AEP to cancel its contract with Lucasys, citing trade secrets concerns. Specifically, as discussed above, PowerPlan sent AEP a demand letter, stating *inter alia* that

> To protect our intellectual property, including trade secrets, we cannot permit our customers to provide Lucasys with access to our proprietary software and associated confidential information **while Lucasys is simultaneously developing, marketing, and selling competitive software to those same customers**.

(July 17, 2020 Letter to AEP, Doc. 18-2) (emphasis added.) Of note, Lucasys alleges that it cannot obtain any proprietary information simply by accessing customer data through PowerPlan software. (Compl. ¶ 54.)[4] Ultimately,

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[3] Lucasys further alleges that software competition "in the Supplemental Management Services Market is the most likely route for a potential competitor in the Utility Management Software market to achieve sufficient scale to threaten PowerPlan's monopoly. Thus, Powerplan's *modus operandi* of allowing consulting competition in the Supplemental Management Services market but thwarting through anticompetitive conduct all software competition in that market, effectively protects its monopoly" in the Utility Software Market. (Compl. ¶ 62.)

[4] Also relevant, as noted in the above Factual Background, Lucasys alleges that PowerPlan's software that houses customers' data is based on an outdated coding language and therefore customer data cannot simply be exported to make calculations elsewhere. (Compl. ¶ 23.) Lucasys alleges that it needs access to its customers' data in order to design and develop solutions to meet customers' needs and also to provide consulting services. (*Id.* ¶ 60.)

AEP, citing legal concerns, narrowed the scope of its contract with Lucasys so that the agreement was for the provision of *services only*, not the development of new tax software, which would have **[**26]** competed with PowerPlan's tax suites. (*Id.*)

The Complaint also alleges that Lucasys' founders have backgrounds and experience in the relevant market, specifically stating that: Lucasys was founded in 2018 by three employees who previously worked for PowerPlan but left in 2013, 2014 and 2015; each founder worked for other employers (after PowerPlan) where they obtained additional experience in software development, business consulting, and tax advising; and Lucasys provides subject matter expertise to utility customers to help with data issues. (Compl. ¶ 27.) Currently, Lucasys is actively competing in the Supplemental Services Market, providing consulting services to utilities in need of services to supplement the alleged deficiencies of PowerPlan's software. (*Id.* ¶¶ 79, 47, 50.) Lucasys is also one of three companies currently competing in the Deferred Tax Market. (*Id.* ¶ 82.)

[*1346] Accordingly, the allegations in the Complaint establish that: Lucasys' founders had the background and experience necessary to compete in the Utility Software Market; Lucasys had already taken affirmative steps to enter the market by developing relevant software and tools; Lucasys had consummated at least one **[**27]** contract with AEP for the development of additional software to compete with or replace PowerPlan's current tax suites and another contract with Liberty Utilities to implement its Copilot technology; and Lucasys had a plan to finance its continued development of new technology and expansion—therefore meeting all of the preparedness factors. *Hayes, 597 F.2d at 973*; *Martin, 365 F.2d at 633-34*.

In *Sanger, supra, 802 F.3d 732 (5th Cir. 2013)*, the plaintiff company (Sanger) was attempting to enter the market of selling/brokering veterinary professional liability insurance but was blocked by the defendant company, which had a near monopoly in the market. *Id. at 734-35*. In particular, Sanger argued that, upon learning of its plans to enter the market, the defendant monopoly reached out to underwriters (The Hartford, Travelers, Zurich) and to veterinary associations considering endorsing Sanger, and sought to influence those actors not to work with Sanger. *Id. at 736*. There, the defendant company made the same argument that PowerPlan makes here—that the plaintiff was not prepared to enter the market. In finding that Sanger had standing (at the summary judgment stage), the Fifth Circuit explained that Sanger had taken affirmative steps, including marketing its services to members of the Texas Equine Veterinary **[**28]** Association; setting up an office and staff; conducting discussions internally with veterinarians, insurance companies, brokers, and consultants; and even making some minor sales before it was blocked. *Id. at 739-40*.

The Fifth Circuit further explained that "*[t]he degree to which a business must take affirmative steps is mitigated by the impact of the antitrust violation*, which we assume to have occurred when analyzing standing. ***HN10***[] Thus, nascent competitors need not 'pay a courtroom entrance fee in the form of an expenditure of substantial resources in a clearly futile competitive gesture.'" *Id.* (citing *Fleer Corp. v. Topps Chewing Gum, Inc., 415 F.Supp. 176, 180 (E.D. Pa. 1976)* (emphasis added)). Thus, the *Sanger* Court found it "critical" that the obstacles to full entry flowed from the alleged anticompetitive conduct itself rather than unrelated reasons. *Id. at 740*. ("Without access to insurers, and to the rates and coverage options offered by those insurers, it would have been futile to take those steps.")

Here, the same reasoning applies. Lucasys took affirmative steps to enter the software market by creating three technological products (including cloud-based software), marketing and selling their products to consumers, and winning contract bids to develop more software. More than in **[**29]** *Sanger*, even, Lucasys' founders had significant experience in the business. Critically, like in *Sanger*, Lucasys' inability to grow was a direct result of PowerPlan's anticompetitive actions, which the Court assumes to be true for purposes of a standing analysis. *See Sanger, 802 F.3d at 738* (citing *Gas Util. Co. of Ala., 996 F.2d at 283 (11th Cir. 1993)*). Absent PowerPlan's actions, Lucasys would have retained the contract with AEP to develop new software, would have implemented its Copilot technology into NextEra's systems, and would have had access to the customers, their data, and additional revenue, all necessary to expand their technological operations. *Sanger, 802 F.3d at 740* ("Absent the exclusive dealing arrangement that Sanger contends prevented it from brokering policies, a factfinder could **[*1347]** conclude that Sanger was prepared to enter at least the Texas market").

Considering the allegations in the Complaint and in light of the authority above, the Court concludes that Lucasys has sufficiently pled that it was prepared to enter the Utility Software Market absent PowerPlan's anticompetitive conduct. *Sanger, 802 F.3d at 740*; *Hayes, 597 F.2d at 973*; *Martin, 365 F.2d at 633-34*; *Thompson, 934 F.2d at 1572*.[5] Accordingly, the portion of PowerPlan's motion to dismiss for lack of preparedness and standing is **DENIED**.

B. Injury to Competition in the Supplemental Market and Deferred Tax Market

In **[**30]** its second argument for dismissal, PowerPlan contends that Lucasys fails to allege plausible injury *to competition* in the Supplemental and Deferred Tax Markets, as opposed to just injury *to Lucasys*. (Mot. at 14-19.) As a result, PowerPlan seeks dismissal of Counts III, IV, and V for failure to allege harm to competition in these markets. (*Id.* at 19.)[6]

Counts III, IV, and V assert claims under *Section One* of the Sherman Act. In particular, Count III alleges that PowerPlan engaged in "negative tying," when it conditioned customers' purchases of its main utility management software on an agreement not to purchase/use products in the Supplemental and Deferred Tax Markets that are provided by PowerPlan's perceived competitors. (Compl. ¶ 114.) In Count IV, Lucasys alleges a "refusal to deal" claim, asserting that PowerPlan coerced customers — such as AEP, NextEra, and Liberty Utilities — into agreeing not to do business with Lucasys. (*Id.* ¶ 120.) In Count V, Lucasys alleges that PowerPlan engaged in *de facto* exclusive dealing by preventing customers from releasing their own data to third-party vendors, like Lucasys, without PowerPlan's permission. (*Id.* ¶ 126.)[7]

"*Section 1* ***HN11***[] of the Sherman Act prohibits '[e]very contract, **[**31]** combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states." *Ohio v. American Express Co., 138 S.Ct. 2274, 2283, 201 L. Ed. 2d 678 (2018)* (citing *15 U.S.C. § 1*). The phrase "restraint of trade" is best read to mean "undue restraint." *Id.* Accordingly, *§ 1* is understood to outlaw only unreasonable restraints. *Id.*

HN12[] Under *§ 1*, "[a] small group of restraints are unreasonable *per se* because they always or almost always tend to restrict competition and decrease output." *Id. at 2283* (cleaned up); *see also, Spanish Broadcasting Sys. of Fla., Inc. v. Clean Channel Communications, Inc., 376 F.3d 1065, 1069 (11th Cir. 2004)* (noting that "some restraints on trade remain illegal *per se*, such as certain agreements to fix prices . . ."). "Restraints that are not unreasonable **[*1348]** *per se* are judged under the 'rule of reason.'" *American Express Co., 138 S.Ct. at 2284*. "The rule of reason requires courts to conduct a *fact-specific* assessment of 'market power and market structure ... to assess the [restraint]'s actual effect' on competition." *Id.* (citing *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*) (emphasis added); *see also, Spanish Broadcasting, 376 F.3d at 1071* (explaining that most Section One claims that assert a prohibited contract that unlawfully restrains trade require the factfinder to "decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, **[**32]** its conditions before and after the restraint was imposed, and the restraint's history, nature, and effect.") (citing *State Oil v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*).

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[5] The Court notes that all of PowerPlan's cited cases, in which courts found a lack of preparedness, were before the court on summary judgment. PowerPlan's dearth of authority arising at the motion to dismiss stage only reinforces the Court's finding at this juncture.

[6] In its Motion to Dismiss, PowerPlan argues that Lucasys fails to allege injury to competition in the Deferred Tax Market in Section 3 of its brief. (Mot. at 22.) As reasoned *infra*, however, the Court finds that Plaintiff has adequately pled the contours of the Deferred Tax Market and therefore addresses issues of whether Plaintiff has sufficiently pled harm to competition in both markets together.

[7] PowerPlan does not argue that Lucasys fails to allege harm to competition in the Utility Software Market or argue for dismissal of Counts I and II on that basis. Counts I and II assert *§ 2* violations for unlawful maintenance of a monopoly. Accordingly, the Court does not assess those claims here or the issue of harm to competition in the Utility Software Market.

In making this fact-specific assessment, "[t]he goal is to 'distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.'" *American Express Co., 138 S.Ct. at 2284* (quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*).

HN13[] To determine whether a restraint violates the rule of reason under *§ 1*, courts conduct a three-step, burden-shifting analysis. *Id.* The plaintiff "has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Id.* If a plaintiff makes this showing, the burden shifts to the defendant to establish a procompetitive rationale for the restraint. *Id.* If the defendant makes this showing, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.*

HN14[] On the first step, "[i]n alleging the anticompetitive effect of the defendant's conduct, an antitrust plaintiff must show harm to competition rather than to competitors." *Spanish Broadcasting, 376 F.3d at 1071* (citation omitted). In other words, **[**33]** the anticompetitive effects "are measured by their impact on the market rather than by their impact on competitors." *Id; see also, Nat'l Collegiate Athletic Assoc. v. Alston, 141 S.Ct. 2141, 2159 (2021)* ("The 'statutory policy' of the Act is one of competition and it 'precludes inquiry into the question of whether competition is good or bad.'"). It is well-recognized that

> The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.

Spanish Broadcasting, 376 F.3d at 1069.

HN15[] To show this anticompetitive effect on the market, a plaintiff "may either prove that the defendants' behavior had an actual detrimental effect on competition, or that the behavior *had the potential* for genuine adverse effects on competition." *Id. at 1072*. (citing *Levine, 72 F.3d at 1551*) (emphasis added).

HN16[] A plaintiff can show anticompetitive effects on the market by direct evidence, "such as reduced output, increased prices, or decreased quality in the relevant market," *American Express Co., 138 S.Ct. at 2284*, or through indirect evidence, for example, "proof **[**34]** of market power plus **[*1349]** some evidence that the challenged restraint harms competition." *Id.; McWane, Inc. v. F.T.C., 783 F.3d 814, 827, 835 (11th Cir. 2015)* (explaining that exclusive dealing arrangements can harm competition by allowing a defendant to "increase prices, restrict output, reduce quality, slow innovation, or otherwise harm consumers" and also noting examples of "indirect evidence" including "the degree of rivals' exclusion, the duration of the exclusive deals, and the existence of alternative channels of distribution"); *Impax Laboratories, Inc. v. F.T.C., 994 F.3d 484, 492 (5th Cir. 2021)* ("Anticompetitive effects are those that harm consumers. Think increased prices, decreased output, or lower quality goods. Eliminating potential competition is, by definition, anticompetitive."); *1-800 Contacts, Inc. v. F.T.C., 1 F.4th 102, 118 (2d Cir. 2021)* (noting that anticompetitive harm may include "evidence of retarded innovation, or other manifestations of harm to consumer welfare") (internal citation omitted).

In the present case, PowerPlan argues that the Complaint does not allege plausible injury to competition in the Supplemental Market because it only alleges injury to Lucasys and any other allegations of harm to the Supplemental Market are "pure speculation." (Mot. at 14-19.)

In connection with harm to competition in the Supplemental and Deferred Tax Markets, the Complaint **[**35]** alleges that PowerPlan's anticompetitive conduct harms competition in these markets by:

- depriving utility customers of a choice in obtaining necessary services (*id.* ¶ 85);
- motivating customers to hire PowerPlan for supplemental services to avoid the risk that the customer's chosen service provider will be denied access to the customer's data (*id.*);

• imposing a Hobson's Choice on customers that excludes competitors and reduces output of new products and services, which in turn raises prices for customers (*id.*);

• coercing customers to terminate or reduce the scope of contracts with their chosen providers and are thus forcing them to accept lower quality services (*id.* ¶ 86);

• threatening customers to obtain fewer solutions from Lucasys and others, which decreases output (*id.* ¶ 87);

• reducing choices available to customers because it blocks Lucasys or others from establishing a software/technological component to that Supplemental Market (*id.* ¶ 88);

• raising prices because allowing a technological or software component in the Supplemental Market (like Lucasys' Copilot program) would be cheaper than consulting labor (*id.*);

• decreasing the quality of products and services in the Supplemental **[**36]** Market because innovative software or automation tools would improve performance (*id.*);

• generally reducing quality by keeping "utility customers in the technological dark ages" by squelching competitive innovation (*id.*);

• raising operating costs and reducing efficiency in the Supplemental and Deferred Tax Markets, which gets passed on to end-consumer ratepayers (*id.* ¶ 89).

In addition, Lucasys has supported these allegations with specific incidents. For example, Lucasys alleges that PowerPlan's actions limited output when PowerPlan coerced AEP into cancelling its contract with Lucasys to create new software and again when PowerPlan blocked NextEra's **[*1350]** implementation of Lucasys' innovative Copilot product. (Compl. ¶¶ 47, 54.) Without PowerPlan's intervention, new technology would have been available to customers seeking supplemental services. Relatedly, Lucasys alleges that Liberty Utilities has expressed concerns that, because of PowerPlan's interference, it was deprived of its choice of the most efficient, cost-effective provider in the market. (*Id.* ¶ 51.) On top of this, Lucasys alleges that PowerPlan engaged in similar tactics with other competitors, for example by similarly threatening **[**37]** Regulated Capital Consultants ("RCC") with "baseless trade secret misappropriation claims" because it perceived RCC's custom code editing and extension coding service as a threat. (*Id.* ¶ 44.) Further, Lucasys alleges that PowerPlan similarly threatened another individual consultant named Doug Johnson. (*Id.*)

At this early stage, Lucasys' allegations of harm to competition in the Supplemental and Deferred Tax Markets in the form of reduced output, decreased product quality, stymied innovation, and raised prices — which are supported by specific examples — sufficiently allege anticompetitive effects in these markets. *American Express Co., 138 S.Ct. at 2284*; *See also, Lifewatch Servs. Inc. v. Highmark Inc., 902 F.3d 323, 341 (3d Cir. 2018)* (finding allegations adequate to allege harm to competition where defendant denied coverage for specific cardiac monitor supplied by plaintiff company where denial of coverage allegedly resulted in reduced quality of cardiac monitors, reduced output of more effective devices, and hindered research, development, and innovation in the market).[8]

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[8] *See also Restore Robotics, LLC v. Intuitive Surgical, Inc., 2019 U.S. Dist. LEXIS 228084, 2019 WL 8063989, at *4 (N.D. Fla. Sept. 16, 2019)* (finding that plaintiff adequately alleged injury to competition where it alleged that tying and exclusive dealing arrangements harmed competition in the aftermarkets in general even though plaintiff was still able to "compete some" with defendant's anticompetitive conduct); *CollegeNet, Inc. v. Common Application, Inc., 355 F. Supp. 3d 926, 950 (D. Or. 2018)* (finding that plaintiff had adequately plead anticompetitive effect where, as a result of allegedly unlawful tying of products, members were coerced into agreeing not to purchase higher-quality, more innovative, or lower-priced college application processing services from rival); *Epic Games, Inc. v. Apple Inc., 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *101 (N.D. Cal. Sept. 10, 2021)* (finding that plaintiff had shown anticompetitive harm to competition by showing that Apple precluded developers from opening competing game stores, which would have increased competition and reduced prices and even improved innovation) .

Additionally, Lucasys' allegations that PowerPlan's anticompetitive conduct harmed competition by depriving customers of choice, and thereby prevented them from accessing lower-cost, higher-quality options, sufficiently **[**38]** assert harm to competition. *See* *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 528, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions . . ."); *Ross v. Bank of America, 524 F.3d 217, 223 (2d Cir. 2008)* (recognizing that one form of antitrust injury is coercive activity that prevents its victims from making free choices between market alternatives); *Glen Holly Entertainment, Inc. v. Tektronix Inc., 343 F.2d 1000, 1011 (9th Cir. 2003)* (same); *Procaps S.A. v. Patheon Inc., 141 F.Supp.3d 1246, 1275-76 (S.D. Fla. 2015)* (addressing relevant authority and acknowledging that "loss of choice can be evidence of actual adverse effects of the challenged restraint if the necessary impact on the market is demonstrated"); *In the Matter of McWane, Inc., A Corp., & Star Pipe Prod., Ltd. A. Ltd. P'ship.*, 2014-1 Trade Cas. (CCH) ¶ 78670 (MSNET Jan. **[*1351]** 30, 2014) ("McWane's exclusive dealing policy also had another adverse impact on competition: it denied its customers the ability to make meaningful choice regarding domestic fittings suppliers that the evidence shows many of them sought"), *aff'd sub. nom.* *McWane, Inc. v. F.T.C., 783 F.3d 814, 838 (11th Cir. 2015)*.

Most troubling, perhaps, are the allegations of anticompetitive effects of stymied innovation of software products and technological tools, such as Copilot, to be used in the Supplemental Market. "[A] dominant firm's restraints on the innovations of others goes to the **[**39]** heart of antitrust policy . . ." Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* ¶ 704d (4th ed. 2015) at 234. In the context of monopolistic restraints on innovation,

> The rationales for the monopolist's position are clear enough. Innovation is capable of producing significant, unexpected, market-shifting social gains. Many monopolists enjoy their positions as a result of dramatic innovations. However, once a monopolist has acquired its position, its attitude towards innovation can become quite different. Its investment in its own technology has been made, and just as it may have dislodged older rivals from their position by innovating, so too it fears dislodgement by the nascent technology of newer or potential rivals . . . .
>
> Restraints on innovation are very likely even more harmful than traditional price cartels, which we usually consider to be the most harmful anticompetitive practice. Innovation restraints are almost certainly more harmful than a great many of the exclusionary practices that antitrust has condemned . . .

(*Id.* at 234-35.). *See also, United States v. Microsoft Corp., 253 F.3d 34, 77-78, 346 U.S. App. D.C. 330 (D.C. Cir. 2001) cert. denied, 534 U.S. 952 (2001)* (finding that Microsoft engaged in anticompetitive behavior, **[**40]** albeit under *§ 2*, when it *inter alia* threatened to stop distributing Intel products bundled with Windows products unless Intel stopped aiding other firms (Sun and Netscape) from developing Java technology that would threaten Microsoft's monopoly in operating system market).

In light of these allegations, PowerPlan's heavy reliance on *Spanish Broadcasting* is misplaced. In that case, the plaintiff did not describe how defendant's conduct could harm competition, admitted that consumer prices were *lower* than they might be absent the defendant's activities, and even alleged that it had considerably expanded its share of the market over the past few years. *376 F.3d at 1074*. Moreover, unlike the plaintiffs in *Spanish Broadcasting* who alleged only the *possibility* of limited output, Lucasys has alleged that PowerPlan's actions did in fact limit output, for example, when it coerced AEP into cancelling a contract to create new software and blocked NextEra's implementation of Lucasys' existing Copilot product. (Compl. ¶¶ 47, 54.)

PowerPlan also cites *Spanish Broadcasting* for the proposition that damage to a single competitor is rarely sufficient to establish competitive harm. But what the *Spanish Broadcasting* Court said is that "damage to a critical competitor may also damage competition in general" **[**41]** where the plaintiff "draw[s] that implication with specific factual allegations." *376 F.3d at 1072-73* (citing *Full Draw Productions v. Easton Sports, Inc., 182 F.3d 745 (10th Cir. 1999)* (discussing reduction in exhibition space at archery trade shows following elimination of sole competitor); *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 331 U.S. App. D.C. 226 (D.C. Cir. 1998)* (discussing allegations that defendants' monopoly on radio advertising caused consumers to pay higher prices)).

[*1352] At this juncture, Lucasys has argued that damage to it — PowerPlan's only competitor that offered software solutions in the Supplemental Market — was damage to competition in general because the blocking of new products hampered innovation, reduced output, deprived consumers of the choice of a software component in the aftermarket, and ultimately raised prices. Thus, Lucasys has supported its contention that harm to it was harm to the Supplemental and Deferred Tax Market "with specific factual allegations." *Spanish Broadcasting, 376 F.3d at 1072-73*. *See* *In the Matter of McWane, supra, 2014-1 Trade Cas. (CCH) ¶ 78670* ("[T]he evidence that McWane's exclusive dealing policy significantly impaired the access of McWane's only rival, Star, to the main channel of distribution, thereby increasing its costs and keeping it below the critical level necessary to pose a real competitive threat, is plainly sufficient to meet the standard of harm to competition set forth in the prevailing case **[**42]** law"). Further, the Court notes that Lucasys alleges that PowerPlan engaged in similar anticompetitive conduct against at least one other firm (RCC), whose custom code editing PowerPlan perceived as a threat.

Under the circumstances here, Lucasys has adequately alleged anticompetitive effect and harm to competition in the Supplemental and Deferred Tax Markets.

C. The Deferred Tax Market

PowerPlan argues that Lucasys cannot state any claims based on the Deferred Tax Market because Lucasys' market definition is insufficient as a matter of law. (Mot. at 19.) Specifically, PowerPlan asserts that Lucasys has not pled facts concerning how the public views the submarket, the extent to which there are distinct customers, distinct prices, sensitivity to price change, or the number of customers in the submarket. (*Id.* at 21.)

Lucasys contends that it has adequately alleged the contours of the Deferred Tax Market and explained why the market it alleges is relevant and economically significant, in light of the "minimal burden required" to define markets at the motion to dismiss stage. (Pl. Resp. at 16-17.)

HN17[] In bringing claims under *Section One*, a plaintiff must define both (1) a geographic market and (2) a production **[**43]** market. *Jacobs v. Tempur-Pedic Intern., Inc., 626 F.3d 1327, 1336 (11th Cir. 2010)*. "Although the parameters of a given market are questions of fact . . . antitrust plaintiffs still must present enough information in their complaint to plausibly suggest the contours of the relevant geographic and product markets." *Id.*

Here, Lucasys has alleged that the relevant geographic market is the United States. (Compl. ¶ 83.) In pleading the relevant product market for the Deferred Tax Market, Lucasys alleges

> 81. In addition, or alternatively, there is a separate or sub-market within the Supplemental Management Services Market for deferred tax solutions for utilities (the "Deferred Tax Solutions Market"). This market comprises consulting services to assist investor-owned rate-regulated utilities with cleansing and remediating their data and implementing systems that allow them to calculate tax positions associated with changes in the tax code at scale.
>
> 82. Only three firms are capable of providing these specialized services: PowerPlan, Regulated Capital Consultants, and Lucasys.

(Compl. ¶¶ 81-82)

HN18[] "Defining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or **[**44]** potential—to take significant **[*1353]** amounts of business away from each other." *Duty Free Americas, Inc. v. Estee Lauder Co., Inc., 797 F.3d 1248, 1263 (11th Cir. 2015)* (*Polypore Int'l, Inc. v. F.T.C., 686 F.3d 1208, 1217 (11th Cir. 2012)*); *American Express, 138 S.Ct. at 2285* ("[T]he relevant market is defined as 'the area of effective competition.'").

HN19[] "A product market consists of products that have reasonable interchangeability for the purposes for which they are produced." *Estee Lauder, 97 F.3d at 1263* (citing *McWane, Inc. v. F.T.C., 783 F.3d 814, 828 (11th Cir. 2015)* (cleaned up)). "A relevant product market can exist as a distinct subset of a larger product market." *Jacobs, 626 F.3d at 1337*. However, "if customers view the products as substitutes, the products are part of the same market." *Id.* (citing *Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1435 (9th Cir. 1995)*).

"Defining the relevant submarket is a fact-intensive endeavor," and courts consider a variety of factors, including "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Estee Lauder Co., Inc., 797 F.3d at 1263* (citing *Polypore Int'l, 686 F.3d at 1217*). In light of this "fact-intensive" endeavor, a "dismissal of an antitrust claim for failure to adequately plead the relevant market can be problematic." *E.I. du Pont de Nemours and Co. v. Kolon Industries, Inc., 637 F.3d 435, 443 (4th Cir. 2011)* ("Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market.") **[**45]** (citing *Todd v. Exxon Corp., 275 F.3d 19, 199-200 (2d Cir. 2001)* (Sotomayor, J.)).

In *Jacobs, supra*, the Eleventh Circuit affirmed the district court's dismissal of the plaintiff's antitrust suit because "the complaint's allegations of the relevant product market [were] legally insufficient." *626 F.3d 1327, 1338 (11th Cir. 2010)*. In that case, the plaintiff alleged that the relevant product market was for "visco-elastic foam mattresses" which he alleged was a separate and distinct market from mattresses generally. *Id.* In explaining why the allegation was insufficient, the Eleventh Circuit noted that

> The complaint provides no factual allegations of the cross-elasticity of demand or other indications of price sensitivity that would indicate whether consumers treat visco-elastic foam mattresses differently than they do mattresses in general. Consumer preferences for visco-elastic foam mattresses versus traditional innerspring mattresses, and the costs associated with their sale, may vary widely, may vary little, or may not vary at all. Jacobs's complaint, however, gives no indication of which of these is the case. The allegations that visco-elastic foam mattresses are more expensive than traditional innerspring mattresses and that visco-elastic foam mattresses have "unique attributes" are **[**46]** similarly of little help. They do not indicate the degree to which consumers prefer visco-elastic foam mattresses to traditional mattresses because of these unique attributes and differences in price . . . . Are visco-elastic foam mattresses put to different uses (as luxury goods, such as in fine hotels and within higher income brackets) than are traditional mattresses? These types of questions, which our precedent makes clear are crucial to understanding whether a separate market exists, go unanswered in the complaint.

Id. at 1338. (further acknowledging that the plaintiff did not have a chance to undertake discovery but nevertheless had an obligation under *Twombly* to indicate that he *could* provide evidence plausibly suggesting **[*1354]** the definition of the alleged submarket).

PowerPlan relies heavily on *Jacobs* and Lucasys distinguishes it. As Lucasys points out, the plaintiff in *Jacobs* attempted to plead an artificially narrow market — visco-elastic mattresses instead of all mattresses — because, with a broader market, he likely could not establish that Tempur-Pedic had sufficient "market power." *Id. at 1340*. In addition, the visco-elastic mattresses, a product rather than a service, had obvious substitutes—other mattresses.

Here, **[**47]** Lucasys' Complaint alleges that the Deferred Tax Market includes services and products that are separate and distinct from the Supplemental Market, specifically services/products that allow utilities to configure their data to implement and assess new regulatory requirements resulting from 2017 and 2018 changes in the tax code. (Compl. ¶¶ 21-23.) Most importantly, Lucasys alleges that only three firms are capable of providing these specialized services at scale. (*Id.* ¶ 82.) Taking as true this allegation that only three potential suppliers are "capable of providing" deferred tax services, and making all reasonable inferences in Plaintiff's favor, it follows that the other seven consulting firms that provide services in the Supplemental Market are *not* capable of providing these services and therefore *do not* have the ability "to take significant amounts of [deferred tax consulting] business away from" the three providers of deferred tax services—Lucasys, PowerPlan, and RCC. *Estee Lauder Co., Inc., 797 F.3d at 1263*. Based on these allegations, it is plausible that the "peculiar characteristics," distinct services, and "specialized vendors" of the Deferred Tax Market support that it could be a "separate economic entity" from **[**48]** the Supplemental Market. *Id., 797 F.3d at 1263*.

In so finding, the Court places significant emphasis on the posture in which this issue arises. ***HN20***[] As the above authority demonstrates, defining the relevant market is a highly "fact-intensive endeavor," *Estee Lauder Co., Inc., 797 F.3d at 1263*, and the proper market definition can sometimes "be determined only after a factual inquiry into the 'commercial realities' faced by consumers." *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. The Court is also mindful that the Federal Rules allow a plaintiff to plead alternative theories of recovery, *Fed. R. Civ. P. 8(a)(3)*, which Plaintiff appears to have intentionally done with respect to its market definition. For these reasons, Plaintiff has adequately alleged a separate Deferred Tax Market. Of course, any challenge to Plaintiff's market definitions will be subject to significantly more stringent review as the case proceeds and Plaintiff will be required to provide evidence demonstrating *why* the seven other consulting firms that operate in the Supplemental Market are not capable of providing deferred tax services, that consumers see the Deferred Tax Market as separate from the Supplemental Market, and/or that it is priced differently, *etc.*[9]

D. Tortious Interference Claims

In addition to federal antitrust claims, Lucasys **[**49]** asserts a host of state law claims against PowerPlan. PowerPlan moves to dismiss only the tortious interference with contract and business claims (Counts VII and VIII) as precluded by the "stranger **[*1355]** doctrine." (Mot. at 23-25.) Responding, Lucasys argues that PowerPlan is not an essential party or third-party beneficiary to any of Lucasys' contracts with the utilities; rather, PowerPlan is a stranger to these agreements, and thus the "stranger doctrine" is no bar to Plaintiff's claims. (Pl. Resp. at 19-23.)

HN21[] To state a claim for tortious interference with contract or business relations, a plaintiff must show: (1) improper action or wrongful conduct by the defendant without privilege; (2) that the defendant acted purposely and with malice with the intent to injure; (3) that the defendant induced a breach of contractual obligations or caused a party or third parties to discontinue or fail to enter into an anticipated business relationship with the plaintiff; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff. *Tribeca Homes, LLC v. Marathon Inv. Corp., 322 Ga. App. 596, 745 S.E.2d 806, 808-09 (Ga. Ct. App. 2013)*.

HN22[] Under the first element, acting "without privilege" means that "the defendant was an intermeddler or 'stranger' to the business relationship at issue." **[**50]** *ASC Constr. Equip. USA, Inc. v. City Commercial Real Estate, Inc., 303 Ga. App. 309, 693 S.E.2d 559, 564 (Ga. Ct. App. 2010)*; *see also, Cox v. City of Atlanta, 266 Ga. App. 329, 596 S.E.2d 785 (Ga. Ct. App. 2004)*. In *Atlanta Market Center Mgmt., Co. v. McLane, 269 Ga. 604, 503 S.E.2d 278, 282 (Ga. 1998)*, the Georgia Supreme Court outlined the contours of who falls into the "stranger" category (*i.e.*, those who can be sued for tortious interference) and detailed how that category of individuals or entities has narrowed over time.

A defendant "is not a stranger to the contract just because [it] is not a party to the contract . . ." *McLane, 503 S.E.2d at 282*. For example, where the alleged intermeddler is the agent for one of the parties and the meddling acts were done within the scope of agency duties, the agent is not a stranger to the contract. *Id.* (citing *Jet Air v. Nat. Union Fire Ins. Co., 189 Ga. App. 399, 375 S.E.2d 873 (Ga. Ct. App. 1988)* (where intermeddler was the underwriter for party insurance company); *Hyre v. Denise, 449 S.E.2d 120 (Ga. Ct. App. 1994)* (where intermeddler was attorney acting on behalf of party client); *Nexus Services v. Manning Tronics, 201 Ga. App. 255, 410 S.E.2d 810 (Ga. Ct. App. 1991)* (where intermeddler was corporate president of one of contracting parties)). Third-party beneficiaries, whether intended or not, are not strangers to the contract. *Id.*

The "shadow of liability was further diminished" when the Georgia Court of Appeals "reasoned that 'all parties to a comprehensive interwoven set of contracts which provided for the financing, construction, and transfer of ownership' were not strangers." *Id.* (quoting *Jefferson-Pilot Comm. Co. v. Phoenix City Broadcasting, 205 Ga. App. 57, 421 S.E.2d 295 (Ga. Ct. App. 1992)* (where purchaser of radio station was not stranger to contractual relations **[**51]** between radio station's seller and seller's lenders)). ***HN23***[] Further, where a defendant is an "essential entity" to another contract, he cannot be liable for tortious interference. *Id.* (citing *Renden v. Liberty Real*

[9] PowerPlan also argued that Lucasys failed to adequately allege harm to the Deferred Tax Market. (Mot. at 21-22.) But, as detailed in Section B., *supra*, Plaintiff has adequately pled injury to competition in this market based on allegations similar to the ones related to the Supplemental Market.

Estate, 213 Ga. App. 333, 444 S.E.2d 814 (Ga. Ct. App. 1994) (where the lessor was an "essential entity" to the subletting space by its tenants since the tenant's right to sublease was set forth in the lessor's lease)). The McLane Court embraced this over-time reduction of the "number of entities against which a claim of tortious interference can be maintained." *Id.*

HN24[] Even so, strangers still exist. To qualify as an unintended third-party beneficiary, who cannot be sued for tortious interference, an individual or entity must have a *legitimate* and *direct* economic interest in the contract at issue. Howerton v. Harbin Clinic, LLC, 333 Ga. App. 191, **[*1356]** 776 S.E.2d 288, 295 (Ga. Ct. App. 2015); Mabra v. SF, Inc., 316 Ga. App. 62, 728 S.E.2d 737 (Ga. Ct. App. 2012). Put another way, if an entity does not have a legitimate and direct economic interest, it can be sued, absent other barriers. Further, a defendant does not become an unintended third-party beneficiary of a contract simply because he might receive some incidental benefit from performance of the agreement. Howerton, 776 S.E.2d at 295.

Likewise, a fact pattern involving multiple contracts with related entities does not necessarily mean that those contracts are "interwoven" such that any involved party **[**52]** is immune from liability for tortious interference. *See* id. at 296 (where plaintiff had contract with hospital, hospital had contract with clinic, and clinic had contract with defendant, the three agreements were not "a comprehensive interwoven set of contracts" because they involved separate subject matter and each addressed issues that were separate and independent of the subjects of the other two). In assessing the relatedness of the contracts, the Howerton Court emphasized that the defendant failed to show that he had a "direct economic interest" in the plaintiff's contract that was the subject of the tortious interference allegations. *Id.*

Here, Lucasys alleges that PowerPlan acted with malice to sabotage Lucasys' contracts with various customers including NexEra, Liberty Utilities, AEP, and another unnamed customer. (Compl. ¶¶ 47-55.) As alleged, PowerPlan threatened these customers with litigation and also directly or implicitly threatened to cancel software licensing agreements if the customers continued to work with Lucasys. (*Id.* ¶ 56.) As a result, two of four of Lucasys' major utilities customers terminated their relationships with Lucasys, one reduced the scope of Lucasys contract, and one **[**53]** "remains at risk." (*Id.* ¶ 57.) Besides cancelled contracts, Lucasys has also lost out on future opportunities with other customers, which harms its ability to innovate new technology and to grow. (*Id.* ¶¶ 59-62.) The Complaint does not allege that PowerPlan was a party to any of Lucasys contracts or any facts to support that PowerPlan was an unintended beneficiary of Lucasys' contracts.

Like in Howerton, PowerPlan has identified no *direct* interest in Lucasys' contracts or business relationships with the utility customers. 776 S.E.2d at 296. That PowerPlan also has a contract with AEP to provide utility management software does not mean it had an interest in a wholly *separate* agreement between AEP and Lucasys for separate services. Howerton, 776 S.E.2d at 296. Indeed, based on the allegations in the Complaint, PowerPlan's primary interest in Lucasys' contracts or prospective business agreements with utilities was that of a competitor.[10] **HN25**[] **[*1357]** Georgia Courts have acknowledged that tortious interference claims can be brought against competitors who are not otherwise deprived of stranger status for some other reason. *See* Parks v. Multimedia Techs., Inc., 239 Ga. App. 282, 520 S.E.2d 517, 526-27 (Ga. Ct. App. 1999) (holding that competitor

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[10] Without using this explicit language, PowerPlan argues that it had an interest in Lucasys' relationships because, under its separate contracts with customers, it has the power to protect its interest in PowerPlan confidential information. (Reply at 14-15.) But, taking the allegations in the Complaint as true at this stage, "neither Lucasys not any other customer or third party can obtain proprietary information simply by accessing customer data through PowerPlan's software." (Compl. ¶ 54.) PowerPlan's assertions of trade secret concerns were, according to the Complaint, baseless and concocted, (*id.*), and thus not *direct* or *legitimate*. For this reason, PowerPlan's reliance on CAE Inc. v. Gulfstream Aero. Corp., 2017 U.S. Dist. LEXIS 124573, at *20-23 (D. Del. Aug. 2, 2017), an unreported case cited in its reply brief, is misplaced. There, the contract at issue involved a third party's *agreement to provide* plaintiff with defendant's data. 2017 U.S. Dist. LEXIS 124573, [WL] at *3-6. Here, Lucasys' contract with AEP (or others) was not for the provision of PowerPlan's data, *i.e.*, PowerPlan's data was not the direct subject of any agreement. Instead, Lucasys' agreement with AEP was for separate services that involved accessing customer data which *indirectly* involved access to PowerPlan software (but not in a manner that would allow a third party to obtain proprietary information, *see* Compl. ¶ 54).

was indisputably a stranger to the contracts and business relationship); *Tom's Amusement Co. v. Total Vending Servs., 243 Ga. App. 294, 533 S.E.2d 413, 417 (Ga. Ct. App. 2000)* (physical precedent only) (noting **[**54]** that, even though employee, acting as agent for employer, was not stranger and thus "cannot be held liable" under a claim of tortious interference, "the competitor and its agents who assist in the interference can").

In light of PowerPlan's failure to identify a direct interest in Lucasys' contract with AEP (or other utilities), its cited authority is inapposite. In *Atlanta Fiberglass USA, LLC v. KPI, Co., 911 F. Supp. 2d 1247 (N.D. Ga. 2012)*, the plaintiff (Atlanta Fiberglass) and defendant (KPI) were part of a single supply chain agreement in which KPI agreed to manufacture products exclusively for the Atlanta Fiberglass, and Atlanta Fiberglass agreed to assist its customers in developing products to be exclusively manufactured by KPI. *Id. at 1256-57*. KPI allegedly reached out to customers, attempting to cut out the middleman (Atlanta Fiberglass). *Id.* Atlanta Fiberglass alleged that, in reaching out directly to customers, KPI (the manufacturer) both violated its contract with Atlanta Fiberglass and also tortiously interfered with the Atlanta Fiberglass's contracts with its customers. *Id.* The court found that KPI was not a stranger to the plaintiff's contracts with its customers because the contracts were interwoven, **[**55]** as evidenced by the allegation that KPI's breach of its contract with plaintiff prevented the plaintiff from fulfilling its contracts with customers. *Id. at 1257*. In that scenario, the contracts were multiple links in single supply chains, and the agreements were dependent on one another. KPI, as the exclusive manufacturer of the customers' products had a *legitimate* and *direct* interest in Atlanta Fiberglass's contracts with the customers—indeed, it was a *direct third-party beneficiary* to these contracts.

That is not the situation presently before the Court. As noted, PowerPlan has provided no direct and legitimate interest in Lucasys' contracts with AEP and other customers. Rather, Lucasys' contracts were for independent and separate services that required nothing of PowerPlan. Most importantly, PowerPlan was not a direct third-party beneficiary of Lucasys's contracts, unlike in *Atlanta Fiberglass*. Moreover, as Plaintiff points out, if PowerPlan's theory were correct — that because PowerPlan has contracts with customers for utility management software it therefore has an interest in *any* contract that its customers enter into that involves the monopoly software product — then PowerPlan would *never* be a stranger **[**56]** to the contracts its customers had with any supplemental service provider. The Court rejects this invitation to grant PowerPlan immunity to tortiously interfere with any potential competitors in a market in which it has an alleged monopoly.

Under the circumstances and based on the allegations in the Complaint, PowerPlan has not identified any facts or authority to support the conclusion that it had a direct and legitimate interest in Lucasys' contracts and business relationships with the various utilities/customers. PowerPlan's request for dismissal of the tortious interference claims is therefore **DENIED**.

[*1358] IV. Conclusion

At this stage, Lucasys has adequately alleged facts to support that: it was prepared to enter the Utility Software Market; PowerPlan's actions harmed competition in all three markets; and the Deferred Tax Market is separate and distinct from the Supplemental Market. The Complaint also supports that PowerPlan was a stranger to the contracts/business relationships with which it allegedly interfered.

Accordingly, Defendant's Motion to Dismiss [Doc. 18] is **DENIED**. It appears that the Parties have already exchanged initial disclosures and completed the joint preliminary conference. **[**57]** (*See* Docs. 23, 24, 25, 27.) The Court **ORDERS** that PowerPlan's Answer to the Complaint shall be due within 14 days of the date of this Order and discovery shall commence on that same date. The Parties are **DIRECTED** to submit a proposed joint case management scheduling order within 20 days of the date of this Order.

IT IS SO ORDERED this 30th day of September 2021.

/s/ Amy Totenberg

Honorable Amy Totenberg

United States District Judge

[Sky Federal Credit Union v. Fair Isaac Corp. (In re FICO Antitrust Litig.)]

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

September 30, 2021, Decided; September 30, 2021, Filed

No. 1:20-CV-02114; No. 1:20-CV-02516; No. 1:20-CV-02533; No. 1:20-CV-02559; No. 1:20-CV-02651; No. 20-CV-02755; No. 20-CV-03204; No. 20-CV-03315; No. 20-CV-03395; No. 20-CV-04575

Reporter
2021 U.S. Dist. LEXIS 189371 *; 2021 WL 4478042

IN RE: FICO ANTITRUST LITIGATION RELATED CASES;This Document Relates to the Following Cases: SKY FEDERAL CREDIT UNION, on behalf of itself and all others similarly situated, Plaintiffs, v. FAIR ISAAC CORPORATION, Defendant.FIRST CHOICE FEDERAL CREDIT UNION, on behalf of itself and all others Similarly situated, Plaintiffs, v. FAIR ISAAC CORPORATION, Defendant.AMALGAMATED BANK, on behalf of itself and all others similarly situated, Plaintiffs, v. FAIR ISAAC CORPORATION, Defendant.ALCOA COMMUNITY FEDERAL CREDIT UNION, on behalf of itself and all others similarly situated, Plaintiffs, v. FAIR ISAAC CORPORATION, Defendant.GETTEN CREDIT COMPANY, individually And on behalf of all others similarly situated, Plaintiffs, v. FAIR ISAAC CORPORATION, Defendant.KENMORE NY TEACHERS FEDERAL CREDIT UNION, on behalf of itself and all Others similarly situated, Plaintiffs, v. FAIR ISAAC CORPORATION, EQUIFAX, INC, EXPERIAN, PLC and TRANSUNION, LLC, Defendants.ALTERNATIVE FINANCE, INC and BROOKFIELD MANAGEMENT COMPANY, on behalf of themselves and all others similarly situated, Plaintiffs, v. FAIR ISAAC CORPORATION, Defendant.CITY OF BOSTON CREDIT UNION, Plaintiff, v. FAIR ISAAC CORPORATION, Defendant.HOLMES COUNTY BANK AND TRUST COMPANY, Plaintiff, v. FAIR ISAAC CORPORATION, Defendant.GARNER PROPERTIES & MANAGEMENT on behalf of itself and all others similarly situated, Plaintiffs, v. FAIR ISAAC CORPORATION, Defendant.

Subsequent History: Dismissed by, in part, Without prejudice *In re FICO Antitrust Litig. Related Cases, 2023 U.S. Dist. LEXIS 174653, 2023 WL 6388247 (N.D. Ill., Sept. 28, 2023)*

Core Terms

Purchasers, credit bureau, scores, indirect, consolidated, appointed, Interim, antitrust, monopoly, damages, bought, cases, team, treble damages, conspiracy, consumers, includes, prices, Reply, motion to dismiss, related action, state law

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For Amalgamated Bank, Plaintiff (1:20-cv-02533): Barbara J Hart, LEAD ATTORNEY, PRO HAC VICE, Grant & Eisenhofer P.A., New York, NY; Andrea Farah, Christian Levis, Frank Strangeman, PRO HAC VICE, Lowey Dannenberg, P.C., White Plains, NY; Jennifer Winter Sprengel, Cafferty Clobes Meriwether & Sprengel LLP, Chicago, IL.

For Fair Isaac Corporation, Defendant (1:20-cv-02533): Britt Marie Miller, LEAD ATTORNEY, J. Gregory Deis, Matthew David Provance, Mayer Brown LLP, Chicago, IL.

For Alcoa Community Federal Credit Union, on behalf of itself **[*3]** and all others similarly situated, Plaintiff (1:20-cv-02559): Bart D. Cohen, Linda P. Nussbaum, Nussbaum Law Group, P.C., New York, NY; Joseph Michael Vanek, Matthew T. Slater, Paul Ethan Slater, Sperling & Slater, P.C., Chicago, IL; Karen Halbert, PRO HAC VICE, Roberts Law Firm, P.A., Little Rock, AR; Michael G Dickler, Sperling & Slater, Chicago, IL; Michael L. Roberts, PRO HAC VICE, Roberts Law Firm, P.A., Little Rock, AR.

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For Getten Credit Company, Plaintiff (1:20-cv-02651): Michelle J. Looby, Daniel E Gustafson, Daniel C Hedlund, Gustafson Gluek PLLC, Minneapolis, MN; Melinda J. Morales, Kenneth A. Wexler, Wexler Wallace LLP, Chicago, IL.

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For Fair Isaac Corporation, Defendant (1:20-cv-02755): **[*4]** J. Gregory Deis, LEAD ATTORNEY, Mayer Brown LLP, Chicago, IL.

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For Experian, PLC, Defendant (1:20-cv-02755): Carolyn Pelling Gurland, LEAD ATTORNEY, White & Case, LLC, Chicago, IL; Bryan Gant, PRO HAC VICE, Martin Michael Toto, Robert A Milne, White & Case, New York, NY; Jack Edward Pace, III, PRO HAC VICE, White & Case LLP, New York, NY.

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For Alternative Finance, Inc., on behalf of themselves and all others similarly situated, Plaintiff (1:20-cv-03204): Michael Eisenkraft, Cohen Milstein Sellers & Toll PLLC, New York, NY; Brent W. Johnson, Daniel McCuaig, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Christopher James Bateman, David Owen Fisher, PRO HAC VICE, Cohen Milstein Sellers & Toll, PLLC, New York, NY; Carol V Gilden, Cohen Milstein Sellers & Toll PLLC, Chicago, IL.

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For Fair Isaac Corporation, Defendant (1:20-cv-03204): Britt Marie Miller, LEAD ATTORNEY, J. Gregory Deis, Matthew David Provance, Mayer Brown LLP, Chicago, IL.

For City of Boston Credit Union, Plaintiff (1:20-cv-03315): Gregory Asciolla, LEAD ATTORNEY, Labaton Sucharow LLP-NY, New York, NY; Guillaume Buell, LEAD ATTORNEY, PRO HAC VICE, Thornton Law Firm LLP, Boston, MA; Jonathan Scott Crevier, Karin E. Garvey, Matthew J Perez, LEAD ATTORNEYS, PRO HAC VICE, Labaton Sucharow LLP, New York, NY; Robin Van Der Meulen, LEAD ATTORNEY, Labaton Sucharow Llp, New York, NY; Robin A. van der Meulen, LEAD ATTORNEY, PRO HAC VICE, Labaton Sucharow, New York, NY; Buell Guillaume; Lori Ann Fanning, Marvin Alan Miller, Miller Law LLC, Chicago, **[*6]** IL.

For Fair Isaac Corporation, Defendant (1:20-cv-03315): Britt Marie Miller, LEAD ATTORNEY, J. Gregory Deis, Matthew David Provance, Mayer Brown LLP, Chicago, IL.

For Holmes County Bank and Trust Company, Plaintiff (1:20-cv-03395): Gregory Asciolla, LEAD ATTORNEY, PRO HAC VICE, Labaton Sucharow LLP-NY, New York, NY; Jonathan Scott Crevier, LEAD ATTORNEY, PRO HAC VICE, Labaton Sucharow LLP, New York, NY; Karin E. Garvey, LEAD ATTORNEY, PRO HAC VICE, Labaton Sucharow, LLP, New York, NY; Matthew J Perez, LEAD ATTORNEY, PRO HAC VICE, Labaton Sucharow Llp, New York, NY; Robin Van Der Meulen, LEAD ATTORNEY, Labaton Sucharow Llp, New York, NY; Robin A. van der Meulen, LEAD ATTORNEY, PRO HAC VICE, Labaton Sucharow, New York, NY; Charles Foose Barrett, PRO HAC VICE, Neal & Harwell, PLC, Nashville, TN; Lori Ann Fanning, Miller Law LLC, Chicago, IL; Marvin Alan Miller, Miller Law LLC, Chicago, IL.

For Fair Isaac Corporation, Defendant (1:20-cv-03395): Britt Marie Miller, LEAD ATTORNEY, J. Gregory Deis, Matthew David Provance, Mayer Brown LLP, Chicago, IL.

For Garner Properties & Management, LLC, on Behalf of Itself and All Others Similarly Situated, Plaintiff (1:20-cv-04575): Brant D. Penney, Garrett **[*7]** D Blanchfield, Jr., PRO HAC VICE, Reinhardt Wendorf & Blanchfield, St. Paul, MN; Charles Robert Watkins, Guin Stokes & Evans, LLC, Chicago, IL.

Judges: Honorable Edmond E. Chang, United States District Judge. Magistrate Judge David E. Weisman.

Opinion by: Edmond E. Chang

Opinion

MEMORANDUM OPINION AND ORDER

Ten separate proposed antitrust class actions against Fair Isaac Company (FICO) are pending before this Court: *Sky Federal Credit Union vs. Fair Isaac Corporation*, 20-cv-02114; *First Choice Federal Credit Union vs. Fair Isaac Corporation*, 20-cv-02516; *Amalgamated Bank vs. Fair Isaac Corporation*, 20-cv-02533; *Alcoa Community Federal Union vs. Fair Isaac Corporation*, 20-cv-02559; *Getten Credit Company vs. Fair Isaac Corporation*, 20-cv-02651; *Kenmore NY Teachers Federal Credit Union vs. Fair Isaac Corporation*, 20-cv-02755; *City of Boston Credit Union vs. Fair Isaac Corporation*, 20-cv-03315; *Holmes County Bank and Trust Company vs. Fair Isaac Corporation*, 20-cv-03395; *Garner Properties & Management vs. Fair Isaac Corporation*, 20-cv-04575; and *Alternative Finance, Inc. et al vs. Fair Isaac Corporation*, 20-cv-03204. Having accepted reassignment of these actions, R. 48, the parties have presented various proposals on **[*8]** how best to consolidate the cases under *Federal Rule of Civil Procedure 42(a)*, and whom to appoint as interim class counsel under *Rule 23*. All ten related actions allege that FICO engaged in monopolistic behavior that caused the Plaintiffs to overpay for FICO credit scores, in violation of the

Sherman Act, *15 U.S.C. §§ 1* & *2*, and various state laws.[1] But the various Plaintiffs' attorneys wish to proceed on different legal theories of recovery for a subset of Plaintiffs and class members. This has led them to disagree over how the cases should be consolidated. R. 62, Alternative Finance Br.; R. 65, Sky Fed. Br.[2]

For the reasons discussed in this Opinion, the Court grants the motion filed by Sky Federal Credit Union, which has the support of the Plaintiffs in eight of the ten related cases (20-cv-02114, 20-cv-02516, 20-cv-02533, 20-cv-02559, 20-cv-02651, 20-cv-02755, 20-cv-03315, and 20-cv-03395). R. 64, Sky Fed. Mot. The competing motion filed by Alternative Finance and Brookfield Management is denied. R. 61, Alternative Finance Mot. Scott+Scott Attorneys at Law LLP (the firm for Sky Federal Credit Union) is appointed as Interim Class Counsel representing the direct-purchaser plaintiffs as defined by them, **[*9]** with MoloLamken LLP acting as liaison counsel. Cohen Mil-stein Sellers & Toll PLLC is appointed to represent the indirect-purchaser plaintiffs as defined by Scott+Scott.

I. Background

All ten related cases allege that FICO overcharged for credit scores. A credit score is a three-digit number that is supposed to convey the creditworthiness of a consumer, based on his or her credit history. R. 1, Compl. ¶ 1. Consumers can buy their own credit scores to monitor their own creditworthiness—the market for these scores is called the B2C market, short for business-to-consumer. *Id.* But the cases now before the Court are all concerned with the B2B, or business-to-business market, in which businesses buy consumers' credit scores to assess the risk of extending credit or engaging in transactions with those consumers. *Id.* ¶¶ 1-2.[3] FICO has allegedly maintained a 90% monopoly over the B2B credit-score market for many years. *Id.* ¶ 2. According to most of the Plaintiffs, FICO has had help maintaining its monopoly from the three major credit bureaus: TransUnion, Equifax, and Experian. *Id.* ¶ 5.[4] These credit bureaus allegedly acted as FICO's agents and co-conspirators in negotiating sales of credit scores **[*10]** to businesses in all 50 states, all on terms that favor FICO. *Id.*

There will be time enough later to delve into the details of FICO's allegedly monopolistic behavior and alleged conspiracy with the credit bureaus. For purposes of the consolidation motions, what matters are the different types of Plaintiffs in the ten related cases. Although they are all B2B credit-score purchasers, the details of their interactions with FICO differ in important ways.

The first category of Plaintiffs includes entities like Amalgamated Bank, which says it bought FICO scores directly from FICO as well as from credit bureaus. R. 1, 20-cv-2533, Compl. ¶ 14. Amalgamated Bank's complaint seeks to represent a class of B2B FICO-score consumers that includes "[a]ll B2B Purchasers residing in the United States that directly purchased a FICO Score from Fair Isaac ... = during the Class Period." *Id.* ¶ 86. Sky Federal's Complaint proposes the same class. Compl. ¶ 86. The Court will call this category of Plaintiffs that bought credit scores directly from FICO, "FICO-Direct Purchasers."

The second category of Plaintiffs includes Sky Federal and all other entities that allege that they bought credit scores from **[*11]** FICO through agreements with FICO *and the credit bureaus*. Compl. ¶¶ 14, 55-59. The full definition of Sky Federal's proposed class includes this second category of businesses: "All B2B Purchasers residing in the United States that directly purchased a FICO Score from Fair Isaac *and/or a Credit Bureau* during

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1 The Court has subject matter jurisdiction over Sherman Act and Clayton Act claims under *28 U.S.C. § 1331*, and supplemental jurisdiction over the state law claims under *28 U.S.C. § 1367*.

2 Citations to the record are noted as R. __, followed by the docket number, with a page or paragraph number if applicable. Unless otherwise noted, docket citations are to the docket in *Sky Federal Credit Union vs. Fair Isaac Company*, 1:20-cv-02114.

3 There is no need to review the factual allegations in all ten related cases—the overlap is considerable—but a representative sample will show the different types of claims and theories they present.

4 *See also* R. 1, 20-cv-02516, Compl. ¶ 5; R. 1, 20-cv-02533, Compl ¶ 5; R. 1, 20-cv-02559, Compl. ¶¶ 3-5; R. 1, 20-cv-2561, Compl. ¶¶ 2, 15; R. 1, 20-cv-2755, Compl. ¶¶ 4, 8; R. 1, 20-cv-03315, Compl. ¶¶ 4-7; R. 1, 20-cv-03395, Compl. ¶¶ 4-7.

the Class Period." Comp. ¶ 86 (emphasis added). The Court will call these entities, which bought FICO scores through the credit bureaus, "Credit Bureau Purchasers." Remember that Sky Federal and seven other Plaintiffs allege that the credit bureaus engaged in a conspiracy with FICO that helped maintain FICO's monopoly. *Id.* ¶ 5 (see also, footnote 4).

The third and final group of Plaintiffs includes those that bought FICO scores not from FICO or a credit bureau, but from an intermediary company. This group includes, for example, Brookfield Management Services, a co-plaintiff in *Alternative Finance, Inc. et al v. Fair Isaac Company*, 20-cv-03204. Brookfield Management Services is a property management company that buys FICO scores from a tenant-screening service, which has bought them from the credit bureaus. R. 1, 20-cv-03204, Compl. ¶ 4. Garner Properties & Management, which filed **[*12]** its own related lawsuit, is a similar business. R. 1, 20-cv-04575, Compl. ¶ 6.[5] Alternative Finance seeks to represent a class "consisting of all end-user business-customers that indirectly purchased a FICO Score in the Business Market for credit scores for use and not for resale from January 1, 2006 through the present in a Repealer Jurisdiction." *Alternative Finance* Compl. at 1. (More later on "repealer jurisdictions.") This would include Brookfield, Garner, and any other company that bought a FICO score from a company that is not FICO or a credit bureau. The Court will call these the Indirect Purchasers.

But Alternative Finance believes its class also encompasses the second category of Plaintiffs described above: those who bought FICO scores from one of the three credit bureaus. R. 62, Alternative Finance Brief in Support of Motion to Consolidate, 1-3. According to Alternative Finance, a credit bureau is a direct purchaser of a FICO score, but anyone who buys a credit score from a credit bureau is an indirect purchaser. *Id.* This, of course, contradicts Sky Federal's claim that FICO and the credit bureaus are acting in a conspiracy.

So Sky Federal's counsel and Alternative Finance's **[*13]** counsel have filed separate motions to consolidate the actions in this case, through which they are vying for the right to represent a presumably dominant share of the proposed classes of plaintiffs: the Credit Bureau Purchasers. Sky Federal's counsel, Scott+Scott, wishes to represent "Direct Purchasers," while Alternative Finance's counsel, Cohen Milstein, wishes to represent "Indirect Purchasers" of credit scores. Each side believes the Credit Bureau Purchasers fall in its domain. Neither seems to object to the other firm taking charge of the undisputed plaintiffs on either end of the spectrum (the Indirect Purchasers for Cohen Milstein, and the FICO-Direct Purchasers for Scott+Scott). The questions now before the Court are: in what configuration should the ten related cases be consolidated, and who should take the lead on representing the Credit Bureau Purchasers?

II. Standard of Review

A. *Rule 42(a)*: Consolidation

Federal Rule of Civil Procedure 42(a) grants federal district courts the authority and discretion to consolidate related actions for greater efficiency. The Rule states: "If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the **[*14]** actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay." *FED. R. CIV. P. 42(a)*. Courts should consolidate related actions when possible to promote judicial economy, as long as the consolidation does not unduly prejudice any party. *Ikerd v. Lapworth, 435 F.2d 197, 204 (7th Cir.1970)*; *United States v. Knauer, 149 F.2d 519, 520 (7th Cir. 1945)*.

B. *Rule 23(g)*: Class Counsel

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[5] Garner Properties & Management is the only Plaintiff to take no position on the motions to consolidate filed before the Court. R. 62, Alt. Finance Br. at 2 (FN 2). Garner does not intend to apply for the lead counsel position and supports Cohen Milstein as the lead counsel for indirect-purchaser plaintiffs. *Id.*

In a proposed class action, a federal court may assign interim class counsel even before taking up the motion for class certification. *Fed. R. Civ. P. 23(g)(1)*, *(3)*. In deciding whom to appoint as class counsel, the court must consider the following factors that show counsel's likely competency to handle the case:

> (i) the work counsel has done in identifying or investigating potential claims in the action;
> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
> (iii) counsel's knowledge of the applicable law; and
> (iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A). The Court can also consider any other factors related to "counsel's ability to fairly and adequately represent the interests of the class." *Fed. R. Civ. P. 23(g)(1)(B)*. Among these miscellaneous factors, courts have routinely recognized, over the past decade, the value of a legal team that is diverse across axes of **[*15]** gender, race, and other aspects of identity. *See, e.g., City of Providence, Rhode Island v. AbbVie Inc., 2020 U.S. Dist. LEXIS 189472, 2020 WL 6049139, at *6 (S.D.N.Y. Oct. 13, 2020)*.

III. Analysis

Before examining the consolidation and class-counsel proposals, it makes sense to further explain the significance of categorizing plaintiff classes as indirect or direct purchasers. Plaintiffs who win on violations of federal antitrust laws are entitled to recover treble damages under the Clayton Act. *15 U.S.C. § 15*. But the Supreme Court ruled in the canonical *Illinois Brick* case that only *direct purchasers*— those who purchased goods or services directly from the alleged antitrust-violator at a monopoly price—may recover under federal ***antitrust law***. *Illinois Brick Co. v. Illinois, 431 U.S. 720, 746, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. When a conspiracy is afoot, the first purchaser outside the conspiracy is considered a direct purchaser. *Marion Healthcare, LLC v. Becton Dickinson & Co., 952 F.3d 832, 839 (7th Cir. 2020)*. Indirect purchasers—those who would have to show that the direct purchaser passed on the monopoly pricing to the next purchaser, through every link in the alleged supply chain—are out of luck under this rule. *Illinois Brick, 431 U.S. at 735*.

But the antitrust laws of some states permit indirect purchasers to recover damages, effectively "repealing" *Illinois Brick*'s prohibition for plaintiffs who assert state law claims. The parties to this case call those states "Repealer Jurisdictions." Alternative Finance **[*16]** reports that the Repealer Jurisdictions are Arizona, California, District of Columbia, Florida, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin. R. 1, 20-cv-3204, Compl. ¶ 91. This leaves over 20 states and territories in which no indirect purchasers can recover any damages for antitrust violations.

In any antitrust case, an indirect purchaser and a direct purchaser are trying to prove different things, which might or might not put them at odds. The direct purchaser needs to show only that it paid the alleged antitrust-violator monopoly prices. Under *Illinois Brick*, a direct purchaser can recover treble damages for violations of federal ***antitrust law*** *regardless* of whether it passed on the monopoly prices to downstream consumers. *Illinois Brick, 431 U.S. at 746-47*. An indirect purchaser bringing claims under state law in a Repealer Jurisdiction, by contrast, *must* show that the monopoly prices were passed on to it to recover any damages. *Supreme Auto Transp., LLC v. Arcelor Mittal USA, Inc., 902 F.3d 735, 743-44 (7th Cir. 2018)*. But if an indirect purchaser can do that, an important damages multiplier **[*17]** can be the result: indirect purchasers in Repealer Jurisdictions can recover damages under state law even if direct purchasers also recover damages under the Clayton Act, leading to multiple liability for the defendants. *California v. ARC Am. Corp., 490 U.S. 93, 105, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)* ("Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law, and no clear purpose of Congress indicates that we should decide otherwise in this case") (cleaned up).[6] Proving passed-on damages is necessary for the indirect purchaser, but unnecessary—though also not inherently harmful—to the direct purchaser.

Categorizing the Credit Bureau Plaintiffs as indirect versus direct purchasers thus has significant consequences for their ability to recover damages through this litigation, as well as for litigation strategy. The Court prefers not to decide at this stage, without thorough adversarial briefing, whether the Credit Bureau Purchasers are indirect or direct purchasers. Scott+Scott, with the support of counsel in eight of the ten cases before the Court, proposes to argue that they are direct purchasers. Sky Fed. Br. Even though Cohen Milstein disagrees with this position, **[*18]** they appear to accept that the argument must at least be permitted to proceed to the motion-to-dismiss stage. R. 77, Alternative Finance Reply at 1. The question for the Court is how best to organize the case to proceed efficiently, without prejudice to the parties.

A. Consolidation

On consideration of the current record and pleadings, the most sensible and efficient path forward is to appoint Scott+Scott as Interim Class Counsel representing the FICO-Direct Purchasers and *exclusively* representing the Credit Bureau Purchasers: this will be the consolidated Direct Purchaser Action. Cohen Milstein is appointed as Interim Class Counsel representing the (undisputed) Indirect Purchasers only. Scott+Scott is prepared to argue that the Credit Bureau Purchasers are direct purchasers by virtue of the alleged conspiracy between FICO and the credit bureaus, and thus entitled to treble damages under the Clayton Act if FICO violated the Sherman Act. Sky Fed. Br. at 5. They have also pleaded claims under various state antitrust and unfair practices statutes. Compl. ¶¶ 148-51. If their Sherman Act claims on behalf of the Credit Bureau Purchasers fail, then they are prepared to argue in the alternative **[*19]** for recovery under state laws. Sky Fed. Br. at 5; R. 73, Sky Fed. Resp. at 7. Cohen Milstein, by contrast, believes that the Credit Bureau Purchasers are indirect purchasers, and thus not entitled to recover treble damages under federal law. Alt. Finance Br. at 2. They would not pursue treble damages under federal law for Credit Bureau Purchasers, which would prejudice those plaintiffs. Again, at this stage the Court is not saying which law firm is right. But the Credit Bureau Purchasers are entitled to be represented by the more aggressive counsel that will pursue all potentially viable claims on their behalf.

The Court appreciates Cohen Milstein's attempt at a compromise proposal in its reply brief, which suggested that both teams of counsel should proceed as representatives of the Credit Bureau Purchasers, pleading and briefing their theories until one emerges victorious. Alternative Finance Reply at 1. But that would have been inefficient and unwieldy. Cohen Milstein appears to be confident that a motion to dismiss would quickly resolve the issue with the Credit Bureau Purchasers, leaving only one class counsel (in their prediction, Cohen Milstein) representing the Credit Bureau **[*20]** Purchasers. *Id.* at 1-2. But what if Scott+Scott's theory survives a motion to dismiss? That would *not* mean that the alternative arguments under state laws can be abandoned. Many a claim has survived a dismissal motion only to fall at summary judgment or be defeated a trial. Would both teams of attorneys continue to represent the same disputed class of plaintiffs, possibly for years, coordinating discovery and presenting duplicative arguments to the Court? That cannot be the solution to the problem.

The double-Complaint strategy is also unnecessary because Scott+Scott can make the same arguments Cohen Milstein would have made on behalf of the Credit Bureau Purchasers—in the alternative. The Court does not share Cohen Milstein's concern over possible conflicts in that approach. Alternative Finance Reply at 3-4. Attorneys routinely plead in the alternative and zealously argue multiple theories in search of the best possible outcome for their clients. Nor do the possible outcomes from a motion to dismiss generate immediate cause for concern. It is not clear that, if the Credit Bureau Purchasers are found to be indirect purchasers, then this would create a conflict of interest for Scott+Scott **[*21]** with the FICO-Direct purchasers. Cohen Milstein argues that Scott+Scott will be put in an untenable position because "indirect purchasers like Alternative Finance would need to prove the credit bureaus passed FICO's overcharges on, but the undisputed direct purchasers like Amalgamated Bank have no incentive to

[6] This opinion uses (cleaned up) to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See* Jack Metzler, *Cleaning Up Quotations*, 18 Journal of Appellate Practice and Process 143 (2017).

do so." Alternative Finance Reply at 6. But this is not really a conflict—it just means that the Scott+Scott team would have to make multiple arguments at once, as lawyers often do. It bears repeating that plaintiffs recovering under federal law can recover treble damages *even if* they passed on the monopoly pricing. So, it does not harm the direct-purchaser plaintiffs if *other* plaintiffs show that the pricing was passed on.[7] If Sky Federal's federal claims for the Credit Bureau Purchasers *do* survive a motion to dismiss, then the Court does not see why Scott+Scott must choose between the two competing theories, as Cohen Mil-stein predicts. Alternative Finance Reply at 9. For all the reasons just discussed, they can simply continue preparing the case with multiple theories, even up through a trial.[8]

All of that being said, if it becomes clear later that Scott+Scott **[*22]** cannot effectively represent all the plaintiffs and classes encompassed by the FICO-Direct Purchasers and Credit Bureau Purchasers, the Court can and will address the problem then. Scott+Scott has assembled a team of experienced attorneys from outside its firm to serve as a steering committee for this litigation if necessary. Sky Fed. Br. at 13-14. They have already mapped out possible scenarios, including various subclasses and groups, which might require different appointed counsel. *Id.* at 12-14. They appear to be taking any possible future conflicts with appropriate seriousness.

As for FICO's proposal that all of the Plaintiffs be forced to fall into step behind one interim class counsel and one consolidated complaint, the Court rejects it. R. 74, FICO Br. For the reasons discussed above, it makes sense to separate out the indirect-purchaser plaintiffs from the direct-purchaser plaintiffs in these related actions. The Court notes that this does appear to be standard practice in this District and others, as proffered by all of the moving Plaintiffs. Alternative Finance Br. at 11; Sky Fed. Br. at 5. This belies the notion that it would be a special burden on FICO to face two separate **[*23]** consolidated complaints on behalf of two proposed classes. FICO Br. at 6. To the extent that FICO was simply seeking to avoid a situation where competing theories are before the Court in separate Complaints, its wish is granted: that was Cohen Milstein's proposal, and the Court has rejected it.

B. Class Counsel

The Court agrees that Scott+Scott is qualified to act as Interim Lead Counsel for the direct-purchaser plaintiffs, with MoloLamken serving as Liaison Counsel. Sky Fed. Br. at 9. Both law firms have been involved in this litigation since its early days and have the expertise and experience needed to represent the proposed class. The Court notes Scott+Scott's track record of successful complex antitrust litigation, as well as MoloLamken's sterling reputation and local presence. *Id.* 10-11. The Court also appreciates that counsel has already thought ahead to possible subclasses and is prepared to propose a Plaintiffs' Steering Committee to handle those developments if they become reality; the committee would consist of additional qualified attorneys who could step in to take on more responsibility if necessary. *Id.* 12-14. Although there might be some small loss in efficiency due to **[*24]** involving additional law firms, Scott+Scott and MoloLamken have already demonstrated that they can effectively lead and coordinate with other attorneys, by bringing together counsel from eight of the ten related actions to support their motion for consolidation and appointment of interim class counsel. Finally, the Court agrees that it is in the class's best interest to have a diverse legal team at its disposal, and that Scott+Scott and MoloLamken can provide such a team. *Id.* 14-15.

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[7] Also, Scott+Scott is not seeking to represent the credit bureaus (see Compl. ¶ 87); and the Credit Bureau Purchasers are only trying to show that the *credit bureaus* passed on costs, not, as far as the Court knows, that any FICO-Direct plaintiffs or class members passed on any costs.

[8] Meanwhile, there is a potential conflict in Cohen Milstein's proposed class, between undisputed Indirect Purchasers, and the disputed Credit Bureau Purchasers. According to Alternative Finance's own Complaint, Brookfield Management purchased FICO scores from agencies that purchased them from the credit bureaus—in other words, from a Credit Bureau Purchaser. R. 1, 20-cv-03204, Compl. ¶ 4. It is true that Cohen Milstein proposes to represent only end-users, not resellers. Alternative Finance Reply at 8. But they also acknowledge that some entities could be end-users for some purchases and resellers for other purchases. *Id.* The Court is not convinced that Cohen Milstein's plan would necessarily have avoided any possible intra-class conflicts.

Cohen Milstein is likewise eminently qualified to represent the indirect purchaser plaintiffs. The firm has a long history of success in class action litigation, including antitrust class actions. Alternative Finance Br. at 14-15.

IV. Conclusion

For the reasons discussed above, Sky Federal's Motion to Consolidate and for the Appointment of Interim Class Counsel, R. 64, is granted. Alternative Finance's competing motion, R. 61, is denied. Scott+Scott is appointed as Interim Class Counsel representing the Direct Purchaser Plaintiffs, including both the FICO-Direct Purchasers and the Credit Bureau Purchasers, with the understanding that Scott+Scott will continue to pursue alternative theories in case its federal **[*25]** claims for the Credit Bureau Purchasers fail. Scott+Scott is directed to file a consolidated complaint on behalf of all Direct Purchaser Plaintiffs by October 21, 2021. Cohen Milstein is appointed to represent the Indirect Purchasers, including Garner Properties & Management and Brookfield Management Company and others like them. The respective Interim Class Counsel and FICO shall confer and propose an answer or *Rule 12* motion schedule. The parties shall file, on the docket in 20-cv-2114, a status report on October 28, 2021. The Court sets a tracking status hearing for November 5, 2021, at 8:30 a.m., but to track the case only (no appearance is required). Instead, the Court will review the status report before that date.

ENTERED:

/s/ Edmond E. Chang

Honorable Edmond E. Chang

United States District Judge

DATE: September 30, 2021

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LexisNexis

Vention, Inc. v. JB Hamlet, LLC

Superior Court of North Carolina, Richmond County

October 1, 2021, Decided

21 CVS 695

Reporter
2021 NCBC LEXIS 86 *; 2021 NCBC Order 21

VENTION, INC., Plaintiff, v. JB HAMLET, LLC d/b/a VBC MANUFACTURING, a/k/a VOLUMETRIC BUILDING COMPANIES, a/k/a VOLUMETRIC COMPANIES-MANUFACTURING, Defendant.

Notice: This document is designated an Order of Significance by the North Carolina Business Court. Orders of Significance are not published as Business Court opinions but may be cited and relied upon.

Core Terms

designation, Counterclaims, complex business, mandatory, deceptive trade practices, anti trust law, Notice, unfair, breach of contract, material issue, pleaded, invoke

Judges: [*1] Louis A. Bledsoe, III, Chief Business Court Judge.

Order by: Louis A. Bledsoe, III

Order

ORDER ON DESIGNATION

1. **THIS MATTER** is before the Court pursuant to the Determination Order issued on 30 September 2021 by the Honorable Paul Newby, Chief Justice of the Supreme Court of North Carolina, directing the undersigned to determine whether this action is properly designated as a mandatory complex business case in accord with *N.C.G.S. § 7A-45.4(a)* (the "Determination Order").

2. Plaintiff filed the Complaint initiating this action in Richmond County Superior Court on 14 July 2021, asserting claims against Defendant for breach of contract and quantum meruit. (*See* Compl. ¶¶ 59-70.) Defendant filed its Motion to Dismiss, Affirmative Defenses, Answer and Counterclaims (the "Counterclaims") on 29 September 2021, asserting counterclaims against Plaintiff for breach of contract and unfair and deceptive trade practices under *N.C.G.S. § 75-1.1*. (*See* Mot. Dismiss, Affirmative Defenses, Answer & Countercls. ¶¶ 31-45 [hereinafter "Countercls."].) That same day, Defendant filed a Notice of Designation ("NOD"), contending that Vention, Inc. v. JB Hamlet, LLC, 2021 NCBC Order 21. designation is proper under *N.C.G.S. § 7A-45.4(a)(3)*. (Notice Designation 1 [hereinafter "NOD"].)

3. "For **[*2]** a case to be certified as a mandatory complex business case, the pleading upon which designation is based must raise a material issue that falls within one of the categories specified in *section 7A-45.4*." *Composite Fabrics of Am., LLC v. Edge Structural Composites, Inc., 2016 NCBC LEXIS 11, at *25 (N.C. Super. Ct. Feb. 5, 2016)*. Here, designation is based upon the Counterclaims. *Id. at *19* ("[A] party may use its counterclaim as the basis for a notice of designation.").

4. In support of designation under this section, Defendant argues that "Defendant's counterclaim pleads a claim under Chapter 75 of the North Carolina General Statutes and prohibited by *N.C. Gen. Stat. § 74-1.1* [sic], specifically, a claim of an unfair and deceptive trade practice by Plaintiff."[1] (NOD 3.) Designation under *section 7A-45.4(a)(3)*, however, is proper only if the action involves a material issue related to "[d]isputes involving ***antitrust law***, including disputes arising under Chapter 75 of the General Statutes *that do not arise solely under G.S. 75-1.1* or *Article 2 of Chapter 75 of the General Statutes*." *N.C.G.S. § 7A-45.4(a)(3)* (emphasis added). As pleaded, Defendant's unfair and deceptive trade practice counterclaim arises solely under *section 75-1.1* and does not otherwise invoke state or federal ***antitrust law***. (*See* Countercls. ¶¶ 31-45.) As a result, designation under *section 7A-45.4(a)(3)* is improper. *See, e.g., Pinsight Tech., Inc. v. Driven Brands, Inc., 2020 NCBC LEXIS 23, at *4, 2020 NCBC Order 9 (N.C. Super. Ct. Feb. 20, 2020)* (holding that (a)(3) designation was improper where plaintiff "has not alleged trade **[*3]** secret misappropriation, a Chapter 75 claim other than one under *section 75-1.1*, or otherwise invoked state or federal ***antitrust law***").

5. Based on the foregoing, the Court determines that this action shall not proceed as a mandatory complex business case under *N.C.G.S. § 7A-45.4(a)* and thus shall not be assigned to a Special Superior Court Judge for Complex Business Cases.

6. Consistent with the Determination Order, the Court hereby advises the Senior Resident Superior Court Judge of Judicial District 16A that this action is not properly designated as a mandatory complex business case so that the action may be treated as any other civil action, wherein the parties may pursue designation as a *Rule 2.1* exceptional case with the Senior Resident Judge.

SO ORDERED, this the 1st day of October, 2021.

/s/ Louis A. Bledsoe, III

Louis A. Bledsoe, III

Chief Business Court Judge

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[1] The Court notes that Defendant's reference to "*N.C. Gen. Stat. § 74-1.1*," both in the NOD and the Counterclaims, (*see* NOD 3; Countercls. ¶ 43), appears to be a typo.

[Maralago Cay Homeowners Ass'n v. MHC Operating Ltd. P'ship](#)

United States District Court for the Southern District of Florida

October 4, 2021, Decided; October 5, 2021, Entered on Docket

CASE NO. 21-80049-CV-MIDDLEBROOKS/Matthewman

Reporter
2021 U.S. Dist. LEXIS 196385 *

MARALAGO CAY HOMEOWNERS ASSOCIATION, INC., Plaintiff, v. MHC OPERATING LIMITED PARTNERSHIP, et al., Defendants.

Prior History: *Maralago Cay Homeowners Ass'n v. Mhc Operating, 2021 U.S. Dist. LEXIS 248397, 2021 WL 6135181 (S.D. Fla., Aug. 4, 2021)*
Drummond v. Zimmerman, 454 F. Supp. 3d 1210, 2020 U.S. Dist. LEXIS 65234 (S.D. Fla., Apr. 13, 2020)

Core Terms

conspiracy, restraint of trade, summary judgment, res judicata, law firm, homeowners, antitrust claim, final judgment, rental, entities, mobile, nonmoving, conspire, monopolize, splitting, parties, purposes, genuine, legal theory, mobile home, standardized, antitrust, monopoly, merits, cases, same cause of action, concerted action, personal stake, rent increase, allegations

Counsel: **[*1]** For Maralago Cay Homeowners Association, Inc., on behalf of themselves, the class of current and former mobile homeowners in the Park and all others similartly situated formerly known as Arrowhead Mobile Homeowners Association, Inc., Plaintiff: Daniel Wayne Perry, LEAD ATTORNEY, Law Office of Daniel Perry, Orlando, FL.

For MHC Operating Limited Partnership, Defendant: Jody Blouch Gabel, LEAD ATTORNEY, Lutz Bobo Telfair, Sarasota, FL; Mahlon Herbert Barlow, III, LEAD ATTORNEY, Tampa, FL; J. Allen Bobo, PRO HAC VICE, Lutz, Bobo & Telfair, P.A., Sarasota, FL; Ali Vakili Mirghahari, Sivyer Barlow & Watson P.A., Tampa, FL.

For Equity Lifestyle Properties, Inc., MHC Maralago Cay, L.L.C., Eric Zimmerman, Stanley Martin, Sydney Morris, Rene Scott, Beverly Sagehorn, Bertha Rodriguez, Milagros Rivera, j. allen bobo, Lutz, Bobo & Telfair, P.A., Defendants: Ali Vakili Mirghahari, LEAD ATTORNEY, Sivyer Barlow & Watson P.A., Tampa, FL; Mahlon Herbert Barlow, III, LEAD ATTORNEY, Tampa, FL; J. Allen Bobo, PRO HAC VICE, Lutz, Bobo & Telfair, P.A., Sarasota, FL; Jody Blouch Gabel, Lutz Bobo Telfair, Sarasota, FL.

Judges: DONALD M. MIDDLEBROOKS, UNITED STATES DISTRICT JUDGE.

Opinion by: DONALD M. MIDDLEBROOKS

Opinion

ORDER GRANTING SUMMARY [*2] JUDGMENT

THIS CAUSE comes before the Court upon Defendants' Motion for Summary Judgment. (DE 52). The Motion is fully briefed. (DE 61; DE 68). For the reasons set forth below, the Motion is granted.

BACKGROUND

On October 12, 2020, Plaintiff Maralago Cay Homeowners Association, Inc., a mobile homeowners association, filed this action in state court. (DE 1-1). It was removed to this Court on January 11, 2021. (DE 1). Plaintiff brings this action "in its representative capacity on behalf of itself, and more than 1,000 current and former mobile homeowners in the Maralago Cay Mobile Home Park." (DE 15 at 3). Defendants include three business entities that own and operate the mobile home park (MHC Operating Limited Partnership, Equity LifeStyle Properties, Inc., and MHC Maralago Cay, LLC) and seven current and former agents of those entities (Eric Zimmerman, Stanley Martin, Sydney Morris, Rene Scott, Beverly Sagehorn, Bertha Rodriguez, Milagros Rivera). Collectively these Parties will be referred to throughout this Order as the "Park Defendants." Plaintiff also names, attorney J. Allen Bobo, and the law firm of Lutz, Bobo & Telfair, P.A. (collectively, the "Law Firm Defendants"). (*Id.* at ¶¶ **[*3]** 8-17, 20-21).

This is the second putative class action Plaintiff has filed against these Defendants alleging substantively the same wrongful conduct. Plaintiff's grievances, which begin with Defendants' purchase of the Park in 1997 and span through today, focus on the alleged harms caused by the use of "illegal" lot rental agreements ("LTAs"), fraudulent lot rental prices, diversion of lot resales, discrimination against elderly mobile homeowners, and reduction or elimination of services. Plaintiff, along with four individual mobile homeowners, brought a federal lawsuit against all twelve of these Defendants in 2019 alleging violations of, among other statutes, RICO, the Florida Deceptive and Unfair Trade Practices Act, the Americans With Disabilities Act, and the Florida Mobile Home Act, which governs the landlord-tenant relationship between mobile homeowners and park operators. That case was pending before District Judge Singhal. On a motion to dismiss, Judge Singhal dismissed the entire action without prejudice as a shotgun pleading, and he also ruled on Defendants' failure to state a claim arguments in an effort to narrow the issues for purposes of an anticipated amended complaint. **[*4]** That order is set forth in a published opinion: *Drummond v. Zimmerman, 454 F. Supp. 3d 1210 (S.D. Fla. 2019)*. But instead of amending the complaint, Plaintiffs voluntarily dismissed that action in June 2020 and brought the instant action four months later in October 2020. (DE 1-1; 55-2 at 103-04). In this action, Plaintiff attempts to repurpose its previously-pled factual allegations into this new antitrust claim.

The Amended Complaint contains one claim for violations of the *Florida Antitrust Act ("FAA")*. (*Id.* at ¶¶ 61-74).[1] In this claim, Plaintiff alleges violations of *§ 542.18*, the provision barring restraints of trade, and *§ 542.19*, the provision barring monopolies. Plaintiff alleges that Defendants "conspired to eliminate discounting of lot rental amount[s] by ensuring that all park owners charged the same minimum price and used the same terms." (*Id.* at ¶ 65). Plaintiff seeks compensatory damages and injunctive relief. (*Id.* at 27-28). On March 10, 2021, Plaintiff stipulated that the pecuniary relief sought is limited to the allegedly unreasonable rent increases in the 48-month period prior to filing this action in October 2020. (DE 22-3).

Defendants allegedly "entered into a continuing agreement, understanding, and conspiracy to raise, fix, maintain, or/or **[*5]** impose mobile home lot rental prices" by imposing on Plaintiff and its members an "illegal" standardized LTA. (DE 15 at ¶¶ 64-65). Plaintiff thus characterize the alleged antitrust misconduct as a price-fixing conspiracy. (*See id.*). Plaintiff further maintains that "[t]his conspiracy, combination, or concert of action resulted in higher mobile home lot rental prices . . . than would have existed in a competitive market." (*Id.* at ¶ 2). Plaintiff also alleges that Defendants—the Park and its employees and lawyers—"furthered and effectuated" the conspiracy through actions such as engaging in secret meetings regarding "each other's" lot rental amounts, setting a price floor to quote prospective mobile homeowners, imposing "fraudulent" lot rental amounts, frustrating Plaintiff's right of first refusal to purchase the Park, diversion of lot resales, concealment of contaminated water, and elimination of services. (*Id.* at ¶ 72). Defendants raise several grounds for summary judgment. (*See* DE 52).

LEGAL STANDARD

[1] Plaintiff also included in its original complaint a claim under the ADA, which it removed in its Amended Complaint. (DE 1-1; DE 15).

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A disputed **[*6]** fact is "material" if it "might affect the outcome of the suit under the governing law." *Talavera v. Shah, 638 F.3d 303, 308, 395 U.S. App. D.C. 7 (D.C. Cir. 2011)* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*). A dispute over a material fact is "genuine" if it could lead a reasonable jury to return a verdict in favor of the nonmoving party. *See* *Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge at summary judgment. Thus, [the court] do[es] not determine the truth of the matter, but instead decide[s] only whether there is a genuine issue for trial." *Barnett v. PA Consulting Grp., Inc., 715 F.3d 354, 358, 404 U.S. App. D.C. 439 (D.C. Cir. 2013)* (quoting *Pardo-Kronemann v. Donovan, 601 F.3d 599, 604, 390 U.S. App. D.C. 178 (D.C. Cir. 2010)*).

Under the summary judgment standard, the moving party bears the "initial responsibility of informing the district court of the basis for [its] motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits which [it] believe[s] demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. In response, the nonmoving party must "go beyond the pleadings and by [its] own affidavits, or depositions, answers to interrogatories, and admissions on file, 'designate' specific facts showing that there is a genuine issue for trial." *Id. at 324* (internal citations **[*7]** omitted). If the non-moving party fails to "establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial[,]" summary judgment is warranted. *Id. at 322*. The party moving for summary judgment bears the burden of establishing that there is insufficient evidence to support the non-moving party's case. *Id. at 325*. Moreover, "[t]he court must view all evidence in the light most favorable to the non-movant and must resolve all reasonable doubts about the facts in favor of the non-movant." *United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of Am., 894 F.2d 1555, 1557-58 (11th Cir. 1990)* (citation omitted).

DISCUSSION

I. Standing

Defendants argue that Plaintiff lacks standing to bring "this action challenging rents or rent increases," because the Florida Mobile Home Act ("FMHA"), under which Plaintiff claims representational capacity, limits HOA standing with respect to rent increases. (DE 52 at 11). *Section 723.037 of the FHMA* states: "The homeowners association shall have no standing to challenge the increase in lot rental amount, reduction in services or utilities, or change of rules and regulations unless a majority of the affected homeowners agree, in writing, to such representation." *Fla. Stat. § 723.037(1)*. However, this action is being brought under Florida ***antitrust law***, not under **[*8]** the FMHA to challenge rent increases. Plaintiff also invoked in its complaint *Florida Rule of Civil Procedure 1.221*, which confers on HOAs standing to sue "concerning matters of common interests to the members." (DE 15 at ¶ 4); *see also* *Fla. R. Civ. P. 1.221*. Therefore, I find that *§ 723.037* does not deprive Plaintiff of standing in this FAA action. *See* *Malco Indus. v. Featherock Homeowners Ass'n, 854 So. 2d 755, 757 (Fla. 2nd DCA 2003)* (holding that *Rule 1.221* controlled, not *§ 723.037*, in a dispute over the interpretation of a mediation agreement where the mediation pertained to rent increases). Summary judgment is denied on the issue of standing.[2]

II. Res Judicata and Claim Splitting

[2] I note that Defendants raise only this narrow standing issue premised on the above-cited provision of the FMHA. In their Reply brief, Defendants seem to suggest that they raised lack of Article III standing in their initial Motion for Summary Judgment. (DE 68 at 1). However, Defendants' initial motion contains no legal argument for lack of Article III standing, nor does it cite to any law on Article III standing. My ruling on the standing issue here is therefore confined to only the standing argument Defendants actually raised and briefed.

Defendants argue that this action is precluded by res judicata and claim splitting. For the reasons set forth below, I agree that res judicata bars this action as to the Law Firm Defendants; however as to the Park Defendants, I do not find that either doctrine is applicable.

Throughout this Order, I will refer to the present case as "Maralago II." The prior action which was pending before Judge Singhal (*Drummond v. Zimmerman*, Case No. 19-CV-81532-AHS) will be referred to as "Maralago I." Maralago I was brought by the same HOA Plaintiff as Maralago II and names the same list of Defendants. *454 F. Supp. 3d at 1214*. Whereas Maralago II involves only the HOA Plaintiff, Maralago I additionally named **[*9]** four other plaintiffs who were individual mobile homeowners.

In Maralago I, Plaintiff and the homeowners brought the following claims: violation of state and federal RICO (Counts I—IV); violation of the *Florida Deceptive and Unfair Trade Practices Act ("FDUTPA")* (Count V); violation of the *Americans with Disabilities Act ("ADA")* (Count VI); violation of the *Florida Mobile Home Act ("FMLA")* (Count VII); the exploitation of individuals over the age of 65 (Count VIII); and race and national origin discrimination (Count VIIII). *Id at 1214-15*.

a. Res Judicata

The doctrine of res judicata bars a later action "litigating claims that were or could have been litigated in a prior action between the parties." *Lobo v. Celebrity Cruises, Inc. 704 F.3d 882, 892 (11th Cir. 2013)* For res judicata to apply: (1) "both cases must involve the same parties or their privies;" (2) "both cases must involve the same causes of action;" (3) "there must have been a final judgment on the merits;" and (4) "the prior decision must have been rendered by a court of competent jurisdiction." *Id.* (citing *In re Piper Aircraft Corp., 244 F.3d 1289, 1296 (11th Cir. 2001)*). The first three elements are at issue; I will address each in turn.

With respect to the first element, Maralago I and Maralago II involve the same parties and I reject Plaintiffs argument to the contrary. All twelve Defendants in Maralago II were **[*10]** also defendants in Maralago I.[3] (Maralago I Compl. at ¶¶ 3-14; DE 1-1 at ¶¶ 8-12).[4] Both actions were brought by the HOA representing itself and a putative class of over 1,000 current and former mobile homeowner members. (Maralago I Compl. at ¶ 2; DE 1-1 at ¶ 4). Therefore, Plaintiff's argument that the two actions involve different parties because Maralago I "was filed primarily by individual plaintiffs (and the HOA only as to the ADA claim)" lacks merit. (DE 61 at 1). All claims except the ADA claim were brought by all plaintiffs, including the HOA. *Drummond, 454 F. Supp. 3d at 1217*; *see generally* Maralago I Compl.

Second, the "same cause of action" element is met because res judicata bars not only the specific legal theories raised in the first action, but also "all legal theories and claims arising out of the same operative nucleus of fact" or "based upon the same factual predicate." *TVPX ARS, Inc. v. Genworth Life & Annuity Ins. Co., 959 F.3d 1318, 1325 (11th Cir. 2020)* (internal citations omitted). Whether two cases arise from the same nucleus of fact "centers on whether the primary right and duty are the same." *Id.* (internal citation omitted); *see also* *N.A.A.C.P. v. Hunt, 891 F.2d 1555, 1561 (11th Cir. 1990)* (barring a second action despite that the plaintiffs sought relief under different legal theories, because both involved the same factual predicate **[*11]** of the placement of a confederate flag on a state capitol—the same wrongful act—and both sought to vindicate the right to be free from discrimination—the same right). Additionally, full relief must have been available in the first action. *Maldonado v. U.S. Atty. Gen., 664 F.3d 1369, 1377 (11th Cir. 2011)*.

Here, both cases are predicated on the same lengthy list of wrongs. A comparison of the factual allegations in the two complaints reveals a near total overlap, including: the "illegal" sale of the Park in 1997 and frustration of Plaintiff's right of first removal (Maralago 1 Compl. at ¶¶ 27-32; DE 1-1 at ¶¶ 26-30); another "illegal" transfer in

[3] In Maralago II, Plaintiff added an additional defendant which it has since dismissed. (DE 40).

[4] I note that Defendants attached the Maralago I complaint as an exhibit to the Declaration of J. Allen Bobo. (DE 55-1). For the sake of clarity, I will cite to the Maralago I complaint directly instead of the page numbers in the exhibit.

2003 (Maralago I Compl. at ¶¶ 33-36; DE 1-1 at ¶¶ 31-34); imposition of an "illegal" proposed standardized LTA (Maralago I Compl. at ¶¶ 50-59; DE 1-1 at ¶¶ 37-45); diversion of resales of mobile home lots (Maralago I Compl. at 85; DE 1-1 at ¶¶ 52); alleged concealment of contaminated water (Maralago I Compl. at ¶¶ 64-65; DE 1-1 at ¶¶ 53-54); alleged rejection of Plaintiff's lot rental comparisons (Maralago I Compl. at ¶¶ 60-61; DE 1-1 at ¶¶ 58); and reduction or elimination of services (Maralago I Compl. at ¶¶ 64-65; DE 1-1 at ¶¶ 69-77). Whereas Plaintiff argues in Maralago II that these wrongs contribute **[*12]** to alleged antitrust misconduct, in Maralago I Plaintiff framed this scheme as a fraudulent one in violation of RICO (*e.g.*, Maralago I Compl. at ¶ 107) and deceptive practices under FDUTPA (*id* at ¶¶ 140-41), among other claims. Additionally, a majority of the factual allegations appear verbatim or nearly so. *See Lobo, 704 F.3d at 893* (finding that verbatim allegations of the facts in the first and later actions "satisfies the same cause of action requirement"). Plaintiff's claim that "no common set of facts" exists is therefore plainly contradicted by the record. (DE 61 at 2).

Plaintiff's next argument, that the standardized LTA presents a significant factual difference and is premised on a different legal theory, is also unpersuasive.[5] Plaintiff's new theory is that the standardized LTA is illegal because it operates as a price fixing mechanism by setting a minimum price and terms for lot rentals. Plaintiff largely repurposed the previously-pled allegations to fit this new theory. *E.g., compare* DE 1-1 at ¶ 37 ("[the Defendants] *extorted* [Plaintiff] to adopt an illegal standardized lot rental agreement"), *with* Maralago I Compl. at ¶ 39 ("[the Defendants] *fraudulently compelled* [Plaintiff] to execute an illegal **[*13]** long term rental agreement"). And although Plaintiff did add some facts in the Maralago II Complaint that speak more directly to antitrust, these are not significant enough factual distinctions to warrant a finding that the cases are not effectively the "same cause of action" for res judicata purposes.[6] The facts and legal theories in the first and second action need not be identical. Res judicata operates to bar claims that *could have been brought* in the first action, and Plaintiff could have brought the antitrust claim previously.

Importantly, all of the facts underlying Maralago II arose prior to Maralago I. *Cf. Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc., 140 S. Ct. 1589, 1596, 206 L. Ed. 2d 893 (2020* ("Claim preclusion generally 'does not bar claims that are predicated on events that postdate the filing of the initial complaint.' (internal citations omitted)); *see also Trustmark Ins. Co. v. ESLU, Inc., 299 F.3d 1265, 1270 (11th Cir. 2002)* ("A series of breaches of the same contract, all occurring before filing suit, should be brought in that suit."). Indeed, Maralago I squarely raised the issue of "illegal" LTAs, including the standardized LTA specifically at issue in Maralago II.[7] (Maralago I Compl. at ¶¶ 50-59). And no legal barriers prevented Plaintiff from bringing its antitrust claim in Maralago I. *See Maldonado, 664 F.3d at 1377* (finding that a later claim **[*14]** did not arise from the same nucleus of operative fact because the later claim involved a new legal theory made available by a statutory change after the first action). Therefore, I find that the antitrust claim in Maralago II arises from the same cause of action as the claims in Maralago I.

Third, the finality requirement is met, but only as to the Law Firm Defendants. In Maralago I, Judge Singhal conducted an analysis of whether the Complaint stated a claim under *Rule 12(b)(6)*, and as to the Law Firm Defendants, he concluded that it did not, and he dismissed all claims as to those defendants with prejudice. *Drummond, 454 F. Supp. 3d at 1222*. A *12(b)(6)* dismissal for failure to state a claim is typically a final judgment on the merits for res judicata purposes, even where the court does not state whether the dismissal is with or without prejudice, unless the court specifies otherwise. *Hunt, 891 F.2d at 1560* (quoting *Federated Dep't Stores v. Moitie, 452 U.S. 394, 399 n. 3, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981)* (*and citing Fed. R. Civ. P. 41(b)*). A dismissal

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[5] Plaintiff does not explicitly raise this argument for res judicata purposes but does with respect to claim splitting. Given the doctrinal overlap between res judicata and claim splitting, I will address this argument here.

[6] For example, the 4-5% annual lot rental increase since 2016 (DE 1-1 at ¶ 58) and the alleged efforts to implement the "state-wide adoption of the LTA by other [unnamed] mobile home park owners" (*id*. at ¶ 46).

[7] Plaintiff also argues that the Maralago I court "struck the LTA and all references of the LTA from the Complaint before entering" the dismissal order (DE 61 at 1), seemingly finding it relevant that this issue was not litigated at the motion to dismiss stage. However, whether an issue was actually litigated is relevant to issue preclusion, not claim preclusion. *See Sellers v. Nationwide Mut. Fire Ins. Co., 968 F.3d 1267 (11th Cir. 2020)*.

without prejudice, however, is generally not an adjudication on the merits. Hughes v. Lott, 350 F.3d 1157, 1161 (11th Cir. 2013). As all claims against the Law Firm Defendants were dismissed *with* prejudice, Maralago I has preclusive effect as to those defendants.

With respect to the Park Defendants, the analysis is not as straightforward. Judge Singhal dismissed the **[*15]** entire complaint as a shotgun pleading. Id at 1217. With respect to that basis for dismissal he granted leave to amend. He also ruled on Defendants' failure to state a claim arguments under Rule 12(b)(6) so as to narrow the issues for an amended complaint.[8] *Id.* In doing so, he dismissed the FDUTPA claim *with* prejudice (id at 1220), and he dismissed the RICO claim *without* prejudice and with leave to amend (id. at 1222). Then, instead of amending, Plaintiffs moved to voluntarily dismiss the entire action, and Judge Singhal granted that request. (DE 55-2 at 103-04).

While a Rule 12(b)(6) dismissal typically indicates finality, Hunt, 891 F. 2d at 1560, dismissal without prejudice and with leave to amend cuts the other way. *See* Hughes, 350 F.3d at 1161 (holding that the dismissal without prejudice of an *in forma pauperis* complaint was not a final adjudication on the merits and did not bar the plaintiff from re-filing his claim). Further, a voluntary dismissal generally is not a final judgment on the merits. Sealey v. Branch Banking & Tr. Co., 693 Fed. Appx. 830, 834 (11th Cir. 2017) (citing Fed. R. Civ. P. 41(a)(1)(B)). While the FDUTPA claim was dismissed with prejudice and arises from the same cause of action as Maralago II, I cannot ignore the fact that the other claims predicated on the common facts, including the four RICO claims, were dismissed *without* prejudice, with leave **[*16]** to amend, and were subsequently voluntarily dismissed. Therefore, I find that res judicata does not bar this antitrust claim as to the Park Defendants.

b. Claim Splitting

Neither does claim splitting bar this action. "The claim-splitting doctrine: (1) 'requires a plaintiff to assert all of its causes of action arising from a common set of facts in one lawsuit,' and (2) applies where a second suit has been filed before the first suit has reached a final judgment." Kennedy v. Floridian Hotel, Inc., 998 F.3d 1221 (11th Cir. 2021) *(quoting* Vanover v. NCO Fin. Servs., 857 F.3d 833, 840, 841 n. 3 (11th Cir. 2017). The Parties disagree on the operative date of "final judgment" in Maralago I. Defendants argue that final judgment had not been entered in Maralago I as of the filing of this Motion in August 2021 because the Maralago I court reserved jurisdiction to adjudicate attorneys' fees, and an order of final judgment was forthcoming. (DE 52 at 9). Plaintiff suggests that the Order on Motion to Dismiss is the relevant final judgment. (DE 61 at 2). I agree that the April 2020 Order on Motion to Dismiss constitutes the date of final judgment for claim splitting purposes.

Defendants' summary of the applicable law is accurately stated but misapplied. Claim splitting is analyzed as "an aspect of res judicata." Vanover, 857 F.3d at 841. Defendants are correct **[*17]** that the inquiry involves asking "whether the first suit, assuming it were final, would preclude the second suit." (DE 52 at 12). However, I need not engage in hypotheticals about the potential preclusive effect of a final judgment in the prior case, because I already analyzed that question under res judicata and found that the Maralago I dismissal is not preclusive as to the Park Defendants, but is preclusive as to the Law Firm Defendants. The facts of this case demonstrate the inapplicability of claim splitting once res judicata comes into play, i.e., claim splitting no longer applies once the first action reaches a final judgment capable of being analyzed to assess its effect as either a merits determination or not. The fact that Judge Singhal retained jurisdiction to resolve attorneys' fees is irrelevant, as that was a collateral issue capable of resolution after the merits of the case. *See* Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988) ("[I]t [is] indisputable that a claim for attorney's fees is not part of the merits of

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[8] Plaintiff argues that the Maralago I court did not intend for the overall dismissal to operate as an adjudication on the merits, because in footnote 3 the court "expressly declined to address the Defendants' argument that Plaintiff failed to state a claim upon which relief can be granted." (DE 61 2). That is not so. The Maralago I court declined to rule on Defendants' 12(b)(6) argument *only* with respect to the ADA claim because it found that Plaintiffs lacked standing to bring that specific

the action to which the fees pertain"); *see also* *Vasconcelo v. Miami Auto Max, Inc., 981 F.3d 934 (11th Cir. 2020)*. Therefore, the claim splitting doctrine does not bar this action.

I further note that while this case falls outside the letter of this rule, Plaintiff's conduct **[*18]** with respect to these two actions seems to violate its spirit. The claim splitting doctrine requires plaintiffs to bring all related claims in a single action instead of instituting separate parallel proceedings, and seeks to avoid wasting judicial resources and inefficient resolution of cases. *Vanover, 857 F.3d at 841*. After receiving an adverse ruling from Judge Singhal, Plaintiff dismissed that action and refiled substantively the same claim under a new legal theory in state court, which Defendants removed to this Court. Judge Singhal retained jurisdiction in Maralago I to resolve attorneys' fees until August 2021, just a few months before Maralago II was set for trial. Plaintiffs successive dismissal and refiling impeded the efficient resolution of its claims.

III. Evidence of an Agreement or Conspiracy to Restrain Trade

Defendants further move for summary judgment on the restraint of trade branch of Plaintiff's antitrust claim under *§ 542.18*. (DE 62 at 13). Defendants argue that they cannot conspire with each other within the meaning of *§ 542.18* and that no record evidence exists that any Defendant engaged in a conspiracy to restrain trade. *(Id* at 14).[9] Because Plaintiff, the non-moving party, bears the burden of proof **[*19]** on this issue at trial, Defendants must only show "that there is an absence of evidence to support the nonmoving party's case." *Celotex, 477 U.S. at 325*. If the moving party satisfies that burden, the nonmoving party then must "go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial.'" *Id. at 324* (internal citation omitted). The nonmoving party must prove the existence of "evidence on which the jury could reasonably find for the plaintiff . . . [t]he mere scintilla of evidence in support of the plaintiffs position will be insufficient." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

Under *§ 542.18 of the FAA*, "[e]very contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful." *Fla. Stat. § 542.18*. Similarly, *section 1 of the Sherman Act* provides that [e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States . . . is declared to be illegal. *15 U.S.C. § 1*. "A *section 1* plaintiff must prove an agreement between two or more persons to restrain trade because unilateral conduct is not illegal under *section 1*." *Levine v. Cent. Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1545 (11th Cir. 1996)* (citations omitted).[10]

An agreement to restrain trade can be horizontal or vertical. It is uncontested that Plaintiff has no evidence of a horizontal conspiracy—an agreement between **[*20]** Defendants and competitors. Plaintiff does not dispute the fact that while it "alleged that Defendants `exchange[d] confidential and competitively sensitive information regarding *each other's* lot rental amounts charged in their Florida Mobile Home business[,]' it does not identify the 'others' involved in the alleged conspiracy." (DE 59 at ¶ 42; DE 62 at ¶ 42). Defendants further point to an absence of any evidence of a horizontal agreement or conspiracy to restrain trade. (DE 52 at 14). Defendants also contend that Plaintiff "has not identified a single competitor that has allegedly conspired with the owner of Maralago Cay Park to fix prices." (DE 52 at 14-15). Plaintiff does not address this argument at all and makes no effort to contest it. Plaintiff therefore appears to concede that no evidence of a horizontal conspiracy exists.

The analysis then turns to a vertical conspiracy. I must first address whether Defendants are capable of engaging in concerted action, as opposed to merely unilateral action, within the meaning of a restraint of trade antitrust claim.

[9] Plaintiff initially named an additional defendant, against which Plaintiff dismissed all claims on July 31, 2021. (DE 40). Neither party argues that the dismissed defendant should presently be considered a co-conspirator; as such, I decline to reach that question and analyze only the relationships among the remaining Defendants.

[10] The Florida Antitrust Act's construction provision provides: "It is the intent of the Legislature that, in construing this chapter, due consideration and great weight be given to the interpretations of the federal courts relating to comparable federal antitrust statutes." *Fla. Stat. § 542.32*.

Defendants argue that as related entities and employees and outside counsel of those entities, they cannot conspire with **[*21]** each other or engage in concerted action, thereby rendering the alleged misconduct unilateral and not actionable. I agree. I will assess the Park Defendants (three business entities and seven individuals), and Law Firm Defendants (attorney J. Allen Bobo and his law firm, Lutz, Bobo & Telfair, PA), in turn.

Contrary to Plaintiffs argument, whether entities are distinct for purposes of a restraint of trade antitrust claim "does not turn simply on whether the parties involved are legally distinct entities." *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 191, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* (citing *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*.[11] The inquiry favors substance over form and looks to the "competitive reality" over formalistic labels. *Id. at 195-96*. "The key is whether the alleged 'contract, combination . . ., or conspiracy' is concerted action—that is, whether it joins together separate decisionmakers." *Id. at 195*. In other words, whether it joins "separate economic actors pursuing separate economic interests such that the agreement 'deprives the marketplace of independent decisionmaking.'" *Id. at 187, 195-96* (finding that the NFL, "an unincorporated association . . . [of] 32 separately owned professional football teams," is not a singular entity for *§ 1* purposes because their "corporate actions are guided . . . by 'separate corporate consciousnesses' **[*22]** and they pursue their own corporate economic interests as opposed to "the common interests of the whole" (internal citations omitted)); *see also* *Copperweld, 467 U.S. at 771* ("[C]oordinated activity of a parent and its wholly owned subsidiary are a single entity for *§ 1*" because "their objectives are common" and, "with or without a formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder.").

The three entity Park Defendants have "a complete unity of interest." *See* *Copperweld, 467 U.S. at 771*. The following facts are uncontested: Defendant MHC Maralago Cay, LLC holds title to the real property comprising Maralago Cay. (DE 59 at ¶ 13; DE 62 at ¶ 13). The sole member of MHC Maralago Cay, LLC is Defendant MHC Operating Limited Partnership. *(Id)*. MHC Operating Limited Partnership has one general partner, Defendant Equity Lifestyles Properties, Inc. (DE 59 at ¶ 14; DE 62 at ¶ 14). These three entities are not independent decisionmakers pursuing separate economic interests, but rather a single enterprise with the common goal of managing the Park. Therefore, as a matter of law, the three entity Defendants cannot conspire to restrain trade.

Nor can the Park Defendants conspire to fix prices with the current or **[*23]** former employee Defendants. A corporation generally cannot conspire with its officers or employees for purposes of *§ 1*. *Copperweld, 467 U.S. at 769*; *see also* *Hackett v. Metropolitan Gen. Hosp., 422 So. 2d 986, 988 (Fla. 2nd DCA 1982)*. Intrafirm conduct can constitute concerted action only in the "rare case[]" where "the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action." *Id. at 201*; *Hackett, 422 So. 2d at 988 n. 2* (noting that an exception exists where "the conspiring corporate agents are alleged to have an independent personal stake in achieving the object of the conspiracy"). It is uncontested that the individual Defendants are or were employed by the Park. (DE 59 at ¶¶ 16-22; DE 62 at ¶¶ 16-22). Defendants argue that no personal stakes exist as to the Park employees and Plaintiff does not argue otherwise.

With respect to the Law Firm Defendants, the parties disagree as to whether the "personal stake" exception is met. Specifically, they dispute whether J. Allen Bobo, a Law Firm Defendant, said at a trade association meeting, "if lot rental increases were appropriately higher, . . . retiree mobile homeowners would be filing lawsuits all over the state." (DE 59 at ¶ 57; DE 62 at ¶ 57). Plaintiff argues **[*24]** that this *single* fact "adequately establishes that the Law Firm Defendants have an independent personal stake." (DE 61 at 5). Plaintiff offers no other evidence of Bobo's alleged personal stake.

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[11] Plaintiff cites to several Supreme Court cases for the opposite proposition—that "[t]he fact that there is common ownership or control of the contracting corporations does not 'liberate them from the impact of the antitrust laws.'" (DE 61 at 5 (quoting *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 71 S. Ct. 259, 95 L. Ed. 219 (1951)* and citing *Timken Co. v. United States, 341 U.S. 593, 598, 71 S. Ct. 971, 95 L. Ed. 1199 (1951)* and *United States v. Yellow Cab Co., 332 U.S. 218 227, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947)*)). Those cases have been overruled by *Copperweld* and its progeny. *See* *Copperweld, 467 U.S. at 763-65, 777*.

This factual dispute is immaterial. Even if Bobo uttered the statement at issue, that fact alone cannot establish that Bobo had a sufficiently independent economic stake in achieving the object of the conspiracy—fixing mobile home prices state-wide through imposing on the Park residents a standardized LTA. The Law Firm Defendants served as outside counsel to the Park and assisted in drafting its LTAs. (DE 55-1, Bobo Decl. at ¶¶2, 23). In restraint of trade antitrust cases, "agreements within a single firm" are treated "as independent action on the presumption that the components of the firm will act to maximize the firm's profits." *Am. Needle, 560 U.S. at 200*. Only in the "rare case[]" will that presumption not hold. *Id.* Bobo's alleged statement does not itself demonstrate that by drafting or implementing his client's LTA, Bobo was acting in his *own* economic interest, "separate from those of the firm," to maximize his *own* profits, as opposed to executing his client's wishes which may tangentially benefit him if he succeeds. **[*25]** *See id.* at 20001; *see also* *Am. Credit Card Tele. Co. v. Nat'l Pay Tele. Corp., 504 So. 2d 486, 489 (Fla. 1st DCA 1987)* (holding that outside counsel acting in that capacity, as opposed to acting on their own behalf, did not meet the personal stake exception). This case falls far short of the "rare case[]" in which intrafirm conduct can constitute concerted action for the purposes of a restraint of trade antitrust claim. *See* *Am. Needle, 560 U.S. at 200*.

In sum, I find that the Law Firm Defendants and Park Defendants cannot conspire with each other or engage in concerted action as required for a restraint of trade antitrust claim. Their alleged conduct is thus unilateral, which is not actionable under *§ 542.18*. Summary judgment is therefore granted for Defendants on the restraint of trade branch of Plaintiff's antitrust claim. I also note that even if Defendants could conspire with each other as a matter of law, Plaintiff pointed to no evidence of a conspiracy to restrain trade in response to Defendants' argument that no such evidence exists in the record. (DE 52 at 14-17; *see* DE 61).

IV. Evidence of Monopolization or Conspiracy to Monopolize

Defendants move for summary judgment on the second branch of Plaintiff's single-count antitrust claim brought under *§ 542.19*, the monopolization provision, arguing that no evidence **[*26]** exists to support this claim. (DE 52 at 17). Under *§ 542.19*, "[i]t is unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce in this state." A claim of monopoly requires: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. Second, to attempt to monopolize, there must be: "(1) intent to bring about a monopoly and (2) dangerous probability of success," which is demonstrated by the defendant's degree of control of the relevant market. *Norton Tire Co. Inc. v. Tire Kingdom Co., Inc., 858 F.2d 1533, 1535 (11th Cir. 1988)*. Third, a conspiracy to monopolize requires: "(1) an agreement to restrain trade, (2) deliberately entered into with the specific intent of achieving a monopoly rather than a legitimate business purpose, (3) which could have had an anticompetitive effect, and (4) the commission of at least one overt act in furtherance of the conspiracy." *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F. 3d 986, 1001 (11th Cir. 1993)*.

Since Plaintiff, the non-moving party, bears the burden of proof on this issue at trial, Defendants need only point to an absence **[*27]** of evidence in the record before the burden shifts to Plaintiff to "go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex, 477 U.S. at 324-25*. Defendants sufficiently demonstrate a lack of evidence in the record to support any claim of monopolization, and Plaintiff fails to identify any evidence whatsoever to demonstrate a genuine issue of material fact as to any element of this claim.

The following facts are undisputed: Plaintiff has "no qualified witness who can testify to:" (1) "the possession of monopoly power in the relevant market" (DE 59 at ¶ 52; DE 62 at ¶ 52); (2) "the relevant market for antitrust purposes" (DE 59 at ¶ 53; DE 62 at ¶ 53); and (3) "the willful acquisition or maintenance of monopoly power by any Defendant." (DE 59 at ¶ 54; DE 62 at 54). Plaintiff's witness list contains no expert witnesses and four lay witnesses. (DE 38). Each of Plaintiff's four lay witnesses are mobile homeowners. (DE 59 at ¶ 26; DE 62 at ¶ 26). Additionally, the Parties agree that Plaintiff has "no expert identified to offer any analysis, test, report or opinion suggesting statistically or otherwise any evidence of a conspiracy between park owners in **[*28]** Florida to restrain trade by any means." (DE 59 at ¶ 46; DE 62 at ¶ 46). Plaintiff also "did not compile its own market study for the rent negotiations that occurred [during the relevant time period]." (DE 59 at ¶ 64; DE 62 at ¶ 64). In Response to Defendant's Motion, Plaintiff did not offer any argument or make any attempt to contest this lack of evidence. It is unclear to me whether Plaintiff has simply abandoned this aspect of its claim or whether its silence in briefing is a concession that no supporting evidence of this claim exists in the record. But either scenario requires that I grant summary judgment for Defendants on the monopolization branch of Plaintiff's antitrust claim.

V. Additional Arguments

Defendants raise two additional arguments: (1) the alleged anticompetitive activity is exempt from the FAA and (2) the application of ***antitrust law*** is precluded by the implied preclusion doctrine. (DE 52 at 19-20). As I granted summary judgment for all Defendants on Plaintiff's substantive claims under *Fla. Stat. § 542.18* and *§ 542.19*, and for the Law Firm Defendants on the additional ground of res judicata, I need not rule on these other potential grounds for summary judgment.

CONCLUSION

Accordingly, it is **[*29]** hereby **ORDERED AND ADJUDGED** that:

(1) Defendants' Motion for Summary Judgment (DE 52) is **GRANTED**.

(2) Defendants' Motion in Limine (51) is **DENIED AS MOOT**.

(3) Judgment in favor of Defendants will be entered by separate order.

SIGNED, in Chambers, at West Palm Beach, Florida this 4 day of October, 2021.

/s/ Donald M. Middlebrooks

DONALD M. MIDDLEBROOKS

UNITED STATES DISTRICT JUDGE

FINAL JUDGMENT

THIS CAUSE is before the Court pursuant to this Court's Order on Motion for Summary Judgment. (DE 75). Pursuant to *Federal Rule of Civil Procedure 58*, it is hereby **ORDERED and ADJUDGED** that:

1. Final Judgment is **ENTERED** in favor of Defendants MHC Operating Limited Partnership, Equity Lifestyle Properties, Inc., MHC Maralago Cay, LLC, Eric Zimmerman, Stanley Martin, Sydney Morris, Rene Scott, Beverly Sagehorn, Bertha Rodriguez, Milagros Rivera, J. Allen Bobo, and Lutz, Bobo & Telfair, P.A., and against Plaintiff Maralago Cay Homeowners Association, Inc., as to all claims.

2. The Clerk of Court shall **CLOSE THIS CASE**.

3. All pending motions are **DENIED AS MOOT**.

SIGNED in Chambers at West Palm Beach, Florida, this 4 day of October, 2021.

/s/ Donald M. Middlebrooks

DONALD M. MIDDLEBROOKS

UNITED STATES DISTRICT JUDGE

IIT, Inc. v. Commc'ns Distribs., LLC

United States District Court for the District of Colorado

October 7, 2021, Decided; October 7, 2021, Filed

Civil Action No. 20-cv-01580-RM-STV

Reporter
2021 U.S. Dist. LEXIS 221265 *

IIT, INC., a Colorado corporation, ABDI ABAS, an individual, Plaintiffs, v. COMMUNICATIONS DISTRIBUTORS, LLC, a dissolved Colorado limited liability company, IDT CORPORATION, a Delaware corporation, ROBERT DIETER, an individual, and COMMUNICATIONS DISTRIBUTORS, LLC, a Florida limited liability company, Defendants.

Subsequent History: Adopted by, Motion denied by, in part, Dismissed by, in part, Motion denied by *IIT, Inc. v. Communications Distribs., 2021 U.S. Dist. LEXIS 236566 (D. Colo., Dec. 10, 2021)*

Prior History: *Iit, Inc. v. Communications Distribs., 2021 U.S. Dist. LEXIS 221202 (D. Colo., Jan. 27, 2021)*

Core Terms

retailers, alleges, motion to dismiss, distributors, amended complaint, RECOMMENDS, commissions, counterclaims, tortious interference, terminate, affirmative defense, pled, unjust enrichment, sales, motion to strike, defamation, reasons, promissory estoppel, Antitrust, fails, leads, economic loss rule, third party, respectfully, competitors, conversion, network, parties, courts, civil conspiracy

Counsel: [*1] For IIT, Inc., a Colorado corporation, Abdi Abas, an individual, Plaintiffs: T. Edward Williams, Williams LLP, New York, NY USA.

For Communications Distributors, LLC, a disolved Colorado limited liability company, Robert Dieter, an individual, Communications Distributors, LLC, a Florida limited liability company, Defendants, Counter Claimants: Michael P. Cross, Michael Jon Ogborn, Ogborn Mihm, LLP, Denver, CO USA.

For IDT Corporation, a Delaware corporation, Defendant: Andrew J. Soven, Holland & Knight LLP-Philadelphia, Philadelphia, PA USA; Anna S. Day, Holland & Knight LLP-Denver, Denver, CO USA; Timothy Robert Carwinski, Reed Smith LLP-Chicago, Chicago, IL USA.

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For IIT, Inc., a Colorado corporation, IIT, Inc., a Colorado corporation, Counter Defendants: T. Edward Williams, Williams LLP, New York, NY USA.

Judges: Scott T. Varholak, United States Magistrate Judge.

Opinion by: Scott T. Varholak

Opinion

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Scott T. Varholak

[*2] This matter is before the Court on four motions: (1) Defendant IDT Corporation's ("IDT") Motion to Dismiss ("IDT's Motion to Dismiss") [#88]; (2) Defendants Communications Distributors, LLC ("CDI") and Robert Dieter's Motion to Dismiss ("CDI's Motion to Dismiss") [#89]; (3) Plaintiffs' Motion to Dismiss CDI's Counterclaims ("Plaintiffs' Motion to Dismiss") [#98]; and (4) Plaintiffs' Motion to Strike Affirmative Defenses Nos. 1 and 6 under *Fed. R. Civ. P. 12(f)* ("Plaintiffs' Motion to Strike") [#99]. The Motions have been referred to this Court. [## 91, 101] The Court has carefully considered the Motions and related briefing, the entire case file, and the applicable case law, as well as oral argument held on September 30, 2021 [#110]. For the following reasons, the Court respectfully **RECOMMENDS** that IDT's Motion to Dismiss be **GRANTED IN PART** and **DENIED IN PART**, CDI's Motion to Dismiss be **GRANTED IN PART** and **DENIED IN PART**, Plaintiffs' Motion to Dismiss be **GRANTED IN PART** and **DENIED IN PART**, and Plaintiffs' Motion to Strike be **DENIED**.

I. BACKGROUND

Plaintiffs' Amended Complaint asserts twelve claims: (1) breach of contract against CDI,[1] IDT, and Robert Dieter [#87 at ¶¶ 144-52]; (2) tortious interference with contract against all Defendants [*id.* at ¶¶ 153-66]; (3) declaratory judgment asking the Court to declare that certain provisions of a Master Distribution Agreement (the "Agreement") entered into by IIT, Inc. ("IIT"), Abas Abdi, and CDI are unenforceable [*id.* at ¶¶ 167-72]; (4) violation of the Colorado Antitrust Act and the Sherman Antitrust Act against all Defendants [*id.* at ¶¶ 173-84]; (5) conversion against all Defendants [*id.* at ¶¶ 185-89]; (6) civil theft against CDI and **[*3]** IDT [*id.* at ¶¶ 190-95]; (7) breach of fiduciary duty against CDI and IDT [*id.* at ¶¶ 196-203]; (8) civil conspiracy against CDI and IDT [*id.* at ¶¶ 204-11]; (9) promissory estoppel against CDI and Mr. Dieter [*id.* at ¶¶ 212-17]; (10) a demand for an accounting [*id.* at ¶¶ 218-22]; (11) equal rights violation pursuant to *42 U.S.C. § 1981* against all Defendants [*id.* at ¶¶ 223-31]; and (12) unjust enrichment against all Defendants [*id.* at ¶¶ 234-38]. IDT's Motion to Dismiss seeks to dismiss all claims asserted against it. [#88] CDI's Motion to Dismiss seeks to dismiss all claims against Mr. Dieter[2] and Claims Two, Four, Seven, Eight, Nine, Eleven, and Twelve against CDI. [#89]

In addition to moving to dismiss several claims against it, CDI also filed three counterclaims against both Plaintiffs: (1) breach of contract [#90 at ¶¶ 58-64]; (2) tortious interference with contractual relationships [*id.* at ¶¶ 65-68]; and (3) defamation [*id.* at ¶¶ 69-73]. Plaintiffs have moved to dismiss all three counterclaims. [#98] Additionally, Plaintiffs have moved to strike two affirmative defenses raised by CDI: (1) Affirmative Defense One stating that one or more of Plaintiffs' claims **[*4]** fail to state facts sufficient to support a cause of action, and (2) Affirmative Defense Six stating that Plaintiffs' claims are frivolous, groundless, vexatious, and lack substantial justification as contemplated by *Federal Rule of Civil Procedure 11* and *Colo. Rev. Stat. § 13-17-102*. [#99]

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[1] The caption to the Amended Complaint names CDI twice, first as a dissolved Colorado limited liability company and second as a Florida limited liability company. [#87] Nonetheless, the Amended Complaint treats CDI as a single entity and does not distinguish between the dissolved entity and the operating entity. [*See generally id.*]

[2] It appears from the Amended Complaint that Claims One, Two, Four, Five, Nine, Eleven, and Twelve are all asserted against Mr. Dieter. [*See generally* #87] CDI's Motion states that during conferral with Plaintiffs' counsel, Plaintiffs' counsel indicated that only Claims Two, Nine, Eleven, and Twelve were asserted against Mr. Dieter in his personal capacity. [#89 at 1] Plaintiffs' Response does not challenge this assertion. [*See generally* #100] Nonetheless, during oral argument, Plaintiffs' counsel indicated that he had not intended to concede the additional claims apparently alleged against Mr. Dieter. As a result, out of an abundance of caution, the Court will analyze whether Plaintiff has plausibly alleged Claims One, Four, and Five against Mr. Dieter.

A. Plaintiffs' Claims[3]

Plaintiff IIT is a Colorado corporation owned by Plaintiff Abdi. [#87 at ¶¶ 1-2][4] Mr. Abdi is originally from Somalia and his native language is Somali. [*Id.* at ¶ 2][5] Defendant CDI is a dissolved Colorado limited liability company and recently formed Florida limited liability company. [*Id.* at ¶ 3][6] Defendant Dieter owns and manages CDI and serves as CDI's registered agent. [*Id.* at ¶¶ 3, 5][7] Defendant IDT is a Delaware corporation. [*Id.* at ¶ 4][8]

1. The Agreement and Plaintiffs' Initial Performance

BOSS Revolution ("the Service") is a mobile telephone service developed and owned by Defendant IDT that enables immigrants to call relatives in their home country. [*Id.* at ¶ 1][9] IDT contracted with CDI to distribute the Service. [*Id.* at ¶ 10] IDT and CDI focused on generating revenue from African immigrants living in the United States who had relatives living in Africa. [*Id.* at ¶ 12] Because of Mr. Abdi's cultural connection to African retailers and **[*5]** because Mr. Abdi speaks multiple languages, IDT and CDI targeted Mr. Abdi to distribute the service. [*Id.* at ¶ 14]

IDT and CDI told Plaintiffs that they were looking for distributors who could build markets with foreign customers in the United States. [*Id.* at ¶ 15] CDI's owner, Mr. Dieter, told Mr. Abdi that IIT could "have the entire African market in Colorado and in other states" and that Mr. Abdi would be paid commissions for sales and leads. [*Id.* at ¶ 16] Mr. Dieter further told Mr. Abdi that he would be paid a commission on any sales of the Service or leads generated. [*Id.* at ¶ 17] Mr. Dieter also told Mr. Abdi that if Mr. Abdi developed leads in other states: (1) distributors would be selected for those leads, (2) Mr. Abdi would manage those distributors, and (3) Mr. Abdi would receive commissions from those sales. [*Id.* at ¶ 18]

"On or about April 6, 2012, IIT, Mr. Abdi, and CDI entered into [the Agreement] that permitted and authorized CDI to offer the 'Service' through IIT's distribution channel." [*Id.* at ¶ 20; *see also* #80-2[10]] The Agreement authorized IIT to promote, market, distribute, and sell the Service. [*Id.*] The Agreement set forth discount rates at which CDI and IDT would **[*6]** provide the Service to IIT and discount rates at which IIT could distribute the Service to retailers. [##87 at ¶ 23; 80-2 at 2-3] It also stated that CDI or IDT would pay IIT commissions on sales, provide other benefits, and provide IIT with access to sales and commissions records. [##87 at ¶¶ 24-26; 80-2 at 3-4]

In signing the Agreement, IIT acknowledged that it would not acquire proprietary or other rights in the Service. [##87 at ¶ 29; 80-2 at 4] The Agreement contained a "Non-Compete; Non-solicitation" provision stating that IIT could not engage in competitive business against CDI for a period of three years after termination of the Agreement. [##87 at ¶ 35; 80-2 at 6] Finally, the Agreement stated that CDI could only terminate the Agreement

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[3] The facts in this Section are drawn from the allegations in Plaintiffs' Amended Complaint [#87], which must be taken as true when considering IDT's Motion to Dismiss and CDI's Motion to Dismiss. *See* *Wilson v. Montano, 715 F.3d 847, 850 n.1 (10th Cir. 2013)* (citing *Brown v. Montoya, 662 F.3d 1152, 1162 (10th Cir. 2011)*).

[4] The Complaint has two sets of Paragraphs 1-5. In this instance, the Court cites to the second set of Paragraphs 1 and 2.

[5] In this instance, the Court cites to the second Paragraph 2.

[6] In this instance, the Court cites to the second Paragraph 3.

[7] In this instance, the Court cites to the second set of Paragraphs 3 and 5.

[8] In this instance, the Court cites to the second Paragraph 4.

[9] In this instance, the Court cites to the first Paragraph 1.

[10] The Agreement was referenced as an attachment to the Amended Complaint [##87, ¶ 20; 80-2] and is therefore properly considered by the Court in evaluating both IDT's Motion to Dismiss and CDI's Motion to Dismiss. *Smith v. United States, 561 F.3d 1090, 1098 (10th Cir. 2009)* ("In evaluating a *Rule 12(b)(6)* motion to dismiss, courts may consider not only the complaint itself, but also attached exhibits . . . and documents incorporated into the complaint by reference." (citations omitted)).

upon the occurrence of: (1) IIT's insolvency or bankruptcy, (2) breach of the Agreement by IIT without a cure within fifteen days of notice, or (3) a finding by a governmental authority that the Agreement is contrary to law. [##87 at ¶ 33; 80-2 at 5] If IIT's breach caused the termination, IIT's commissions were to continue for twelve months. [*Id.*]

Mr. Abdi and IIT performed their obligations under the Agreement by creating a network of customers **[*7]** for the Service, which generated significant revenue for CDI and IDT. [#87 at ¶¶ 36-38, 42] Indeed, IIT ranked first or second on the list of CDI's distributors. [*Id.* at ¶ 48] At their peak, Mr. Abdi and IIT had over 950 retail stores in their distributor network and CDI paid IIT between $195,000 and $225,000 annually. [*Id.* at ¶ 49] IIT and Mr. Abdi expended significant resources developing their customer leads. [*Id.* at ¶¶ 39-41, 44]

2. CDI's Reduction of Distributors Generally

In approximately 2014, IDT instructed CDI to begin cutting distributors to generate additional profits for IDT and CDI.[11] [#87 at ¶¶ 2, 51] Thus, Mr. Dieter and Patricia Rumero[12] began contacting distributors seeking to amend or terminate the distributors' master distributor agreements. [*Id.* at ¶¶ 3, 52-58][13] Mr. Dieter and Ms. Rumero falsely stated that they were amending or terminating the master distributor agreements because the distributors were not producing. [*Id.* at ¶ 53] Mr. Dieter also told some of these distributors that IDT had ordered him to terminate the agreements. [*Id.* at ¶¶ 54-55]

"Near the end of 2016 and into 2017, IDT and CDI agreed to a scheme whereby they would keep (or not pay) substantial **[*8]** revenues generated by the distributors."[14] [*Id.* at ¶ 64] CDI, stating that it was acting on orders from IDT, told distributors that the master distribution agreements needed to be amended or else CDI and IDT would be forced to bar all distributors from distributing the Service through their respective retailer network. [*Id.* at ¶ 65] The only distributors targeted, however, were African or Muslim immigrants. [*Id.* at ¶ 66] These distributors were targeted "because IDT, CDI, and [Mr.] Dieter all reasoned that immigrants who were African or Muslim were stupid, had no access to legal resources, and, in any event, they would not know how to vindicate their claims in court." [*Id.* at ¶ 67]

"[Mr.] Dieter, IDT, and CDI did not take kindly when distributors challenged them on the changes to the [m]aster [d]istributor [a]greement[s]." [*Id.* at ¶ 72] For example, on one occasion, a distributor's commissions were stopped after the distributor questioned the amendment. [*Id.* at ¶ 73] "Most of the distributors, under economic pressure, caved to IDT and CDI's demands to alter the agreements without additional consideration." [*Id.* at ¶ 74]

3. CDI's Specific Actions Toward Plaintiffs

At some point,[15] CDI and **[*9]** IDT realized that Mr. Abdi and IIT had built a significant African-based retail and customer market, thereby achieving IDT's and CDI's needs. [*Id.* at ¶ 50] CDI and IDT decided they no longer

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[11] The Court has done its best to attempt to reconstruct the exact timeline of events outlined in the Amended Complaint. The Amended Complaint is often disjointed—jumping from one timeframe to another—and it is difficult to determine when various actions were alleged to have occurred.

[12] The Amended Complaint identifies Ms. Rumero as an "employee" but does not indicate whether she was an employee of IDT or CDI. [*Id.* at ¶ 3] Given that Plaintiffs allege that Ms. Rumero "performed the bulk of the work in stealing Plaintiffs' retailers" [*id.* at ¶ 90], Plaintiffs failure to precisely identify Ms. Rumero's employer is especially troubling. It appears from CDI's counterclaims that Ms. Rumero is CDI's Sales Director. [#90 at ¶ 24]

[13] In this instance, the Court cites to the first Paragraph 3.

[14] Again, it is not clear from the Amended Complaint whether this was a new "scheme" or was merely a continuation of the actions that allegedly began in 2014. This distinction does not affect the Court's analysis.

[15] Once again, the Amended Complaint rarely provides specific dates and instead generally refers to the four-year timeframe of 2014-2018.

needed assistance from Mr. Abdi and IIT. [*Id.*] CDI and IDT thus refused to provide leads to IIT, preventing IIT from obtaining commissions. [*Id.* at ¶ 46] CDI and IDT also refused to pay commissions for leads that IIT developed or assisted in developing. [*Id.* at ¶ 47]

At some unspecified date,[16] CDI presented Mr. Abdi and IIT with a new master distributor agreement. [*Id.* at ¶ 77] When Mr. Abdi was asked to amend the Agreement, he hired a lawyer and refused to do so. [*Id.* at ¶¶ 2, 58, 80] In response, CDI threatened to terminate the Agreement. [*Id.* at ¶ 2][17] After IIT's and Mr. Abdi's attorneys intervened, however, CDI backed down. [*Id.*]

Still, "[w]hen Plaintiffs declined to enter into the new master distributor agreement, Defendants retaliated against Plaintiffs." [*Id.* at ¶ 81] "IDT, CDI, and [Mr.] Dieter[] agreed to steal Plaintiffs['] retailers from Plaintiffs' network." [*Id.* at ¶ 82] IDT and CDI told Plaintiffs' retailers that they could get a better rate than the rate provided by Plaintiffs.[18] [*Id.* **[*10]** at ¶¶ 83, 85-95] This created discontent with the retailers and required IIT to provide a different rate, causing IIT to lose money. [*Id.* at ¶ 84] CDI and IDT also stopped providing IIT a promotion code to give customers; instead, CDI and IDT provided customers promotion codes themselves—"rais[ing] questions in the [r]etailer's minds about why Plaintiffs did not provide them the promotional code."[19] [*Id.* at ¶ 101] In some instances, new accounts were set up for the retailers and the retailers' use of the Service would be billed through these new numbers, thereby depriving Plaintiffs of the commissions from those retailers. [*Id.* at ¶ 102]

On August 24, 2015[20], CDI's legal counsel sent Plaintiffs a letter alleging breach of the Agreement and giving Plaintiffs fifteen days to cure. [*Id.* at ¶¶ 104-05] The letter alleged that Plaintiffs did not use their best efforts to promote, market, and distribute the Service. [*Id.* at ¶ 104] The letter further alleged that Plaintiffs were not favorably conducting business. [*Id.* at ¶ 105]

On September 9 and 15, 2015, Plaintiffs disputed the allegation and sought clarification. [*Id.* at ¶ 106] On September 23, 2015, CDI responded and cited Plaintiffs' decline in sales as evidence of the breach. [*Id.* at ¶ 107] In that same letter, without providing specifics, CDI indicated that Plaintiffs had disparaged CDI and IDT. [*Id.* at ¶ 108] Nonetheless, the letter stated that CDI did not wish to terminate its relationship with IIT. [*Id.* at ¶ 109]

On January 11, 2016, CDI told Plaintiffs about a new INACTIVE Retailer Campaign designed to reduce the number of inadequately performing accounts; this program was not part of the Agreement. **[*11]** [*Id.* at ¶ 110] On February 3, 2016, CDI again alleged that Plaintiffs were in breach of the Agreement for failing to use their best efforts to promote the Service and disparaging CDI, IDT, and the Service. [*Id.* at ¶ 111-12] On February 16, 2016, IIT

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[16] From the Amended Complaint, it is impossible to determine whether this incident occurred before or after CDI and IDT stopped providing leads. It is likewise impossible to determine whether this incident occurred before or after the correspondence described below.

[17] In this instance, the Court cites to the first Paragraph 2.

[18] Although the Amended Complaint alleges that both IDT and CDI were involved in these calls, the only individuals specifically identified as having made the calls are Mr. Dieter and Ms. Rumero. [*Id.* at ¶¶ 83, 85-95]

[19] It is possible, though far from clear from the Amended Complaint, that Ms. Rumero—the person who is alleged to have been primarily involved in the conversations with retailers [*id.* at ¶ 90]—may have allegedly engaged in other actions related to the retailers besides offering the retailers better rates. In Paragraph 96, Plaintiffs allege verbatim: "At times, during her visit, Ms. Rumero, acting on the orders of Defendants, would make changes to the retailers' account with the ultimate goal of changing the retailers' account number to make it appear as if there was no." [*Id.* at ¶ 96] And that is where the sentence ends. The Court is left to forever wonder why Ms. Rumero would allegedly change the retailers' account numbers. In the next two paragraphs, Plaintiffs allege that Ms. Rumero made various representations and omissions, but do not identify these representations and omissions. [*Id.* at ¶¶ 97-98] The Court does not know whether these representations or omissions were supposed to have been included in the unfinished Paragraph 96, or whether Paragraphs 97 and 98 are merely conclusory statements.

[20] The Amended Complaint refers to the date of this letter as both "August 24, 2015" and "August 24, 2014." [#87 at ¶¶ 104-105] The Court assumes, based on the dates provided in the surrounding paragraphs, that the correct year is 2015.

responded to the breach allegation, asked CDI to stop unilaterally amending the Agreement, and requested an accounting. [*Id.* at ¶¶ 113-14] CDI never provided an accounting. [*Id.* at ¶ 116]

In total, CDI removed approximately 700 retail accounts from IIT's distributor network. [*Id.* at ¶ 118] On July 18, 2018, Mr. Abdi sent a text message to an IDT employee stating that CDI was stealing IIT's business. [*Id.* at ¶ 119] On July 24, 2018, Mr. Abdi sent Mr. Dieter an email asking that CDI and IDT stop calling Plaintiffs' retailers and customers and stop creating new accounts for IIT's retail stores. [*Id.* at ¶ 120] Mr. Abdi also demanded the return of the stolen stores to IIT's network and compensation for lost commissions. [*Id.* at ¶ 121]

On October 26, 2018, CDI terminated the Agreement "as a result of IIT's multiple breaches of the same." [*Id.* at ¶ 123] CDI did not provide any specific details about the breaches. [*Id.* at ¶ 124] CDI did not provide **[*12]** fifteen days' notice for cure. [*Id.* at ¶ 127] CDI stopped paying IIT commissions in November 2018. [*Id.* at ¶ 131] On January 2, 2019, CDI sent Mr. Abdi a letter threatening to withhold post-termination commissions and including a post-termination agreement, which Mr. Abdi and IIT did not sign. [*Id.* at ¶¶ 128-29] On January 15, 2019, CDI sent another letter to Mr. Abdi and IIT stating that it was withholding payment of commissions and placing those commissions in an escrow account. [*Id.* at ¶ 130]

B. CDI's Counterclaims[21]

CDI is a distributor of the Service. [#90, ¶ 1] In addition to distributing the Service directly, CDI also contracts with independent distributors. [*Id.* at ¶ 2] On April 6, 2012, CDI and IIT entered into the Agreement. [*Id.* at ¶ 3] The Agreement provides:

> The terms and conditions of this Agreement, and all proprietary information regarding the Service and its distribution, shall be confidential between the parties, and neither shall reveal such terms, conditions or information to any third parties other than its accountants or attorneys or as required by process of law. The obligations of this confidentiality provision shall survive the expiration or any termination **[*13]** of this Agreement.

[*Id.* at ¶ 5] This provision is critical to CDI as its distributors and retailers receive different commissions based upon a number of factors, including sales volume. [*Id.* at ¶ 6]

Mr. Abdi and IIT breached this confidentiality provision on several occasions by revealing to other distributors and retailers specific commissions paid by CDI to IIT and other retailers. [*Id.* at ¶ 8] In a malicious attempt to sow discord and damage CDI, Mr. Abdi revealed to other distributors his commission structure and suggested that they demand more from CDI. [*Id.* at ¶ 9] For example, in August of 2018, Mr. Abdi revealed his commission structure to CDI's Kentucky distributor and encouraged the Kentucky distributor to demand a higher commission from CDI. [*Id.* at ¶ 10] Mr. Abdi also revealed his commission rates to retailers. [*Id.* at ¶ 11] Mr. Abdi's revelation of these rates to distributors and retailers was intended to damage, and did indeed damage, CDI. [*Id.* at ¶¶ 12-13]

Another core requirement of the Agreement is the obligation to be available and responsive to retailers. [*Id.* at ¶ 14] It required IIT and Mr. Abdi to manage accounts and review sales to set margins. [*Id.* at ¶ 16] CDI **[*14]** also required distributors, including IIT and Mr. Abdi, to align commission rates based on sales. [*Id.* at ¶ 17] As sales rates increased, so should commissions, particularly if requested by retailers. [*Id.* at ¶ 18] But, for many years, even with strong sales, Plaintiffs failed to align commissions paid to retailers with sales. [*Id.* at ¶ 19] As a result, CDI's competitors gained a competitive advantage with retailers served by IIT. [*Id.* at ¶ 20] At the same time, Mr. Abdi told retailers that he could not provide them a higher commission because the commission he received from CDI was too low, providing the retailers with fabricated commission figures. [*Id.* at ¶ 21]

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[21] The facts in this Section are drawn from the allegations in CDI's Counterclaims [#90 at 17-22], which must be taken as true when considering Plaintiffs' Motion to Dismiss. *See* [*Wilson, 715 F.3d at 850 n.1*].

In addition to providing retailers with false commission figures, Plaintiffs also ignored retailers. [*Id.* at ¶ 23] CDI received numerous complaints from retailers that Mr. Abdi could not be reached. [*Id.*] When CDI tried to reach Mr. Abdi about the complaints, Mr. Abdi would not answer. [*Id.*] Often, Mr. Abdi's voicemail was full. [*Id.* at ¶¶ 24-25] As a result of Mr. Abdi's inattentiveness to consumers, sales of the Service at retail stores serviced by Mr. Abdi declined precipitously. [*Id.* at ¶ 28] This resulted in lost revenue **[*15]** for CDI. [*Id.* at ¶ 32]

The Agreement further provides: "Distributor shall use its best efforts to promote, market and distribute the Service to Retailers." [*Id.* at ¶ 33] On January 1, 2015, Boss Revolution instituted a program call BR Rewards that incentivized distributors to increase sales of the Service. [*Id.* at ¶ 34] All distributors, including IIT, were required to encourage retailers to sign up for the BR Rewards program. [*Id.* at ¶ 35] Ten months after the program began, over 100 retailers that IIT serviced had not signed up for the BR Rewards program. [*Id.* at ¶ 36] Similarly, Boss Revolution engaged in a marketing initiative called "Paint the Town Red." [*Id.* at ¶ 38] CDI instructed distributors such as IIT to contact their retailers to encourage participation. [*Id.* at ¶ 39] IIT refused to participate in the Paint the Town Red program, and by one year into the program not a single IIT retailer had enrolled. [*Id.* at ¶ 40]

On an ongoing basis, Mr. Abdi made racist and anti-Semitic comments about Mr. Dieter to IDT employees, CDI employees, distributors, and retailers. [*Id.* at ¶ 43] Retailers and distributors informed CDI employees that Mr. Abdi consistently emphasized Mr. Dieter's **[*16]** Jewish heritage. [*Id.* at ¶ 44] After CDI terminated IIT, Mr. Abdi told several people in the industry that the sole reason for the termination was that Mr. Dieter is Jewish and Mr. Abdi is Black and Muslim. [*Id.* at ¶ 45] Mr. Abdi also threatened to "make war" with CDI. [*Id.* at ¶ 46]

On several occasions, Mr. Abdi falsely told retailers that CDI would steal money from them. [*Id.* at ¶ 47] For example, in July 2018, Mr. Abdi called a Denver retailer and falsely claimed that CDI diverted funds from their account. [*Id.* at ¶ 48] That same month, Mr. Abdi told the owner of another Denver retailer that CDI would "take full control of his credit card." [*Id.* at ¶ 49] The next month, Mr. Abdi told the owner of an Omaha retailer that CDI would steal her residuals. [*Id.* at ¶ 50] These actions were taken to damage CDI and caused quantifiable losses. [*Id.* at ¶ 51]

CDI provided numerous notices to Plaintiffs, formally and informally, of IIT's failure to meet its contractual obligations. [*Id.* at ¶ 52] Plaintiffs were given opportunities to comply and cure the breaches, but failed to do so. [*Id.* at ¶ 53] As a result, CDI validly terminated the Agreement. [*Id.* at ¶ 56] Nonetheless, CDI paid Mr. Abdi for **[*17]** twelve months commissions. [*Id.* at ¶ 57]

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(1) empowers a court to dismiss a complaint for "lack of subject-matter jurisdiction." Dismissal under *Rule 12(b)(1)* is not a judgment on the merits of a plaintiff's case, but only a determination that the court lacks authority to adjudicate the matter. *See* *Castaneda v. INS, 23 F.3d 1576, 1580 (10th Cir. 1994)* (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). A court lacking jurisdiction "must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co., 495 F.2d 906, 909 (10th Cir. 1974)*.

Under *Federal Rule of Civil Procedure 12(b)(6)*, a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." In deciding a motion under *Rule 12(b)(6)*, a court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri, 595 F.3d 1120, 1124 (10th Cir. 2010)* (alteration in original) (quoting *Smith v. United States, 561 F.3d 1090, 1098 (10th Cir. 2009)*). Nonetheless, a plaintiff may not rely on mere labels or conclusions, "and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible **[*18]** on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed.*

2d 868 (2009) (quoting Twombly, 550 U.S. at 570). Plausibility refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting Twombly, 550 U.S. at 570). "The burden is on the plaintiff to frame a 'complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief." *Id.* (quoting Twombly, 550 U.S. at 556). The ultimate duty of the court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." Forest Guardians v. Forsgren, 478 F.3d 1149, 1160 (10th Cir. 2007).

Pursuant to Federal Rule of Civil Procedure 12(f), the Court—sua sponte or on a motion made by a party—"may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The Court "possesses considerable discretion in disposing of a Rule 12(f) motion to strike" and "[a]ny doubt about whether the challenged material is redundant, immaterial, impertinent, or scandalous should be resolved in favor of the non-moving party." 5C Charles A. Wright et al., Fed. Prac. & Proc. § 1382 (3d ed. 2019).

"[A]s a general matter, motions to **[*19]** strike under Rule 12(f) are disfavored." Broach v. Yegappan, No. 17-CV-02791-MSK-NYW, 2019 U.S. Dist. LEXIS 213651, 2019 WL 6724246, at *2 (D. Colo. Dec. 11, 2019) (quotation omitted). "[B]ecause federal judges have made it clear, in numerous opinions they have rendered in many substantive contexts, that Rule 12(f) motions to strike on any of the[ ] grounds [articulated in the text of the Rule] are not favored, often being considered purely cosmetic or 'time wasters,' there appears to be general judicial agreement, as reflected in the extensive case law on the subject, that they should be denied unless the challenged allegations have no possible relation or logical connection to the subject matter of the controversy." 5C Charles A. Wright et al., Fed. Prac. & Proc. § 1382 (3d ed. 2019) (footnotes omitted). Motions to strike thus "are usually only granted when the allegations have no bearing on the controversy and the movant can show that he has been prejudiced." Kimpton Hotel & Rest. Grp., LLC v. Monaco Inn, Inc., No. CIV.A. 07-CV-01514-W, 2008 U.S. Dist. LEXIS 5278, 2008 WL 140488, at *1 (D. Colo. Jan. 11, 2008).

III. ANALYSIS

As set forth above, Plaintiffs' Amended Complaint asserts twelve claims: (1) breach of contract against CDI, IDT, and Mr. Dieter [#87 at ¶¶ 144-52]; (2) tortious interference with contract against all Defendants [*id.* at ¶¶ 153-66]]; (3) declaratory judgment asking the Court to declare that certain provisions of the Agreement are unenforceable [*id.* at **[*20]** ¶¶ 167-72]; (4) violation of the Colorado Antitrust Act and the Sherman Antitrust Act against all Defendants [*id.* at ¶¶ 173-84]; (5) conversion against all Defendants [*id.* at ¶¶ 185-89]; (6) civil theft against CDI and IDT [*id.* at ¶¶ 190-95]; (7) breach of fiduciary duty against CDI and IDT [*id.* at ¶¶ 196-203; (8) civil conspiracy against CDI and IDT [*id.* at ¶¶ 204-11]; (9) promissory estoppel against CDI and Mr. Dieter [*id.* at ¶¶ 212-17]; (10) a demand for an accounting [*id.* at ¶¶ 218-22]; (11) equal rights violation pursuant to 42 U.S.C. § 1981 against all Defendants [*id.* at ¶¶ 223-31]; and (12) unjust enrichment against all Defendants [*id.* at ¶¶ 234-38]. IDT's Motion to Dismiss seeks to dismiss all claims asserted against it. [#88] CDI's Motion to Dismiss seeks to dismiss all claims against Mr. Dieter and Claims Two, Four, Seven, Eight, Nine, Eleven, and Twelve against CDI. [#89]

CDI has filed three counterclaims against both Plaintiffs: (1) breach of contract [#90 at ¶¶ 58-64]; (2) tortious interference with contractual relationships [*id.* at ¶¶ 65-68]; and (3) defamation [*id.* at ¶¶ 69-73]. Plaintiffs have moved to dismiss all three counterclaims. [#98] Additionally, Plaintiffs have moved to strike **[*21]** two affirmative defenses raised by CDI: (1) Affirmative Defense One stating that one or more of Plaintiffs' claims fail to state facts sufficient to support a cause of action, and (2) Affirmative Defense Six stating that Plaintiffs' claims are frivolous, groundless, vexatious, and lack substantial justification as contemplated by Federal Rule of Civil Procedure 11 and Colo. Rev. Stat. § 13-17-102. [#99]

The Court will first address IDT's Motion to Dismiss. Next, the Court will turn to CDI's Motion to Dismiss. Third, the Court will address Plaintiffs' Motion to Dismiss. Finally, the Court will address Plaintiffs' Motion to Strike.

A. IDT's Motion to Dismiss

IDT has moved to dismiss all claims against it. [#88] The Court addresses each claim in turn.

1. Claim One: Breach of Contract

Under Colorado Law, a breach of contract claim requires: (1) existence of a contract; (2) performance by the plaintiff; (3) failure to perform by the defendant; and (4) damages. *Shell v. Am. Fam. Rights Ass'n, 899 F. Supp. 2d 1035, 1058 (D. Colo. 2012)* (citing *W. Distrib. Co. v. Diodosio, 841 P.2d 1053, 1058 (Colo. 1992)*). With respect to the first element, a plaintiff "must show that the contract was properly formed," with "mutual assent to an exchange between competent parties—where an offer is made and accepted—regarding a subject matter which is certain, and for which there is legal consideration." **[*22]** *Galvin v. McCarthy, No. 07-cv-00885-PAB-BNB, 2009 U.S. Dist. LEXIS 30041, 2009 WL 890717, at *6 (D. Colo. Mar. 31, 2009)* (citing *Indus. Prods. Int'l, Inc. v. Emo Trans, Inc., 962 P.2d 983, 988 (Colo. App. 1997)*).

IDT argues that the Amended Complaint fails to allege the existence of a contract between Plaintiffs and IDT. [#88 at 7-8] The Court agrees. The Agreement itself states that it is "by and between [Mr. Abdi] and IIT . . . and [CDI]." [#80-2 at 1] And IDT is neither a signatory nor party to the contract. [*See generally Id.*]

In their response, Plaintiffs argue that a contract need not be in writing to be enforceable and that a written contract need not be signed. [#100 at 5] It is true that "common law contract principles . . . allow for the formation of contracts without the signatures of the parties bound by them." *Yaekle v. Andrews, 195 P. 3d 1101, 1107 (Colo. 2008)*. But such a principle does not negate the other requirements of contract formation. *See* *Galvin, 2009 U.S. Dist. LEXIS 30041, 2009 WL 890717, at *6*. In other words, even without IDT's signature, Plaintiffs could successfully plead that IDT was bound to the Agreement, but only by pleading other facts that plausibly allege "mutual assent . . . where an offer is made and accepted—regarding a subject matter which is certain, and for which there is legal consideration." *Id.*; *see also* *I.M.A., Inc. v. Rocky Mountain Airways, Inc., 713 P.2d 882, 888 (Colo. 1987)* (stating that the parties' agreement to establish a contract can be inferred from conduct or oral statements). **[*23]** The Complaint contains no such allegations.

Plaintiffs also argue that the Agreement "includes a number of provisions under which IDT is obligated to perform obligations owed to Plaintiffs." [#100 at 6] For example, the Agreement states that "IDT and CDI hereby authorize" IIT to promote the Service. [#80-2 at 2] Elsewhere, the Agreement states that commissions will be paid "by CDI or IDT." [*Id.* at 3] But the Amended Complaint fails to plausibly allege that IDT assented to be bound by these terms or that IDT authorized CDI to bind IDT to the Agreement.[22] The Court declines to find that the mention of IDT by name in the contract between CDI and Plaintiffs could, on its own, bind IDT to that Agreement.

Plaintiffs further argue that the Amended Complaint plausibly alleges a breach of contract claim because it "alleges that IDT performed under the Agreement by sending Plaintiffs leads, by sending Plaintiffs Point of Sale . . . materials, by requiring that Plaintiffs adhere to the confidentiality provision in the [Agreement], by providing training directly to Plaintiffs, [and] by paying Plaintiffs commissions as called for under the [Agreement]." [#100 at 6-7] But nothing in the Amended Complaint **[*24]** plausibly alleges that IDT performed these tasks because they were a party to the Agreement—as opposed to performing these tasks out of its own self-interest, such as generating additional revenue, or out of a separate obligation, such as an agreement between IDT and CDI. Thus, the fact that

[22] The Amended Complaint states: "IDT developed the Service, but IDT could not sell the service without distributors. IDT contracted with CDI and with Plaintiffs to distribute the Service." [#87 at ¶ 10] But this does not allege that IDT gave CDI permission to contract on its behalf; it alleges only that CDI's contract with IDT permitted CDI to take additional actions in order to distribute the Service. And the conclusory statement that IDT contracted with Plaintiffs is insufficient to demonstrate an actual contract where the Agreement does not include IDT as a party and the Amended Complaint fails to allege the terms of any other agreement—oral or written—between IDT and Plaintiffs.

IDT performed some of the actions listed in the Agreement does not in turn mean that IDT was a party to the Agreement.

Accordingly, this Court RECOMMENDS that Claim One be DISMISSED as to Defendant IDT for failure to allege the existence of a contract between Plaintiffs and IDT. This Court further RECOMMENDS that Claims Three and Ten be DISMISSED as to IDT. Claim Three requests a declaratory judgment invalidating the non-competition and nonsolicitation provisions of the Agreement between Plaintiffs and CDI. Because the Complaint does not sufficiently allege that Defendant IDT was a party to that, or any, contract, the Complaint does not sufficiently allege a claim regarding the provisions of that Agreement as to IDT. Similarly, Claim Ten requests an accounting, which Plaintiffs allege they are entitled to as part of the terms of the Agreement between Plaintiffs and CDI. Because this Court finds **[*25]** that Plaintiffs have not sufficiently alleged that IDT was a party to that Agreement, the Complaint fails to sufficiently allege that Plaintiffs are entitled to an accounting by IDT.[23]

2. Claim Two: Tortious Interference

Claim Two alleges both tortious interference with an existing contract and tortious interference with a prospective business relation. [#87 at ¶¶ 153-66] "Except in one respect, the elements of the[se] claims are the same; the Plaintiff must allege: (i) it had either a valid existing contract with a third party or that it expected to enter into a contract with a third party; (ii) the Defendants induced or otherwise caused the third party to breach the contract or not enter into the contractual relation; and (iii) the Defendants did so intentionally and via improper means." *Tara Woods Ltd. P'ship v. Fannie Mae, 731 F.Supp.2d 1103, 1119 (D. Colo. 2010)* (citing *Harris Grp., Inc. v. Robinson, 209 P.3d 1188, 1195-96 (Colo. App. 2009)*).

IDT argues that Plaintiffs have failed to allege either an existing or expected contract or that IDT engaged in intentional or improper interference. [#88 at 10-13] In response, Plaintiffs maintain that they had relationships with various retailers, the Agreement provided Plaintiffs an exclusive right to commissions from those retailers, and IDT acted to remove **[*26]** those retailers from Plaintiffs' distribution network. [#100 at 8-9] Because the Court agrees that the Amended Complaint does not sufficiently allege that IDT engaged in intentional and improper interference, and therefore does not sufficiently allege a tortious interference claim, the Court does not address whether Plaintiffs have sufficiently alleged a valid existing or expected contract with a third party.

Here, the Amended Complaint cites to three allegedly improper means of interference. [#87 at ¶ 163] Specifically, the Amended Complaint alleges that IDT, CDI and Mr. Dieter: (1) provided promotional discounts directly to the retailers without providing such codes to Plaintiffs, (2) opened new retail accounts for retailers in Plaintiffs' distribution network, contrary to the Agreement's terms, and (3) took leads that Plaintiffs identified and developed by telling those leads that IDT, CDI and Plaintiffs were the same. [*Id.*] The first two of these allegedly improper means of interference do not constitute improper interference, and the third is insufficiently pled.

[23] "Although an accounting is an extraordinary remedy, it may be ordered if the plaintiff is unable to determine how much, if any, money is due him or her from another." *Patterson v. BP Am. Prod. Co., 159 P.3d 634, 642 (Colo. App. 2006)*, *overruled on other grounds by* *185 P.3d 811 (Colo. 2008)* (citing *Andrikopoulos v. Broadmoor Mgmt. Co., 670 P.2d 435 (Colo. App. 1983)*). "Under Colorado law, a demand for an accounting and a refusal to comply with the demand must be pleaded and proved." *Postal Instant Press v. Jackson, 658 F. Supp. 739, 743 (D. Colo. 1987)* (citing *Am. Woodmen's Life Ins. Co. v. Supreme Camp of Am. Woodmen, 37 Colo. App. 311, 549 P.2d 423, 425 (Colo. App. 1976)*). However, exceptions to the pre-suit demand requirement apply where preclusion of the accounting claim would be unreasonable, such as where the accounting claim is ancillary to a breach of contract claim and its main purpose is to facilitate an accurate calculation of damages once the breach of contract is found. *See* *Kirzhner v. Silverstein, 09-CV-02858-CMA, 2010 U.S. Dist. LEXIS 74963, 2010 WL 2985615, at *12 (D. Colo. July 23, 2010)*; *Patterson, 159 P.3d 634 at 642*. Here, Plaintiffs' accounting claim centers on its assertion that the Agreement requires CDI and IDT to provide records regarding commissions due under the Agreement. [#87 at ¶ 219] But because Plaintiffs have not sufficiently alleged that IDT was a party to the Agreement, they are not entitled to an accounting from IDT.

Under Colorado law it is not enough for a plaintiff to allege mere interference; "[i]n order to be tortious, the interference **[*27]** must also be by improper means." *Bolsa Res., Inc. v. Martin Res., Inc., No. 11-cv-01293-MSK-KMT, 2014 U.S. Dist. LEXIS 138369, 2014 WL 4882132, at *9 (D. Colo. Aug. 28, 2014)* (citing *Amoco Oil Co. v. Ervin, 908 P.2d 493, 500 (Colo. 1995)*, *recommendation aff'd and adopted*, *2014 U.S. Dist. LEXIS 138367, 2014 WL 4980045 (Sept. 30, 2014)*. "Threats of physical violence or law suits, economic pressure, and misrepresentations qualify as improper inducements to breach contractual or business relationships." *Id.* (citing *Restatement (Second) of Torts § 767 cmt c* (1979)). But competitive self-interest, including persuading third parties to change providers, is not improper on its own. *Id.; see also Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111, 1123 (10th Cir. 2008)* (stating that competitive self-interest is not, by itself, improper, even if it harms competitors); *Amoco Oil, 908 P.2d at 502* ("[A]n actor may use persuasion . . . without engaging in wrongful means"). Thus, the mere fact that IDT attempted to remove the retailers from Plaintiffs' network—through actions such as offering the retailers better rates or discounts—does not constitute improper interference.[24] For this reason, the first two allegedly improper means of interference fail to support Plaintiffs' claim.

The third allegedly improper means of interference has been insufficiently pled. To the extent the Amended Complaint makes vague references to IDT taking improper actions—such as by misrepresenting information to Plaintiffs' retailers—the allegations are insufficient to support an intentional interference claim. **[*28]** [*See* #87 at ¶¶ 97-101] "In the context of a tortious interference claim, 'the heightened pleading standard [of *Rule 9(b)*] . . . applies to the fraudulent inducement element of the tortious interference claim.'" *Purac Am. Inc. v. Birko Corp., No. 14-cv-01669-RBJ, 2015 U.S. Dist. LEXIS 45955, 2015 WL 1598065, at *6* (quoting *Dawson v. Litton Loan Servicing, LP, No. 12-CV-01334-CMA-KMT, 2013 U.S. Dist. LEXIS 49228, 2013 WL 1283848, at *8 (D. Colo. Mar. 28, 2013)*); *see also N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale, 567 F.3d 8, 14 (1st Cir. 2009)* (*Rule 9(b)* apples where "fraudulent misrepresentation is the lynchpin" of tortious interference claim). *Rule 9(b)* requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*. This heightened pleading standard requires the Complaint to "'set forth the who, what, when, where and how of the alleged fraud,' or, in other words, 'the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof.'" *Purac, 2015 U.S. Dist. LEXIS 45955, 2015 WL 1598065, at *6* (quoting *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah, 472 F.3d 702, 726-27 (10th Cir. 2006)*).

As applied here, the Amended Complaint alleges that Ms. Rumero made false "misrepresentations (and omissions)" to the retailers.[25] [#87 at ¶ 97] But it does not provide the time, place, or contents of those false representations or omissions. And, in any event, Ms. Rumero is a representative of CDI, not IDT. The Amended Complaint also makes reference to "CDI and IDT . . . lower[ing] the **[*29]** percentage IIT's retailers received for the Service in CDI's computer system" and attempting to convince retailers that IIT was not providing truthful information to retailers. [*Id.* at ¶ 99] But, once again, this allegation lacks sufficient information to plausibly plead improper interference—the Amended Complaint does not allege the identity of the party making the false statements or the time or place of those false statements. "Indeed, the [Amended Complaint] provide[s] little information about those statements beyond alleging their content" and is therefore insufficient to state a claim under *Rule 9(b)* for fraudulent misrepresentation leading to tortious interference. *Purac, 2015 U.S. Dist. LEXIS 45955, 2015 WL 1598065, at *6*.

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[24] Nor does the "exclusivity" provision of the Agreement make the interference improper. Initially, the Agreement appears to disclaim any exclusivity, specifically stating that the "Agreement shall not confer upon [Plaintiffs] any type of exclusive right pertaining to the marketing and sale of the Service and CDI and IDT shall retain the right to enter into the same or similar arrangements with other entities." [#80-2 at 4] But, in any event, as detailed above, IDT was not a party to the Agreement and therefore cannot have acted improperly by failing to comply with the terms of the Agreement.

[25] As explained earlier, in Paragraph 96 of the Amended Complaint, Plaintiff alleges: "At times, during her visit, Ms. Rumero, acting on the orders of Defendants, would make changes to the retailers' account with the ultimate goal of changing the retailers' account number to make it appear as if there was no." [*Id.* at ¶ 96] But the sentence ends without explaining the changes to the retailers' accounts or how those changes were fraudulent.

Accordingly, because the Amended Complaint fails to sufficiently allege a claim for tortious interference with contract or prospective business relationship, this Court RECOMMENDS that Claim Two be DISMISSED as to IDT.

3. Claim Four: Violation of State and Federal Antitrust Laws

The Amended Complaint next asserts that IDT violated the Colorado Antitrust Act and *Section 1* of the Sherman Antitrust Act. [#87 at ¶¶ 173-84] "Because federal ***antitrust law*** principles apply to both the federal and state antitrust claims, both claims may be analyzed together." **[*30]** *Arapahoe Surgery Ctr., LLC v. CIGNA Healthcare, Inc., 80 F. Supp. 3d 1257, 1262-63 (D. Colo. 2015)*; *see also* *Colo. Rev. Stat. § 6-4-119* ("[T]he courts shall use as a guide interpretations given by the federal courts to comparable federal antitrust laws").

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations". *15 U.S.C. § 1*; *see also* *Colo. Rev. Stat. § 6-4-104* ("Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce is illegal."). "[A] person asserting a claim under *§ 1* must prove not only the existence of an agreement or conspiracy between two or more competitors to restrain trade, but also that the restraint is unreasonable." *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp., 846 F.3d 1297, 1306 (10th Cir. 2017)*. And "[b]ecause *§ 1* of the Sherman Act does not prohibit all unreasonable restraints of trade but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express." *Twombly, 550 U.S. at 553* (internal citations and brackets omitted). Accordingly, the pleading stage of an antitrust claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made . . . [and] to raise a reasonable expectation **[*31]** that discovery will reveal evidence of illegal agreement." *Id. at 556*. "Such an agreement is established by evidence that the conspiring parties 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Arapaho Surgery Center, 80 F. Supp. 3d at 1263* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*).

IDT argues that Plaintiffs have failed to plead a contract, combination, or conspiracy, and have failed to plausibly plead any wrongdoing by IDT. [#88 at 13-14] The Court agrees that Plaintiffs have failed to plausibly plead a violation of the antitrust laws. "Most claims under [*Section 1* of the Sherman Act] are subject to the 'rule of reason' which requires [the Court] to analyze the relevant market power of defendants and therefore require the plaintiff to allege a valid market." *Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111, 1119 (10th Cir. 2008)*. Here, Plaintiffs' Amended Complaint is devoid of any facts concerning the market definition and this failure would ordinarily require dismissal of Plaintiffs' antitrust claims. *See id.* ("Those claims brought by [plaintiff] that fall under the rule of reason must fail because of the legally inadequate market definition within his complaint.").

At oral argument, however, counsel for Plaintiffs clarified that Plaintiffs were pursuing a price fixing claim. "Horizontal price fixing . . . [is a] **[*32]** per se violation[], so [Plaintiffs'] failure to allege a relevant market is not fatal to [that] claim[]." *Id.* (quotation omitted). "Per se violations are restricted to those restraints that would always or almost always tend to restrict competition and decrease output." *Id.* (quotation omitted). "This concern is greatest when actual competitors enter agreements because cooperation among would-be competitors will deprive[] the marketplace of the independent centers of decisionmaking that competition assumes and demands, and risk anti-competitive effects." *Id.* (quotation omitted). Here, however, the Amended Complaint does not allege that CDI and IDT are competitors and, during oral argument, counsel for Plaintiffs acknowledged that CDI and IDT had a vertical arrangement.

Despite acknowledging that CDI and IDT had a vertical arrangement, during oral argument Plaintiffs' counsel nonetheless argued that the Amended Complaint's allegations were sufficient to support a per se violation. But the Tenth Circuit has recognized that, unlike horizontal arrangements between competitors, "[v]ertical arrangements . . . do not generally give rise to the same concerns and often have pro-competitive effects." **[*33]** *Id.* As a result, "[t]o support a per se violation of the Sherman Act, a complaint alleging price fixing . . . must allege conspiracy by competitors." *Id.* Because Plaintiffs' Amended Complaint fails to allege a conspiracy by competitors, Plaintiffs cannot pursue a per se violation of the antitrust laws.[26] And because the Amended Complaint does not contain any other allegations concerning other actions that might violate ***antitrust law*** by impacting competition in the market, Plaintiffs' antitrust claims fail. *Bright v. Moss Ambulance Serv., Inc., 824 F.2d 819, 824 (10th Cir. 1987)* ("Whether a practice violates the antitrust laws is determined by its effect on competition, not its effect on an individual competitor."); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (finding that antitrust laws are designed to protect competition, not competitors). Accordingly, this Court RECOMMENDS that Claim Four be DISMISSED as to IDT.

4. Claims Five and Six: Conversion and Civil Theft

The Complaint also asserts two related claims, for conversion and civil theft. [#87 at ¶¶ 185-95] "Conversion is any distinct, unauthorized act of dominion or ownership exercised by one person over personal property belonging to another." *Byron v. York Inv. Co., 133 Colo. 418, 296 P.2d 742, 745 (Colo. 1956)*. "[P]redicates to a successful claim for conversion are the owner's **[*34]** demand for the return of property, and the controlling party's refusal to return it." *Glenn Arms Assoc. v. Century Mortg. & Inv. Corp., 680 P.2d 1315, 1317 (Colo. App. 1984)*. "While Colorado statutes do not define 'civil theft,' Colorado courts only grant triple damages for civil theft under *§ 18-4-405* when a plaintiff has proven conduct that satisfies the statutory definition of criminal theft under *Colo. Rev. Stat. § 18-4-401*."[27] *Internet Archive v. Shell, 505 F. Supp.2d 755, 764 (D. Colo. 2007)* (citing *Itin v. Ungar, 17 P.3d 129, 133 (Colo. 2000)*). "A person commits theft under *section 18-4-401(1)* when he or she 'knowingly obtains, retains, or exercises control over anything of value of another without authorization or by threat or deception,' and acts intentionally or knowingly in ways that deprive the other person of the property permanently." *Van Rees v. Unleaded Software, Inc., 373 P.3d 603, 608, 2016 CO 51 (Colo. 2016)* (citing *§ 18-4-401(1)(a)-(d)*). The statute requires "the specific intent to permanently deprive the owner of the benefit of property." *Itin, 17 P.3d at 134*.

The Complaint alleges that IDT, CDI, and Mr. Dieter "exercised control over Plaintiffs' commissions that IDT and CDI were required to pay Plaintiffs but instead stole from Plaintiffs." [#87 at ¶ 187; *see also id.* at ¶ 193]. IDT argues that these claims fail because IDT did not contract with Plaintiffs and therefore did not owe Plaintiffs any commissions. [#88 at 15] The Court agrees.

As explained above, Plaintiffs have failed to plausibly plead that IDT was a party to the Agreement **[*35]** or any other contract with Plaintiffs. Absent such a contractual relation, Plaintiffs have failed to plausibly plead any obligation on the part of IDT to pay Plaintiffs' commissions.[28] Nor have Plaintiffs pled facts that would enable the Court to conclude that IDT "knowingly obtain[ed], retain[ed], or exercise[ed] control" over Plaintiffs' commissions in some other manner—such as by hacking into Plaintiffs' bank account and taking those commissions after they had been paid. *C.R.S. § 18-4-401(1)(a)-(d)*; *Itin, 17 P.3d at 134*.

In their response, Plaintiffs argue that their "claims for conversion and civil theft are independent of the [Agreement and] . . . the allegation is that Defendants (IDT included) stole Plaintiffs' commissions." [#100 at 14] But neither the Amended Complaint nor the response describe any actions taken by IDT to steal Plaintiffs' commissions. Rather, the Amended Complaint simply alleges that IDT failed to pay commissions that Plaintiffs believe they are owed. But if IDT did not have any obligation to pay such commissions—and as set forth herein, the Amended Complaint has

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[26] During oral argument, Plaintiff argued that vertical arrangements could indeed support a per se violation and relied on *Budicak, Inc. v. Lansing Trade Grp., LLC* for the proposition that "a typical price-fixing claim involves collusion . . . between two levels in the same supply chain for a particular product (vertical price-fixing)." *452 F. Supp. 3d 1029, 1054 (D. Kan. 2020)*. But the *Budicak* court, too, determined that "the Court has uncovered [no cases] where a court afforded per se analysis to a price-fixing conspiracy between non-competitors." *Id.*

[27] A successful claim of civil theft entitles a plaintiff to triple damages, attorney fees and costs. *Colo. Rev. Stat. § 18-4-405*.

[28] And, in any event, a mere breach of contract will not support an action for conversion. *Byron v. York Investment Co., 133 Colo. 418, 296 P.2d 742, 745 (Colo. 1956)*.

not plausibly pled any such obligation—then IDT cannot have "stolen" the commissions it was under no obligation to pay.

Accordingly, the Court concludes **[*36]** that Plaintiffs have not plausibly pled a civil theft or conversion claim against IDT. The Court therefore RECOMMENDS that Claims Five and Six be DISMISSED as to IDT.

5. Claim Seven: Breach of Fiduciary Duty

The Complaint next asserts a claim for breach of fiduciary duty. [#87 at ¶¶ 196-203] As a prerequisite for a breach of fiduciary duty claim under Colorado law, a plaintiff must show that the defendant was "acting as a fiduciary to the plaintiff." *Oaster v. Robertson, 173 F. Supp. 3d 1150, 1179 (D. Colo. 2016)* (internal quotations omitted). "Although a fiduciary relationship typically involves a special relationship, such as an attorney-client relationship, a fiduciary duty can be created 'when one party has a high degree of control over the property or subject matter of another, or when the benefiting [sic] party places a high level of trust and confidence in the fiduciary to look out for the beneficiary's best interest.'" *Id.* (quoting *MDM Grp. Assoc., Inc. v. CX Reinsurance Co., 165 P.3d 882, 889 (Colo. App. 2007)*).

In support of this Claim, the Amended Complaint states that IDT "acted as Plaintiffs' fiduciary in preserving records, holding on commissions generated from Plaintiffs' retailers, and otherwise agreeing to allow Plaintiff[s] to provide discounted rates to [their] retailers exclusively." [#87 at ¶ 197] But, "[f]iduciary **[*37]** relationships that derive from a special relationship of trust, reliance, influence and control are distinguishable from business relationships involving parties dealing at arm's length for mutual benefits." *Accident & Injury Med. Specialists, P.C. v. Mintz, 279 P.3d 658, 663, 2012 CO 50 (Colo. 2012)*. And "[m]ost business relationships or contractual relationships . . . do not by themselves create fiduciary obligations, and fiduciary obligations should be extended reluctantly to commercial or business transactions." *Id.* (quotation omitted).

Plaintiffs have failed to plead sufficient facts to justify extending a fiduciary relationship to their business dealings with IDT. Conclusory statements that Plaintiffs "placed a high level of trust in Defendants" [#87 at ¶ 200] do not support a finding of a fiduciary relationship. Nor does the fact that "Defendants held all the records" [*id.* at ¶ 201] create a fiduciary relationship where that fact arises only from the business relationship itself. *Id.*[29]

Simply put, the Amended Complaint does not allege facts suggesting that Plaintiffs placed a "high level of trust" in IDT or that a confidential relationship existed. Nor does it allege that IDT had a high level of control over Plaintiffs' property or had assumed a duty to represent Plaintiffs' **[*38]** interests. *Oaster, 173 F. Supp. 3d at 1179*. In fact, Plaintiffs make no allegations as to any direct contact between IDT and Plaintiffs such that a "high level of trust and confidence" would reasonably flow from that relationship.[30] *Id.*

Thus, Plaintiffs have failed to plausibly plead a breach of fiduciary duty claim against IDT. Accordingly, this Court RECOMMENDS that Claim Seven be DISMISSED as to IDT.

6. Claim Eight: Civil Conspiracy

Claim Eight of the Amended Complaint asserts a civil conspiracy claim. [#87 at ¶¶ 204-11] This claim requires a plaintiff to show: "1) two or more persons; 2) an object to be accomplished; 3) a meeting of the minds on the object

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[29] The Agreement states that CDI and IDT shall "upon request, provide [Plaintiffs] with such other records as are necessary to show the amount of [c]ommissions that [Plaintiffs] and [r]etailers within [Plaintiffs'] [n]etwork are entitled to receive under this Agreement." [#80-2 at 4]

[30] In their response, besides providing citations to the law on fiduciary relationships generally, Plaintiffs' sole statement in support of their fiduciary duty claim is that it "is related to Plaintiffs' claims for conversion and civil theft." [#100 at 13] This statement does not provide the Court any assistance in analyzing Plaintiffs' fiduciary duty claim.

or course of action; 4) an unlawful overt act; and 5) damages as the proximate result." *F.D.I.C. v. First Interstate Bank of Denver, N.A., 937 F. Supp. 1461, 1473 (D. Colo. 1996)* (citing *Jet Courier Service, Inc. v. Mulei, 771 P.2d 486, 502 (Colo. 1989)*). IDT argues that the Amended Complaint fails to sufficiently allege an overt unlawful act[31] and fails to adequately allege an agreement or conspiracy between CDI and IDT. [#88 at 16-17] The Court disagrees.

Initially, the Amended Complaint sufficiently alleges an agreement between CDI and IDT. It alleges that "IDT and CDI engaged in a scheme whereby they planned to cut out Plaintiffs from the sales process and retain Plaintiffs' clients for themselves." [#87 at ¶ 205] **[*39]** As part of that scheme, Plaintiffs allege that "IDT instructed CDI to begin cutting distributors to generate additional profits for IDT and CDI." [*Id.* at ¶ 51] The Amended Complaint then alleges that Mr. Dieter and Ms. Rumero began contacting distributors in multiple states. [*Id.* at ¶ 52] Mr. Dieter and Ms. Rumero allegedly told the distributors that IDT had asked CDI to ban the distributors from selling the Service and had given false reasons for breaking the agreements. [*Id.* at ¶ 53] The Amended Complaint then provides specific examples of these conversations. [*Id.* at ¶¶ 54-56] Finally, the Amended Complaint alleges that CDI did the same thing to Plaintiffs. [*Id.* at ¶¶ 57, 123-34] The Court finds these allegations sufficient to plausibly allege an agreement or conspiracy between CDI and IDT.

The Amended Complaint further alleges at least one unlawful overt act.[32] "[T]he elements for a civil conspiracy claim require that the underlying acts be unlawful and create an independent cause of action." *Double Oak Constr., LLC. v. Cornerstone Dev. Int'l, LLC, 97 P.3d 140, 146 (Colo. App. 2003)*. Plaintiffs allege that CDI and IDT engaged in the scheme to "terminate[] the Agreement with Plaintiff[s] and st[eal] Plaintiffs['] retailers . . . because Plaintiff is African and black" and **[*40]** in violation of *42 U.S.C. § 1981(a)*. [#87 at ¶¶ 224-228] Because—as this Court will describe in more detail below—Plaintiffs plausibly plead an equal rights violation, the Court finds the allegations sufficient at this stage of the pleadings to allege an overt unlawful act.

Thus, the Court finds that Plaintiffs have plausibly pled a civil conspiracy claim against IDT. Accordingly, this Court RECOMMENDS that the Motion be DENIED as to Claim Eight against IDT.

7. Claim Eleven: Equal Rights Violation

Claim Eleven alleges that IDT violated Plaintiffs' equal rights, in violation of *42 U.S.C. § 1981(a)*. *Section 1981* states in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

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[31] Although IDT states in its Motion that the Amended Complaint does not allege any unlawful act, IDT does not elaborate on, nor provide support for, this assertion. [#88 at 17]

[32] Colorado courts have left open the possibility that a claim for civil conspiracy to a breach of contract could be pursued against a non-party to the contract, *Logixx Automation v. Lawrence Michels Fam. Tr., 56 P.3d 1224, 1232 (Colo. App. 2002)*, and courts in this district have reached conflicting results on this topic, *Ubel v. Progressive Direct Ins. Co., No. 20-cv-00204-RM-NYW, 2020 U.S. Dist. LEXIS 213414, 2020 WL 9432929, at *22 (D. Colo. Oct. 22, 2020)*, *report and recommendation adopted*, *2020 U.S. Dist. LEXIS 212329, 2020 WL 6701102 (D. Colo. Nov. 13, 2020)* (civil conspiracy claim cannot be premised upon a conspiracy to breach a contract, even against non-signatories); *McNees v. Ocwen Loan Servicing, LLC, No. 16-cv-1055-WJM-KLM, 2019 U.S. Dist. LEXIS 67830, 2019 WL 1762947, at *12 (D. Colo. Apr. 22, 2019)* (same); *Bituminous Cas. Corp. v. Hartford Cas. Ins. Co., No. 12-cv-000433-WYD-KLM, 2013 U.S. Dist. LEXIS 16096, 2013 WL 452374, at *10 (D. Colo. Feb. 6, 2013)* (civil conspiracy claim may be premised upon a conspiracy to breach a contract provided the claim is brought against a nonparty to the contract). Because IDT has not briefed this issue, and because at least one other overt act is proceeding, the Court will not reach whether civil conspiracy for breach of contract can be pursued against IDT.

42 U.S.C. § 1981(a). The statute protects the ability to contract or purchase property free from impairment "so long as the impairment **[*41]** arises from intentional discrimination." Hampton v. Dillard Dep't Stores, Inc., 247 F.3d 1091, 1106 (10th Cir. 2001). "Thus the proper focus is on whether the defendant had the intent to discriminate on the basis of race, and whether that discrimination interfered with the making or enforcing of a contract." Id. at 1106-1107.

To establish a prima facie case under Section 1981, a plaintiff must demonstrate: "(1) that the plaintiff is a member of a protected class; (2) that the defendant had the intent to discriminate on the basis of race; and (3) that the discrimination interfered with a protected activity as defined in [the statutes]." Hampton, 247 F.3d at 1102. Here, the Amended Complaint alleges that Mr. Abdi is African and black, thus satisfying the first element. [#87 at ¶ 228] The Amended Complaint further alleges that IDT, CDI, and Mr. Dieter targeted African and black distributors—including Mr. Abdi—in an attempt to amend these distributors' master distributor agreements. [*Id.* at ¶¶ 65-68] The Amended Complaint alleges that Defendants targeted these individuals because of their race; specifically, that Defendants "reasoned that immigrants who were African or Muslim were stupid." [*Id.* at ¶ 67] Thus, the Amended Complaint sufficiently alleges that IDT had the intent to discriminate on the basis of race, **[*42]** thereby satisfying the second element. Finally, the Amended Complaint alleges that the end result of this targeting was that CDI improperly canceled its contract with Plaintiff, thereby alleging the third element—interference with the protected activity of enforcing contracts.[33] *See* Reynolds v. School Dist. No. 1, Denver, Colo., 69 F.3d 1523, 1532 (10th Cir. 1995) ("Section 1981 prohibits racial discrimination in 'the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'") (quoting 42 U.S.C. § 1981); Shawl v. Dillard's Inc., 17 F. App'x 908, 910 (10th Cir. 2001) ("By its language, Section 1981 establishes four protected interests: (1) the right to make and enforce contracts; (2) the right to sue, be parties, and give evidence; (3) the right to the full and equal benefit of the laws; and (4) the right to be subjected to like pains and punishments." (quotations omitted)).

Thus, the Court finds that Plaintiffs have plausibly pled a Section 1981 claim. Accordingly, the Court respectfully RECOMMENDS that the Motion be DENIED to the extent it seeks to dismiss Claim Eleven.

8. Claim Twelve: Unjust Enrichment

Finally, in Claim Twelve Plaintiffs assert an unjust enrichment claim against IDT. [#87 at ¶¶ 234-38] "To prove unjust enrichment, a plaintiff must demonstrate that **[*43]** (1) at [his or her] expense, (2) the defendant received a benefit, (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying." Oaster, 173 F.Supp.3d at 1176. IDT first argues that Plaintiffs cannot pursue an unjust enrichment claim because the Agreement covers the same subject matter. [#88 at 19] But while it is true that a plaintiff cannot succeed on an unjust enrichment claim where an express contract covers the same subject matter, courts in this District have allowed plaintiffs to pursue both alternative theories at the pleadings stage. *See* United Water & Sanitation Dist. v. Geo-Con, Inc., 488 F.Supp.3d 1052, 1058 (D. Colo. 2020); Robert W. Thomas and Anne McDonald Thomas Revocable Tr. v. Inland Pac. Colo., LLC, No. 11-cv-03333-WYD-KLM, 2012 U.S. Dist. LEXIS 82312, 2012 WL 2190852, at *4 (D. Colo. June 14, 2012).

IDT also argues that Plaintiffs have failed to allege any factual allegations suggesting that IDT received benefits under circumstances that would make it unjust for it to retain the benefit. [#88 at 19-20] The Court disagrees. The Amended Complaint generally alleges that Plaintiffs recruited numerous retailers to the Service, IDT received

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[33] IDT argues that Plaintiffs failed to allege a specific contract that IDT interfered with and that, in any event, Plaintiffs failed to allege that IDT "possessed sufficient authority to significantly interfere with contracts between Plaintiffs and their alleged retailers, or that IDT actually exercised that authority to . . . [Plaintiffs'] detriment." [#88 at 18 (quotations omitted)] But while the Amended Complaint does rely upon the contracts with the retailers in support of Plaintiffs' Section 1981 claims, it also cites to CDI's termination of the Agreement. [#87 at ¶ 227] And the Amended Complaint does plausibly allege that IDT had the ability to influence CDI's decisions with respect to the master distribution agreements, including the Agreement at issue here. [*Id.* at ¶¶ 53-57]

payments and otherwise benefitted from those retailers' participation in the Service, and IDT for racially motivated reasons then encouraged CDI to break its Agreement with Plaintiffs, **[*44]** thereby depriving Plaintiffs of commissions to which they were entitled and transferring those commissions to IDT. [*See generally* #87] The Court concludes that such allegations plausibly allege that IDT received benefits under circumstances that would make it unjust for it to retain the benefit.

Thus, the Court concludes that Plaintiffs have plausibly alleged an unjust enrichment claim against IDT. The Court thus RECOMMENDS that IDT's Motion to Dismiss be Denied as to Claim Twelve.

9. Conclusion

For the foregoing reasons, the Court respectfully RECOMMENDS that IDT's Motion to Dismiss be GRANTED IN PART and DENIED IN PART. Specifically, the Court RECOMMENDS that IDT's Motion to Dismiss be GRANTED to the extent it seeks dismissal of Claims One, Two, Three, Four, Five, Six, Seven, and Ten but DENIED to the extent it seeks dismissal of Claims Eight, Eleven, and Twelve.

B. CDI's Motion to Dismiss

CDI's Motion to Dismiss seeks to dismiss all claims against Mr. Dieter and Claims Two, Four, Seven, Eight, Nine, Eleven, and Twelve against CDI. [#89] The Court addresses these claims in turn.

1. Claim One: Breach of Contract

As explained earlier, it appears from the Amended Complaint that Claim One was **[*45]** asserted against Mr. Dieter. [*See* #87 at ¶¶ 144-52] CDI's Motion, however, states that during conferral with Plaintiffs' counsel, Plaintiffs' counsel indicated that only Claims Two, Nine, Eleven, and Twelve were asserted against Mr. Dieter in his personal capacity. [#89 at 1] Plaintiffs' Response does not challenge this assertion. [*See generally* #100] Nonetheless, during oral argument, Plaintiffs' counsel indicated that he had not intended to concede Claim One against Mr. Dieter. As a result, despite Plaintiffs' apparent concession of Claim One against Mr. Dieter, and without any briefing by the parties, the Court will analyze whether Claim One alleges a plausible breach of contract claim against Mr. Dieter.[34]

The Agreement itself states that it is "by and between [Mr. Abdi] and IIT . . . and [CDI]." [#80-2 at 1] Although Mr. Dieter signed the contract, he did so on behalf of CDI and as CDI's managing partner. [*Id.* at 8] And in Colorado, "[i]f he has proper authorization, an individual is not liable under a contract signed by him on behalf of another when he has given notice to the third party that there is a principal for whom he acts and also notice of the name or identity of the principal." **[*46]** *Beneficial Fin. Co. of Colorado v. Bach, 665 P.2d 1034, 1036 (Colo. App. 1983)* (citing *Fink v. Montgomery Elevator Co., 161 Colo. 342, 421 P.2d 735 (1966)*). Thus, because the Amended Complaint does not allege that Mr. Dieter lacked authorization to enter into the Agreement on CDI's behalf, and because the Agreement clearly indicates that Mr. Dieter is acting on CDI's behalf, Mr. Dieter is not personally liable on the Agreement.

Thus, the Court concludes that Plaintiffs have failed to plausibly plead a breach of contract claim against Mr. Dieter.[35] Accordingly, the Court respectfully RECOMMENDS that Claim One as asserted against Mr. Dieter be DISMISSED.

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[34] Ordinarily, the Court would not make such a sua sponte analysis. But the Court cannot fault Mr. Dieter for not briefing the merits of a claim that Plaintiffs' counsel apparently conceded was not being pursued against Mr. Dieter. As a result, and because Plaintiffs will have the opportunity to object to this Recommendation and present their arguments about the merits of this claim to Judge Moore, the Court will sua sponte address whether Plaintiffs have plausibly pled a breach of contract claim against Mr. Dieter.

2. Claim Two: Tortious Interference

As explained earlier, Claim Two alleges both tortious interference with an existing contract and tortious interference with a prospective business relation. [#87 at ¶¶ 153-66] CDI and Mr. Dieter argue that this claim is barred by the economic loss rule.[36] [#89 at 3-5] The Court agrees.

The Colorado Supreme Court has held that "a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law." *Town of Alma*, 10 P.3d at 1264. "Two conditions must be met for the economic loss rule to apply. First, the duty must arise from a source other than the contract. Second, **[*47]** the duty must not also be a duty imposed by the contract." *Great Am. Opportunities, Inc. v. Kent, 352 F. Supp. 3d 1126, 1138 (D. Colo. 2018)*. "If the duty is also 'memorialized in the contracts, it follows that the plaintiff has not shown any duty independent of the interrelated contracts and economic loss rule bars the tort claim.'" *Id.* (quoting *BRW, Inc. v. Dufficy & Sons, Inc., 99 P.3d 66, 74 (Colo. 2004)*).

Here, Plaintiffs allege that Mr. Dieter and CDI interfered with Plaintiffs' relationships with the retailers by: (1) providing discounts to Plaintiffs' retailers without providing such codes to Plaintiffs "contrary to the terms of the Agreement" [#87 at ¶ 163.a]; (2) opening new retail accounts for retailers in Plaintiffs' distribution network and removing them from Plaintiffs' distribution network "contrary to the Agreement's terms" [*id.* at ¶ 163.b]; and (3) taking leads that Plaintiffs developed and then signing them under a CDI account number [*id.* at ¶ 163.c]. As the Amended Complaint expressly acknowledges with respect to the first two methods of interference, the duty allegedly violated arises from the terms of the Agreement. As a result, the economic loss rule prohibits Plaintiffs from relying upon the alleged breach of these duties to support their intentional interference claims. *Great Am. Opportunities, 352 F.Supp.3d at 1138*. With respect to the third method **[*48]** of interference, Plaintiffs have not identified a source independent of the Agreement that would prohibit CDI and Mr. Dieter from attempting to take leads that Plaintiffs developed and signing them to a CDI account number. Thus, once again, the economic loss rule bars such a claim.[37] *Id.*

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[35] CDI does not separately challenge the breach of contract claim.

[36] Plaintiffs did not bother to reply to this argument. [#100]

[37] In 2019 the Colorado Supreme Court revisited the economic loss rule and the *Town of Alma* case in *Bermel v. Blueradios, Inc., 440 P.3d 1150, 2019 CO 31 (Colo. 2019)*. The *Bermel* court noted that "[o]ur previous cases have applied the economic loss rule to bar only certain common law negligence claims." *Id. at 1153*; *see also id. at 1153* ("we have applied the [economic loss] rule only to common law tort claims for negligence and negligent misrepresentation"); *id. at 1155* ("Notably, however, since adopting the economic loss rule, we have applied it only to bar common law tort claims of negligence or negligent misrepresentation."). The court went on to state in a footnote that "the economic loss rule generally should not be available to shield intentional tortfeasors from liability for misconduct that happens to also breach a contractual obligation." *Id. at 1154 n.6*. Although these statements are dicta, courts in this district have considered them alongside *Town of Alma* in determining whether intentional tort claims fall under the economic loss rule. *See Western State Bank v. Cosey, L.L.C., No. 19-cv-01155-JLK, 2019 U.S. Dist. LEXIS 190874, 2019 WL 5694271, at *4 (D. Colo. Nov. 4, 2019)* ("Western State's fraud claim alleges an intentional tort. So, under *Bermel*, the economic loss rule would not bar Western State's fraud claim."); *McWhinney Holding Co., LLLP v. Poag, No. 17-cv-02853-RBJ, 2019 U.S. Dist. LEXIS 232438, 2019 WL 9467529, at *2 (D. Colo. Dec. 6, 2019)* ("The *Bermel* footnote [Footnote No. 6] clarifies that intentional torts depend on duties independent of contract and therefore are not barred by the economic loss rule. . . . The plain language clearly indicates the [Colorado Supreme Court] does not believe intentional torts should be covered by the economic loss rule."); *In re Bloom, 622 B.R. 366, 428 (Bankr. D. Colo. 2020)* (finding that in light of *Bermel*, the "intentional tort claims . . . are simply 'outside the scope' of the economic loss rule."). However, even considering the *Bermel* dicta, this Court nonetheless concludes that the economic loss rule bars Plaintiffs' tortious interference claims against CDI. Although this claim is an intentional tort, Plaintiff does not identify actions taken by CDI that would be wrongful or improper *but for* the existence of the contract. *Compare Bermel, 440 P.3d at 1151, 1153* (tortfeasor knowingly forwarded thousands of company emails containing proprietary information to his personal email account without authorization, and was found at trial to have committed civil theft). Indeed, as noted in Section III.A.2 *supra*, competitive actions to obtain retailers are not on their own improper—except that here they allegedly violate the parties' contractual obligations. Moreover, to the degree that Plaintiffs

The Court therefore concludes that the economic loss rule bars Plaintiffs' tortious interference claims against CDI and Mr. Dieter. Accordingly, the Court RECOMMENDS that Claim Two be dismissed against those Defendants.

3. Claim Four: Violation of State and Federal Antitrust Laws

Claim Four alleges that CDI and Mr. Dieter violated the Colorado Antitrust Act and *Section 1* of the Sherman Antitrust Act. [#87 at ¶¶ 173-84] This claim fails for the reasons identified above. *See supra* Section III.A.3. Accordingly, this Court RECOMMENDS that Claim Four be DISMISSED as to CDI and Mr. Dieter.

4. Claim Five: Conversion

As with the breach of contract claim, based upon counsels' conferral and Mr. Dieter's belief that the conversion claim was not being asserted against Mr. Dieter, the parties did not brief the validity of the conversion claim against **[*49]** Mr. Dieter. Nonetheless, for the reasons articulated above, the Court will address the plausibility of the conversion claim as pled against Mr. Dieter. *See supra* n.34.

Claim Five is premised upon CDI, IDT, and Mr. Dieter's alleged conversion of Plaintiffs' commissions. [##87 at ¶ 187] But the Amended Complaint fails to plausibly allege that Mr. Dieter personally exercised dominion or control over these commissions. The Amended Complaint alleges that CDI or IDT would pay the commissions [#87 at ¶ 24] and that it was these entities that ultimately refused to pay these commissions [*id.* at ¶ 47]. Plaintiffs' conclusory statement that Mr. Dieter "exercised control over Plaintiffs' commissions" is wholly insufficient to plead a conversion claim against Mr. Dieter.

Thus, the Court concludes that Plaintiffs have failed to plausibly allege a conversion claim against Mr. Dieter. Accordingly, the Court RECOMMENDS that Claim Five be DISMISSED as to Mr. Dieter.

5. Claim Seven: Breach of Fiduciary Duty

Claim Seven asserts a claim for breach of fiduciary duty against CDI. [#87 at ¶¶ 196-203] CDI argues that this claim is barred by the economic loss rule. Colorado courts have held that the economic loss **[*50]** rule bars a breach of fiduciary duty claim when the fiduciary duties are set forth by the contractual relationship. *Casey v. Colorado Higher Educ. Ins. Benefits All. Tr., 310 P.3d 196, 202-04, 2012 COA 134M (Colo. App. 2012)*. On the other hand, Colorado courts have refused to apply the economic loss rule if the special relationship, by its very nature, automatically triggers an independent fiduciary duty of care. *Id.*; *A Good Time Rental, LLC v. First Am. Title Agency, Inc., 259 P.3d 534, 540 (Colo. App. 2011)*.

As detailed earlier, the Court does not believe that Plaintiffs plausibly alleged that IDT owed Plaintiffs a fiduciary duty. [*See supra* Section III.A.5] Plaintiffs make the same allegations against CDI and thus, for the reasons previously articulated, Plaintiffs have not plausibly pled a breach of fiduciary duty claim. But, in any event, any such fiduciary obligations could only have arisen from the duties set forth in the Agreement, and, as a result, this claim is barred by the economic loss rule. *Casey, 310 P.3d at 202-04*.

Accordingly, the Court concludes that Plaintiffs have failed to plausibly plead a breach of fiduciary duty claim against CDI that is not otherwise barred by the economic loss rule. Accordingly, the Court RECOMMENDS that Claim Seven be dismissed against CDI.[38]

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allege that CDI engaged in fraudulent misrepresentations—which could raise a duty separate from the contractual obligations, *see* *Western State Bank, 2019 U.S. Dist. LEXIS 190874, 2019 WL 5694271, at *4*—Plaintiffs have failed to sufficiently plead their fraud claim under *Federal Rule 9(b)*. Section III.A.2., *supra*.

[38] To the extent the breach of fiduciary duty claim is alleged against Mr. Dieter, it fails for the same reasons.

6. Claim Eight: Civil Conspiracy

Claim Eight of the Amended Complaint asserts a civil conspiracy claim against CDI. [#87 at **[*51]** ¶¶ 204-11] In the Motion, CDI's only argument regarding Plaintiffs' civil conspiracy claim is that "Plaintiffs have failed to plead factual allegations sufficient to establish 'a meeting of the minds' between CDI and IDT." [#89 at 6] As explained earlier, Plaintiffs have sufficiently pled both an agreement between CDI and IDT and an unlawful overt act. Section III.A.6, *supra*. Thus, Plaintiffs have plausibly pled a civil conspiracy claim against CDI. Accordingly, the Court RECOMMENDS that the Motion be DENIED as to Claim Eight against CDI.[39]

7. Claim Nine: Promissory Estoppel

Claim Nine is a claim for promissory estoppel against CDI and Mr. Dieter. [#87 at ¶¶ 212-17] Under Colorado law, a claim for promissory estoppel has four elements: "(1) a promise; (2) that the promisor reasonably should have expected would induce action or forbearance by the promisee or a third party; (3) on which the promisee or third party reasonably and detrimentally relied; and (4) that must be enforced in order to prevent injustice." *Pinnacol Assurance v. Hoff, 375 P.3d 1214, 1221, 2016 CO 53 (Colo. 2016)*.

CDI and Mr. Dieter argue that the undisputed existence of a contract between Plaintiffs and CDI bars Plaintiffs' promissory estoppel claim. [#89 at 7-9] According to CDI and Mr. **[*52]** Dieter, promissory estoppel is "applicable only in the absence of an otherwise enforceable contract." [#89 at 8 (quoting *Scott Co. of Cal. v. MK-Ferguson Co., 832 P.2d 1000, 1003 (Colo. App. 1992)*, *overruled on other grounds* by *Lewis v. Lewis, 189 P.3d 1134, 1140 (Colo. 2008)*)]. Because "the alternative remedy of promissory estoppel is never reached when there has been mutual agreement by the parties on all essential terms of a contract," CDI and Mr. Dieter argue that Plaintiffs' promissory estoppel claims must be dismissed. [*Id.*]

While the Court agrees with the basic premise of this argument, the Court believes that the argument is premature.[40] In Colorado, "inconsistent contract and tort claims may be pled in the alternative." *Gorsuch, Ltd. v. Wells Fargo Nat'l Bank Ass'n, No. 11-cv-00970-PAB-MEH, 2013 U.S. Dist. LEXIS 174682, 2013 WL 6925132, at *3 (D. Colo. Dec. 13, 2013)* (collecting cases). And "Colorado law recognizes promissory estoppel as an alternative theory of recovery to the formation of a contract." *Carthon v. Balfour Senior Care, LLC, No. 21-cv-00007-MEH, 2021 U.S. Dist. LEXIS 132464, 2021 WL 2954685, at *3 (D. Colo. June 16, 2021)*. Courts have thus permitted, at the early stages of the proceedings, plaintiffs to pursue both a breach of contract claim and a promissory estoppel

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[39] At oral argument, Plaintiffs' counsel conceded that Claim Eight was not brought against Mr. Dieter in his individual capacity. To the extent that it was, this Court finds that Plaintiffs have not pled facts sufficient to show that Mr. Dieter in his individual capacity—and not as the acting agent for CDI—engaged in a conspiracy with IDT. And as an agent for CDI, Mr. Dieter and CDI cannot conspire with each other. *Lockwood Grader Corp. v. Bockhaus, 129 Colo. 339, 270 P.2d 193, 196 (Colo. 1954)* (person acting on behalf of corporation cannot conspire with himself individually); *Pittman v. Larson Distrib. Co., 724 P.2d 1379, 1390 (Colo. App. 1986)* ("A corporation and its employees do not constitute the 'two or more persons' required for a civil conspiracy . . . at least if the employees are acting on behalf of the corporation and not as individuals for their individual advantage."). Accordingly, this Court RECOMMENDS that Claim Eight be DISMISSED as to Mr. Dieter.

[40] In making this argument, CDI and Mr. Dieter rely upon the assertion that "[n]o party at any point has challenged the enforceability of the [Agreement]." [#89 at 8] Though not explicitly cited in their response, to determine whether any party has questioned the enforceability of the Agreement, the Court would need to look to the answers filed by CDI, IDT, and Mr. Dieter—without referencing these answers, the Court would not know whether any party has challenged the enforceability of the Agreement. But CDI and Mr. Dieter have filed a motion to dismiss pursuant to *Rule 12(b)(6)*, not a motion for judgment on the pleadings pursuant to *Rule 12(c)*. [*See generally* #89] And while it may be possible for the Court to convert the motion into a *Rule 12(c)* Motion, *see* *Muller v. Vilsack, No. CV 13-0431 MCA/KK, 2015 U.S. Dist. LEXIS 194088, 2015 WL 13665433, at *4 (D.N.M. Mar. 30, 2015)*; *Nicks v. Brewer, No. 10-CV-1220-JAR-JPO, 2010 U.S. Dist. LEXIS 124490, 2010 WL 4868172, *2 (D. Kan. Nov. 23, 2010)*, the Court declines to do so in the absence of a request from CDI and Mr. Dieter.

claim. *Carthon, 2021 U.S. Dist. LEXIS 132464, 2021 WL 2954685, at * 3*; *BBG Holding Corp. v. K Capital, LLC, No. 20-cv-03268-MEH, 2021 U.S. Dist. LEXIS 8154, 2021 WL 147085, at *3 (D. Colo. Jan. 15, 2021)*.

CDI and Mr. Dieter nonetheless argue that dismissal is especially appropriate here because the Agreement contains an integration clause prohibiting oral amendments to the Agreement. But in Colorado, "a subsequent **[*53]** oral agreement between the parties may modify a provision of an earlier written contract, even in the face of a provision in the original contract that modifications must be in writing." *Agritrack, Inc. v. DeJohn Housemoving, Inc., 25 P.3d 1187, 1193 (Colo. 2001)*; *see also* *James H. Moore & Assocs. Realty, Inc. v. Arrowhead at Vail, 892 P.2d 367, 372 (Colo. App. 1994)* ("[G]enerally, a written contract may be modified by a later oral agreement even in the face of a specific provision in the written agreement that all modifications must be in writing." (citation omitted)). Thus, the Court cannot conclude, at this early stage of the litigation, that the existence of the Agreement bars Plaintiffs' promissory estoppel claims. Accordingly, the Court RECOMMENDS that the CDI Motion be DENIED with respect to Claim Nine.

8. Claim Eleven: Equal Rights Violation

Claim Eleven asserts an equal rights violation against CDI and Mr. Dieter pursuant to *42 U.S.C. § 1981*. [#87 at ¶¶ 223-33] CDI and Mr. Dieter move to dismiss Claim Eleven arguing that Plaintiffs have failed to provide specific factual allegations supporting actionable discrimination. [#89 at 9-10] For the reasons outlined in Section III.A.7, the Court disagrees. Accordingly, the Court respectfully RECOMMENDS that the Motion be DENIED to the extent it seeks dismissal of Claim Eleven.

9. Claim Twelve: Unjust Enrichment

Finally, **[*54]** in Claim Twelve Plaintiffs assert an unjust enrichment claim against CDI and Mr. Dieter. [#87 at ¶¶ 234-38] CDI and Mr. Dieter maintain that Plaintiffs' unjust enrichment claim should be dismissed because the Agreement "covers the same subject matter [and therefore] precludes any implied-in-law contract." [#89 at 10 (quoting *Interbank Invs., LLC v. Eagle River Water & Sanitation Dist., 77 P.3d 814, 816 (Colo. App. 2003)*] For the reasons outlined in Section III.A.8 above, the Court concludes that Plaintiffs may, at this stage, plead unjust enrichment as an alternative to their breach of contract claims. *United Water & Sanitation Dist., 488 F.Supp.3d at 1058*; *Robert W. Thomas and Anne McDonald Thomas Revocable Tr., 2012 U.S. Dist. LEXIS 82312, 2012 WL 2190852, at *4*.

Alternatively, Mr. Dieter argues that Plaintiffs have failed to plausibly allege that Mr. Dieter—as opposed to CDI—has been unjustly enriched. Plaintiffs did not respond to this argument [#100 at 15-16], and the Court agrees with Mr. Dieter:

> At most, the complaint alleges that [IDT and CDI] received a benefit at [Plaintiffs'] expense, not [Mr. Dieter] personally. There are no non-conclusory allegations in the complaint regarding what benefits [Mr. Dieter] received, and the complaint does not explain how [CDI] distributed revenues from the [retailers] it allegedly poached from [IIT]." Thus, this claim fails against [Mr. Dieter]."

DTC Energy Grp., Inc. v. Hirschfeld, 420 F. Supp. 3d 1163, 1178 (D. Colo. 2019) (internal citations omitted).

Thus, the Court concludes **[*55]** that Plaintiffs have plausibly pled an unjust enrichment claim as an alternative to their breach of contract claim against CDI, but not against Mr. Dieter. Accordingly, the Court RECOMMENDS that Claim Twelve be DISMISSED as to Mr. Dieter but that CDI's Motion to Dismiss be DENIED to the extent it seeks to dismiss Claim Twelve against CDI.

10. Conclusion

For the foregoing reasons, the Court respectfully RECOMMENDS that CDI's Motion to Dismiss be GRANTED IN PART and DENIED IN PART. Specifically, the Court RECOMMENDS that CDI's Motion to Dismiss be GRANTED to the extent it seeks dismissal of Claims One against Mr. Dieter, Claim Two against both Defendants, Claim Four against both Defendants, Claim Five against Mr. Dieter, Claim Seven against both Defendants, Claim Eight against Mr. Dieter, and Claim Twelve against Mr. Dieter. The Court RECOMMENDS that CDI's Motion to Dismiss be DENIED to the extent it seeks dismissal of Claim Eight, Claim Nine, Claim Eleven, or Claim Twelve against CDI.

C. Plaintiffs' Motion to Dismiss[41]

Plaintiffs have moved to dismiss all three counterclaims filed by CDI. [#98] Initially, Plaintiffs contend that CDI lacks standing to bring its counterclaims. [*Id.* at 5-6] **[*56]** Alternatively, Plaintiffs argue that CDI has failed to plausibly plead its tortious interference and defamation counterclaims.[42] [*Id.* at 7-11] In its response, CDI admits that it has failed to plausibly allege a tortious interference with contract cause of action, and the Court therefore RECOMMENDS that Plaintiffs' Motion to Dismiss be GRANTED to the extent it seeks to dismiss Counterclaim Two. The Court, therefore, first addresses CDI's standing, then addresses the plausibility of CDI's defamation counterclaims.

1. Standing

Plaintiffs first argue that CDI lacks standing to bring its counterclaims. [*Id.* at 5-6] "Article III of the Constitution confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies.'" *Hollingsworth v. Perry, 570 U.S. 693, 704, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013)* (quoting *U.S. Const. art. III, § 2*). "Plaintiffs must demonstrate a personal stake in the outcome in order to assure that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions." *City of Los Angeles v. Lyons, 461 U.S. 95, 101, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)* (quotations omitted). "Plaintiffs must show they have sustained or are immediately in danger of sustaining some direct injury, and the injury or threat of injury must be real and immediate, not conjectural or hypothetical." *Faustin v. City & Cty. of Denver, 268 F.3d 942, 947 (10th Cir. 2001)*. As a result, "[t]o establish **[*57]** standing, plaintiffs must show injury in fact, a causal relationship between the injury and the challenged action of the defendant, and a likelihood that the injury will be redressed by a favorable decision." *Id.*

According to Plaintiffs, the Colorado CDI has been dissolved and "CDI failed to allege any facts as part of its counterclaims that it has continued its existence to maintain counterclaims." [#98 at 5] The entire premise of this argument, however, is that the Colorado CDI has been dissolved. But CDI's counterclaims do not reference such a dissolution and, indeed, allege that it was the entity that entered into the Agreement with Plaintiffs. [*See generally* #90 at 17-22] Thus, to the extent Plaintiffs are making a facial attack of the Counterclaims under *Rule 12(b)(1)*,[43] their facial attack fails.[44] *See* *Holt v. United States, 46 F.3d 1000, 1002 (10th Cir. 1995)* (holding that, "[i]n reviewing

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[41] In its response, CDI states that Plaintiffs failed to confer with CDI prior to filing Plaintiffs' Motion to Dismiss, in contravention of Judge Moore's practice standards. [#105 at 1-2] In response, Plaintiffs' state that "Plaintiffs long warned [Mr.] Dieter and CDI that the[ir] counterclaims were suspect and injected in this proceeding to be tough." [#107 at 3 n. 1] It thus appears that Plaintiffs did not confer about the specific alleged deficiencies in the counterclaims or whether those deficiencies could be cured, and therefore did indeed violate Judge Moore's practice standards. Indeed, in response to Plaintiffs' Motion to Dismiss, CDI has agreed that it did not plead a plausible tortious interference cause of action and has withdrawn that counterclaim. [#105 at 5] Plaintiffs are cautioned that future failures to confer may result in sanctions.

[42] Plaintiffs' Motion to Dismiss does not bring a *Rule 12(b)(6)* challenge to CDI's breach of contract claim. [*See generally* #98]

[43] Plaintiffs' Motion to Dismiss fails to indicate whether Plaintiffs are making a facial attack to CDI's standing or whether they are asking the Court to go beyond the allegations contained in the Counterclaim and consider evidence challenging the factual basis upon which subject matter jurisdiction rests. At oral argument, counsel for Plaintiffs indicated that Plaintiffs were making a facial attack on the Court's subject matter jurisdiction.

a facial attack on the complaint [under *Rule 12(b)(1)*], a district court must accept the allegations in the complaint as true").

To the extent Plaintiffs are asking the Court to go beyond the allegations contained in the Counterclaim and consider evidence challenging the factual basis upon which subject matter jurisdiction rests, that challenge likewise fails. Simply put, Plaintiffs **[*58]** have not presented any evidence for the Court to consider. And while Plaintiffs reference "information available on the Colorado Secretary of State's website about CDI" [#98 at 5], Plaintiffs have neither submitted that "information," asked the Court to take judicial notice of that "information," or provided necessary details for the Court to be able to take judicial notice of that "information." *See Operating Eng'rs Local 101 Pension Fund v. Al Muehlberger Concrete Constr., Inc., No. 13-2050-JAR-DJW, 2013 U.S. Dist. LEXIS 138267, 2013 WL 5409116, at *2 (D. Kan. Sept. 26, 2013)* (refusing to take judicial notice of information from secretaries of state websites where the printouts were not certified as official documents and the offering party did not provide sufficient information about the authenticity of the documents).

Accordingly, to the extent Plaintiffs challenge CDI's counterclaims based upon an alleged lack of standing, the Court RECOMMENDS that Plaintiffs' Motion to Dismiss be DENIED.

2. Counterclaim Three: Defamation

Counterclaim three alleges defamation against both Plaintiffs. [#90 at ¶¶ 69-73] To state a cause of action for defamation in Colorado, a plaintiff must plausibly plead: "(1) a defamatory statement concerning another; (2) published to a third party; (3) with fault amounting to at least negligence on the part of the publisher; and (4) either **[*59]** actionability of the statement irrespective of special damages or the existence of special damages to the plaintiff caused by the publication."[45] *Williams v. Dist. Court, Second Judicial Dist., City & Cty. of Denver, 866 P.2d 908, 911 n.4 (Colo. 1993)*. Without identifying the particular element that Plaintiffs believe CDI has failed to plausibly plead, Plaintiffs generally assert that CDI has failed to plausibly plead a defamation claim. [#98 at 8-11] The Court disagrees.

The Counterclaim alleges that, after CDI terminated IIT, Mr. Abdi told several people in the industry that CDI terminated the Agreement because Mr. Dieter is Jewish and Mr. Abdi is black and Muslim. [#90 at ¶ 45] The Counterclaim further states that the real reason for terminating the Agreement was Plaintiffs' breach of the Agreement and failure to cure those breaches. [*Id.* at ¶¶ 52-56] If these allegations are true, then CDI has successfully pled the first three elements of a defamation claim: (1) a defamatory statement concerning another, (2) published to a third party, (3) with fault amounting to at least negligence on the part of Plaintiffs. *Williams, 866 P.2d at 911 n.4*. Similarly, the Counterclaim alleges that in July of 2018, Mr. Abdi called a Denver retailer and falsely claimed that CDI diverted residuals from **[*60]** the retailer's account. [*Id.* at ¶ 48] Once again, if true, these allegations plausibly plead the first three elements of a defamation claim.

As to the last element, a defamatory statement can be "either defamatory per se or defamatory per quod, depending upon the certainty of the defamatory meaning of the publication." *Gordon v. Boyles, 99 P.3d 75, 79 (Colo. App. 2004)*. If a defamatory communication is defamatory per se, damage is presumed, and a plaintiff need not plead special damages. *Id.* This arises where the defamatory meaning is apparent from the face of the publication, or if the subject matter of the publication falls into one of the traditional defamatory per se categories. *Id.* The traditional defamatory per se categories include "imputation of (1) a criminal offense; (2) a loathsome

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[44] In their Motion to Dismiss, Plaintiffs state that they "incorporate[] the factual background in [their] First Amended Complaint. [#98 at 3] Plaintiffs fail to offer any support for the notion that this Court can consider facts alleged in the First Amended Complaint when considering a *Rule 12(b)(1)* or *Rule 12(b)(6)* challenge to CDI's counterclaims.

[45] "Oral defamation is slander while that which is written is libel." *Nguyen v. Mai Vu, No. 18-CV-01132-CMA-NRN, 2018 U.S. Dist. LEXIS 186592, 2018 WL 5622634, at *5 n.12 (D. Colo. Oct. 30, 2018)*, *report and recommendation adopted*, *2018 U.S. Dist. LEXIS 222963, 2018 WL 6603955 (D. Colo. Nov. 15, 2018)*. Here, we are dealing with oral statements, or slander.

disease; (3) a matter incompatible with the individual's business, trade, profession, or office; or (4) serious sexual misconduct." *Id.*; *see also* *Examination Bd. of Prof. Home Inspectors v. Int'l Ass'n of Certified Home Inspectors, 519 F. Supp. 3d 893, 913 (D. Colo. 2021)*.

Here, both statements identified above are defamatory on their face and also accuse CDI of matters incompatible with its business. Specifically, the first statement accuses CDI of terminating the Agreement for improper reasons and the second statement accuses CDI of improperly diverting residuals from **[*61]** the Denver retailer's account. Indeed, this second statement may even allege criminal conduct—theft—and thus fall into yet another traditional defamatory per se category. *Gordon, 99 P.3d at 79*. The Court therefore concludes that the defamation alleged constitutes defamation per se, and the Court need not evaluate whether the Third Counterclaim sufficiently alleges special damages.

Thus, the Court concludes that CDI has plausibly alleged a claim for defamation. Accordingly, the Court RECOMMENDS that Plaintiffs' Motion to Dismiss be DENIED to the extent it seeks to dismiss the Third Counterclaim.

3. Conclusion

For the foregoing reasons, the Court respectfully RECOMMENDS that Plaintiffs' Motion to Dismiss be GRANTED to the extent it seeks dismissal of Counterclaim Two but DENIED to the extent it seeks dismissal of Counterclaims One or Three.

D. Plaintiffs' Motion to Strike

Finally, the Court turns to Plaintiffs' Motion to Strike, which seeks to strike the First and Sixth Affirmative Defenses pled by Mr. Dieter and CDI. [#99] In response, CDI and Mr. Dieter have agreed to withdraw their Sixth Affirmative Defense.[46] [#104 at 3] Thus, the Court addresses only the First Affirmative Defense, failure to state facts sufficient **[*62]** to constitute a cause of action against Mr. Dieter and CDI. [#90 at 16]

Plaintiffs provide no authority for their assertion that the defense of failure to state a claim upon which relief can be granted should not be presented as an affirmative defense "because, beyond the motions to dismiss stage, [that] defense will have no impact." [#106 at 2] Indeed, Plaintiffs' assertion runs contrary to the plain language of *Rule 12(b)(6)* which states that a party "*may* assert" failure to state a claim by motion. *Fed. R. Civ. P. 12(b)(6)* (emphasis added). Indeed, "[t]he defense of failure to state a claim can be raised at any time, including at trial." *Chavez v. Thornton*, No. 05-cv-00607-REB-MEH, 2007 WL 2908293, at *1 (D. Colo. Oct. 3, 2007). And courts routinely allow parties to plead such a defense as an affirmative defense. *See, e.g.*, *id.;* *Bruner v. Midland Funding, LLC, No. CIV-16-1371-D, 2018 U.S. Dist. LEXIS 12186, 2018 WL 563183, at *3 (W.D. Okla. Jan. 25, 2018)*; *Resol. Trust Co. v. Thomas, No. CIV.A. 92-2084-GTV, 1995 U.S. Dist. LEXIS 6071, 1995 WL 261641, at *1 (D. Kan. Apr. 25, 1995)*. Indeed, on multiple occasions, counsel for Plaintiffs has himself filed answers in which he has asserted as an affirmative defense that the opposing party's complaint failed to state a claim for relief pursuant to *Rule 12(b)(6)*. *Rivard v. Gates & Rymph, Inc.*, No. 12-cv-00236-REB-KMT [#7 at 7]; *Spokas v. Am. Fam. Mut. Ins. Co.*, No. 12-cv-00380-WYD-KLM [#13 at 8]; *McIntosh v. Vida Salon, LLC*, No. 12-cv-00874-MSK-MJW [#14 at 4]. In any event, Plaintiffs **[*63]** have not demonstrated in the Motion to Strike that the first affirmative defense "ha[s] no bearing on the controversy" or that Plaintiffs "ha[ve] been prejudiced" by the inclusion of such a defense. *Kimpton Hotel & Rest. Grp., LLC, 2008 U.S. Dist. LEXIS 5278, 2008 WL 140488, at *1*. As a result, Plaintiffs have not satisfied their burden of demonstrating that the First Affirmative Defense should be stricken.

Accordingly, the Court RECOMMENDS that Plaintiffs' Motion to Strike be DENIED.

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[46] Once again, Plaintiffs appear to have disregarded the conferral requirement prior to filing their Motion to Strike. [#104 at 2] Had Plaintiffs conferred, Mr. Dieter and CDI could have simply withdrawn their Sixth Affirmative Defense.

IV. CONCLUSION

For the foregoing reasons, the Court respectfully **RECOMMENDS** that:

(1) IDT's Motion to Dismiss [#88] be **GRANTED IN PART** and **DENIED IN PART**. Specifically, the Court **RECOMMENDS** that IDT's Motion to Dismiss be **GRANTED** to the extent it seeks dismissal of Claims One, Two, Three, Four, Five, Six, Seven, and Ten but **DENIED** to the extent it seeks dismissal of Claims Eight, Eleven, and Twelve. Because this is the second round of motions to dismiss briefing, and because Plaintiffs have had prior opportunities to cure deficiencies in their pleadings, the Court respectfully **RECOMMENDS** that Claims One, Two, Three, Four, Five, Six, Seven, and Ten as asserted against IDT be **DISMISSED WITH PREJUDICE**. *S.D. v. Lajeunesse, No. 15-CV-02404-WJM-CBS, 2017 U.S. Dist. LEXIS 8228, 2017 WL 262692, at *4 n.4 (D. Colo. Jan. 20, 2017)* ("By the time of a second amended complaint it is **[*64]** often the case that pleading deficiencies such as those evident here may be deemed irreparable, and the complaint will be dismissed with prejudice.").

(2) CDI's Motion to Dismiss [#89] be **GRANTED IN PART** and **DENIED IN PART**. Specifically, the Court **RECOMMENDS** that CDI's Motion to Dismiss be **GRANTED** to the extent it seeks dismissal of Claims One against Mr. Dieter, Claim Two against both Defendants, Claim Four against both Defendants, Claim Five against Mr. Dieter, Claim Seven against both Defendants, Claim Eight against Mr. Dieter, and Claim Twelve against Mr. Dieter. The Court **RECOMMENDS** that CDI's Motion to Dismiss be **DENIED** to the extent it seeks dismissal of Claim Eight, Claim Nine, Claim Eleven, or Claim Twelve against CDI. Because this is the second round of motions to dismiss briefing, and because Plaintiffs have had prior opportunities to cure deficiencies in their pleadings, the Court respectfully **RECOMMENDS** that Claims One, Two, Four, Five, Seven, Eight, and Twelve asserted against Mr. Dieter and Claims Two, Four, and Seven asserted against CDI be **DISMISSED WITH PREJUDICE**. *Lajeunesse, 2017 U.S. Dist. LEXIS 8228, 2017 WL 262692, at *4 n.4*.

(3) Plaintiffs' Motion to Dismiss [#98] be **GRANTED IN PART** and **DENIED IN PART**. Specifically, the Court **[*65]** **RECOMMENDS** that Plaintiffs' Motion to Dismiss be **GRANTED** to the extent it seeks to dismiss Counterclaim Two but **DENIED** to the extent it seeks to dismiss Counterclaims One and Three. Because CDI acknowledges that it cannot plausibly plead a tortious interference claim [#105 at 5], the Court respectfully **RECOMMENDS** that Claim Two be **DISMISSED WITH PREJUDICE**.

(4) Plaintiffs' Motion to Strike [#99] be **DENIED**.[47]

DATED: October 7, 2021

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[47] Within fourteen days after service of a copy of this Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings of fact, legal conclusions, and recommendations with the Clerk of the United States District Court for the District of Colorado. *28 U.S.C. § 636(b)(1)*; *Fed. R. Civ. P. 72(b)*; *Griego v. Padilla (In re Griego), 64 F.3d 580, 583 (10th Cir. 1995)*. A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. 2121 East 30th Street, 73 F.3d 1057, 1060 (10th Cir. 1996)*. Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings of fact, legal conclusions, **[*66]** and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings of fact, legal conclusions, and recommendations of the magistrate judge. *See* *Vega v. Suthers, 195 F.3d 573, 579-80 (10th Cir. 1999)* (holding that the district court's decision to review magistrate judge's recommendation *de novo* despite lack of an objection does not preclude application of "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc., 52 F.3d 901, 904 (10th Cir. 1995)* (finding that cross-claimant waived right to appeal certain portions of magistrate judge's order by failing to object to those portions); *Ayala v. United States, 980 F.2d 1342, 1352 (10th Cir. 1992)* (finding that plaintiffs waived their right to appeal the magistrate judge's ruling by failing to file objections). *But see, Morales-Fernandez v. INS, 418 F.3d 1116, 1122 (10th Cir. 2005)* (holding that firm waiver rule does not apply when the interests of justice require review).

BY THE COURT:

/s/ Scott T. Varholak

United States Magistrate Judge

Tithonus Partners II, LP v. Chi. Title Ins. Co.

United States District Court for the Western District of Pennsylvania

October 8, 2021, Decided; October 8, 2021, Filed

Civil Action No. 2:20-cv-952

Reporter

566 F. Supp. 3d 314 *; 2021 U.S. Dist. LEXIS 195179 **; 2021 WL 4711284

TITHONUS PARTNERS II, LP, Plaintiff, v. CHICAGO TITLE INSURANCE COMPANY, Defendant.

Subsequent History: Appeal dismissed by *Tithonus Partners Ii LP v. Chicago Title Ins. Co., 2022 U.S. App. LEXIS 12216 (3d Cir., Feb. 25, 2022)*

Core Terms

Insured, successor, wholly owned, coverage, named insured, grantee, limited partnership, ambiguous, deed, argues, summary judgment, Entity, convey, general partner, subsidiary, assisted living facility, dissolution, parties, holds, time of conveyance, limited partner, merger, vacant, terms, summary judgment motion, title insurance policy, matter of law, bad faith, reorganization, consolidation

LexisNexis® Headnotes

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

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

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

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

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

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is warranted if the Court is satisfied that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material if it must be decided to resolve the substantive claim or defense to which the motion is directed. There is a genuine dispute of material fact if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. The court must view the evidence presented in the light most favorable to the nonmoving party. It refrains from making credibility determinations or weighing the evidence. Real questions about credibility, gaps in the evidence, and doubts as to the sufficiency of the movant's proof will defeat a motion for summary judgment.

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Cross Motions

HN2[] **Entitlement as Matter of Law, Appropriateness**

When both parties move for summary judgment, the court must rule on each party's motion on an individual and separate basis, determining for each side whether a judgment may be entered in accordance with the Fed. R. Civ. P. 56 standard. Under the same rule, if upon review of a party's motion for summary judgment, the court, viewing the evidence in the light most favorable to the nonmoving party, enters summary judgment for the moving party, the court may properly declare the opposing party's cross-motion for summary judgment as moot.

Insurance Law > ... > Policy Interpretation > Ambiguous Terms > Construction Against Insurers

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Ordinary & Usual Meanings

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Question of Law

HN3[] **Ambiguous Terms, Construction Against Insurers**

Courts generally enforce the plain language of an insurance policy. Straightforward language in an insurance policy should be given its natural meaning. Under Pennsylvania law, an insurance contract is ambiguous where it: (1) is reasonably susceptible to different constructions, (2) is obscure in meaning through indefiniteness of expression, or (3) has a double meaning. Courts should not, however, distort the meaning of the language or resort to a strained contrivance in order to find an ambiguity. Any ambiguity in policy language should be interpreted against the insurer. Failing to define a coverage term does not mean that it is ambiguous. Parties' disagreement on the proper construction of a provision does not render it ambiguous. Whether a contract is ambiguous is a question of law for the court to decide.

Governments > Legislation > Interpretation

HN4[] **Legislation, Interpretation**

A word may be known by the company it keeps. Thus, words grouped in a list should be given related meaning. Further, that several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.

Insurance Law > ... > Policy Interpretation > Ambiguous Terms > Construction Against Insurers

Insurance Law > ... > Policy Interpretation > Ambiguous Terms > Unambiguous Terms

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Ordinary & Usual Meanings

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Plain Language

Insurance Law > ... > Policy Interpretation > Ambiguous Terms > Coverage Favored

HN5[] **Ambiguous Terms, Construction Against Insurers**

When insurance policy language is clear and unambiguous, the court must give effect to the langue of the contract. However, if the policy provision is ambiguous, the policy provision must be construed in favor of the insured and against the insurer as the drafter of the instrument. Also, the words of the insurance policy must be construed in their natural, plain and ordinary sense. Moreover, if the terms of a policy are clear, the court cannot rewrite it or give it a construction in conflict with the accepted and plain meaning of the language used.

Contracts Law > ... > Ambiguities & Contra Proferentem > Contract Ambiguities > Patent Ambiguities

HN6[] **Contract Ambiguities, Patent Ambiguities**

A contract will be found ambiguous only if it is: (1) reasonably or fairly susceptible of different constructions; (2) capable of being understood in more than one sense; (3) obscure in meaning through indefiniteness of expression; or (4) its words have a double meaning. A contract is not ambiguous if the court can determine its meaning absent a guide other than knowledge of the simple facts on which, from the nature of the language in general, its meaning depends; and a contract is not rendered ambiguous by the mere fact that the parties do not agree on the proper construction. Ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of its terms. In determining whether or not there is an ambiguity, the whole contract must be considered and not an isolated part.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

HN7[] **Contract Interpretation, Ambiguities & Contra Proferentem**

Ambiguity in a contract must emanate from the contractual language itself, not from any party's perception or interpretation of those terms.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN8[] **Sherman Act, Claims**

The rule that a parent and wholly owned subsidiary cannot conspire with one another for antitrust purposes recognizes that given the control a parent wields over its wholly owned subsidiary, these parties always share a unity of purpose or a common design, and thus, cannot engage in Section 1 of the Sherman Antitrust Act concerted activity.

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

Torts > Vicarious Liability > Corporations > Subsidiary Corporations

HN9[] **Existence, Distinct & Separate Legal Entity**

In the context of a parent company and a wholly owned subsidiary, "wholly" means completely and entirely in an absolute and objective sense.

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > Elements of Bad Faith

HN10[] **Bad Faith & Extracontractual Liability, Elements of Bad Faith**

A claim for statutory bad faith under 42 Pa. C.S. § 8371 requires that the insurer has acted in bad faith toward the insured.

Counsel: **[**1]** For TITHONUS PARTNERS II, LP, Plaintiff: Daniel B. McLane, LEAD ATTORNEY, Michael P. Pest, Duane Morris LLP, Pittsburgh, PA.

For CHICAGO TITLE INSURANCE COMPANY, Defendant: James A Willhite, LEAD ATTORNEY, PRO HAC VICE, Philadelphia, PA.

Judges: Hon. WILLIAM S. STICKMAN IV, UNITED STATES DISTRICT JUDGE.

Opinion by: WILLIAM S. STICKMAN IV

Opinion

[*316] **MEMORANDUM OPINION**

WILLIAM S. STICKMAN IV, United States District Judge

Plaintiff, Tithonus Partners II, LP ("Tithonus Partners"), sued Defendant, Chicago Title Insurance Company ("Chicago Title"), alleging that it breached a title insurance policy by failing to indemnify Tithonus Partners in a related action concerning a land dispute, and that Chicago Title's refusal to do so was in violation of Pennsylvania's insurance bad faith statute, *42 Pa. C.S. § 8371*. (ECF No. 21). The parties filed cross-motions for summary judgment. (ECF Nos. 27 and 28). For the following reasons, the Court holds that summary judgment is warranted in Chicago Title's favor because, as a matter of law, no coverage was owed under the insurance agreement.

I. FACTUAL BACKGROUND

In 2012, Tithonus Partners, a limited partnership, was formed with Tithonus GP II, LLC ("Tithonus GP") as the general partner and Hawthorne Assisted **[**2]** Living Partners II, LP, Richard Irwin and Loriann Putzier as the limited partners. Tithonus Partners then created three separate limited partnerships so that each limited partnership could acquire an assisted living facility. One of these partnerships was Tithonus Tyrone, LP ("Tithonus Tyrone"), which took title to an assisted living facility in Tyrone, Pennsylvania known as Colonial Courtyard at Tyrone. 0.1% of Tithonus Tyrone was owned by one general partner, Tithonus GP, and 99.9% was owned by one limited partner, Tithonus Partners. (ECF No. 33, ¶¶ 2-3, 5-7, 9; ECF No. 39, ¶¶ 2-3, 5-7, 9; ECF **[*317]** No. 30, ¶¶ 1-4, 18-19; ECF No. 35, ¶ 1-4, 18-19).

In June 2012, Tithonus Tyrone purchased three adjoining parcels of property totaling approximately 60 acres in the Tyrone Borough of Blair County, Pennsylvania. The assisted living facility was located on a portion of the insured land, and the rest of the insured land was vacant. (ECF No. 33, ¶¶ 11, 14; ECF No. 39, ¶¶ 11, 14). Tithonus Tyrone also obtained a policy of title insurance (Policy Number 120181PIT-B) from Chicago Title, dated July 2, 2012, in the amount of $3,077,000.00 (the "Policy"). (ECF No. 21-1). "Schedule A" to the Policy defined **[**3]** the "Insured" as "Tithonus Tyrone, LP, a Pennsylvania limited partnership." (ECF No. 21-1, p. 3). The "Definition of Terms" further identified the "Insured" as:

(i) The term "Insured" also includes

(A) successors to the Title of the Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors, personal representatives, or next of kin;

(B) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization;

(C) successors to an Insured by conversion to another kind of Entity;

(D) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title

(1) if the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named insured,

(2) if the owns the named Insured;

(3) if the grantee is wholly-owned by an affiliated Entity of the named Insured; provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity, or

(4) if the grantee is a trustee or beneficiary of a trust created by a written instrument established by the Insured named in Schedule A for estate planning purposes.

(ii) With regard to (A), (B), (C), and **[**4]** (D) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured.

(ECF No. 21-1, p. 13, § 1(d)).[1] The Policy insured "against loss or damage" for "Covered Risks" subject to certain "Exclusions from Coverage," "Exceptions from Coverage Contained in Schedule B" and the "Conditions" set forth in the policy. (ECF No. 21-1, p. 2) (capitalization removed). It further stated that the "law of the jurisdiction where the Land is located" shall be applied to "interpret and enforce the terms of this policy." (ECF No. 21-1, p. 17).

In 2013, Tithonus Tyrone separated the 1-2 acre lot on which the assisted living facility sat (Lot 4) for refinancing with the U.S. Department of Housing and Urban Development ("HUD"). The purpose of the subdivision was to facilitate refinancing through HUD of Tithonus Tyrone's mortgage loan and to finance some capital improvements on the assisted living facility. To complete the financing, it was necessary for Tithonus Tyrone to convey the vacant land. Accordingly, Tithonus Tyrone **[*318]** retained title to Lot 4 and the assisted living facility, and it conveyed the 58 acres of vacant property to Tithonus Partners **[**5]** through a deed ("First Deed") dated April 24, 2014.[2] (ECF No. 21-2; ECF No. 30, ¶¶ 5, 17; ECF No. 35 ¶¶ 5, 17; ECF No. 33, ¶¶ 19-22; ECF No. 39, ¶¶ 19-22). The First Deed states, in relevant part:

THIS INDENTURE is made as of the 23rd day of April, 2014, between TITHONUS TYRONE, LP, a Pennsylvania limited partnership ("Grantor") and TITHONUS PARTNERS II, LP, a Pennsylvania limited partnership ~("Grantee").

WITNESSETH, that Grantor, as a distribution to Grantee with a value of Twenty-Two Thousand Five Hundred Dollars ($22,500), the receipt and legal sufficiency of which are hereby acknowledged, does hereby grant, bargain, sell, release, convey and confirm, unto Grantee, and Grantee's successors and assigns, all of Grantor's interest in and described in Exhibit A, attached hereto.

UNDER AND SUBJECT TO any and all easements, rights of way, leases, licenses, restrictions, reservations and grants (including, but not limited to reservations and grants of mining, coal, gas and oil rights, if any) as described in Title Insurance Policy No. 120181PIT-B, dated July 2, 2012, issued to Grantor by Chicago Title Insurance Company.

TOGETHER with all singular ways, waters, water courses, rights, liberties, **[**6]** privileges, hereditaments and appurtenances whatsoever thereunto belonging, or in anywise appertaining, and the reversions and remainders, rents, issues and profits thereof and also all the estate, right, title, interest, use, trust, property, possession, claim and demand whatsoever of Grantor, in law, equity, or otherwise, howsoever, of, in, to or out of the same.

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[1] The Policy fails to include a further definition of the phrase "successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization," set forth in § 1(d)(i)(B), or to further define the teem "wholly-owns" set forth in § 1(d)(i)(D)(2). (ECF No. 30, ¶¶ 15, 16; ECF No. 35, ¶¶ 15, 16).

[2] Tithonus Tyrone is now owned by a third-party. (ECF No. 33, ¶¶ 37, 38, 41; ECF No. 39, ¶¶ 37, 38, 41).

> TO HAVE AND TO HOLD the same to and for the use of the said Grantee, and the Grantee's successors and assigns, FOREVER.
> AND THE GRANTOR hereby covenants and agrees that Grantor will warrant SPECIALLY the property hereby conveyed.

(ECF No. 21-2, p. 2). Tithonus Partners did not obtain a new owner's policy of title insurance on the vacant land. (ECF No. 33, ¶ 25; ECF No. 39, ¶ 25). It did not speak to anyone at Chicago Title about obtaining a new owner's policy of title insurance on the vacant land identifying it as the name insured. Chicago Title did not represent to Tithonus Partners that it would be covered by the Policy issued to Tithonus Tyrone. (ECF No. 33, ¶¶ 25-28; ECF No. 39, ¶¶ 25-28).

In 2017, Tithonus Partners subdivided the 58 acres of vacant land to facilitate the sale of a small portion, Lot 5. Then, by deed dated **[**7]** January 30, 2018 ("Second Deed"), Lot 5 was sold by Tithonus Partners to Port Pizza, LLC ("Port Pizza"). (ECF No. 21-4; ECF No. 30, ¶¶ 23-24; ECF No. 35, ¶¶ 23-24; ECF No. 33, ¶¶ 34-35; ECF No. 39, ¶¶ 34-35).

On or about January 21, 2020, Port Pizza commenced an action against Tithonus Partners and four other defendants at Docket No. 2020-CN-239 in the Court of Common Pleas of Blair County, Pennsylvania, alleging that a portion of the conveyed property had not been owned by Tithonus Partners. Tithonus Partners then submitted a claim to Chicago Title on February **[*319]** 21, 2020, requesting that it fully indemnify, defend and/or resolve issues pertaining to the allegations in the Port Pizza litigation. It claimed it was an "'Insured' under the 2012 Policy through a Deed of distribution dated April 23, 2014 delivered by Tithonus Tyrone, LP."[3] (ECF No. 34, p. 270; ECF No. 33, ¶¶ 43-44; ECF No. 39, ¶¶ 43-44).

Chicago Title determined that Tithonus Partners did not qualify for coverage as an "insured" under the Policy, and it denied the claim by March 13, 2020 letter ("First Denial Letter"). Its explanation for the denial of coverage was:

> The Claimant is not an "insured" as the term is defined by the **[**8]** Policy. The Claimant is not the named insured identified in Schedule A of the Policy. The Claimant is not a successor to the Named Insured because the Claimant acquired the Property by grant. Finally, the Claimant is not a grantee of an insured under a deed delivered without payment because Claimant paid $22,500 to the Named Insured in exchange for the Property. As such, the Claimant does not qualify as an insured as defined under the Policy.

(ECF No. 21-5, p. 3).

By March 25, 2020 letter, Tithonus Partners requested reconsideration arguing that it: (1) qualified as an insured under § 1(d)(i)(B) of the Policy because it was a successor to Tithonus Tyrone's interests in the property by distribution; and/or it (2) qualified as an insured under § 1(d)(i)(D)(2) of the Policy because it never paid any consideration to Tithonus Tyrone for the distribution of the property and because Tithonus Partners wholly owned Tithonus Tyrone at the time of the grant.[4] (ECF No. 34, pp. 272-73). By April 10, 2020 letter, Chicago Title once again denied Tithonus Partners's claim, because it not an "Insured" under the Policy. (ECF No. 21-6). As to Tithonus Partners's first argument regarding coverage under **[**9]** § 1(d)(i)(B) of the Policy, Chicago Title responded:

> A distribution of the nature mentioned in the Policy occurs as part of a non-voluntary transfer by operation of law resulting from some acts such as a dissolution or merger. In this instance, there was no dissolution of the Named Insured, and the Named Insured did not merge with the Claimant. In this circumstance, the transfer of the deed evidences an agreement between the Named Insured and the Claimant to voluntarily convey the Property rather than being merely a confirmatory act memorializing a transfer that had already occurred by operation of law.

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[3] At time of its claim, Tithonus Partners and Tithonus Tyrone had no common ownership. (ECF No. 33, ¶ 45; ECF No. 39, ¶ 45). Furthermore, Tithonus Tyrone is not a party to the Port Pizza litigation, and Tithonus Partners has not demanded that Tithonus Tyrone defend and indemnify Tithonus Partners in the litigation. (ECF No. 33, ¶ 47; ECF No. 39, ¶¶ 47, 48).

[4] Tithonus Partners was actually a 99.9% owner of Tithonus Tyrone at the time of the grant.

(ECF No. 21-6, p. 3) (internal citations omitted). As to Tithonus Partners's second argument regarding coverage under § 1(d)(i)(D)(2) of the Policy, Chicago Title responded:

> [T]he Agreement of Limited Partnership for the Named Insured states that the Named Insured is a limited partnership with [Tithonus] GP II, LLC ("[Tithonus] GP") as the general partner, and the Claimant as the limited partner. The Claimant's Agreement of Limited Partnership states that the Claimant is a limited partnership with [Tithonus] GP **[*320]** as the general partner, and Hawthorne Assisted Living Partners II, LP, Richard **[**10]** Irwin, and Loriann Putzier as limited partners. As such, it does not appear that the Named Insured is wholly owned by the Claimant, and, as a result, the Claimant does not quality as an insured as defined under the Policy.

(ECF No. 21-6, p. 3) (citations omitted).

On May 28, 2020, Tithonus Partners commenced this action in the Civil Division of the Court of Common Pleas of Allegheny County, Pennsylvania. (ECF No. 1). Chicago Title removed the case to this Court on June 26, 2020, on the basis of diversity jurisdiction, *see* *28 U.S.C. §§ 1332*, *1441*. (ECF No. 1). Both parties have sought summary judgment in their favor as to both counts. Chicago Title argues that, as a matter of law, it correctly (Count I) and reasonably (Count II) denied coverage under the Policy and refused to defend Tithonus Partners in the Port Pizza litigation. (ECF No. 32). In contrast, Tithonus Partners argues that summary judgment should be granted in its favor because, as a matter of law, it qualified as an "Insured" under the Policy (Count I), and that Chicago Title failed to conduct a reasonable investigation prior to denying its claim (Count II). (ECF Nos. 28, 29).

II. Standard Of Review

HN1[] Summary judgment is warranted if the Court is **[**11]** satisfied that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*; *see also* *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. A fact is material if it must be decided to resolve the substantive claim or defense to which the motion is directed. *See* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. There is a genuine dispute of material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The Court must view the evidence presented in the light most favorable to the nonmoving party. *Id. at 255*. It refrains from making credibility determinations or weighing the evidence. *Id.* "[R]eal questions about credibility, gaps in the evidence, and doubts as to the sufficiency of the movant's proof' will defeat a motion for summary judgment. *El v. Se. Pa. Transp. Auth., 479 F.3d 232, 238 (3d Cir. 2007)*.

HN2[] "When both parties move for summary judgment, 'Nile court must rule on each party's motion on an individual and separate basis, determining for each side whether a judgment may be entered in accordance with the *Rule 56* standard.'" *Auto-Owners Ins. Co. v. Stevens & Ricci Inc., 835 F.3d 388, 402 (3d Cir. 2016)* (quoting 10A Charles Alan Wright Et Al., Federal Practice And Procedure § 2720 (3d ed. 2016)). Under the same rule, if upon review of a party's motion for summary judgment, the court, viewing the evidence in the light most **[**12]** favorable to the nonmoving party, enters summary judgment for the moving party, the court may properly declare the opposing party's cross-motion for summary judgment as moot. *Beenick v. LeFebvre, 684 F. App'x 200, 205-06 (3d Cir. 2017)*.

III. Analysis

The threshold issue is whether Tithonus Partners is an "Insured" party under the Policy issued by Chicago Title to Tithonus Tyrone in 2012. After a probing examination of the relevant contractual language, the Court holds that Tithonus Partners is not an "Insured." As such, no coverage is owed. Because it is not an "Insured" and is not entitled to coverage, Tithonus Partners's bad faith claim also fails.

[*321] A. COUNT I - BREACH OF CONTRACT

The parties agree that Pennsylvania law governs the Court's analysis of the Policy language. Tithonus Partners bears the burden of proving facts that bring its claim at Count I within the Policy's grant of coverage. If it meets that burden, then Chicago Title bears the burden of demonstrating that a policy exclusion excuses it from providing coverage. *State Farm Fire & Cas. Co. v. Est. of Mehlman, 589 F.3d 105, 111 (3d Cir. 2009)* (citing *Koppers Co., Inc. v. Aetna Cas. And Sur. Co., 98 F.3d 1440, 1446 (3d. Cir. 1996)* (applying Pennsylvania law)).

HN3[] Courts generally enforce the plain language of an insurance policy. *Reliance Ins. Co. v. Moessner, 121 F.3d 895, 901 (3d Cir. 1997)* ("If . . . the terms of the policy are clear and unambiguous, the general rule in Pennsylvania is to give effect **[**13]** to the plain language of the agreement." (citations omitted)). "Straightforward language in an insurance policy should be given its natural meaning." *Lawson v. Fortis Ins. Co., 301 F.3d 159, 162 (3d Cir. 2002)*. "Under Pennsylvania law, an insurance contract is ambiguous where it: '(1) is reasonably susceptible to different constructions, (2) is obscure in meaning through indefiniteness of expression, or (3) has a double meaning.' *Viera v. Life Ins. Co. of N. Am., 642 F.3d 407, 419 (3d Cir. 2011)* (quoting *Lawson, 301 F.3d at 163*). Courts should not, however, "distort the meaning of the language or resort to a strained contrivance in order to find an ambiguity." *Madison Constr. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 735 A.2d 100, 106 (Pa. 1999)*; *see also* *Selko v. Home Ins. Co., 139 F.3d 146, 152 n.3 (3d Cir. 1998)* (applying Pennsylvania law). Any ambiguity in policy language should be interpreted against the insurer. *McMillan v. State Mut. Life Assurance Co., 922 F.2d 1073, 1075 (3d Cir. 1990)*. Failing to define a coverage term does not mean that it is ambiguous. *Cap. Flip, LLC v. Am. Modern Select Ins. Co., 416 F. Supp. 3d 435, 439 (W.D. Pa. 2019)* (citing *Heebner v. Nationwide Ins. Enterprise, 818 F. Supp. 2d 853, 857 (E.D. Pa. 2011)*). Parties' disagreement on the proper construction of a provision does not render it ambiguous. *Trombetta v. Raymond James Fin. Servs., Inc., 2006 PA Super 229, 907 A.2d 550, 562 (Pa. Super. 2006)*. Whether a contract is ambiguous is a question of law for the court to decide. *Id. at 561-62*; *Thomas Rigging & Constr. Co., Inc. v. Contraves, Inc., 2002 PA Super 134, 798 A.2d 753, 756 (Pa. Super. 2002)*; *see also* *Allstate Prop. & Cas. Ins. Co. v. Squires, 667 F.3d 388, 391 (3d Cir. 2012)* (under Pennsylvania law, the interpretation of an insurance contract is a matter of law).

1. Tithonus Partners is not a "successor" to Tithonus Tyrone pursuant to § 1(d)(i)(B) of the Policy and, therefore, it is not an "Insured" under that clause of the Policy.

Section 1(d)(i)(B) of the Policy **[**14]** provides:

> The term "Insured" also includes (B) successors to an Insured by dissolution, merger, consolidation, ***distribution***, or reorganization[.]

(ECF No. 21-1, p. 13) (emphasis added). Tithonus Partners contends that it is a successor to Tithonus Tyrone by distribution. Tithonus Partners concedes that there was not a dissolution, merger, consolidation, or reorganization of Tithonus Tyrone. According to Tithonus Partners, the First Deed conveying the Property to it from Tithonus Tyrone expressly labels the conveyance as "a distribution to Grantee." (ECF No. 21-2, p. 2). It takes the position that "by the plain and express language of the First Deed, Tithonus Partners is a successor to the Property by distribution to Tithonus Tyrone." (ECF No. 29, p. 15). Thus, because it qualifies as **[*322]** a "successor" to Tithonus Tyrone, Tithonus Partners argues that it is clearly an "Insured" under the plain language of the Policy. (ECF No. 42, pp. 5-6; ECF No. 47, pp. 2-3).

In contrast, Chicago Title argues that Tithonus Partners has not shown that it is actually Tithonus Tyrone's successor. It contrasts the language of § 1(d)(i)(A), which references "successors to the Title of the Insured by operation of law," with **[**15]** that of § 1(d)(i)(B), which references "successors to an Insured." (ECF No. 36, p. 10). Chicago Title argues that this difference is significant and provides coverage in distinct situations. Citing to Black's Law Dictionary, it argues that being a "successor" to an entity—rather than merely to the title— "implies that the predecessor entity has ceased to exist and has been replaced for all purposes by the successor entity." (ECF No. 36, p. 10). Chicago Title contends that it is undisputed that Tithonus Tyrone still exists and that it operates an assisted living facility on the portion of the land it kept (Lot 4) from which it generates income. And, Tithonus Tyrone's portion of the land remains insured under the Policy. (ECF No. 32, pp. 10-11). Chicago Title also argues that "[e]very owner of real estate who takes title by grant has succeeded to its predecessor's title in that limited sense, but this does not make the current owner the 'successor' to the prior owner. There is a difference under the Policy between a 'successor to the title' and a 'successor to the Insured.' (ECF No. 48, pp. 3-4).

The Court holds that Tithonus Partners is not a successor to Tithonus Tyrone pursuant to § 1(d)(i)(B) **[**16]** of the Policy. In reaching its holding, the Court first examined the specific language of the clause at issue—which provides coverage to "successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization." It is significant, as Chicago Title argued, that § 1(d)(i)(B) specifically references successors "to an Insured" rather than "to the Title of the Insured" referenced at § 1(d)(i)(A). The Court may not ignore the difference in language—it must give it full effect that recognizes and actualizes the difference in terminology used in each clause. The fact that the phrase "successors *to an Insured"* is modified by a list of specific events highlights that § 1(d)(i)(B) contemplates an existential alteration, if not extinction, of the original "Insured."

The Court's reading of § 1(d)(i)(B) is bolstered by the interpretive canon[5] *noscitur a sociis*, which is "literally translated as 'it is known by its associates.'" *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson, 559 U.S. 280, 288, 130 S. Ct. 1396, 176 L. Ed. 2d 225 (2010)* (citation omitted). ***HN4***[] The canon "counsels lawyers reading statutes that 'a word may be known by the company it keeps.'" *Id.* (citation omitted). Thus, "words grouped in a list should be given related meaning." *S.D. Warren Co. v. Me. Bd. of Env't Prot., 547 U.S. 370, 378, 126 S. Ct. 1843, 164 L. Ed. 2d 625 (2006)* (citations omitted). Further, "[t]hat several items in a list share an attribute counsels **[**17]** in favor of interpreting the other items as possessing that attribute as well." *Beecham v. United States, 511 U.S. 368, 371, 114 S. Ct. 1669, 128 L. Ed. 2d 383 (1994)*. Section 1(d)(i)(B) includes "distribution" in a series of words that each refer to an event whereby a business entity is structurally changed (i.e., "merger," "consolidation," **[*323]** "reorganization") or eliminated (i.e., "dissolution"). "Distribution," as used in §1(d)(i)(B), must be read consistently with its companions. Thus, it must refer to the liquidation of an entity's assets, rather than partnership distributions made in the ordinary course of business. This reading is internally consistent with the provisions of § 1(d)(i)(B), and it also recognizes the distinction between "successors to the Title of the Insured" and "successors to an Insured." Tithonus Partners is not an "Insured" under § 1(d)(i)(B).

2. Tithonus Partners is not an "Insured" under § 1(d)(i)(D)(2) of the Policy.

Tithonus Partners also claims coverage as an "Insured" under § 1(d)(i)(D)(2) of the Policy. That subclause defines an "Insured" as:

> (D) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title
>
> * * *
>
> (2) if the grantee wholly owns the named Insured[.]

(ECF No. 21-1, p. 13). Tithonus Partners argues that the record is **[**18]** clear that it did not pay consideration for the property. (ECF No. 38, pp. 8-9). It contends that the original named "Insured," Tithonus Tyrone, should be deemed "wholly owned" by Tithonus Partners because it owned 99.9% of Tithonus Tyrone at the time of the transfer of property, and the remaining 0.1% was owned by Tithonus Partners's general partner, Tithonus GP II, LLC, which was also a general partner of Tithonus Tyrone. Tithonus Partners argues that it is impossible for a limited partnership to be 100% owned by one single entity in Pennsylvania, as it must have a general partner and a limited partner. (ECF No. 38, pp. 10-12; ECF No. 47, pp. 3-5). Tithonus Partners submits that "[t]his is as close as a Pennsylvania limited partnership can be to 'wholly owned,'" such that it effectively "wholly owned" Tithonus Tyrone at the time of the conveyance and, therefore, it was insured under § 1(d)(i)(D)(2) of the Policy. (ECF No. 47, p. 5).

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[5] *See, e.g., Viera, 642 F.3d at 418-19* (applying a canon of statutory interpretation to interpret language in an insurance contract); *J.C. Penney Life Ins. Co. v. Pilosi, 393 F.3d 356, 365-66 (3d Cir. 2004)* (same).

Chicago Title argues that Tithonus Partners cannot be classified as an "Insured" as the grantee of Tithonus Tyrone because, even assuming no consideration was paid, it failed to meet the test set forth in § 1(d)(i)(D)(2) of the Policy- "if the grantee wholly **[**19]** owns the named Insured." (ECF No. 32, pp. 15-17). According to Chicago Title, when the claim for coverage was made, Tithonus Partners owned 0% of Tithonus Tyrone, and Tithonus Partners has admitted as much. (ECF No. 48, p. 6). Tithonus Partners is a limited partnership with four partners, none of whom were ever Tithonus Tyrone. When the original Policy was sought in 2012, Tithonus Tyrone was a limited partnership with Tithonus GP II, LLC as the general partner and Tithonus Partners as the limited partner. (ECF No. 32, pp. 15-16). It submits that "[a] conveyance from a parent corporation to a wholly owned subsidiary would qualify; but a conveyance by a partnership to only one of its two partners, as occurred here, would not." (ECF No. 32, p. 16).

The Court will first address whether to read the provisions of this subclause as referring to ownership at the time of the conveyance or at the time the insurance claim is made. Chicago Title takes the position that because § 1(d)(i)(D)(2) uses the present tense, the critical point is the ownership of the named Insured at the time the claim is made, rather than the time of conveyance. If, as Chicago Title argues, the critical date is the time the claim was **[**20]** made, then there is no question that Tithonus Partners is not an "Insured" **[*324]** because it is undisputed that, at the time, it did not own any part of Tithonus Tyrone.

The Court holds, however, that the proper point of reference is the time of the grant. The focal point of § 1(d)(i)(D) is the grant of the insured Title pursuant to "a deed delivered without payment of actual valuable consideration." This clause looks to the time of the grant. And the relevant subclause—"if the grantee wholly owns the named Insured," § 1(d)(i)(D)(2)—clearly refers to the specific event of the conveyance effectuated by "a deed *delivered* without payment," § 1(d)(i)(D) (emphasis added). Moreover, the reading espoused by Chicago Title, focusing on the time the claim was made, would allow related companies (as Tithonus Partners and Tithonus Tyrone are here) to recalibrate ownership structures prior to making a claim when, at the time of the conveyance, the "wholly owned" provision of §1(d)(i)(D) was clearly inapplicable. This would not be a sound result and is not supported by the terms of the contract. As such, the Court will, as urged by Tithonus Partners, look to the time of the conveyance.

The Court holds that there is no genuine issue of material fact that **[**21]** Tithonus Partners made no "payment of actual valuable consideration" in return for the conveyance. The critical issue, therefore, is whether Tithonus Tyrone was "wholly owned" by Tithonus Partners. Notwithstanding the fact that, as Tithonus Partners argues, it owned *almost* all of Tithonus Tyrone, 99.9%, the Court cannot hold that it *wholly* owned Tithonus Tyrone. The contract clearly and unambiguously calls for whole ownership, not nearly whole or "effectively whole" as Tithonus Partners advocates.

"Wholly owned" is not defined by the Policy, so the Court must interpret what the term means in the context of the Policy. Pennsylvania law on interpreting insurance contracts provides:

> In interpreting an insurance policy, a court must ascertain the intent of the parties as manifested by the language of the written agreement. ***HN5***[] When the policy language is clear and unambiguous, the court must give effect to the langue of the contract. However, if the policy provision is ambiguous, the policy provision must be construed in favor of the insured and against the insurer as the drafter of the instrument. Also, ***the words of the insurance policy must be construed in their natural, plain and ordinary [**22] sense***.

Riccio v. Am. Republic Ins. Co., 550 Pa. 254, 705 A.2d 422, 426 (Pa. 1997) (internal citations omitted) (emphasis added). Moreover, "[i]f the terms of a policy are clear, [the] Court cannot rewrite it or give it a construction in conflict with the accepted and plain meaning of the language used." *Treesdale, Inc. v. TIG Ins. Co., 681 F. Supp. 2d 611, 616-17 (W.D. Pa. 2009)* (quoting *Wall Rose Mut. Ins. Co. v. Manross, 2007 PA Super 395, 939 A.2d 958, 962 (Pa. Super. 2007)*).

HN6[] "[A] contract will be found ambiguous only if it is: (1) reasonably or fairly susceptible of different constructions; (2) capable of being understood in more than one sense; (3) obscure in meaning through indefiniteness of expression; or (4) its words have a double meaning." *Id. at 617* (citing *Bohler-Uddeholm Am., Inc. v. Ellwood Grp., Inc., 247 F.3d 79, 93 (3d Cir. 2001)*). Further:

> A contract is not ambiguous if the court can determine its meaning absent a guide other than "knowledge of the simple facts on which, from the nature of the language in general, its meaning depends; and a contract is not rendered ambiguous by the mere fact that the **[*325]** parties do not agree on the proper construction." "[A]mbiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of its terms." In determining whether or not there is an ambiguity, "the whole contract must be considered and not an isolated part."

Id. (internal citations omitted).

The Court holds that the term "wholly owned" as used **[**23]** in § 1(d)(i)(D)(2) is clear and unambiguous. It is not readily susceptible to different constructions. Nor is it capable of being understood in more than one sense. It is not obscure in meaning through indefiniteness of expression and, finally, its words do not have a double meaning. Although Tithonus Partners argues that it is impossible for a limited partnership to be wholly owned, this was not specifically couched, nor does the Court construe it, as an argument that the term "wholly owned" is ambiguous. ***HN7***[] Ambiguity must emanate from the contractual language itself, not from any party's perception or interpretation of those terms. The Court cannot read into "wholly owned" an ambiguity that is not present. The term is not ambiguous.

The Court must afford the terms of § 1(d)(i)(D)(2) their natural, plain and ordinary meaning at the time of the execution of the contract. Black's Law Dictionary[6] defined "wholly" as "[n]ot partially; fully; completely." *Wholly*, BLACK'S LAW DICTIONARY 1735 (9th ed. 2009). The Random House Dictionary similarly defined "wholly" as "entirely; totally; altogether" and "to the whole amount, extent." *Wholly*, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2171 (2d ed. 1987). Finally, Webster's **[**24]** Third defined the term as "to the full or entire extent" and "to the exclusion of other things." *Wholly*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2612 (3d ed. 1993). Here, the record shows that, at the time of the conveyance, Tithonus Partners owned 99.9% of Tithonus Tyrone. The Court therefore cannot find that it "wholly owned" Tithonus Tyrone. To do so would be to expand the plain meaning of "wholly owned" to—as advocated by Tithonus Partners—*"effectively* wholly owned." But that is not what the Policy says, and the Court does not have the authority to amend and broaden the terms of the parties' agreement.

Tithonus Partners cites to *Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1133 (3d Cir. 1995)*, as a purported example of a case where the Third Circuit has held that a rule governing "wholly owned" subsidiaries may apply where the ownership is substantial, but less than 100%. *Siegel* arose in the antitrust context and addressed whether the rule that a parent company cannot conspire with its wholly-owned subsidiary—enunciated by the Supreme Court in *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*—also applied when the parent does not quite own 100% of the subsidiary. *Siegel* cannot be read for the broad proposition that somewhat less than 100% may be construed as "wholly owned" **[**25]** in all cases and for all purposes. Rather, it must be construed and constrained by the context in which it arose ***antitrust law***. The *Copperweld* decision addressed the "fundamental question . . . [of] whether an agreement **[*326]** between a parent and its wholly owned subsidiary represents the conduct of one economic actor or two." *Siegel, 54 F.3d at 1132*. ***HN8***[] The rule that a parent and "wholly owned" subsidiary cannot conspire with one another for antitrust purposes recognizes that "given the control a parent wields over its wholly owned subsidiary, these parties always share 'a unity of purpose or a common design,' and thus, cannot engage in *Section 1* [of the *Sherman Antitrust Act*] concerted activity." *Id.* (citing *Copperweld, 467 U.S. at 771-72*). Because the focus of the *Copperweld* decision was market impact, it was not a far stretch to extend this rule to situations where a parent did not own a complete majority of the subsidiary. The effect on markets of concerted action is essentially the same. This market-based rule reflects the purpose of ***antitrust law***, the effect of companies' collaboration on markets. It cannot be read as a blanket redefinition of the term "wholly owned" to be something less. The Third Circuit simply did not hold that, as a

[6] The Court reviewed dictionaries that were contemporaneous with the execution of the contract in 2012. *See Madison Constr. Co., 735 A.2d at 108* ("Words of common usage in an insurance policy are to be construed in their natural, plain, and ordinary sense, and we may inform our understanding of these terms by considering their dictionary definitions.").

general matter, "wholly owned" as used in contracts **[**26]** and other contexts really means "effectively wholly owned" or some other looser measure.

The Court holds that it must afford the term "wholly owned" used in § 1(d)(i)(D) its ordinary and natural construction. ***HN9***[] "Wholly" means completely and entirely in an absolute and objective sense.[7] Tithonus Partners did not wholly own Tithonus Tyrone. It is not, therefore, an "Insured" under Section 1 of the Policy. Because it is not an "Insured," coverage is not owed. As such, the Court must enter judgment in favor of Chicago Title and against Tithonus Partners on the breach of contract claim.[8]

B. Count II - Insurance Bad Faith Pursuant To *42 Pa. C.S. § 8371*

HN10[] A claim for statutory bad faith under *42 Pa. C.S. § 8371* requires that "the insurer has acted in bad faith toward the insured." As explained above, Tithonus Partners was not an "Insured" under the Policy. Because **[*327]** Tithonus Partners was not an "Insured" it cannot maintain a bad faith claim against Chicago Title. *See Seasor v. Liberty Mut. Ins. Co., 941 F. Supp. 488, 491 (E.D. Pa. 1996)* ("[I]n order to bring an action for bad faith against an insurer, one must qualify as an "insured" as that term is defined in the policy."). Accordingly, summary judgment will be entered in favor of Chicago Title as to Count II.

IV. Conclusion

For the foregoing reasons of law and fact, **[**27]** the Court will grant Chicago Title's summary judgment motion (ECF No. 27) and enter judgment in its favor as to Counts I and II. Orders of Court will follow.

BY THE COURT:

/s/ William S. Stickman IV

WILLIAM S. STICKMAN IV

UNITED STATES DISTRICT JUDGE

10-8-2021

Date

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[7] Tithonus Partners offers a final counterpoint, asserting that "Chicago Title cannot reasonably seek to enforce a 100% 'wholly owned' exclusion" because it is "legal[ly] and factual[ly] impossib[le]" for any entity to own 100% of Tithonus Tyrone, a Pennsylvania limited partnership. (ECF No. 29, p. 18). Tithonus Partners cites *Daburlos v. Commercial Insurance Co. of Newark, New Jersey, 381 F. Supp. 393, 400 (E.D. Pa. 1974)*, for the proposition that "conditions which are impossible of performance are ineffectual and void." That case concerned a policy condition that made it "impossible for the insureds, within the literal terms of [the contract], to modify their insurance [coverage]," thereby depriving them of an express "contractual right purchased by the payment of the premium." *Id. at 402*. The court thus "disregarded" the impossible condition and held that the insureds' beneficiary, having satisfied the other conditions of coverage, had a right to collect under the policy. *Id. at 397, 401*. The purportedly impossible condition in this case, however, is of a different sort. The "wholly owned" subclause—part of a generic definition section—does not have any effect whatsoever on the coverage rights of the named Insured (Tithonus Tyrone). Nor does it operate as the sole method for third parties (like Tithonus Partners) to seek coverage rights as successors to the named Insured. Thus, while affording "wholly owned" its plain meaning may render it inapplicable in most, if not all cases, it would not cause an outright deprivation of rights at the heart of the contract, as occurred in *Daburlos*. Accordingly, the Court will not "disregard[]" the "wholly owned" requirement. *Id at 401*. And the Court cannot "rewrit[e]" the contract or interpret it to require something less than whole ownership, which would not be a "reasonable interpretation" of unambiguous policy language. *Id.*

[8] Because, as a threshold matter, Tithonus Partners is not entitled to coverage as an "Insured" under Section 1 of the Policy, the Court need not address the parties' arguments under *Section 2*.

ORDER OF COURT

AND NOW, this 8th day of October 2021, for the reasons set forth in the Memorandum Opinion filed this same day, IT IS HEREBY ORDERED that Defendant Chicago Title Insurance Company's Motion for Summary Judgment (ECF No. 27) is GRANTED. Summary judgment will be entered in favor of Chicago Title Insurance Company and against Plaintiff Tithonus Partners II, LP. Plaintiff Tithonus Partner II, LP's Motion for Summary Judgment (ECF No. 28) is DENIED.

BY THE COURT:

/s/ William S. Stickman IV

WILLIAM S. STICKMAN IV

UNITED STATES DISTRICT JUDGE

JUDGMENT ORDER

AND NOW, this 8th day of October 2021, IT IS HEREBY ORDERED that pursuant to *Federal Rule of Civil Procedure 58*, summary judgment is entered in favor of Defendant Chicago Title Insurance Company and against Plaintiff Tithonus Partners II, LP. The Clerk of Court is directed to mark this CASE CLOSED.

BY THE COURT:

/s/ William S. Stickman IV

WILLIAM S. STICKMAN IV

UNITED STATES DISTRICT JUDGE

Ikspan, Inc. v. Ruben

Superior Court of California, County of Los Angeles

October 12, 2021, Decided

21STCV03363

Reporter

2021 Cal. Super. LEXIS 114505 *

IKSPAN, INC. v. LAURENT RUBEN, et al.

Core Terms

concealed, settlement agreement, unfair, cause of action, conspiracy, material fact, induced, fraudulent, rights, relinquished, alleges, attorney's fees, suppressed, Damages

Counsel: **[*1]** For Plaintiff(s): Maurice David Pessah and Summer Benson (Via LACourtConnect).

For Defendant(s): Ira George Bibbero (Via LACourtConnect); Richard Cipolla (Via LACourtConnect); Kyle Paul Kelley (Via LACourtConnect).

Judges: David Sotelo.

Opinion by: David Sotelo

Opinion

Minute Order

Central District, Stanley Mosk Courthouse,

Department 40

Deputy Sheriff: None

Courtroom Assistant: M. Navarro

NATURE OF PROCEEDINGS: Hearing on Demurrer - with Motion to Strike (CCP 430.10)

The Court's tentative ruling is provided to all sides via the Court's website.

The matter is called for hearing.

1. After hearing argument, the Court rules as follows: Plaintiff Ikspan, Inc. ("Plaintiff") sues Defendants Laurent Ruben ("Laurent"), Estelle Garnier Ruben ("Estelle"), David Schottenstein ("David"), and Prive Goods, LLC ("Prive"). Plaintiff alleges that it was fraudulently induced by Defendants to relinquish its rights under an agreement relating to the exclusive distribution of Prive Revaux eyewear in 15 countries in the European Union, the United Kingdom, and Turkey (the "Territory"). The Complaint asserts causes of action for: Fraudulent Concealment

2. Constructive Fraud

3. Conspiracy to Commit Fraud

4. Breach of Fiduciary Duty

5. Self-Dealing

6. **[*2]** Constructive Trust

7. Intentional Interference With Prospective Economic Advantage

8. Unfair Competition.

Defendants Prive and David (hereinafter referred to collectively as "Defendants") demurrer as to Plaintiff's First, Third, and Eight causes of action AND to strike Punitive Damages and Attorney's Fees.

Defendants' Request for Judicial Notice as Exhibits A-B is DENIED.

Analysis

Settlement Agreement: Defendants' initial contention that the First, Third, and Eight causes action are barred by a settlement agreement between the parties is misguided.

"Fraud in the inducement … occurs when 'the promisor knows what he is signing but his consent is induced by fraud, mutual assent is present and a contract is formed, which, by reason of the fraud is voidable." (*Rosenthal v. Great Western Financial Securities Corp. (1996) 14 Cal.4th 394, 415* (quoting *Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal.App.3d 1011, 1028*).)

Here, Plaintiff alleges that it was induced by fraud to enter into a settlement agreement (the "Settlement Agreement"), which relinquished its rights to the exclusive distribution of Prive Revaux eyewear in the Territory, as it was acting on incomplete information, which was concealed by Laurent, David, and Prive. (FAC, 6, 21, 26.) To the extent that it is determined that Plaintiff was induced to enter the contract by fraud, **[*3]** the Settlement Agreement will be voidable and unenforceable.

Thus, Defendants' demurrer as to the First, Third, and Eighth causes of action based on the Settlement Agreement is OVERRULED.

Cause of Action One, Fraudulent Concealment: OVERRULED

"[T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC (2008) 162 Cal.App.4th 858, 868*.) In California, fraud, including negligent misrepresentation, must be pled with specificity. (*Small v. Fritz Companies, Inc. (2003) 30 Cal.4th 167, 184*.) "The particularity demands that a plaintiff plead facts which show how, when, where, to whom, and

by what means the representations were tendered." (*Cansino v. Bank of America (2014) 224 Cal.App.4th 1462, 1469*.)

Defendants contends that the alleged omissions were not material facts: that Salfio Group was in active discussions **[*4]** to acquire majority interest in Prive, that Laurent, Plaintiff's CFO, was engaged in back-channel discussions with David during the Settlement Negotiations, and that Laurent was privy to information that would have caused Plaintiff to refrain from giving up its exclusive distribution rights. (FAC, ¶ 23-26, 29.)

Here, the Court finds that the facts were material as Defendant's concealment of the same is what induced Plaintiff to enter into the Settlement Agreement. (FAC, ¶ 6, 21, 26.) Plaintiff alleges that if it had known the facts it would not have relinquished its rights. (FAC, ¶ 6, 21, 26.) Plaintiff also alleges that Laurent, David and Laurent worked in concert, so that Plaintiff could relinquish its exclusive distribution because of the significant monetary gains that would result from Plaintiff relinquishing those rights. (FAC, ¶ 29.) Plaintiff further alleges that after it relinquished its rights Prive was free to do business in the Territory, and Prive announced an exclusive European expansion with commercial giant GrandVision. (FAC, ¶ 22.) Plaintiff has alleged sufficient facts to show that Plaintiff concealed certain facts to gain Plaintiff to enter into the Settlement Agreement. **[*5]**

In addition, Defendants contend that Defendants did not owe a duty to disclose the allegedly omitted facts.

Contrary to Defendants' contention, it was under a duty to disclose. Nondisclosure or concealment may constitute actionable fraud when: (1) there is a fiduciary relationship between the parties; (2) the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) the defendant actively conceals a material fact from the plaintiff; and (4) the defendant makes partial representations but also suppresses some material facts. (See *Los Angeles Memorial Coliseum Commission v. Insomniac, Inc. (2015) 233 Cal.App.4th 803, 831*.) As previously stated, had knowledge of material facts that it concealed. (See *Barnhouse v. City of Pinole (1982) 133 Cal.App.3d 171, 187* ["[t]here is a duty of disclosure, inter alia, when one party to a transaction has sole knowledge or access to material facts and knows that such facts are not known or reasonably discoverable by the other party." (Internal quotations omitted).)

Furthermore, Defendants contend that Plaintiff possessed the alleged omitted information because the knowledge is imputed through Laurent, Plaintiff's CFO, who was working in concert with Defendants. While Defendants are correct that, generally, the knowledge of an officer will be imputed to the corporation, that **[*6]** knowledge will not be imputed when an officer "collaborates with outsiders to defraud the corporation." (*Uecker v. Zentil (2016) 244 Cal.App.4th 789, 797*.) As stated above, Plaintiff has alleged that Laurent, David, and Prive worked in concert to induce Plaintiff to enter into the Settlement Agreement and was working against the interest of Plaintiff.

Moreover, Defendants contend that Plaintiff fails to allege why the failure to disclose damaged it. Here, contrary to Defendants' contention, Plaintiff has alleged that it was damaged because Defendants intentionally omitted material facts to induce Plaintiff to enter into the Settlement Agreement, knowing that if Plaintiff gave up its exclusive distribution rights it would result in significant monetary gains for Defendants. (FAC, ¶ 29.)

Lastly, the Court finds that this cause of action has been pled with the required specificity, as Plaintiff has alleged the parties who made the material omissions, what material omissions were made, and when those omissions were made. Any additional facts regarding the alleged fraud will be in the possession of defendant and will be uncovered during discovery. (See *Bradley v. Hartford Acc. & Indem. Co. (1973) 30 Cal.App.3d 818, 825*.)

Cause of Action Three, Conspiracy to Commit Fraud: OVERRULED.

"Conspiracy is not a cause **[*7]** of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.] By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. [Citation.] In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors.

Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort. "'A civil conspiracy, however atrocious, does not per se give rise to a cause of action unless a civil wrong has been committed resulting in damage.'" [Citations.]

"'The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design

In such an action the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or **[*8]** not he was a direct actor and regardless of the degree of his activity.'" [Citation.]" (Applied Equipment Corp. v. Litton Saudi Arabia Ltd.

(1994) 7 Cal.4th 503, 510-511.) As stated, the Court found that Plaintiff has set forth sufficient facts to establish a cause of action for fraudulent concealment. In addition, Plaintiff has alleged that Laurent, David, and Prive acted in concert and intentionally omitted material facts from Plaintiff to induce it to enter into the Settlement Agreement because Defendants knew of the significant monetary gains that they would if Plaintiff relinquished its exclusive rights to distribution. (FAC, ¶ 6, 46-48)

Cause of Action Eight, Unfair Competition: SUSTAINED

California Business and Professions Code section 17200 prohibits "any unlawful, unfair or fraudulent business act or practice." (*Bus. & Prof. Code § 17200*; see *Clark v. Superior Court (2010) 50 Cal.4th 605, 610*.) A private party has standing to bring a UCL claim if he or she has suffered injury in fact and has lost money or property because of Defendant's unfair competition. (See Law Offices of Mathew Higbee v. Expungement Assistance Services (2013) 214

Cal.App.4th 544, 555-56.) "[A]n identifiable trifle [of injury] is enough for standing

" (*Id. at 561*.) The fraudulent prong of a UCL claim is less rigorous than common law fraud as common law fraud requires allegations **[*9]** of actual falsity and reasonable reliance while fraud under UCL does not. (See *Morgan v. AT&T Wireless Services, Inc. (2009) 177 Cal.App.4th 1235, 1256*.) To establish a fraudulent practice under the UCL, the plaintiff must show that members of the public are likely to be deceived. (See *West v. JPMorgan Chase Bank, N.A. (2013) 214 Cal.App.4th 780, 806*.) Lastly, "[a] fraudulent business practice under *section 17200* 'is not based upon proof of the common law tort of deceit or deception but is instead premised on whether the public is likely to be deceived.'" (*Pastoria v. Nationwide Ins. (2003) 112 Cal.App.4th 1490, 1498*.) Stated another way, "In order to state a cause of action under the fraud prong of [*section 17200*] a plaintiff need not show that he or others were actually deceived or confused by the conduct or business practice in question." (Id.) "A business practice is unfair within the meaning of the UCL if it violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." (*McKell v. Washington Mutual, Inc. (2006) 142 Cal.App.4th 1457, 1473*.) When the UCL claim is brought against a competitor, the "unfair" prong of the statute "means conduct that threatens an incipient violation of an ***antitrust law*** or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." **[*10]** (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 187*.) "[A]ny finding of unfairness to competitors under *section 17200* [must] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." (*Id. at 186-187*.) In commercial actions, conduct is unfair if it significantly threatens or harms competition. (See *Cel-Tech Communications, Inc, supra, 20 Cal.4th at 187*.)

Plaintiff does not allege any actionable conduct under the UCL: Plaintiff fails to allege how members of the public are likely to be deceived by Defendants' conduct. In addition, while

Plaintiff generally contends that Defendants' conduct constitutes unfair business practices, creates unfair competition, and provided Defendants an unfair advantage, there are no allegations regarding some actual or threatened impact on competition.

Motion to Strike

Attorney's Fees: GRANTED (NO LEAVE)

"[A]s a general rule, attorney fees are not recoverable as costs unless they are authorized by statute or agreement." (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc. (2007) 147 Cal.App.4th 424, 429*.) Courts may strike prayers for attorney fees where a party demonstrated no potential basis for their recovery. (*Agricultural Ins. Co. v. Superior Court (1999) 70 Cal.App.4th 385, 404*.) Defendants contends that there is no statute or contractual provision that provides for Plaintiff to recover attorney's fees, while Plaintiff fails to address this argument at all.

Punitive Damages: DENIED **[*11]**

The Court and counsel confer regarding scheduling an Informal Discovery Conference.

Informal discovery conferences are available if all counsel are present and have made prior arrangements with the Judicial Assistant.

Plaintiff is to give notice.

End of Document

Ikspan, Inc. v. Ruben

Superior Court of California, County of Los Angeles

October 12, 2021, Decided

21STCV03363

Reporter

2021 Cal. Super. LEXIS 114641 *

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Opinion by: David Sotelo

Opinion

Minute Order

Deputy Sheriff: None

Central District, Stanley Mosk Courthouse,

Department 40

Courtroom Assistant: M. Navarro

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Moreover, Defendants contend that Plaintiff fails to allege why the failure to disclose damaged it. Here, contrary to Defendants' contention, Plaintiff has alleged that it was damaged because Defendants intentionally omitted material facts to induce Plaintiff to enter into the Settlement Agreement, knowing that if Plaintiff gave up its exclusive distribution rights it would result in significant monetary gains for Defendants. (FAC, ¶ 29.)

Lastly, the Court finds that this cause of action has been pled with the required specificity, as Plaintiff has alleged the parties who made the material omissions, what material omissions were made, and when those omissions were made. Any additional facts regarding the alleged fraud will be in the possession of defendant and will be uncovered during discovery. (See *Bradley v. Hartford Acc. & Indem. Co. (1973) 30 Cal.App.3d 818, 825*.)

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"'The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design In such an action the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, **[*8]** irrespective of whether or not he was a direct actor and regardless of the degree of his activity.'" [Citation.]" (Applied Equipment Corp. v. Litton Saudi Arabia Ltd.

(1994) 7 Cal.4th 503, 510-511.) As stated, the Court found that Plaintiff has set forth sufficient facts to establish a cause of action for fraudulent concealment. In addition, Plaintiff has alleged that Laurent, David, and Prive acted in concert and intentionally omitted material facts from Plaintiff to induce it to enter into the Settlement Agreement because Defendants knew of the significant monetary gains that they would if Plaintiff relinquished its exclusive rights to distribution. (FAC, ¶ 6, 46-48)

Cause of Action Eight, Unfair Competition: SUSTAINED

California Business and Professions Code section 17200 prohibits "any unlawful, unfair or fraudulent business act or practice." (*Bus. & Prof. Code § 17200*; see *Clark v. Superior Court (2010) 50 Cal.4th 605, 610*.) A private party has standing to bring a UCL claim if he or she has suffered injury in fact and has lost money or property because of Defendant's unfair competition. (See Law Offices of Mathew Higbee v. Expungement Assistance Services (2013) 214

Cal.App.4th 544, 555-56.) "[A]n identifiable trifle [of injury] is enough for standing

" (*Id. at 561*.) The fraudulent prong of a UCL claim is less rigorous than common law fraud as common **[*9]** law fraud requires allegations of actual falsity and reasonable reliance while fraud under UCL does not. (See *Morgan v. AT&T Wireless Services, Inc. (2009) 177 Cal.App.4th 1235, 1256*.) To establish a fraudulent practice under the UCL, the plaintiff must show that members of the public are likely to be deceived. (See *West v. JPMorgan Chase Bank, N.A. (2013) 214 Cal.App.4th 780, 806*.) Lastly, "[a] fraudulent business practice under *section 17200* 'is not based upon proof of the common law tort of deceit or deception but is instead premised on whether the public is likely to be deceived.'" (*Pastoria v. Nationwide Ins. (2003) 112 Cal.App.4th 1490, 1498*.) Stated another way, "In order to state a cause of action under the fraud prong of [*section 17200*] a plaintiff need not show that he or others were actually deceived or confused by the conduct or business practice in question." (Id.) "A business practice is unfair within the meaning of the UCL if it violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." (*McKell v. Washington Mutual, Inc. (2006) 142 Cal.App.4th 1457, 1473*.) When the UCL claim is brought against a competitor, the "unfair" prong of the statute "means conduct that threatens an incipient violation of an ***antitrust law*** or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly **[*10]** threatens or harms competition." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 187*.) "[A]ny finding of unfairness to competitors under *section 17200* [must] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." (*Id. at 186-187*.) In commercial actions, conduct is unfair if it significantly threatens or harms competition. (See *Cel-Tech Communications, Inc, supra, 20 Cal.4th at 187*.)

Plaintiff does not allege any actionable conduct under the UCL: Plaintiff fails to allege how members of the public are likely to be deceived by Defendants' conduct. In addition, while

Plaintiff generally contends that Defendants' conduct constitutes unfair business practices, creates unfair competition, and provided Defendants an unfair advantage, there are no allegations regarding some actual or threatened impact on competition.

Motion to Strike

Attorney's Fees: GRANTED (NO LEAVE)

"[A]s a general rule, attorney fees are not recoverable as costs unless they are authorized by statute or agreement." (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc. (2007) 147 Cal.App.4th 424, 429*.) Courts may strike prayers for attorney fees where a party demonstrated no potential basis for their recovery. (*Agricultural Ins. Co. v. Superior Court (1999) 70 Cal.App.4th 385, 404*.) Defendants contends that there is no statute or contractual provision that provides for Plaintiff to recover attorney's fees, while Plaintiff fails to address this argument **[*11]** at all.

Punitive Damages: DENIED

The Court and counsel confer regarding scheduling an Informal Discovery Conference.

Informal discovery conferences are available if all counsel are present and have made prior arrangements with the Judicial Assistant.

Plaintiff is to give notice.

Mobile Emergency Hous. Corp. v. HP, Inc.

United States District Court for the Northern District of California

October 15, 2021, Decided; October 15, 2021, Filed

Case No. 20-cv-09157-SVK

Reporter
2021 U.S. Dist. LEXIS 263433 *; 2021 WL 9867952

MOBILE EMERGENCY HOUSING CORP., et al., Plaintiffs, v. HP, INC., Defendant.

Subsequent History: Motion denied by *Mobile Emergency Hous. Corp. v. HP, Inc., 2022 U.S. Dist. LEXIS 234808, 2022 WL 18098217 (N.D. Cal., Dec. 7, 2022)*

Objection overruled by *Mobile Emergency Hous. Corp. v. HP, Inc., 2023 U.S. Dist. LEXIS 36888 (N.D. Cal., Mar. 6, 2023)*

Core Terms

printers, cartridges, updates, firmware, allegations, transmission, consumers, argues, toner, motion to dismiss, judicial notice, message, authorization, damages, contends, unfair, prong, permission, non-HP, accessed, webpages, dynamic, notice, collecting, computer system, intentionally, third-party, printing, courts, incorporate by reference

Counsel: **[*1]** For David Justin Lynch, Mobile Emergency Housing Corp., Track Rat Enterprises Inc., Plaintiffs: Mark Louis Javitch, Javitch Law Office, San Mateo, CA.

For Henry So, Plaintiff: Michael Francis Ram, LEAD ATTORNEY, Morgan & Morgan, San Francisco, CA.

For HP Inc., Defendant: Joseph Richard Rose, LEAD ATTORNEY, San Francisco, CA; Ilissa S. Samplin, LEAD ATTORNEY, Gibson Dunn & Crutcher LLP, Los Angeles, CA; Samuel G. Liversidge, LEAD ATTORNEY, Gibson Dunn & Crutcher LLP, Los Angeles, CA; Sarah M Kushner, LEAD ATTORNEY, Gibson Dunn Crutcher, Los Angeles, CA.

For Mobile Emergency Housing Corp., Track Rat Enterprises Inc., Plaintiffs: Thomas A. Zimmerman Jr, Zimmerman Law Offices P.C., Chicago, IL.

Judges: SUSAN VAN KEULEN, United States Magistrate Judge.

Opinion by: SUSAN VAN KEULEN

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

Re: Dkt. Nos. 44, 45, 46, 47, 49, 50

Defendant HP, Inc. d/b/a HP Computing and Printing Inc. ("Defendant" or "HP") moves to dismiss Plaintiffs Mobile Emergency Housing Corp. ("Mobile Emergency"), Track Rat Enterprises, Inc. d/b/a Performance Automotive & Tire Center ("Performance Automotive"), and David Justin Lynch's ("Lynch") (collectively, **[*2]** "Plaintiffs") Third Amended Complaint ("TAC") (Dkt. 42) pursuant to *Federal Rule of Civil Procedure 12(b)(1)* for lack of subject matter jurisdiction, *Rule 12(b)(6)* for failure to state a claim upon which relief can be granted, and/or move to strike Plaintiffs' requests for injunctive relief pursuant to *Rule 12(f)*. Dkt. 44. The Parties have consented to the jurisdiction of a magistrate judge. Dkts. 15, 21, 33.

Pursuant to *Civil Local Rule 7-1(b)*, the Court deems the motion to dismiss suitable for determination without oral argument. Having carefully considered the Parties' submissions, the case file, and the relevant law, and for the reasons discussed below, the Court **GRANTS IN PART AND DENIES IN PART** Defendant's motion to dismiss the TAC.

I. BACKGROUND

This discussion of the background facts is based on the allegations of Plaintiffs' TAC. Plaintiffs allege that HP transmits firmware updates without authorization to HP printers through the Internet. Dkt. 42 ¶¶ 1, 28. Plaintiffs further allege that these firmware updates act as malware, "adding, deleting or altering code, diminishing the capabilities of HP printers, and rendering the competitors' supply cartridges incompatible with HP printers." *Id.* ¶¶ 1, 24, 26. Further, while users are told that the HP printers have a **[*3]** "supply problem," HP intentionally caused the issue by sending this malware to render third-party supplies incompatible with HP products. *Id.* ¶¶ 5, 24, 26, 29, 30. Plaintiffs allege that as a result of this malware, HP printer owners are either forced to buy HP cartridges or they cannot use their printers until third parties can develop workarounds in their products. *Id.* ¶ 3. Plaintiffs also allege that "HP uses this firmware update process to conceal that it is actually collecting data on whether consumers are using HP or its competitors' cartridges" without their consent. *Id.* ¶¶ 1, 27.

Plaintiff Mobile Emergency, through its authorized representative, purchased an HP Color LaserJet Pro M254 for $238.96 on August 21, 2019 from a Staples store in New York. *Id.* ¶ 35. The printer came with an initial set of model 202 HP-brand toner supply cartridges. *Id.* ¶ 37. When those supply cartridges were exhausted, Mobile Emergency purchased a set of model 202 Greensky toner supply cartridges that were advertised to be compatible with this HP printer from Amazon.com for $52.49. *Id.* ¶ 39. Plaintiffs allege that on or around November 18, 2020, HP sent or activated a transmission to HP printers, which **[*4]** "altered the code and data" of the printer, rendering the printer incompatible with third-party toner supply cartridges, including the Greensky cartridges purchased by Mobile Emergency. *Id.* ¶ 40. HP did not notify Mobile Emergency of the transmission, and Mobile Emergency only discovered this when the authorized representative attempted to print a document, received an error message stating "[s]upply problem," and the printer ceased printing. *Id.* ¶¶ 41, 42. On December 1, 2020, Mobile Emergency purchased a black HP toner cartridge for $71.68 from Staples to replace the Greensky cartridges. *Id.* ¶ 44.

Plaintiff Performance Automotive, through its authorized representative, used rewards points to purchase an HP Color LaserJet Pro MFP M281fdw Laser Multifunction Printer from HP in November 2018. *Id.* ¶¶ 46-47. The printer came with an initial set of model 202 HP-brand toner supply cartridges. *Id.* ¶ 49. When those supply cartridges were exhausted, Performance Automotive purchased model 202 GPC Image, Linkyo, and Greensky toner cartridges for approximately $60 per set that were advertised to be compatible with this HP printer from Amazon.com. *Id.* ¶ 51. Plaintiffs allege that on or around November **[*5]** 18, 2020, HP sent or activated a transmission to HP printers, which "altered the code and data" of the printer, rendering the printer incompatible with third-party toner supply cartridges, including the GPC Image, Linkyo, and Greensky cartridges purchased by Performance Automotive. *Id.* ¶ 52. HP did not notify Performance Automotive of the transmission, and Performance Automotive only discovered the effects of the transmission when it attempted to print a document and received an error message stating "[s]upply problem." *Id.* ¶ 53. Performance Automotive's printer ceased printing and when its authorized representative checked the printer, he saw that the BIOS version had been changed. *Id.* ¶ 54. The authorized representative researched the issue and discovered that HP Had issued a "Bios Update," which caused the printer to cease working. *Id.* ¶ 55. As a result of the update, Performance Automotive's printer and supply cartridges were disabled, and it purchased a printer from a different printer manufacturer. *Id.* ¶ 56.

Plaintiff Lynch purchased an HP Color LaserJet Pro M254dw Wireless Printer for $239.25 from Best Buy on March 3, 2020. *Id.* ¶ 58. The printer came with an initial set of model **[*6]** 202 HP-brand toner supply cartridges. *Id.* ¶ 59. When those supply cartridges were exhausted, Lynch purchased a set of high-capacity model 202 toner cartridges for $215.46 from Express-Inks that were advertised to be compatible with this HP printer. *Id.* ¶ 60. In January 2021, HP sent or activated a transmission which altered the code and data of the printer, rendering the printer incompatible with third-party toner supply cartridges, including the Express-Inks cartridges purchased by Lynch. *Id.* ¶ 62. HP did not notify Lynch of the transmission, and Lynch only discovered the effects of the transmission when he attempted to print a document, his printer ceased printing, and he received an error message stating "[s]upply problem." *Id.* ¶¶ 63-65. The printer also displayed an error message stating that "[t]he indicated supplies are not communicating correctly with the printer. Try reinstalling the supplies. If the problem persists, replace the supplies to continue printing." *Id.* ¶ 66. As a result of the transmission, Lynch purchased new HP cartridges from Amazon.com to get the printer operating again. *Id.* ¶¶ 68-69.

Plaintiffs bring this action to seek damages and injunctive and other equitable **[*7]** relief as a class action on behalf of themselves and the following classes:

> Device Owner Class: All persons and entities in the United States who own a Class Printer.[1]
>
> Damages Subclass: All persons and entities in the United States who own a Class Printer that displayed a diagnostic error, such as "Supply Problem" or other similar error code, as a result of HP's transmission of a firmware update.
>
> State Consumer Subclass: All persons and entities residing in California and States with a similar consumer protection statute to *Cal. Civ. Code 1770(a)(15)*, who own a Class Printer that displayed a diagnostic error, such as "Supply Problem" or other similar error code, as a result of HP's transmission of a firmware update.

Id. ¶ 74.

II. REQUEST FOR JUDICIAL NOTICE AND INCORPORATION BY REFERENCE

A. Legal Standard

There are two doctrines that allow district courts to consider material outside the pleadings without converting a motion to dismiss into a motion for summary judgment: judicial notice under *Federal Rule of Evidence 201* and incorporation by reference. *Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 998 (9th Cir. 2018)*, *cert. denied sub nom. Hagan v. Khoja, — U.S. —, 139 S. Ct. 2615, 204 L. Ed. 2d 264 (2019)*. "The court may judicially notice a fact that is not subject to reasonable dispute." *Fed. R. Evid. 201(b)*. A fact is "not subject to reasonable dispute" if it "is generally known" or "can **[*8]** be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)(1)-(2)*. However, "[j]ust because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth." *Khoja, 899 F.3d at 999*.

Incorporation by reference is a judicially created doctrine that allows a court to consider certain documents as though they are part of the complaint itself. *Khoja, 899 F.3d at 1002*. "The doctrine prevents plaintiffs from selecting only portions of documents that support their claims, while omitting portions of those very documents that weaken—or doom—their claims." *Id.* A defendant can seek to incorporate a document into the complaint "if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *U.S. v. Ritchie, 342 F.3d 903,*

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[1] Plaintiffs allege that "[s]ubject to information learned in discovery, the Class Printers comprise HP Color LaserJet printers and all-in-one devices, in the following non-exhaustive list of products and product series: HP Color LaserJet Pro M254, HP Color LaserJet Pro MFP M280, HP Color LaserJet Pro MFP M281, and all other models affected by HP malware transmissions in the way described herein ('Class Printers')." Dkt. 42 ¶ 33.

908 (9th Cir. 2003) (citations omitted). While the "mere mention" of the existence of a document is insufficient to incorporate a document, it is proper to incorporate a document if the claim "necessarily depended" on them. Khoja, 899 F.3d at 1002.

After a defendant offers such a document, the district court can treat the document as part of the complaint, and "thus may assume that its contents are true for purposes of a motion **[*9]** to dismiss under Rule 12(b)(6)." Ritchie, 342 F.3d at 908. However, "[w]hile this is generally true, it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint." Khoja, 899 F.3d at 1003. Indeed, using extrinsic documents to "resolve competing theories against the complaint risks premature dismissals of plausible claims that may turn out to be valid after discovery" and it is "improper to do so only to resolve factual disputes against the plaintiff's well-pled allegations in the complaint." Id. at 998, 1014.

B. Analysis

Defendant asks the Court to take judicial notice of or incorporate by reference the following documents:

(1) The "HP Printers - Dynamic Security Enabled Printers" webpage ("Dynamic Security Page"), as it appeared on November 11, 2020 (Dkt. 45-3 Exhibit A);

(2) The "Specs" tab of the HP store page for the HP Color LaserJet Pro MFP M281fdw printer model, as it appeared on April 22, 2018 (Dkt. 45-4 Exhibit B);

(3) The "Specs" tab of the HP store page for the HP Color LaserJet Pro M254dw printer model, as it appeared on March 18, 2018 (Dkt. 45-5 Exhibit C);

(4) The "HP Color LaserJet Pro - 10.xx and Supplies Messages" webpage ("Troubleshooting Page") (Dkt. 45-6 Exhibit **[*10]** D);

(5) The online message board (Dkt. 45-7 Exhibit E); and

(6) The "What Data We Collect" section of the "HP Privacy Statement" webpage ("Privacy Statement"), as it appeared on October 30, 2018 (Dkt. 45-8 Exhibit F).

Defendant asks the Court to take judicial notice of the Dynamic Security Page (Dkt. 45-3), the store pages for the HP Color LaserJet Pro MFP M281fdw (Dkt. 45-4) and the HP Color LaserJet Pro M254dw (Dkt. 45-5), and the Privacy Statement (Dkt. 45-8), because courts in this circuit "have routinely taken judicial notice of content from the Internet Archive's Wayback Machine." Dkt. 45 at 5 (citing Parziale v. HP, Inc., No. 5:19-cv-05363-EJD, 2020 U.S. Dist. LEXIS 179738, 2020 WL 5798274, at *3 (N.D. Cal. Sept. 29, 2020) ("*Parziale II*")). Defendant also argues that at a minimum, the Court should take judicial notice that HP consumers are on notice that cartridges that do not have a HP chip or are modified may not function and even if they function for a period of time, they may cease to function, as this notice was available on the Dynamic Security Page before the firmware updates at issue were allegedly transmitted. *Id.* Further, Defendant contends that regarding the two store pages, the Court should take judicial notice of the fact that HP's notice to consumers that these printers are "[d]ynamic **[*11]** security enabled printer[s]" and that "[c]artridges using a non-HP chip may not work, and those that work today may not work in the future" was publicly available on the respective store pages before Plaintiffs purchased their printers. *Id.* Finally, Defendant argues that at a minimum, the Court should take judicial notice of the fact that at all relevant times, the Privacy Statement advised consumers that HP "automatically" "collect[s] product usage data such as . . . ink or toner brand." *Id.*

Plaintiffs oppose Defendant's request for judicial notice of each of these documents, arguing that the webpages are irrelevant and not relied upon in the TAC. Dkt. 46 at 2. Further, Plaintiffs argue that they do not allege "that they viewed these webpages or anything stated on HP's website, and thus did not have reason to view HP's webpages." *Id.* at 3. Plaintiffs argue that "[n]o Plaintiff purchased their printer on HP's website." *Id.* at 4. Plaintiffs distinguish this case from *Parziale II*, arguing that in that case, the complaint heavily referred to the store page and plaintiff alleged that he relied on the information on the store page in deciding to make his purchase. *Id.* at 3. Plaintiffs also **[*12]** argue that "[m]erely because something is 'available' online is not a basis for charging a plaintiff with notification of it." *Id.* at 3-4.

The Court finds that these webpages are publicly available pages whose accuracy cannot reasonably be questioned. The Court takes judicial notice of these webpages for the fact that Defendant made these statements, but not for the truth of those statements. The request for judicial notice of Exhibits A, B, C, and F are **GRANTED**.

Defendant asks the Court to take judicial notice of the Troubleshooting Page (Dkt. 45-6) because it is posted on a publicly available website. Dkt. 45 at 6. Additionally, Defendant contends that the Troubleshooting Page is incorporated by reference in the TAC, because Plaintiffs allege that after the error message appeared, Mobile Emergency's authorized representative "searched HP's website [to] check for a solution . . . but could find only a recommendation to replace the cartridge with an HP-branded cartridge." *Id.* (citing Dkt. 42 ¶ 43). Defendant contends that this allegation "is a clear reference to the Troubleshooting Page." *Id.* Plaintiffs argue that paragraph 43 of the TAC stating "that [the authorized representative] **[*13]** searched HP's website to check for a solution is not a clear reference to the Troubleshooting Page" and should not be considered. Dkt. 46 at 5. The Court finds that the Troubleshooting Page is publicly available, and its accuracy cannot reasonably be questioned. However, the Court finds that it is unclear whether Plaintiffs are referring to this page in its TAC and the claim does not "necessarily depen[d]" on the existence of this document. *See* *Khoja, 899 F.3d at 1002*. Accordingly, request for judicial notice of Exhibit D is **GRANTED** and the request to incorporate by reference is **DENIED**.

Finally, Defendant asks the Court to take judicial notice of the online message board (Dkt. 45-7), arguing that it is referenced repeatedly in the TAC and incorporated by reference. Dkt. 45 at 7 (citing Dkt. 42 ¶ 71, nn.13-16). The Court does not rely on this exhibit in evaluating Defendant's motion to dismiss. Accordingly, Defendant's request for judicial notice and request to incorporate by reference are **DENIED AS MOOT**.

III. MOTION TO DISMISS AND/OR STRIKE

A. Legal Standard

1. Motion to Dismiss Under *Federal Rule of Civil Procedure 12(b)(1)*

A defendant may move to dismiss an action for lack of subject matter jurisdiction under *Federal Rule of Civil Procedure 12(b)(1)*. Article III standing is a threshold requirement **[*14]** for federal court jurisdiction. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. The party seeking standing must show that "(1) he or she has suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." *Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1225 (9th Cir. 2008)* (citing *Lujan, 504 U.S. at 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351*).

A party moving to dismiss under *Rule 12(b)(1)* may make a facial challenge by asserting that "the allegations contained in [the] complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)*. The Court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss, we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan, 504 U.S. at 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351* (internal quotation marks and citation omitted).

2. Motion to Dismiss Pursuant to *Federal Rule of Civil Procedure 12(b)(6)*

Under *Rule 12(b)(6)*, a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. In ruling on a motion to dismiss, the court may consider only "the complaint, materials **[*15]** incorporated into the complaint by reference, and matters of which the court may take judicial notice." *Metzler Inv. GMBH v. Corinthian Colls., Inc., 540 F.3d 1049, 1061 (9th Cir. 2008)* (citation omitted). In deciding whether the plaintiff has stated a claim, the court must assume the plaintiff's allegations are true and draw all reasonable inferences in the plaintiff's favor. *Usher v. City of L.A., 828 F.2d 556, 561 (9th Cir. 1987)*. However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)* (citation omitted).

To survive a motion to dismiss under *Rule 12(b)(6)*, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. This "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

Courts should freely give leave to amend unless the district court determines that it is clear that the complaint's deficiencies cannot be cured by amendment. *Lucas v. Dep't of Corr., 66 F.3d 245, 248 (9th Cir. 1995)*. When amendment would be futile, the court may dismiss without leave to amend. *Dumas v. Kipp, 90 F.3d 386, 393 (9th Cir. 1996)*.

B. Analysis

Plaintiffs allege that due to Defendant's unlawful conduct, Plaintiffs' printers and supply cartridges were "rendered incompatible and inoperable." Dkt. 42 ¶ 7. Further, Plaintiffs **[*16]** allege that they "would not have purchased an HP printer had they known HP was engaged in and would engage in [this] conduct." *Id.* Finally, Plaintiffs allege that as a result of HP's misconduct, they "sustained damages, including but not limited to the loss of the value of the supply cartridges they purchased that are no longer compatible with their printers, loss of time and effort to diagnose the damage to their printers and to determine what remedial measures to take, the need to purchase expensive HP supply cartridges, uncertainty in the functioning of their printers and supply cartridges, and future remedial costs." *Id.* From these allegations, Plaintiffs assert eight claims: (1) violation of the Computer Fraud and Abuse Act; (2) violation of the California Comprehensive Computer Data Access and Fraud Act; (3) violation of the California False Advertising Law; (4) violation of the California Unfair Competition Law under the fraudulent prong; (5) violation of the California Unfair Competition Law under the unfair prong; (6) violation of the California Unfair Competition Law under the unlawful prong; (7) trespass to chattels; and (8) violation of the California Consumers Legal Remedies **[*17]** Act.

Defendant asserts that Plaintiffs' data-collection claims fail because Plaintiffs do not allege that they suffered any injury as a result of Defendant's alleged data collection. Dkt. 44 at 12, 18-19. Further, Defendant asserts an overarching argument that the TAC should be dismissed, because Defendant's privacy policy advises consumers that Defendant "automatically" collects "product usage data such as . . . ink or toner brand." *Id.* Defendant also contends that it publicly discloses on its webpages that its printers are "dynamic security enabled" and that "[c]artridges using a non-HP chip may not work, and those that work today may not work in the future." *Id.* at 12-13. Defendant also asserts arguments as to why certain claims individually should be dismissed. The Court turns to the arguments below.

1. Article III Standing

"[T]he Court notes at the outset that the threshold question of whether Plaintiffs have standing and the Court has jurisdiction is distinct from the merits of Plaintiffs' claim." *Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 796 (N.D. Cal. 2011)* (quoting *Maya v. Centex Corp., 658 F.3d 1060, 1068 (9th Cir. 2011)*) (internal quotation marks omitted). "Rather, the jurisdictional question of standing precedes, and does not require, analysis of the merits." *Maya, 658 F.3d at 1068* (quoting *Equity Lifestyle Props., Inc. v. Cnty. of San Luis Obispo, 548 F.3d 1184, 1189 n.10 (9th Cir.2008)*) (internal quotation marks omitted). **[*18]** "At the same time, it is well established that the actual or threatened injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Fraley, 830 F. Supp. 2d at 796* (citing *Warth v. Seldin, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L. Ed. 2d 343 (1975)*) (internal quotation marks omitted). Accordingly, "a plaintiff may be able to establish constitutional injury in fact by pleading violation of a right conferred by statute, so long as [he] can allege that the injury [he] suffered was specific to [him]." *Id.*

Defendant contends that Plaintiffs' data-collection claims fail due to lack of standing to the extent that they are predicated on their data collection theory. Dkt. 44 at 18. Specifically, Defendant argues that Plaintiffs' theory of injury that HP uses the data collected to punish its customers is theoretical and is not an injury in fact. *Id.* at 18-19. Without assessing the merits of Plaintiffs' claims, the Court finds that Plaintiffs allege that Defendant violated their individual rights and that they suffered injuries as a result of Defendant's conduct. *See* Dkt. 42 ¶¶ 86-157. Additionally, the Court finds that Plaintiffs' alleged injuries are "concrete and particularized." The TAC contains specific allegations describing what **[*19]** losses Plaintiffs suffered, including being forced to purchase HP-authorized cartridges, purchasing other printers, paying to dispose of their unused supplies, decreased market value of the printers, as well as money, time, and labor spent to research and fix the issues. *See id.* ¶¶ 97-99, 108-111, 121, 133, 141-42, 148, 155. "[A]s the Ninth Circuit recently reminded, 'standing analysis, which prevents a claim from being adjudicated for lack of jurisdiction, [may not] be used to disguise merits analysis, which determines whether a claim is one for which relief can be granted if factually true." *Fraley, 830 F. Supp. 2d at 800* (quoting *Catholic League for Religious and Civil Rights v. City & Cnty. of S.F., 624 F.3d 1043, 1049 (9th Cir. 2010)* (en banc)). "At this stage, the Court must presume 'that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* (citing *Lujan, 504 U.S. at 561*); *see also* *Ruiz v. Gap, Inc., 540 F. Supp. 2d 1121, 1126 (N.D. Cal. 2008)* (denying motion to dismiss for lack of standing but noting that "[s]hould it become apparent that [plaintiff's] alleged injury is in fact too speculative or hypothetical, the Court will conclude, as it must, that [plaintiff] lacks standing"). The Court finds that Plaintiffs have set forth sufficient "general factual allegations of injury resulting from the defendant's conduct" to survive a 12(b)(1) motion to dismiss. **[*20]** *See* *Lujan, 504 U.S. at 561*. Accordingly, Defendant's motion to dismiss pursuant to *Rule 12(b)(1)* is **DENIED**.

2. HP's Public Disclosures

Defendant first argues that several of Plaintiffs' claims fail to state a claim because Defendant's privacy policy advises consumers that Defendant "automatically" collects "product usage data such as . . . ink or toner brand." Dkt. 44 at 12. Defendant also contends that it publicly discloses on its webpages that its printers are "dynamic security enabled" and that "[c]artridges using a non-HP chip may not work, and those that work today may not work in the future." *Id.* at 12-13.

In the TAC, Plaintiffs allege that HP did not advise them of the unsolicited transmission that rendered their printers incompatible with third-party toner supply cartridges. Dkt. 42 ¶¶ 40-41, 52-53, 62-63. Further, Plaintiffs allege that "HP uses the firmware update process to conceal that it is actually collecting data on whether consumers are using HP or its competitors' cartridges." *Id.* ¶ 1. Additionally, in its opposition, Plaintiffs contend that no plaintiff visited any HP store page, any HP website at any relevant time, and did not rely on "any statements of HP that arguably could have put any of them on **[*21]** notice that automatic firmware updates might render a [] [p]rinter inoperable." Dkt. 47 at 14. In contrast, in *Parziale II*, the Court stated that plaintiffs were expressly notified that cartridges using a non-HP chip may not work, concluding that "Plaintiff was on notice of the potential firmware update and its effects." *Parziale II, 2020 U.S. Dist. LEXIS 179738, 2020 WL 5798274, at *7*. At the motion to dismiss stage, the Court is not prepared to find that Defendant's statements, which Plaintiffs purport that they did not view or rely on, establish an absolute bar to Plaintiffs' claims. *Usher, 828 F.2d at 561* ("On a motion to dismiss for failure to state a claim, the court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party.") (citation omitted).

3. Computer Fraud and Abuse Act ("CFAA") Claim

The CFAA provides that "[a]ny person who suffers damages or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief." *18 U.S.C. § 1030(g)*. "The CFAA prohibits a number of different computer crimes, the majority of which involve accessing computers without authorization or in excess of authorization, and then **[*22]** taking specified forbidden actions, ranging from obtaining information to damaging a computer or computer data." *LVRC Holdings LLC v. Brekka, 581 F.3d 1127, 1135 (9th Cir. 2009)* (citing *18 U.S.C. §§ 1030(a)(1)-(7) (2004)*). In the TAC, Plaintiffs allege that HP violated *Sections 1030(a)(5)(A)* and *1030(a)(2)(C)*. *Section 1030(a)(5)(A)* creates liability for whomever "knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer." *Section 1030(a)(2)(C)* creates liability for whomever "intentionally access a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer."

a. *18 U.S.C. § 1030(a)(5)(A)*

Defendant argues that Plaintiffs' *Section 1030(a)(5)(A)* claim fails because its firmware updates do not meet the statutory definition of "damage." Dkt. 44 at 29. Specifically, Defendant contends that "Plaintiffs do not allege that the updates destroyed their printers or data on them, or made their printers less secure." *Id.* Additionally, Defendant argues that Plaintiffs fail to allege that the damage was "without authorization" as defined by the statute. *Id.* at 30. Defendant argues that Plaintiffs were also on notice that the printers are "[d]ynamic security enabled" and that "[c]artridges using a non-HP chip may not work, and **[*23]** those that work today may not work in the future." *Id.*

Section 1030(e)(8) defines "damage" as "any impairment to the integrity or availability of data, a program, a system, or information." "[D]istrict courts in the Ninth Circuit have expressly held that, under the CFAA, it is not necessary for data to be physically changed or erased to constitute damage to that data." *NovelPoster v. Javitch Canfield Group, 140 F. Supp. 3d 954, 962 (N.D. Cal. 2014)*. In the TAC, Plaintiffs allege that after the firmware update transmission, the printers and cartridges stopped printing, displayed a "[s]upply problem" error message, and the printer and supply cartridges were disabled. Dkt. 42 ¶¶ 1, 41-42, 44, 53-56, 63-67. The Court finds that this qualifies as an "impairment to the integrity or availability of . . . a system," as required to show damage under the CFAA. *See* *18 U.S.C. § 1030(e)(8)*. Further, Plaintiffs allege that Defendant knowingly transmitted the firmware update and intentionally caused damage, and Defendant did not have permission or authorization from Plaintiffs to make these updates. *See* Dkt. 42 ¶¶ 91-95. The Court finds that these allegations are sufficient at the pleading stage. *See* *San Miguel v. HP Inc., 317 F. Supp. 3d 1075, 1085-86 (N.D. Cal. 2018)* ("To the extent Plaintiffs' CFAA claim is based upon *subsection (A)*, the claim is cognizable because *subsection (A)* does not require accessing **[*24]** a computer 'without authorization.'"). Finally, as discussed in Section III.B.2., the Court declines to find at this stage that Plaintiffs were on notice that the printers are "[d]ynamic security enabled" and that "[c]artridges using a non-HP chip may not work, and those that work today may not work in the future."

i. CFAA's Loss Requirement

In order to bring a civil action under the CFAA, a person must "suffer[] damage or loss by reason of a violation" of the statute. *18 U.S.C. § 1030(g)*. Plaintiffs must allege "loss to 1 or more persons during any 1-year period . . . aggregating at least $5,000 in value." *Id.* at *§ 1030(c)(4)(A)(i)(I)*. Loss is defined as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." *Id.* at *§ 1030(e)(11)*.

Defendant contends that Plaintiffs cannot satisfy this statutory "loss" requirement. Dkt. 44 at 31. Defendant argues that "the TAC does not plead that the alleged violation . . . resulted in any loss—much less loss of 'at least $5,000.'" *Id.* at **[*25]** 32 (emphasis omitted).

Courts have found "that the legislative history of the CFAA revealed that Congress intended to permit aggregation of damages, so long as those damages arose from the same act by a defendant." *In re Apple & AT & TM Antitrust*

Litigation, 596 F. Supp. 2d 1288, 1308 (N.D. Cal. 2008) ("The Court therefore permits Plaintiffs to aggregate their individual damages to reach the $5,000 threshold."). Plaintiffs allege that Mobile Emergency purchased its printer for $238.96 and purchased Greensky toner supply cartridges for $52.49. Dkt. 42 ¶¶ 97-98. Performance Auto purchased multiple sets of GPC Image, Linkyo, and Greenksy supply cartridges for approximately $60 per set and then purchased a printer from another manufacturer. *Id.* ¶ 97. Lynch spent $239.25 for his HP printer, bought supply toner cartridges from Express-Inks for $215.46, and then spent $493.56 to get his printer working again. *Id.* ¶¶ 97-98. Plaintiffs allege that "[t]he firmware transmission also caused loss to Plaintiffs and Class members, as they had to expend money, time, and labor to investigate and repair disabled Class Printers." *Id.* ¶ 99. Further, Plaintiffs allege that "Defendant sent this transmission to at least ten thousand (10,000) Class Printers." *Id.* ¶ 79. In sum, the Court concludes **[*26]** that Plaintiffs sufficiently plead cognizable loss of at least $5,000 in value to satisfy CFAA's loss requirement.

b. *18 U.S.C. § 1030(a)(2)(C)*

Defendant argues that Plaintiffs' *Section 1030(a)(2)(C)* claim fails because Defendant did not act "without authorization" given that Plaintiffs concede "not only that HP had permission to access their printers, but also that HP had the 'exclusive ability' to access them." Dkt. 44 at 29 (citing Dkt. 42 ¶ 4). Defendant also argues that Plaintiffs' theory is not plausible given that HP makes public disclosures regarding its practice of "automatically" collecting "product usage data such as . . . ink or toner brand." *Id.*

Here, Plaintiffs allege that "[o]n a repeated basis, HP accessed Plaintiffs' and Class members' Class Printers without their authorization or knowledge, and obtained information on the type of printer cartridge Plaintiffs and Class members were using." Dkt. 42 ¶ 90. However, Plaintiffs also allege that HP "has the exclusive ability to install firmware updates to the printers it sells that are connected to the Internet." *Id.* ¶ 4. Accordingly, this subsection is not applicable in light of Plaintiffs' allegations in the TAC regarding HP's ability to install firmware updates. *See* ***[*27]*** *San Miguel, 317 F. Supp. 3d at 1085* (finding that certain subsections of *18 U.S.C. § 1030* cannot apply because plaintiffs alleged that HP had "authorized access" and "can communicate with HP printers after it sells them by updating their firmware"). Further, "Congress enacted the CFAA in 1984 primarily to address the growing problem of computer hacking, recognizing that '[i]n intentionally trespassing into someone else's computer files, the offender obtains at the very least information as to how to break into that computer system.'" *U.S. v. Nosal, 676 F.3d 854, 858 (9th Cir. 2012)* (en banc). "The CFAA should be interpreted in a manner that 'maintains the CFAA's focus on hacking rather than turning it into a sweeping Internet-policing mandate.'" *San Miguel, 317 F. Supp. 3d at 1085* (citing *Nosal, 676 F.3d at 858*). The Court finds that Plaintiffs have not alleged facts to show that HP accessed their printers "without authorization."

Accordingly, the motion to dismiss Plaintiffs' CFAA claim is **DENIED** to the extent that the CFAA claim is based on *Section 1030(a)(5)(A)* and **GRANTED WITH LEAVE TO AMEND** to the extent that the CFAA claim is based on *Section 1030(a)(2)(C)*.

4. Comprehensive Computer Data Access and Fraud Act ("CDAFA") Claim

California Penal Code § 502 imposes liability on a person who commits certain acts that constitute a public offense. *Cal. Penal Code § 502(c)*. The relevant provision of the CDAFA provides that a person **[*28]** is liable who:

> (1) Knowingly accesses and without permission alters, damages, deletes, destroys, or otherwise uses any data, computer, computer system, or computer network in order to either (A) devise or execute any scheme or artifice to defraud, deceive, or extort, or (B) wrongfully control or obtain money, property, or data.
> (2) Knowingly accesses and without permission takes, copies, or makes use of any data from a computer, computer system, or computer network, or takes or copies any supporting documentation, whether existing or residing internal or external to a computer, computer system, or computer network.
> (3) Knowingly and without permission uses or causes to be used computer services.

> (4) Knowingly accesses and without permission adds, alters, damages, deletes, or destroys any data, computer software, or computer programs which reside or exist internal or external to a computer, computer system, or computer network.
> (5) Knowingly and without permission disrupts or causes the disruption of computer services or denies or causes the denial of computer services to an authorized user of a computer, computer system, or computer network.
> ***
>
> (7) Knowingly and without permission accesses **[*29]** or causes to be accessed any computer, computer system, or computer network.

Cal. Penal Code § 502(c)(1)-(5), *(7)*.

Defendant contends that Plaintiffs have failed to allege that HP engaged in the conduct at issue "without permission." Dkt. 44 at 33. Specifically, Defendant argues that "Plaintiffs' admission that HP had the 'exclusive ability' to access their printers 'to install firmware updates'" as well HP's public disclosures regarding its dynamic security and data collection undermines Plaintiffs' theories. *Id.* Defendant also argues that Plaintiffs fail to allege that HP's data collection of firmware updates circumvented any technical barriers. *Id.*

The Ninth Circuit has held that *§ 502* is different from CFAA. *United States v. Christensen, 828 F.3d 763, 789 (9th Cir. 2015)*. "In contrast to the CFAA, the California statute does not require unauthorized access. It merely requires knowing access." *Id.* (emphasis omitted). "Rather, whether there is liability under *§ 502* requires an analysis of the specific 'acts' that are alleged to constitute an offense and whether there was 'permission' to engage in those acts." *San Miguel, 317 F. Supp. 3d at 1087*. The Court finds that Plaintiffs' allegations that they received an allegedly false error message stating that the printer had a "supply problem" is sufficient to state a claim for **[*30]** violation of *subsection (c)(1)*. Dkt. 42 ¶¶ 1, 5, 29, 30, 41, 53, 63, 65, 107. The Court also finds that Plaintiffs' allegations that Defendant collected data regarding the type of cartridges Plaintiffs were using to operate the printers is sufficient to state a claim for violation of *subsections (c)(2)* and *(c)(3)*. *Id.* ¶¶ 1, 27, 107. The Court finds that Plaintiffs' allegations that Defendant transmitted firmware updates that disabled their printers is sufficient to state a claim for violation of *subsections (c)(4)* and *(c)(5)*. *Id.* ¶¶ 1, 2, 6, 7, 24, 26, 42, 44, 54, 56, 64, 67, 107. The Court finds that the alleged violation of *subsection (c)(7)*s fails because Plaintiffs acknowledge that HP had permission to access their printers. Accordingly, Defendant's motion to dismiss the CDAFA claim is **DENIED** to the extent it is based upon *subsections (c)(1)-(c)(5)* and **GRANTED WITHOUT LEAVE TO AMEND** to the extent it is based upon *subsection (c)(7)*. *See* *Allen v. City of Beverly Hills, 911 F.2d 367, 374 (9th Cir. 1990)* (finding that "any further amendment to the complaint would likely prove futile").

5. False Advertising Law ("FAL"), Consumers Legal Remedies Act ("CLRA"), and Unfair Competition Law ("UCL") Fraudulent Prong Claim

Plaintiffs allege that HP made false and misleading statements and material omissions regarding the compatibility of third-party ink cartridges with their printers in violation of the FAL, CLRA, and the fraudulent prong of the UCL. The FAL makes it unlawful for **[*31]** any person to "induce the public to enter into any obligation" based on a statement that is "untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." *Cal. Bus. & Prof. Code § 17500*. "Whether an advertisement is 'misleading' must be judged by the effect it would have on a reasonable consumer." *Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1161-62* (citing *Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008)*). "A reasonable consumer is the ordinary consumer acting reasonably under the circumstances." *Id. at 1162* (internal quotation marks and citation omitted). Similarly, the CLRA, which prohibits "unfair methods of competition and unfair or deceptive acts or practices," are also governed by the "reasonable consumer test." *Cal. Civ. Code § 1770*; *In re Sony PS3 Other OS Litigation, 551 F. App'x 916, 920 (9th Cir. 2014)*. "In order to state a cause of action under the fraud prong of the UCL, a plaintiff must show that members of the public are likely to be deceived," which is also "judged by the effect it would have on a reasonable consumer." *In re iPhone Application Litig., 844 F. Supp. 2d 1040, 1073 (N.D. Cal. 2012)* (citing *Schnall v. Hertz Corp., 78 Cal. App. 4th 1144, 1167, 93 Cal. Rptr. 2d 439*

(2000)); *Davis, 691 F.3d at 1169* (quoting *Puentes v. Wells Fargo Home Mortg., Inc., 160 Cal. App. 4th 638, 72 Cal. Rptr. 3d 903, 909 (2008)*).

Defendant contends that Plaintiffs cannot pursue relief under the FAL and UCL and Lynch cannot pursue equitable relief under the CLRA because the alleged injuries can be remedied with monetary damages. Dkt. 44 at 19-21. In *Sonner v. Premier Nutrition Corp.*, the Ninth Circuit held that a plaintiff **[*32]** "must establish that she lacks an adequate remedy at law before securing equitable restitution for past harm under the UCL and CLRA." *971 F.3d 834, 844 (9th Cir. 2020)* (citations omitted). "[E]quitable relief can come in different forms - for example, injunctive relief or restitution." *Julian v. TTE Technology, Inc., No. 20-cv-02857-EMC., 2020 U.S. Dist. LEXIS 215039, 2020 WL 6743912, at *4 (N.D. Cal. Nov. 17, 2020)*. Further, "[t]he holding in *Sonner* applies only to 'equitable restitution for past harm under the UCL,' not to an injunction for future harm." *Brooks v. Thomson Reuters Corp., No. 21-cv-01418-EMC, 2021 U.S. Dist. LEXIS 154093, 2021 WL 3621837, at *10 (N.D. Cal. Aug. 16, 2021)* (citing *Sonner, 971 F.3d at 844*) (finding that "Plaintiffs are not barred from seeking equitable relief in the form of an injunction under the UCL") (emphases omitted). Plaintiffs' FAL, UCL, and CLRA claims seek equitable relief in the form of an injunction. *See* Dkt. 42 ¶¶ 124-27, 134-35, 143-44, 150-51, 165-66. Accordingly, Plaintiffs are not barred from seeking equitable relief under these claims. *See* *Brooks, 2021 U.S. Dist. LEXIS 154093, 2021 WL 3621837, at *11* (noting that "[m]ore recently, . . . other courts have declined to apply *Sonner* to bar UCL claims for injunctive relief, recognizing that the prospect of paying damages is sometimes insufficient to deter a defendant from engaging in an alleged unlawful, unfair, or fraudulent business practice") (citations omitted).

Defendant argues that the information that Plaintiffs contend HP omitted regarding the dynamic security **[*33]** and the data collection was disclosed on various HP webpages, including the store pages and the Troubleshooting Page. Dkt. 44 at 22-23. As previously discussed in Section III.B.2., at the motion to dismiss stage, the Court declines to find that Plaintiffs were on notice that Defendant "automatically" collects "product usage data such as . . . ink or toner brand" or that the printers are "[d]ynamic security enabled" and that "[c]artridges using a non-HP chip may not work, and those that work today may not work in the future."

Defendant argues that it did not have a duty to make any disclosures regarding dynamic security and that "the duty to disclose is limited to a physical product defect relating to the central function of the product or a safety defect." *Id.* at 22. Defendant also argues that Plaintiffs' claims under the FAL and fraudulent prong of the UCL based on the "supply problem" error message is not viable because members of the public are not "likely to be deceived" by the message. *Id.* at 24-25. Further, Defendant argues that the error message also cannot support a CLRA violation because the relevant provision prohibits representing that a replacement part is needed when in **[*34]** fact it is not. *Id.* Finally, Defendant contends that Plaintiffs cannot establish that the error message caused injury. *Id.* at 25.

In the TAC, Plaintiffs allege that Defendant's printers displayed a "supply problem" error message even though there was no supply problem, and it "intentionally misrepresented the cause of the printer issue, suggesting that the third-party supply cartridges were broken when, instead, the transmission simply disabled the supply cartridges that had previously functioned satisfactorily and would have continued to function but for HP's transmission of the update." Dkt 42 ¶¶ 5, 30, 41, 53, 63, 65-66. "The alleged omission, that HP intentionally used a firmware update to disable printers that were using non-HP ink cartridges, is arguably contrary to the explanations for the printer failure stated in the error messages." *San Miguel, 317 F. Supp. 3d at 1090*. At the pleading stage, the Court finds that Plaintiffs' allegations are sufficient to state fraud by omission under the FAL, CLRA, and the UCL. Accordingly, Defendant's motion to dismiss Plaintiffs' claims for fraud by false and misleading statements or omission under the FAL, CLRA, and the UCL are **DENIED**.

6. Remaining Unfair Competition Law ("UCL") [*35] Claims

The UCL creates a cause of action for business practices that are: (1) unlawful; (2) unfair, or (3) fraudulent. *Cal. Bus. & Profs. Code § 17200*. Each "prong" of the UCL provides a separate and distinct theory of liability. *Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 731 (9th Cir. 2007)*. Further, to have standing to pursue this claim, plaintiffs must show that they "lost money or property" because of Defendant's conduct. *Cal. Bus. & Prof. Code § 17204*; *see* *In re Facebook, Inc., Consumer Privacy User Profile Litig., 402 F. Supp. 3d 767, 804 (N.D. Cal. 2019)*.

a. Unfair Prong

"The UCL also creates a cause of action for a business practice that is 'unfair' even if not specifically proscribed by some other law." *In re iPhone Application Litig., 844 F. Supp. 2d at 1072* (citing *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1143, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*). "The UCL does not define the term 'unfair.' In fact, the proper definition of 'unfair' conduct against consumers 'is currently in flux' among California courts." *Hodsdon v. Mars, Inc., 891 F.3d 857, 866 (9th Cir. 2018)* (quoting *Davis, 691 F.3d at 1169*). "Before *Cel-Tech*, courts held that 'unfair' conduct occurs when that practice 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *Davis, 691 F.3d at 1169* (citing *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 85 Cal. Rptr. 2d 301, 316 (1999)*). The balancing test in *S. Bay Chevrolet* requires the Court to "weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Davis, 691 F.3d at 1169* (internal quotation marks and citation omitted). In *Cel-Tech*, the California Supreme Court established a more concrete definition **[*36]** of "unfair," defining it as "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *20 Cal. 4th at 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527*. Further, "any finding of unfairness to competitors under *section 17200* [must] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Id. at 186-87*. While the *Cel-Tech* test did not apply to actions by consumers, "some courts in California have extended the *Cel-Tech* definition to consumer actions." *Davis, 691 F.3d at 1170*.

Defendant contends that Plaintiffs fail to state a plausible claim under either test. Dkt. 44 at 26. Defendant argues that under the *South Bay* test, Plaintiffs fail to plausibly allege that the conduct at issue is sufficient to state a claim. *Id.* Specifically, Defendant argues that HP's dynamic security feature benefits customers, HP disclosed the third-party cartridge compatibility issue as well as the product usage data they collect, and the alleged omissions do not "rise to the level of immoral or substantially injurious conduct." *Id.* at 26-27. Defendant also **[*37]** argues that under the *Cel-Tech* test, Plaintiffs only allege in conclusory terms that HP's conduct "offends an established public policy." *Id.*

As previously discussed in Section III.B.2., the Court declines to find that Plaintiffs were on notice that Defendant "automatically" collects "product usage data such as . . . ink or toner brand" or that the printers are "[d]ynamic security enabled" and that "[c]artridges using a non-HP chip may not work, and those that work today may not work in the future" at the pleading stage. Further, at the motion to dismiss stage, the Court cannot say that the benefits from HP's business practices of collecting product usage data and its dynamic security feature outweighs the harm. *See In re iPhone Application Litig., 844 F. Supp. 2d at 1073* ("While the benefits of Apple's conduct may ultimately outweigh the harm to consumers, this is a factual determination that cannot be made at this stage of the proceedings."). Accordingly, Defendant's motion to dismiss on the unfair prong of the UCL is **DENIED**.

b. Unlawful Prong

"The unlawful prong of the UCL prohibits anything that can properly be called a business practice and that at the same time is forbidden by law." *In re iPhone Application Litig., 844 F. Supp. 2d at 1072* (citing *Cel-Tech, 20 Cal.4th at 180*) (internal quotation marks omitted)). *Section 17200 of the Business and Professions Code* permits **[*38]** injured customers to "borrow" violations of other laws and treat them as unfair competition that is independently actionable. *Id.*

In the TAC, Plaintiffs allege that "[e]ach of HP's malicious transmissions constitutes a violation of *18 U.S.C. § 1030(a)(5)(A) of the CFAA*, *Cal. Penal Code § 502*, California's False Advertising Law, and trespass to chattels." Dkt. 42 ¶ 147. The Court has already considered the adequacy of Plaintiffs' allegations related to *18 U.S.C. § 1030(a)(5)(A) of the CFAA* (Section III.B.3), *Cal. Penal Code § 502* (Section III.B.4), and FAL (Section III.B.5). Further, the Court discusses trespass to chattels below in Section III.B.7. Accordingly, Plaintiffs' UCL claim survives to the extent it is based upon *18 U.S.C. § 1030(a)(5)(A) of the CFAA*, the remaining subsections under *Cal. Penal*

Code § 502, and the FAL. Thus, Defendant's motion to dismiss Plaintiffs' UCL claim under the unlawful prong is **DENIED**.

7. Trespass to Chattels

The California Supreme Court has held that the principles underlying the tort of trespass to chattels for "unauthorized entry" apply to allegations of digital trespass. *See* *Intel Corp. v. Hamidi, 30 Cal. 4th 1342, 1 Cal. Rptr. 3d 32, 71 P.3d 296 (2003)*. "[T]o prevail on a claim for trespass based on accessing a computer system, the plaintiff must establish: (1) defendant intentionally and without authorization interfered with plaintiff's possessory interest in the computer system; and (2) defendant's **[*39]** unauthorized use proximately resulted in damage to plaintiff." *eBay, Inc. v. Bidder's Edge, Inc., 100 F.Supp.2d 1058, 1069-70 (N.D. Cal. 2000)*.

Plaintiffs allege that HP "wrongfully, intentionally, and without authorization interfered with the ownership, possession, and use of the Class Printers and Plaintiffs' and Class members' supply cartridges" when it sent malware to the printers which disabled printers containing non-HP cartridges, rendering those cartridges and printers inoperable. Dkt. 42 ¶ 154. Additionally, Plaintiffs allege that HP also accessed the printers "without the users' knowledge or permission to obtain data on the types of cartridges being used to operate the devices." *Id.* As previously discussed in Section III.B.3.b, while Plaintiffs allege that HP acted "without authorization," Plaintiffs also allege that HP "has the exclusive ability to install firmware updates to the printers it sells that are connected to the Internet." *Id.* ¶ 4. Accordingly, this subsection is not applicable in light of Plaintiffs' allegations in the TAC regarding HP's ability to install firmware updates. Thus, Defendant's motion to dismiss Plaintiffs' trespass to chattels claim is **GRANTED WITH LEAVE TO AMEND**.

8. Plaintiffs' Request for Injunctive Relief

Defendant contends **[*40]** that Plaintiffs' request for prospective injunctive relief should be dismissed or stricken because Plaintiffs lack Article III standing to pursue this relief. Dkt. 44 at 35. Defendant argues that in the TAC, Plaintiffs allege that Performance Automotive alleges that it purchased a different printer to avoid further losses and Mobile Emergency and Lynch replaced their third-party cartridges with HP-branded cartridges. *Id.* (citing Dkt. 42 ¶¶ 44, 56, 68). Further, Defendant argues that Plaintiffs' allegations that they "would continue to use" their printers "with non-HP toner supply cartridges if given the opportunity to do so without risk of future malware transmissions from HP" is insufficient to establish Plaintiffs' standing to pursue injunctive relief. *Id.* at 35-36 (citing Dkt. 42 ¶ 7).

In the TAC, Plaintiffs consistently allege that they "would continue to use their [printers] with non-HP toner supply cartridges if given the opportunity to do so without the risk of future malware transmissions from HP." Dkt. 42 ¶¶ 7, 38, 45, 50, 57, 61, 70. Here, "the threat of a future firmware update that could further modify Plaintiffs' printers is sufficiently 'concrete and particularized' to establish **[*41]** standing." *Parziale v. HP, Inc., 445 F.Supp.3d 435, 452 (2020)* (finding that "[t]he injury is particularized because it would affect Plaintiff, as an owner of HP printers, in a personal and individual way") (internal quotation marks omitted). The Court finds that at the motion to dismiss stage, Plaintiffs have shown a sufficient likelihood that they will be wronged again in a similar way to establish standing for injunctive relief. Thus, HP's motion to dismiss or strike Plaintiffs' request for injunctive relief is **DENIED**.

IV. CONCLUSION

For the reasons stated above, the Court **DENIES** Defendant's motion to dismiss pursuant to *Rule 12(b)(1)*. Additionally, the Court **GRANTS IN PART AND DENIES IN PART** Defendant's motion to dismiss pursuant to *Rule 12(b)(6)*. Specifically, Defendant's motion to dismiss Plaintiffs' claims for violations of CFAA to the extent that the CFAA claim is based on *Section 1030(a)(5)(A)*, CDAFA to the extent it is based upon *subsections (c)(1)-(c)(5)*, FAL, CLRA, UCL, and Plaintiffs' request for injunctive relief are **DENIED**. Defendant's motion to dismiss Plaintiffs' claims against Defendant for violations of CFAA to the extent that the CFAA claim is based on *Section 1030(a)(2)(C)* and trespass to chattels are **GRANTED WITH LEAVE TO AMEND**. Defendant's motion to dismiss Plaintiffs' claim against Defendant for violation of CDAFA to the **[*42]** extent it is based upon *subsection (c)(7)* is **GRANTED WITHOUT LEAVE TO AMEND**. Additionally, Defendant's motion to strike Plaintiffs' request for injunctive relief is **DENIED**.

Plaintiffs may file an amended complaint by **October 29, 2021**. Plaintiffs may not add new causes of actions or parties without leave of the Court or stipulation of the parties pursuant to *Federal Rule of Civil Procedure 15*.

SO ORDERED.

Dated: October 15, 2021

/s/ Susan Van Keulen

SUSAN VAN KEULEN

United States Magistrate Judge

Wyndham Vacation Ownership v. Montgomery

United States District Court for the Middle District of Florida, Tampa Division

October 18, 2021, Decided; October 18, 2021, Filed

Case No. 8:19-cv-1895-CEH-CPT

Reporter
2021 U.S. Dist. LEXIS 207860 *; 2021 WL 4948151

WYNDHAM VACATION OWNERSHIP, INC., WYNDHAM VACATION REORTS, INC., WYNDHAM RESORT DEVELOPMENT CORPORATION, SHELL VACATIONS, LLC, SVC-WEST, LLC, SVC-AMERICANA, LLC, and SVC-HAWAII, LLC, Plaintiffs, v. THE MONTGOMERY LAW FIRM, LLC, MONTGOMERY & NEWCOMB, LLC, M. SCOTT MONTGOMERY, ESQ., W. TODD NEWCOMB, ESQ., CLS, INC., ATLAS VACATION REMEDIES, LLC, PRINCIPAL TRANSFER GROUP, LLC, DONNELLY SNELLEN, JASON LEVI HEMINGWAY, MUTUAL RELEASE CORPORATION, DAN CHUDY, MATTHEW TUCKER and CATALYST CONSULTING FIRM LLC, Defendants.MONTGOMERY & NEWCOMB, LLC, Counter-Plaintiff, v. WYNDHAM VACATION OWNERSHIP, INC., WYNDHAM VACATION REORTS, INC., WYNDHAM RESORT DEVELOPMENT CORPORATION, SHELL VACATIONS, LLC, SVC-WEST, LLC, SVC-AMERICANA, LLC, and SVC-HAWAII, LLC, Counter-Defendants.

Prior History: *Wyndham Vacation Ownership, Inc. v. Montgomery Law Firm, LLC, 2020 U.S. Dist. LEXIS 78356, 2020 WL 2128498 (M.D. Fla., May 5, 2020)*

Core Terms

N Law, timeshare, lawsuit, preliminary injunction, counterclaim, exit, anticompetitive, courts, Vacations, conspiracy, quotation, marks, injunction, antitrust, anti trust law, allegations, prong, customers, sham, asserts, movant, consumers, parties, injunctive relief, cause of action, competitors, contracts, avers, trade association, demonstrating

Counsel: **[*1]** For Wyndham Vacation Ownership, Inc., a Delaware corporation, Wyndham Vacation Resorts, Inc., a Delaware corporation, Wyndham Resort Development Corporation, an Oregon Corporation, Shell Vacations, LLC, a Arizona limited liability company, SVC-Americana, LLC, an Arizona limited liability company, SVC-Hawaii, LLC, a Hawaii limited liability company, Plaintiffs: Alfred J. Bennington, Jr., Glennys Ortega Rubin, LEAD ATTORNEYS, Shutts & Bowen, LLP, Orlando, FL; Christian Leger, GrayRobinson, PA, Miami, FL; Jonathan Phillip Hart, Shutts & Bowen, LLP, West Palm Beach, FL; Daniel Joseph Barsky, Shutts & Bowen LLP, Miami, FL.

For SVC-West, LLC, a California limited liability company, Plaintiff: Alfred J. Bennington, Jr., Glennys Ortega Rubin, LEAD ATTORNEYS, Shutts & Bowen, LLP, Orlando, FL; Jonathan Phillip Hart, Shutts & Bowen, LLP, West Palm Beach, FL; Daniel Joseph Barsky, Shutts & Bowen LLP, Miami, FL.

The Montgomery Law Firm, LLC, a Missouri limited liability company, Defendant, Pro se.

Montgomery & Newcomb, LLC, a Missouri limited liability company, Defendant, Pro se.

CLS, Inc., a Missouri corporation, doing business as, Atlas Vacation Remedies, doing business as, Principal Transfer Group, **[*2]** Defendant, Pro se, Springfield, MO.

Atlas Vacation Remedies, LLC, a Missouri limited liability company, Defendant, Pro se, Springfield, MO.

Principal Transfer Group, LLC, a Missouri limited liability company, Defendant, Pro se, Sprinfield, MO.

Jason Levi Hemingway, an individual, Defendant, Pro se, Springfield, MO.

Mutual Release Corporation, a MIssouri limited liability company, also known as, Defendant, Pro se.

For Dan Chudy, an individual, Defendant: David Anthony Wilson, LEAD ATTORNEY, Law Office of David A. Wilson, Ocala, FL.

Matthew Tucker, an individual, Defendant, Pro se, Springfield, MO.

For Catalyst Consulting Firm LLC, a Missouri limited liability company, Defendant: David Steinfeld, LEAD ATTORNEY, Law Office of David Steinfeld, PL, Palm Beach Gardens, FL.

For SVC-Americana, LLC, an Arizona limited liability company, SVC-Hawaii, LLC, a Hawaii limited liability company, SVC-West, LLC, a California limited liability company, Shell Vacations, LLC, a Arizona limited liability company, Wyndham Resort Development Corporation, an Oregon Corporation, Wyndham Vacation Ownership, Inc., a Delaware corporation, Wyndham Vacation Resorts, Inc., a Delaware corporation, Counter Defendants: Alfred **[*3]** J. Bennington, Jr., Glennys Ortega Rubin, LEAD ATTORNEYS, Shutts & Bowen, LLP, Orlando, FL; Jonathan Phillip Hart, Shutts & Bowen, LLP, West Palm Beach, FL; Daniel Joseph Barsky, Shutts & Bowen LLP, Miami, FL.

Judges: HONORABLE CHRISTOPHER P. TUITE, United States Magistrate Judge.

Opinion by: CHRISTOPHER P. TUITE

Opinion

REPORT AND RECOMMENDATION

Before me on referral is Defendant/Counter-Plaintiff Montgomery & Newcomb, LLC's (M&N Law) motion for a preliminary injunction against Plaintiffs/Counter-Defendants Wyndham Vacation Ownership, Inc.; Wyndham Vacation Resorts, Inc.; Wyndham Resort Development Corporation; Shell Vacations, LLC; SVC-West, LLC; SVC-Americana, LLC; and SVC-Hawaii, LLC (collectively, Wyndham).[1] (Doc. 353). After careful consideration of the parties' submissions and with the benefit of a hearing on the matter, I respectfully recommend that the Court deny M&N Law's motion.

I.

Wyndham is a real estate developer that promotes, markets, and manages "timeshares," mostly as vacation properties. (Doc. 1 at 3). M&N Law is a Missouri-based law firm operated by Defendants M. Scott Montgomery and W. Todd Newcomb that specializes in timeshare "exits." (Docs. 353-8, 353-9). M&N Law's instant request for a preliminary **[*4]** injunction comes before the Court after several years of litigation between the parties, which has spanned multiple lawsuits across state and federal courts in both Florida and Missouri. To understand the basis for the parties' dispute, as well as the nature and context of M&N Law's motion, some background is necessary.[2]

Wyndham sells its timeshares to consumers, who, in return, acquire certain benefits, including—most notably—the right to use Wyndham's resorts during designated periods of time. (Doc. 1 at 3). Wyndham memorializes its

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[1] In its operative pleading, M&N Law also names "Wyndham Destinations, Inc." as a counter-defendant. (Doc. 342 at 11). None of the Plaintiffs in this action bear that name, however, nor does the record contain a return of service for such an entity. In addition, M&N Law's instant submission does not contain any references to a "Wyndham Destinations, Inc." Accordingly, I assume for purposes of this report and recommendation that M&N Law does not seek a preliminary injunction against Wyndham Destinations, Inc.

[2] The background set forth herein is derived largely from the Court's prior Orders in this action, *see, e.g.*, (Docs. 144, 275, 336), the parties' respective pleadings and other submissions, *see, e.g.*, (Docs. 1, 342, 353, 355, 360), and decisions rendered by other courts in various related actions.

timeshare arrangements with its customers in written contracts that govern the financial aspects of the parties' relationship. *Id.* at 16. The terms of those contracts cover, among other matters, the base price of the consumers' timeshare interests, the payment of taxes and other intermittent fees associated with maintaining the properties, and, on occasion, the debt the consumers incurred in obtaining their rights and benefits under their agreements with Wyndham. *Id.*

According to M&N Law, some timeshare owners ultimately conclude that the costs associated with complying with their contractual obligations with Wyndham exceed the rewards **[*5]** of their timeshare interests. (Doc. 342 at 14). Other owners, M&N Law avers, believe that they are victims of high-pressure sales tactics employed by Wyndham (and other timeshare developers), which result in them feeling "trapped" in unreasonably priced, long-term agreements for properties they rarely use. *Id.* M&N Law further avers that when these disgruntled customers look to off load their timeshares to other parties, they learn that the market places little value on this asset. *Id.* at 15. Upon being faced with many years of spending large sums of money for vacation properties they no longer want, these customers—M&N Law alleges—look for an expeditious way to escape their legal commitments.

For its part, Wyndham contends that, to the extent its customers are dissatisfied, they can settle their grievances with Wyndham through mutually agreed-upon resolutions or through alternative product offerings. (Doc. 1 at 4). Despite these options, Wyndham asserts that a "nefarious cottage industry" has emerged to "prey[ ] upon unsuspecting timeshare owners" and to drive a wedge between Wyndham and its existing customers. *Id.* at 3, 4-7. Wyndham avers that some of the entities involved in this **[*6]** so-called "timeshare exit" business "instruct, deceive, induce, or persuade" the owners simply to stop paying the costs imposed under their timeshare contracts with Wyndham on the premise that the owners can "exit" their legal agreements by doing so. *Id.* at 3, 5. By Wyndham's account, these exit entities "demand exorbitant upfront payments" but frequently "do little or nothing on behalf of the customer[s]." *Id.* at 4.

According to Wyndham, the basic structure of this alleged scam is as follows. First, M&N Law's co-conspirators—with M&N Law's knowledge and approval—employ "various advertising methods, including online, telemarketing, direct mailing, and in-person sales presentations, to target and solicit [Wyndham's] timeshare owners to use their timeshare exit services." (Doc. 144 at 4) (citing Doc. 1 at 24-43); *see also* (Doc. 1 at 22). As part of these presentations, M&N Law's cohorts reportedly "denigrat[e] timeshare developers in general, and Wyndham in particular" by providing "distorted" and "misleading" information about the future costs associated with the owners' timeshare interests. (Doc. 1 at 40). The presentations also supposedly guarantee the owners a successful "exit" from **[*7]** their timeshare contracts but do not inform them about the potential negative consequences—namely, default and foreclosure—that may occur when they cease paying for their timeshares. (Doc. 275 at 3-4) (citing Doc. 1 at 9-22).

Once the timeshare owners remit a substantial fee to the marketers, Wyndham claims these entities share their proceeds with M&N Law (as well as with other law firms) and additionally "refer" the timeshare owners to M&N Law to "implement [the] purported 'cancellation' or 'transfer' services related to" the owners' timeshare contracts with Wyndham. (Doc. 1 at 5). M&N Law then allegedly sends dunning letters on behalf of its "clients" to Wyndham, in which it cites various defenses against the timeshare agreements in the "hop[e] that the threat of litigation will convince [Wyndham] to cancel or release the timeshare owners from their contracts." (Doc. 275 at 4) (citing Doc. 1 at 23). By Wyndham's account, M&N Law often takes no further action to aid the timeshare owners, and the owners are eventually harmed when Wyndham forecloses on the owners' timeshare interests due to their lack of payment. *Id.*; (Doc. 1 at 6). Wyndham avers that "[t]housands of customers" have **[*8]** been victimized by the actions of M&N Law's unseemly confederacy, and that these consumers have paid M&N Law and others in the exit industry as much as "tens of thousands of dollars" for what are effectively illusory services. (Doc. 1 at 44). And because the timeshare owners are no longer paying Wyndham the monies that they owe, Wyndham asserts that it loses out on the revenue associated with its timeshare contracts (which it estimates has already totaled "millions of dollars") and also suffers damage to its goodwill. *Id.* at 6, 7.

The opening salvo in the now years long litigation involving Wyndham and M&N Law occurred in the months leading up to the commencement of this lawsuit. In August 2018, M&N Law brought an action against Wyndham in Missouri state court on behalf of "dozens" of supposedly defrauded timeshare owners. (Doc. 353-8); *Kohlbeck v.*

Wyndham Vacation Resorts, Inc., 7 F.4th 729, 733 (8th Cir. 2021). Following the removal of that case, a district court in the Western District of Missouri awarded summary judgment to Wyndham, and the Eighth Circuit Court of Appeals affirmed that judgment on appeal. *Kohlbeck, 7 F.4th at 733*.

In December 2018, roughly four months after the initiation of the *Kohlbeck* action, Wyndham filed this suit in the Middle District of Florida's Orlando Division **[*9]** against M&N Law, Messrs. Montgomery and Newcomb, and multiple other Defendants, alleging that they were all engaged in the above fraudulent scheme. (Doc. 1). Based on those allegations, Wyndham asserted claims for (1) false and misleading advertising and contributory false advertising under the Lanham Act, *15 U.S.C. § 1125*; (2) tortious interference with contractual relations; (3) civil conspiracy; and (4) violations of the *Florida Deceptive and Unfair Trade Practices Act (FDUTPA), §§ 501.201-213, Fla. Stat.* (Doc. 1 at 46-70).

In response to Wyndham's commencement of this litigation, attorneys Montgomery and Newcomb filed two "separate but identical actions" in Missouri state court against Wyndham, its law firm, and its process server, asserting that this case constituted "an abuse of process." *Newcomb v. Wyndham Vacation Ownership, Inc., 999 F.3d 1134, 1135-36 (8th Cir. 2021)*. Wyndham and the other defendants in the Missouri actions removed those lawsuits to federal court, where they were dismissed at the pleading stage. *Id.* Messrs. Montgomery and Newcomb appealed those decisions, but the Eighth Circuit dismissed their challenges on jurisdictional grounds. *Id.*[3]

In the interim, M&N Law and the other Defendants also moved to dismiss the instant lawsuit for lack of personal jurisdiction or, alternatively, to **[*10]** have it transferred to the Western District of Missouri. *See* (Docs. 31, 51, 56, 67, 100). After the parties engaged in substantial jurisdictional discovery, a District Judge in the Orlando Division—the Honorable Roy B. Dalton—issued an Order in August 2019 denying the Defendants' motion. (Doc. 144). In doing so, Judge Dalton found that Wyndham had adequately alleged claims for tortious interference with contractual relations and civil conspiracy, and that Wyndham's Lanham Act and FDUTPA claims were likewise not subject to dismissal because the Defendants had failed to challenge the legal sufficiency of those causes of action. *Id.* Judge Dalton also included a directive in his Order that the case be transferred to the District's Tampa Division. *Id.*

In August 2019, shortly after that transfer was effectuated, M&N Law and several of the other Defendants filed a consolidated answer, in which they denied most of Wyndham's allegations and asserted counterclaims against Wyndham for (1) "intentional tortious interference with existing economic relationships and with prospective economic advantage;" (2) trade libel; (3) "common law unfair competition;" and (4) false advertising under the Lanham Act. (Doc. **[*11]** 149 at 42-51). Wyndham subsequently moved to strike various portions of that answer and to dismiss the above counterclaims. (Docs. 166, 167). The Court largely granted that motion in May 2020 due to a number of pleading deficiencies. (Doc. 275). In response, M&N Law and several of the related Defendants filed an amended pleading in June 2020 after retaining new counsel, in which they reiterated the same counterclaims as the ones the Court had previously dismissed. (Doc. 281).

In July 2020, M&N Law additionally moved for summary judgment on Wyndham's claim for contributory false advertising under the Lanham Act. (Doc. 295). M&N Law essentially argued in its motion that Wyndham's Lanham Act claim was legally untenable because no Circuit Court of Appeals—other than the Eleventh Circuit—had found such a cause of action to be viable. *Id.* In the alternative, M&N Law asked that the Court certify the case for an interlocutory appeal on the issue of whether the Court could ignore Eleventh Circuit precedent. *Id.*

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[3] In addition to these legal proceedings, M&N Law commenced a state court action in Missouri in July 2019 against another ostensible timeshare developer, Bluegreen Vacations Unlimited, Inc. (Bluegreen Vacations). (Doc. 353-8). According to M&N Law, the court in that case certified a class of over 17,000 Bluegreen Vacations owners "based upon [M&N Law's] allegations that Bluegreen [Vacations] committed the illegal act of the unauthorized practice of law in connection with timeshare sales." *Id.*; Bluegreen Vacations Hldg. Corp., Annual Report (Form 10-K) (Mar. 1, 2021). More recently, Bluegreen Vacations sued M&N Law and other parties in the Southern District of Florida, alleging the same claims as Wyndham asserts here. *See Bluegreen Vacations Unlimited, Inc. v. Montgomery Law Firm, LLC*, Case No. 1:19-cv-24704-JEM (S.D. Fla.); (Doc. 353-8).

In February 2021, the Court denied M&N Law's summary judgment motion, finding that existing Eleventh Circuit case law—namely, *Duty Free Americas, Inc. v. Estée Lauder Cos., Inc., 797 F.3d 1248 (11th Cir. 2015)*—clearly and expressly authorized Wyndham's Lanham Act claim. (Doc. **[*12]** 336). The Court also denied M&N Law's interlocutory appeal request, concluding that "there [wa]s not a substantial ground for difference of opinion within the Eleventh Circuit" on the validity of Wyndham's Lanham Act claim under *Duty Free Americas*, and that "an immediate appeal . . . [would] not materially advance the termination of this litigation." *Id.* at 5.

Later that same month, the Court dismissed, in part, M&N Law's amended answer and counterclaims, again on pleading grounds, and granted M&N Law leave to file a second amended answer. (Doc. 339). M&N Law and a few of the related Defendants filed such a pleading in early March 2021. (Doc. 342). This time around, however, M&N Law abandoned its counterclaims grounded in tort (including the causes of actions the Court had previously found potentially viable) in favor of several requests for a declaratory judgment, as well as—of significance here—an antitrust counterclaim for damages and injunctive relief under the Clayton Act, *15 U.S.C. §§ 15*, *26*, based on Wyndham's purported violation of *section 1* of the Sherman Act, *15 U.S.C. § 1*.[4] (Doc. 342).

With respect to its Sherman Act counterclaim, M&N Law asserts that Wyndham's lawsuit contravenes the antitrust laws because it is a "sham pleading designed merely to oppress M&N Law **[*13]** . . . with harassing discovery[and] to put [M&N Law] out of business." *Id.* at 29. In support of this assertion, M&N Law alleges that Wyndham, joined by Bluegreen Vacations, conspired to sue M&N Law in various fora to "decrease competition in the timeshare industry" and to "increase Wyndham['s] monopoly power." *Id.* at 29, 30. As evidence of their concerted actions, M&N Law avers that Wyndham and Bluegreen Vacations share the same attorneys and utilized similar complaints with identical causes of action in their lawsuits against M&N Law in the Middle District of Florida and the Southern District of Florida, respectively. *Id.* at 26-29. In addition, M&N Law claims that Wyndham is a member of what appears to be a trade association for persons involved in the timeshare industry (known as the American Resort Development Association or ARDA), and that unidentified members of this trade association have, at some unspecified point in time, agreed to file actions against other unnamed persons supposedly engaged in timeshare exit frauds to "decrease competition among them" and to "raise all of their pricing power on timeshares." *Id.* at 30. M&N Law further asserts that it has been "directly harmed" **[*14]** by Wyndham's lawsuit and cites, as examples, that it "has had to incur exorbitant legal fees;" has had to deal with "uncertain[ty] about its ability to continue providing legal services in Missouri [and] helping timeshare interest owners;" "has suffered reputational harm and injury[ ] and . . . received fewer clients;" and has lost its "errors and omissions insurance policies" and is facing "dramatically" higher premiums. *Id.* at 31.

Wyndham promptly moved to dismiss M&N Law's second amended complaint, arguing, in pertinent part, that M&N Law "lack[ed] standing" to bring its Sherman Act counterclaim and also "failed to allege any facts to establish [the requisite] antitrust agreement[or] any anticompetitive harm in a defined market." (Doc. 346 at 14-23). That motion remains pending.

The instant preliminary injunction motion, filed by M&N Law over two-and-ahalf years after Wyndham initiated this lawsuit and almost three months after M&N Law first raised its Sherman Act counterclaim, followed. (Doc. 353). By way of that motion, M&N Law requests that the Court enter an order "(A) staying [Wyndham's] claims against M&N Law," and "(B) issuing a nationwide injunction precluding [Wyndham] (and other persons identified **[*15]** in [*Federal Rule of Civil Procedure 65(d)(2)*] from initiating any further lawsuit against M&N Law and its attorneys, in federal or state court, based on their provision of legal services to timeshare owners, until" the Court resolves the merits of M&N Law's Sherman Act counterclaim. *Id.* at 22-23. In support of this request, M&N Law attaches to its motion a number of documentary exhibits, including several hearing transcripts, orders, and affidavits from discovery and scheduling disputes in another lawsuit apparently involving a different timeshare company. (Docs. 353-2-353-7). M&N Law also includes with its motion affidavits from Messrs. Montgomery and Newcomb, in which the two attorneys reiterate M&N Law's position that this litigation is unduly burdensome and unfounded. (Docs. 353-8-353-9).

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[4] For ease of reference, M&N Law's antitrust counterclaim under the Clayton and Sherman Acts is generally described herein as M&N Law's Sherman Act counterclaim.

Wyndham filed a response in opposition to M&N Law's preliminary injunction motion, to which M&N Law then submitted a reply. (Docs. 355, 356, 359, 360). Upon review of the parties' filings, I convened a hearing on the matter, which was attended by counsel for M&N Law and Wyndham, as well as by Messrs. Montgomery and Newcomb. (Doc. 383). Both parties presented arguments in support of their respective positions but did not seek to introduce **[*16]** any additional evidence.[5] *Id.*; M.D. Fla. R. 3.01(h).

At the same time that it filed the instant motion with this Court, M&N Law sought a nearly-identical nationwide preliminary injunction and stay of proceedings in the *Bluegreen Vacations* litigation being conducted in the Southern District of Florida. *See* Bluegreen Vacations, 2021 WL 4430366 (S.D. Fla. May 20, 2021). Following an evidentiary hearing on that motion, the court in the Southern District of Florida denied M&N Law's requests for relief in late September 2021. *Id., report and recommendation adopted*, 2021 U.S. Dist. LEXIS 183999, 2021 WL 4428211 (S.D. Fla. Sept. 27, 2021).[6] M&N Law's request for a preliminary injunction or a stay in this case is similarly now ripe for the Court's resolution.

II.

A preliminary injunction—as the Supreme Court and other courts have often emphasized—is "an extraordinary and drastic remedy." Munaf v. Geren, 553 U.S. 674, 689, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008) (internal quotation marks and citation omitted); *see also* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right.") (citation omitted). Designed to preserve the status quo until a final decision on the merits, Univ. of Tex. v. Camenisch, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981), preliminary injunctions are the exception, not the rule, Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A., 320 F.3d 1205, 1210 (11th Cir. 2003) (citing Texas v. Seatrain Int'l, S.A., 518 F.2d 175, 179 (5th Cir. 1975)).

To prevail on a request for a preliminary injunction, the movant must "clearly establish" that there is "(1) a substantial **[*17]** likelihood of success on the merits; (2) that irreparable injury will be suffered unless the [sought-after] injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." Brown v. Sec'y, U.S. Dep't of Health & Hum. Servs., 2021 U.S. App. LEXIS 20795, 4 F.4th 1220, 1224 (11th Cir. 2021) (citations omitted). The movant bears the burden of persuasion as to each of these requirements. *See* Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) (per curiam) (citations omitted); Ne. Fla. Ch. of Ass'n of Gen. Contrs. of Am. v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990) (citations omitted). In deciding whether the movant has met its burden, "[a] district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is appropriate given the character and objectives of the injunctive proceeding." Levi Strauss & Co. v. Sunrise Int'l Trading Inc., 51 F.3d 982, 985 (11th Cir. 1995) (internal quotation marks and citation omitted); *see also* Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc., 304 F.3d 1167, 1171 (11th Cir. 2002) ("Preliminary injunctions are, by their nature, products of an expedited process often based upon an underdeveloped and incomplete evidentiary record.") (citation omitted). A movant's failure to establish any one of the above requirements warrants a denial of a request for a preliminary injunction irrespective of the merits of the remaining elements. Wreal, LLC v. Amazon.com, Inc., 840 F.3d 1244, 1248 (11th Cir. 2016) (noting that the failure **[*18]** to meet even one of the four prerequisites for a preliminary injunction "dooms" such a request) (citation omitted).

In the end, the decision to grant or deny a preliminary injunction rests within the district court's sound discretion and will not be overturned on appeal absent a clear abuse of that discretion. Osmose, Inc. v. Viance, LLC, 612 F.3d

[5] M&N Law did agree at the hearing, however, to withdraw the portion of its proposed preliminary injunction, which requested that Wyndham's alleged co-conspirators be barred from suing M&N Law in any state court across the United States. (Doc. 383 at 21-22).

[6] Wyndham recently filed a notice of supplemental authority advising the Court of the Southern District of Florida's ruling in the *Bluegreen Vacations* action. (Doc. 396). M&N Law did not do the same, however, even though it cited the *Bluegreen Vacations* litigation in its preliminary injunction motion. *See* (Doc. 353 at 2).

1298, 1307 (11th Cir. 2010) (citation omitted). Indeed, appellate review in this context is "exceedingly narrow" and "deferential" because "a district court often must make difficult judgments about the viability of a plaintiff's claims based on a limited record." Wreal, LLC, 840 F.3d at 1248 (citations omitted). As a result, not only does a movant face a "tough road in establishing [the] four prerequisites to obtain a preliminary injunction in the first instance, but, on appeal, [the movant] must also overcome the steep hurdles of showing that the district court clearly abused its discretion in its consideration of each of the four prerequisites." *Id.* (citation omitted).

In this case, as noted above, M&N Law premises its preliminary injunction motion on its antitrust counterclaim pursuant to section 1 of the Sherman Act, by way of sections 4 and 16 of the Clayton Act. *See* 15 U.S.C. §§ 1, 15, 26. Section 1 of the Sherman Act forbids any agreement that restrains competition. In particular, it states that "[e]very **[*19]** contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. § 1. Notwithstanding the expansive breadth of this language, courts have long held that section 1 only prohibits conspiracies or agreements that "unreasonably" restrain interstate trade or commerce. Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co., 917 F.3d 1249, 1260 (11th Cir. 2019) (en banc) (citing Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 343, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)).

Private parties can enforce section 1 of the Sherman Act through sections 4 and 16 of the Clayton Act and recover damages and injunctive relief under those respective provisions. *See* McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1555 n.4 (11th Cir. 1992); Todorov v. DCH Healthcare Auth.,1991 U.S. App. LEXIS 1142, 921 F.2d 1438, 1444 n.10, 1448-49, 1452 (11th Cir. 1991) (citations omitted). "A private plaintiff proceeding under section 4 . . . must prove (1) [a] violation of the antitrust laws, (2) [a] cognizable injury attributable to the violation, and (3) at least the approximate amount of the damage." McGuire Oil Co., 958 F.2d at 1557-58 (citation omitted). A private plaintiff seeking recourse under section 16 must make the same showing, with the caveat that the cognizable injury requirement is somewhat relaxed under this provision. Todorov, 921 F.2d at 1452 (citations omitted). Regardless of the differences between these two statutes, a plaintiff seeking to rely on either section 4 or 16 "must still allege an injury of the type the antitrust laws were designed to prevent." Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 111, 113, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986).

A.

In this case, M&N Law has not met its burden of clearly **[*20]** establishing a substantial likelihood of success on its counterclaim under section 1 of the Sherman Act. To begin, M&N Law fails to demonstrate in its motion that this cause of action is not barred by the so-called *Noerr-Pennington* doctrine. Named after the Supreme Court's decisions in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), the *Noerr-Pennington* doctrine shields a party from antitrust liability where the party exercises its right to petition the government "by resorting to administrative and/or judicial proceedings." Andrx Pharms., Inc. v. Elan Corp., PLC, 421 F.3d 1227, 1233 (11th Cir. 2005) (citing Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)). This form of immunity is grounded, at least in part, on the First Amendment right to associate with others and to petition the government for the redress of grievances. *Id.; see also* Feminist Women's Health Ctr., Inc. v. Mohammad, 586 F.2d 530, 542 (5th Cir. 1979) ("[T]he First Amendment right of competitors to join in petitioning courts and administrative bodies entails the right to band together for purposes of supporting litigation."). As the Supreme Court has explained:

> [I]t would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal [ ] courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitors. **[*21]**

Cal. Motor Transp., 404 U.S. at 510-11.

The Eleventh Circuit has extended the *Noerr-Pennington* doctrine to encompass threats of litigation, as well as the actual commencement of a legal action. McGuire Oil Co., 958 F.2d at 1559-60. And contrary to M&N Law's suggestion in its reply (Doc. 360 at 3), the party bringing an antitrust claim must show that the *Noerr* doctrine does not apply, *see* *McGuire Oil Co., 958 F.2d at 1559 n.9, 1560* (quoting Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and their Application* § 203.4c (Supp. 1990)).

In an effort to meet its burden here, M&N Law seeks to invoke the "sham litigation" exception to the *Noerr* doctrine. *Andrx Pharms., 421 F.3d at 1233* (citing *Prof'l Real Estate Invs., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*). That exception is directed at parties "whose activities are not genuinely aimed at procuring favorable government action" but instead are a mere pretext "to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *McGuire Oil Co., 958 F.2d at 1559* (internal quotation marks and citations omitted).

To fall within the ambit of the sham litigation exception, (1) the claim or lawsuit at issue must be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits;" and (2) "the party bringing the allegedly baseless [claim or] suit did so with **[*22]** a subjective motivation . . . to interfere directly with the business relationships of a competitor." *Andrx Pharms., 421 F.3d at 1234* (quoting *Prof'l Real Estate Invs., 508 U.S. at 60-61*) (internal quotation marks omitted). This two-prong analysis requires the party relying on *Noerr*'s sham litigation exception "to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability." *In re Terazosin Hydrochloride Antitrust Litig., 335 F. Supp. 2d 1336, 1357 (S.D. Fla. 2004)* (quoting *Prof'l Real Estate Invs., 508 U.S. at 61* (emphasis in original)).

The sham litigation exception's first prong is judged against a standard of probable cause and asks whether, at the time the challenged litigation was initiated, the party bringing the lawsuit had at least a "reasonable belief" that there was a chance that its claim(s) "may be held valid upon adjudication." *Prof'l Real Estate Invs., 508 U.S at 62-63, 65* (internal quotation marks and citations omitted). This standard does not require a winning claim(s), nor does it demand the support of established case law, as long as the party who filed the action can make an "objective[ ] good faith argument for the extension, modification, or reversal of existing law." *Id. at 65* (internal quotation marks and citation omitted). Courts must be mindful in this regard that "'[e]ven when the law or the facts appear questionable or unfavorable at the outset, a party **[*23]** may have an entirely reasonable ground for bringing suit.'" *Id. at 60 n.5* (citation omitted). Only if the party invoking the sham litigation exception demonstrates that the challenged legal proceeding "was objectively baseless or frivolous" need the court move to the next part of the analysis. *Id. at 61, 65*.

Under the sham litigation exception's second prong, courts must "entertain evidence" of the party's "economic motivations in bringing suit," such as whether it "was indifferent to the outcome on the merits" of its claim(s); whether any damages for its claim(s) "would be too low to justify [its] investment in the suit;" or whether it "decided to sue primarily for the benefit of collateral injuries inflicted through the use of [the] legal process." *Id. at 61, 65, 66*. In evaluating these considerations, courts must focus not on the ill will or animosity that might motivate the action but on whether the suing party sought to use the process of litigation, rather than the outcome, "as an anticompetitive weapon." *Id. at 59, 61*; *see also* *id. at 69* (Stevens, J., concurring in judgment) ("We may presume that every litigant intends harm to his adversary."). The "difficulty" of proving subjective motivation under the sham litigation's second prong "obviously **[*24]** 'places a heavy thumb on the scale' in favor of granting protection" under the *Noerr-Pennington* doctrine. *Campbell v. Penn. Sch.ham Bds. Ass'n, 972 F.3d 213, 219 (3d Cir. 2020)* (citation omitted). Ultimately, the party invoking *Noerr*'s sham litigation exception bears the burden of demonstrating that both prongs have been satisfied. *McGuire Oil Co., 958 F.2d at 1560*; *In re Terazosin, 335 F. Supp. 2d at 1356* (citation omitted); *see also* *Campbell, 972 F.3d at 221*.

M&N Law does not make such a showing with respect to Wyndham's lawsuit here. As discussed above, Wyndham asserts four claims in its complaint against M&N Law: (1) false and misleading advertising and contributory false advertising under the Lanham Act; (2) tortious interference with contractual relations; (3) civil conspiracy; and (4) a violation of the FDUTPA. (Doc. 1 at 46-70). In support of these claims, Wyndham sets forth in its complaint a lengthy and detailed recitation of averments chronicling the Defendants' reported involvement in the above-described timeshare exit scheme, which Wyndham buttresses by way of exhibits attached to its complaint, *see, e.g.*, (Docs. 1-2, 1-16, 1-19-1-24), as well as by various declarations it has submitted to the Court since the inception of the lawsuit, *see, e.g.*, (Docs. 100-3, 100-5-100-9, 377-1). This evidence alone undermines M&N Law's contention that Wyndham's lawsuit **[*25]** is objectively baseless or frivolous.

Solely by way of illustration, Exhibit 1 to Wyndham's complaint provides an organizational chart depicting M&N Law's relationship and contributions to the Defendants' purported fraud that forms the basis for Wyndham's claims. (Doc. 1-2). The declaration of attorney Mary Clapp, filed with Wyndham's response to M&N Law's motion to dismiss soon after this litigation commenced, adds greater detail to the innerworkings of the Defendants' alleged scam from the perspective of a lawyer who separated herself from the Defendants due to her concerns over the legitimacy of the Defendants' enterprise. (Doc. 100-9); *see also* (Docs. 100-7, 100-8). In another declaration, a Wyndham employee—James Ward—represents that Wyndham had "received and reviewed" 124 dunning letters from M&N Law, which demonstrates Wyndham's familiarity with M&N Law's representation of timeshare owners. (Doc. 100-6). And in still two other declarations, Jeffrey Chavez, who appears to be a former associate of the Defendants' operations, avers that he "received complaints from many . . . timeshare owners that M&N Law[, among others,] failed to provide any actual services to assist them in exiting **[*26]** their timeshare contracts." (Docs. 100-3, 100-5).

M&N Law's attempt to counter this evidence by including with its motion the affidavits of Messrs. Montgomery and Newcomb is unavailing. (Docs. 353-8, 353-9). At most, these affidavits raise a possible factual dispute as to whether Wyndham could prove some of the elements of one or more of its claims at a trial on the merits. They certainly do not make the requisite showing that Wyndham lacked a "reasonable belief" when it commenced this action that there was a chance that its claims "may be held valid upon adjudication." *Prof'l Real Estate Invs., 508 U.S. at 62-63, 65*.

M&N Law's assertion that Wyndham's lawsuit is objectively baseless or frivolous is further undermined by the fact that M&N Law's efforts throughout this litigation to attack the legal sufficiency of Wyndham's causes of action have proven futile. By way of example, in response to the Defendants' prior challenge to Wyndham's tortious interference and civil conspiracy-related allegations, the Court found that Wyndham's averments adequately stated claims upon which relief could be granted. (Doc. 144). The Court also denied M&N Law's recent motion for summary judgment on Wyndham's Lanham Act claim based on the Eleventh Circuit's **[*27]** decision in *Duty Free Americas*. (Doc. 336).[7]

Undeterred, M&N Law now asserts that Wyndham's FDUTPA claim is legally infirm as well and cites *Club Exploria, LLC v. Aaronson, Austin, P.A., 2020 U.S. Dist. LEXIS 210098, 2020 WL 6585802 (M.D. Fla. 2020)* in support of its position. (Doc. 360 at 4). Putting aside the fact that M&N Law's challenge to this FDUTPA claim pertains to only one portion of Wyndham's lawsuit, M&N Law's reliance on *Club Exploria* is misplaced. In *Club Exploria*, a timeshare exit attorney moved for summary judgment on a FDUTPA claim brought by a timeshare developer. *2020 U.S. Dist. LEXIS 210098, 2020 WL 6585802, at *1*. In addressing that motion, the court noted that "[l]awyers are not *per se* exempt from FDUTPA" and explained that whether a lawyer can be held liable under the FDUTPA for timeshare exit activity turns "on the specific conduct at issue." *2020 U.S. Dist. LEXIS 210098, [WL] at *7* (citations omitted). After analyzing the matter, the court granted the timeshare exit attorney's summary judgment motion, concluding that the timeshare developer had failed to satisfy the elements of a FDUTPA claim given the evidence presented at that stage of the case. *2020 U.S. Dist. LEXIS 210098, [WL] at *8*. Nowhere in the court's opinion, however, did it intimate, much less hold, that the timeshare developer's FDUTPA claim was "objectively baseless" from the outset. Quite the opposite. The court denied an earlier motion **[*28]** by the timeshare exit attorney to dismiss that cause of action, finding that it stated a claim upon which relief could be granted. *See Club Exploria, 2019 U.S. Dist. LEXIS 47139, 2019 WL 1297964, at *6 (M.D. Fla. Mar. 21, 2019)*. Other courts in this District have likewise determined that a lawyer's timeshare exit activity can be actionable under the FDUTPA in circumstances akin to those present in this case. *See, e.g., Wyndham Vacation Ownership, Inc. v. Clapp Business Law, LLC, 411 F. Supp. 3d 1310, 1320 (M.D. Fla. 2019)*; *Westgate Resorts, Ltd. v. Sussman, 387 F. Supp. 3d 1318, 1365 (M.D. Fla. 2019)*;

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[7] It should be noted that the Southern District of Florida similarly rejected M&N Law's challenges to Wyndham's identical tortious interference, civil conspiracy, and Lanham Act causes of action in the *Bluegreen Vacations* case. *See Bluegreen Vacations*, Case No. 1:19-cv-24704-JEM, (Doc. 69) (S.D. Fla. Nov. 20, 2020).

Wyndham Vacation Ownership, Inc. v. Miller, 2019 U.S. Dist. LEXIS 186597, 2019 WL 5394074, at *8 (M.D. Fla. Oct. 11, 2019).

Not only does M&N Law fall well short of satisfying the first prong of the sham litigation exception, which alone is dispositive of its preliminary injunction motion, Prof'l Real Estate Invs., 508 U.S. at 65, it also does not establish the exception's second prong—namely, that Wyndham brought this action with the subjective motivation of using the litigation "as an anticompetitive weapon," id. at 61 (citation omitted). Applying the above considerations articulated by the Supreme Court in *Professional Real Estate Investors*, M&N Law does not demonstrate, for example, that Wyndham is indifferent to the outcome of this litigation, id. at 65, particularly given Wyndham's vigorous prosecution of the matter and the fact that it has promptly sought default judgments against M&N Law's delinquent co-Defendants, *see* (Docs. 290, 330). Nor does M&N Law argue, must less show, that the damages Wyndham seeks in this action are **[*29]** "too low to justify [its] investment in the suit." Prof'l Real Estate Invs., 508 U.S. at 65. Further, M&N Law's conclusory and attenuated allegations regarding Wyndham's motivations in pursuing this action do not provide the Court with an adequate factual basis upon which to conclude that Wyndham elected "to sue [M&N Law] primarily for the benefit of collateral injuries inflicted through the use of [the] legal process." *Id.; see also* Or. Nat. Res. Council v. Mohla, 944 F.2d 531, 533 (9th Cir. 1991) ("Conclusory allegations are not sufficient to strip a defendant's activities of *Noerr-Pennington* protection.") (citation omitted). M&N Law's suggestion in its motion notwithstanding, nothing in *Professional Real Estate Investors* indicates that the sham exception's subjective intent requirement can be met simply by pointing to evidence that other persons in the timeshare industry (such as members of ARDA) may have taken steps to stop other timeshare exit actors' allegedly illicit conduct. *See* Prof'l Real Estate Invs., 508 U.S. at 62-66; *see also* McGuire Oil Co., 958 F.2d at 1560 ("[I]t is axiomatic that actions taken with an anti-competitive purpose or intent remain insulated from antitrust liability under the *Noerr-Pennington* doctrine.") (citations omitted).

Because M&N Law fails to clearly establish a substantial likelihood that it can meet both prongs of the sham **[*30]** litigation exception and thus that Wyndham's Sherman Act claim is not entitled to Noerr immunity, M&N Law's motion for a preliminary injunction cannot stand. *See* Jes Props., Inc. v. USA Equestrian, Inc., 458 F.3d 1224, 1228 (11th Cir. 2006) (citing Levine v. Cent. Fla. Med. Affs., Inc., 72 F.3d 1538, 1545 (11th Cir. 1996)). Even were that not the case, M&N Law's motion suffers from a number of other defects, the first of which pertains to the issue of standing.

It is well established that a private plaintiff seeking damages or injunctive relief under the antitrust laws must show that it has standing to sue. Fla. Seed Co. v. Monsanto Co., 105 F.3d 1372, 1374 (11th Cir. 1997). Standing in an antitrust case, however, "involves more than the 'case or controversy' requirement that drives constitutional standing." Todorov, 921 F.2d at 1448 (citations omitted). Instead, a party asserting claims under the antitrust laws must prove both that it has suffered an "antitrust injury" and that it "is an efficient enforcer of the antitrust laws." Id. at 1449.

To satisfy the first element, a plaintiff must demonstrate that it has sustained an injury "the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977). In other words, a "plaintiff[ ] must plead and prove that the injury [it] ha[s] suffered derives from some anticompetitive conduct." Todorov, 921 F.2d at 1450. This showing "ensures that the plaintiff, although motivated **[*31]** by private interests, is seeking to vindicate the type of injury to the public that the antitrust laws were designed to prevent," i.e., harm to competition and consumers, not mere harm to competitors or other third parties. Sunbeam Tele. Corp. v. Nielsen Media Rsch., Inc., 711 F.3d 1264, 1271 n.16 (11th Cir. 2013) (citation omitted); *see also* Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc., 376 F.3d 1065, 1071 (11th Cir. 2004) (explaining that an "antitrust plaintiff must show harm to competition in general, rather than merely damage to an individual competitor").

As for the second element, a plaintiff must essentially demonstrate "that it is a customer or competitor in the relevant antitrust market." Fla. Seed Co., 105 F.3d at 1374 (citing Assc'd Gen. Contrs. of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 539, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)); *see also Palmyra Park Hosp., Inc. v. Phoebe Putney Mem'l Hosp., 604 F.3d 1291, 1299 (11th Cir. 2010)* (gathering nonexclusive list of factors courts sometimes employ in analyzing the second prong of antitrust standing) (citation omitted).[8] The purpose of this element is to make certain that a "particular plaintiff will efficiently vindicate the goals of the antitrust laws." Todorov, 921 F.2d at 1452.

In the end, the party bringing an antitrust claim bears the burden of demonstrating that it meets both of the above elements. Fla. Seed Co., 105 F.3d at 1374 (citations omitted). In deciding whether it has done so, courts look to the allegations contained in the operative pleading. Todorov, 921 F.3d at 1448 (citing Austin v. Blue Cross & Blue Shield of Ala., 903 F.3d 1385, 1387 (11th Cir. 1990)); *see also* Feldman v. Am. Dawn, Inc., 849 F.3d 1333, 1341 (11th Cir. 2017) (finding plaintiff lacked antitrust standing to challenge conduct not alleged in his complaint). **[*32]**

Looking to the relevant allegations here, M&N Law avers in its Sherman Act counterclaim that Wyndham and Bluegreen Vacations agreed to sue M&N Law to "decrease competition in the timeshare industry" and to "increase Wyndham['s] monopoly power." (Doc. 342 at 29). As alluded to previously, M&N Law also avers that it has been "directly harmed" by Wyndham's lawsuit because it has had to spend money to defend itself in this action; its cost of business has increased, including the price of its malpractice insurance, and "its ability to assist customers has decreased;" and it "has suffered reputational harm and injury[ ] and has received fewer clients." *Id.* at 31. In support of these assertions, M&N Law relies on Mr. Newcomb's representations in his affidavit that, among other things, he "believe[s]" his last malpractice insurance quote was as high as "maybe about $26,250.00 per year," and that he "would be shocked if [Wyndham's discovery efforts] did not cause a decline in M&N Law's business." (Doc. 353-9 at 2-3).

These conclusory and unsubstantiated allegations do not meet the first prong of the antitrust standing inquiry—namely, that M&N Law has suffered the type of harm the antitrust laws were designed **[*33]** to prevent. New Vision Eye Ctr., LLC v. Fla. Eye Inst., PA, 2010 U.S. Dist. LEXIS 163033, 2010 WL 11602458, at *2 (S.D. Fla. Mar. 23, 2010) ("A motion for preliminary injunction must be supported by evidence; a party is not entitled to preliminary injunctive relief 'solely on the basis of its naked allegations.'") (quoting Church of Scientology Flag Serv. Org. v. City of Clearwater, 777 F.2d 598, 608 (11th Cir. 1985)). There is no assertion made by M&N Law in its operative pleading, for example, that this lawsuit has actually caused a reduction in competition in Wyndham's line of business (i.e., the development and selling of timeshares) or in M&N Law's legal industry. Nor does M&N Law provide a sufficient factual basis in its operative pleading for its contention that Wyndham and Bluegreen Vacations's legal actions against M&N Law have "increase[d] [Wyndham's] monopoly power," rather than that of Bluegreen Vacations, or any other timeshare developer for that matter. Instead, M&N Law complains only of speculative harm to its business interests, which the Eleventh Circuit has rejected as insufficient to establish a cognizable antitrust injury. Spanish Broad., 376 F.3d at 1069 (citing Am. Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1579 n.8 (11th Cir. 1985)); Andela v. Univ. of Miami, 692 F. Supp. 2d 1356, 1375 (S.D. Fla. 2010) ("It is axiomatic that antitrust laws aim to protect competition, not competitors.").

Perhaps recognizing that its allegations do not satisfy the first prong of the standing analysis, M&N Law avers for the first time in its motion that Wyndham's "anti-competitive **[*34]** conduct is keeping timeshare prices artificially high by restricting supply." (Doc. 353 at 18). Putting aside the fact that this averment is not mentioned anywhere in M&N Law's operative pleading, *see* (Doc. 342 at 26-32), M&N Law does not explain how such conduct would harm the primary and/or secondary market(s) for timeshare interests, which—it appears—is the gist of its newly revised theory. This omission is especially notable since M&N Law makes seemingly conflicting claims in its motion about the impact of Wyndham's purportedly predatory conduct. Specifically, M&N Law asserts, on the one hand, that its customers are motivated by the low resale value of their Wyndham timeshares while, on the other hand, Wyndham's lawsuit somehow harms these same consumers by inflating Wyndham's timeshare prices. (Doc. 342 at 15). M&N Law also fails to demonstrate how its proposed relief—an injunction or a stay—would meaningfully

[8] There is Eleventh Circuit case authority that where a plaintiff seeks only injunctive relief under section 16 of the Clayton Act, the showing required to establish the second element of the standing analysis is generally "less demanding" than under section 4 of the Clayton Act. Todorov, 921 F.2d at 1452. The Court need not resolve what showing this decisional law might require of M&N Law here because, as explained below, M&N Law has not satisfied the first prong of the antitrust standing inquiry or established that it will likely prevail on the principal elements of its Sherman Act counterclaim.

advance the fiscal interests of timeshare owners, as opposed to merely the firm's economic prospects. Because M&N Law does not clearly establish a substantial likelihood that it can meet the first prong of the antitrust standing analysis, its motion for a preliminary injunction **[*35]** fails on that ground as well.[9]

In addition to the above issues, there are other reasons to doubt the merits of M&N Law's Sherman Act counterclaim, including whether it can satisfy the elements of such a cause of action. As explained at the outset, *section 1* of the Sherman Act prohibits, in pertinent part, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. "Despite the different terminology . . . . [c]ourts use the words 'contract,' 'combination,' and 'conspiracy' interchangeably." *Tidmore Oil Co., Inc. v. BP Oil Co., 932 F.2d 1384, 1388 (11th Cir. 1991)* (citation omitted). In essence, the "common element to a 'contract, combination . . ., or conspiracy' is a requirement of concerted action" on the part of the defendants. *Procaps S.A. v. Patheon, Inc., 845 F.3d 1072, 1080 (11th Cir. 2016)* (citing *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 767-68, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*). The "crucial question" for claims predicated on *section 1* "'is whether the challenged anticompetitive conduct stems from [an] independent decision or from an agreement, tacit or express.'" *Quality Auto, 917 F.3d at 1249* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*); *Spanish Broad., 376 F.3d at 1071* ("Section [1] applies only to agreements between two or more businesses; it does not cover unilateral conduct.") (citing *Fisher v. City of Berkeley, 475 U.S. 260, 266, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986)*).

It is well settled in this regard that "conduct that is as consistent with permissible competition as with illegal conspiracy does not, **[*36]** without more, support even an inference of conspiracy" in violation of the antitrust laws. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 597 n.21, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (citing *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763-64, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*). Indeed, the Eleventh Circuit has observed that "evidence of conscious parallelism alone does not permit an inference of conspiracy unless the plaintiff either establishes that, assuming there is no conspiracy, each defendant engaging in the parallel action acted contrary to its economic self-interest, or offers other 'plus factors' tending to establish that the defendants were . . . in a collusive agreement to fix prices or otherwise restrain trade." *Quality Auto, 917 F.3d at 1261* (quoting *City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 570-71 (11th Cir. 1998)*) (internal quotation marks omitted). Plus factor evidence is evidence that "tend[s] to exclude the possibility that the [challenged parties] merely were engaged in lawful conscious parallelism." *Harcros Chems., 158 F.3d at 572*. Evidence does not cross this threshold if it would require a factfinder either to "engage in speculation and conjecture to such a degree as to render [his or her] finding a guess or mere possibility," or to base a conclusion of conspiracy on "fallacious reasoning." *Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1302 (11th Cir. 2003)* (internal quotation marks and citation omitted).

As previously discussed, to bolster its claim that Wyndham and Bluegreen Vacations have illegally acted in concert in suing **[*37]** it, M&N Law notes that both entities employ the same attorneys, have used similar complaints in their respective actions against M&N Law, and have alleged identical causes of action. (Doc. 342 at 26-29). Moreover, M&N Law points out that Wyndham and Bluegreen Vacations belong to a trade association for persons involved in the timeshare industry and that some unknown members of this association have, at some unspecified time, agreed to sue certain unidentified persons committing certain timeshare exit frauds to "decrease competition among them." *Id.* at 29-30. M&N Law further contends that the trade group's goal is to "raise all of their pricing power on timeshares." *Id.*

These averments do not clearly show that M&N Law is substantially likely to establish the threshold element of "concerted" action necessary to sustain its Sherman Act counterclaim. Indeed, they appear to amount to nothing more than the type of alleged "parallel conduct" and "bare assertion of conspiracy" that the Supreme Court and the

[9] Because M&N Law does not satisfy the antitrust injury element and—as discussed below—also does not meet its burden on the merits of its Sherman Act counterclaim, the Court need not resolve whether it can establish the second element of the antitrust standing inquiry. *See* *Levine, 72 F.3d at 1545*. I note only that an evaluation of the second element can be much more involved than an assessment of the first element and would necessitate a far more extended discussion, particularly given M&N Law's apparently evolving theories behind its Sherman Act counterclaim. *See* ***Palmyra Park, 604 F.3d at 1299*** (citation omitted).

Eleventh Circuit have routinely rejected in Sherman Act cases. *See* Twombly, 550 U.S. at 556-57; Quality Auto, 917 F.3d at 1261-62 (citations omitted). Notably, M&N Law does not present sufficient facts outlining the parameters of Wyndham's supposed conspiratorial agreement **[*38]** with Bluegreen Vacations, or the nature of the illicit communications and activities—if any—in which these two timeshare entities participated with one another or other unknown members of the timeshare trade association. Despite M&N Law's suggestion to the contrary, the fact that Wyndham and Bluegreen Vacations may be members of a trade group is not enough "to exclude the possibility that [they] were engaged in lawful conscious parallelism." Harcros Chems., 158 F.3d at 572; *see also* Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1295 (11th Cir. 2010) (finding it "well-settled" that the mere "participation in trade organizations provides no indication of conspiracy") (citations omitted); Parker Auto Body Inc. v. State Farm Mut. Auto. Ins. Co., 171 F. Supp. 3d 1274, 1285 (M.D. Fla. 2016) ("[P]articipation in trade associations and similar organizations provides no indication of conspiracy.") (citation omitted). The same can be said of the fact that Wyndham and Bluegreen Vacations's utilize the same law firm, since "the mere *opportunity* to conspire . . . does not tend to exclude the possibility that [the defendants] did not avail themselves of such opportunity or, conversely, that they actually did conspire." Williamson Oil Co., 346 F.3d at 1319 (emphasis added; internal quotation marks and citation omitted).[10]

The exhibits M&N Law attaches to its preliminary injunction motion do not cure this deficiency. By way of **[*39]** example, the declarations tendered by Messrs. Montgomery and Newcomb simply parrot the legally insufficient allegations recited above that underlie M&N Law's Sherman Act counterclaim. And purely because they make broad, conclusory assertions that they are the target of an alleged unlawful conspiracy does not make it so. It is equally possible that Wyndham and Bluegreen Vacations have filed actions against M&N Law because they each recognized that mitigating fraud in the timeshare industry promotes their customers' welfare, engenders consumer loyalty, and reallocates negative externalities created by timeshare exit scams.

Nor am I persuaded by the letter that Mr. Montgomery asserts he received from a timeshare trade association "trustee," in which this "trustee" represented that the trade group's "mission [in 2019 was] to eradicate timeshare exit firms." (Doc. 353-8 at 13). Not only does M&N Law neglect to explain the origins of this letter or the relationship between its drafter and the trade association, but the letter itself does not mention Wyndham or Bluegreen Vacations or reference their litigation activities. *Id.* M&N Law offers no concrete evidence demonstrating that this third **[*40]** party's claim about the association's "mission" specifically relates to Wyndham's supposed agreement to sue M&N Law in the year before the letter was even sent or to continue the litigation after the year's "mission" had ended. *See* Am. Contrs. Supply, LLC v. HD Supply Constr. Supply, Ltd., 989 F.3d 1224, 1234 (11th Cir. 2021) (observing that evidence of an illicit conspiracy must exceed equivocation and "tend to exclude the inference of independent action") (internal quotation marks and citation omitted).

M&N Law's reliance on another timeshare exit attorney's affidavit which was filed in a different case is similarly unavailing. In that declaration, the lawyer states he attended a conference sponsored by the trade association in March 2017, where he "learned that some resorts and their lawyers [were] intent upon suing all those associated with [timeshare] exits, including lawyers representing timeshare owners and exit companies." (Doc. 353-6 at 6). As with the trustee letter, the lawyer's affidavit does not reference Wyndham or Bluegreen Vacations, much less an agreement between the two entities to sue M&N Law in contravention of the antitrust laws. *See* Am. Contrs. Supply, 989 F.3d at 1234. In fact, the affidavit does not suggest any agreement at all, just that the attorney perceived some of the trade group's **[*41]** members to share a general attitude towards actors in the timeshare exit business.

In sum, based on the allegations and evidence currently before the Court, M&N Law has not made the requisite showing in support of its preliminary injunction motion that Wyndham's instant lawsuit stems from a contract, combination, or conspiracy to restrain trade or commerce in violation of the Sherman Act. This deficiency provides yet another basis for denying M&N Law's motion.

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[10] I also note that M&N Law does not attempt to refute Wyndham's rejoinder that it and Bluegreen Vacations retained the same lawyers because of the quality of the attorneys' work and the cost-savings involved. (Doc. 355 at 10 n.4). Wyndham's other rejoinder—that the tortious conduct at issue in both lawsuits is the same—appears well-taken and likewise stands unrebutted. *Id.*

M&N Law's Sherman Act counterclaim faces additional headwinds as well. As noted previously, the Supreme Court has long recognized that the Sherman Act "outlaw[s] only *unreasonable* restraints" on trade. *Ohio v. Am. Exp. Co., 585 U.S. __, 138 S. Ct. 2274, 2283 (2018)* (emphasis added) (quoting *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*). To determine whether a given restraint rises to this level, courts "presumptively" apply a "rule of reason analysis." *Nat'l Coll. Athletic Ass'n v. Alston, 594 U.S. __, 141 S. Ct. 2141, 2151 (2021)* (citations omitted). This analysis "generally requires a court to 'conduct a fact specific assessment of market power and market structure' to assess a challenged restraint's 'actual effect on competition.'" *Id.* (quoting *Am. Exp. Co.*, 138 S. Ct. at 2284); *see also Levine, 72 F.3d at 1546* (explaining the rule of reason requires that courts "engage in a comprehensive analysis of the agreement's purpose and effect to determine whether it unreasonably restrains competition") **[*42]** (citation omitted).

To satisfy this test, a Sherman Act plaintiff must prove that (1) the defendant's challenged actions have an anticompetitive effect on the relevant market, and (2) such actions also have no pro-competitive benefit or justification. *Spanish Broad., 376 F.3d at 1071* (citing *Levine, 72 F.3d at 1551*). To establish the first prong, a plaintiff may demonstrate either that the defendant's "'behavior had an actual detrimental effect on competition, or that the behavior has the potential for genuine adverse effects on competition.'" *Id.* Actual harm in this context "is indicated by a factual connection between the alleged harmful conduct and its impact on competition in the market," as evidenced by "specific damages done to consumers in the market." *Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1339 (11th Cir. 2010)* (internal quotation marks and citation omitted). Actual anticompetitive harm includes reductions in output, increases in price, or deteriorations in quality, although "consumer welfare, understood in the sense of allocative efficiency, is the animating concern of the Sherman Act." *Id.* (citations omitted).

In addition to proving an actual or potential harm to competition, a plaintiff must also delineate under the first prong the "relevant market" in which the harm occurs, as well as a causal connection between **[*43]** the defendant's presence in that market and the alleged harm. *Id.; see also Am. Exp. Co.*, 138 S. Ct. at 2285 (recognizing that "courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market," since, without a known market, "there is no way to measure [the defendant's] ability to lessen or destroy competition") (internal quotation marks and citations omitted). For purposes of this analysis, the relevant market is defined as "both (1) a geographic market and (2) a product [or service] market." *Jacobs, 626 F.3d at 1336* (citation omitted). The plaintiff "must present enough information in [its operative pleading] to plausibly suggest the contours of the relevant geographic and product [or service] markets." *Id.*

Once the plaintiff satisfies its initial burden of demonstrating that the challenged restraint has a substantial anticompetitive effect, "the burden then 'shifts to the defendant to show a procompetitive rationale for the [alleged] restraint.'" *Alston*, 141 S. Ct. at 2160 (citing *Am. Exp. Co.*, 138 S. Ct. at 2284). "If the defendant can make that showing, 'the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies [touted by the defendant] could be reasonably achieved through less anticompetitive means.'" *Id.* Overall, **[*44]** the Court's use of this multi-step inquiry into the reasonableness of the defendant's conduct should involve a weighing of "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (internal quotation marks and citation omitted). In this regard, the Court must consider other particular information about the relevant business, as well as "the restraint's history, nature, and effect." *Id.* (internal quotation marks and citation omitted).

As M&N Law points out, the Supreme Court has concluded there are "some agreements among competitors [that] so obviously threaten to reduce output and raise prices that they might be condemned as unlawful *per se* or rejected only after a quick look." *Alston*, 141 S. Ct. at 2156 (citations omitted); *see also Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)* (explaining that the *per se* rule applies only to those agreements that are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality"). The Supreme Court has endorsed the utilization of the so-called "quick look" test in those relatively rare situations where "an observer with even a rudimentary understanding of economics could conclude **[*45]** that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*. In this narrow category of cases, "the great likelihood of anticompetitive effects can easily be ascertained" from the circumstances in which the agreements exist, *id.*, such "that they might be condemned . . . or rejected after only a quick look," *Alston*, 141 S. Ct. at 2156 (citations omitted).

The "quick look" test does not apply, however, "where . . . any anticompetitive effects of given restraints are far from intuitively obvious." *Cal. Dental, 526 U.S. at 759*. Indeed, the Supreme Court has warned lower courts that they must "take special care" not to deploy this type of abbreviated approach "until [they] have amassed 'considerable experience with the type of restrain[t] at issue' and 'can predict with confidence that it would be invalidated in all or almost all instances.'" *Alston*, 141 S. Ct. at 2156 (citations omitted).

Here, M&N Law contends that the Court should abandon the presumptive rule of reason analysis and instead employ the seldom used quick look test. (Doc. 353 at 16). To justify such a deviation from the norm, M&N Law argues:

> [T]he purpose of [Wyndham's] lawsuit here and lawsuits like it is to drive out of business those dedicated to helping unhappy **[*46]** timeshare owners out of their contracts. In other words, the point of this litigation is to eliminate the unhappy timeshare owner's access to resources relevant to a decision to default, so that the owner is less likely to choose to default and have his or her timeshare interests returned to the market. The litigation is patently anti-competitive because, by keeping these unwanted timeshare interests from becoming part of the available timeshare supply, the timeshare companies are artificially restricting the supply and increasing the market price of timeshares. Moreover, by reducing the risk that timeshare owners will default, [Wyndham's] litigation strategy is also artificially reducing the riskiness of its timeshare financing-backed securities and the amount it must pay investors back in the future based on the securities' coupon rate.

(Doc. 353 at 16-17) (footnote omitted).

M&N Law's argument for the application of the quick look test does not withstand scrutiny. To begin, the "parade of horribles" that M&N Law portrays as emanating from this lawsuit are not alleged anywhere in its operative pleading, which instead focuses mostly, if not entirely, on the toll this litigation has **[*47]** taken on its business interests. *See* (Doc. 342 at 26-32). Nor are some of the firm's other above assertions, like the one pertaining to financing-backed securities and the securities' coupon rate, mentioned in the supporting affidavits attached to its motion. Furthermore, M&N Law offers no factual evidence to demonstrate the veracity of these contentions and the supposedly obvious anticompetitive effects of Wyndham's lawsuit. *See* *Devs. Sur. & Indem. Co. v. Bi-Tech Constr., Inc., 964 F. Supp. 2d 1304, 1309 (S.D. Fla. 2013)* (recognizing that, in seeking a preliminary injunction, the movant must proffer "evidence [that] establishes each of the four prerequisites") (citing *Levi Strauss, 51 F.3d at 985*).

Even putting aside these infirmities, the argument raised in M&N Law's motion—not its Sherman Act counterclaim—carries with it many assumptions about the connection between Wyndham's instant litigation and the primary and/or secondary market(s) for the timeshares at issue. These assumptions include, but are not limited to, that any possible limits on consumer choice in the market for Missouri-based timeshare-specialized attorneys would influence the perceived or actual value of a particular timeshare developer's interests in the national and/or regional primary and/or secondary market(s) for timeshares; that the externalities **[*48]** created by M&N Law's allegedly deceptive practices have had no impact on timeshare prices in those markets; and that there is a demonstrable (and causal) correlation between Wyndham's lawsuit, M&N Law's provision of legal services to timeshare owners, and the price of Wyndham's timeshare-backed securities. *See* *Cal. Dental, 551 U.S. at 779-81* (explaining that the "experience of the market [must be] so clear . . . that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one").

Suffice it to say that whatever any "anticompetitive effects" might stem from this lawsuit, they "are far from intuitively obvious." *Id. at 759, 771*; *Procaps, 845 F.3d at 1084 n.3* (finding that the lack of evidence about the challenged anticompetitive conduct in a given market augured against the application of the *per se* or "quick look" approaches). And even if M&N Law has answers to all the above questions, those answers do not appear anywhere in its operative pleading or in its preliminary injunction motion and accompanying exhibits. *Procaps, 845 F.3d at 1084* (finding that a plaintiff must point to specific facts demonstrating harm to competition to meet its burden of showing actual anticompetitive effects and **[*49]** cannot rely on conclusory allegations) (citations omitted).

In sum, the averments and evidence currently before the Court do not clearly demonstrate that M&N Law is substantially likely to succeed on its assertion that even a cursory review of the circumstances surrounding this lawsuit would reveal an unreasonable restraint on trade in violation of the Sherman Act. The absence of such a showing provides an additional reason to deny M&N Law's preliminary injunction motion.

B.

While M&N Law's failure to carry its burden on the substantial likelihood of success requirement is dispositive of its preliminary injunction request, *Church v. City of Huntsville, 30 F.3d 1332, 1342 (11th Cir. 1994)*, the remaining prerequisites for such relief will be addressed here in the interest of completeness, beginning with matter of irreparable harm, *Siegel, 234 F.3d at 1176*.

Harm is deemed to be "irreparable" only if it would occur without the sought-after injunction and only if it cannot be remedied through monetary relief. *See* *Swain v. Junior, 961 F.3d 1276, 1292 (11th Cir. 2020)* (citation omitted); *Cunningham v. Adams, 808 F.2d 815, 821 (11th Cir. 1987)* (citation omitted). A delay in seeking an injunction, however, "weighs strongly against [a] finding of harm." *Malicious Women Candle Co., LLC v. Cox, 506 F. Supp. 3d 1245, 1247 (M.D. Fla. 2020)* (citing *Wreal, 840 F.3d at 1248*).

Applying these legal principles here, I find that M&N Law's alleged harm resulting from Wyndham's lawsuit—which mainly consists of litigation **[*50]** costs and business expenses the firm has already incurred—does not meet the standard of irreparability. As an initial matter, there is no indication that these costs and expenses could not be recouped through a recovery of treble damages or an award of attorneys' fees, both of which M&N Law seeks through its Sherman Act counterclaim.

More importantly, it appears that a fair amount of the harm M&N Law has purportedly suffered to this point—including damage to its reputation—is due, at least in large part, to its own delay in seeking to enjoin Wyndham's lawsuit. As explained above, Wyndham initiated this litigation in December 2018 after a number of timeshare owners, represented by M&N Law, sued Wyndham in Missouri state court. In response to Wyndham's lawsuit, M&N Law's principals made the strategic decision to spar with Wyndham in Missouri and then to contest vigorously Wyndham's efforts to advance this lawsuit, including in responding to Wyndham's discovery requests. It was not until this case had been pending for roughly two-and-a-half years that M&N Law first raised its Sherman Act counterclaim, and several more months passed before the firm sought injunctive relief. Courts in the Eleventh Circuit have **[*51]** displayed little tolerance for such dilatoriness. *See, e.g.,* *Wreal, 840 F.3d at 1248* ("A delay in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm.") (citations omitted); *Roberts v. Swearingen, 2018 U.S. Dist. LEXIS 164839, 2018 WL 4620707, at *2 (M.D. Fla. Sept. 26, 2018)* (collecting case law to buttress the conclusion that a "multi-month delay in seeking injunctive relief strongly militate[d] against a finding of irreparable harm") (citations omitted); *Pippin v. Playboy Ent. Grp., Inc., 2003 U.S. Dist. LEXIS 25415, 2003 WL 21981990, at *2 (M.D. Fla. July 1, 2003)* ("Delay, or too much of it, indicates that a suit or request for injunctive relief is more about gaining an advantage (either a commercial or litigation advantage) than protecting a party from irreparable harm."); *Millennium Funding, Inc. v. 1701 Mgmt. LLC, 2021 U.S. Dist. LEXIS 153554, 2021 WL 3618227, at *10 (S.D. Fla. Aug. 16, 2021)* (recognizing that courts often deny preliminary injunctions that are delayed by more than two months and gathering authority).

Notably, M&N Law does not address the reason for its delay in its preliminary injunction motion or in its reply. Instead, when asked about the matter at the hearing, M&N Law offered only that it had to retain new counsel in June 2020. (Doc. 383 at 24-25). This explanation is insufficient. This Court and other courts all too often see such an excuse given by parties as a convenient crutch to avoid the consequences for failing to proceed **[*52]** in a timely manner, and crediting that proffered rationale here would allow M&N Law to escape any responsibility for not seeking the sought-after relief far earlier in this action. *See, e.g.,* *Tech Traders, LLC v. Insuladd Env't, Ltd., 2018 U.S. Dist. LEXIS 190514, 2018 WL 5830568, at *3 (M.D. Fla. Nov. 7, 2018)* (finding the "financial or practical difficulty" in obtaining legal counsel to facilitate litigation "[was] not an adequate excuse for [a] delay" in seeking injunctive relief); *Badillo v. Playboy Ent. Grp., Inc., 2004 U.S. Dist. LEXIS 8236, 2004 WL 1013372, at *2 (M.D. Fla. Apr. 16, 2004)* (same); *Menudo Int'l, LLC v. In Miami Prod., LLC, 2017 U.S. Dist. LEXIS 179777, 2017 WL 4919222, at *6 (S.D. Fla. Oct. 31, 2017)* (observing that if the plaintiff "was truly being irreparably harmed," it would have acted "swiftly to protect itself," including by hiring new attorneys who would have more zealously advanced its cause) (citations omitted); *cf.* *InVue Sec. Prods. Inc. v. Vanguard Prods. Grp., Inc., 2019 U.S. Dist. LEXIS 167593, 2019 WL 4671143, at *7 (M.D. Fla. July 1, 2019)* (refusing to countenance the argument that the plaintiff needed to further investigate its claim because "then the necessity of moving expeditiously . . . could be brushed away and the irreparable harm prong could be eliminated by a lawyer citing a good faith need to investigate") (internal quotation marks and citations omitted), *report and recommendation adopted*, *2019 U.S. Dist. LEXIS 167591, 2019 WL 4673755 (M.D. Fla. Aug. 15, 2019)*. Moreover, M&N Law retained its current attorney nearly a year prior to filing the instant motion and it does not provide any creditable justification for why it did not promptly seek to amend its counterclaim and pursue an **[*53]** injunction or a stay upon hiring new counsel. *See* *Wreal, 840 F.3d at 1248* (observing that a lack of speedy and urgent action to protect a plaintiff's rights "necessarily undermines a finding of irreparable harm") (citations omitted).

C.

The next requirement for a preliminary injunction—that the threatened harm to the movant outweighs whatever damage the proposed injunction may cause the opposing party—also counsels against granting M&N Law's motion. *Siegel, 234 F.3d at 1176* (citation omitted). The Eleventh Circuit has instructed that courts should exercise great care in entering a preliminary injunction before an entire case has been fully and fairly heard, so as to assure that the power of the court to require or deter action does not create unwarranted harm to the defendant or the public. *Alabama v. U.S. Army Corps of Eng'rs, 424 F.3d 1117, 1128 (11th Cir. 2005)* (citation omitted). Given the above-articulated concerns about the paucity of evidence and legal authority M&N Law has tendered to establish, *inter alia*, the sham litigation exception to the *Noerr-Pennington* doctrine, its standing to bring its Sherman Act counterclaim, the existence of an antitrust agreement between Wyndham and Bluegreen Vacations, and the alleged anticompetitive effects emanating from their challenged conduct, I cannot find that any harm **[*54]** to M&N Law from maintaining the status quo outweighs the damage the proposed preliminary injunction would cause to Wyndham. This conclusion is bolstered by the fact that this case has already been pending for nearly three years, and the dispositive motions deadline is only weeks away. Halting the litigation of Wyndham's causes of action at this late stage of the proceedings would invite more disruption to this protracted matter than is necessary given the possibility of a resolution in the reasonably near future.

D.

The next requirement for a preliminary injunction—that the movant establish that such relief would not disserve or be adverse to the public interest—also weighs against M&N Law. *Siegel, 234 F.3d at 1176* (citation omitted). While M&N Law contends that allowing Wyndham's lawsuit to continue would hinder the firm's ability to provide legal services to dissatisfied timeshare owners, there is not an adequate basis at this point to find that M&N Law has been unable to represent timeshare owners since the initiation of this suit in late 2018 due solely, or even mainly, to this litigation. M&N Law additionally has not demonstrated by way of any case law or other evidence that such a possible harm warrants **[*55]** enjoining Wyndham's litigation efforts at this juncture. *Cf.* *BE&K Constr. Co. v. N.L.R.B., 536 U.S. 516, 532, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002)* ("[E]ven unsuccessful but reasonably based suits advance some *First Amendment* interests [because they] allow the public airing of disputed facts . . . and raise matters of public concern.") (internal quotation marks and citations omitted).

In any event, the information and exhibits presently before the Court do not support a finding that M&N Law's interest in providing timeshare-related legal services in Missouri surpasses Wyndham's interest in protecting its business and customers from allegedly deceptive practices and legal professionals. As a result, notwithstanding M&N Law's protestations to the contrary, it has not shown that the balance of harms and the public interest militate in favor of the requested preliminary injunction.

E.

The final requirement for a preliminary injunction—namely, a security bond to protect against an improvidently granted injunction—also remains unsatisfied. Such a bond is mandated by the Clayton Act, which conditions the award of a preliminary injunction "upon the execution of a proper bond," *15 U.S.C. § 26*, and by *Federal Rule of*

Civil Procedure 65, which authorizes the Court to issue a preliminary injunction "only if the movant gives security," *Fed. R. Civ. P. 65(c)*.[11]

Here, M&N Law **[*56]** maintains that it should be allowed to post, at most, a nominal bond on the theory that the sought-after injunction will have very little impact on Wyndham. (Doc. 353 at 4). Even assuming *arguendo* that the Court possesses the discretion to set a nominal bond amount or forgo a bond entirely, M&N Law's argument is unaccompanied by any legal authority or factual support, and thus falls well short of the showing necessary for the Court to authorize such relief under the circumstances presented.[12]

IV.

As noted above, M&N Law alternatively asks the Court to stay Wyndham's prosecution of its causes of action so the Court can devote all its efforts to deciding whether M&N Law will prevail on its Sherman Act counterclaim. (Doc. 353 at 21-22). This request also fails.

It is well settled that a stay represents "an intrusion into the ordinary processes of administration and judicial review." *Nken v. Holder, 556 U.S. 418, 427, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)* (internal quotation marks and citation omitted). As a result, the party seeking a stay bears the burden of demonstrating that the facts at issue justify such relief. *Id. at 433-34* (citations omitted).

Courts typically weigh three factors in determining whether a stay is appropriate: "(1) the stage of the litigation; (2) [any] undue prejudice **[*57]** to the nonmoving party; and (3) [the] simplification of the issues in question." *Prisua Eng'g Corp. v. Samsung Elecs. Co., Ltd., 472 F. Supp. 3d 1183, 1185 (S.D. Fla. 2020)* (citations omitted). If the court determines that a stay will damage others, the moving party must also "make out a clear case of hardship or inequity in being required to go forward." *Fidelity Land Tr. Co. v. Sec. Nat'l Mortg. Co., 905 F. Supp. 2d 1276, 1278 (M.D. Fla. 2012)* (internal quotation marks and citation omitted). The Supreme Court has cautioned, however, that a stay "is not a matter of right, even if irreparable injury might otherwise result to the [movant]." *Nken, 556 U.S. at 427* (internal quotation marks and citation omitted).

In the end, "[t]he decision whether to grant a stay is committed to the district court's sound discretion, and the court is 'given considerable leeway in the exercise of its judgment.'" *Prisua Eng'g Corp., 472 F. Supp. 3d at 1185* (citations omitted). On appeal, a district court's decision to grant or deny a stay is reviewed for an abuse of discretion. *Fed. Trade Comm'n v. Primary Grp., Inc., 713 F. App'x 805, 808 (11th Cir. 2017)* (per curiam) (citations omitted).[13]

Applying these legal principles here, it is evident that a stay is unwarranted given the considerations discussed above relative to M&N Law's request for a preliminary injunction. In addition, M&N Law fails to offer any explanation as to how a stay at this late stage would not lead to inefficiencies in adjudicating this litigation, nor does **[*58]** it provide any proposed timeline for resolving its Sherman Act counterclaim that would allow the Court to assess whether a stay could aid the Court's resolution of Wyndham's much-delayed lawsuit.

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[11] Local Rules 6.01 and 6.02 also obligate a party to include with its motion "a precise and verified explanation of the amount and form of the required security." *M.D. Fla. R. 6.01(a)*, 6.02(a). M&N Law failed to adhere to this requirement and acknowledged at the hearing that such a failure "could be grounds alone to deny [its] motion." (Doc. 383 at 29). It orally moved, however, for the Court to excuse its noncompliance with these provisions. *Id.* The Court need not address this request given the other infirmities with M&N Law's preliminary injunction motion.

[12] In light of the deficiencies in M&N Law's motion, the Court likewise need not resolve M&N Law's bid to bind the full panoply of parties sanctioned by *Federal Rule of Civil Procedure 65*. I note only that such a request appears to be wanting given M&N Law's unsupported allegations about the other persons involved in Wyndham's alleged conspiracy, and the Eleventh Circuit's directive that an injunction be "'narrowly tailored to fit specific legal violations [so as to] not impose unnecessary burdens on lawful activity.'" *Cumulus Media, 304 F.3d at 1178* (citation omitted).

[13] Unpublished opinions are not considered binding precedent but may be cited as persuasive authority. *11th Cir. R. 36-2*.

M&N Law also does not mention, much less address, any of the above factors, except to assert that it should be awarded a stay because litigating this action will require time and cost money. (Doc. 353 at 21-22). That may be so, but time and money are inevitable concerns in any adversarial proceeding. *Garmendiz v. Capio Partners, LLC, 2017 U.S. Dist. LEXIS 122229, 2017 WL 3208621, at *2 (M.D. Fla. July 26, 2017)* ("[M]any modern courts have held that being required to defend a lawsuit does not constitute a hardship or inequity [to justify a stay of proceedings].") (citation omitted). And M&N Law does not provide the Court with actual financial numbers (or even estimates) that demonstrate "'a clear case of hardship or inequity in being required to go forward.'" *Fidelity Land Tr. Co., 905 F. Supp. 2d at 1278* (citation omitted). Further, M&N Law does not demonstrate how disposing of its Sherman Act counterclaim now—as well as resolving the likely appeal of the Court's decision on M&N Law's injunctive relief request, regardless of the outcome—will save the parties, this Court, or the Eleventh Circuit any time or resources as compared to handling each of the parties' claims **[*59]** at the summary judgment stage in the upcoming months. M&N Law's request for a stay is therefore without merit.

V.

For all these reasons, I respectfully recommend that M&N Law's motion for a preliminary injunction (Doc. 353) be denied.

Respectfully submitted this 18th day of October 2021.

/s/ Christopher P. Tuite

HONORABLE CHRISTOPHER P. TUITE

United States Magistrate Judge

Roohipour v. Blue Cross Blue Shield of Ill.

United States District Court for the Central District of California

October 21, 2021, Decided; October 21, 2021, Filed

CV 21-6434 DSF (GJSx)

Reporter

2021 U.S. Dist. LEXIS 211272 *; 2021 WL 5104383

RAMIN M. ROOHIPOUR, M.D., INC., a California corporation; and R&R SURGICAL INSTITUTE, an unincorporated association, Plaintiffs, v. BLUE CROSS BLUE SHIELD OF ILLINOIS, an Illinois Corporation; and DOES 1 through 20, inclusive, Defendants.

Subsequent History: Dismissed by, in part, Motion denied by, in part *Roohipour v. Blue Cross Blue Shield of Ill., 2022 U.S. Dist. LEXIS 32311 (C.D. Cal., Jan. 13, 2022)*

Core Terms

Patient, unfair, misrepresentation, verification, out-of-network, Plaintiffs', benefits, pre-authorization, allegations, scheduled, consumers, promise, rates, leave to amend, fee claim, reimburses, coverage, billing, priced, negligent misrepresentation, out-of-pocket, particularity, providers, eligible, estoppel, courts

Counsel: **[*1]** Ramin M. Roohipour, M.D., Inc., a California corporation, Plaintiff, Pro se.

R&R Surgical Institute, an unincorporated association, Plaintiff, Pro se.

For Blue Cross Blue Shield of Illinois, an Illinois corporation, Defendant: Amir Shlesinger, Reed Smith LLP, Los Angeles, CA USA.

Judges: Dale S. Fischer, United States District Judge.

Opinion by: Dale S. Fischer

Opinion

Order GRANTING Motion to Dismiss (Dkt. 10)

Defendant Health Care Services Corporation (HCSC)[1] moves to dismiss Plaintiffs Ramin M. Roohipour, M.D., Inc. and R&R Surgical Institute's (collectively, Plaintiffs) claims for breach of contract, promissory estoppel, intentional and negligent misrepresentation, and violations of *California Business & Professions Code § 17200, et seq.* Dkt. 10 (Mot.). Plaintiffs oppose. Dkt. 12 (Opp'n). The Court deems these matters appropriate for decision without oral argument. See *Fed. R. Civ. P. 78*; Local Rule 7-15. For the reasons stated below, HCSC's Motion is GRANTED.

I. BACKGROUND

[1] HCSC states it was erroneously sued as Blue Cross Blue Shield of Illinois. Mot. at 6. For the purposes of this Order, the Court refers to HCSC rather than BCBS when referring to the allegations in the FAC.

Ramin M. Roohipour, M.D., Inc. is a California corporation, and R&R Surgical Institute is an unincorporated association doing business in California as an ambulatory surgery center. Dkt. 1-2 (FAC) ¶¶ 1-2. HCSC is a health care benefits company. Id. ¶ 3; Mot. at 7. Plaintiffs are out-of-network providers that do not have an express **[*2]** written contract with HCSC to be reimbursed for services based on a negotiated rate. FAC ¶ 9.

Plaintiffs allege HCSC failed to reimburse the claims of three of their patients in violation of California law.

A. Patient A

Plaintiffs allege that prior to Patient A's January 18, 2019 scheduled procedure, Plaintiffs called HCSC[2] to verify whether Patient A was eligible for coverage, as well as to determine the rate at which the plan reimbursed out-of-network claims. Id. ¶ 15. Plaintiffs spoke with an HCSC agent,[3] who "represented that Patient A was eligible for coverage; that "Patient A's plan reimburses out-of-network benefits at 60% of the Maximum Allowable rate; and that Patient A's remaining deductible and out-of-pocket amounts were $0 and $2,354, respectively." Id. Plaintiffs' billing manager "memorialized" this information in a document titled "Insurance Verification." Id.

Plaintiffs' billing manager called HCSC again on January 14, 2019, to determine whether the scheduled procedure required pre-authorization, and HCSC "advised that no authorization was needed." Plaintiffs' billing manager noted this information on a "Pre-Authorization" form. Id. ¶ 16.

Plaintiffs completed the scheduled **[*3]** procedure and subsequently submitted a $10,000 fee claim. Id. ¶¶ 17-18. HCSC sent an explanation of benefits (EOB) issuing $247.04 and leaving Patient A with an out-of-pocket responsibility of $9,752.06. Id. ¶ 18. The EOB stated the amount billed "exceeds the priced amount for this service" but did not state the "priced amount." Id. Plaintiffs appealed the adverse benefit determination, and HCSC upheld its determination. Id. ¶ 20.

HCSC then submitted a $20,000 fee claim, in response to which HCSC sent an EOB with the same explanation that the amount billed "exceeds the priced amount for this service," issuing $117.98 in payment and leaving Patient A with an out-of-pocket responsibility of $19,882.02. Id. ¶ 20. Plaintiffs appealed, but HCSC upheld the determination on the grounds that "the member's benefit office has overridden our allowance and is using their own pricing due to specific account requirements." Id. ¶ 21.

Plaintiffs scheduled a second set of procedures with Patient A for February 4, 2019. Prior to the scheduled date, Plaintiffs called HCSC to verify coverage and confirm that no pre-authorization was needed and received the same information relayed in the prior verification **[*4]** call. Id. ¶¶ 24-25. Plaintiffs' billing manager noted the information contemporaneously. Id. Following these calls, Plaintiffs completed the scheduled procedures for Patient A and submitted a $30,000 claim. Id. ¶¶ 26-27. HCSC issued payment for only $1,286.46, Plaintiffs appealed, and HCSC's response letter explained that the rates used to price or pay for services for out-of-network providers are based on those for in-network providers. Id. ¶ 28. Plaintiffs subsequently submitted a $20,000 claim, for which HCSC issued payment in the amount of $428.82. Plaintiffs appealed, and HCSC upheld its determination on the grounds that "the member's benefit office has overridden our allowance and is using their own pricing due to specific account requirements." Id. ¶¶ 29-30.

Plaintiffs allege that HCSC failed to pay the above fee claims at the "pre-service represented rate." Id. ¶ 31.

B. Patient B

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[2] Plaintiffs did not allege the date of the first verification call for Patient A, or for several of the verification calls relating to Patients B and C.

[3] Plaintiffs alleged the names of the representatives of HCSC with whom they spoke on each call to verify benefits and pre-authorization requirements. FAC ¶¶ 15, 16, 24, 25, 33, 39, 40, 53, 54.

Plaintiffs allege HCSC failed to pay fee claims for services provided to Patient B on February 18, 2019 and April 22, 2019. For both sets of procedures, Plaintiffs allege they placed verification calls to HCSC, during which HCSC confirmed the following: (1) Patient B was eligible for coverage; (2) Patient **[*5]** B's plan reimburses out-of-network benefits at 50% of the maximum allowable rate; (3) Patient B's deductible and out-of-pocket amounts were $9,000 and $19,650 respectively in February 2019 and $3,445.91 and $14,095.91 respectively in April 2019; (4) Patient B's plan did not have a per-day max-cap for out-of-network facility fee benefits; and (5) no pre-authorization was needed for the April 2019 procedure.[4] Id. ¶¶ 32, 33, 38-40.

Following both sets of procedures, Plaintiffs submitted claims to HCSC, for which HCSC issued payment in the amount of $0. Id. ¶¶ 35, 42, 43. Plaintiffs appealed each adverse determination, and HCSC upheld its determinations. Id. ¶¶ 36, 44-50. Plaintiffs allege that the reasons for the adverse benefit determinations in the EOBs were based on criteria unknown to them, including that "the program requirements as identified by the members [sic] contract have not been fulfilled" and "that the service provided is not covered based on corporate medical policy criteria." See id. ¶¶ 35, 43.

C. Patient C

Plaintiffs allege HCSC failed to pay fee claims for procedures on Patient C scheduled for February 19, 2019. Prior to the scheduled procedures, Plaintiffs placed verification **[*6]** calls to HCSC, during which HCSC "represented that Patient C was eligible for coverage; that Patient C's plan reimburses out-of-network benefits at 60% of the Maximum Allowable rate; that Patient C's remaining deductible and out-of-pocket amounts were $1,000 and $5,900 respectively; and that Patient C's plan did not have a per-day max-cap for out-of-network facility fee benefits." Id. ¶¶ 52-53. HCSC also advised that the specific procedures to be performed on Patient C did not require pre-authorization. Id. ¶¶ 54.

Plaintiffs performed the scheduled procedures on Patient C, and subsequently submitted fee claims, for which HCSC issued only partial payment, explaining that the "program requirements as identified by the members [sic] contract have not been fulfilled." Id. ¶¶ 55-56. Plaintiffs appealed, and HCSC upheld its determination, explaining that "the member's benefit office has overridden our allowance and is using their own pricing due to specific account requirements." Id. ¶ 57. Plaintiffs contend that HCSC "concealed these 'specific account requirements'" during the prior phone calls. Id.

II. LEGAL STANDARD

Rule 12(b)(6) allows an attack on the pleadings for failure to state a claim on which **[*7]** relief can be granted. "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (per curiam). However, a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Id. (alteration in original) (quoting *Twombly, 550 U.S. at 557*). A complaint must "state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 570*. This means that the complaint must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*. There must be "sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively . . . and factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011)*.

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[4] Plaintiffs do not allege they inquired about pre-authorization requirements for the February 2019 procedure.

Ruling on a motion to dismiss will be "a context-specific task that requires the reviewing court to draw on its judicial experience and common **[*8]** sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not 'show[n]' - 'that the pleader is entitled to relief.'" *Iqbal, 556 U.S. at 679* (alteration in original) (citation omitted) (quoting *Fed. R. Civ. P. 8(a)(2)*).

Under *Federal Rule of Civil Procedure 9(b)*, fraud claims must be pleaded with particularity. *Kearns v. Ford Motor Co., 567 F.3d 1120, 1126 (9th Cir. 2009)*. "[A] plaintiff must set forth *more* than the neutral facts necessary to identify the transaction." *In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994)*. Fraud allegations must "be specific enough to give defendants notice of the particular misconduct so that they can defend against the charge and not just deny that they have done anything wrong." *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)* (citing *Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)* (internal punctuation omitted)).

As a general rule, leave to amend a complaint that has been dismissed should be freely granted. *Fed. R. Civ. P. 15(a)*.

III. DISCUSSION

A. Breach of Contract

Plaintiffs allege they had an oral contract with HCSC, and that HCSC breached that contract. FAC ¶¶ 60, 64.

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." *Oasis W. Realty, LLC v. Goldman, 51 Cal. 4th 811, 821, 124 Cal. Rptr. 3d 256, 250 P.3d 1115 (2011)*. "The wrongful, i.e., the unjustified or unexcused, failure **[*9]** to perform a contract is a breach." 1 Witkin, Summary of Cal. Law § 872 (11th ed. 2018).

"To be enforceable under California law, a contract must be sufficiently definite for the court to ascertain the parties' obligations and to determine whether those obligations have been performed or breached." *Sateriale v. R.J. Reynolds Tobacco Co., 697 F.3d 777, 789 (9th Cir. 2012)* (internal quotation marks omitted). "The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." *Sateriale, 697 F.3d at 789*.

Plaintiffs allege "an oral contract existed between the parties," FAC ¶ 60, and cite *California Spine & Neurosurgery Inst. v. United Healthcare Servs., Inc., No. 18-CV-2867 PSG (AFM), 2018 U.S. Dist. LEXIS 225961, 2018 WL 6074567, at *3 (C.D. Cal. June 28, 2018)* (denying motion to dismiss breach of contract claim). See Opp'n at 13. In *California Spine*, the plaintiff was an out-of-network health care provider who placed a verification call to the defendant insurance company, during which the insurance company allegedly "promised to pay 75% of the UCR rate until Patient's Max Out of Pocket ("MOOP") expense of $2,000 was met." *California Spine, 2018 U.S. Dist. LEXIS 225961, 2018 WL 6074567, at *1*. In finding the plaintiff had sufficiently alleged an oral contract, the Court stated "[t]he facts alleged include specific names and dates of the calls between Plaintiff and Defendant regarding payment for Patient's services, what the services would be, what was said, **[*10]** and by whom — including that Defendant agreed to pay a specific price: 75% of the UCR rate until Patient's MOOP expense was met, and 100% of the UCR rate afterwards." *2018 U.S. Dist. LEXIS 225961, [WL] at *4*.

Here, as in *California Spine*, Plaintiffs have alleged the names and dates of the calls to HCSC for each of the three patients, including the names of the representatives with whom Plaintiffs spoke. FAC ¶¶15, 16, 24, 25, 33, 39, 40, 53, 54. Plaintiffs alleged they called HCSC first to verify the patients were eligible for insurance benefits, and second to check if pre-authorization was required for the specific procedures. Id. Plaintiffs allege HCSC "represented" it would pay providers for services at the following rates: (1) Patient A at 60% of the max allowable rate; (2) Patient B at 50% of the max allowable rate; and (3) Patient C at 60% of the max allowable rate. FAC ¶ 67.

Plaintiffs also allege HCSC "further represented that preauthorization was not required for the proposed surgeries and that no other relevant pre-service restrictions or requirements applied." Id. ¶ 68.

However, unlike the plaintiffs in *California Spine*, Plaintiffs here do not allege HCSC made a *promise* to pay at the rates determined during the verification calls. Plaintiffs' other **[*11]** cited cases are distinguishable as well because the plaintiffs in those cases adequately alleged that the defendant "promised" or "ensured" payment at the rates discussed on verification calls. See *Out of Network Substance Use Disorder Claims, No. SACV 19-2075 JVS (DFMx), 2020 U.S. Dist. LEXIS 81195, 2020 WL 2114934, at *8 (C.D. Cal. Feb. 21, 2020)* ("Defendants, and each of them, orally promised to pay Plaintiff for the treatment provided to Defendants' insureds"); *Bristol SL Holdings, Inc. v. Cigna Health Life Ins. Co., No. SACV 19-00709 AG (ADSx), 2020 U.S. Dist. LEXIS 76342, 2020 WL 2027955, at *3 (C.D. Cal. Jan. 6, 2020)* ("[Plaintiff's] allegations go beyond a simple pre-authorization or verification and the blanket guarantee that Cigna would cover the treatment . . . [plaintiffs' assignee] was ensured the payment would be made at the previously agreed upon rate.").

While Plaintiffs need not have used the word "promise" in their allegations, they have failed to allege facts that, taken as true, allow the Court to infer that HCSC made a promise to Plaintiffs. For example, while Plaintiffs allege the existence of documents memorializing the information conveyed by representatives of HCSC on the verification calls, Plaintiffs do not allege additional details about the contents of those documents that would allow the Court to infer that HCSC agreed to be bound by the terms allegedly conveyed in the verification calls. Plaintiffs contend in their opposition brief that "the FAC alleges . . . **[*12]** that Defendant *agreed to pay* the specific price of either 60% or 50% of the Allowable rate, after each patients' deductible was met." Opp'n at 14 (emphasis added) (citing FAC ¶¶ 24-25, 39-40, 53-54). This statement is plainly inaccurate; nowhere in the cited paragraphs do Plaintiffs allege that HCSC agreed to pay or promised to pay the rates discussed in the phone calls. See FAC ¶¶ 24-25, 39-40, 53-54.

The Court finds Plaintiffs have not sufficiently alleged an oral contract was formed. The Court GRANTS HCSC's motion as to the breach of contract claim with leave to amend.

B. Promissory Estoppel

The elements of promissory estoppel under California law are "(1) a clear and unambiguous promise; (2) reliance by the party to whom the promise is made; (3) the reliance is both reasonable and foreseeable; and (4) the party asserting estoppel is injured by his reliance." *U.S. Ecology Inc. v. State of California, 129 Cal. App. 4th 887, 901, 28 Cal. Rptr. 3d 894 (2005)*.

Because Plaintiffs have not sufficiently alleged a clear and unambiguous promise, the Court GRANTS HCSC's motion as to the claim for promissory estoppel with leave to amend.

C. Intentional and Negligent Misrepresentation

The elements of a claim for intentional misrepresentation are: (1) misrepresentation, including concealment **[*13]** or nondisclosure; (2) knowledge of the falsity of the misrepresentation; (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting damages. *Chapman v. Skype Inc., 220 Cal. App. 4th 217, 230-31, 162 Cal. Rptr. 3d 864 (2013)*. "The essential elements of a count for negligent misrepresentation are the same except that it does not require knowledge of falsity but instead requires a misrepresentation of fact by a person who has no reasonable grounds for believing it to be true." *Id. at 231*. Both claims are subject to the heightened pleading requirements of *Rule 9(b)*. Claims grounded in fraud, including misrepresentation, must be pleaded with particularity under *Rule 9(b)*. *Avakian v. Wells Fargo Bank, N.A., 827 F. App'x 765, 766 (9th Cir. 2020)* (holding "claims for unfair business practices, intentional misrepresentation, fraud, and negligent misrepresentation are all fraud-based claims, and must meet the heightened pleading requirements of *Rule 9(b) of the Federal Rules of Civil Procedure*.").

The Court finds Plaintiffs have failed to adequately plead misrepresentation. In support of their intentional misrepresentation claim, Plaintiffs merely recite the rates at which HCSC allegedly represented it would pay Plaintiffs for services provided to Patients A, B, and C, and then state "Defendant's representations were false." FAC ¶¶ 74-75. So too for their negligent misrepresentation claim. Id. ¶¶ 82-83. **[*14]** Plaintiffs allege HCSC misrepresented it would pay Plaintiffs the rates that HCSC conveyed during the verification calls because the resulting coverage was allegedly inconsistent with what HCSC communicated during those calls. The Court finds these bare assertions do not state with particularity the alleged falsity.

Plaintiffs' allegations lack key facts to support the claim that HCSC made a misrepresentation. For instance, Plaintiffs do not allege the amount of the maximum allowable rate, nor do they allege that they requested that information from HCSC or that HCSC provided them with an inaccurate rate, for example. Plaintiffs' opposition brief states in a footnote "[a]ccording to appeal response letters from Defendant to Plaintiffs in the present action, the 'Allowable amount' here is commensurate with the 'usual and customary' or 'UCR' rate." Opp'n at 17 n.1. Plaintiffs do not allege this in the FAC. Moreover, the FAC refers to several forms in which the information conveyed by HCSC agents on verification calls were "memorialized," but Plaintiffs do not allege the contents of those forms or what was written down. FAC ¶¶ 15, 16, 24, 25, 33, 39, 40, 53, 54. While it is true that this **[*15]** information may be sought in discovery, *Rule 9(b)* requires misrepresentation claims to be pleaded with particularity, and the FAC falls short of this requirement.

The Court GRANTS HCSC's motion as to the claims for intentional and negligent misrepresentation with leave to amend.

D. Unfair Competition

Plaintiffs' remaining claim alleges a violation of *Business & Professions Code § 17200*, which prohibits "any unlawful, unfair or fraudulent business act or practice." Plaintiffs assert that Defendant "made representations of pre-service requirements, policy terms, benefits promised thereunder, and future amounts payable," and "Defendant further engaged in unfair claims practices by failing to include adequate explanations regarding its adverse claim determinations." FAC ¶ 89. In their opposition, Plaintiffs assert that their claim is based on the "unfair" and "fraudulent" prongs of the UCL.[5] Opp'n at 21.

The UCL does not define the term "unfair," and "the proper definition of 'unfair' conduct against consumers 'is currently in flux' among California courts." *Hodsdon v. Mars, Inc., 891 F.3d 857, 866 (9th Cir. 2018)* (citing *Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1169 (9th Cir. 2012)*. "Before Cel-Tech, courts held that 'unfair' conduct occurs when that practice 'offends an established public policy or when the practice is immoral, unethical, oppressive, **[*16]** unscrupulous or substantially injurious to consumers.'" Id. (quoting *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 886-887, 85 Cal. Rptr. 2d 301 (1999)* (the South Bay test).

In *Cel-Tech*, the California Supreme Court established a more concrete definition of "unfair" as "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 186-87, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. The *Cel-Tech* court further required that "any finding of unfairness to competitors under *section 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." Id.

However, the *Cel-Tech* test applied to actions by competitors, not consumers. *Id. at 187 n.12*. "[S]ome courts in California have extended the *Cel-Tech* definition to consumer actions, while others have applied the [South Bay test]." *Davis, 691 F.3d at 1169-70*. In Lozano v. AT&T Wireless Svcs., Inc., the Ninth Circuit held that, "[i]n the

[5] Defendant also asserts Plaintiffs' UCL claim should be dismissed because it is based on underlying claims that are not actionable. Mot. at 16. This argument is inapplicable because Plaintiffs did not base their UCL claim on the unlawful prong.

absence of further clarification by the California Supreme Court," courts can apply either the Cel-Tech or South Bay test. *504 F.3d 718, 736 (9th Cir. 2007)*. In the years following *Cel-Tech*, the California Supreme Court has not "addressed the question whether in actions under the UCL brought on behalf of consumers rather **[*17]** than competitors, the term 'unfair' in the UCL needs to be similarly defined in a more prescribed standard or test, and, if so, what that test should be." *Nationwide Biweekly Admin., Inc. v. Superior Ct. of Alameda Cty., 9 Cal. 5th 279, 303, 261 Cal. Rptr. 3d 713, 462 P.3d 461 (2020)* (declining to determine whether the *Cel-Tech* test applies to consumer actions).

The Court follows the California appellate courts in applying the *Cel-Tech* test. In Gregory v. Albertson's, Inc., the California Court of Appeal noted that Cel-Tech "may signal a narrower interpretation of the prohibition of unfair acts or practices in *all* unfair competition actions and provides reason for caution in relying on the broad language in earlier decisions that the court found to be 'too amorphous.'" *104 Cal. App. 4th 845, 854, 128 Cal. Rptr. 2d 389 (2002)* (emphasis added); see also *Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1365-66, 108 Cal. Rptr. 3d 682 (2010)* (rejecting the "vague test of unfairness" under South Bay and collecting cases applying *Cel-Tech* in consumer UCL actions).

Plaintiffs fail to meet the *Cel-Tech* test. In order for a claim to be "sufficiently 'tethered' to a legislative policy for the purposes of the unfair prong," there must be a "close nexus between the challenged act and the legislative policy." *Hodsdon, 891 F.3d at 866* (citing *Cel-Tech, 20 Cal. 4th at 187*). Plaintiffs have not identified any legislative policy Defendants have violated.

As for the fraudulent prong, for the reasons explained above, the Court finds Plaintiffs have failed **[*18]** to plead the alleged misrepresentation with particularity as required by *Rule 9(b)*.

The Court GRANTS HCSC's motion as to the UCL claim with leave to amend.

IV. CONCLUSION

The motion to dismiss is GRANTED. The FAC is dismissed with leave to amend consistent with this order. An amended complaint must be filed and served no later than November 22, 2021. Failure to file by that date will waive the right to do so. The Court does not grant leave to add new defendants or new claims. Leave to add defendants or new claims must be sought by a separate, properly noticed motion.

IT IS SO ORDERED.

Date: October 21, 2021

/s/ Dale S. Fischer

Dale S. Fischer

United States District Judge

Litovich v. Bank of Am. Corp.

United States District Court for the Southern District of New York

October 25, 2021, Decided; October 25, 2021, Filed

20-cv-3154 (LJL)

Reporter

568 F. Supp. 3d 398 *; 2021 U.S. Dist. LEXIS 205553 **; 2021 WL 4952034

ISABEL LITOVICH, et al., Plaintiffs, -v- BANK OF AMERICA CORPORATION, et al., Defendants.

Subsequent History: Appeal filed, 11/23/2021

Motion denied by *Litovich v. Bank of Am. Corp., 2022 U.S. Dist. LEXIS 205390 (S.D.N.Y., Nov. 10, 2022)*

Core Terms

platforms, trading, pricing, allegations, investors, dealers, odd-lot, conspiracy, Bonds, corporate bond, retail, Plaintiffs', spreads, boycott, Defendants', electronic, group boycott, odd, non-Defendant, antitrust, transparency, communications, round, traders, transactions, market share, alleged conspiracy, invested, concentrated, round lot

LexisNexis® Headnotes

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

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

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

To survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a complaint must include sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.

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

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

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

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Determining whether a complaint states a plausible claim for relief will be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. Put another way, the plausibility requirement calls for enough fact to raise a reasonable expectation that discovery will reveal evidence supporting the claim.

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

HN3[] **Complaints, Requirements for Complaint**

Although a court must accept all the factual allegations of a complaint as true, it is not bound to accept as true a legal conclusion couched as a factual allegation. The issue is not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claims.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

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

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

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

HN4[] **Sherman Act, Claims**

There is no heightened pleading standard in antitrust cases. The Sherman Act bans every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states. 15 U.S.C.S. § 1. The crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express. Stating a § 1 claim requires a complaint with enough factual matter to suggest that an agreement was made, meaning the complaint must contain enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. The ultimate existence of an agreement under ***antitrust law***, however, is a legal conclusion, not a factual allegation.

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

Evidence > Types of Evidence > Circumstantial Evidence

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

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

Evidence > Inferences & Presumptions > Inferences

HN5[] **Conspiracy to Monopolize, Elements**

A plaintiff's job at the pleading stage, in order to overcome a motion to dismiss, is to allege enough facts to support the inference that a conspiracy actually existed. There are two ways to do that. Plaintiffs can either assert direct evidence that the defendants entered into an agreement in violation of the antitrust laws, or present circumstantial facts supporting the inference that a conspiracy existed. By their nature, conspiracies are often difficult to prove with direct evidence. As such, cases often focus on whether indirect and circumstantial allegations are sufficient to plausibly allege a conspiracy and survive a motion to dismiss.

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

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

HN6[] **Cartels & Horizontal Restraints, Price Fixing**

A horizontal agreement among competitors is commonly based on claims of parallel conduct by the alleged co-conspirators. However, an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a 15 U.S.C.S. § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. Post-Twombly, courts considering whether a complaint states a § 1 claim look for both parallel conduct and plus factors that, along with the parallel conduct, make it plausible to infer an agreement among competitors.

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

HN7[] **Cartels & Horizontal Restraints, Price Fixing**

The first step in analyzing a conspiracy claim is to identify allegations of parallel conduct. However, parallel conduct does not itself establish conspiracy or a plausible inference of conspiracy. Stating a 15 U.S.C.S. § 1 claim without direct evidence requires allegations of parallel conduct placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Inferences & Presumptions > Inferences

HN8[] **Sherman Act, Claims**

An inference of conspiracy will not arise when the alleged conspirators' conduct made perfect business sense, or where there are obvious alternative explanations for the facts alleged.

Business & Corporate Law > Joint Ventures > Formation

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

Business & Corporate Law > Agency Relationships > Agents Distinguished > Joint Venturers

HN9[] **Joint Ventures, Formation**

Viewing the operation of a legitimate joint venture as akin to that of a single firm, modern ***antitrust law*** evaluates such joint conduct, including the creation of the joint venture itself, its business focus, its product selection, and its pricing, under the rule of reason, with the pleading requirements that standard imposes.

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

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

HN10[] Cartels & Horizontal Restraints, Price Fixing

Plus factors are additional circumstances which, when viewed in conjunction with parallel acts, can serve to allow a fact-finder to infer a conspiracy. The plus factors may include: a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of inter-firm communications. However, something like inter-firm conduct does not automatically convert parallel conduct not suggestive of a conspiracy into a valid 15 U.S.C.S. § 1 claim; rather, plus factors must be circumstances which, when combined with parallel behavior, might permit a jury to infer the existence of an agreement.

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

HN11[] Conspiracy to Monopolize, Elements

The plus factor of market concentration looks at the feasibility of competitors reaching and enforcing an agreement to restrain trade. The fewer the number of participants in the market, the easier to reach an agreement to restrain trade, and the easier to enforce such an agreement, thus the more plausible the inference of conspiracy.

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

HN12[] Vertical Restraints, Price Fixing

Conscious parallelism, a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions is not in and of itself unlawful.

Antitrust & Trade Law > Sherman Act > Claims

HN13[] Sherman Act, Claims

Where there are extensive communications among high-level officials at dealers with responsibilities for the products at issue and where communications occur in fora where discussion of competitive threats may naturally arise, those communications tend to be supportive of the existence of a conspiracy. That is particularly true where the communications represent a departure from the ordinary pattern of communications between defendants or where there is evidence that defendants exchanged confidential information or sought to conceal their communications.

Antitrust & Trade Law > Sherman Act > Claims

HN14[] Sherman Act, Claims

A mere showing of close relations or frequent meetings between alleged conspirators will not sustain a plaintiff's burden absent evidence which would permit the inference that the close ties led to an illegal agreement. Analysis of inter-firm communications is not mechanical, and the probative value of such evidence depends on the participants, the information exchanged, and the context, specifically, the connection between the content and the conspiracy alleged.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN15[] **Sherman Act, Claims**

It is fundamental to pleading in the post-Twombly era that before a defendant is forced to be held to account for conduct as serious as a conspiracy in restraint of trade in violation of the Sherman Act that the pleader inform the defendant what it is alleged to have done. It is not sufficient for the plaintiff to allege that a group has done something wrong unless the allegations give reason to believe that the defendant, as a member of the group, also has committed the wrong. A complaint that provides no basis to infer the culpability of the specific defendants named in the complaint fails to state a claim.

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

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

HN16[] **Motions to Dismiss, Failure to State Claim**

Claims as to the motivations or actions of defendants as a general collective bloc, or generalized claims of parallel conduct, must be set aside as impermissible group pleading. An antitrust complaint that fails to connect each or any individual entity to the over-arching conspiracy cannot ordinarily survive a motion to dismiss.

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

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Governments > Legislation > Statute of Limitations > Time Limitations

HN17[] **Motions to Dismiss, Failure to State Claim**

Although the statute of limitations is ordinarily an affirmative defense that must be raised in the answer, a statute of limitations defense may be decided on a Fed. R. Civ. P. 12(b)(6) motion if the defense appears on the face of the complaint. In the instance of a case where the discovery accrual rule is at issue, where the facts needed for determination of when a reasonable investor of ordinary intelligence would have been aware of the existence of fraud can be gleaned from the complaint and papers integral to the complaint, resolution of the issue on a motion to dismiss is appropriate.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

HN18[] **Sherman Act, Defenses**

A claim under § 1 of the Sherman Act is subject to a four-year statute of limitations that runs from the date of injury.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Clayton Act > Defenses

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

HN19[] **Sherman Act, Defenses**

Antitrust law provides that, in the case of a continuing violation, say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and injures the plaintiff, e.g., each sale to the plaintiff, starts the statutory period running again. However, the rule only applies to overt acts that are part of the violation; an overt act committed more than four years prior to the filing of the complaint whose effects were first felt outside the limitations, therefore, usually will not support a cause of action even the effects persist into the limitations period.

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

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

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

HN20[] **Horizontal Refusals to Deal, Boycotts**

In a price-fixing conspiracy, each fixed price is itself an overt act that is part of the antitrust violation, and therefore starts the statutory period as to that act. In contrast, in a group boycott conspiracy, higher prices are not the conspiracy itself but are, at most, the effects of the boycott agreement and actions.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

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

HN21[] **Sherman Act, Defenses**

In a continuing antitrust conspiracy, the general limitations rule is usually understood to mean that each time a plaintiff is injured by an act of the defendants, a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act. In other words, an action by defendants within the statutory period does not bring the entire alleged conspiracy, the vast majority of which occurred outside the statutory period, into that period. Rather, it will only give rise to a cause of action (a) if the action within the statutory period itself injures the plaintiffs and (b) as to damages stemming from that action.

Antitrust & Trade Law > Sherman Act > Defenses

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Tolling

HN22[ ] **Sherman Act, Defenses**

A claim of fraudulent concealment must be pled with particularity. An antitrust plaintiff may prove fraudulent concealment sufficient to toll the running of the statute of limitations if he establishes: (1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within four years of the commencement of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part. For the first element, a plaintiff may prove the concealment element by showing either that a defendant took affirmative steps to prevent the plaintiff's discovery of his claim or injury or that the wrong itself was of such a nature as to be self-concealing.

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

HN23[ ] **Consumer Protection, Deceptive & Unfair Trade Practices**

Communications to the community at large will not generally support a finding of fraudulent concealment.

Securities Law > ... > Elements of Proof > Materiality > Puffery

HN24[ ] **Materiality, Puffery**

It is well established that general statements about reputation, integrity, and compliance with ethical norms are inactionable puffery, meaning that they are too general to cause a reasonable investor to rely upon them. If that is so, the statements are also too general for a would-be plaintiff to rely upon them in foregoing an investigation.

Governments > Legislation > Statute of Limitations > Tolling

HN25[ ] **Statute of Limitations, Tolling**

All that is necessary to cause a tolling period to cease is for there to be reason to suspect the probability of any manner of wrongdoing.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN26[ ] **Clayton Act, Claims**

Section 4 of the Clayton Act establishes a private right of action for violations of the federal antitrust laws, and entitles any person who is injured in his business or property by reason of anything forbidden in the antitrust laws to treble damages for those injuries. 15 U.S.C.S. § 15. A court requires a private antitrust plaintiff plausibly to allege (a) that it suffered a special kind of antirust injury, and (b) that it is a suitable plaintiff to pursue the alleged antitrust violations and thus is an efficient enforcer of the antitrust laws.

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For Citigroup Inc., Citigroup Global Markets Inc., Defendants: Jay B. Kasner, LEAD ATTORNEY, Karen Hoffman Lent, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY.

For Credit Suisse Securities LLC, Defendant: Herbert Scott Washer, Sheila Chithran Ramesh, Tara Halsch Curtin, Cahill Gordon & Reindel LLP, New York, NY.

For Deutsche Bank Securities Inc., Defendant: Brian John Roe, Susannah Sidney Geltman, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP (NY), New York, NY; John Terzaken, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP (DC), Washington, DC; Adrienne Vollmer Baxley, Lani Lear, Simpson Thacher & Bartlett LLP, Washington, DC.

For The Goldman Sachs Group, Inc., Goldman Sachs & Co., LLC, Defendants: Jonathan Sloan Carter, Sullivan & Cromwell LLP, New York, NY; Matthew Joseph Porpora, Sullivan & Cromwell, LLP (NYC), New York, NY; Richard C. Pepperman, **[**3]** II, Sullivan and Cromwell, LLP(NYC), New York, NY.

For JPMorgan Chase & Co., J.P. Morgan Securities LLC, Defendants: Andrew W. Chang, Covington & Burling, Washington, DC; John S. Playforth, Covington & Burling LLP, Washington, DC; Robert D. Wick, Covington & Burling, LLP (DC), Washington, DC.

For Morgan Stanley, Morgan Stanley & Co., LLC, Morgan Stanley Smith Barney LLC, Defendants: Brad Scott Karp, Richard A. Rosen, Susanna Michele Buergel, LEAD ATTORNEYS, Paul Weiss (NY), New York, NY; Jane Baek O'Brien, LEAD ATTORNEY, Paul, Weiss, Rifkind, Wharton & Garrison, LLP (DC), Washington, DC.

For Natwest Markets Securities Inc., Defendant: Paul Steel Mishkin, LEAD ATTORNEY, Adam Gabor Mehes, John Michael Briggs, Davis Polk & Wardwell LLP (NYC), New York, NY.

For Wells Fargo & Co., Wells Fargo Securities LLC, Wells Fargo Clearing Services, LLC, Defendants: Amanda Leigh Dollinger, Jayant W. Tambe, Laura W. Sawyer, Stephen Jay Obie, Jones Day (NYC), New York, NY; Shan Jiang, Jones Day - New York, New York, NY.

Judges: LEWIS J. LIMAN, United States District Judge.

Opinion by: LEWIS J. LIMAN

Opinion

[*407] OPINION AND ORDER

LEWIS J. LIMAN, United States District Judge:

Defendants, a group of investment banks and their affiliates[1] (collectively, **[**4]** "Defendants"), jointly move, pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, to dismiss Plaintiffs' amended consolidated class action complaint at Dkt. No. 128 (the "Complaint" or "SAC") for failure to state a claim.

For the following reasons, the motion to dismiss is granted.

BACKGROUND

The Court assumes the truth of the well-pled allegations of the Complaint and the documents incorporated therein for purposes of the motion to dismiss.

I. The Relevant Market

The Complaint relates to an alleged conspiracy in the secondary market for odd lots of corporate bonds (the "Relevant Market"). SAC ¶ 246.

[*408] Corporate bonds are debt instruments issued by corporations to raise funds for their operations; they are issued through individual offerings to one or more registered securities firms in the primary market. *Id.* ¶¶ 3, 59. The securities firms—the dealers—then trade these bonds with other dealers and investors in the secondary market. *Id.* ¶ 4. Corporate bonds are not traded on anonymous exchanges, but rather are generally traded individually with dealers in the secondary over-the-counter market. *Id.* ¶¶ 5, 65.

Within this market, corporate bonds are broken down into two categories based on the number of bonds included in the trade. **[**5]** "Round lots" consist of bond trades involving increments of 1,000 bonds, or that are greater than and divisible by $1 million in par value, while "odd lots" generally consist of bond trades involving fewer than 1,000 bonds, or that are less than $1 million in par value. *Id.* Because bonds from the same issue are fungible, odd lots of that issue can be combined into a round lot, and a round lot of that issue can be broken into odd lots. *Id.* Round-lot trades almost always involve institutional investors, whereas odd-lot trades are more likely to involve retail investors. *Id.* ¶¶ 81-85. Round-lot trades make up approximately 82% of total trading volume of corporate bonds in the United States. *Id.* ¶¶ 93, 116, 257 n.56.

In the secondary market, dealers trade in both round lots and odd lots, providing a bid price at which they are willing to purchase lots of a specific bond or an offer price at which they are willing to sell lots of a specific bond. *Id.* ¶ 6. Bid prices and offer prices are expressed as percentages of the bond's par value. *Id.* ¶ 59. The difference between

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[1] Defendants are Bank of America Corporation, Merrill Lynch, Pierce, Fenner & Smith, Inc., and BofA Securities, Inc. (collectively, "Bank of America"); Barclays Capital Inc. ("Barclays"); Citigroup Inc., and Citigroup Global Markets Inc. (collectively, "Citigroup"); Credit Suisse Securities (USA) LCC ("Credit Suisse"); Deutsche Bank Securities Inc. ("Deutsche Bank"); The Goldman Sachs Group, Inc. and Goldman, Sachs & Co., LLC (collectively, "Goldman Sachs"); JPMorgan Chase & Co. and J.P. Morgan Securities LLC (collectively, "JPMorgan"); Morgan Stanley, Morgan Stanley & Co., LLC, and Morgan Stanley Smith Barney LLC (collectively, "Morgan Stanley"); NatWest Markets Securities Inc. ("NatWest" or "RBS"); and Wells Fargo & Co., Wells Fargo Securities LLC, and Wells Fargo Clearing Services, LLC (collectively, "Wells Fargo").

bid price and offer price—the bid-offer spread—becomes the profit dealers make on their trades. *Id.* ¶ 7. For example, a bid-offer **[**6]** spread of 99/101 means that the dealer is willing to buy a bond at 99% of the bond's par value, and is willing to sell the bond at 101% of the bond's par value; the difference would be the dealer's profit. *Id.* ¶ 59.

Defendants are a group of ten investment banks—and their affiliates—who are dealers in the secondary corporate bond market, both in round lots and odd lots; Plaintiffs are three individuals, a trust, and a pension fund who traded in the Relevant Market.

II. The Alleged Conspiracy

Plaintiffs' claim revolves around the allegation of "a conspiracy by Defendants from at least August 1, 2006 to the present . . . to restrain electronic advances in the marketplace that would have reduced transactional costs for investors in odd-lots of corporate bonds to the detriment of Defendants' trading profits." SAC ¶ 2; *see also id.* ¶ 279 ("Defendants have conspired and agreed with each other to engage in a group boycott as alleged above of certain odd-lot focused electronic trading platforms . . . that sought to increase pre-trade pricing transparency, allow all-to-all direct trading and/or anonymous trading, and/or otherwise promote pricing competition for odd-lot investors.").

Although Plaintiffs **[**7]** do not bring a claim of price-fixing in the Complaint, *see* Dkt. No. 133 at 3, their anticompetitive theory is predicated on an allegation that Defendants trade odd lots at significantly higher bid-offer spreads than they do round lots: "Defendants display remarkable parallel pricing in terms of odd-lots versus round lots. Despite the high number of odd-lot trades executed by dealers and the fact that such trades are qualitatively identical to round lot trades, Defendants demand odd-lot investors, such as Plaintiffs . . . , pay spreads that are 25% to 300% higher than [those paid by] investors trading in **[*409]** round lots of the same issue." SAC ¶ 10. Plaintiffs allege that "[n]o reasonable economic justification explains the magnitude of the pricing disparity between odd-lot and round lot trades of the same issue," and that "[i]n a truly competitive market, multiple factors, such as advances in technology that improve pre-trade price transparency and dealers' competitive desire to secure a greater share of the growing odd-lot market, suggest that Defendants should be narrowing their spreads on odd-lots toward parity with the already profitable round lot trades." *Id.* ¶ 11. This central theory—that **[**8]** there is a huge discrepancy between the bid-offer spread for round-lot trades and odd-lot trades, and that this discrepancy has no reasonable economic justification and can only be explained by anticompetitive behavior—underlies Plaintiffs' allegations of a conspiracy among Defendants.

A. The Group Boycott

Plaintiffs' central claim is that Defendants "engaged in a joint scheme to boycott electronic trading platforms with increased pricing transparency, refusing to participate in them and provide them liquidity, even though gaining market share in the growing odd-lot market through such participation would be in each Defendants' unilateral interest if they were not conspiring with one another." Dkt. No. 133 at 2. Plaintiffs allege that "E-platforms have the ability to allow Plaintiffs and the Class to trade corporate bonds with greater transparency and significantly less cost, *i.e.*, with narrower bid-offer spreads. Therefore, in order to maintain wider spreads on odd-lot trades of corporate bonds, Defendants have engaged in a pattern of parallel conduct and anticompetitive collusion to restrict competition from those electronic platforms seeking to improve odd-lot pricing for bond investors **[**9]** and seeking to compete with Defendants in this market." SAC ¶ 131. They allege that this collusive conduct included:

> punishing those participants in the bond odd-lot markets that were engaging in trading activity that had the potential to narrow the bid ask spreads; investing in and acquiring control of various electronic platforms to ensure they did not improve pricing for old-lot investors (including one platform, TradeWeb, that was co-owned by all Defendants and used repeatedly to acquire and shut down platforms that threatened to provide pre-trade pricing transparency and increase pricing competition for retail odd-lot investors); engaging in a group boycott of other retail-focused (and therefore, odd-lot focused) electronic trading platforms; punishing others who attempted to offer support or liquidity to such retail-focused electronic trading platforms; denying liquidity to

> electronic platforms that might improve price competition for retail odd-lot investors despite the potential opportunity such platforms offer to increase each Defendant's market share of odd-lot transactions; and using their market power to deny and/or delay access to essential facilities that competing retail-focused **[**10]** electronic platforms required to enter the secondary market for trading odd-lots of corporate bonds.

Id. ¶ 133. Plaintiffs' allegations that Defendants punished those who threatened their conspiracy relate to two instances. First, Plaintiffs allege that "when odd-lot traders employed by InterVest engaged in trading that Salomon Smith Barney (later acquired by Citigroup) deemed to be 'disruptive' of the market, Salomon refused to do business with those traders. None of the other Defendants stepped in to do business with the traders, instead, as one would expect in a competitive market." *Id.* ¶ 137. Second, Plaintiffs allege that from 2015-2019, **[*410]** Blackrock used competitive regional banks and brokers such as First Tennessee for odd-lot trading, including on electronic platforms like MarketAxess, because they provided narrower spreads; Morgan Stanley and Citigroup threatened to limit their business with First Tennessee to penalize them for offering these narrower spreads. *Id.* ¶¶ 138-139.

The remainder of Plaintiffs' broad group boycott allegations relate to six electronic trading platforms.

1. InterVest

In the mid-1990s, InterVest Financial Services planned to debut a new electronic trading **[**11]** system for corporate bonds with anonymous, push-button trading on Bloomberg terminals, pursuant to an agreement with Bloomberg. SAC ¶ 141. However, once this was announced, bond dealers began to complain to Bloomberg that InterVest offered a service that competed with them. *Id.* ¶ 142. Bloomberg tried to withdraw from its agreement with InterVest, but after InterVest threatened legal action, the system launched on Bloomberg terminals in December 1996. Bloomberg terminated the service about a year later "due to pressure from Defendants." *Id.* The Complaint does not include any specific allegations regarding this "pressure," who specifically applied it, and how it was applied.

2. TradeWeb

TradeWeb is an electronic platform that was founded in 1996, with initial funding by four of the defendants: Credit Suisse, Lehman Brothers (later acquired by Barclays), Saloman Smith Barney (later acquired by Citigroup), and Goldman Sachs. SAC ¶ 143. By 2004, Citigroup, Merrill Lynch, Morgan Stanley, JPMorgan, and Deutsche Bank held ownership interests in TradeWeb as well. *Id.* In 2004, Thompson Reuters purchased TradeWeb, but agreed to a joint ownership structure called "Project Fusion" that went into **[**12]** effect in January 2008, wherein Credit Suisse, Goldman Sachs, Lehman Brothers, Merrill Lynch, Morgan Stanley, JPMorgan, Deutsche Bank, and RBS would retain minority ownership stakes in TradeWeb; Citigroup joined this list in 2008 as well. *Id.* ¶¶ 150-151. According to at least one source, the trader defendants sold to Thomson Reuters because of "regulatory concerns over potential conflicts of interest and competition issues in dealer-owned networks"; the sale followed the issuance of antitrust civil investigative demands to similar electronic trading platforms. *Id.* ¶ 149.

Plaintiffs allege two separate kinds of anticompetitive behavior via TradeWeb. First, Defendants' ownership of TradeWeb allowed them to use it as a "stalking horse" to "catch and kill" other electronic platforms that threatened to increase transparency and offer better pricing to retail odd-lot investors. *Id.* ¶ 152. Second, Defendants' ownership of TradeWeb allowed them to block retail investors from the platform; "[t]o this day, in what can only be explained by Defendants' refusal to support it as a competitive platform for odd-lot trades, TradeWeb does not allow access to retail investors to trade in odd-lot corporate **[**13]** bonds, and continues to maintain a dealer-to-dealer market structure rather than all-to-all trading." *Id.*

3. BondDesk

BondDesk was a bond platform founded in 1999 that originally focused on smaller trades and investment advisors representing retail investors but was not directly open to retail investors. SAC ¶ 172. Over the next five years, BondDesk sold ownership stakes to fourteen major banks, including Goldman Sachs, Bank of America, JPMorgan, and Wells Fargo. *Id.* ¶ 173. In 2004, these fourteen banks held six out of eleven seats on the board of directors, **[*411]** including seats held by Brad Levy, who was affiliated with Goldman Sachs, and Matthew Frymier, who was affiliated with Bank of America. *Id.* ¶ 174. Plaintiffs allege that Defendants saw BondDesk's innovations as threatening to their "supracompetitive profitability," and therefore "conspired to use their positions on the BondDesk board to remove the existing management of BondDesk from their day-to-day leadership positions at the company in 2004." *Id.* ¶¶ 175-176. Levy and Frymier led this effort—which entailed pressuring the management to leave by raising false concerns about existing stock option accounting treatment, something management **[**14]** would be held responsible for—by reaching out to BondDesk's outside accounting firm and encouraging them to raise a red flag about the existing accounting treatment in exchange for referring additional clients to the firm. *Id.* ¶¶ 176-179. The firm agreed to do so, and the board, controlled by the board members affiliated with the bank owners, used this as an excuse to remove BondDesk's management; subsequently, the accounting issue was resolved without any changes to existing procedure. *Id.* ¶¶ 180-181.

In 2006, a private equity firm bought majority stake in BondDesk, which subsequently announced that it was extending its marketplace to institutional traders and portfolio managers, but not to retail investors directly. *Id.* ¶ 182. The platform became the primary bond-trading platform for retail odd-lot-sized trades for several major retail and institutional investment advisors, facilitating about a third of retail-sized trades. *Id.* ¶ 183. In 2011, BondDesk hired a new CEO who announced a plan to introduce a system for direct retail trading on BondDesk; he implemented BondWorks, which initially created workstations for advisors and brokers to access BondDesk and would "eventually" allow **[**15]** retail investors such access as well. *Id.* ¶ 184. BondDesk also partnered with another trading platform in 2011 and made this new combined service immediately available to its dealer clients but not retail investors. *Id.* ¶ 185.

Plaintiffs allege that Defendants were "threatened by these moves that would provide greater price transparency to retail odd-lots investors and allow retail investors the opportunity to trade outside of the Defendant-controlled and intermediated OTC market," and responded by using TradeWeb—which, as described above, several Defendants had minority ownership interest in—to acquire BondDesk in 2013. *Id.* ¶ 186. Plaintiffs allege that Defendants, "(via TradeWeb) . . . closed off BondDesk access for retail investors," except for indirect access. *Id.* ¶ 188. Plaintiffs never allege, however, that retail investors had direct access to BondDesk at any point prior to this acquisition. BondDesk became TradeWeb Direct, a platform open to institutional investors and dealers that allows trading in odd lots. *Id.* ¶ 187.

4. ABS/NYSE

In 1976, the New York Stock Exchange ("NYSE") introduced the Automated Bond System ("ABS"), which allowed trading in a variety of bonds, including **[**16]** corporate bonds. SAC ¶ 153. ABS failed to gain traction in the corporate bond market, however; by 2002, only 5% of corporate bonds were listed on ABS, and by 2006, only about 1% of corporate bond issues traded on ABS. *Id.* ¶ 154. In 2007, ABS was replaced by NYSE Bonds, which offered pre-trade transparency for investors on pricing. *Id.* ¶ 155. A 2014 study found that corporate bonds listed on NYSE Bonds had lower bid-offer spreads than similar bonds not listed on NYSE Bonds, and that these price effects were greatest for trades of less than $100,000. *Id.* However, NYSE Bonds also failed to gain traction **[*412]** among dealers trading in corporate bonds. *Id.* ¶ 156.

Plaintiffs allege that this was due to "(a) a concerted boycott of the platforms by Defendants, and (b) collusive efforts by Defendants to deny or delay NYSE Bonds access to the Bloomberg TOMS facility, an essential venue necessary for any newcomer seeking to participate in and compete within the corporate bond market." *Id.* ¶ 157. Although "[o]btaining access to Bloomberg TOMS should have taken a short period of time for NYSE Bonds, particularly given the significance and power of the New York Stock Exchange," it took eighteen to nineteen **[**17]** months for NYSE Bonds to obtain this access. *Id.* ¶ 162. Defendants "used their market power and value to Bloomberg as Bloomberg Terminal customers to force Bloomberg to materially delay NYSE Bonds' connection to the essential facility of Bloomberg TOMS," and "forced Bloomberg to delay NYSE Bonds' connectivity through Bloomberg TOMS by threatening to terminate or reduce their Bloomberg Terminal leases if Bloomberg failed to do so." *Id.* ¶ 163.

5. Bonds.com

Bonds.com is another company that sought to introduce an electronic trading platform. It launched a bond trading platform called BondStation in 2008 which was open to both retail and institutional investors; after three months, the company shifted its focus to the institutional segment "due to market conditions and other economic factors." *Id.* ¶ 167 (internal quotation marks omitted). Plaintiffs allege that one of these market conditions was a group boycott of the platform by dealers. *Id.* In 2010, Bonds.com stopped using BondStation and offered a new platform called BondsPro, which aimed to offer institutional investors an alternative trading system for odd-lot fixed income securities. *Id.* ¶ 168. The platform continued to allow all-to-all, **[**18]** anonymous, exchange-style trading. *Id.*

Plaintiffs allege that in 2012 and 2013, "Bonds.com sought order flow and participation on its platform from major corporate bonds dealers like Defendants," but that "[n]one of the dealers would participate with Bonds.com and the Defendants monitored and policed their conspiracy to make sure there would be no defectors." *Id.* ¶¶ 169-170. Specifically, Plaintiffs allege that Bank of America was interested in participating on BondsPro but was worried about "blowback it would suffer from other Defendants." *Id.* ¶ 170. They allege that Bank of America said that it would only participate on the platform if at least one or two other large dealers did as well. *Id.* "As a result of this group boycott," Bonds.com ran out of funding in 2013 and was sold in 2014. *Id.* ¶ 171.

6. Trading Edge

Plaintiffs allege that most electronic platforms "failed within a few years," and that even when they had success, "they were quickly acquired and shuttered by Defendant-backed platforms." *Id.* ¶¶ 191-192. As an example, Plaintiffs allege that Trading Edge, a startup trading platform that offered exchange-like electronic trading with anonymous matching on bond trades, had success **[**19]** in 1999-2000 and was subsequently acquired in 2001 by MarketAxess, an electronic trading platform that was open only to institutional investors and was founded by JPMorgan, among others. *Id.* ¶¶ 192-193. MarketAxess originally stated that it would integrate the anonymous trading with its current platform but decided to terminate the anonymous trading within seven months. *Id.* ¶ 194.

PROCEDURAL HISTORY

Plaintiffs filed a complaint against Defendants on April 21, 2020. Dkt. No. 1. On **[*413]** July 14, 2020, Plaintiffs filed an amended consolidated complaint. Dkt. No. 106. Defendants filed a joint motion to dismiss the amended consolidated complaint on September 10, 2020. Dkt. No. 116. Plaintiffs filed the second amended consolidated complaint on October 29, 2020. Dkt. No. 128. The Court denied Defendants' pending motion to dismiss the amended consolidated complaint as moot. Dkt. No. 129. Defendants filed a new joint motion to dismiss the second amended consolidated complaint on December 15, 2020. Dkt. No. 130. Plaintiffs filed their response in opposition to the motion on January 28, 2021, Dkt. No. 133, and Defendants filed their reply in further support of the motion on March 15, 2021, Dkt. No. **[**20]** 136.

LEGAL STANDARD

HN1[] To survive a motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, a complaint must include "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*).

HN2[] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id. at 679*. Put another way, the plausibility requirement "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence [supporting the claim]." *Twombly, 550 U.S. at 556*; *accord Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 46, 131 S. Ct. 1309, 179 L. Ed. 2d 398 (2011)*.

HN3[] Although the Court must accept all the factual allegations of a complaint as true, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 555*). The issue "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Walker v. Schult, 717 F.3d 119, 124 (2d Cir. 2013)* (quoting *Scheuer v. Rhodes, 416 U.S. 232, 235-36, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*); *see also DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 113 (2d Cir. 2010)* ("In ruling on a motion pursuant to *Fed. R. Civ. P. 12(b)(6)*, the duty of a court is merely to assess the **[**21]** legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." (internal quotation marks and citation omitted)).

HN4[] "There is no heightened pleading standard in antitrust cases." *In re Interest Rate Swaps Antitrust Litigation, ("IRS I"), 261 F. Supp. 3d 430, 461 (S.D.N.Y. 2017)* (citing *Concord Assocs., L.P. v. Entm't Props. Tr., 817 F.3d 46, 52 (2d Cir. 2016)*). The *Sherman Act* bans "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. "[T]he crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express." *Twombly, 550 U.S. at 553* (internal quotations, citations, and alterations omitted). Stating a *Section 1* claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made," meaning the complaint must contain "enough facts to raise a reasonable expectation **[*414]** that discovery will reveal evidence of illegal agreement." *Id. at 556*. "The ultimate existence of an 'agreement' under ***antitrust law***, however, is a legal conclusion, not a factual allegation." *Mayor and City Council of Baltimore v. Citigroup, 709 F.3d 129, 134-35 (2d Cir. 2013)* (citing *Starr v. Sony BMC Music Entertainment, 592 F.3d 314, 319 n.2 (2d Cir. 2010)* ("The allegation that defendants agreed to [a] price floor is obviously conclusory, and is not accepted as true.")).

HN5[] "A plaintiff's job at the pleading stage, in order to overcome a motion to dismiss, **[**22]** is to allege enough facts to support the inference that a conspiracy actually existed. . . . [T]here are two ways to do this." *Citigroup, 709 F.3d at 136*. Plaintiffs can either assert "direct evidence that the defendants entered into an agreement in violation of the antitrust laws," or "present circumstantial facts supporting the *inference* that a conspiracy existed." *Id.* By their nature, conspiracies are often difficult to prove with direct evidence. As such, cases often focus on whether indirect and circumstantial allegations are sufficient to plausibly allege a conspiracy and survive a motion to dismiss.

HN6[] "A horizontal agreement among competitors, the sort of pact alleged here, is commonly based on claims of parallel conduct by the alleged co-conspirators." *IRS I, 261 F. Supp. 3d at 462*. However, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a *§ 1* claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel **[**23]** conduct that could just as well be independent action." *Twombly, 550 U.S. at 556-57*. Post-*Twombly*, courts considering whether a complaint states a *Section 1* claim look for both parallel conduct and "plus factors" that, "along with the parallel conduct, make it plausible to infer an agreement among competitors." *IRS I, 261 F. Supp. 3d at 462-63*.

DISCUSSION

Defendants move to dismiss Plaintiffs' Complaint on four grounds. First, they argue that Plaintiffs have not pled a plausible boycott conspiracy. Second, they argue that the Complaint fails to connect any specific Defendant to the alleged conspiracy and instead engages in impermissible group pleading. Third, they argue that Plaintiffs' claim is time-barred. Fourth, they argue that Plaintiffs fail to plead antitrust standing. The Court addresses each of these arguments in turn.

I. Plaintiffs Fail to Plead a Plausible Boycott Conspiracy

Defendants argue that Plaintiffs have failed to plead a plausible boycott conspiracy. They argue that Plaintiffs' boycott theory is fundamentally implausible; that Plaintiffs have not alleged facts—either in the form of direct evidence of a conspiracy or parallel conduct and plus factors—that lead to the inference of a conspiracy; and that Plaintiffs' allegations with regard to **[**24]** each of the electronic trading platforms that they argue Defendants either controlled or boycotted are individually defective.

The Complaint is ambiguous and unclear regarding the precise nature of the group boycott Plaintiffs allege. At some points, the Complaint appears to allege a conspiracy to boycott platforms that would allow access to retail investors and thereby increase transparency for such investors. SAC ¶¶ 195-200. That theory would require **[*415]** the existence, or at least the prospect of, platforms that would allow access to both retail and institutional investors. A group boycott of a platform that would allow access to retail investors could not occur absent the existence or the prospect of such a platform.

At other points, Plaintiffs appear to allege a group boycott of platforms that permit trading of both round lots and odd lots, or "a group boycott designed to maintain pricing opacity for odd-lot corporate bonds, whether they were bought to sold by retail or institutional investors." Dkt. No. 133 at 31. That theory would not necessarily be undermined by the absence of a platform that permitted access to retail investors for the group to boycott; Plaintiffs allege that institutional **[**25]** investors, as well as retail investors, trade odd lots. It would, however, be undermined by evidence that members of the purported group did business with, and did not boycott, platforms that provided pricing for odd lots. A defendant cannot boycott one with whom it does business.

Plaintiffs' briefing expressly disavows the former theory—a boycott of platforms that were open to retail investors. Dkt. No. 133 at 31. None of the platforms that Plaintiffs identify as part of Defendants' group boycott allowed direct access by retail investors. The allegations of the Complaint undercut the latter theory. The Complaint alleges that the Defendants who were members of the conspiracy in fact supported TradeWeb and MarketAxess—platforms that "increase pre-trade pricing transparency, which results in better competition on pricing and lower transactional costs for institutional investors trading in corporate bonds." SAC ¶ 198.

The Court's discussion that follows is agnostic to the different theories. The analysis would apply to both theories. The Court identifies the allegations of parallel conduct, analyzes whether those allegations of parallel conduct plausibly support the existence of a preexisting **[**26]** agreement among competitors to engage in predetermined conduct, and then analyzes the relevant plus factors. Regardless whether the Complaint is understood to plead a conspiracy to boycott a platform that would permit retail investors or to boycott platforms that provide pricing for odd-lot transactions, it fails to state a plausible claim for relief.

1. Parallel Conduct

Plaintiffs acknowledge in their opposition that they do not plead "direct evidence of an agreement among defendants." Dkt. No. 133 at 16. They seek rather to support the existence of a conspiracy by attempting to "present circumstantial facts supporting the *inference* that a conspiracy existed." *Citigroup, 709 F.3d at 136*. They argue that parallel conduct in addition to plus factors supports the existence of a conspiracy.

HN7[] The first step in analyzing such a claim is to identify allegations of parallel conduct. However, parallel conduct does not itself establish conspiracy or a plausible inference of conspiracy. For one, "'conscious parallelism' [is] a common reaction of 'firms in a concentrated market [that] recogniz[e] their interests and their interdependence with respect to price and output decisions.'" *Twombly, 550 U.S. at 553-54* (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*). It is "as much in line with **[**27]** a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market" as it is with conspiracy. *Id. at 554*. Thus, stating a *Section 1* claim without direct evidence requires "allegations of parallel conduct . . . placed in a context that raises a suggestion of a **[*416]** preceding agreement, not merely parallel conduct that could just as well be independent action." *Id. at 556-57*; *see also* *Citigroup, 709 F.3d at 136* ("Generally, however, alleging parallel conduct alone is insufficient, even at the pleading stage. This is *Twombly*'s contribution."); *id.* (quoting *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 323 (3d Cir. 2010)*, for the proposition that "[a] corollary of [Twombly] is that plaintiffs relying on parallel conduct must allege facts that, if true, would establish at least one 'plus factor,' since plus factors are, by definition, facts that tend to ensure that courts punish concerted action—an actual agreement—instead of the unilateral, independent conduct of competitors").

The Court first identifies the well-pled allegations in the Complaint that establish parallel conduct. They fall into three general categories: (1) parallel investment in certain trading platforms; (2) parallel refusal to support other trading platforms that Plaintiffs allege would improve pricing **[**28]** transparency, including two electronic trading platforms in particular; and (3) parallel application of punishment and pressure to boycott electronic platforms and specific dealers or traders that threatened to improve pricing. Dkt. No. 133 at 9-13, 27-29.

The Court rejects Defendants' argument that conduct must be "unexpected or idiosyncratic" in order to be parallel. Dkt. No. 136 at 4. That argument conflates and collapses two separate inquiries—the identification of well-pled conduct alleged to be parallel and the judgment whether that conduct, if accepted as true, supports a plausible inference of a preexisting agreement among competitors. *See* *Citigroup, 709 F.3d at 138* (noting that "Plaintiffs have essentially pleaded only parallel conduct, with little more," and that they do not allege additional facts "to suggest that this parallel conduct flowed from a preceding agreement rather than from their own business priorities"); *see also* *id. at 140* ("Although *Twombly*'s holding rests on numerous justifications, at bottom its prime concern, like all cases interpreting *Rule 12(b)(6)*, is isolating those cases that assert a plausible antitrust conspiracy . . . from those that merely presume a conspiracy from parallel action.").

Defendants' general **[**29]** point, however, is well-taken. In summary and as further elaborated below, the conduct alleged to be parallel is not suggestive of a preexisting agreement; rather it is suggestive of independent competitive conduct, whether analyzed in isolation or "holistically," *see* Dkt. No. 133 at 30.

In essence, Plaintiffs assert that over a decades-long period, a group of ten Defendants invested in parallel in certain electronic trading platforms that allowed access only to institutional investors and did not provide transparent pricing for odd-lot transactions, and that they also did not support platforms that would allow access to retail investors or otherwise increase pre-trade pricing transparency for odd-lot transactions. They claim that such conduct must have been based on a preexisting agreement to restrain competition and to preserve what Plaintiffs claim was Defendants' supracompetitive—i.e., not competitive—pricing.

Plaintiffs' theory falters upon their own factual allegations. If, as Plaintiffs allege, each Defendant had interests in (1) preserving a pricing structure that was profitable to that Defendant, SAC ¶ 77, and (2) investing in platforms that otherwise threatened to take some **[**30]** of their profits, which they could recoup by owning equity in those platforms, *id.* ¶ 148, they would not have needed to form a group boycott to pursue those interests. It would have been in the interest of each Defendant **[*417]** individually to invest in platforms that they believed would be successful and thus would immediately take some of their profits. It also would have been in the interest of each Defendant individually not to invest in other platforms that did not have the promise of success. There is no reason to assume the existence of a preexisting agreement from each Defendant's actions, even if all of them took similar actions. "[T]here is no reason to infer that the [Defendants] had agreed among themselves to do what was only natural anyway." *Twombly at 566* (holding that no inference of conspiracy can be drawn by parallel conduct of each defendant intended to maintain "its regional dominance"). ***HN8***[] An inference of conspiracy will not arise when the alleged conspirators' conduct "made perfect business sense," *Citigroup, 709 F.3d at 138*, or where there are "obvious alternative explanations for the facts alleged," *In re INS Brokerage Antitrust Litig., 618 F.3d 300, 322-23 (3d Cir. 2010)* (internal quotation marks and alterations omitted) (quoting *Twombly, 550 U.S. at 567*).

No inference of conspiracy can be drawn from the **[**31]** allegations that a Defendant would not participate in a platform without knowing whether others would do so as well. If, as Plaintiffs suggest, no platform could be successful without the participation of all or most of the dealers in the corporate bond market, it would be "only natural" for no individual dealer to commit to participate in a particular platform without knowing or believing that others would participate in that same platform. No preexisting agreement would be necessary or can be inferred. It would be in the independent business interest of each dealer not to make the investment of time and resources to trade on a platform unless it believed others would do so as well.

Finally, if, as Plaintiffs further allege, over the extended period of the purported conspiracy most of the start-up electronic trading platforms have quickly failed, SAC ¶ 132, it would be "natural" that each individual defendant acting unilaterally and in its own economic self-interest would be loath to make an investment of time and resources without a strong belief that a new platform would break the pattern and succeed.

No inference of preexisting agreement can be drawn from Plaintiffs' allegations. **[**32]** At various times during the lengthy period of the alleged conspiracy, some of the Defendants invested in particular platforms, while others chose not to invest or to participate. There are no allegations of parallel conduct that was so consistent in time, *see* *IRS I, 261 F. Supp. 3d at 475* (highlighting allegations that four defendants each contacted a platform *on the same day* to tell them that they would not participate in the that platform until they had taken specific steps), or that was so unexpected or idiosyncratic in type as to be unlikely in the absence of an agreement, *see* *Quality Auto Painting Ctr. Of Roselle, Inc. v. State Farm Indem. Co., 917 F.3d 1249, 1272 (11th Cir. 2019)* ("The alleged boycotting methods are not so idiosyncratic that they suggest conspiracy."); *see also* *In re Treasury Securities Auction Antitrust Litigation ("TSA"), 2021 U.S. Dist. LEXIS 62529, 2021 WL 1226670, at *15 (S.D.N.Y. Mar. 31, 2012)* (noting that in *Alaska Electrical Pension Fund v. Bank of America Corp., 175 F. Supp. 3d 44, 54 (S.D.N.Y. 2016)*, the complaint alleged that defendants "claimed to have the exact same bid/ask spread for nearly every day for multiple years," and finding persuasive the fact that there were no similar allegations by the *TSA* plaintiffs).

In the end, then, Plaintiffs are left with the allegations that it is more expensive to **[*418]** purchase a bond in an odd-lot transaction than in a round-lot transaction and that a platform that provides pricing transparency for odd-lot transactions has been slow to develop. As further explained below, the **[**33]** first claim does not establish an antitrust conspiracy, much less a group boycott. Plaintiffs' statistics do not show that Defendants each enjoyed the ability to impose supracompetitive, non-market prices they had an interest in preserving. Moreover, the Complaint shows why such pricing differentials would persist in a natural, competitive environment. Round lots of corporate bonds tend to be traded by institutional investors, who are "sophisticated, repeat participants in the market that maintain longstanding relationships with dealers and are willing and able to shop around for the best pricing," and who "tend to be better informed than odd-lot or retail investors, who typically trade infrequently." SAC ¶ 81. In other words, they have market power to drive better bargains. *See id.* ¶ 82. And since the "costs to Defendants for actual transmission and trading execution is . . . the same whether Defendants are dealing in [smaller] odd-lots or [larger] round lots of corporate bonds," *id.* ¶ 232, there are obvious scale efficiencies which the round-lot purchasers enjoy. As to the second claim, even assuming that the platform the Plaintiffs desire has not yet emerged, there is nothing in **[**34]** the Complaint that suggests that this failure was the result of a preexisting agreement to restrain trade rather than the function of independent market forces.

The Court now turns to the three sets of allegations in detail.

a. Investment in and Control over Trading Platforms

The Complaint alleges that Defendants invested in parallel in certain trading platforms: TradeWeb, MarketAxess, and BondDesk. It also alleges conduct in connection with the direction of those platforms. First, it alleges that in 1996 two Defendants and two entities later acquired by two other Defendants provided initial funding for TradeWeb: Credit Suisse, Goldman Sachs, Lehman Brothers (later acquired by Barclays) and Salomon Smith Barney (later acquired by Citigroup). SAC ¶ 143. It further alleges that by 2004, Citigroup, Merrill Lynch, Morgan Stanley, JPMorgan, and Deutsche Bank had also obtained ownership interests in TradeWeb; at that point, Thompson Reuters purchased TradeWeb from its owners. *Id.* ¶ 143, 149. It then alleges that "Thompson Reuters proposed

'Project Fusion,' a joint ownership structure that went into effect in January 2008 that gave minority ownership stakes in TradeWeb to Credit Suisse, Goldman **[**35]** Sachs, Lehman Brothers (later acquired by Barclays), Merrill Lynch (later acquired by Bank of America), Morgan Stanley, JPMorgan, Deutsche Bank, and RBS," and that Citigroup acquired ownership interest in TradeWeb in 2008 as well. *Id.* ¶ 151. Second, the Complaint alleges that in 2000, MarketAxess was founded by JPMorgan, among others, *id.* ¶ 193, and it cites a 2000 *Euromoney* article saying that Credit Suisse and Lehman (now owned by Barclays) have also invested in MarketAxess, *id.* ¶ 147. Third, the Complaint alleges that by 2004, BondDesk, which was founded in 1999, "had sold ownership stakes to 14 major banks, including Defendants such as Goldman Sachs, Bank of America, JPMorgan, and Wells Fargo," *id.* ¶ 173, before BondDesk was acquired by TradeWeb and folded into TradeWeb Direct, *id.* ¶¶ 186-188.

The Court treats this investment activity as parallel conduct. Although Defendants argue that "no court has treated this type of lawful joint-investment activity as a form of 'parallel behavior' that supports an inference of unlawful conspiracy," Dkt. No. **[*419]** 136 at 6-7, there is no logical reason why parallel investment—like parallel failure to invest—cannot be considered parallel conduct. Conduct **[**36]** that would be lawful if taken independently is paradigmatic parallel conduct.

However, Defendants are correct that this conduct is "lawful parallel conduct" that "fails to bespeak unlawful agreement," and does not support an inference of unlawful conspiracy. *See* *Twombly, 550 U.S. at 556-57*. According to Plaintiffs, the emergence of new platforms posed a threat to each Defendant's business model. In those circumstances, it would be "only natural," *id. at 556*, for a Defendant acting in its own independent economic interest to invest in a platform to at least continue to enjoy indirectly the business and the market share that it otherwise—but for the emergence of the platform—would have been able to enjoy directly, *see* SAC ¶ 148 (quoting a *Euromoney* article arguing that investment in electronic trading platforms that threatened to decrease dealers' profits was a way for those dealers to replace that lost revenue). That several Defendants chose to invest in platforms that appeared as if they might be profitable and might otherwise take business from them proves nothing more than pursuit of the adage: "If you can't beat them, join them." Collins Online Dictionary, accessible at https://www.collinsdictionary.com/us/dictionary/english/if-you-cant-beat-them-join-them **[**37]** (accessed Oct. 12, 2021).

Plaintiffs allege that, after some Defendants invested, the platforms either limited access to institutional investors, did not provide transparent pricing for odd lots, or acquired other platforms which (but for their acquisition) might have provided access to retail investors. These allegations do not establish parallel conduct by the firms who invested in the platform and who had representatives involved with the platform. Conduct that is engaged in by a company or joint venture in which certain Defendants were investors or held board positions is not parallel conduct. It is not simultaneous, similar conduct of competitors otherwise expected to conduct business and compete with one another independently. It is the activity of a single joint venture. ***HN9***[] "[V]iewing the operation of a legitimate joint venture as akin to that of a single firm, modern ***antitrust law*** evaluates such joint conduct—including the creation of the joint venture itself, its business focus, its product selection, and its pricing—under the rule of reason, with the pleading requirements that standard imposes." *IRS I, 261 F. Supp. 3d at 467* (citing *Texaco, Inc. v. Dagher, 547 U.S. 1, 1 n.1 & 6-7, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*, for the proposition that "[a]s a single entity, a joint venture, like **[**38]** any other firm, must have the discretion to make decisions regarding the conduct of that venture" (internal quotation omitted)). As in *IRS I*, Plaintiffs here fail to plead any facts that would remove decisions about the operation of a legitimate joint venture from this body of case law and further fail "to plead facts sufficient to support the conclusion that, evaluated under rule-of-reason methodology, the Project Fusion joint venture . . . represented an unreasonable restraint of trade." *Id. at 468*. In short, Plaintiffs do not allege that any of the joint ventures engaged in conduct as a joint venture that was against that joint venture's own economic interest or that constituted an unreasonable restraint of trade.

Moreover, even if decisions of the platforms could be considered parallel conduct by Defendants rather than unilateral activity by the joint venture, Plaintiffs have not adequately pled facts supporting the alleged use of the platforms **[*420]** to stifle transparent trading, including by blocking direct retail-investor access to the platforms. Indeed, Plaintiffs' factual allegations undermine their own theory.

First, although Plaintiffs allege that "[t]to this day," TradeWeb "continues to **[**39]** maintain a dealer-to-dealer market structure rather than all-to-all trading," SAC ¶ 152, the Complaint also asserts that TradeWeb (as well as MarketAxess) "allow[s] investor-to-investor direct trading (without intermediary dealers), and increase[s] pre-trade pricing transparency, which results in better competition on pricing and lower transactional costs for institutional investors trading in corporate bonds," *id.* ¶ 198. Second, although Plaintiffs allege that "Defendants' ownership of TradeWeb (as well as other platforms, such as MarketAxess) gave them . . . the ability to shut out retail odd-lot investors from using these platforms," *id.* ¶ 152, tellingly they do not allege that TradeWeb ever considered opening its platform to retail odd-lot investors whether before or after Defendants' investment. Similarly, although Plaintiffs allege that BondDesk was seen "as a threat to the supracompetitive profitability [Defendants] enjoyed from wider bid-offer spreads on odd-lots of corporate bonds," *id.* ¶ 175, they admit that "[f]rom its inception, BondDesk . . . was not directly open to retail clients," *id.* ¶ 172, and do not allege that BondDesk ever considered any contrary business model. **[**40]** Thus, Plaintiffs do not allege the existence or prospect of any retail all-to-all platform for Defendants to "catch and kill" with the platforms they invested in.

The Court in *IRS* I rejected similar allegations. The plaintiffs there alleged that defendants acquired ownership interests in TradeWeb and used that to ensure that it would not be used for all-to-all trading. The court dismissed these allegations as conclusions "not supported by well-pled facts." *IRS I, 261 F.3d at 466*. The complaint failed to state a claim because it "d[id] not cite *any* evidence supporting its critical background premise—that Tradeweb ever had such a plan [for all-to-all trading]. The SAC's claim that Tradeweb was 'planning' in 2007 to introduce such a platform, which 'plan' the Dealers then sought to subvert, is stated as a conclusion. It is not supported by well-pled facts." *Id.* The same result follows here.

b. Failure to Support Platforms that Would Increase Pricing Transparency

Plaintiffs' next set of allegations is a combination of inaction and action—the failure to support as well as the boycott of platforms that would admit retail investors or provide increased pricing transparency for odd-lot trades.

Much of what Plaintiffs **[**41]** allege is in generalities: Defendants engaged in conduct to "continu[e] to maintain a dealer-to-dealer market structure rather than all-to-all trading," SAC ¶ 94, in that they individually did not support the development of a platform for all-to-all trading for both round-lot and odd-lot trades that if all of them collectively decided to support would have been successful.[2] Therefore, Plaintiffs conclude, the failure of any one Defendant to support the development of a platform that permitted all-to-all pricing for both round lots and odd lots must have been the product of a preexisting agreement between all Defendants.

The theory is flawed factually and logically. Factually, the Complaint acknowledges that TradeWeb and MarketAxess, **[*421]** which Defendants invested in and supported, "allow investor-to-investor direct trading (without intermediary dealers), and increase pre-trade pricing transparency, which results in better competition on pricing and lower transactional costs for institutional investors trading in corporate bonds." SAC ¶ 198. Logically, the more plausible inference is that to the extent no such platform has yet developed, that is because no entrepreneur has developed a business **[**42]** model that would permit all-to-all pricing for round lots and odd lots that would compete with existing platforms and that has been attractive to any dealer individually. The Complaint shows the functioning of a competitive market and not the absence of one.

Plaintiffs' more specific allegations are that Defendants "refus[ed] to participate in and provide order flow (supply of bonds for trading) to odd-lot trading platforms, NYSE Bonds and Bonds.com." Dkt. No. 133 at 28; *see* SAC ¶¶ 156-158, 168. These allegations start with the failure of ABS and NYSE Bonds and reason backwards that such failure must have been the product of a group boycott. The Complaint alleges that:

- "ABS failed. By 2002, only 5% of all corporate bonds were listed on ABS for trading. By 2006, only 333 U.S. corporate bond issues (around 1% of the total number of unique TRACE-eligible corporate bond issues traded that year) traded on ABS." SAC ¶ 154.

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[2] Or drawn them all down collectively.

• "NYSE Bonds failed to gain traction in trading among dealers. As of November 2017, only 25 bond dealers continued to participate on NYSE Bonds." *Id.* ¶ 156.

• "ABS and NYSE Bonds failed to achieve larger-scale success among investors because of . . . a concerted boycott **[**43]** of the platforms by Defendants." *Id.* ¶ 157.

• "Defendants engaged in a group boycott to not provide or allow order flow to ABS/NYSE Bonds, or to severely limit such order flow to a small number of corporate bond issues." *Id.* ¶ 158.

These allegations fail to state a claim for group boycott. Plaintiffs "fail to . . . plead a single time, place, or person involved in the alleged agreement to boycott ABS/NYSE Bonds" and fail to "allege that any Defendant declined to participate on the platform." Dkt. No. 136 at 11. "[N]o specific Boycott Defendant is identified," and "the actions themselves are described in generic terms." *TSA, 2021 U.S. Dist. LEXIS 62529, 2021 WL 1226670, at *19*. As such, the allegations are conclusions, unsupported by well-pled factual allegations.

In the absence of any well-pled factual allegations, the Complaint asks the Court to accept the premise that it would be in the economic self-interest of each Defendant alone, and without the participation of others, to support ABS and NYSE. From that premise, Plaintiffs would draw the conclusion that the decision of every single one of Defendants not to participate in ABS or NYSE must have been a result of a preexisting agreement. The premise is not well-pled or supported, however, **[**44]** and thus the conclusion does not follow. From the Complaint's allegations, no one Defendant would necessarily have had an interest in supporting ABS or NYSE without believing that others would do the same and that the platform was likely to succeed. The claim that none of the Defendants supported ABS and NYSE thus cannot support the conclusion that each of the Defendants is a party to a conspiracy.

The allegations regarding Bonds.com suffer from similar flaws. The Complaint alleges:

[*422] • "Another example of Defendants' collusive conduct designed to prevent competition from electronic platforms is their refusal to deal with Bonds.com." SAC ¶ 164.

• "After just three months, . . . Bonds.com jettisoned BondStation's retail odd-lot focus amidst pressure from dealers such as Defendants. In April 2008, the company '[r]efocused from the retail segment to the institutional segment due to market conditions and other economic factors.' One of those 'market conditions' was a group boycott of the retail-focused BondStation by dealers." *Id.* ¶ 167.

• "Between 2012 and 2013, Bonds.com sought order flow and participation on its BondsPro platform from major corporate bond dealers like Defendants, including **[**45]** Bank of America, JPMorgan, and Morgan Stanley, among others." *Id.* ¶ 169.

• "None of the dealers would participate with Bonds.com and the Defendants monitored and policed their conspiracy to make sure there would be no defectors. Bank of America indicated that it had interest in participating on BondsPro, but that it could not do so due to the blowback it would suffer from other Defendants. Of course, threatening to punish cartel defectors is further evidence of the existence of the conspiracy. Bank of America stated that it would only be willing to participate on Bonds.com if at least one or two of the larger dealers (such as Morgan Stanley or JPMorgan) also participated and could provide it cover from retribution." *Id.* ¶ 170.

• "As a result of this group boycott by Defendants of Bonds.com's all-to-all, anonymous odd-lot trading platform, Bonds.com ran out of money by late 2013 . . . ." *Id.* ¶ 171.

The claim thus appears to be two-fold: (1) Bank of America, JPMorgan, and Morgan Stanley were solicited and failed to participate and thus they must have reached a collective agreement not to participate; and (2) Bank of America stated it would only be willing to participate if others participated **[**46]** as well.

The first claim does constitute parallel conduct. However, it is not parallel conduct suggestive of conspiracy for the same reasons identified above with respect to ABS and NYSE. An inference of conspiracy cannot be drawn from the fact that Bank of America, JPMorgan, and Morgan Stanley each chose not to participate. The conduct suggests "rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Twombly, 550 U.S. at 554*. The second claim illustrates the point. Not only is the unilateral expression of one market participant insufficient to show the existence of a preexisting agreement not to compete, but it is the expression of a market participant acting its own independent "competitive business strategy." *Id.* It would "only be natural," *id.*, for a market participant such as Bank of America not to devote resources to a start-up platform such as BondsPro unless it thought that others would participate as well and that the platform would enjoy the liquidity that would make trading on it attractive. Thus, to the extent Plaintiffs allege any parallel conduct, it is the very same type of parallel conduct that *IRS I* rejected, because there is "a 'natural explanation,' **[**47]** consistent with unilateral action, for the Dealers' decisions not to supply liquidity to" the platform without knowing that at least some others would do the same. *IRS I, 261 F. Supp. 3d at 475* (citation omitted). Defendants' lack of individual motivation to support a platform **[*423]** like BondsPro can be explained both by the fact that their existing business model was profitable and it was in their individual self-interests to maintain that model and by the fact that most start-up platforms quickly failed. As such, "[e]ach Dealer's decision to avoid the startup platforms, like the decision by each phone company in *Twombly* not to compete in new markets, is, in and of itself unremarkable. Considered alone, it is not—at all—suggestive of conspiracy." *Id.*

c. Enforcement of the Conspiracy via Punishment and Pressure

Plaintiffs' third set of allegations relates to what they claim was parallel conduct by Defendants in applying "punishment and pressure to boycott electronic platforms that threatened improved pricing." Dkt. No. 133 at 10.

Plaintiffs allege that "when odd-lot traders employed by InterVest engaged in trading that Salomon Smith Barney (later acquired by Citigroup) deemed to be 'disruptive' of the market, Salomon refused **[**48]** to do business with those traders," SAC ¶ 137, and that "none of the other Defendants stepped in to do business with the traders, as one would expect in a competitive market," *id.* However, Plaintiffs plead no facts for their central premise that "one would expect" a different dealer to "step in" if Salomon chose not to do business with the traders. There is no allegation that the traders were particularly attractive or valuable or that any of the dealers lacked access to the traders before Salomon ceased doing business with them. Plaintiffs' allegation rests on mere conclusion. Even if the individual decisions of each of the other Defendants not to "step in" could be considered parallel conduct (or non-conduct), it is not suggestive of conspiracy. It most plausibly suggests that no Defendant thought it could make more money transacting through the InterVest traders than they had been able to make transacting with other traders.

Plaintiffs also allege that "[f]ollowing the announcement of InterVest [which would debut a new electronic trading system for corporate bonds] on Bloomberg, bond dealers began to complain to Bloomberg that InterVest offered a service that competed with them." **[**49]** *Id.* ¶ 142. But Plaintiff does not name a single Defendant who complained or a single complaint that was made to Bloomberg. Moreover, even if the Complaint had contained a well-pled allegation that more than one dealer who paid money for services from Bloomberg complained when Bloomberg decided to do business with that dealer's competitor, such allegation would not without more suggest that each complaint was the product of a conspiracy. Each dealer individually would have an interest in a competitor not taking market share from it. That is ordinary competitive activity. It does not require an agreement.

Next, Plaintiffs allege that Defendants pressured and threatened Bloomberg to stop it from quickly granting NYSE Bonds a connection to Bloomberg TOMS: "Defendants — which are large financial institutions with significant accounts with Bloomberg's separate and profitable Bloomberg Terminal business — used their market power and value to Bloomberg as Bloomberg Terminal customers to force Bloomberg to materially delay NYSE Bonds' connectivity through Bloomberg TOMS by threatening to terminate or reduce their Bloomberg Terminal leases if Bloomberg failed to do so." *Id.* ¶ 163. Again Plaintiffs **[**50]** do not identify any complaint that was made to Bloomberg or any Defendant who made a complaint. The allegation rests on speculation: The fact that NYSE Bonds' connectivity was delayed must have been a result of threats **[*424]** from "Defendants." But, Plaintiffs do not allege what those threats were, that they were made by more than one Defendant, or how they impacted Bloomberg. There is nothing in that conduct that suggests a preexisting agreement rather than an individual decision of each alleged complainant as to its own economic interest.

Plaintiffs further allege that Defendants monitored and policed their boycott of Bonds.com through threats. The only specific factual allegation is that Bank of America was reluctant to participate on Bonds.com if other dealers did not participate and therefore it monitored whether others would participate:

> None of the dealers would participate with Bonds.com and the Defendants monitored and policed their conspiracy to make sure there would be no defectors. Bank of America indicated that it had interest in participating on BondsPro, but that it could not do so due to the blowback it would suffer from other Defendants. Of course, threatening to punish cartel **[**51]** defectors is further evidence of the existence of the conspiracy. Bank of America stated that it would only be willing to participate on Bonds.com if at least one or two of the other larger dealers (such as Morgan Stanley or JPMorgan) also participated and could cover it from retribution.

Id. ¶ 170.

This allegation begins with a conclusion and ends with a factual example that does not support the conclusion. Simply stating that "Defendants monitored and policed their conspiracy to make sure there would be no defectors" is a label and conclusion insufficient to get Plaintiffs over the *Twombly/Iqbal* line or subject Defendants to discovery. The allegation that Bank of America chose not to participate in BondsPro due its perception of "the blowback it would suffer from other Defendants" does not contain the factual content necessary to cross that line. It does not create an inference that any Defendant—much less a group of Defendants—in parallel threatened Bank of America for participation. The further allegation that Bank of America declined to participate in Bonds.com if at least one or two other large dealers did not also participate does not add support to the claim. The most plausible **[**52]** inference from the pleaded facts is that Bank of America arrived at that decision independently in the exercise of its own business judgment, and not collectively as the result of an agreement. No dealer would want to invest time or money in a trading platform absent some indication that other large dealers would also participate. Absent any allegations that other Defendants engaged in similar conduct, made similar excuses to avoid participating in new platforms, or similarly expressed reluctance to act alone, this allegation pertains just to one isolated comment by one isolated Defendant, and not to any parallel conduct.

Plaintiffs' only specific allegation of parallel enforcement conduct is their claim that two of the eleven Defendants—Morgan Stanley and Citibank—each threatened to limit its business with First Tennessee, a regional bank, to punish it for offering narrow spreads for corporate bond transactions:

> • "Defendants [sic] efforts to punish those who threaten to narrow odd-lot spreads continue to this day. . . . Blackrock began to use competitive regional banks and brokers such as First Tennessee, Piper Jaffrey, and McDonald & Co. for its odd-lots trading needs because of the **[**53]** narrower spreads they provided. When defendant Morgan Stanley learned that Blackrock was providing First Tennessee with axe sheets and allowing it to gain business because of the **[*425]** narrower spreads that it was providing, Morgan Stanley threatened to limit any business that it transacted with First Tennessee and blackball them. Defendant Morgan Stanley took such steps in order to punish First Tennessee for offering narrower spreads for such transactions." SAC ¶ 138.
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> • "During the period from 2016 through 2018, Blackrock used electronic RFQ's available on MarketAxess to execute directly with regional banks such as First Tennessee, Piper Jaffrey, and McDonald & Co. in order to benefit from the narrower spread that such dealers provided. Eventually, defendants Morgan Stanley and Citibank learned of these transactions and threatened to limit any business that they transacted with First Tennessee for offering narrower spreads for such transactions." *Id.* ¶ 139.
>
> • "When individual employees of disciplining Defendant dealers tried to help the traders that were being penalized (by, for example, transacting business with them), they did so at risk of losing their jobs with the

> Defendant dealer. The **[**54]** substantial risks faced by employees ensured that the penalty box — the disciplining action — worked." *Id.* ¶ 140.

The claim that "defendants Morgan Stanley and Citibank learned of these transactions and threatened to limit any business that they transacted with First Tennessee for offering narrower spreads for such transactions," *id.* ¶ 129, can be read to suggest parallel conduct, albeit barely. But the interest of each of them in not doing business with a bank that undercut its own individual pricing and the fact that all that Plaintiffs can allege is that two of the eleven Defendants made such a threat is also inconsistent with conspiracy.[3]

2. Plus Factors

When stripped of conclusions and reduced to allegations of fact, the Complaint contains three well-pled allegations of parallel conduct: (1) Defendants' parallel investments in TradeWeb, BondDesk, and MarketAxess; (2) two Defendants' alleged retaliation against First Tennessee; and (3) the alleged group boycott of BondsPro. For reasons stated above, these allegations are not suggestive of a conspiracy whether viewed individually or collectively; rather, they are consistent with Defendants' individual self-interest.

The Court next **[**55]** considers whether the Complaint pleads any "plus factors" which, considered in conjunction with the parallel conduct, support the inference of a conspiracy. ***HN10***[] Plus factors are "additional circumstances . . . which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy." *Apex Oil Co. v. DiMaruo, 822 F.2d 246, 253-54 (2d Cir. 1987)*. "These plus factors may include: a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Citigroup, 709 F.3d at 136* (internal quotation **[*426]** marks omitted) (quoting *Twombly v. Bell Atl. Corp., 425 F.3d 99, 114 (2d Cir. 2005)*, *rev'd on other grounds, Twombly, 550 U.S. 544*). However, something like interfirm conduct does not automatically convert parallel conduct not suggestive of a conspiracy into a valid *Section 1* claim; rather, plus factors must be "circumstances which, when combined with parallel behavior, might permit a jury to infer the existence of an agreement." *Id. at 136 n.6*; *see also Apex, 822 F.2d at 254* ("However, such plus factors may not necessarily lead to an inference of conspiracy. For example, such factors in a particular case could lead to an equally plausible inference of mere interdependent behavior, i.e., actions taken by market actors **[**56]** who are aware of and anticipate similar actions taken by competitors, but which fall short of a tacit agreement. In such a case, a court might find it difficult to hold that the parallel acts 'tend to exclude the possibility' of interdependent action.").

Plaintiffs argue that the Complaint pleads four plus factors: (1) statistical evidence that shows that Defendants acted against their unilateral self-interest; (2) market concentration; (3) common motive to conspire; and (4) interfirm communication. Those factors do not support the alleged conspiracy.

a. Statistical Evidence of Actions Against Individual Self-Interest

Plaintiffs argue that the Complaint's "abundant statistical evidence of Defendants' supracompetitive odd-lots pricing" is "market evidence that makes no rational, economic sense" and therefore "lends plausibility to the existence of a conspiracy." Dkt. No. 133 at 44-45. Plaintiffs presume that each of the Defendants, and Defendants alone, enjoyed "supracompetitive" pricing and from that presumption seek to draw the inference that Defendants also enjoyed a common interest or motive to preserve a market where prices would not be competitive. They further assert that "if

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[3] Although Plaintiffs seem to allege that this was part of a course of parallel conduct along with the earlier-referenced InterVest "penalty" by Salomon, two isolated actions that are somewhat similar but separated by about two decades do not constitute parallel conduct. *See TSA, 2021 U.S. Dist. LEXIS 62529, 2021 WL 1226670, at *19* (holding with regard to events that "took place ten years or more before most of Plaintiffs' remaining allegations" that "Plaintiffs have not pled sufficient intervening facts to tie together the alleged 2003 conduct with conduct that took place in 2013 or later").

the **[**57]** relevant market were truly competitive, each Defendant would be competing on price and driving down odd-lot spreads to parity with already profitable round-lot spreads in order to gain a larger share of the market," but that instead Defendants "ignored the logical competitive response of meeting customer demand and growing market share with better prices created by available technological innovations—which is in their unilateral interests—and instead have repeatedly and collectively settled for smaller market share by stifling any evolution in the market for odd lots of corporate bonds that would threaten their ability to change." *Id.* at 45. In other words, they suggest that their statistical allegations of a pricing disparity between odd-lot spreads and round-lot spreads demonstrate actions against each Defendant's unilateral self-interest and indicate the existence of a conspiracy.

The Court analyzes Plaintiffs' statistical allegations in detail. When carefully reviewed, they do not support the existence of a boycott conspiracy, nor do they support the claim that each Defendant enjoyed similar "supracompetitive odds-lots pricing," or that any individual Defendant enjoyed wider spreads **[**58]** than any individual dealer in the non-Defendant group.

Plaintiffs' first set of statistical allegations consists of evidence that the mean or average price per bond paid for the purchase of bonds in odd lots is higher and the spread is wider than for the purchase of bonds in round lots. SAC ¶¶ 86-94. Plaintiffs cite eleven studies that "show that odd-lot investors in corporate bonds pay average transaction costs (represented by the bid-offer spread) that are between 10% . . . to as much as 1,775% . . . greater than round lot investors." *Id.* ¶ 90. Plaintiffs **[*427]** conclude from these allegations: "In sum, numerous peer-reviewed studies demonstrate that dealers, including Defendants, have engaged in a pattern of parallel conduct by charging odd-lot investors higher selling prices and paying them lower purchase prices than round lot investors for the same bond issue." *Id.* ¶ 94.

These allegations do not support the inference that Defendants enjoyed supracompetitive pricing or had an interest in engaging in a group boycott conspiracy. The quoted studies describe that, on average, purchasers of bonds in odd lots suffered a pricing disparity compared to purchasers of round lots. They do not reflect **[**59]** that each dealer imposed a pricing disparity on all purchasers of odd lots compared to round lots or that Defendants—and Defendants alone—imposed such a disparity. The Complaint alleges that "dealers, including Defendants," charged odd-lot investors higher selling prices, not that all Defendants did so or that only Defendants did so. Indeed, Plaintiffs have abjured any allegation of price-fixing among Defendants.

The plausible inference to be drawn from Plaintiffs' allegations is that any price disparity between the price paid for bonds purchased in an odd lot versus the price paid for bonds purchased in a round lot is the result of natural competitive forces. Plaintiffs themselves allege that "[r]ound lot transactions, given their size, almost always involve institutional investors that trade for numerous individuals and companies - sophisticated, repeat participants in the market that maintain longstanding relationships with dealers and are willing and able to shop around for the best pricing. As a result, they tend to be better informed than odd-lot or retail investors, who typically trade infrequently." *Id.* ¶ 81. Those investors—by virtue of their size, sophistication, and market **[**60]** power—are able to demand better pricing. The Complaint further outlines why, in a competitive market, this translates to a pricing disparity between odd-lot and round-lot trades:

> As a result, dealers responding to an RFQ for a round lot know that they are dealing with an institutional investor that is likely to be: (a) price sensitive; (b) willing and able to obtain multiple quotes from other dealers; (c) knowledgeable regarding the market and pricing due to their repeated role in trading; and (d) in control of large portfolios of bond that offer additional trading opportunities in the future if the dealer is competitive in its pricing. Responding to these incentives, dealers provide quotes for round lots at their best competitive prices, keeping their spreads narrow, in the hope of securing this (and other, future) trades from the round lot institutional investor - a process entirely consistent with economic and market microstructure theory.

Id. ¶ 82.

The Complaint also outlines the reasons why in a natural, competitive market dealers generally would be able to offer better prices to round-lot investors, regardless whether they were institutions. The "costs to Defendants for actual transmission **[**61]** and trading execution is . . . the same whether Defendants are dealing in [smaller] odd-lots or [larger] round lots of corporate bonds." *Id.* ¶ 232. The average price is lower and the bid-offer spread more narrow when those costs are able to be spread over a larger lot of bonds.

In other words, the Complaint itself provides specific and detailed allegations outlining why each dealer and therefore also each individual Defendant would have both the ability to offer better pricing to investors trading in round lots than investors trading in odd lots and the interest in **[*428]** doing so, undercutting the theory that "[t]here is no explanation consistent with a healthy, competitive market for why the differential in spreads between odd-lots and round lots has persisted to the degree it has." *Id.* ¶ 85. Each individual Defendant has clear incentives to offer lower prices to repeat institutional investors; although this may negatively impact prices for Plaintiffs and other retail investors, "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway." *Twombly, 550 U.S. at 556*.

That same conclusion follows from the analysis provided by Plaintiffs' expert, set forth in the Complaint, **[**62]** who "analyzed the transactions costs for Riskless Principal Trades ("RPTs") in the U.S. corporate bond market from January 2006 to December 2019." SAC ¶ 95. The expert found "statistically and economically significant differences in transaction costs for round lot and odd lot trades over the period from 2006-2009." *Id.* ¶ 99. The study reflects what one would expect in a market environment in which—as Plaintiffs allege—the institutional investors who command buy-side market power also transact primarily in round lots and in which there is obvious scale efficiency to purchasing in a round lot. Prices are lower for those who purchase through an institutional investor and do so in round lots. The study shows nothing distinctive about Defendants and nothing other than what one would expect from the natural operation of market forces.

Plaintiffs' next set of statistical allegations sets out to remedy one flaw in the previous sets of allegations. However, it leaves the remaining flaws. Plaintiffs indicate that they "have gone a step further and analyzed a subset of actual trades by Defendants." *Id.* ¶ 100. They allege that "[t]he analysis found that . . . Defendants charged an average of 86 **[**63]** basis points for smaller odd-lot trades (less than or equal to $50,000 in size) 94 basis points for odd-lot trades ranging from $50,000 to $100,000 in size and 22 basis points for odd-lot trades from $100,000 to $1 million. In contrast, average spreads on round lot RPT trades over $1 million executed by Defendants averaged 13 basis points." *Id.* ¶ 102. Plaintiffs then compare their data regarding "RPT spreads on odd-lot trades executed by Defendants to trades by non-Defendant dealers," and allege that "transaction costs on odd-lot trades less than or equal to $50,000 in size executed by Defendant dealers average 62 basis points higher than non-Defendant trades of the same size," and that "for odd-lot trade sizes ranging from $50,000 to $100,000 . . . Defendant trades average 17 basis points higher than same-sized trades by non-Defendant trades." *Id.* ¶ 103 (emphasis omitted).

These allegations have the benefit of trying to isolate the Defendant group from the group of non-Defendants. But, because Plaintiffs make these allegations only in gross with respect to the Defendant group as a whole and the non-Defendant group as a whole, they do not say anything meaningful about the role of any **[**64]** individual Defendant and thus about the group of Defendants as a whole. Plaintiffs compare *average* spreads for odd lots amongst *all* Defendants to *average* spreads for odd lots amongst *all* non-Defendant dealers. Plaintiffs do not analyze whether each Defendant on average charges more for an odd-lot transaction than every non-Defendant or even whether a majority of Defendants charge more than the average non-Defendant for purchases done in an odd lot. It is impossible to know from Plaintiffs' statistics whether the average for the Defendant group is driven by one particular dealer who charges a higher spread than the remainder and whose trades drive the average **[*429]** or whether the average for the non-Defendant group too is driven by one or a small group of dealers who charge a lower spread. From Plaintiffs' allegations, it is equally if not more plausible that one or more than one Defendant charges lower prices on average for odd-lot transactions than one or more of the dealers in the non-Defendant group.

The allegation suffers from additional defects. Plaintiffs presumably proffer the statistics for the proposition that Defendants, and Defendants alone, charge higher prices for bonds purchased **[**65]** in odd lots than those purchased in round lots and thus that they have a pricing advantage with respect to odd lots over other participants in the market that they are trying to preserve. But the allegation does not compare the pricing of round-lot transactions by Defendants to those by non-Defendants. It compares only odd lots, *see id.*, and is entirely and conspicuously silent about the pricing for bonds purchased in round lots through non-Defendants. From the allegations, it is equally if not more plausible that for the non-Defendant group and for each dealer within the non-Defendant group there is a similar or greater differential as compared to that within the Defendant group between the price charged for a bond purchased in a round lot and one purchased in an odd lot.

The allegation thus shows only that bonds can be purchased cheaper if purchased as part of a round lot than if purchased as part of an odd lot. But, for reasons stated, those allegations do not show that Defendants had any particular pricing advantage they were trying to preserve, much less that each of them had such a pricing advantage. They show only that those who have market power and who can benefit from scale **[**66]** economies frequently do so in a natural competitive market environment.

Paragraph 112 of the Complaint offers the first—and only—statistical allegation that compares pricing differentials of *individual* Defendants with non-Defendant dealers. Plaintiffs compare "the differential between individual Defendants' and non-Defendants'" non-competitive price markdowns for customer-initiated odd-lot sales. However, once again, Plaintiffs utilize an average of all non-Defendant dealers as a comparator; there is no way to infer from this that each Defendant's pricing differentials were higher than those of every non-Defendant dealer, or even that each Defendant's pricing differentials were higher than those of a majority of non-Defendant dealers. Moreover, the table Plaintiffs present—comparing each individual Defendant's average customer-initiated round-lot sales price minus customer-initiated odd-lot sales price for the matching bond and date, which Plaintiffs refer to as the "markup," with the average non-Defendant markup—highlights the problem with the earlier statistics that grouped together Defendants as a whole. The table omits two Defendants, Goldman Sachs and Credit Suisse, because their **[**67]** markups were *lower* than the average non-Defendant markup. *Id.* ¶ 112. And the significant disparity between the numbers presented for each of the eight individual Defendants included in the table undercuts any assumption that Defendants' odd-lot bond pricing was supracompetitive and that Defendants were not competing amongst each other. Barclays' average markdown was 83.7 basis points, which is significantly higher than Goldman Sachs' average markdown of 27.3 basis points. *Id.* This pricing disparity is consistent with a market in which Defendants "compete[d] for odd-lot business by improving execution prices," *contra id.* ¶ 109, and as discussed above, the fact that pricing is still different for each Defendant between odd lots and round lots has a logical explanation **[*430]** also consistent with a competitive market. As such, Plaintiffs fail to present any statistical evidence or allegations plausibly suggesting that Defendants each, or all, benefitted from supracompetitive odd-lot pricing, that Defendants were not competing amongst each other, or that Defendants were acting against their unilateral self-interest.

b. Market Concentration

Plaintiffs argue that they have alleged a plus factor of **[**68]** market concentration. Dkt. No. 133 at 46. ***HN11***[] This factor looks at the feasibility of competitors reaching and enforcing an agreement to restrain trade. The fewer the number of participants in the market the easier to reach an agreement to restrain trade and the easier to enforce such an agreement, thus the more plausible the inference of conspiracy. *See* *Todd v. Exxon Corp., 275 F.3d 191, 208 (2d Cir. 2001)* ("Generally speaking, the possibility of anticompetitive collusive practices is most realistic in concentrated industries."); *SourceOne Dental, Inc. v. Patterson Companies, Inc., 310 F. Supp. 3d 346, 362 (E.D.N.Y. 2018)* ("Defendants' secure positions in the market and the relative ease of excluding others make the allegations of collusive behavior all the more plausible.").

Plaintiffs allege that the U.S. corporate bond market is a concentrated market that Defendants control. The Complaint alleges that "OTC trading in the secondary markets for U.S. corporate bonds is highly concentrated, and is becoming even more so. This concentration makes it more likely that Defendants are engaging in collusion. Defendants have dominated the U.S. corporate bond market for well over a decade." SAC ¶ 78. Plaintiffs allege that the ten Defendants "have controlled 65% or more of the bond underwriting market every year since at least 2014." *Id.* **[**69]** ¶ 79. They allege that this market share means that Defendants "control the vast majority of trading, such that the market is highly concentrated," and that this "dominance over the supply of U.S. corporate bonds has allowed them to effectively conspire to inflate the spread of odd-lot bonds in the secondary trading market." *Id.* ¶ 229.

The Complaint only alleges specific facts about Defendants' market share in the *underwriting* market, not in the Relevant Market—the secondary odd-lot corporate bond market. It alleges that a large share of the underwriting market translates directly to a large share of the secondary market: "The Defendants' collectively large market share in the underwriting market for U.S. corporate bonds gives them power over the secondary market for trading in these bonds. That power flows from their control over the supply of bonds to be sold in the secondary market. From these leading positions as U.S. corporate bond underwriters, Defendants have secured a correspondingly larger aggregate share as the top dealers in the Relevant Market . . . for secondary trading in U.S. corporate bonds." *Id.* ¶ 80. The Complaint reiterates this assumption throughout: "In short, the **[**70]** Defendants control the largest inventory of bonds because they serve as underwriters and issuers of those bonds. That dominance over the supply of U.S. corporate bonds has allowed them to effectively conspire to inflate the spread of odd-lot bonds in the secondary trading market." *Id.* ¶ 229. Defendants argue that Plaintiffs' premise—that a large market share in the underwriting market directly translates to a large market share in the secondary market—is false. They argue: "Bond underwriters purchase new bond from issuers and resell them to investors and other dealers in the primary market. After the underwriters resell the bonds, investors and other dealers trade them in the secondary **[*431]** market. The underwriters have no control over the bonds in the secondary market once they sell them in the primary market." Dkt. No. 131 at 26 (citing SAC ¶¶ 3-4).

Plaintiffs' allegations, taken as true, do not establish that the secondary corporate bond market for odd lots—the Relevant Market—was concentrated. Both the number of entities whom Plaintiffs contend "control" the market and the aggregate market share they enjoy are inconsistent with the notion that the Relevant Market is concentrated. Defendants **[**71]** are ten entities and their affiliates; even if they collectively control something around 65% of the secondary corporate bond market, this does not constitute the "highly concentrated" market that Plaintiffs argue enables a conspiracy. Ten market participants is a large number; there is no basis to assume that an anticompetitive agreement among that large a number of banks would be easy to reach or, once reached, easy to enforce, particularly when other market participants—not part of the alleged conspiracy—already controlled the remaining 35% of the market. *See* Dkt. No. 133 at 14; *cf. Ross v. American Exp. Co., 35 F. Supp. 3d 407, 430 (S.D.N.Y. Apr. 10, 2014)* ("Because such a small number of firms [the issuing banks—7 entities] hold nearly 80% of the market share, the credit card market is highly concentrated and oligopolistic."); *Todd, 275 F.3d at 208* ("If the relevant market in this case is defined as the plaintiff contends, the defendants would collectively control a 80-90% market share. While this is an extremely high market share by any measure, the district court contends that the alleged market 'is not, as plaintiff contends, so clearly oliogopolistic.' The district court points out that there are fourteen defendants in this case, and that this is not a concentrated market **[**72]** under the Department of Justice Merger Guidelines. That the market would not be deemed highly concentrated by this measure, however, does not preclude the possibility of collusive activity."); *E.I. du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128, 130-31 (2d Cir. 1984)* ("During . . . the period of the alleged violations, these were the only four domestic producers and sellers of the compounds. No other firm has ever made or sold the compounds in this country. Thus, the industry has always been highly concentrated."); *In re Text Messaging Antitrust Litigation, 630 F.3d 622, 628 (7th Cir. 2010)* (finding that where the complaint alleged that the four defendants sell 90% of U.S. text messaging services, it would not be difficult for them to agree on prices and detect any deviations from that agreement); *Starr v. Sony BMG Music Entertainment, 592 F.3d 314, 318 (2d Cir. 2010)* (noting that four defendants had combined 80% market share); *Transnor (Bermuda) Ltd. v. BP North America Petroleum, 738 F. Supp. 1472, 1481 n.15 (S.D.N.Y. 1990)* (finding, on a summary judgment motion, that eight firms accounting for 65% of total product sales in Western Europe represented a "moderately concentrated market" under the Herfindahl-Hirshman Index).

Moreover, Plaintiffs' allegations do not demonstrate that Defendants had control over the secondary corporate bond market for odd lots. Plaintiffs allege that "bonds being traded from the same issue are fungible," so "odd-lots of that issue can be combined into a round lot, and, **[**73]** conversely, a round lot of a given issue can be broken into odd-lots of that issue." SAC ¶ 5. They further allege that approximately 82% of trading volume by par value in the U.S. corporate bond market is estimated to be in round lots. *Id.* ¶ 93. Given this, there is no way for any Defendant—or all Defendants—to control what happens with that 82% of corporate bonds once they are sold in round lots; any institutional investor **[*432]** who purchases them could easily break them down into odd lots and resell them at "competitive" rates. As such, even crediting Plaintiffs' allegations that Defendants' share of the underwriting market means that they have corresponding control of those bonds when they enter the secondary market, this does not mean that Defendants controlled the same share of the *odd-lot* secondary market, and furthermore this control does not extend to the level Plaintiffs suggest and does not support an inference that Defendants had control over pricing in the secondary corporate bond market.

But even crediting *arguendo* Plaintiffs' assertion that they have pled that Defendants control a large market share of the secondary corporate bond market, this does not make the alleged parallel **[**74]** conduct suggestive of a conspiracy and therefore does not count as a plus factor; rather, it is suggestive of mere interdependent conduct. ***HN12***[] "Even conscious parallelism, a common reaction of firms *in a concentrated market* that recognize their shared economic interests and their interdependence with respect to price and output decisions is not in and of itself unlawful." *Twombly, 550 U.S. at 553-54* (emphasis added) (internal quotation and alterations omitted).

c. Common Motive to Conspire

Third, Plaintiffs argue that Defendants have a common motive "to protect the pricing opacity that was jeopardized by the electronic platforms." Dkt. No. 133 at 47.

This theory rests on two premises: first that Defendants enjoyed supracompetitive pricing, which they were seeking to preserve and which increased pricing transparency would jeopardize, and second that the platform Defendants allegedly boycotted—BondsPro—presented an immediate threat to pricing opacity in a way that the platforms Defendants supported did not. As *IRS I* held, a common motive to conspire is "at best thinly pled" where the allegedly boycott platform did not present a threat to Defendants' profit margins. *261 F. Supp. 3d at 471*.

As to the former, as discussed above, despite its plethora **[**75]** of statistics, the Complaint fails to plausibly allege that Defendants enjoyed supracompetitive pricing for odd-lot bonds. The Complaint therefore does not allege that there was a pricing advantage that the Defendants as a group had a motive to preserve. Each Defendant had an interest in competing against the others as well as against those not named as defendants.

As to the latter, the Complaint fails to plausibly allege that BondsPro threatened pricing opacity in a way that platforms like TradeWeb and MarketAxess, which Defendants supported, did not. The Complaint also makes it clear that BondsPro, like TradeWeb and MarketAxess, "focus[ed] on institutional odd-lot investors rather than retail investors." SAC ¶ 168. It therefore does not support a common motive to conspire to prevent the emergence of electronic trading platforms that would improve transparency and pricing for *retail investors*. The Complaint does allege that BondsPro "allow[ed] all-to-all, anonymous, exchange-style trading - trading that would eliminate Defendants as middlemen, or force them through anonymous pricing competition to lower odd-lot bid-offer spreads." *Id.* However, the Complaint acknowledges that TradeWeb **[**76]** and MarketAxess, which Defendants supported, "allow investor-to-investor direct trading (without intermediary dealers), and increase pre-trade pricing transparency, which results in better competition on pricing and lower transactional costs for institutional investors trading in corporate bonds." *Id.* ¶ 198. Plaintiffs offer no plausible reason why Defendants would **[*433]** have a common motive to support some platforms that increased pricing transparency and competition, removed Defendants as intermediaries, and did not offer access to retail investors yet also boycott a platform because it threatened to increase pricing transparency and competition, threatened to remove Defendants as intermediaries, and did not offer access to retail investors. They similarly do not offer any reason to believe a platform like BondsPro, which was similar to platforms Defendants supported but also similar to the many start-up trading platforms that quickly failed, presented any *immediate* threat to Defendants' profits—as such, "there was little urgency to conspire against it." *IRS I, 261 F. Supp. 3d at 471*.

Thus, Plaintiffs have not plausibly pled a common motive to conspire to boycott platforms that presented an immediate threat to their **[**77]** supracompetitive pricing, both because Plaintiffs have not demonstrated supracompetitive pricing and because Plaintiffs have not demonstrated any distinct threat posed by BondsPro.

d. Interfirm Communication

Plaintiffs further argue that the Complaint alleges "high levels of interfirm communications among Defendants." Dkt. No. 133 at 14. This plus factor is relevant because the existence of communications among firms could permit an anticompetitive conspiracy to form and to flourish. ***HN13***[] Thus, where there are "extensive communications among high-level officials at Dealers with responsibilities" for the products at issue and where communications occur in fora where discussion of competitive threats "might naturally arise," those communications tend to be supportive of the existence of a conspiracy. *IRS I, 261 F. Supp. 3d at 476-77*. This is particularly true where the communications "'represent[] a departure from the ordinary pattern' of communications between defendants" or "where there is evidence that defendants exchanged confidential information or sought to conceal their communications." *Anderson News, L.L.C. v. American Media, Inc., 123 F. Supp. 3d 478, 504 (S.D.N.Y. 2015)* (quoting *United States v. Apple, Inc., 952 F. Supp. 2d 638, 655 n.14 (S.D.N.Y. 2013)*).

The Complaint alleges no such communications. *Cf. Gelboim v. Bank of America Corp., 823 F.3d 759, 781 (2d Cir. 2016)* (holding that this plus factor was established and helped the allegations **[**78]** of a conspiracy "clear the bar of plausibility" where the complaint alleged "a high number of interfirm communications, including Barclays' knowledge of other banks' confidential individual submissions in advance"); *Iowa Pub. Employees' Retirement Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc., 340 F. Supp. 3d 285, 321-22 (S.D.N.Y. 2018)* (holding that allegations were sufficient to "plead 'a high level of interfirm communications' and to support an inference of an opportunity to conspire" where the allegations included "multiple interfirm meetings at conferences, private dinners, and . . . board meetings, including the 2009 meeting convened by Bank of America[;] meetings between Wipf and Conley; a 2009 meeting between Bank of America and Goldman Sachs executives; meetings between Morgan Stanley, Goldman Sachs, and other Defendants at private dinners and conferences" (internal citations omitted)); *In re Propranolol Antitrust Litigation, 249 F. Supp. 3d 712, 722 (S.D.N.Y. 2017)* (holding that plaintiffs' allegations established this plus factor where "[t]he pleadings extensively recount defendants' participation in trade association meetings taking place over a number of years and list the dates of such conferences, the names of the attendees from each defendant, and their respective job titles," and the pleadings **[*434]** further alleged that the representatives "were responsible for setting **[**79]** drug prices" and had discussions at these meetings regarding pricing strategies and "other competitively-sensitive information").

Instead, the Complaint focuses exclusively on the fact that traders from different dealers communicate about pricing in the course of trading. It alleges that "there is a constant communication loop among a small group of bond trading insiders" and that "Defendants' traders see live quotes from their competitors and likewise coordinate their pricing." SAC ¶¶ 237-241. It is conceivable that those fora could provide a venue for traders to fix prices. *See id.* (alleging that the high levels of interfirm communication "makes fixing prices in odd-lots of corporate bonds easier to accomplish," and that "it appears that Defendants use these channels of interfirm communication to collude, rather than to find ways to compete that would improve prices for odd-lot investors"); *see also City of Philadelphia v. Bank of America Corp., 498 F. Supp. 3d 516, 529 (S.D.N.Y. 2020)* (holding that a high level of interfirm communications was established and supports the inference of a price-fixing conspiracy where those communications were alleged to include "Banks routinely . . . shar[ing] information about their base rates, inventory levels, and planned rate changes **[**80]** with each other over the telephone and through electronic communications . . . [and] Banks communicat[ing] their future rates to each other"). The Court need not reach that issue as Plaintiffs have abandoned any *Section 1* price-fixing claim.

The allegations do not support a plus factor of high levels of interfirm communication *relevant to the alleged boycott*. There is no reason to believe that the traders who communicate with one another about pricing in the course of the day are communicating confidential information much less that they are discussing the platforms they will support and those that they will boycott. The conduct Plaintiffs challenge involves decisions regarding investment in and management of alternate platforms for the trading of bonds. The Complaint offers no reason to believe that the traders who transacted on individual trades would have had the authority to make decisions about such matters or the interest in communicating about them on behalf of the firms for which they worked, nor does it offer any reason to believe that any of those who had authority or an interest in such strategic matters engaged in interfirm communications.

In contrast, in *IRS I*, the court found that **[**81]** this plus fact was "clearly present" for a boycott claim when the complaint alleged communication "via the Dealers common ownership of TradeNet, their participation in OTCDerivNet, their participation on industry associations, and the social and professional . . . interactions among executives of Dealers in this market niche." *261 F. Supp. 3d at 471*. These types of interfirm communication are all plausibly related to a boycott, whereas the types of interfirm communication alleged here relate only to communications between traders related to pricing. ***HN14***[] A "mere showing of close relations or frequent meetings between the alleged conspirators . . . will not sustain a plaintiff's burden absent evidence which would permit the inference that these close ties led to an illegal agreement." *H.L. Moore Drug Exch. v. Eli Lilly & Co., 662 F.2d 935, 941 (2d Cir. 1981)* (citation omitted). "[A]nalysis of inter-firm communications is not mechanical, and the probative value of such evidence depends on the participants, the information exchanged, and the context—specifically, the connection between the content and the . . . conspiracy alleged." *In re Commodity Exchange, Inc. Gold Futures **[*435]** and Options Trading Litigation, 328 F. Supp. 3d 217, 229 (S.D.N.Y. 2018)*. Plaintiffs have not alleged any interfirm communications that are connected to the alleged group boycott; as such, the Complaint does not establish this **[**82]** plus factor, and it lends no additional support to the plausibility of the alleged conspiracy.

II. Plaintiffs' Complaint Fails to Connect Any Specific Defendant to the Alleged Conspiracy

HN15[] It is fundamental to pleading in the post-*Twombly* era that before a defendant is forced to be held to account for conduct as serious as a conspiracy in restraint of trade in violation of the *Sherman Act* that the pleader inform the defendant what it is alleged to have done. It is not sufficient for the plaintiff to allege that a group has done something wrong unless the allegations give reason to believe that the defendant, as a member of the group, also has committed the wrong. "[A]uthorities overwhelmingly hold that a complaint that provides no basis to infer the culpability of the specific defendants named in the complaint fails to state a claim." *In re Mexican Government Bonds Antitrust Litig. ("MGB"), 412 F. Supp. 3d 380, 388 (S.D.N.Y. 2019)* (internal quotation marks, alterations, and citation omitted).

For example, in *TSA*, the court held that as to allegations which referred to only one defendant by name and "refer[red] to the other Boycott Defendants collectively - as in 'among other Boycott Defendants' and 'gave in to the Boycott Defendants' threat' - the Complaint engages in impermissible group pleading." *2021 U.S. Dist. LEXIS 62529, 2021 WL 1226670, at *21*. ***HN16***[] "[C]laims **[**83]** as to the motivations or actions of [defendants] as a general collective bloc, or generalized claims of parallel conduct, must . . . be set aside . . . as impermissible group pleading." *In re Interest Rate Swaps Antitrust Litig. ("IRS II"), 2018 U.S. Dist. LEXIS 86732, 2018 WL 2332069, at *15 (S.D.N.Y. May 23, 2018)*; *see also* *TSA, 2021 U.S. Dist. LEXIS 62529, 2021 WL 1226670, at *17* (quoting *IRS II* for the same proposition). "An antitrust complaint that fails to connect each or any individual entity to the overarching conspiracy . . . cannot ordinarily survive a motion to dismiss." *MGB, 412 F. Supp. 3d at 387* (internal quotation marks, alterations, and citation omitted).

The Complaint fails those precepts. It does not contain allegations as to any individual Defendant that would establish that such Defendant engaged in a group boycott. And, in the absence of such allegations as to any Defendant, the Complaint must be dismissed against all Defendants.

The thrust of the Complaint is that Defendants were all among the largest underwriters of bonds and that as such each individual Defendant had an interest in preserving the market structure. In essence, because a Defendant ranked as number 1, or number 3, or number 7 in the ranks of bond underwriters, the Complaint alleges that such Defendant must have been a participant in what is claimed to be a group boycott. The deficiencies of that approach have **[**84]** already been discussed. The fact that a bank is large and active does not mean that it is an antitrust conspirator.

At oral argument, when asked to identify a particular Defendant against whom they claimed the allegations were well-pled and to identify the facts that supported the claim, Plaintiffs directed the Court to their allegations against Goldman Sachs. Oral Argument Transcript at 26:2-5. Examination of those allegations, however, demonstrates the flaws in Plaintiffs' pleading. The Complaint alleges that Goldman Sachs held between a 7% and 8% share of the

U.S. corporate bond underwriting market between 2014 and 2018, SAC ¶ 79; that **[*436]** Goldman Sachs' prices obtained for their customers selling odd lots as compared to round lots of the same bond on the same date were 27.3 basis points lower, *id.* ¶ 111; that Goldman Sachs, along with three other banks, provided initial funding for TradeWeb, regained a minority ownership stake in TradeWeb as part of "Project Fusion" in 2008, and was also invested in BondBook, *id.* ¶¶ 143, 147, 151; that Goldman Sachs had ownership interests in BondDesk—which was later acquired by TradeWeb—"by 2004," and that two "individuals affiliated with" Goldman **[**85]** held seats on the board of directors of BondDesk in 2004, which they used "to remove the existing management of BondDesk from their day-to-day leadership positions at the company in 2004," *id.* ¶¶ 173-181, 186. At oral argument, Plaintiffs summarized their allegations of parallel conduct as to Goldman Sachs specifically as: "So our allegations of the parallel conduct are defendants' use of these companies to catch and kill potential competitors that threaten their market. We also make other allegations about refusal to provide liquidity and delaying access." Oral Argument Transcript at 28:21-25.

The allegations amount, at most, to the claim that Goldman Sachs had a less than 10% market share of the U.S. corporate bond underwriting market and that it invested in TradeWeb and in BondDesk, which was later acquired by TradeWeb. That conduct, however, is as consistent with the rational and competitive decisions of a business which wants to at least preserve its market share and, if possible, gain market share, and believes that it can do so by investing in a platform that offers traders a further venue through which to obtain a price. The Complaint also goes into significant detail about **[**86]** actions of board members of BondDesk who were affiliated with Goldman Sachs, but activity by board members within a lawful joint venture cannot be imputed against Goldman as parallel conduct relevant to a per se *Section 1* group boycott claim. Absent from the Complaint is any allegation of concerted action by Goldman Sachs with any of the other Defendants alleged to be a member of the group boycott. Indeed, as discussed in detail above, the only statistical allegation proffered by Plaintiffs cuts against the inference Plaintiffs would draw of conspiracy. The Complaint compares pricing differentials of certain *individual* Defendants with non-Defendant dealers for customer-initiated odd-lot sales but omits Goldman Sachs entirely from the analysis because their markups were *lower* than the average non-Defendant markup. SAC ¶ 112. In short, assuming it is even "conceivable" that the allegations against Goldman Sachs would be consistent with anticompetitive conduct, those allegations fail to push the inference that Goldman Sachs participated in a group boycott over the line from "possible" to "plausible," and thus fail to "state a claim to relief that is plausible on its face" as against Goldman Sachs. **[**87]** *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 570*).

Other than Goldman Sachs, the Defendant whose name is most frequently mentioned in the Complaint is JPMorgan. The allegations against JPMorgan are that it held between an 11% and 12% share of the U.S. corporate bond underwriting market between 2014 and 2018, SAC ¶ 79; that its average markup for odd-lot sales as compared to round-lot sales was 55.7 basis points, as compared to a 41.7 basis point average markup among non-Defendants, *id.* ¶ 112; that it held an ownership interest in TradeWeb by 2004, *id.* ¶ 143; that it regained a minority ownership stake in TradeWeb as part of "Project Fusion" in 2008, *id.* ¶ 151; that Bonds.com "sought order flow and participation on its BondsPro **[*437]** platform from major corporate bond dealers like Defendants, including . . . JPMorgan," but that "[n]one of the dealers would participate with Bonds.com," *id.* ¶ 169; that it had ownership interests in BondDesk—which was later acquired by TradeWeb—"by 2004," and that one "individual[] affiliated with" Bear Stearns & Co., later acquired by JPMorgan, held a seat on the board of directors of BondDesk in 2004, which it used "to remove the existing management of BondDesk from their day-to-day leadership **[**88]** positions at the company in 2004," *id.* ¶¶ 173-181, 186; and that JPMorgan was one of the founders of MarketAxess, which acquired Trading Edge in 2001 but did not carry over its anonymous trading feature, *id.* ¶ 193.

Those allegations fail to state an antitrust claim against JPMorgan. As with Goldman Sachs, activity within a lawful joint venture that JPMorgan had ownership stakes in cannot be imputed against JPMorgan as parallel conduct relevant to a per se *Section 1* group boycott claim. What is left, then, is the allegation that JPMorgan's pricing disparity that disadvantaged odd-lot sales was slightly worse than the average among all non-Defendants (absent any basis from which to conclude that it was worse than that of all, or even most, non-Defendants), the allegations that JPMorgan participated in TradeWeb and MarketAxess, and the allegation that BondsPro "sought order flow and participation" from JPMorgan but that JPMorgan did not participate. Viewed holistically, the allegations do not make out a plausible inference that JPMorgan was part of a group boycott conspiracy. The Complaint does not establish that JPMorgan enjoyed supracompetitive pricing as compared to any non-Defendant dealer; **[**89]** JPMorgan's lawful investment activity has a rational explanation and thus does not give rise to a plausible inference of conspiracy; and the allegation that JPMorgan chose not to participate on BondsPro is similarly consistent with its rational and competitive business interests.

The allegations against the other Defendants are even more sparse.

Absent allegations that would support a claim against an individual defendant, there is no basis for the Court to sustain the complaint against any defendant. *MGB, 412 F. Supp. 3d at 387* ("An antitrust complaint that fails to connect each or any individual entity to the overarching conspiracy . . . cannot ordinarily survive a motion to dismiss." (internal quotation marks, alteration, and citation omitted)). The Complaint here is replete with allegations that refer to Defendants as a collective bloc and assert generalized claims of parallel conduct, but it fails to connect any individual Defendant to the alleged conspiracy. The vast majority of the allegations in the Complaint that refer to specific Defendants relate to the fact that many Defendants had lawful ownership interests in platforms like TradeWeb and MarketAxess. However, these allegations do not plead that those **[**90]** Defendants, who were participants in a lawful joint venture, "in their individual capacities, consciously committed themselves to a common scheme designed to achieve an unlawful objective." *AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, 234 (2d Cir. 1999)*. With regard to the actual boycott activity itself—the failure to support or trade on platforms like BondsPro—the Complaint is almost entirely devoid of allegations about any specific defendant. This defect is fatal to Plaintiffs' boycott claims.

III. Plaintiffs' Claim is Time-Barred

Defendants also move to dismiss on the separate ground that Plaintiffs' group boycott claim is time-barred. ***HN17***[] "Although the statute of limitations is ordinarily **[*438]** an affirmative defense that must be raised in the answer, a statute of limitations defense may be decided on a *Rule 12(b)(6)* motion if the defense appears on the face of the complaint." *Ellul v. Cong. of Christian Brothers, 774 F.3d 791, 798 n.1 (2d Cir. 2014)* (citation omitted); *see also Ghartey v. St. John's Queens Hosp.*, 869, F.2d 160, 162 (2d Cir. 1989) ("Where the dates in a complaint show that an action is barred by a statute of limitations, a defendant may raise the affirmative defense in a pre-answer motion to dismiss."). In the instance of a case where the discovery accrual rule is at issue, "[w]here . . . the facts needed for determination of when a reasonable investor of ordinary intelligence would have **[**91]** been aware of the existence of fraud can be gleaned from the complaint and papers . . . integral to the complaint, resolution of the issue on a motion to dismiss is appropriate." *Dodds v. Cigna Sec., Inc., 12 F.3d 346, 352 n.3 (2d Cir. 1993)*.

HN18[] A claim under *Section 1 of the Sherman Act* is subject to a four-year statute of limitations that runs from the date of injury. Plaintiffs filed their initial complaint on April 21, 2020; Defendants argue that any claim based on conduct that occurred before April 21, 2016 is therefore time-barred, and that because the Complaint does not allege any anticompetitive conduct that occurred after this date, the entire Complaint must be dismissed. Plaintiffs argue that the Complaint should not be dismissed under the statute of limitations because "each sale of an odd-lot bond is a continuing violation" and because Defendants fraudulently concealed their conspiracy.

A. Continuing Violation

Plaintiffs argue that "each sale of an odd-lot bond is a continuing violation, starting the running of the four-year statute of limitations period from that time." Dkt. No. 133 at 49. ***HN19***[] The Supreme Court has held that "[a]ntitrust law provides that, in the case of a 'continuing violation,' say, a price-fixing conspiracy that brings about a series of unlawfully **[**92]** high priced sales over a period of years, 'each overt act that is part of the violation and injures the plaintiff,' *e.g.*, each sale to the plaintiff, 'starts the statutory period running again.'" *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1984)*. However, this rule only applies to overt acts that are *part of the violation*; "an overt act committed more than four years prior to the filing of the complaint whose effects were first felt outside the limitations, therefore, usually will not support a cause of action even the *effects* persist into the limitations period." *In re Nine West Shoes Antitrust Litigation, 80 F. Supp. 2d 181, 191 (S.D.N.Y. 2000)*; *see also* *US Airways v. Sabre Holdings Corp., 938 F.3d 43, 69 (2d Cir. 2019)* ("We thus conclude that each supracompetitive price charged to US Airways by Sabre pursuant to the 2006 contract was not an overt act of its own, but a manifestation of the prior overt act of entering into the 2006 contract."). Because of this distinction, the price-fixing continuing violation cases that Plaintiffs cite are inapposite. ***HN20***[] In a price-fixing conspiracy, each "fixed" price is itself an overt act that is part of the antitrust violation, and therefore starts the statutory period as to that act. In contrast, in a group boycott conspiracy, higher prices are not the conspiracy itself but are, at most, the effects of the boycott agreement and actions. As **[**93]** such, even crediting the argument that odd-lot bonds continued to be sold at inflated prices after April 21, 2016 *because* of the conspiracy, each sale at an inflated price is not part of the antitrust violation—the boycott—but rather merely an effect of the antitrust violation, **[*439]** which therefore does not start the statutory period running again.

Plaintiffs also argue that "[o]ther acts also continued after April 2016. Morgan Stanley took steps to punish First Tennessee (a competitive regional bank) that was offering Blackrock odd-lot trades at narrower spreads than those offered by the Defendant and (¶¶ 138-139) that Defendants shut down retail investor access to TradeWeb and MarketAxess. (¶¶15, 135, 147, 152, 193.)" Dkt. No. 133 at 49. As to the former, paragraphs 138 and 139 of the Complaint do not identify with specificity when "Morgan Stanley [took] steps to punish First Tennessee." *Id.* But even assuming that this conduct occurred during the statutory period—and assuming, for the purposes of the statute of limitations analysis that this allegation is well-pled and relates to a broader well-pled conspiracy—it does not extend the conspiracy as a whole into the statutory period. ***HN21***[] As Plaintiffs **[**94]** point out in their briefing, "In a continuing antitrust conspiracy, . . . the general limitations rule 'has usually been understood to mean that each time a plaintiff *is injured* by an act of the defendants a cause of action accrues to him to recover *the damages caused by that act* and that, as to those damages, the statute of limitations runs from the commission of the act.'" *Id.* (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*); *see also* *Klehr, 521 U.S. at 191* (analogizing, from the antitrust rule that "each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again," that in civil RICO cases "the plaintiff cannot use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations" (internal quotation marks omitted)). In other words, an action by defendants within the statutory period does not bring the entire alleged conspiracy, the vast majority of which occurred outside the statutory period, into that period. Rather, it will only give rise to a cause of action (a) if the action within the statutory period itself injures the plaintiffs and (b) as to damages stemming from that action. Applying this **[**95]** framework, Morgan Stanley's alleged retaliation towards First Tennessee does not give rise to a cause of action for Plaintiffs. It is difficult to imagine—and Plaintiffs do not allege in their Complaint or elucidate in their briefing—how one Defendant retaliating against a regional bank for offering a narrower spread to BlackRock could have caused injury to Plaintiffs, who do not allege that they ever purchased bonds from either BlackRock or First Tennessee, or how this one isolated incident within the statutory period could have had any broad impact on the market that in turn might have indirectly injured Plaintiffs. As to the latter, the Complaint alleges that Defendants gained ownership interest in both TradeWeb and MarketAxess well before 2016, and alleges no conduct whatsoever by any Defendants after 2016 to shut down retail investor access to these platforms.

B. Fraudulent Concealment

HN22[] "A claim of fraudulent concealment must be pled with particularity." *IRS I, 261 F. Supp. 3d at 487*. "[A]n antitrust plaintiff may prove fraudulent concealment sufficient to toll the running of the statute of limitations if he establishes: (1) that the defendant concealed from him the existence of his cause of action, (2) that **[**96]** he remained in ignorance of that cause of action until some point within four years of the commencement of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part." **[*440]** *New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1083 (2d Cir. 1988)*.

For the first element, "the plaintiff may prove the concealment element by showing either that the defendant took affirmative steps to prevent the plaintiff's discovery of his claim or injury or that the wrong itself was of such a nature as to be self-concealing." *Id. at 1083-84*. Plaintiffs argue both that the alleged conspiracy is "inherently self-concealing" and that "Plaintiffs also pleaded active concealment." Dkt. No. 133 at 51. However, the group boycott allegations do not support a finding of active concealment or of a self-concealing conspiracy.

First, Plaintiffs argue that "Defendants used secret Bloomberg messages, dealer-to-sales-desk-to dealer channels and online platforms closed to retail investors to collude. They regularly communicated pricing information via these channels that they withheld from odd-lot investors." *Id.* (citing SAC ¶¶ 16, 237-241, 261). Plaintiffs fail to address, however, that the alleged secret communications relate only to "pricing information," *id.*, **[**97]** not to any group boycott conspiracy. As such, the allegations about private Bloomberg messages and communications among individual dealers and traders on platforms closed to retail investors are entirely irrelevant to concealment of a group boycott conspiracy.

Plaintiffs also argue that Defendants actively concealed their conspiracy by taking "affirmative steps to throw Plaintiffs off of their scent," by "hold[ing] out to the public that their activities are in good faith through detailed codes of conduct promising the highest ethical standards." *Id.* (citing SAC ¶ 263). The Complaint alleges that "each Defendant's code of conduct represented that their operations were above-board, providing a false sense of security to corporate bond investors." SAC ¶ 263. ***HN23***[] These statements "are not sufficient to invoke fraudulent concealment," because "communications to the community at large will not generally support a finding of fraudulent concealment." *In re Merrill, BofA, and Morgan Stanley Spoofing Litigation. ("Spoofing"), 2021 U.S. Dist. LEXIS 40712, 2021 WL 827190, at *11 (S.D.N.Y. Mar. 4, 2021)*. As in *Spoofing*, there is no evidence here that Defendants' general representations of ethical behavior in their codes of conduct were directed at Plaintiffs, referred specifically **[**98]** to the Relevant Market, or were intended or reasonably understood to induce the kind of reliance that Plaintiffs now claim. *See id.* ***HN24***[] Moreover, "[i]t is well established that general statements about reputation, integrity, and compliance with ethical norms are inactionable 'puffery,' meaning that they are 'too general to cause a reasonable investor to rely upon them.'" *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 183 (2d Cir. 2014)* (quoting *ECA & Loc. 134 IBEW Joint Pension Tr. of Chi. v. JPMorgan Chase Co., 553 F.3d 187, 206 (2d Cir. 2009)*). "If that is so, the statements are also too general for a would-be plaintiff to rely upon them in foregoing an investigation . . . ." *Spoofing, 2021 U.S. Dist. LEXIS 40712, 2021 WL 827190, at *11*.

Nor is the alleged conspiracy self-concealing. In *IRS I*, the court emphasized "the visible nature of Tradeweb's trading platform and of Defendants' majority ownership," and therefore reasoned that the conspiracy was not self-concealing because "[o]n plaintiffs' theory the failure of TradeWeb to evolve into an all-to-all IRS trading exchange occurred in plain sight and in contrast to the market's expectations," which "if anything would have invited, rather than lulled, skeptical attention." *261 F. Supp. 3d at 488*. Similarly, here Plaintiffs' allegations about Defendants' control of several trading platforms and boycott of **[*441]** others are largely derived from contemporaneous, publicly available news articles, **[**99]** statistics, and information about the various platforms and their success. *See, e.g.*, SAC ¶¶ 146-149, 151, 171. Plaintiffs do not allege that Defendants' ownership interests in platforms like TradeWeb and MarketAxess were hidden, and on Plaintiffs' theory it would have been readily apparent to the public that trading platforms that sought to increase pre-trade pricing transparency or allow access to retail investors failed to gain support and quickly failed. It is not plausible that these events, which the Complaint establishes were public at the time, were self-concealing. As such, Plaintiffs cannot establish the first element of a fraudulent concealment claim—the concealment itself.

In addition, even if Plaintiffs could establish either that Defendants actively concealed their alleged conspiracy or that the alleged conspiracy was self-concealing, the Complaint's allegations establish that Plaintiffs were on inquiry notice of the conspiracy. ***HN25***[] "[A]ll that is necessary to cause the tolling period to cease is for there to be reason to suspect the probability of any manner of wrongdoing." *131 Maine St. Assocs. v. Manko, 179 F. Supp. 2d 339, 348 (S.D.N.Y. 2002)*; *see also* *LC Capital Partners, LP v. Frontier Ins. Group, Inc., 318 F.3d 148, 154 (2d Cir. 2003)* ("As we have explained, '[W]hen the circumstances would suggest to an investor of ordinary **[**100]** intelligence the probability that she has been defrauded, a duty of inquiry arises.' 'Such circumstances are often analogized to "storm warnings."'" (quoting *Dodds v. Cigna Securities, Inc., 12 F.3d 346, 350 (2d Cir. 1993)*)). The Complaint alleges that "[t]he fact that electronic trading platforms . . . are open to institutional investors, but not retail investors, defies any economic, competitive justification." SAC ¶ 203. As in *IRS I*, "plaintiffs' express claim" is that the failure of the market to develop a platform that either increased pre-trade pricing transparency, was open to retail investors, or both "was unnatural and contrary to expectations, suggesting conspiratorial manipulation." *261 F. Supp. 3d at 489*. Accepting this premise "that only a plot can explain the missing platforms, [Plaintiffs] had every basis, in real time, to smell a rat. At minimum, they were on inquiry notice." *Id.*

IV. Antitrust Standing

Defendants also argue that the Complaint should be dismissed because no Plaintiff has antitrust standing to assert a group boycott claim.

"*Section 4 of the Clayton Act* ***HN26***[] establishes a private right of action for violations of the federal antitrust laws, and entitles 'any person who is injured in his business or property by reason of anything forbidden in the antitrust laws' to **[**101]** treble damages for those injuries." *Gatt Comms., Inc. v. PMC Assocs, L.L.C., 711 F.3d 68, 75 (2d Cir. 2013)* (alterations omitted) (quoting *15 U.S.C. § 15*). The Second Circuit, applying *Associated General Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 534, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, has "distilled" the factors used to determine whether a private plaintiff has antitrust standing "into two imperatives: we require a private antitrust plaintiff plausibly to allege (a) that it suffered 'a special kind of "antitrust injury,"' and (b) that it is a suitable plaintiff to pursue the alleged antitrust violations and thus is an 'efficient enforcer' of the antitrust laws." *Gatt, 711 F.3d at 75* (quoting *Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121-22 (2d Cir. 2007)*).

[*442] Plaintiffs' Complaint fails to plead antitrust standing at the first inquiry. Defendants argue that Plaintiffs lack antitrust standing because "they do not allege that they or a broker or investment advisor acting on their behalf ever sought to trade corporate bonds on an electronic platform but were blocked from doing so because of the supposed boycott." Dkt. No. 131 at 59. Plaintiffs respond in their briefing that their injury is not that they were prevented from trading on electronic platforms, but rather that "the Complaint alleges harm through the inflation of prices resulting from continued opacity in a market that, in the absence of Defendants' collusive conduct, would have seen the development **[**102]** of robust electronic trading platforms." Dkt. No. 133 at 58. They argue that "[t]he conspiracy affected pricing throughout the market, not just for those that tried to purchase their bonds through the platforms that Defendants conspired to eliminate." *Id.* at 58-59 (citing SAC ¶¶ 2, 10). The factual allegations of the Complaint do not support this conclusory statement. The Court therefore does not need to reach the question whether the link is too attenuated to constitute antitrust injury or whether Plaintiffs are efficient enforcers of the antitrust laws.

The Complaint's introductory section alleges that the case "involves a conspiracy by defendants to restraint electronic advances in the marketplace that would have reduced transactional costs for investors in odd-lots of corporate bonds" plus the boilerplate claim "[a]s a result of Defendants' conspiracy, Plaintiffs and the Class paid more when buying, and received less when selling, their corporate bonds, suffering antitrust injury under *Section 1 of the Sherman Act*." SAC ¶ 2. This allegation is merely a conclusion and a recitation of the required elements. *See* *Rosner v. Bank of China, 528 F. Supp. 2d 419, 428, 430 (S.D.N.Y. 2007)* (noting that "a plaintiff's pleading obligations require more than labels and conclusions, **[**103]** and a formulaic recitation of the elements of a cause of action will not suffice," and finding that plaintiff's complaint "merely states that 'inventors were injured as a result of [defendant's] conduct' but does not allege that any specific injuries were caused by" defendant's specifically challenged conduct (alteration omitted)). The other paragraph cited by Plaintiffs, paragraph 10, focuses exclusively on a claim of parallel pricing and makes no reference to a group boycott.

Notably, the section of the Complaint that directly addresses antitrust injury contains a single paragraph—paragraph 258. It alleges that "Plaintiffs and the Class have suffered the quintessential antitrust injury - purchasing *a price-fixed product* directly from horizontal competitors." SAC ¶ 258. It makes no reference to a group boycott. This allegation, and the Complaint as a whole, fails to establish that Plaintiffs suffered any antitrust injury stemming from the alleged group boycott conspiracy, rather than from the price-fixing conspiracy that Plaintiffs originally claimed but have now abandoned.

CONCLUSION

The motion to dismiss is GRANTED. Because the Court concludes that any amendment would be futile and **[**104]** also because the statute of limitations on Plaintiffs' claims has run and Plaintiffs have not proffered a reason for tolling the statute of limitations, and also because Plaintiffs have not requested leave to amend the Complaint if the motion to dismiss is granted, the Complaint is dismissed with **[*443]** prejudice.[4]

The Clerk of Court is respectfully directed to close the motion at Dkt. No. 130 and to prepare a judgment and close the case.

SO ORDERED.

Dated: October 25, 2021

New York, New York

/s/ Lewis J. Liman

LEWIS J. LIMAN

United States District Judge

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[4] Moreover, Plaintiffs have already amended their complaint once in response to Defendants' first motion to dismiss, at Dkt. No. 117, which raised virtually identical arguments to those considered here.

Nat'l Prods. v. Innovative Intelligent Prods., LLC

United States District Court for the Western District of Washington

October 25, 2021, Decided; October 25, 2021, Filed

C20-428 RAJ

Reporter

2021 U.S. Dist. LEXIS 206081 *; 2021 WL 4948165

NATIONAL PRODUCTS INC., Plaintiff, v. INNOVATIVE INTELLIGENT PRODUCTS, LLC d/b/a GPS LOCKBOX, Defendant, v. JEFFREY CARNEVALI, Third-Party Defendant.

Subsequent History: Reconsideration denied by, Claim dismissed by *Nat'l Prods. v. Innovative Intelligent Prods. LLC, 2022 U.S. Dist. LEXIS 33644 (W.D. Wash., Feb. 25, 2022)*

Prior History: *Nat'l Prods. Inc. v. Innovative Intelligent Prods., LLC, 2020 U.S. Dist. LEXIS 146032, 2020 WL 4698767 (W.D. Wash., Aug. 13, 2020)*

Core Terms

patent, Counterclaim, patents-in-suit, inequitable conduct, affirmative defense, products, biasing, contacts, pleaded, allegations, motion to dismiss, mismarking, magnetic, deceive, license, cradle, expectancy, antitrust, inventor, patent application, co-inventor, accusation, contends, reasonable inference, relevant market, leave to amend, anticompetitive, monopolization, competitors, cognizable

LexisNexis® Headnotes

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

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

A motion brought pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss a counterclaim is evaluated under the same standards applicable to a motion to dismiss a complaint. In a patent case, Rule 12(b)(6) motions are governed by regional circuit law. The Ninth Circuit instructs that, when considering a Rule 12(b)(6) motion to dismiss, the court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the non-moving party.

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

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

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

Although a pleading challenged by a Fed. R. Civ. P. 12(b)(6) motion to dismiss need not provide detailed factual allegations, it must offer more than labels and conclusions and contain more than a formulaic recitation of the elements of a cause of action. A pleading may be lacking for one of two reasons: (i) absence of a cognizable legal theory, or (ii) insufficient facts to support a cognizable legal claim. The question for the court is whether the facts in the pleading sufficiently state a plausible ground for relief. If the court dismisses a pleading or portions thereof, it must consider whether to grant leave to amend. Fed. R. Civ. P. 15(a)(2) provides that leave to amend should be freely given when justice so requires.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Effect of Inequitable Conduct

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Patent Law > ... > Defenses > Inequitable Conduct > Fact & Law Issues

Patent Law > ... > Defenses > Inequitable Conduct > Elements

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

HN3[] **Inequitable Conduct, Effect of Inequitable Conduct**

Although the Ninth Circuit's procedural standards apply to a Fed. R. Civ. P. 12(b)(6) motion, whether inequitable conduct has been adequately pleaded is a question of Federal Circuit, not regional circuit, jurisprudence because it pertains to or is unique to patent law. The substantive elements of inequitable conduct are: (1) an individual associated with the filing and prosecution of a patent application made an affirmative misrepresentation of a material fact, failed to disclose material information, or submitted false material information; and (2) the individual did so with a specific intent to deceive the U.S. Patent and Trademark Office (PTO.) Although scienter may be alleged generally, a pleading of inequitable conduct must, in addition to stating the who, what, when, where, and how of the material misrepresentation or omission, include sufficient facts from which a court can reasonably infer that a specific individual both knew of the invalidating information that was withheld from the PTO and withheld that information with a specific intent to deceive the PTO. Fed. R. Civ. P. 9(b).

Patent Law > Originality > Correction of Inventorship Errors

Patent Law > Originality > Joinder of Inventors

Patent Law > Originality > Joint & Sole Inventorship

HN4[] **Originality, Correction of Inventorship Errors**

35 U.S.C.S. § 256 is limited in effect and cannot properly be the vehicle for substituting or adding inventors on a patent based on a claim sounding in fraud. Section 256 provides a remedy for only innocent errors in joinder or non-joinder of inventors.

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

Patent Law > Infringement Actions > Defenses > Marking

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

HN5[ ] Heightened Pleading Requirements, Fraud Claims

35 U.S.C.S. § 292 prohibits affixing on an unpatented article the word patent (or a word or number implying that the item is patented) for the purpose of deceiving the public. Because § 292 claims sound in fraud, the heightened pleading standards of Fed. R. Civ. P. 9(b) apply. To survive a Fed. R. Civ. P. 12(b)(6) challenge, an accusation of mismarking must contain particularized allegations plausibly showing (i) an unpatented article was (ii) marked in a way that falsely suggested it is patented (iii) with the intent of deceiving the public.

Evidence > Inferences & Presumptions > Inferences

Patent Law > Infringement Actions > Defenses > Marking

HN6[ ] Inferences & Presumptions, Inferences

An item is unpatented within the meaning of 35 U.S.C.S. § 292 if it is not covered by at least one claim of each patent with which the article is marked. If a product is mismarked as patented, then the inquiry is whether the accused party had a reasonable belief that the article was covered by the patent or patents at issue. An honest, but mistaken, view that a mismarked item was indeed patented cannot be a basis for liability, but the mere assertion of a lack of intent to deceive is also not a sufficient defense. The question of intent is measured by objective criteria and the fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity is enough to warrant drawing the inference that there was a fraudulent intent. To survive a motion to dismiss, a mismarking claim must contain specific underlying facts tending to show the requisite knowledge from which intent may be inferred.

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

Constitutional Law > Supremacy Clause > Federal Preemption

HN7[ ] Deceptive & Unfair Trade Practices, State Regulation

A Washington Consumer Protection Act claim is preempted when it merely restates claims that are or could be brought under federal patent law.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

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

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

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

HN8[ ] Sherman Act, Claims

An entity that obtained a patent by fraud may not enjoy the limited exception for patents to the monopoly prohibitions of § 2 of the Sherman Act. 15 U.S.C.S. § 2. Because a Walker Process monopolization claim arises under the Sherman Act (or state ***antitrust law***), and not patent law, it must be evaluated under regional circuit (or state) jurisprudence. Use of a fraudulently-acquired patent constitutes an antitrust violation if the patent was employed to produce (or attempt to produce) monopoly power in a specified market. To establish liability for monopolization, a plaintiff must show that (i) defendant possessed monopoly power in the relevant market; (ii) defendant willfully acquired or maintained such power; and (iii) plaintiff suffered causal antitrust injury. To prove attempted monopolization, a plaintiff must demonstrate that (i) defendant engaged in predatory or anticompetitive conduct with (ii) a specific intent to monopolize and (iii) a dangerous probability of achieving monopoly power. A relevant market must be defined by the interchangeability of use or the cross-elasticity of demand between the product in question and substitutes for it.

Torts > ... > Business Relationships > Intentional Interference > Elements

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

HN9[] **Intentional Interference, Elements**

The tort of interference with a business expectancy has five elements: (i) the existence of a business expectancy; (ii) knowledge of that expectancy; (iii) interference with the expectancy done for an improper purpose or using improper means; (iv) termination of the expectancy induced or caused by the interference; and (v) resultant damage.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Immaterial Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Irrelevant Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Redundant Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Scandalous Matters

HN10[] **Motions to Strike, Immaterial Matters**

Like a Fed. R. Civ. P. 12(b)(6) motion, a motion brought under Rule 12(f) to strike one or more affirmative defenses is governed by regional circuit law. The court may strike from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. P. 12(f). Motions to strike are generally disfavored and should be granted only when doing so will save time and expense by disposing of matters that clearly could have no possible bearing on the subject of the litigation.

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For Innovative Intelligent Products LLC, doing business as GPS Lockbox, Defendant: Dale C Barr, CONSTELLATION LAW GROUP PLLC, TRACYTON, WA; Joshua King, King IP Law, Bellevue, WA.

For Innovative Intelligent Products LLC, Counter Claimant: Dale C Barr, CONSTELLATION LAW GROUP PLLC, TRACYTON, WA; Joshua King, King IP Law, Bellevue, WA.

Judges: Honorable Richard A. Jones, United States District Judge.

Opinion by: Richard A. Jones

Opinion

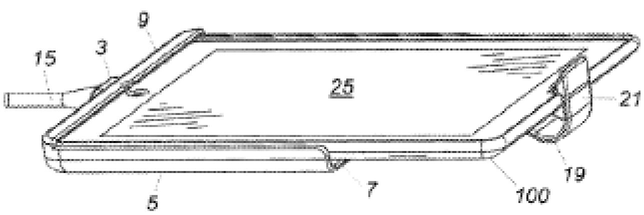
ORDER

THIS MATTER comes before the Court on a motion, docket no. 47, brought by plaintiff National Products Inc. ("NPI") to dismiss certain counterclaims and to strike certain affirmative defenses. Having reviewed all papers filed in support of, and in opposition to, the motion, and having concluded that the motion can be decided without oral argument, the Court enters the following Order.

Background

In this action, NPI has asserted patent infringement claims against defendant Innovative Intelligent Products, LLC d/b/a GPS Lockbox ("GPS") relating to four (4) patents: U.S. Patents Nos. 9,706,026 (the "'026 Patent"), 10,454,515 (the "'515 Patent"), 10,630,334 (the "'334 Patent"), and 10,666,309 (the "'309 Patent"). See 2d Am. Compl. (docket **[*2]** no. 43). Each of the patents-in-suit is titled "Docking Sleeve with Electrical Adapter," and each discloses a "protective arrangement for an electronic device" and a "fixedly positioned" adapter having a "male plug" that can mate with the "female socket of the device." See Exs. A-C to Am. Compl. (docket nos. 14-1, 14-2, & 14-3) ('026, '515, and '334 Patents); Ex. A to McMichael Decl. (docket no. 48-1) ('309 Patent). Each patent contains the following illustration of an embodiment of the invention:

Fig. 2 of '026, '515, '334, & '309 Patents (docket nos. 14-1, 14-2, 14-3, & 48-1).



The above figure shows an electronic device with a touch-sensitive screen display **25**, inserted into the cavity of a protective cover **100**, a docking cradle **5** that has a tray **7** with a base receiver **9**, a docking connector **3**, which includes a plurality of biasing electrical contacts (typically biasing pogo pins or biasing leaf spring contacts) that are coupled to leads in a cable **15**, and a clamp **19**, which has a compression component or arm **21**. See '026, '515, '334, and '309 Patents at Cols. 6-10. All of the patents-in-suit identify Jeffrey D. Carnevali as the inventor, and indicate that NPI is the assignee and applicant. Id. at 1.

In response to NPI's Second Amended Complaint, GPS filed a Third **[*3]** Amended Answer and Amended Counterclaims ("3d Am. Ans."), docket no. 38.[1] In its operative pleading, GPS has asserted twelve (12) affirmative defenses, four (4) of which NPI moves to strike, and seventeen (17) counterclaims, the last nine (9) of which NPI moves to dismiss. GPS alleges, in essence, that Joseph Todrzak of GPS is the inventor (or at least a co-inventor) of the technology at issue, that the patents-in-suit were procured by fraud on the U.S. Patent and Trademark Office ("PTO"), and that NPI has misused the patents to engage in anticompetitive behavior. See 3d Am. Ans. at ¶¶ 97-407 (docket no. 38). According to GPS, while attending a trade show in Las Vegas in January 2014, Todrzak met

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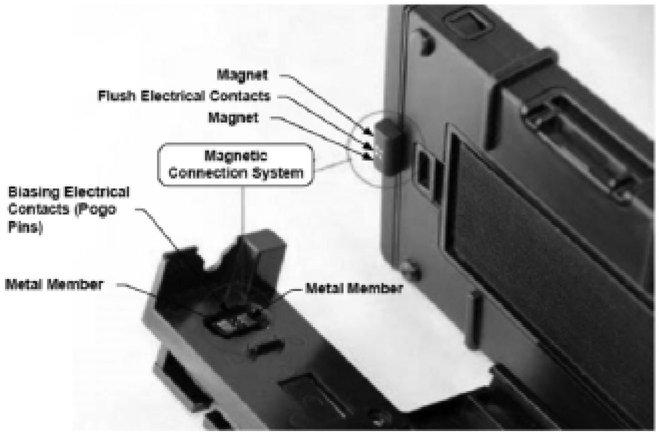
[1] NPI accuses GPS of violating *Federal Rule of Civil Procedure 15*, which permits a party to amend its pleading "once as a matter of course" within 21 days after (i) serving it, (ii) service of a responsive pleading, or (iii) service of a motion under *Rule 12(b)*, *(e)*, or *(f)*, whichever is earlier. See *Fed. R. Civ. P. 15(a)(1)*. NPI contends that GPS used its "once as a matter of course" opportunity when it filed its Second Amended Answer and Amended Counterclaims, docket no. 35, on December 8, 2020. Citing *Ramirez v. County of San Bernardino, 806 F.3d 1002 (9th Cir. 2015)*, GPS counters that all prior amendments of its responsive pleading were filed with NPI's consent, as "other amendments" pursuant to *Rule 15(a)(2)*, and that it invoked its "once as a matter of course" right only in filing its Third Amended Answer and Amended Counterclaims, docket no. 38. NPI does not dispute that GPS's latest pleading was filed within 21 days after NPI filed its original motion to dismiss, docket no. 36, which was later voluntarily withdrawn, see Notice (docket no. 44), and NPI has not disagreed with GPS's characterization of its earlier amendments as having been filed upon agreement of the parties, see Reply (docket no. 69); see also Stip. Mot. (docket no. 32). The Court finds no procedural deficiency in GPS's operative pleading, but to the extent that GPS had already exercised its "once as a matter of course" option, the Court hereby GRANTS leave to amend nunc pro tunc and considers GPS's Third Amended Answer and Amended Counterclaims properly filed.

representatives of a South Korean company known as Dae Han and learned of a magnetic connection system marketed under the brand name "Magtron." Id. at ¶ 103. By early February 2014, the Magtron system had been incorporated into GPS's electronic-device cradle called the Ultra Pro 7. Id. at ¶¶ 111-13. GPS avers that, since early 2014, the magnetic connection system and other material features of the Ultra Pro 7 have remained substantially the same, and that they are incorporated into the Accused **[*4]** Products, namely ATMOS cradle kits, ELD vehicle mount kits, Flex II cradle kits, Flex III ATMOS cradle kits, Eclipse PTT and ATMOS cradle packages, Push-to-Talk cradle packages, and various GPS Lockbox Rugged Cases, all of which are designed for Samsung devices. See id. at ¶ 116; see also 2d Am. Compl. at ¶¶ 29, 36, 45, & 52 (docket no. 43) (describing the Accused Products). In its operative pleading, GPS has offered the following view of the magnetic connection system at issue:



3d Am. Ans. at ¶ 114 (docket no. 38).

GPS indicates that Todrzak and a colleague, Jack Dovey, "presented, offered for sale, and otherwise made public" the Ultra Pro 7 (and two other products containing the magnetic connection system) at the Sprint Trade Show in Seattle, which was held in February 2014. Id. at ¶ 118. GPS further alleges that, in March or April 2014, Todrzak and Dovey met with Jake Parker and Aaron Hursey (misspelled in GPS's pleading and hereinafter appearing as "Hersey") of NPI at NPI's offices in Seattle and showed them the Ultra Pro 7, to explore the possibility of collaborating on its production. Id. at ¶¶ 129-38. According to GPS, in August 2014, NPI filed a patent application **[*5]** that was the first one to include any reference to a magnetic connection system. See id. at ¶¶ 145-53. Several more patent applications followed, and during the entire period of patent prosecution, GPS and NPI were competitors in a "relatively small market of customers," but NPI never disclosed GPS's products to the PTO. Id. at ¶¶ 201-02.

The first eight (8) of GPS's counterclaims seek declaratory relief of invalidity and non-infringement as to the four (4) patents-in-suit, and they are not the subject of NPI's motion to dismiss. GPS's remaining counterclaims, which NPI seeks to dismiss, are as follows: Counts Nine, Ten, and Eleven allege inequitable conduct before the PTO, Count Twelve seeks a declaratory judgment that Todrzak is a co-inventor of one or more of the patents-in-suit, Count Thirteen accuses NPI of patent mismarking, Count Fourteen pleads a violation of the unfair competition provisions of Washington's Consumer Protection Act ("CPA"), Counts Fifteen and Seventeen claim that NPI has engaged in anticompetitive conduct in violation of Washington and federal law, respectively, and Count Sixteen asserts that NPI tortiously interfered with GPS's economic relations. Id. at ¶¶ **[*6]** 219-407. GPS's eighth affirmative defense, which NPI moves to strike, overlaps with its Ninth, Tenth, and Eleventh Counterclaims alleging inequitable conduct. See id. at ¶ 70. NPI also asks that the Court strike GPS's ninth, tenth, and twelfth affirmative defenses of patent misuse, license, and unclean hands, respectively. See id. at ¶¶ 71, 72-77, & 80. Finally, counsel for NPI, which has not appeared on behalf of Carnevali, argues that GPS did not timely join Carnevali as a defendant and has not adequately pleaded claims for individual liability against him.

Discussion

A. Counterclaims

HN1[] A motion brought pursuant to *Federal Rule of Civil Procedure 12(b)(6)* to dismiss a counterclaim is evaluated under the same standards applicable to a motion to dismiss a complaint. See *Lemman v. Foley, No. C20-591, 2020 U.S. Dist. LEXIS 229456, 2020 WL 7181055, at *1 (W.D. Wash. Dec. 7, 2020)*. In a patent case, *Rule 12(b)(6)* motions are governed by regional circuit law. *Deep9 Corp. v. Barnes & Noble, Inc., No. C11-35, 2012 U.S. Dist. LEXIS 203227, 2012 WL 13019208, at *2 (W.D. Wash. July 11, 2012)* (citing *McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1355-56 (Fed. Cir. 2007)*, and *Polymer Indus. Prods. Co. v. Bridgestone/Firestone, Inc., 347 F. 3d 935, 937 (Fed. Cir. 2003)*). The Ninth Circuit instructs that, when considering a *Rule 12(b)(6)* motion to dismiss, the Court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the non-moving party. See id. (citing *Wyler Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998)*).

HN2[] Although a pleading challenged by a *Rule 12(b)(6)* motion to dismiss need not provide detailed factual allegations, it must offer "more than labels and conclusions" and contain more **[*7]** than a "formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A pleading may be lacking for one of two reasons: (i) absence of a cognizable legal theory, or (ii) insufficient facts to support a cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984)*. The question for the Court is whether the facts in the pleading sufficiently state a "plausible" ground for relief. *Twombly, 550 U.S. at 570*. If the Court dismisses a pleading or portions thereof, it must consider whether to grant leave to amend. *Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)*; see *Fed. R. Civ. P. 15(a)(2)* (leave to amend should be "freely" given "when justice so requires").

1. Inequitable Conduct

HN3[] Although the Ninth Circuit's procedural standards apply to NPI's *Rule 12(b)(6)* motion, whether inequitable conduct has been adequately pleaded is a question of Federal Circuit, not regional circuit, jurisprudence because it "pertains to or is unique to patent law." *Deep9, 2012 U.S. Dist. LEXIS 203227, 2012 WL 13019208, at *2* (citing *Exergen Corp. v. Wal-Mart Stores, Inc., 575 F.3d 1312, 1326 (Fed. Cir. 2009)*). "The substantive elements of inequitable conduct are: (1) an individual associated with the filing and prosecution of a patent application made an affirmative misrepresentation of a material fact, failed to disclose material information, or submitted false material information; and (2) the individual did so with a specific intent to deceive the PTO." Id. Although scienter may be alleged **[*8]** generally, a pleading of inequitable conduct must, in addition to stating the who, what, when, where, and how of the material misrepresentation or omission, "include sufficient facts from which a court can 'reasonably infer that a specific individual both knew of the invalidating information that was withheld from the PTO and withheld that information with a specific intent to deceive the PTO.'" Id. (quoting *Delano Farms Co. v. Cal. Table Grape Comm'n, 655 F.3d 1337, 1350 (Fed. Cir. 2011)*); see also *Fed. R. Civ. P. 9(b)*.

GPS's three theories of inequitable conduct are as follows: with the intent to deceive the PTO, Carnevali, a co-owner of NPI, and/or others acting on his behalf (i) misrepresented to the PTO that he was the sole inventor as to the patents-in-suit; (ii) misrepresented (or made inconsistent representations) to the PTO concerning the state of the art related to biasing contacts (biasing pogo pins or biasing leaf spring contacts); and/or (iii) withheld from the PTO information about the Ultra Pro 7 and other GPS products. See 3d Am. Ans. at ¶¶ 219-340 (docket no. 38).

With regard to the first claim of inequitable conduct (the Ninth Counterclaim), NPI argues that GPS has not pleaded enough to establish joint inventorship and that GPS has not provided corroboration for its **[*9]** assertion that Todrzak and Dovey met with Parker and Hersey in March or April 2014. GPS, however, need not prove joint inventorship to establish inequitable conduct; the crux of its claim is that NPI copied GPS's design and that Carnevali, with knowledge of this fact, misrepresented to the PTO that he invented the magnetic connection system disclosed in the various patents-in-suit. GPS also need not, at this stage of the proceedings, proffer evidence to support its factual statements; rather, the Court must accept the allegations of GPS's operative pleading as true and draw all reasonable inferences in favor of GPS. Having done so, the Court concludes that GPS's Ninth

Counterclaim for inequitable conduct is sufficiently pleaded. Whether this particular accusation of inequitable conduct has merit is a question for another day.

As to GPS's second claim of inequitable conduct (the Tenth Counterclaim), NPI does not rely on an absence of a cognizable legal theory or supporting facts, but rather disputes the inferences to be drawn from the allegations of the operative pleading. GPS asserts that NPI indicated in five patent applications filed between February 24, 2014, and March 24, 2015, **[*10]** that "[m]ost docking cradles . . . use some sort of biasing pogo pin or biasing leaf spring contact in the docking connector." 3d Am. Ans. at ¶¶ 275-78. The applications that ripened into the patents-in-suit, however, did not contain this statement about biasing contacts, id. at ¶¶ 279-80, and in response to the patent examiner's initial rejections based on prior art, Carnevali (or others on his behalf) amended the claim language to specify biasing contacts, id. at ¶¶ 283-291. GPS alleges that, but for this change, the claims of the patents-in-suit would not have been allowed, see id. at ¶ 301 (quoting Notice of Allowance for '026 Patent (Application No. 14/936,517)), and that omission of the earlier explanation about the state of the art relating to biasing contacts violated the duty of candor owed to the PTO.

In seeking to dismiss the Tenth Counterclaim, NPI denies that it "removed" the statement about biasing contacts, but this argument involves mere semantics; GPS's pleading is best understood as alleging that the statement was "omitted," as opposed to "removed," from the relevant patent applications. NPI also explains that the patent examiner, not NPI, indicated that the prior art did not **[*11]** disclose biasing contacts, but this account of events misses the point of GPS's accusation. GPS contends that, because Carnevali (or others acting on his behalf) omitted the statement about biasing contacts, the patent examiner was misled into believing that biasing contacts were novel over the prior art. Again, whether GPS's accusation of inequitable conduct has merit is an issue for another time; for now, the Court concludes that GPS has provided the requisite who, what, when, where, and how in support of its Tenth Counterclaim.

With respect to the last claim of inequitable conduct (the Eleventh Counterclaim), NPI again tries to deny the factual allegations of GPS's Third Amended Answer and Amended Counterclaims. NPI, however, cannot prevail on a motion to dismiss by insisting on evidence to corroborate the operative pleading. NPI also discounts the reasonable inferences to be drawn from the factual information proffered by GPS, arguing that, even if Todrzak and Dovey did meet with Parker and Hersey, GPS has not plausibly suggested that Carnevali was told (by Parker or Hersey) about the Ultra Pro 7 or knew he should have disclosed it to the PTO. GPS has, however, further indicated **[*12]** that Carnevali is one of NPI's owners, that the first patent application listing Carnevali as the inventor in which a magnetic connection system was disclosed was filed a few months after Todrzak and Dovey supposedly showed the Ultra Pro 7 to Parker and Hersey, that NPI and GPS were (and still are) competitors in a small market, and that the Ultra Pro 7 and GPS's other products were publicly available during the period when the patents-in-suit were being prosecuted. Taken together, these factual assertions, along with the alleged meeting in the spring of 2014, give rise to a reasonable inference and plausible claim that Carnevali was aware of GPS's magnetic connection system and intentionally withheld it from the PTO. GPS will be permitted to further develop its Eleventh Counterclaim for inequitable conduct.

2. Co-Inventorship

GPS's Twelfth Counterclaim, seeking a declaration that Todrzak is a co-inventor of one or more of the patents-in-suit, is pleaded under *35 U.S.C. § 256*. See 3d Am. Ans. at ¶ 343 (docket no. 38). ***HN4***[] *Section 256*, however, is "limited in effect and cannot properly be the vehicle for substituting [or adding] inventors on a patent . . . [based on] a claim sounding in . . . fraud." *Bemis v. Chevron Rsch. Co., 599 F.2d 910, 912 (9th Cir. 1979)*. *Section 256* provides a **[*13]** remedy for "only innocent errors in joinder or non-joinder of inventors." Id. GPS does not assert inadvertence or mere oversight in omitting Todrzak as a co-inventor, but rather contends his exclusion was fraudulent, and thus, GPS has not stated a cognizable claim under *§ 256*. No purpose would be served in allowing GPS to amend its Twelfth Counterclaim; if Carnevali is not the sole inventor (an assertion that must be proven by clear and convincing evidence), then the patents-in-suit are invalid and Todrzak could not be simply joined as a co-inventor. See *Solomon v. Kimberly-Clark Corp., 216 F.3d 1372, 1381 (Fed. Cir. 2000)*. In light of these rulings, the

Court need not address NPI's arguments concerning the substantive deficiencies of GPS's assertion that Todrzak is a co-inventor of one or more of the patents-in-suit.

3. Patent Mismarking

HN5[] GPS's Thirteenth Counterclaim is brought under 35 U.S.C. § 292, which prohibits inter alia affixing on an unpatented article the word "patent" (or a word or number implying that the item is patented) for the purpose of deceiving the public. GPS contends that NPI has engaged in this type of patent mismarking by listing its patents on a website in a vague, confusing, or inaccurate manner, rather than specifying the relevant patents on its **[*14]** products or accompanying literature. See 3d Am. Ans. at ¶¶ 351-60 (docket no. 38). Because § 292 claims sound in fraud, the heightened pleading standards of Rule 9(b) apply. See *Music Grp. Servs. US Inc. v. Peavey Elecs. Corp., No. C10-2066, 2011 U.S. Dist. LEXIS 168532, 2011 WL 13232515, at *2 (W.D. Wash. June 21, 2011)*. To survive a Rule 12(b)(6) challenge, an accusation of mismarking must contain particularized allegations plausibly showing (i) an unpatented article was (ii) marked in a way that falsely suggested it is patented (iii) with the intent of deceiving the public. See id. (citing *Brinkmeier v. Graco Child.'s Prods. Inc., 684 F. Supp. 2d 548, 551 (D. Del. 2010)*).

HN6[] An item is "unpatented" within the meaning of § 292 if it is "not covered by at least one claim of each patent with which the article is marked." *Clontech Labs., Inc. v. Invitrogen Corp., 406 F.3d 1347, 1352 (Fed. Cir. 2005)*. If a product is mismarked as "patented," then the inquiry is whether the accused party had a reasonable belief that the article was covered by the patent or patents at issue. *Id. at 1352-53*. An honest, but mistaken, view that a mismarked item was indeed patented cannot be a basis for liability, but the mere assertion of a lack of intent to deceive is also not a sufficient defense. *Id. at 1352*. The question of intent is measured by objective criteria and "the *fact* of misrepresentation coupled with proof that the party making it had knowledge of its falsity is enough to warrant drawing the inference that there was a fraudulent intent." Id. (emphasis **[*15]** in original). To survive a motion to dismiss, a mismarking claim must contain "specific underlying facts" tending to show the requisite knowledge from which intent may be inferred. See *In re BP Lubricants USA Inc., 637 F.3d 1307, 1311-12 (Fed. Cir. 2011)*.

In its operative pleading, GPS indicates that (i) NPI sell numerous products under the trademarks "GDS" and "IntelliSkin," (ii) some of these items are not covered by any of the patents-in-suit, (iii) NPI's website associates all of the patents-in-suit with the "GDS" and "IntelliSkin" branded articles, see Ex. E to Tamimi Decl. (docket no. 37-5) (printed from NPI's webpage https://www.rammount.com/legal), and (iv) NPI has admitted in discovery that it sells no embodiment of the claims of one of the four patents-in-suit, namely the '334 Patent. 3d Am. Ans. at ¶¶ 358-59 (docket no. 38). NPI counters that its website contains the explanation that its RAM® products are "covered under one or more of the following patents," which "undercuts" GPS's premise that NPI intended to deceive the public; NPI contends that its overbroad listing of patents serves the public interest by providing notice of all "patents that would need to be avoided to launch a competing product." Mot. at 18-19 (docket no. 47). NPI further argues **[*16]** that GPS's failure to allege that any of NPI's products are not covered by at least one patent is fatal to its mismarking claim.

NPI cites no legal authority to support its propositions concerning what GPS must plead or eventually prove, and *Clontech*, which NPI did not cite, actually contradicts NPI's contentions. *Clontech* suggests that NPI's attempted disclaimer ("one or more of the following") is ineffective and that at least one claim of each listed patent must "read on" the marked article. The Federal Circuit opinion also undermines NPI's apparent assertion that, if at least one listed patent covers the marked product, then the product is not "unpatented" within the meaning of § 292. NPI's mistake in enumerating more patents than it honestly believed protected its "GDS" and "IntelliSkin" articles appears to be one of law, not of fact, and the Court concludes that GPS has adequately pleaded the requisite knowledge from which an intent to deceive may be inferred. Thus, GPS's Thirteenth Counterclaim remains in the case.

4. CPA Violation

Other than noting that an individual may be held personally liable for a CPA violation, see Resp. at 23 (docket no. 67), GPS has made no effort to support its Fourteenth **[*17]** Counterclaim. ***HN7***[] A CPA claim is preempted when it merely restates claims that are or could be brought under federal patent law. See *Milo & Gabby, LLC v. Amazon.com, Inc., 12 F. Supp. 3d 1341, 1347 (W.D. Wash. 2014)*. GPS's operative pleading does not set forth subject matter for the CPA claim that is outside the realm of patent law, and GPS has not stated a cognizable claim for unfair competition under *RCW 19.86.020*. The Court recognizes that NPI did not invoke preemption as a basis for dismissal, and the Court will therefore grant leave to amend, but reminds GPS and its attorneys of their obligations under *Federal Rule of Civil Procedure 11* and *28 U.S.C. § 1927*.

5. Anticompetitive Behavior

GPS's Fifteenth and Seventeenth Counterclaims are predicated on GPS's assertion that the patents-in-suit were procured through fraud. ***HN8***[] An entity that obtained a patent by fraud may not enjoy the limited exception for patents to the monopoly prohibitions of *Section 2 of the Sherman Act*. See *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 175-77, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*; see also *15 U.S.C. § 2*. Because a *Walker Process* monopolization claim arises under the *Sherman Act* (or state ***antitrust law***), and not patent law, it must be evaluated under regional circuit (or state) jurisprudence. See *Chandler v. Phoenix Servs. LLC, 1 F.4th 1013 (Fed. Cir. 2021)* (concluding that the Federal Circuit lacks appellate jurisdiction as to a standalone *Walker Process* monopolization claim). Use of a fraudulently-acquired patent constitutes an antitrust violation if the patent was employed to produce (or **[*18]** attempt to produce) monopoly power in a specified market. See *Bourns, Inc. v. Raychem Corp., 331 F.3d 704, 711 (9th Cir. 2003)*. To establish liability for monopolization, GPS must show that (i) NPI possessed monopoly power in the relevant market; (ii) NPI willfully acquired or maintained such power; and (iii) GPS suffered causal antitrust injury. See *Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 989-90 (9th Cir. 2020)*. To prove attempted monopolization, GPS must demonstrate that (i) NPI engaged in predatory or anticompetitive conduct with (ii) a specific intent to monopolize and (iii) a dangerous probability of achieving monopoly power. See *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*; see also *Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 893 (9th Cir. 2008)*. But see *Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 59, 738 P.2d 665 (1987)* (declining to adopt "dangerous probability of success" as an element of a claim under *RCW 19.86.040* because it may be inferred from specific intent and monopoly power, citing *Lessig v. Tidewater Oil Co., 327 F.2d 459, 474-75 (9th Cir. 1964)*, abrogated by *Spectrum Sports, 506 U.S. at 457-59*).

NPI contends that GPS's antitrust counterclaims should be dismissed because GPS has not (i) adequately pleaded inequitable conduct, (ii) defined the relevant market, or (iii) alleged an antitrust injury. NPI's first argument fails for the reasons set forth in Section A.1 of this discussion. NPI's second ground for dismissal accuses GPS of defining the market in a "hyper-narrow" manner, see Mot. at 16 (docket no. 47), but the authority on which NPI relies does not support such conclusion. **[*19]** See *Adidas Am., Inc. v. Nat'l Collegiate Athletic Ass'n, 64 F. Supp. 2d 1097 (D. Kan. 1999)*. As explained in *Adidas*, "a relevant market must be defined by 'the interchangeability of use or the cross-elasticity of demand between the product [in question] and substitutes for it.'" *Id. at 1102* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*). GPS's operative pleading satisfies this standard; it indicates that four or five entities, including NPI and GPS, are the primary suppliers of articles similar to the Accused Products, and it names ProClip USA Inc. ("ProClip"), Brodit AB ("Brodit"), and Arkon Resources, Inc. ("Arkon") as the other competitors. 3d Am. Ans. at ¶¶ 378-81 (docket no. 38). NPI does not contend that GPS has omitted one or more sources of interchangeable or substitute goods or that GPS could not cure any deficiency by amending its definition of the relevant market. Thus, NPI has not demonstrated that failure to plead the relevant market constitutes a basis to dismiss with prejudice GPS's counterclaims under *Sherman Act § 2* and/or *RCW 19.86.040*.

NPI's last assertion, namely that GPS has not alleged an antitrust harm, likewise lacks merit. GPS's operative pleading indicates that NPI has sued ProClip and Brodit in the District of Wisconsin for infringement of at least two of the patents-in-suit in this matter, and that NPI has entered into **[*20]** a licensing agreement with Arkon after suing it for patent infringement. See 3d Am. Ans. at ¶¶ 379 & 381. In essence, GPS contends that NPI is using the patents-in-suit, which were allegedly obtained through fraud, to try to force every competitor out of the market. Of course, if the patents-in-suit are valid, NPI may, without fear of antitrust liability, exercise its right to exclude others from practicing the art described therein. See *In re Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1325 (Fed. Cir. 2000)* ("The commercial advantage gained by new technology and its statutory protection by patent do not covert the possessor thereof into a prohibited monopolist." (quoting *Abbott Labs. v. Brennan, 952 F.2d 1346, 1354 (Fed. Cir. 1991)*)). On the other hand, if the patents-in-suit are tainted by inequitable conduct before the PTO, then NPI's systematic use of them in litigation against its competitors results in the type of anticompetitive injury that the *Sherman Act* and *RCW 19.86.040* are intended to rectify. See *id. at 1326* (citing *Walker Process, 382 U.S. at 177*). The Court concludes that GPS's Fifteenth and Seventeenth Counterclaims are adequately pleaded.

6. Tortious Interference

In response to NPI's motion to dismiss, GPS offers minimal analysis concerning how the facts alleged in its operative pleading support its Sixteenth Counterclaim. ***HN9***[] The tort of interference with a business **[*21]** expectancy has five elements: (i) the existence of a business expectancy; (ii) knowledge of that expectancy; (iii) interference with the expectancy done for an improper purpose or using improper means; (iv) termination of the expectancy induced or caused by the interference; and (v) resultant damage. See *Greensun Grp., LLC v. City of Bellevue, 7 Wn. App. 2d 754, 768, 436 P.3d 397 (2019)* (quoting *Pac. Nw. Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 351, 144 P.3d 276 (2006)*). In connection with the Sixteenth Counterclaim, the business expectancy at issue was the potential sale of GPS to a third party. See 3d Am. Ans. at ¶ 393 (docket no. 38). The operative pleading, however, does not indicate that NPI knew about the potential sale and does not explain how or why the potential sale was interrupted or terminated. Absent additional factual allegations, the Court cannot conclude that the tortious interference counterclaim is plausible. Although NPI has sought dismissal with prejudice, it has not made a showing that amendment would be futile. Thus, GPS will be provided an opportunity to try to correct the deficiencies of its Sixteenth Counterclaim.

B. Affirmative Defenses

HN10[] Like a *Rule 12(b)(6)* motion, a motion brought under *Federal Rule of Civil Procedure 12(f)* to strike one or more affirmative defenses is governed by regional circuit law. See *Ameranth, Inc. v. Pizza Hut, Inc., No. 11-CV-1810, 2012 U.S. Dist. LEXIS 208152, 2012 WL 12918370, at *2 (S.D. Cal. June 26, 2012)* (citing *McZeal, 501 F.3d at 1355-56*). The Court may strike from a pleading "any **[*22]** insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *Fed. R. Civ. P. 12(f)*. Motions to strike are generally disfavored and should be granted only when doing so will "save time and expense" by disposing of matters that "clearly could have no possible bearing on the subject of the litigation." *Ameranth, 2012 U.S. Dist. LEXIS 208152, 2012 WL 12918370, at *3* (citing *Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1152 (C.D. Cal 2003)*, and quoting *Platte Anchor Bolt, Inc. v. IHI, Inc., 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004)*).

Whether *Twombly*'s "plausibility" standard applies to affirmative defenses has not been addressed by the Ninth Circuit, and district courts have ruled in a variety of ways. *2012 U.S. Dist. LEXIS 208152, [WL] at *3* & n.1. In *Ameranth*, in declining to require that affirmative defenses meet the "plausibility" test, the court reasoned that *Rule 8(a)(2)*'s requirement that a pleader "show" entitlement to relief, which is the language upon which *Twombly*'s doctrines are built, differs from *Rule 8(c)*'s directive that a responding party "state" its defenses. Id. The *Ameranth* Court further observed that practical and judicial economy considerations (for example, the limited time allowed to prepare an answer, avoidance of repeated amendments, and discouragement of motions to strike brought for dilatory or harassment purposes) support the traditional standard for pleading affirmative defenses, namely whether the statement provides "fair notice." *2012 U.S. Dist. LEXIS 208152, [WL] at *4* (citing *Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir. 1979)*); see **[*23]** also *Hargrove v. Hargrove, No. 16-1743, 2017 U.S. Dist. LEXIS 69289, 2017 WL 1788426, at *1 (W.D. Wash. May 5, 2017)* ("Courts generally decline to strike affirmative defenses unless the moving party shows [that] 'there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defense succeed.'").

1. Inequitable Conduct, Patent Misuse, and Unclean Hands

For the same reasons NPI failed to demonstrate that GPS's inequitable conduct counterclaims should be dismissed, NPI's motion to strike GPS's affirmative defenses of inequitable conduct, patent misuse, and unclean hands lacks merit. As drafted, these affirmative defenses give "fair notice" of GPS's contention that it cannot be held liable for infringement of the patents-in-suit because they are invalid and/or unenforceable, NPI is misusing them, and/or NPI is equitably barred from recovering by its improper behavior.

2. License

In its tenth affirmative defense, GPS indicates that some of the Accused Products are covered by the aforementioned license between NPI and Arkon. 3d Am. Ans. at ¶¶ 73-76 (docket no. 38). GPS has further explained that it purchases (or has purchased) some of the Accused Products from Arkon. Resp. at 17 (docket no. 67). NPI, however, has proffered evidence **[*24]** outside the pleadings[2] showing that the license with Arkon concerns only U.S. Patent No. 6,585,212, which is not one of the patents-in-suit. See Settlement Agreement, Ex. E to McMichael Decl. (docket no. 48-5). In response, GPS has not identified any other license that might support its affirmative defense, and thus, has not given the requisite "fair notice." Moreover, NPI has met its burden to show that, with respect to GPS's license defense, no questions of fact exist, the questions of law are clear and not in dispute, and given the circumstances, the defense cannot succeed. See *Hargrove, 2017 U.S. Dist. LEXIS 69289, 2017 WL 1788426, at *1*. GPS's tenth affirmative defense is STRICKEN as insufficient. See *Fed. R. Civ. P. 12(f)*.

C. Individual Liability

The record contains no indication that GPS's third-party claims against Carnevali have been properly served, and no attorney has appeared on Carnevali's behalf. Unless GPS takes the steps necessary to join Carnevali as a third-party defendant, the Court sees no purpose in addressing the arguments made by NPI concerning the insufficiency of GPS's third-party claims against Carnevali. The Court notes, however, that Carnevali need not be individually named as a party with respect to GPS's inequitable conduct counterclaims; the patents-in-suit **[*25]** have been assigned to NPI, and NPI is the real-party-in-interest in supporting their validity. See *Delano Farms, 655 F.3d at 1342* (observing that, if a patentee has transferred all substantial rights in a patent to another, for example, an exclusive licensee, then the assignor is no longer regarded as the owner of the patent and need not be joined in any action brought on the patent).

Conclusion

For the foregoing reasons, the Court ORDERS:

(1) NPI's motion, docket no. 47, is GRANTED in part, STRICKEN in part, and DENIED in part, as follows:

(a) GPS's Twelfth Counterclaim for a declaration of co-inventorship is DISMISSED with prejudice;

(b) GPS's Fourteenth Counterclaim for violation of the CPA is DISMISSED without prejudice and with leave to amend;

(c) GPS's Sixteenth Counterclaim for tortious interference with business expectancy is DISMISSED without prejudice and with leave to amend;

(d) GPS's tenth affirmative defense based on a license between NPI and Arkon is STRICKEN with prejudice;

(e) NPI's arguments advanced on behalf of Carnevali are STRICKEN as premature and not yet ripe for the Court's consideration; and

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[2] The directive requiring the Court to convert a *Rule 12(b)(6)* or *12(c)* motion into one for summary judgment if matters outside the pleadings are presented and not excluded does not apply to *Rule 12(f)* motions to strike. See *Fed. R. Civ. P. 12(d)*.

(f) NPI's motion is otherwise DENIED.

(2) Any amended pleading by GPS must be electronically filed within **[*26]** fourteen (14) days of the date of this Order. Any responsive pleading or motion by NPI shall be filed within fourteen (14) days thereafter. See *Fed. R. Civ. P. 15(a)(3)*.

(3) The Clerk is directed to send a copy of this Order to all counsel of record.

IT IS SO ORDERED.

Dated this 25th day of October, 2021.

/s/ Richard A. Jones

The Honorable Richard A. Jones

United States District Judge

Agency Y LLC v. DFO Global Performance Commerce Ltd.

United States District Court for the Central District of California

October 27, 2021, Decided; October 27, 2021, Filed

8:20-cv-01716-JVS-KES

Reporter
2021 U.S. Dist. LEXIS 250331 *; 2021 WL 6425566

Agency Y LLC et al. v. DFO Global Performance Commerce Ltd. et al.

Prior History: Agency Y LLC v. DFO Global Performance Commerce LTD, 2021 U.S. Dist. LEXIS 61412 (C.D. Cal., Feb. 2, 2021)

Core Terms

Global, registration, allegations, agrees, brand, fraudulent, fraudulent inducement, unfair competition, promised, website, Media, trademark, rebranding, trademark infringement, intellectual property, announcement, advertising, Profile, damages, prong, registered, argues, false advertising, false designation, cause of action, procurement, domain, unfair, motion to dismiss, cancellation

LexisNexis® Headnotes

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

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

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

Under Fed. R. Civ. P. 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state enough facts to state a claim to relief that is plausible on its face. A claim has facial plausibility if the plaintiff pleads facts that allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

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

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

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

In resolving a Fed. R. Civ. P. 12(b)(6) motion under Twombly, the court must follow a two-pronged approach. First, the court must accept all well-pleaded factual allegations as true, but threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Nor must the court accept as true a legal conclusion couched as a factual allegation. Second, assuming the veracity of well-pleaded factual allegations, the court must determine whether they plausibly give rise to an entitlement to relief. This determination is context-specific, requiring the court to draw on its experience and common sense, but there is no plausibility where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > Burdens of Proof

HN3[] **Infringement Actions, Determinations**

To state a claim for trademark infringement, a plaintiff must allege two elements: first, that the plaintiff owns a valid and protectible trademark; and second, that a defendant used, in commerce, a similar mark without authorization in a manner that is likely to cause consumer mistake, confusion, or deception.

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

HN4[] **Infringement Actions, Determinations**

15 U.S.C.S. § 1125 is concerned with the confusion that may arise from trademark infringement—not the confusion that may arise from a wrongfully-registered mark.

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > False Designation of Origin

Trademark Law > ... > Particular Subject Matter > Geographic Terms > Terms Ineligible for Protection

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Trade Dress Protection > Causes of Action

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Elements of False Advertising

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

HN5[] **Likelihood of Confusion, False Designation of Origin**

The Lanham Act prohibits a person from misrepresenting the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities in commercial advertising or promotion. 15 U.S.C.S. § 1125(a)(1)(B). A false advertising claim requires a showing that: (1) the defendant made a false statement either about the plaintiff's or its own product; (2) the statement was made in commercial advertisement or promotion; (3) the statement actually deceived or had the tendency to deceive a substantial segment of its audience; (4) the deception is material; (5) the defendant caused its false statement to enter interstate commerce; and (6) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to the defendant, or by a lessening of goodwill associated with the plaintiff's product. A false designation of origin claim requires that a plaintiff show that the defendant used in commerce any word, term, name, symbol, or device that is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of defendant with plaintiff, or as to the origin, sponsorship, or approval of his goods by plaintiff.

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

HN6[] Actual Fraud, Elements

To state a claim for fraudulent inducement under California law, a plaintiff must allege: (1) a misrepresentation; (2) knowledge of its falsity; (3) with intent to defraud; (4) justifiable reliance; and (5) resulting damages.

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

HN7[] Actual Fraud, Elements

Language considered non-actionable puffery cannot form the basis for fraudulent inducement claims because vague, exaggerated, generalized or highly subjective statements regarding a product or business are extremely unlikely to induce consumer reliance.

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

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

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

HN8[] Heightened Pleading Requirements, Fraud Claims

While mere failure to perform a contract does not constitute fraud, a promise made without the intention to perform can be actionable fraud. To establish a claim of fraudulent inducement, one must show that the defendant did not intend to honor its contractual promises when they were made. Under Fed. R. Civ. P. 9(b), while the factual circumstances of the fraud itself must be alleged with particularity, the state of mind—or scienter—of the defendants may be alleged generally. Nonetheless, allegations of intent must satisfy the plausibility requirements of Fed. R. Civ. P. 8(a). Under Rule 8(a), a plaintiff must point to facts which show that defendant harbored an intention not to be bound by terms of the contract at formation. It is insufficient to allege intent based purely on defendant's failure to perform its promises.

Business & Corporate Compliance > ... > Trademark Law > Causes of Action Involving Trademarks > Fraudulent Registrations

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

Evidence > Burdens of Proof > Allocation

HN9[] Causes of Action Involving Trademarks, Fraudulent Registrations

When a party asserts a claim for fraud on the U.S. Patent and Trademark Office, it must prove a false representation regarding a material fact, the registrant's knowledge or belief that the representation is false, the intent to induce reliance upon the misrepresentation and reasonable reliance thereon, and damages proximately resulting from the reliance. The party alleging trademark fraud bears a heavy burden of proof.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN10[] Standing, Injury in Fact

Injury-in-fact for standing requires a plaintiff to allege an injury that is both concrete and particularized.

Business & Corporate Compliance > ... > US Trademark Trial & Appeal Board Proceedings > Cancellations > Grounds

Trademark Law > ... > Registration Procedures > Federal Registration > Degree of Protection

HN11[] Cancellations, Grounds

15 U.S.C.S. § 1119 gives district courts the power to order the cancellation of a trademark registration in any action involving a registered mark. 15 U.S.C.S. § 1119. The plain language specifies that cancellation may only be sought if there is already an ongoing action that involves a registered mark; it does not indicate that a cancellation claim is available as an independent cause of action.

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

Torts > Business Torts > Unfair Business Practices > Elements

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

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

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

HN12[] State Regulation, Claims

California's Unfair Competition Law (UCL) prohibits any unlawful, unfair, or fraudulent business act or practices. Cal. Bus. & Prof. Code § 17200 et. seq. To prevail on a UCL claim, a plaintiff must make a twofold showing: he or she must demonstrate injury in fact and a loss of money or property caused by unfair competition.

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

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

HN13[] Trade Practices & Unfair Competition, State Regulation

In the context of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, unfair means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

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

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

HN14[] **State Regulation, Claims**

To have standing to assert a California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 claim, the plaintiff must (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that the economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim.

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

Attorneys Present for Defendants: Not Present.

Judges: James V. Selna, United States District Judge.

Opinion by: James V. Selna

Opinion

CIVIL MINUTES - GENERAL

Proceedings: [IN CHAMBERS] Order Regarding Motion to Dismiss

Defendant DFO Global Performance Commerce Ltd. ("DFO") filed a motion to dismiss the Fourth Amended Complaint ("4AC") of Plaintiffs Agency Y LLC ("Agency Y") and Global Media Holdings Incorporated ("Global Media"). Mot., Dkt. No. 67. Agency Y opposed the motion. Opp'n, Dkt. No. 70. DFO replied. Reply, Dkt. No. 71.

For the following reasons, the Court **GRANTS** the motion, without leave to amend.

I. BACKGROUND

The following facts are alleged in Agency Y's 4AC. See 4AC Dkt. No. 67.

Tim Burd ("Burd") is a high-profile internet marketing professional. Id. ¶ 15. Burd's name is recognized as a source of origin for his internet marketing services, some of which he provides through his corporation, Global Media. Id. Global Media is the owner of the service mark TIM BURD and obtained a service mark registration. Id. Later in 2016, Burd and Sean Brown ("Brown") founded Agency Y. Id. ¶ 17. They also created a brand under the service mark "AGENCY Y" to promote Agency Y's **[*2]** internet marketing services via the website at "www.agencyy.com" (the "Domain"). Id. ¶ 18.

In December 2016, Agency Y registered the Domain through the registrar GoDaddy, which has been an important mechanism through which Agency Y has interacted with its clients. Id. ¶ From 2016 to 2020, Agency Y participated in numerous regional and global conferences to market and promote its services under the mark. Id. ¶ 21. In 2017, Agency Y expended approximately $700,000 on the marketing, advertising, and promotion of services offered under the mark. Id. From December 2016 to February 2017, the mark and services offered thereunder received significant media coverage, word of mouth marketing, and personal referrals. Id. ¶ 22. As a result, the mark became distinctive to both the public and Agency Y's trade. Id. ¶ 23. In 2017, Agency Y generated over $750,000 in Year-1 revenue under the mark. Id. The mark came to signify the high quality and high-end services designated by the mark and acquired distinction, reputation, and goodwill belonging exclusively to Agency Y. Id. ¶ 25.

Prior to working with DFO, Agency Y received virtually no complaints. Id. ¶ 26. After DFO took over day-to-day operations, **[*3]** a deluge of complaints followed, particularly regarding a lack of follow-up. Id. Alex Brown ("DFO Brown"), previously DFO's Chief Marketing Officer, admitted that he had not checked the Agency Y leads in months and had not followed up on a single lead. Id.

On October 19, 2016, Jordan Rolband ("Rolband"), President of DFO, texted Burd about traveling to Toronto, Canada to discuss partnering on an advertising agency. Id. ¶ 27. Over dinner, Burd, Rolband, and Niket Shah of Facebook discussed a strategic partnership, and Rolband stated that DFO wanted to associate with the Burd brand to help repair its damaged reputation. Id. On November 17, 2016, Burd met with Rolband and Bruce Cran, DFO's CEO, where Cran promised unlimited resources, funding, growth potential, and synergies between the Burd brand and DFO. Id. ¶ 28. Later in December, Cran and Rolband offered Burd an opportunity to work with them in a minority ownership capacity, which Burd rejected. Id. On September 21, 2017, Burd met with Robland at DFO's San Diego office, where Robland shared details on DFO's internal resources and promised to make Agency Y "one of the biggest powerhouse agencies in the world" and promised that the **[*4]** deal would be worth "millions of dollars to Agency Y." Id. ¶ 29.

In October 2017, Cran approached Burd and Brown about creating a joint venture between Cran's company and Agency Y to promote the AGENCY Y brand and grow Agency Y's business. Id. ¶ 30. In reliance on Cran's representations, on November 8, 2017, Agency Y entered into an agreement (the "Agreement") with DFO NJ for a 12-month term that was renewable for additional 12-month terms. Id. ¶ 31. The Agreement promised Agency Y commissions for referring its clients to DFO in the event that Agency Y's clients engage DFO to perform services. Id. ¶ 32. In return, DFO agreed to manage leads, handle day-to-day client management, and push for growth and upsells. Id.

For approximately two years thereafter, DFO was not taking any steps to grow Agency Y or managing leads or effectively overseeing the day-to-day client management. Id. ¶ 33. On October 2, 2018, DFO Canada filed an application with the USPTO to register the AGENCY Y mark despite not owning it at the time. Id.

During the initial and first renewal term of the Agreement, Agency Y remained the owner of the AGENCY Y service mark and all goodwill associated with it per Section 8(d) **[*5]** of the Agreement. Id. ¶ 34. In less than a year after DFO's assumption of the Agency Y brand, Agency Y noticed that the brand's business reputation was suffering as a result of DFO's subpar service and that any associated goodwill diminished. Id. ¶ 35. Clients were less likely to hire Agency Y for its services and threatened to leave Agency Y. Id. On one occasion, DFO high jacked a referred client's product and business model. Id. ¶ 36. Upon receiving confidential business information from the client, DFO Brown and Jon Biggs ("Biggs") replicated the client's product using data from the client's ad campaigns at Agency Y. Id. ¶¶ 36, 37.

In February 2019, Cran told Burd and Brown that he intended to make some changes to the Agreement to "bring it in line with the business relationship." Id. ¶ 39. Cran said that Agency Y was such a small deal that he did not feel the negotiate and that he would stop working on Agency Y if they did not comply with his demands. Id. On February 27, 2019, Agency Y entered into its first amendment to the Agreement ("First Addendum"). Id. ¶ 40. The First Addendum states that DFO NJ was replaced by DFO BC or DFO NV—which have identical names (although the First **[*6]** Addendum does not specify which is DFO NJ's successor). Id. ¶ 40. The First Addendum also replaced the provision in the Agreement that each party remains the owner of its respective marks and associated goodwill with an assignment from Agency Y to DFO NJ's successor (either DFO BC or DFO NV). Id.

In September 2019, Cran proposed to Burd and Brown the execution of a Second Addendum to the Agreement ("Second Addendum"). Id. ¶ 45. The Second Addendum included a provision whereby Agency Y agreed to sell and transfer its brand name, domain, and website to DFO. Id. Burd was hesitant to agree to the provision, but Cran promised that if the deal went awry, Agency Y would simply take back its intellectual property. Id. Unbeknownst to Burd and Brown, DFO Canada had already registered the AGENCY Y mark with the USPTO. Id. ¶¶ 45-46. Based on Cran's representations of unlimited resources, intentions to grow Agency Y, and Burd and Brown's belief that DFO would deliver on its promise to return Agency Y's intellectual property if the deal went awry, on September 10, 2019, Agency Y entered into the Second Addendum, which also did not specify whether DFO BC or DFO NV is DFO NJ's successor. Id. ¶ 47.

[*7] The Second Addendum changed the mechanism for extension of the term by putting DFO on a "probationary period" with certain performance benchmarks it needed to meet to prevent termination of the Agreement. Id. ¶ 48. The Second Addendum also provided that in the event of termination, DFO would return to Agency Y its intellectual property, which would include the Agency Y brand. Id. However, Cran had no intention of returning to Agency Y its intellectual property and instead intended for DFO to "regain control over the [AGENCY Y] mark, its trademark registration, and the agencyy.com domain name." Id. In fact, upon termination of the Agreement and Agency Y's request for its intellectual property, Cran proceeded to eviscerate Agency Y and moved the business to Amasa, rather than complying with the terms of the Agreement. Id. DFO "intended for Agency Y and Burd to continue to refer its clients to [DFO], take over these clients, use the Agency Y brand and the Tim Burd brand to attract customers and repair their tarnished reputation, and re-brand the services to make the Agency Y brand worthless and irrelevant, simultanesouly shutting Burd and Brown out of the business and denying them of any revenue generated from clients." Id.

Burd and Brown received letters from DFO legal that they had breached the Agreement. Id. ¶ 51. DFO proceeded to disintegrate Agency Y and took clients without compensating either Burd or Brown. Id. Cran informed them of the AGENCY Y trademark registration and stated there was nothing they could do to stop DFO's takeover of the Agency Y brand. Id. On June 4, 2020, Agency Y invoked Section 3(c) of the Second Addendum that authorizes the return of the Agency Y intellectual property rights to Agency Y. Id. ¶ 52. In the meantime, DFO had dismantled the Agency Y website and changed the www.agencyy.com website to display Agency Y on the "Home Page," but to link to DFO's new company, Amasa, at the "About" section. Id. ¶ 53. The Agency Y web address led only to the new website, www.agencyamasa.com, and remnants of Agency Y remained on DFO's website, but clicking on the link for more information about Agency Y directed to www.agencyamasa.com. Id. Moreover, on June 22, 2020, DFO **[*8]** announced a rebranding initiative before the parties had an opportunity to discuss the proper distribution of the intellectual property assets upon termination of the Agreement. Id. ¶ 54.

The announcement is entitled, "Agency Y Announces Major Rebrand," despite the fact that it was DFO, not Agency Y, who undertook the rebranding initiative. Id. ¶ 55. DFO concealed the fact that it is DFO, not Agency Y, that is rebranding itself as Amasa by deceptively calling itself the "[m]edia buying firm Agency Y." Id. The announcement also states that the initiative is the result of the dissolution of DFO's agreement with Tim Burd, rather than stating that the entire DFO/Agency relationship dissolved, thereby giving the impression that while Tim Burd is no longer an associated party, DFO and Agency Y are still doing business together. Id. Burd received Facebook messages and calls from potential clients and people in the industry asking if Burd had sold Agency Y to DFO, if Agency Y was still in business, and whether Agency Y was still able to take on clients. Id. ¶ 56. As he was unable to provide an accurate answer, this caused further damage to his reputation in the industry. Id. In making it appear **[*9]** as though Agency Y no longer existed as a company, DFO vitiated Agency Y's right under the Second Addendum to reclaim its brand, domain, and website address. Id. ¶ 57.

II. Legal Standard

HN1[] Under *Rule 12(b)(6)*, a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

HN2[] In resolving a 12(b)(6) motion under *Twombly*, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal, 556 U.S. at 678*. Nor must the Court "'accept as true a legal conclusion couched as a factual allegation.'" *Id. at 678-80* (quoting *Twombly, 550 U.S. at 555*). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." *Id. at 679*. This determination is context-specific, requiring the Court to draw on its experience and **[*10]** common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id.

III. DISCUSSION

A. Agency Y's Claims

1. Trademark Infringement

HN3[] To state a claim for trademark infringement, a plaintiff must allege two elements: first, that the plaintiff owns a valid and protectible trademark; and second, that a defendant used, in commerce, a similar mark without authorization in a manner that is likely to cause consumer mistake, confusion, or deception. *So. Cal. Darts Ass'n v. Zaffina, 762 F.3d 921, 929 (9th Cir. 2014)*.

DFO asks the Court to dismiss Agency Y's federal and common law trademark infringement claims as they relate to the AGENCY Y mark on the ground that limiting the claims to the period of October 2018 to February 2019 (4AC ¶ 67) does not cure their inconsistencies with the agreements that bar the causes of action, as noted by the Court's prior orders. Mot. at 4. DFO reasons that the Agreement, which operated from November 2017 until the First Addendum was executed in February 2019, gave DFO a "license to use . . . Agency Y's name and associated logos and domain names(s) . . ." Agreement, 4AC, Ex. A, § 8(a).

Agency Y responds that although it licensed the trademark **[*11]** to DFO starting in November 2017, it can maintain an action for trademark infringement because DFO's conduct fell outside the scope of the license. Opp'n at 10-11. First, Agency Y argues that DFO acted outside the scope of the Agreement by filing an application with the USPTO on October 2, 2018 because the original Agreement barred transfer of ownership of the trademark. Id. at 11. Second, Agency Y argues that DFO acted outside the scope of the Agreement by stealing confidential information from Agency Y's client, XTRA-PC, replicating the client's product, and creating advertisements using Agency Y branded materials. Id.

With regard to DFO's USPTO filing, the Court agrees with DFO that "***HN4***[] *Section 1125* is concerned with the confusion that may arise from trademark infringement—not the confusion that may arise from a wrongfully-registered mark." *Stemcell Techs. Canada Inc. V. StemExpress, LLC, No. 21-CV-01594-VC, 2021 U.S. Dist. LEXIS 139816, 2021 WL 3087668, at *1 (N.D. Cal. July 22, 2021)*.

With regard to XTRA-PC, while the 4AC alleges that DFO replicated a client's product and ran advertisements for their version of the product using the advertisements that Agency Y had produced for the client, it does not make clear when the alleged conduct took place. See 4AC ¶¶ 36-67. Agency Y notes in a footnote in its opposition that on February 5, 2019, **[*12]** Burd and Brown met with "XTRA-PC who was a potential client." Opp'n at 11 n.1. Hence, if DFO's alleged conduct took place after the parties signed the First Addendum on February 27, 2019, the conduct would not amount to trademark infringement because the First Addendum irrevocably transferred the AGENCY Y mark to DFO. See 4AC, Ex. D. Even if the conduct took place before then, the Court agrees with DFO that Agency Y has released its right to bring such a claim under the First Addendum. See Addendum, § (b).

Accordingly, the Court **GRANTS** the motion to dismiss the trademark infringement claims as they relate to the Agency Y mark.

2. False Advertising, False Designation of Origin, and Unfair Competition

DFO next asks the Court to dismiss Agency Y's false advertising, false designation of origin, and common law unfair competition claims. Mot. at 5.

HN5[] The Lanham Act "prohibits a person from misrepresenting the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities in commercial advertising or promotion." *Alfasigma USA, Inc. v. First Databank, Inc., 398 F. Supp. 3d 578, 590 (N.D. Cal. 2019)* (citing *15 U.S.C. § 1125(a)(1)(B)*). A false advertising claim requires a showing that: (1) the defendant made a false statement either about the plaintiff's **[*13]** or its own product; (2) the statement was made in commercial advertisement or promotion; (3) the statement actually deceived or had the tendency to deceive a substantial segment of its audience; (4) the deception is material; (5) the defendant caused its false statement to enter interstate commerce; and (6) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to the defendant, or by a lessening of goodwill associated with the plaintiff's product. *Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 835 n.4 (9th Cir. 2002)*. A false designation of origin claim requires that a plaintiff show that the defendant "used in commerce any word, term, name, symbol, or device . . ." that is "likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of [d]efendant with [p]laintiff, or as to the origin, sponsorship, or approval of his goods by [p]laintiff." *Blizzard Entm't, Inc., 2018 U.S. Dist. LEXIS 224178, 2018 WL 7448915, at *5*.

The 4AC alleges violations of the Lanham Act, as well as common law unfair competition, premised on the allegations that (1) DFO announced on June 22, 2020 that Agency Y was rebranding as Amasa, thereby falsely suggesting that DFO was the owner of Agency Y or that Agency Y was taking on the rebranding **[*14]** initiative; (2) DFO re-routed Agency Y's web address to the Amasa website; and (3) DFO posted a Pitchbook Profile with allegedly misleading representations. 4AC ¶¶ 72-82; 122-124. As the 4AC fails to distinguish between false designation of origin and false advertising, the Court will analyze each allegation broadly under the Lanham Act. The same analysis applies to common law unfair competition.

With regards to the June 22, 2020 announcement, in granting DFO's motion to dismiss the Second Amended Complaint ("SAC"), the Court stated:

> "[T]he Court does not find that Agency Y has alleged that this 'rebranding' was false or likely to cause consumer confusion. As DFO Global notes, even if Agency Y is able to prevail on its breach of contract theory and is found to own the Agency Y Mark, in announcing the rebrand, DFO Global ensure[d] that its consumers knew where the services were coming from."

Order re SAC, Dkt. No. 45, at 14. The Court once again agrees with DFO that the announcement correctly indicated that Agency Y services were now going to come from Amasa, instead of DFO. See Mot. at 6. The fact that Burd received messages, calls, and questions in person asking if Burd sold Agency Y to DFO does **[*15]** not change the Court's analysis because, as DFO notes, the Second Addendum provided that Burd "will announce the final sale and transfer of AGENCY Y brand name, domain, and website to DFO." Addendum, 4AC, Ex. B, (d); Second Addendum, 4AC, Ex. C, 3(d).

With regards to re-routing Agency Y's web address to the Amasa website, the Court already found in the Order re Motion to Dismiss the Third Amended Complaint ("TAC") that "rerouting to Amasa is accurate in showing that the services in question were coming from DFO Global" and that "this kind of rerouting from one website to another does not constitute the kind of behavior that the Lanham Act prohibits." Order re TAC, Dkt. No. 61, at 8-9. Again, the fact that Burd and Brown received messages and calls from people looking for details about the name change does not alter the Court's analysis. See 4AC ¶ 78. Moreover, the Court also found that "allegations that Agency Y's June 4, 2020 demand regarding the return of the IP Assets eliminated DFO Global's right to make changes to the website or inform the public of its rebranding is a breach of contract claim, not a false designation claim." Order re TAC. at 9.

With regards to the Pitchbook Profile, Agency **[*16]** Y has not cured any of the deficiencies found by the Court. First, the Court in the Order re SAC dismissed the claim on the basis that Agency Y failed to show "how the Pitchbook profile is [a] '"commercial advertisement or promotion."' Order re SAC at 13. Second, the Court once again finds that "Agency Y does not sufficiently plead that this statement was untruthful or misleading under the circumstances when made" or that DFO was "subsequently '"re-stating'" the Pitchbook profile causing it to be inaccurate." Order re TAC. at 13. Agency Y responds that the Pitchbook profile "has never been accurate has Burd has never had any relationship with Amasa." Opp'n at 12-13. However, given Agency Y's own allegation that "Cran proceeded to eviscerate Agency Y and moved the business to Amasa," Agency Y still must plead that the statement was untruthful under the circumstances when made, which plausibly might be when the transition occurred. 4AC ¶¶ 45.

Finally, the Court agrees with DFO that to the extent Agency Y contends that filing with the USPTO is a Lanham Act violation, the Court already determined that "any damages resulting from the USPTO filing would be breach of contract damages, so the economic **[*17]** loss doctrine bars this tort claim." Order re TAC at 8.

Accordingly, the Court **GRANTS** the motion to dismiss the Lanham Act claims and common law unfair competition claim.

3. Fraudulent Inducement

DFO next asks the Court to dismiss Agency Y's fraudulent inducement claim, arguing that the claim is "simply a compilation of previously-made allegations under a different name." Mot. at 8. Specifically, DFO argues that (1) the claim constitutes non-actionable puffery; (2) the claim is barred by the economic loss doctrine; and (3) Agency Y fails to plead inducement to execute the Second Addendum. Mot. at 8-13.

HN6[] To state a claim for fraudulent inducement under California law, a plaintiff must allege: (1) a misrepresentation; (2) knowledge of its falsity; (3) with intent to defraud; (4) justifiable reliance; and (5) resulting damages. *Lazar v. Superior Court, 12 Cal. 4th 631, 638, 49 Cal. Rptr. 2d 377, 909 P.2d 981 (Cal. 1996)*.

The Court agrees with DFO that Agency Y's allegation that Cran promised Burd and Brown "unlimited resources" and "millions of dollars" and to make Agency Y "one of the biggest powerhouse agencies in the world" is too vague, exaggerated, and generalized, and thus, constitutes non-actionable puffery. See Mot. at 9-10. ***HN7***[] Language considered non-actionable puffery cannot form the **[*18]** basis for fraudulent inducement claims because "vague, exaggerated, generalized or highly subjective statements regarding a product or business" are "extremely unlikely to induce consumer reliance." *Cty. of Marin v. Deloitte Consulting LLP, 836 F. Supp. 2d 1030, 1039 (N.D. Cal. 2011)*; *Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1053 (9th Cir. 2008)*.

Agency Y also argues that Cran fraudulently induced Burd and Brown to enter into the Second Addendum by promising them that "if the deal wen awry, Agency Y could simply take back all of its intellectual property" even though "he knew [DFO] had no intention of ever turning over ownership of this mark to Agency Y." 4AC ¶¶ 133, 134. ***HN8***[] While mere failure to perform a contract does not constitute fraud, "a promise made without the intention to perform can be actionable fraud." *Richardson v. Reliance Nat'l. Indem. Co., No. C 99-2952 CRB, 2000 U.S. Dist. LEXIS 2838, 2000 WL 284211, at *4 (N.D. Cal. Mar. 9, 2000)*; see also *Lazar v. Superior Court, 12 Cal. 4th 631, 49 Cal. Rptr. 2d 377, 909 P.2d 981, 985 (Cal. 1996)*. "To establish a claim of fraudulent inducement, one must show that the defendant did not intend to honor its contractual promises when they were made." *Food Safety Net Services v. Eco Safe Systems USA, Inc., 209 Cal. App. 4th 1118, 1131, 147 Cal. Rptr. 3d 634 (2012)*. Under *Fed. R. Civ. P. 9(b)*, "[w]hile the factual circumstances of the fraud itself must be alleged with particularity, the state of mind—or scienter—of the defendants may be alleged generally." *Odom v. Microsoft Corp., 486 F.3d 541, 554 (9th Cir. 2007)*. Nonetheless, allegations of intent must satisfy the plausibility requirements of *Rule 8(a)*. *Biofuels, LLC v. Chemex LLC, No. 16-CV-00716, 2017 U.S. Dist. LEXIS 47129, 2017 WL 1164296, at *11 (N.D. Cal. 2017)*. Under *Rule 8(a)*, a plaintiff "must point to *facts* which show that defendant harbored an intention not to **[*19]** be bound by terms of the contract at formation." Id. (quoting *UMG Recordings, Inc. v. Glob. Eagle Entm't, Inc., 117 F. Supp. 3d 1092, 1109-10 (C.D. Cal. 2015)*). "[I]t is insufficient to allege intent based purely on Defendant's failure to perform its promises." Id.

Here, the Court finds that Agency Y does not sufficiently allege facts showing that Cran had no intention of returning Agency Y its intellectual property. The allegation that Cran knew that DFO Canada had been the registered owner of the AGENCY Y mark for five months does not show that Cran or DFO harbored an intent not to return the mark upon termination of the Agreement. See 4AC ¶ 134. No allegation in the 4AC amounts to circumstantial evidence that may create an inference of fraudulent intent not to perform the promise. Because the Court has found that this claim is inadequately pled, it does not reach the parties' arguments regarding economic loss.

Although Agency Y argues that it does not base its fraudulent inducement claim on Cran's alleged "threats," the Court nonetheless agrees with DFO that even if Agency Y were to base its claim on the allegation, it is insufficient to show fraudulent inducement.

Accordingly, the Court **GRANTS** the motion to dismiss the fraudulent inducement claim.

*4. Fraudulent Procurement of **[*20]** Federal Registration*

The 4AC alleges that DFO fraudulently procured federal registration of the AGENCY Y mark by procuring the registration despite not owning it at the time. 4AC ¶¶ 142-47. DFO moves the Court to dismiss this claim, arguing that (1) Agency Y released its right to make the claim, (2) Agency Y has not and cannot plead damages, and (3) the claim is duplicative of the breach of contract claim.

HN9[] When a party asserts a claim for fraud on the USPTO, it must prove "a false representation regarding a material fact, the registrant's knowledge or belief that the representation is false, the intent to induce reliance upon the misrepresentation and reasonable reliance thereon, and damages proximately resulting from the reliance." *Levi Strauss & Co. V. Esprit US Distrib. Ltd., 588 F. Supp. 2d, 1083-84 (N. D. Cal. 2008)* (quoting *Robi v. Five Platters, 918 F.2d 1439, 1444 (9th Cir.1990)*). The party alleging trademark fraud bears a "heavy" burden of proof. Id.

The Court agrees with DFO that Agency Y lacks standing to assert its cause of action under *Section 1120*. DFO filed its application to register the AGENCY Y mark with the USPTO on October 2, 2018, and the registration went into effect on April 9, 2019. 4AC, Ex. D. Agency Y cannot plead any damages because the First Addendum irrevocably transferred Agency Y's intellectual property to DFO **[*21]** in February 2019, and DFO's registration for the AGENCY Y mark was not procured until April 9, 2019. 4AC, Ex. D. Agency Y responds that DFO's "application for trademark registration of a mark it did not own was fraud upon the USPTO," rather than "fraud against Agency Y." Opp'n at 19. However, any such injury is not particular to DFO and cannot support its standing under *Section 1120*. See *Spokeo, Inc. V. Robins, 578 U.S. 330, 334, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016)* (noting that ***HN10***[] injury-in-fact requires a plaintiff to allege an injury that is both "concrete *and* particularized").

The Court further agrees with DFO that Agency Y lacks standing to seek cancellation of the trademark registration under *Section 1119*. ***HN11***[] *Section 1119* gives district courts the power to order the cancellation of a trademark registration "in any action involving a registered mark." *15 U.S.C. § 1119*. The plain language "specifies that cancellation may only be sought if there is already an ongoing action that involves a registered mark; it does not indicate that a cancellation claim is available as an independent cause of action." *Air Aromatics, LLC v. Victoria's Secret Stores Brand Mgmt., Inc., 744 F.3d 595, 599 (9th Cir. 2014)*. Given that Agency Y lacks standing under *Section 1120*, there is no basis for Agency Y to have standing to seek cancellation of the registration under *Section 1119*.

More importantly, the Court agrees with DFO that this claim is duplicative of **[*22]** the breach of contract claim. See Order re TAC at 8 ("The Court once again finds that any damages resulting from the USPTO filing would be breach of contract damages, so the economic loss doctrine bars this tort claim.").

Accordingly, the Court **GRANTS** the motion to dismiss with respect to the fraudulent procurement of federal registration claim.

5. California Unfair Competition Law

DFO next asks the Court do dismiss Agency Y's claims under the unlawful, unfair, and fraudulent prongs of California's Unfair Competition Law ("UCL"). Mot. at 15-16.

HN12[] California's UCL prohibits "any unlawful, unfair, or fraudulent business act or practices." *Cal. Bus. & Prof. Code §17200, et. seq.* To prevail on a UCL claim, a plaintiff must "make a twofold showing: he or she must demonstrate injury in fact and a loss of money or property caused by unfair competition." *Peterson v. Cellco P'ship, 164 Cal. App. 4th 1583, 1590, 80 Cal. Rptr. 3d 316 (4th Dist. 2008)*.

As to the unlawful prong, DFO argues, "Agency Y claims DFO has acted unlawfully due to the above allegations. Because these claims must be dismissed, as analyzed *supra*, the UCL claim predicated on the claims must be dismissed as well." Mot. at 15 (citing 4AC ¶¶ 159, 160). For the fourth time on this point, the Court agrees. Agency Y's contention of unlawful behavior under the UCL is **[*23]** based on the fact that DFO registered the AGENCY Y mark with the USPTO and engaged in fraudulent procurement. 4AC ¶ 160. Thus, this claim is premised on the fraudulent procurement claim, which as discussed above, cannot survive. Accordingly, the Court **GRANTS** the motion to dismiss the UCL claim based on the unlawful prong.

With respect to the unfair prong, DFO argues that Agency Y has not cured the defect that the Court noted with regard to the TAC, which was that the "allegations do not sufficiently allege violation of public policy." Order re TAC at 11. Agency responds that it has sufficiently pled that DFO's business practice is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to customers." Opp'n at 21. **HN13**[] In the context of *section 17200*, "unfair . . . means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. As DFO notes, the *Cel-Tech* court determined that appellate defining "unfair" as "immoral, unethical, oppressive, scrupulous, or substantially injurious to consumers" was **[*24]** "too amorphous and provides little guidance to courts and businesses." *Id. at 184-85*. Thus, the Court agrees with DFO that Agency Y's allegations fail under the *Cel-Tech* test. Accordingly, the Court **GRANTS** the motion to dismiss the UCL claim based on the unfair prong.

Finally, with regard to the fraudulent prong, DFO argues that Agency Y's claims fail because once again, they do not meet the *Rule 9(b)* pleading standard and because the fraudulent inducement and fraudulent registration claims on which it is based are insufficiently pled. Mot. at 15-16. The Court finds that because all of the allegations on which Agency Y relies to plead the UCL claim based on the fraudulent prong are either improperly pled or barred, as analyzed above under the Lanham Act, fraudulent inducement, and fraudulent registration, Agenecy Y's UCL claim based on the fraud prong fails. Accordingly, the Court **GRANTS** the motion to dismiss the UCL claim based on the fraudulent prong.

B. Global Media's Claims

1. Trademark Infringement, Unfair Competition, False Advertising, and False Designation of Origin

Global Media brings five causes of action related to the "Tim Burd" mark: (1) federal trademark infringement, (2) common law trademark infringement, (3) **[*25]** federal unfair competition, false advertising and false designation of origin, (4) common law unfair competition, and (5) violation of California's unfair competition law. DFO moves to dismiss all claims. Mot. at 16.

Global Media alleges that DFO relied on the Burd mark to handle calls or meetings with potential clients, asked Burd to record promotional videos to attract clients while telling people his role was passive, misused the mark to onboard a client and copied that client's product, used the mark in posts and videos while telling people that Burd did nothing, yet never received approval from Burd or Global Media to make statements asserting Burd's sponsorship of DFO's services, and made a false Pitchbook Profile. 4AC ¶¶ 89-96; 101-105.

First, the Court agrees with DFO that the allegation that DFO never received approval to assert Burd's sponsorship of DFO's services is contradicted by Global Media's own admission that Burd recorded and participated in promotional videos for DFO. Mot. at 16. The Court further agrees with DFO that none of the aforementioned allegations show that the use of Burd's name was unauthorized, and that "instead, these allegations indicate that DFO was **[*26]** using Burd's name to refer to his involvement in the business, which is accurate." Id. To the extent that DFO allegedly told people that Burd's role was passive or that he did nothing, the Court finds that such allegations do not constitute the kind of conduct that the Lanham Act prohibits. See *15 U.S.C. § 1125(a)(1)(B)* (the Lanham Act "prohibits a person from misrepresenting the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities in commercial advertising or promotion.").

With respect to the Pitchbook Profile, the Court has already found in the Order re TAC, as well as in the present Order, that the Pitchbook Profile fails to sufficiently The Court has already found that the 4AC does not allege sufficient facts regarding the profile to plead a violation of the Lanham Act. See Order re TAC at 13.

With respect to the allegation that DFO stole a client's confidential information and copied the client's product, the Court agrees with DFO that Agency Y does not have standing to bring the claim on the client's behalf. Mot. at 18; see *Kwikset Corp. v. Superior Court, 51 Cal.4th 310, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)* (***HN14***[] To have standing to assert a *Section 17200* claim, the plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify **[*27]** as injury in fact, i.e., economic injury, and (2) show that that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim.").

Finally, the Court has already dismissed any claims brought conjunctively with Agency Y.

Accordingly, the Court **GRANTS** the motion to dismiss the Lanham Act claims, common law trademark infringement claim, and common law unfair competition claim, and UCL claim as they relate to the Burd mark.

2. Fraudulent Inducement

The Court agrees with DFO that the inclusion of Global Media as a Plaintiff for the fraudulent inducement claim is improper because Cran did not enter into a business relationship or contract with Global Media. See Mot. at 9. Accordingly, the Court **GRANTS** the motion to dismiss the fraudulent inducement claim.

C. Claims against Cran

DFO asks the Court to *sua sponte* dismiss all claims against Cran for failure of service. The Court orders Plaintiffs to show good cause for why the complaint against Cran should not be dismissed for failure of service pursuant to *Federal Rule of Civil Procedure 4(m)*.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the motion to dismiss Agency Y's first nine causes of action. The Court **[*28]** finds that leave to amend would be futile and dismisses the first nine causes of action with prejudice.

IT IS SO ORDERED.

In re Farm-Raised Salmon & Salmon Prods. Antitrust Litig.

United States District Court for the Southern District of Florida

October 27, 2021, Decided; October 27, 2021, Entered on Docket

CASE NO. 19-21551-CIV-ALTONAGA/Louis

Reporter
2021 U.S. Dist. LEXIS 232374 *

In re: FARM-RAISED SALMON AND SALMON PRODUCTS ANTITRUST LITIGATION

Core Terms

alteration, rule of reason, Plaintiffs', discovery, amend, leave to amend, undue delay, deadline, new theory, antitrust, email, undue prejudice, new claim, marks, relevant market, district court, italicization, allegations, quotation, litigate

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Judges: CECILIA M. ALTONAGA, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: CECILIA M. ALTONAGA

Opinion

ORDER

THIS CAUSE came before the Court on the Direct Purchaser Plaintiffs' Motion for Leave to Amend Complaint [ECF No. 423], accompanied by supporting exhibits [ECF Nos. 423-1-423-2], filed on September 23, 2021. Defendants filed an Opposition [ECF No. 434], along with supporting exhibits [ECF Nos. 434-1-434-5], to which Plaintiffs filed a Reply [ECF No. 442]. The Court has carefully considered the parties' written submissions, the **[*15]** record, and applicable law. For the following reasons, the Motion is granted.

Background. The Court assumes the reader's familiarity with the underlying allegations and claims raised in this case, which are found in the March 23, 2021 Order Denying Defendants' Motion to Dismiss the Second Consolidated Amended Direct Purchaser Class Action Complaint for Failure to State a Claim [ECF No. 307]. (*See id.* 1-15).[1] In the operative Scheduling Order [ECF No. 308], the Court set a deadline of September 23, 2021 for the filing of motions for leave to amend pleadings. (*See id.* 1). The current operative complaint is Plaintiffs' Second Consolidated Amended Direct Purchaser Class Action Complaint ("SCAC") [ECF Nos. 246, 251-1].

Plaintiffs timely submitted the present Motion, seeking leave to file a Third Consolidated Amended Direct Purchaser Class Action Complaint ("TCAC") that includes the following amendments: "(1) non-substantive changes to reflect that certain plaintiffs have been removed . . . and to delete no-longer-relevant background information regarding Defendants' production of documents; and (2) additional allegations about the relevant production market that have been added following a **[*16]** recent meet and confer with Defendants' counsel." (Mot. 2 (alteration added)). Specifically, given that Defendants recently advised Plaintiffs that they do not believe the SCAC states a rule of reason claim, Plaintiffs would like to amend their pleading to "clarify that they assert a Sherman Antitrust Act claim that can be judged *either* under the *per se* or rule of reason standard[]." (*Id.* (emphasis in original; alteration added)).

Standards. Under *Federal Rule of Civil Procedure 15(a)*, leave to amend a complaint "shall be freely given when justice so requires." *Espey v. Wainwright, 734 F.2d 748, 750 (11th Cir. 1984)* (quotation marks and citation omitted). The district court's discretion under *Rule 15(a)* is "extensive[.]" *Hargett v. Valley Fed. Sav. Bank, 60 F.3d 754, 761 (11th Cir. 1995)* (alteration added; citation omitted). The Supreme Court has directed that leave to amend should be denied only in cases marked by undue delay, bad faith or dilatory motive, futility of amendment, or undue

[1] The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings.

prejudice to the opposing party. *See* Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). The Eleventh Circuit has further explained that "[u]nless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." *Thomas v. Town of Davie, 847 F.2d 771, 773 (11th Cir. 1988)* (alteration added; quotation marks and citation omitted).

Discussion. Defendants raise two *Foman* factors as reasons for the Court to deny Plaintiffs' Motion: undue delay **[*17]** and undue prejudice. (*See generally* Opp'n). The Court addresses each in turn.

Undue Delay. Defendants argue Plaintiffs unduly delayed in asserting the rule of reason theory and insist Plaintiffs "did not include any market-definition or harm-to-competition allegations, as required to plead a rule of reason claim." (*Id.* 5). They further contend Plaintiffs' subsequent court filings confirm Plaintiffs' intention to solely litigate a per se theory (*id.* 5-6) and summarize their argument as follows:

> In short, for over two years, Plaintiffs consistently told Defendants (and the Court) that they were pursuing a *per se* price-fixing claim and only a *per se* claim. They went so far as to expressly tell Defendants that they were not pursuing a rule of reason claim to resist discovery that would plainly be relevant to a rule of reason theory. When Defendants sought to confirm Plaintiffs' position, Plaintiffs sat silent for two months, while document discovery of Defendants went forward at a rapid pace.

(*Id.* 7-8).

According to Plaintiffs, Defendants do not cite any on-point case law that compels the denial of a request for leave to amend on the basis of undue delay in a situation such as this one, where **[*18]** the scheduling order deadline for amendments was complied with, discovery is open, and summary judgment motions and trial are over a year away. (*See* Reply 7-8*; see* Opp'n 5-7). Plaintiffs have the better position.

In the context of undue delay, the "mere passage of time, without anything more, is an insufficient reason to deny leave to amend." *Floyd v. Eastern Airlines, Inc., 872 F.2d 1462, 1490 (11th Cir. 1989)* (citations omitted), *rev'd on other grounds*, *499 U.S. 530, 111 S. Ct. 1489, 113 L. Ed. 2d 569 (1991)*. By contrast, "[p]rejudice and undue delay are inherent in an amendment asserted after the close of discovery and after dispositive motions have been filed, briefed, and decided." *Campbell v. Emory Clinic, 166 F.3d 1157, 1162 (11th Cir. 1999)* (alteration added; citation omitted). Moreover, "[a] district court may find undue delay when the movant knew of facts supporting the new claim long before the movant requested leave to amend, and amendment would further delay the proceedings." *Tampa Bay Water v. HDR Eng'g, Inc., 731 F.3d 1171, 1186 (11th Cir. 2013)* (alteration added; citations omitted), *abrogated on other grounds by* *CSX Transp., Inc. v. Gen. Mills, Inc., 846 F.3d 1333 (11th Cir. 2017)*; *see also* *id. at 1187* (holding the district court did not abuse its discretion in denying a motion for leave to amend brought after the close of discovery where the movant knew "the basis for [the amendment] for almost a year[,]" "amendment would prejudice [the opponent]," and amendment "would require additional discovery **[*19]** and further delay the trial" (alterations added)).

Defendants fail to cite any analogous precedent where a court has found undue delay, likely because the Eleventh Circuit's decisions affirming district courts' denials of leave to amend are radically distinguishable from the present case. (*See* Opp'n 5-8). *See, e.g.,* *Nolin v. Douglas Cnty., 903 F.2d 1546, 1551 (11th Cir. 1990)* (affirming district court's denial of leave to amend for undue delay where "both the parties and the court were fully prepared for trial and the addition of a new claim would have re-opened the pretrial process and delayed the trial, and [the plaintiff's] attorney had sufficient opportunity to request a timely amendment before the pretrial order had been submitted" (alteration added)), *overruled on other grounds by McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994)*; *Rhodes v. Amarillo Hosp. Dist., 654 F.2d 1148, 1154 (5th Cir. 1981)* (same result where a party moved for leave to amend 30 months after the original complaint and only three weeks before trial, and the only justification offered for the delay was plaintiff's retention of a new attorney); *Burger King Corp. v. Weaver, 169 F.3d 1310, 1319 (11th Cir. 1999)* (same result where "forty months had passed since the filing of the original counterclaim, the new counts would require proof of different facts, and the only apparent reason for the new claims was [defendant's] retention of new counsel" **[*20]** (alteration added)).

Here, Plaintiffs timely seek leave to amend. The class certification discovery deadline is not until March 23, 2022; discovery does not close until December 2, 2022; the dispositive motions deadline is not until January 3, 2023; and trial is set to occur during the Court's two-week trial calendar beginning May 22, 2023. (*See* Sched. Order 1-2).

Defendants also cite two antitrust cases where parties sought leave to amend; both are unpersuasive in this context. (*See* Opp'n 8 (citing *In re Aluminum Warehousing Antitrust Litig., No. 13-md-2481, 2016 U.S. Dist. LEXIS 54643, 2016 WL 1629350, at *8 (S.D.N.Y. Apr. 25, 2016)*; *Kelsey K. v. NFL Enters., LLC, 757 F. App'x 524, 527 n.3 (9th Cir. 2018)*)). The first, *In re Aluminum Warehousing*, dealt with a request for leave to amend brought after the scheduling order deadline had passed and was thus subject to the *Rule 16(b)(4)* good cause standard, which the court held the parties failed to meet. *See* *2016 U.S. Dist. LEXIS 54643, 2016 WL 1629350, at *1, 4-8*. The good cause standard does not apply here because Plaintiffs timely moved for leave to amend before the expiration of the Scheduling Order deadline.

The second case, *Kelsey K.*, is likewise inapt. *See* *757 F. App'x 524*. There, the court denied leave to amend where the plaintiff failed to sufficiently plead a rule of reason claim because she provided "no explanation" for her failure to allege facts relevant to a rule of reason analysis, and "the amendments that [she] propose[d] **[*21]** would not cure the[] defects." *Id. at 527 & n.3* (alterations added; citation omitted). Here, Plaintiffs' SCAC survived a motion to dismiss, and Plaintiffs provide a justification for why they now seek to amend their claims — namely, that Defendants, after previously stating they "'were unable to locate any limitation to a per se case in Plaintiffs' pleadings'" (Reply 8 (quoting Opp'n, Ex. 2, Email from Ryan W. Marth [ECF No. 434-2] 2)), later implied during a conferral that they viewed the SCAC as only asserting a per se claim, to the exclusion of a rule of reason claim (*see* Reply 8; *see also* Mot. 2, 7).

Undue Prejudice.

The crux of Defendants' argument is that Plaintiffs are seeking to assert a new theory of liability. (*See generally* Opp'n). To be sure, courts routinely grant leave to amend even where a party seeks to assert new theories of liability or claims. *See, e.g.,* *Stewart v. Bureaus Inv. Grp. No. 1, LLC, 24 F. Supp. 3d 1142, 1164-65 (M.D. Ala. 2014)* (granting leave to amend over objection of undue delay to allow plaintiff to assert new theories of liability four years after the inception of the case); *Gropp v. United Airlines, Inc., 847 F. Supp. 941, 945 (M.D. Fla. 1994)* ("A change of the legal theory of the action cannot be accepted as the test of the propriety of a proposed amendment." (citation omitted)); *Travelers Indem. Co. of Conn. v. Richard McKenzie & Sons, Inc., No. 8:17 cv-2106, 2017 U.S. Dist. LEXIS 234055, 2017 WL 10295897, at *2 (M.D. Fla. Sept. 6, 2017)*; *James Ventures, L.P. v. Timco Aviation Servs., Inc., No. 06-60420-Civ, 2007 U.S. Dist. LEXIS 110682, 2007 WL 9700499, at *1 (S.D. Fla. June 12, 2007)*. That said, *Foman*'s prejudice factor **[*22]** imposes an important limitation on a party's ability to assert new theories or claims. *See* *Tampa Bay Water, 731 F.3d at 1186* ("[P]rejudice is especially likely to exist if the amendment involves new theories of recovery or would require additional discovery[.]" (alterations added; quotation marks and citation omitted)).

Defendants insist they will suffer undue prejudice because (1) "Plaintiffs' new claim will significantly expand the scope of the case, requiring the parties and the [C]ourt to litigate an entirely new set of issues" (Opp'n 9 (alteration added)); (2) "Plaintiffs' new claim targets fundamentally distinct anticompetitive conduct" (*id.* 10); and (3) Plaintiffs disclaimed the rule of reason theory (*see id.* 11). Plaintiffs assert their operative pleading encompasses a rule of reason claim (and, moreover, they were not required to specifically plead which theory they would later rely on).[2] (*See* Mot. 8-10; Reply 3-4, 6, 9-11). They further argue that "[t]he only thing Defendants have identified that they

[2] Plaintiffs think the quick-look standard, an approach that lies "'somewhere on the continuum between the *per se* rule and the rule of reason'" approach, should apply here. (Reply 9 n.5 (quoting *In re Blue Cross Blue Shield Antitrust Litig., 26 F. Supp. 3d 1172, 1185 (N.D. Ala. 2014)*)). "[The quick look approach] applies where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Procaps S.A. v. Patheon, Inc., 845 F.3d 1072, 1084 n.3 (11th Cir. 2016)* (alteration added; quotation marks and citation omitted).

would do differently is seek discovery of fish other than salmon[,]" which Plaintiffs contend is irrelevant and, even if the Court deems it relevant, "Defendants still have more than a year to collect that discovery **[*23]** under the current schedule." (Reply 10 (alterations added)). Plaintiffs summarize: "The mere possibility that a defendant may have 'to do more work than it otherwise would have performed without the amendment does not support a finding of prejudice.'" (*Id.* 11 (quoting *DeCurtis LLC v. Carnival Corp., No. 20-22945-Civ, 2021 U.S. Dist. LEXIS 25277, 2021 WL 493758, at *4 (S.D. Fla. Feb. 10, 2021)*)). Here again, the Court agrees with Plaintiffs.

The leading Eleventh Circuit case on amendment involving new legal theories, *Tampa Bay Water*, held that a district court did not abuse its discretion in denying leave to amend where the movant "knew many of the facts supporting its two new claims . . . for almost a year prior to requesting leave to amend." *731 F.3d at 1186-87* (alteration added). Importantly, the district court found prejudice because amendment "would introduce an entirely new theory of recovery into the case *after the close of discovery*[,]" which would "require additional discovery and further delay the trial." *Id. at 1187* (emphasis and alteration added). This close-of-discovery distinction is, as one court put it, "critical[.]" *Brantley Cnty. Dev. Partners, LLC v. Brantley Cnty., No. 5:19-cv-109, 2020 U.S. Dist. LEXIS 117078, 2020 WL 3621319, at *2 n.3 (S.D. Ga. July 2, 2020)* (alteration added). Here, the discovery cut-off is over a year away, and there is no indication that permitting amendment will delay the trial.

The **[*24]** standard under *Foman* is "*undue* prejudice[,]" *371 U.S. at 182* (emphasis and alteration added), which does not preclude an amendment solely because it may result in additional discovery while the discovery period is still open. Put differently, the possibility that Defendants may have "to do more work than [they] otherwise would have performed without the amendment does not support a finding of [undue] prejudice." *DeCurtis LLC, 2021 U.S. Dist. LEXIS 25277, 2021 WL 493758, at *4* (alterations added; quotation marks and citation omitted).

Further, the Court is not convinced that the TCAC actually pleads a *new* theory of recovery, *i.e.*, that Defendants were not on notice of Plaintiffs' intent to pursue a rule of reason claim, even if secondary and alternative to a per se theory. First, an examination of the SCAC reinforces Plaintiffs' arguments that the proposed amendment includes information that is consistent with the SCAC. (*See* Reply 3-4 (citing SCAC ¶¶ 7, 102, 104, 197-99, 134, 240, 255-64, 275, 301-10); *see also* SCAC ¶¶ 132, 151, 231, 232, 252, 296). Second, the parties' email correspondence (cited by Defendants) indicates that Defendants understood Plaintiffs' SCAC to potentially encompass a rule of reason claim. (*See* Email from Ryan W. Marth 2). A brief discussion **[*25]** of the differences between the proof requirements of a per se versus rule of reason theory is helpful.

"Per se violations 'are limited to a very small class of antitrust practices whose character is well understood and that almost always harm competition.'" *United Am. Corp. v. Bitmain, Inc., 530 F. Supp. 3d 1241, 2021 WL 1807782, at *23 (S.D. Fla. 2021)* (quoting *Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1334 (11th Cir. 2010)*). By contrast, the flexible "rule of reason" analysis requires "the factfinder [to] weigh[] all of the circumstances of a case" before deciding whether the conduct is illegal. *Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)* (alterations added; footnote call number omitted). "Under rule of reason analysis, a plaintiff may show either actual or potential harm to competition[,]" and must also "identify the relevant market in which the harm occurs." *Jacobs, 626 F.3d at 1336* (alteration added; citations omitted). Despite these differences, "no bright line separates per se from [r]ule of [r]eason analysis." *Nat'l Bancard Corp. (NaBanco) v. VISA U.S.A., Inc., 779 F.2d 592, 596 (11th Cir. 1986)* (alteration adopted; other alterations added; quotation marks and citation omitted).

Typical per se violations "include horizontal price fixing among competitors, group boycotts, and horizontal market division — business relationships that, in the courts' experience, virtually always stifle competition." *Jacobs, 626 F.3d at 1334* (citation omitted). Once determined to be applicable, the "per se rule [] applies a conclusive **[*26]** presumption that certain restraints automatically are unreasonable, and therefore illegal, without further investigation." *Nat'l Bancard, 779 F.2d at 597* (alteration added; footnote call number omitted). Notably, "'the per se rule is the trump card of ***antitrust law***. When an antitrust plaintiff successfully plays it, he need only tally his score.'" *Id. at 598* (alteration adopted; quoting *United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1362-63 (5th Cir. 1980)*).

In applying the rule of reason, courts must ask whether the defendant "has shown that the alleged restraint has had an anticompetitive effect on the market." *Procaps S.A., 845 F.3d at 1084*. "[C]ourts usually cannot properly apply the rule of reason without an accurate definition of the relevant market." *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285, 201 L. Ed. 2d 678 (2018)* (alteration added; footnote call number omitted). In cases involving horizontal restraints on trade, the plaintiff need not define the relevant market and plead market power if it has offered actual evidence of adverse effects on competition. *See id. at 2285 n.7* (citations omitted). In cases involving vertical restraints on trade, the plaintiff must do both because "[v]ertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the [c]ourt first defines the relevant market." *Id.* (alterations added; citations **[*27]** omitted).

Although the TCAC adds significant factual allegations related to the product market (*see generally* Mot., Ex. 2, TCAC [ECF No. 423-2]), the SCAC also addresses the salmon market at length. (*See generally* SCAC; *see also* Reply 4 (citing SCAC ¶¶ 102, 134, 240, 255-64, 275)). Indeed, the words "salmon market" appear 13 times throughout the SCAC. (*See* SCAC ¶¶ 6, 96, 102, 103, 109, 120, 129, 141, 169, 233, 251, 268, 270). The SCAC also addresses market power (*see id.* ¶¶ 132, 231, 232), anticompetitive effects (*see id.* ¶ 296), and a lack of procompetitive justifications (*see id.* ¶ 151) — the latter of which Plaintiffs cited to in their Opposition to Defendants' Motion to Dismiss (*see* [ECF No. 298] 24-25).

Although Plaintiffs could choose to "lighten [their] litigation burden" by litigating only under a per se theory — and thus avoid the extensive economic analysis attendant to rule of reason-based claims—the SCAC indicates Plaintiffs did not expressly disavow the rule of reason theory. *In re Processed Egg Prods. Antitrust Litig., 206 F. Supp. 3d 1033, 1051 (E.D. Pa. 2016)* (alteration added; citations omitted), *aff'd*, *962 F.3d 719 (3d Cir. 2020)*. Certainly, the above allegations "would only be relevant to a rule of reason inquiry." *Id. at 1052* (citing *Pace Elecs., Inc. v. Canon Comput. Sys., Inc., 213 F.3d 118, 123 (3d Cir. 2000)* ("We believe that requiring a plaintiff to demonstrate **[*28]** that an injury stemming from a per se violation of the antitrust laws caused an actual, adverse effect on a relevant market in order to satisfy the antitrust injury requirement comes dangerously close to transforming a per se violation into a case to be judged under the rule of reason." (italicization omitted))).

Defendants cite an email in support of their contention that "Plaintiffs represented to us on [a] call that they were pursuing only a per se theory of liability[.]" (Email from Ryan W. Marth 2 (alterations added; italicization omitted)).[3] Yet, this email also undercuts Defendants' position. Defendants noted in the email that they "were unable to locate any limitation to a per se case in Plaintiffs' pleadings[.]" (*Id.* (alteration added)). Defendants' observation buttresses the notion that Plaintiffs never limited — let alone memorialized a decision to limit — their claim to a per se theory of liability.

Admittedly Plaintiffs, throughout the litigation, have relied on quintessential per se conduct — an alleged conspiracy to fix prices. "An antitrust plaintiff, however, does not waive his ability to pursue a rule of reason claim simply by arguing that a conspiracy **[*29]** should be found per se unlawful." *In re Processed Egg Prods. Antitrust Litig., 206 F. Supp. 3d at 1051* (italicization omitted; citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 25, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*). The defendants in *Processed Egg Products* opposed the plaintiffs' rule of reason arguments at summary judgment. *See id. at 1051-52*. Despite plaintiffs' counsel stating to opposing counsel they "were 'definitely sticking with the per se standard for this case[,]'" the court permitted plaintiffs to proceed on a rule of reason theory, explaining that plaintiffs "ha[d] nevertheless developed evidence of the effect of the conspiracy and its unlawful nature; such arguments would only be relevant to a rule of reason inquiry." *Id. at 1052* (alterations added; italicization, citation, and footnote call number omitted).

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[3] These emails relate to a discovery dispute. Defendants sought discovery related to fish other than salmon, which Plaintiffs opposed as not relevant. (*See* Opp'n 6). Defendants contend this opposition was evidence that Plaintiffs intended to only pursue a per se claim, because, according to Defendants, information about other fish is clearly relevant to a rule of reason analysis. (*See id.*). Plaintiffs disagree, stating the market is simply farm-raised Atlantic salmon, and discovery about other fish is irrelevant. (*See* Reply 10). Without commenting on the merits of either position, the Court does not believe that Plaintiffs' discovery position is inconsistent with a rule of reason theory; even now, when pursuing a rule of reason theory, they still contend that non-salmon fish discovery is irrelevant. (*See id.*).

Here, Defendants similarly accuse Plaintiffs of expressly stating they planned to litigate solely under a per se theory. (*See* Opp'n 6-7, 11). But as explained, the SCAC demonstrates Plaintiffs did not commit to any theory, despite their "strenuous arguments in favor of application of a per se rule[.]" *In re Processed Egg Prods. Antitrust Litig., 206 F. Supp. 3d at 1052* (alteration added; italicization omitted).

Relevance of Plaintiff's Extension Request. Defendants lodge one final argument: Plaintiffs' plan to seek an extension of the class certification schedule, found in a separate Motion for Modification **[*30]** [ECF No. 435] filed on October 12, 2021 and not yet fully briefed, "underscores why amendment should be denied." (Opp'n 12). As Defendants put it, "if Plaintiffs do not believe they are capable of litigating this case without a six-month extension as it currently stands, then it is clear that their proposed amendment cannot be accommodated without further derailing progress." (*Id.* 14). Not so. The two inquiries are separate. The Court can certainly grant amendment and deny Plaintiffs' extension request. And the Court will only grant an extension if Plaintiffs establish good cause. *See* *Fed. R. Civ. P. 16(b)*.

Further, Plaintiffs insist that "[e]ven if [they] never sought to amend the SCAC, they would still be asking for an extension to the schedule because the pace of discovery—despite Plaintiffs['] efforts and Magistrate Judge Louis's assistance—does not permit either them (or the Defendants, for that matter) to meet" the Scheduling Order's deadlines. (Reply 11-12 (alterations added; emphasis omitted)). A cursory review of Plaintiffs' now-filed Motion makes apparent that the request for amendment is disconnected from the request for an extension; they lodged the request for an extension because "the upcoming **[*31]** December 1, 2021 deadline for 'the exchange of expert witness summaries or reports on issues of class certification' does not appear feasible[.]" (Pl.'s Mot. Modification 1 (alteration added; quoting Sched. Order 1)). They explain that, among other issues, their already-retained expert's econometric analyses of the millions of transactions are taking longer than anticipated (*see id.* 4), but they make no mention of any link between their request to extend the deadlines and their request for leave to amend (*see generally id.*). There is no reason for the Court to think that Plaintiffs' counsel are being untruthful or misleading about the reasons for the extension request. In short, Defendants' argument on this point also fails.

Conclusion. For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Direct Purchaser Plaintiffs' Motion for Leave to Amend Complaint **[ECF No. 423]** is **GRANTED**. Plaintiffs shall file their third amended complaint as a separate docket entry by October 28, 2021. Defendants' combined response, or separate answers, are due within the time permitted by the Rules.

DONE AND ORDERED in Miami, Florida, this 27th day of October, 2021.

/s/ Cecilia M. Altonaga

CECILIA M. ALTONAGA [*32]

CHIEF UNITED STATES DISTRICT JUDGE

In re Zetia Ezetimibe Antitrust Litig.

United States District Court for the Eastern District of Virginia, Norfolk Division

November 1, 2021, Decided; November 1, 2021, Filed

MDL No. 2:18-md-2836

Reporter

2021 U.S. Dist. LEXIS 252117 *; 2021 WL 6689718

In re ZETIA (EZETIMIBE) ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: All Actions

Subsequent History: Adopted by, Objection overruled by, Motion denied by, Summary judgment granted by *In re Zetia Ezetimibe Antitrust Litig., 587 F. Supp. 3d 356, 2022 U.S. Dist. LEXIS 35784, 2022 WL 595156 (E.D. Va., Feb. 24, 2022)*

Prior History: *In re Zetia (Ezetimibe) Antitrust Litig., 325 F. Supp. 3d 1369, 2018 U.S. Dist. LEXIS 101060 (J.P.M.L., June 8, 2018)*

Core Terms

elasticity, generic, cross-price, relevant market, ezetimibe, prices, drugs, medications, anti-trust, products, cholesterol-lowering, cholesterol, formulary, RECOMMENDS, settlement agreement, patent, anti-competitive, manufacturers, reliable, material fact, market power, substitutes, statins, sales, placement, genuine, summary judgment, experiments, disputed, patients

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Judges: DOUGLAS E. MILLER, UNITED STATES MAGISTRATE JUDGE.

Opinion by: DOUGLAS E. MILLER

Opinion

REPORT AND RECOMMENDATION

Two motions in this multi-district case present the question of whether Defendants' expert testimony is sufficient to create a jury question on the issue of the relevant anti-trust market for the products affected by the anti-trust **[*13]** conduct alleged. In the first, Plaintiffs moved to exclude the proposed testimony of Dr. Anupam B. Jena, (ECF No. 1066, 1070), arguing that the expert's testimony does not reliably address cross-price elasticity of demand in establishing the relevant anti-trust market, Pls.' Mem. in Supp. of Mot. to Exclude (ECF No. 1068) ("Pls.' Mem. to Exclude"). Plaintiffs also moved for partial summary judgment that the relevant anti-trust market is limited to Zetia and its AB-rated generic equivalents sold in the United States and its territories. (ECF No. 1077, 1080); see also

Pls.' Mem. in Supp. of Mot. for Summ. J. (ECF No. 1090, at 20 n.59) ("Pls.' Mem."). Defendants opposed these motions, (ECF No. 1146) ("Defs.' Opp'n"), and Plaintiffs replied, (ECF No. 1206) ("Pls.' Reply").

The matter was referred to the undersigned United States Magistrate Judge for a report and recommendation pursuant to *28 U.S.C. § 636(b)(1)(B)* and *Rule 72(b) of the Federal Rules of Civil Procedure*. This Report concludes that the expert testimony, though admissible, fails to address facts necessary to create a dispute regarding the relevant market, and thus RECOMMENDS the court DENY Plaintiffs' Motion to exclude the proposed testimony of Dr. Anupam B. Jena (ECF No. 1066, 1070) and GRANT Plaintiffs' **[*14]** Partial Motion for Summary Judgment concerning the relevant market (ECF No. 1077, 1080).

I. BACKGROUND

As pertinent to the conclusions set out below,[1] Plaintiffs allege that Merck[2] and Glenmark,[3] a generic drug manufacturer, entered into a patent settlement agreement (hereafter "Settlement Agreement") to delay generic competition for Zetia, a cholesterol medication manufactured by Merck. Specifically, Plaintiffs' claim Glenmark dismissed meritorious patent claims in exchange for Merck's promise not to launch an authorized generic ("AG") for Zetia during Glenmark's period of generic exclusivity. The pending motions seek to define the relevant anti-trust product market -- or the group of products reasonably interchangeable with Zetia as to be affected by the anti-competitive conduct -- from May 2010, when Merck and Glenmark executed their agreement, through December 2016, when generic ezetimibe entered the market. Pls.' Mem. (ECF No. 1090, at 20 n.59); see also *Microbix Biosystems, Inc. v. Biowhittaker, Inc., 172 F. Supp. 2d 680, 695 (D. Md. 2000)* (determining "monopoly power . . . [from] the time the alleged monopolization occurred").

Zetia is the brand-name of the molecule ezetimibe, originally developed and manufactured **[*15]** by Merck. Starr Rpt. ¶ 5 (ECF No. 1090-5, at 4). Ezetimibe is a cholesterol-lowering medication that treats hyperlipidemia. Fazio Rpt. ¶ 27 (ECF No. 1144-1, at 15-16). In 2010, there were several cholesterol-lowering medications available, such as bile acid sequestrants, fibrates, niacin, and combination medications. Id. ¶ 24 (ECF No. 1144-1, at 11-12). Physicians generally consider many types of cholesterol-lowering medications when treating patients, including Zetia. Jena Rpt. ¶¶ 17, 26 (ECF No. 1090-1, at 12, 18-19).

While statins block production of cholesterol in the liver, Zetia works differently, blocking the absorption of cholesterol in the intestine. Starr Rpt. ¶ 12 (ECF No. 1090-5, at 6). Zetia can be prescribed as either a monotherapy or a combination therapy with a statin. Id. ¶ 13 (ECF No. 1090-5, at 6-7). During the relevant period, approximately thirty-five percent of prescriptions were for first-line use (monotherapy or combination), and sixty-five percent of prescriptions were for second-line use. Jena Rpt. ¶¶ 68, 102 (ECF No. 1090-1, at 40-41, 56). Zetia is "primarily used as a second- or later-line treatment after a patient has failed to achieve" cholesterol goals **[*16]** "on his first treatment, typically a statin." Id. ¶ 102 (ECF No. 1090-1, at 56). Zetia is the only FDA-approved cholesterol absorption inhibitor. Starr Rpt. ¶ 12 (ECF No. 1090-5, at 6).

A. Alleged Anti-Competitive Conduct in the Settlement Agreement.

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[1] For a detailed review of the facts in this case, see *In re Zetia (Ezetimibe) Anti. Litig., No. 2:18-md-2836, 2019 U.S. Dist. LEXIS 205545, 2019 WL 6122017, at *1-3 (E.D. Va. Oct. 15, 2019)*, R. & R. adopted as modified, *2019 U.S. Dist. LEXIS 220078, 2019 WL 6977405 (E.D. Va. Dec. 20, 2019)*; *In re Zetia (Ezetimibe) Anti. Litig., No. 2:18-md-2836, 2019 U.S. Dist. LEXIS 59469, 2019 WL 1397228, at *1-10 (E.D. Va. Feb. 6, 2019)*, R. & R. adopted as modified, *400 F. Supp. 3d 418 (E.D. Va. 2019)*.

[2] "Merck" consists of Merck & Co., Inc.; Merck Sharp & Dohme Corp.; Schering-Plough Corp.; Schering Corp.; and MSP Singapore Co. LLC.

[3] "Glenmark" consists of Glenmark Pharmaceuticals Limited and Glenmark Pharmaceuticals Inc., USA, the latter incorrectly identified as Glenmark Generics Inc., USA.

The Drug Price Competition and Patent Term Restoration Act of 1984 ("Hatch-Waxman Amendments"), which amended the Federal Food, Drug, and Cosmetic Act, governs the generic drug approval process. See *21 U.S.C. § 355*. Under the Hatch-Waxman Amendments, a generic manufacturer can submit an abbreviated new drug application ("ANDA") relying on the brand manufacturer's original approval. Id. *§ 355(j)*. A generic that is bioequivalent to the branded drug receives an AB rating (hereafter "AB-rated generic equivalent"). See id. *§ 355(j)(2)(A)(iv)*; DPP Compl. ¶¶ 51-54 (ECF No. 253-1, at 20-22). To provide incentives for generics to enter the market, an ANDA first filer enjoys a statutory 180-day exclusivity period, which generally begins upon marketing the generic. *21 U.S.C. § 355(j)(5)(B)(iv)*.

Glenmark was the ANDA first filer for ezetimibe. DPP Compl. ¶ 5 (ECF No. 253-1, at 9). Glenmark thus had 180 days of exclusivity as to other generic manufacturers, but it could not prevent Merck from selling an AG. Id. Plaintiffs **[*17]** allege that the Settlement Agreement contained a provision in which Merck agreed not to launch an AG as quid pro quo for Glenmark foregoing meritorious challenges to the ezetimibe patents and delaying its generic launch until late 2016. Id. ¶ 193 (ECF No. 253-1, at 63-64). Without competition from a Merck AG, Glenmark could keep the price of its generic higher to maximize its profits during the exclusivity period. Id. ¶ 222 (ECF No. 253-1, at 70). Plaintiffs allege Merck's promise not to launch an AG for Zetia was therefore an actionable anti-competitive payment of the type the Supreme Court has proscribed in *Federal Trade Commission v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*.

B. Competition between Zetia, Generic Ezetimibe, and Other Cholesterol Medication.

From 2010 to 2016, the time between the Settlement Agreement and the release of generic ezetimibe, Merck raised Zetia's wholesale acquisition cost ("WAC price") approximately fourteen times,[4] from approximately three dollars to eight dollars a pill. PX003[5] (ECF No. 1090-2); PX004 (ECF No. 1086-4). These WAC price increases were always profitable to Merck. Davish Dep. 80:11-14 (ECF No. 1086-2, at 5). Merck never reduced Zetia's WAC price, although pharmaceutical companies typically do not lower WAC **[*18]** prices. Id. 108:25-109:5 (ECF No. 1086-2, at 6-7). However, Merck offered rebates and discounts, which could reduce the price actually paid by end consumers (the "net price"). See, e.g., Def.'s Ex. 27 (ECF No. 1147-12).

Merck considered the price of other cholesterol medications in setting its prices. See, e.g., PX009 (ECF No. 1090-6, at 7) (aiming to "[f]ollow Crestor's WAC pricing actions"). Specifically, Merck "took into consideration what the WAC prices were for other brand drugs" when pricing Zetia. Starr Dep. 129:10-15 (ECF No. 1144-11, at 9); cf. Starr Rpt. ¶ 80 n.245 (ECF No. 1090-5, at 50) ("Merck documents refer to Lipitor and Crestor as 'pricing anchors' for Vytorin and aimed to set Zetia's list price somewhat below that of Vytorin."). Among payors, perception of Zetia was "as a non-statin with no direct competitors (branded or generic)." PX009 (ECF No. 1090-6, at 5); see also PX030 (ECF No. 1091-10, at 7) ("No direct competitors for non-statin market."); PX013 (ECF No. 1090-9, at 3) (finding "[n]o branded competition").

In December 2016, Glenmark's generic ezetimibe entered the market. Addanki Rpt. ¶ 28 (ECF No. 1091-11, at 21). During Glenmark's 180-day period of exclusivity, **[*19]** Merck engaged in extensive strategic contracting -- known as loss-of-exclusivity ("LOE") contracting -- by which it offered substantial rebates for Zetia, permitting Zetia to enjoy a more favorable formulary position.[6] Id. ¶¶ 29, 31 (ECF No. 1091-11, at 21-23). Merck's LOE contracting was

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[4] Defendants object on foundation grounds, Defs.' Opp'n (ECF No. 1146, at 15 n.7), to the admissibility of Plaintiffs' exhibit, PX004 (ECF No. 1086-4), through which Patrick T. Davish confirmed the WAC price increases, Davish Dep. 108:10-109:5 (ECF No. 1086-2, at 6-7). However, because Defendants do not dispute the price increases themselves, the court accepts Plaintiffs' evidence that the WAC price increased fourteen times.

[5] Exhibits designated MPX" are the exhibits to the Declaration of Thomas M. Sobol in Support of Purchasers' Oppositions to Merck and Glenmark Defendants' Motions for Summary Judgment and to Exclude the Opinions and Testimony of Purchasers' Experts. (ECF No. 1086). Sealed exhibits are filed at ECF Nos. 1090 and 1091.

successful, allowing "ret[ention of] a relatively large quantity of Zetia sales during Glenmark's 180-day exclusivity period for generic ezetimibe." Id. ¶ 37 (ECF No. 1091-11, at 24).

However, Merck still lost sales. Jena Dep. 317:9-14 (ECF No. 1091-6, at 42). Defendants and other generic ezetimibe manufactures predicted that generics would erode Zetia sales. See, e.g., PX019 (ECF No. 1091-2); Brown Dep. 180:11-20 (ECF No. 1086-24, at 4). During Glenmark's 180-day exclusivity period, fifty-six percent of total prescriptions for ezetimibe were generics. Def.'s Opp'n (ECF No. 1146, at 17 n.10) (citing backup data to Starr's report). One year after multiple generics were on the market, the average WAC price for generic ezetimibe was $0.22 per pill, which is 97.5% less than Zetia's November 2016 price of $8.72 a pill. Starr Rpt. ¶ 51 (ECF No. 1090-5, at 30).

Between 2010 and **[*20]** 2016, several other brand and generic cholesterol drugs launched. PX007 (ECF No. 1086-7). Merck's internal strategy documents indicate that other cholesterol drugs presented relatively small immediate risk to Zetia sales.[7] When generic Niaspan launched in September 2013, Zetia had experienced no impact by October. PX012 (ECF No. 1090-8, at 38). Impact was similarly small in the months after generic Crestor and Lipitor -- two blockbuster statins -- entered the market. See Jankiewicz Dep. 117:12-118:10 (ECF No. 1144-7, at 3-4) (stating no "significant change" for Crestor generic); PX027 (ECF No. 1086-27, at 2) (stating "no discernible impact" for Lipitor generic).

C. Dr. Martha A. Starr's Evidence of Cross-Price Elasticity of Demand with Zetia.

Plaintiffs retained Dr. Martha A. Starr ("Starr"), an economist specializing in health economics and the economics of the pharmaceutical industry, to opine on market definition and market power. Starr Rpt. ¶¶ 2, 5 (ECF No. 1090-5, at 3, 4). After performing various studies, she testified that there was "no positive and significant cross-price elasticities of demand for other cholesterol drugs with respect to ezetimibe . . . ." **[*21]** Id. ¶ 8 (ECF No. 1090-5, at 5). Defendants have not moved to exclude Starr. See Tr. 65:6-7 (ECF No. 1300, at 65) (asserting that they "are not trying to exclude [Starr's] testimony"). However, Defendants' expert, Dr. Anupam B. Jena ("Jena"), was hired to rebut Starr's findings. Defs.' Opp'n (ECF No. 1146, at 58 n.27, 60); Jena Rpt. ¶ 10 (ECF No. 1090-1, at 9).

1. Findings Concerning Cross-Price Elasticity of Demand.

Starr reached her conclusions about cross-price elasticity of demand by conducting a series of "natural experiments" analyzing how sales of other cholesterol drugs changed when generic ezetimibe entered the market. Starr Rpt. ¶ 70 (ECF No. 1090-5, at 41-42). She also examined evidence from estimation of an econometric model of demand, and she applied a Hypothetical Monopolist Test ("HMT"). Id. Starr's results rely on sales data from IQVIA National Sales Perspectives ("IQVIA NSP"). See, e.g., id. ¶ 51 (ECF No. 1090-5, at 30 n.158). Defendants do not dispute the accuracy of the reported data. Defs.' Opp'n (ECF No. 1146, at 17 n.10) (referencing "IQVIA NPA data").

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[6] Defendants contend that Merck "increase[d] discounts and rebates (lowering net price) regularly prior to the loss of exclusivity . . . ." Defs.' Opp'n (ECF No. 1146, at 22) (emphasis in original). Plaintiffs contend "[t]he scattered documents cited . . . do not establish that market-wide discounting for Zetia took place before generic Zetia entry in December 2016." Pls.' Reply (ECF No. 1206, at 27 n.75). Merck planned for LOE contracting at least a year in advance of generic ezetimibe launch. See Addanki Rpt. ¶ 33 (ECF No. 1091-11, at 23). The court agrees that the evidence in the summary judgment record on this motion does not establish that Merck engaged in the same level of rebating and discounting before generic launch as it did upon launch. To the extent reasonable jurors might find more discounting before generic entry, it could not be sufficient to create a dispute of material fact on the relevant market issue, given the consistent and undisputed evidence of WAC price increases.

[7] Plaintiffs repeatedly claim that Merck "knew" that Zetia was not in direct competition with other cholesterol-lowering drugs, see, e.g., Pls.' Mem. (ECF No. 1090, at 16-17), but Plaintiffs' record citations do not establish that Merck universally believed no other cholesterol drugs presented a financial threat to Zetia. In fact, Merck documents classify some products as potential risks. See, e.g., PX012 (ECF No. 1090-8, at 21) (noting that Crestor's LOE was a "risk").

"Natural experiments" are "situations in which an explanatory variable of interest (like price) changes suddenly" **[*22]** and "the change is not itself caused by changes in market conditions." Starr Rpt. ¶ 82 (ECF No. 1090-5, at 52-53). For her natural experiments, Starr first identified potential economic substitutes for Zetia. Id. T. 4 (ECF No. 1090-5, at 52). She then used regression analysis to examine whether trends in drug prescriptions for these products changed significantly in the eighteen months before and after entry of generic ezetimibe. Id. ¶ 85 (ECF No. 1090-5, at 53-54). After examining statins, bile acid sequestrants, fibrates, and other cholesterol drugs, she found that there was "no significant decline in the trend for any of the potential substitutes for Zetia at the time that generic ezetimibe entered." Id. ¶ 88 (ECF No. 1090-5, at 57); see also id. ¶ 87 (ECF No. 1090-5, at 54-55).

As another natural experiment, Starr examined whether the launch of generic versions of other cholesterol medications affected Zetia prescriptions during the period before generic ezetimibe was available. Id. ¶ 89 (ECF No. 1090-5, at 58). The release of generic statins for Pravachol and Zocor in 2006 "did not decelerate the rise of Zetia prescribing" then occurring. Id. ¶ 90. In 2011, generic Lipitor did **[*23]** not "accelerate the decline in Zetia prescribing then" occurring. Id. Finally, "[e]ntries of non-statin drugs Trilipix, Niaspan, and Lovaza in 2013-14 . . . had no significant negative effect on Zetia prescribing." Id.

Starr also used an Almost Ideal Demand System ("AIDS") model to estimate how change in one product's price affects demand for other products. Id. ¶ 91 (ECF No. 1090-5, at 59-60). Starr analyzed the top-prescribed drugs available from March 2004 through December 2018. Id. ¶ 93 (ECF No. 1090-5, at 61). The model showed that "none of the other cholesterol drugs ha[d] a positive and statistically significant cross-price elasticity with respect to Zetia," and only two drugs had a "negative and statically significant" cross-price elasticity "consistent with economic complentarity." Id. ¶ 95 (ECF No. 1090-5, at 61-62). Therefore, her model showed that "[n]one of Zetia's potential economic substitutes were substituted for it on the basis of price." Id. ¶ 96 (ECF No. 1090-5, at 62).

Lastly, Starr performed an HMT. Id. ¶ 97 (ECF No. 1090-5, at 62-63). The HMT comes from the Department of Justice's and Federal Trade Commission's Horizontal Merger Guidelines. Id. As applied to this **[*24]** case, the HMT asks the following question:

> If production of Zetia and its next-best substitute [generic ezetimibe] were to come under the control of a Hypothetical Monopolist, could the monopolist profitably increase the price of the products by 5% for at least a year, assuming prices of all other potential substitutes remanded constant, or would substitution towards other drugs render that price increase unprofitable?

Id. ¶ 99 (ECF No. 1090-5, at 63). Using an empirical analysis, Starr concluded that a hypothetical monopolist could raise prices profitably. Id. ¶ 101 (ECF No. 1090-5, at 64). Because of this, no drugs other than Zetia or its AB-rated generic equivalents "need[ed] to be added to the relevant antitrust market." Id. ¶ 102.

2. Dr. Anupam B. Jena's Critiques of Plaintiffs' Expert Methodology.

Jena, a medical doctor and an economist specializing in the economics of physician behavior, healthcare productivity, and medical innovation, is Defendants' rebuttal expert. Defs.' Opp'n (ECF No. 1146, at 58 n.27, 60); Jena Rpt. ¶¶ 1-4 (ECF No. 1090-1, at 5-6). Plaintiffs do not challenge Jena's qualifications. See Pls.' Mem. to Exclude (ECF No. 1068, at 11); Def.'s Opp'n (ECF No. 1146, **[*25]** at 58 n.27). Using Jena's critiques, Defendants contend that Starr's "natural experiments" are unreliable and therefore cannot establish whether patients switched therapies and whether Zetia lacks elasticity of demand with other cholesterol medications. See, e.g., Defs.' Opp'n (ECF No. 1146, at 49). Jena criticizes the approach Starr[8] took for assessing market definition, primarily because of

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[8] Jena extends his critiques to Dr. Keith Leffler ("Leffler"). See Defs.' Opp'n (ECF No. 1146, at 60); Jena Rpt. ¶¶ 111-63 (ECF No. 1090-1, at 60-83). Leffler also assessed "the competitive impact of the reverse payment settlement" and "whether a delay of generic Zetia allowed Merck to maintain market power in the sale of Zetia." Leffler Rpt. ¶ 7 (ECF No. 1091-13, at 5). Defendants have moved to exclude Leffler. Defs.' Joint Mot. to Exclude Test. & Ops. of Pls.' Experts Drs. Thomas McGuire and Keith Leffler (ECF No. 1048). That motion remains before the court, but it is not necessary to resolve it here. Plaintiffs rely almost exclusively upon Starr in their motion for partial summary judgment. See generally Pls.' Mem. (ECF No. 1090, at 30-32).

allegedly inappropriate data inputs, flawed assumptions, and Starr's use of the HMT. Defs.' Opp'n (ECF No. 1146, at 49-55); Jena Rpt. ¶¶ 111-63 (ECF No. 1090-1, at 60-83).

Regarding data inputs, Jena specifically censures Starr's use of aggregate data for all prescriptions, and not "focus[ing] on" customers likely to switch products based on price (i.e., "newly diagnosed patients or those for whom treatment with a 'moderate-intensity' statin dosage has proven ineffective") and for including "patients whose high cholesterol is already adequately controlled . . . ." Jena Rpt. ¶ 114 (ECF No. 1090-1, at 62). Jena states that this "predispose[s Starr] to find that economic substitution does not exist . . . ." Id. ¶ 111 (ECF No. 1090-1, at 60). Jena also opines that Plaintiffs' experts inadequately **[*26]** controlled for market conditions other than price, like promotional spending. Id. ¶¶ 116-17 (ECF No. 1090-1, at 63-64).

Regarding assumptions, Jena criticizes Starr's AIDS model as assuming that brand and generic versions share prices. Id. ¶ 134 (ECF No. 1090-1, at 70). Jena also accuses Starr of using "prices and quantities at different places in the distribution chain." Id. ¶ 135 (ECF No. 1090-1, at 71). Thus, Starr does "not capture the substantial discounts and rebates that drug manufacturers offer . . . and that ultimately determine the prices that consumers (or their plans) actually pay for the medications." Id. Jena also takes issue with Starr's claims that other cholesterol-lowering drugs, such as statins, are complements of ezetimibe rather than substitutes. Id. ¶¶ 140-42 (ECF No. 1090-1, at 73).

Lastly, Jena argues that Starr's application of the HMT is flawed. See id. ¶1 146-49 (ECF No. 1090-1, at 74-76). Again, Jena argues that the framework does not adequately control for non-price changes and that regulation in the pharmaceutical industry can affect the test. Id.

D. Defendants' Evidence of Cross-Price Elasticity of Demand.

Defendants also hired Jena to opine on the relevant **[*27]** market. Jena Rpt. ¶ 10 (ECF No. 1090-1, at 9). In his report, Jena principally concludes that there was clinical and economic "substitutability" between Zetia and other cholesterol-lowering medications during the relevant time-period. Id. ¶ 13 (ECF No. 1090-1, at 10). Jena, who practices internal medicine, notes that "ezetimibe was one of several treatment options available to treat patients with hyperlipidemia, particularly for second-line use." Id. ¶ 15 (ECF No. 1090-1, at 11). Jena does not specifically identify any pharmaceutical products that he would include in the market with Zetia. See id. ¶ 110 (ECF No. 1090-1, at 60) ("I have not been asked to affirmatively define the outer boundaries of the relevant market . . ."); Jena Dep. 124:20-22 (ECF No. 1091-6, at 31) (stating that he "assess[ed] whether ... [the] market was constituted only by Zetia and ezetimibe"). Rather, he opines that the relevant market involves a broad class of therapies available to treat hyperlipidemia. Jena Rpt. ¶ 110 (ECF No. 1090-1, at 60) " [m]y analyses ... point to Zetia being part of a market of cholesterol-lowering medication that includes statins, non-statins, and combination drugs.").

Jena also examined **[*28]** Zetia's "own-price elasticity of demand," which "measures the extent to which the demand for a product changes when its own price changes." Jena Rpt. ¶ 32 (ECF No. 1090-1, at 21-22) (emphasis added). His analysis found that Merck could increase sales only within a certain range by lowering its price.[9] Id. 11 91 (ECF No. 1090-1, at 51) (finding "an own-price elasticity for Zetia ranging from - 1.74 to - 1.96 percent"). But he conceded that own-price elasticity is "insufficient to assess the contours of the market ..." Jena Dep. 128:7-9 (ECF No. 1091-6, at 33).

Lastly, Jena examined competition for formulary placement between Zetia and other cholesterol-lowering drugs. See Jena Rpt. ¶¶ 79-90 (ECF No. 1090-1, at 45-51). Health plans place drugs on formularies depending on the manufacturer's price. Id. ¶ 79 (ECF No. 1090-1, at 45-46). Formulary placement then affects a patient's co-

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[9] Plaintiffs express concern that Jena's own-price elasticity analysis is based entirely on a 2015 emailed spreadsheet. See Pls.' Mem. to Exclude (ECF No. 1068, at 15-16). Jena confirmed that his "empirical estimate of own-price elasticity . . . comes from this spreadsheet." Jena Dep. 75:20-21 (ECF No. 1091-6, at 19). However, Defendants clarify that the scope of Jena's analysis is broader than just the spreadsheet. Defs.' Opp'n (ECF No. 1146, at 59). For the purposes of this motion, the court accepts Jena's evidence of own-price elasticity.

payment. Id. Merck "sought comparable or preferred formulary placement" compared to other cholesterol-lowering medications, and specifically sought "unrestricted" status so that Zetia would be covered without prior health plan authorization. Id. ¶ 83 (ECF No. 1090-1, at 47). Jena opined that "[p]rice competition **[*29]** for favorable formulary placement . . . is indicative of the economic substitutability between Zetia and other drugs." Id. ¶ 79 (ECF No. 1090-1, at 45-46).

E. Plaintiffs' Current Motions.

Plaintiffs moved to exclude Jena's testimony. (ECF Nos. 1066, 1070).[10] Plaintiffs argued that Jena's opinions were irrelevant because he did not examine cross-price elasticity and that his methods were unreliable, primarily because they differed from his non-litigation academic work. Pls.' Mem. to Exclude (ECF No. 1068). On the same day, Plaintiffs also moved for partial summary judgment on the relevant market. (ECF Nos. 1077, 1080).[11] Plaintiffs argued that the relevant market should only include products with significant cross-price elasticity of demand with Zetia, and that undisputed evidence in the summary judgment record showed that only Zetia and its AB-rated generic equivalents had such elasticity. (ECF Nos. 1078, 1090).[12]

To reduce filings, the court ordered that Defendants file a single opposition brief to both Plaintiffs' motions, and that Plaintiffs similarly reply in a single brief. Order (ECF No. 1109). Defendants opposed both Plaintiffs' motions. (ECF Nos. 1140, 1146). Defendants argued that **[*30]** the relevant market was a more holistic inquiry than merely cross-price elasticity, that Jena had appropriately disputed Plaintiffs' evidence, and that Jena's opinions were reliable and relevant. Plaintiffs replied, (ECF Nos. 1194, 1206), and with the matter fully briefed, the parties appeared by counsel for oral argument on June 30, 2021, Tr. (ECF No. 1300).

On this procedural history and these undisputed facts, this Report addresses the merits of Plaintiffs' motion to exclude the proposed testimony of Dr. Anupam B. Jena (ECF No. 1070) and Plaintiffs' partial motion for summary judgment concerning the relevant market (ECF No. 1077).

II. STANDARD OF REVIEW ON SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56 requires the court to grant a motion for summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. "A material fact is one 'that might affect the outcome of the suit under the governing law.' A disputed fact presents a genuine issue 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Spriggs v. Diamond Auto Glass, 242 F.3d 179, 183 (4th Cir. 2001)* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*).

The party seeking summary judgment has the initial burden of informing the **[*31]** court of the basis of its motion and identifying materials in the record it believes demonstrates the absence of a genuine dispute of material fact.

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[10] The Direct Purchaser Plaintiffs filed the primary motion, (ECF No. 1066), which the End-Payor Plaintiffs then incorporated, (ECF No. 1070).

[11] The Direct Purchaser Plaintiffs filed the primary motion, (ECF No. 1077), which the End-Payor Plaintiffs then incorporated, (ECF No. 1080).

[12] Plaintiffs and Defendants filed supporting memoranda as both public (redacted) and under seal. Plaintiffs' Memorandum in Support is filed as public at ECF No. 1078 and sealed at ECF No. 1090. Defendants' Opposition is filed as public at ECF No. 1140 and sealed at ECF No. 1146. Plaintiffs' Reply is filed as public at ECF No. 1194 and sealed at ECF No. 1206.

This Report and Recommendation relies upon the parties' sealed memoranda. To the extent that the court utilizes facts in recommending disposition that were originally sealed, the court has determined that the interests of the public outweigh the parties' interests in confidentiality, and the information relied upon is hereby unsealed.

Fed. R. Civ. P. 56(c); *Celotex Corp., 477 U.S. at 322-24*. When the moving party has met its burden to show that the evidence is insufficient to support the nonmoving party's case, the burden shifts to the nonmoving party to present specific facts demonstrating that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

In considering a motion for summary judgment, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)*; see *Anderson, 477 U.S. at 255*. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson, 477 U.S. at 249*.

Rule 56 permits partial summary judgment on claims and defenses. *Fed. R. Civ. P. 56(a)*. "A motion for partial summary judgment utilizes the same standards required for consideration of a full motion for summary judgment." *Pettengill v. United States, 867 F. Supp. 380, 381 (E.D. Va. 1994)* (citing *Gill v. Rollins Protective Servs., 773 F.2d 592, 595 (4th Cir. 1985)*, amended, *788 F.2d 1042 (4th Cir. 1986)*; *Fed. R. Civ. P. 56(d)*). Partial summary judgment expedites the trial process:

> "[P]artial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. **[*32]** This adjudication . . . serves the purpose of speeding up litigation by" narrowing the issues for trial to those over which there is a genuine dispute of material fact.

J.E. Dunn Constr. Co. v. S.R.P. Dev. Ltd. P'ship, 115 F. Supp. 3d 593, 599 (D. Md. 2015) (quoting Rotorex Co. v. Kinsbury Corp., F. Supp. 2d 563, 571 (D. Md. 1999)). It "avoid[s] a useless trial of facts and issues over which there was really never any controversy and which would tend to confuse and complicate a lawsuit." *In re Norfolk, Balt. & Carolina Line, Inc., 478 F. Supp. 383, 386 (E.D. Va. 1979)* (quoting *Lucia Steel & Trad. Corp. v. Ford, 9 F.R.D. 479, 481 (D. Neb. 1949)*).

III. ANALYSIS

Plaintiffs' underlying action requires them to prove that Defendants possessed "monopoly power" during the alleged timeframe. *Intell. Ventures I LLC v. Cap. One Fin. Corp., 280 F. Supp. 3d 691, 701 (D. Md. 2017)* (quoting *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*). "A company that can exert market power to set prices or exclude competition, without regard to outside market forces, has monopoly power." *E.I. Dupont De Nemours & Co. v. Kolon Indus., 688 F. Supp. 2d 443, 456 (E.D. Va. 2009)* (citing *In re Payment Card Inter. Fee & Merch. Anti. Disc. Anti. Litig., 562 F. Supp. 3d 392, 399 (E.D.N.Y. 2008)*). Because monopoly power is only found in the relevant market, defining the relevant market becomes a "threshold" inquiry. *Consul, Ltd. v. Transco Energy Co., 805 F.2d 490, 493 (4th Cir. 1986)*.

After considering the summary judgment record, I find that there are no genuine disputes of material fact regarding the relevant market. First, Jena's opinions are admissible under *Federal Rule of Evidence 702* and the standard in *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. However, while Jena's testimony is admissible, it fails to address cross-price elasticity of demand and is therefore insufficient to create a genuine dispute of material fact regarding the relevant market. The record contains **[*33]** sufficient evidence for a reasonable juror to conclude that the relevant market for the anti-trust conduct alleged -- the unlawful delay of generic competition -- was limited to Zetia and its AB-rated generic equivalents. And Defendants have failed to meet their burden to demonstrate a dispute of material fact sufficient to rebut this conclusion. The court thus RECOMMENDS DENYING Plaintiffs' motion to exclude the proposed testimony of Dr. Anupum B. Jena, (ECF Nos. 1066, 1070), and RECOMMENDS GRANTING Plaintiffs' motion for partial summary judgment, (ECF Nos. 1070, 1080).

A. Jena's Expert Opinions are Admissible.

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony. *United States v. Wilson, 484 F.3d 267, 274-75 (4th Cir. 2007)*. Under the Rule:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> > (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> > (b) the testimony is based on sufficient facts or data;
> > (c) the testimony is the product of reliable principles and methods; and
> >
> > (d) the expert has reliably applied the principles and methods to the facts of the **[*34]** case.

Fed. R. Evid. 702. In other words, expert testimony is admissible under *Rule 702* "if it concerns (1) scientific, technical, or other specialized knowledge that (2) will aid the jury or other trier of fact to understand or resolve a fact at issue." *Westberry v. Gislaved Gummi AB, 178 F.3d 257, 260 (4th Cir. 1999)* (citing *Daubert, 509 U.S. at 592*).

The first prong requires the court to examine "whether the reasoning or methodology underlying the expert's proffered opinion is reliable" and the second prong asks the court to analyze "whether the opinion is relevant to the facts at issue." Id.; see also *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)* ("[T]he Federal Rules of Evidence 'assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." (quoting *Daubert, 509 U.S. at 597*)); *Oglesby v. General Motors Corp., 190 F.3d 244, 249-50 (4th Cir. 1999)* ("[A] district judge, considering a proffer of expert testimony under *Federal Rule of Evidence 702*—whether based on scientific, technical, or other knowledge -- [the court] must, in determining its admissibility, ensure that the evidence is 'not only relevant, but reliable'" (quoting *Daubert, 509 U.S. at 589*)). That is, "a reliable expert opinion must be based on scientific, technical, or other specialized knowledge and not on belief or speculation, and inferences must be derived using scientific or other valid methods." *Oglesby, 190 F.3d at 250 (4th Cir. 1999)* (citing *Daubert, 509 U.S. at 590, 592-93*). "The proponent of the **[*35]** testimony must establish its admissibility by a preponderance of proof." *Cooper v. Smith & Nephew, Inc., 259 F.3d 194, 199 (4th Cir. 2001)* (citing *Daubert, 509 U.S. at 592 n.10*).

Thus, the District Court serves as a gatekeeper to assess whether the proffered evidence is reliable and relevant. *Kumho Tire Co., 526 U.S. at 141*. But the gatekeeper function does not require that the Court "determine that the proffered expert testimony is irrefutable or certainly correct" because expert testimony is "subject to testing by 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'" *United States v. Moreland, 437 F.3d 424, 431 (4th Cir. 2006)* (quoting *Daubert, 509 U.S. at 596*). There is no "mechanistic test for determining the reliability of an expert's proffered testimony; on the contrary, 'the test of reliability is flexible and the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination.'" *Peters-Martin v. Navistar Int. Trans. Corp., 410 Fed. Appx. 612, 617 (4th Cir. 2011)* (quoting *United States v. Wilson, 484 F.3d 267, 274 (4th Cir. 2007)* (internal citations and quotations omitted).

Plaintiffs seek exclude Jena's opinions on relevancy grounds because he did not analyze cross-price elasticity of demand. Pls.' Mem. to Exclude (ECF No. 1068, at 15). Plaintiffs also argue that Jena's criticisms of their own experts should be excluded because he used an approach that "differs markedly **[*36]** from his approach in his academic work." Id. at 19. However, Plaintiffs' arguments go to the weight of Jena's testimony and its persuasiveness at trial, or in response to their motion, not to the admissibility or reliability of his testimony. Therefore, this Report RECOMMENDS DENYING Plaintiffs' motion to exclude the proposed testimony of Dr. Anupum B. Jena (ECF Nos. 1066, 1070).

i. Jena's Opinions Are Admissible Despite His Failure to Directly Analyze Cross-Price Elasticity of Demand.

Plaintiffs' arguments about relevancy are not sufficient to exclude Jena's opinions entirely. See Pls.' Mem. to Exclude (ECF No. 1068, at 15). The thrust of Plaintiffs' motion concerns the "[c]orrect [q]uestion" that Plaintiffs argue Jena should have answered: that is, cross-price elasticity of demand. Pls.' Mem. to Exclude (ECF No. 1068, at 11). While the court agrees that this is the determinative legal question for Plaintiffs' motion for partial summary judgment on the relevant market, as discussed below, it is not the correct standard for excluding Jena's opinions entirely.

Relevance under the Federal Rules of Evidence requires only that the evidence have a "tendency to make a fact more or less probable **[*37]** than it would be without the evidence" and that "the fact is of consequence in determining the action." *Fed. R. Evid. 401*. "Relevance is typically a low bar to the admissibility of evidence, even though other [Rules] . . . may otherwise limit such evidence." *Jones v. Ford Motor Co., 71 Fed. App'x 280, 283 (4th Cir. 2006)* (citing *Fed. R. Evid. 401*, *404*). As such, Jena does not need to conclusively prove cross-price elasticity with other products for his testimony to be admissible, and Plaintiffs' focus on the legal standard for the relevant market overstates Defendants' burden in admitting Jena's opinions. See Pls.' Mem. to Exclude (ECF No. 1068, at 11-18).

Jena's testimony may affect the "probable" truth of certain facts, including those related to the relevant anti-trust market. *Fed. R. Evid. 401*. As Defendants argue, the caselaw does not require that "an expert offering an opinion on market definition must undertake a certain type of cross-price elasticity study." Defs.' Opp'n (ECF No. 1146, at 55) (emphasis in original). "[D]ifferent economic analys[e]s" can "bear upon a showing of cross-elasticity of demand." *In re Solodyn (Minocycline Hydrochloride) Anti. Litig. [Solodyn], No. 14-md-02503, 2018 U.S. Dist. LEXIS 11921, 2018 WL 563144, at *9 (D. Mass. Jan. 25, 2018)*. In their opposition, Defendants identify conclusions from Jena's report that are potentially helpful to the trier of fact, Def.'s Opp'n (ECF No. 1146, at 57-58), in evaluating "evidentiary **[*38]** proxies . . . for cross-elasticity," *Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 218, 253 U.S. App. D.C. 142 (D.C. Cir. 1986)*. For instance, Jena examined evidence regarding therapeutic alternatives, formulary placement, and own-price elasticity of demand. Def.'s Opp'n (ECF No. 1146, at 57-58). Lastly, Jena testified that he performed "multifaceted analyses" that accounted for pricing, rebating, and other factors. Jena Dep. 123:13-124:8 (ECF No. 1091-6, at 30-31). While none of his opinions create a genuine dispute of material fact, as discussed below, this does not mean they are entirely irrelevant.

Jena's opinions are also directed to other issues, including damages testimony by Plaintiffs' expert economists. See Jena Rpt. ¶ 10 (ECF No. 1090-1, at 9) (clarifying that his assignment included review of Dr. Keith Leffler's expert report); Leffler Rpt. ¶ 9 (ECF No. 1091-13, at 6) (reporting that Plaintiffs asked him "to quantify the overcharge damages that Plaintiffs suffered because of any delay in the entry of AB-rated generic Zetia"). In evaluating whether to exclude or limit his testimony, the full scope of matters in dispute bears scrutiny.

Jena's opinions likewise stem from his specialized expertise as an economist. See *Westberry, 178 F.3d at 260* (citing *Daubert, 509 U.S. at 592*); Jena Rpt. ¶ 11 (ECF No. 1090-1, at **[*39]** 9). Plaintiffs have not moved to exclude Jena based on his qualifications. See Pls.' Mem. to Exclude (ECF No. 1068, at 11); Def.'s Opp'n (ECF No. 1146, at 58 n.27). Furthermore, Jena has testified that he "personally consider[ed] the relationship between the increase in price of Zetia on the quantities demanded of other drugs . . . ." Jena Dep. (ECF No. 1144-8, at 9). While that opinion ultimately might be insufficient, in his view, Jena did address the requisite standard, and he was fully qualified to perform such analysis. Therefore, this court does not recommend excluding Jena's opinions in connection with the pending motion.

ii. Jena's Criticisms of Plaintiffs' Experts Are Admissible.

Plaintiffs argue that Jena's criticisms of their own experts should also be excluded because he used an approach that "differs markedly from his approach in his academic work." Pls.' Mem. to Exclude (ECF No. 1068, at 19). Specifically, Jena testified that his model "did not converge" in this case, Jena Dep. 269:4-10 (ECF No. 1091-6, at 37), when he always ensures in his "own academic research" that results converge, id. 56:2-5 (ECF No. 1091-6, at 8). When a statistical model fails to converge, it means **[*40]** that it "loops and loops over the data," failing to produce a meaningful result. Id. 48:3-11 (ECF No. 1091-6, at 4). Jena testified that researchers typically re-estimate models until they converge. Id. 49:17-22 (ECF No. 1091-6, at 5). But the court is reluctant to exclude Jena's opinions based on this argument because, in their opposition, Defendants persuasively argue that Jena's deposition testimony on convergence was "misconstrue[d]" and that the failure to converge that Plaintiffs identify described

Jena's re-estimation of Plaintiffs' experts' model over a different time period. Defs.' Opp'n (ECF No. 1146, at 61). Therefore, there is genuine doubt about what Jena's deposition testimony conceded on this point.

Next, Jena is a rebuttal expert, not "an affirmative expert on market definition." Id. at 60. "Rebuttal evidence is defined as 'evidence given to explain, repel, counteract, or disprove facts given in evidence by the opposing party.'" *United States v. Stitt, 250 F.3d 878, 897 (4th Cir. 2001)* (quoting Black's Law Dictionary 1267 (6th ed. 1990)). A major portion of Jena's report is devoted to criticisms of Starr, see Jena Rpt. ¶¶ 111-63 (ECF No. 1090-1, at 60-83), and his criticisms are based on his own specialized knowledge as an **[*41]** economist and physician, see id. ¶¶ 10-11 (ECF No. 1090-1, at 9-10). These criticisms, however, create no dispute of material fact, as discussed below. As a result, although permissible, they are insufficient to create a dispute of material fact on the threshold issue of relevant market.

B. The Relevant Product Market is Zetia and its AB-Rated Generic Equivalents.

Proof of a relevant market is a threshold determination for an anti-trust claim. *Consul, Ltd., 805 F.2d at 493*. The relevant market "provides the context against which to measure the competitive effects of an agreement," *Geneva Pharms. Corp. v. Barr Labs, Inc., 386 F.3d 485, 496 (2d Cir. 2004)*, and it has two components: (1) the geographic market, or area of competition; and (2) the product market, or products and services in competition, *Consul, Ltd., 805 F.2d at 495*. The geographic component examines "that geographic area within which the defendant's customers . . . can practicably turn to alternative supplies if the defendant were to raise its prices or restrict its output." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 441 (4th Cir. 2011)*. The parties agree that the appropriate geographic demarcation is the United States and its territories. See Pls.' Mem. (ECF No. 1090, at 20-21). However, the parties dispute the relevant product market.

Plaintiffs contend that the relevant product market is Zetia and Zetia's AB-rated **[*42]** generic equivalent, ezetimibe. Pls.' Mem. (ECF No. 1090, at 8). Defendants do not specify the outer contours of a different market, but they argue that "Zetia competed in a broad, competitive market for cholesterol-lowering medications." Defs.' Opp'n (ECF No. 1146, at 33). Because the Settlement Agreement underlying Plaintiffs' claims targeted only the market for Zetia and ezetimibe, and because Defendants produced no evidence of substantial cross-price elasticity of demand between Zetia and any products other than its AB-rated generic equivalent, ezetimibe, the court finds that Plaintiffs have satisfied their burden in showing that there are no material disputed facts concerning the scope of the relevant product market within which to evaluate anti-competitive effects of the Settlement Agreement.

1. The Purpose of the Relevant Market Inquiry.

In defining the product market, the court principally seeks to understand whether Defendants were capable of causing anti-competitive effects: "The purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition." *Dickson v. Microsoft Corp., 309 F.3d 193, 210 (4th Cir. 2002)* (quoting *Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447, 460, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*) (emphasis in original). **[*43]** As such, the inquiry is not what Merck and Glenmark did to compete with other cholesterol-lowering drug manufacturers or with each other; the question is what they did to defeat competition. See id.

The boundaries of the relevant market should therefore track the alleged anti-competitive conduct itself. As the court in In re Aggrenox Antitrust Litigation [Aggrenox] observed:

> [A]s a practical matter, the only "relevant" market in . . . cases brought under F.T.C. v. Actavis, will be the market in which the challenged settlement agreement allegedly acted as an anticompetitive restraint: that is, in this case, it will be implicitly defined by the scope of the disputed patent.[13]

199 F. Supp. 3d 662, 665 (D. Conn. 2016). This practical result comes because the patent created the market. And the anti-competitive harm from reverse payment agreements derives from the attempt to illegally extend a previously legitimate monopoly on that market. See *Actavis, Inc., 570 U.S. at 157-58* (referencing the "patentee's market," and noting that companies use reverse payments "to maintain supracompetitive prices . . . rather than face what might have been a competitive market" (emphasis added)). As a result, other courts have similarly limited the relevant market before trial in **[*44]** reverse-payment cases to the branded drug and its generic equivalent. See, e.g., *Aggrenox, 199 F. Supp. 3d at 663, 669*; *United Food & Com. Workers Loc. 1776 & Participating Empr's Health & Welfare Fund v. Teikoku Pharm USA [Lidoderm], 296 F. Supp. 3d 1142, 1176 (N.D. Cal. 2017)*.

Defendants argue that considering the patent's scope in determining relevant market "would result in a finding of market power in essentially all pharmaceutical antitrust cases." Defs.' Opp'n (ECF No. 1146, at 36 n.20). But while a large reverse payment is "suggestive of market power," market power exists only if Defendants could "profitably charge supracompetitive prices over a sustained period" of time. *Aggrenox, 199 F. Supp. 3d at 666*. Because there could "conceivabl[y]" be "fierce competition" in the market, a finding of market power is not certain. Id. But what this focused inquiry makes clear is that pharmaceutical companies, like Merck and Glenmark, are "vanishingly unlikely" to agree to reverse payments if they do not already have market power (because otherwise the disputed patent would be worthless). Id. Of course, Plaintiffs must still prove the Settlement Agreement contained a reverse payment -- a fact sharply contested and on which only Defendants have moved for summary judgment. But if Plaintiffs succeed, then the Settlement Agreement itself would be "a strong indicator" that Defendants exerted power **[*45]** over the market created by the disputed patent. Id.

In this case, therefore, the relevant market depends on the challenged reverse payment provision in the Settlement Agreement, which resolved the Merck-Glenmark patent litigation. As Plaintiffs allege, Merck and Glenmark targeted Zetia and its AB-rated generic equivalents in the Settlement Agreement -- they did not attempt to control pricing on all cholesterol-lowering medication. See Pls.' Mem. (ECF No. 1090, at 22). Plaintiffs allege that the Settlement Agreement's no-AG provision enabled Merck to unlawfully extend the monopoly conferred legitimately by its patent and sell Zetia for longer without generic competition. DPP Compl. ¶¶ 215-16 (ECF No. 253-1, at 68). They also allege the company allowed Glenmark to maximize profits for generic ezetimibe during its 180-day period of exclusivity, holding up the price of the generic by limiting generic competition. Id. ¶ 222 (ECF No. 253-1, at 70). Thus, assuming Plaintiffs establish the reverse payment they have alleged, the Settlement Agreement created two distinct periods of anti-competitive threat, allocating all sales of ezetimibe (Zetia) to Merck before generic competition, and all **[*46]** generic ezetimibe sales to Glenmark after generic entry for 180 days. Id. ¶ 272 (ECF No. 253-1, at 82). Both periods affected the market for the patented drug, ezetimibe.

As important, the Settlement Agreement imposed no other restrictions on either company's ability to compete in all the usual ways. It contained no price or production limits, restrictions on rebating or formulary placement, no allocation of markets, or any other allegedly anti-competitive terms. Therefore, the Settlement Agreement defined the market as comprised only of Zetia and its AB-rated generic equivalents. The question for resolution in this case thus becomes whether this agreement could cause anti-competitive effect. And it is to this question that the relevant market inquiry here must be directed.

2. Cross-Price Elasticity of Demand and Factors for Defining the Relevant Market.

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[13] This observation was made in the context of a discovery dispute, in which the judge found that any discovery related to other drugs beyond the patented one and its generic equivalent was "irrelevant." *Aggrenox, 199 F. Supp. 3d at 663, 669*. Defendants make much of that posture. See, e.g., Tr. 90:25-91:2 (ECF No. 1300, at 90-91) (arguing that the judge "never looked at any evidence"). However, despite the difference between that posture and the one here, I find *Aggrenox*'s legal analysis is sound, persuasive, and entirely consistent with the extensive evidence presented in this motion.

Parties dispute the legal standard applicable to defining the relevant market. Defendants argue that market definition "is a holistic, fact-intensive" inquiry, accusing Plaintiffs of impermissibly focusing on "sensitivity to price changes" as the only applicable metric. Def.'s Opp'n (ECF No. 1146, at 8). Plaintiffs argue that Defendants' **[*47]** holistic approach is contrary to existing law, and that "the existence of cross-price elasticity is the determinative legal question." Pls.' Reply (ECF No. 1206, at 16). They also argue that their own evidence establishes that Zetia had cross-price elasticity only with Zetia and its AB-rated generic equivalents. Id. at 17.

After considering the anti-competitive conduct alleged in this case, I find that cross-price elasticity is determinative of relevant market under Fourth Circuit precedent. Plaintiffs have met their burden in establishing that Zetia had cross-price elasticity only with its AB-rated generic equivalents. Further, Defendants have failed to introduce facts sufficient to permit any reasonable juror to conclude that Zetia demonstrated cross-price elasticity of demand with any other products.

i. The Requirement for Cross-Price Elasticity of Demand in Defining the Relevant Market.

The relevant market must be "the narrowest market which is wide enough so that [other] products . . . cannot compete on substantial parity with those included in the market." *Int'l Wood Processors v. Power Dry, Inc., 792 F.2d 416, 430 (4th Cir. 1986)* (quoting L. Sullivan, Handbook of the Law of Antitrust § 12, at 41 (1977)) (emphasis added). The boundaries of that market **[*48]** depend on the "extent to which consumers will change their consumption of one product in response to a price change in another, i.e., the 'cross-elasticity of demand.'" *It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676, 683 (4th Cir. 2016)* (quoting *Eastman Kodak Co., 504 U.S. at 469*).

Cross-price elasticity of demand measures "the responsiveness of the sales of one product to price changes of the other." *United States v. E.I. Du Pont de Nemours & Co. [DuPont], 351 U.S. 377, 400, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. If a price change "causes a considerable number of customers . . . to switch" products, then there is "a high cross-elasticity of demand" between the products. Id. Products with high elasticity of demand "compete in the same market." Id. Products showing only "low" cross-price elasticity "are not in the same product market." *Fed. Trade Comm'n v. Lundbeck, Inc., 650 F.3d 1236, 1240 (8th Cir. 2011)* (citing *H.J., Inc. v. Int'l Tel. & Tel. Corp., 867 F.2d 1531, 1538, 1540 (8th Cir. 1989)*).

In arguing for a holistic factorial approach to market definition, as opposed to only cross-price elasticity, Defendants rely heavily on *Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. See Def.'s Opp'n (ECF No. 1146, at 8-11, 34-49). There, the Supreme Court of the United States listed appropriate factors for consideration:

> industry or public recognition of the []market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Brown Shoe Co., 370 U.S. at 325. But other caselaw clarifies **[*49]** that these factors are simply "evidentiary proxies . . . for cross-elasticities." *Rothery Storage & Van Co., 792 F.2d at 218*; see also *H.J., Inc. v. Int'l Tel. & Tel. Corp., 867 F.2d 1531, 1538-40 (8th Cir. 1989)* (citing id.). They do not replace cross-elasticity as the key inquiry.

Throughout their briefing, Defendants emphasize "reasonable interchangeability" as the broader inquiry necessary to render Jena's opinions on the relevant market persuasive. See, e.g., Defs.' Opp'n (ECF No. 1146, at 57). However, reasonable interchangeability is not something separate from cross-price elasticity of demand. *Brown Shoe* framed reasonable interchangeability in terms of cross-price elasticity: "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co., 370 U.S. at 325* (emphasis added). The Fourth Circuit echoed this definition, placing cross-price elasticity as its central meaning. See *It's My Party, Inc., 811 F.3d at 683* (quoting *Eastman Kodak Co., 504 U.S. at 469*).

Cross-price elasticity is essential because market definition is used to measure "genuine adverse effects on competition." *Dickson, 309 F.3d at 210* (quoting *Ind. Fed'n of Dentists, 476 U.S. at 460*). As Plaintiffs argue, "the whole question . . . is to identify products that, by threatening Merck with substantial loss of unit sales for doing so, will constrain Merck's ability to **[*50]** raise or maintain Zetia prices a small but significant amount above the competitive level (that is, constrain Merck's market power)." Pls.' Mem. (ECF No. 1090, at 25). The question is not whether ordinary and expected competition in the marketplace restrained Merck's pricing decisions -- it obviously did. But to be part of the relevant market in evaluating Defendants' anti-competitive actions, other drugs must have been able to constrain Zetia's pricing above the competitive level. See *United States v. Microsoft Corp., 253 F.3d 34, 53, 346 U.S. App. D.C. 330 (D.C.C. 2001)* (considering "only substitutes that constrain pricing"). Applying this well-established law requiring cross-price elasticity of demand, there is no dispute of material fact on the relevant market within which to measure Plaintiffs' allegations of antitrust harm.

ii. Plaintiffs' Evidence of Cross-Price Elasticity of Demand with Zetia and Its AB-Rated Generic Equivalents.

Plaintiffs' motion is supported by strong evidence that no other drugs significantly constrained Zetia pricing prior to the launch of generic ezetimibe. Merck raised Zetia's WAC price repeatedly in the years before generic launch, from approximately three to eight dollars a pill, without loss in profitability. PX003 (ECF No. 1090-2); PX004 **[*51]** (ECF No. 1086-4); Davish Dep. 80:11-14 (ECF No. 1086-2, at 5). Merck also never reduced Zetia's WAC price. Davish Dep. 108:25-109:5 (ECF No. 1086-2, at 6-7). Even after recognizing that pharmaceutical companies rarely reduce WAC price, and considering any rebates affecting net price, this profitable rise in WAC price is significant.

Plaintiffs' expert evidence in this case is also compelling. Starr's natural experiments show lack of cross-price elasticity with any other drugs by demonstrating (1) that patients did not switch from other cholesterol-lowering medications to cheaper ezetimibe when it first became available, and (2) that availability of cheaper generics for other cholesterol-lowering medication (i.e., generics of Zocor, Pravachol, Lipitor, Trilipix, Niacin, and Lovaza) did not cause patients to switch from more expensive Zetia. Starr Rpt. ¶¶ 82-90 (ECF No. 1090-5, at 52-59). These natural experiments go to the heart of cross-price elasticity by showing "the responsiveness of the sales of one product to price changes of the other." *DuPont, 351 U.S. at 400*. Starr also did not limit her study to natural experiments, but also drew upon her AIDS model and an HMT. Id. ¶¶ 91-102 (ECF No. 1090-5, at 59-64). **[*52]** Each of these methods "point[ed] to the same finding: The relevant antitrust product market is Zetia and its AB-rated equivalents." Id. ¶ 103 (ECF No. 1090-5, at 64-65).

Lastly, the "price water fall . . . when generic ezetimibe entered the market" demonstrates the absence of cross-price elasticity because previous competition "was not sufficient to discipline the price to anywhere near the competitive level," Tr. 84:24-85:21 (ECF No. 300, at 84-85). Monopoly power is evidenced by a firm's ability to "profitably raise prices substantially above the competitive level." *Dickson, 309 F.3d at 199 n.1* (quoting *United States v. Microsoft Corp., 253 F.3d 34, 51, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*). Drugs with cross-price elasticity discipline a product's pricing. See *DuPont, 351 U.S. at 400 (1956)* (defining cross-price elasticity). Zetia's pre-generic price was $8.72 a pill and the generic price was $0.22 a pill within one year. Starr Rpt. ¶ 51 & Fig. 4 (ECF No. 1090-5, at 30-31). Even recognizing that generic prices are generally lower (as they did not incur research and development costs), Defs.' Opp'n (ECF No. 1146, at 17), the dramatic price difference between Zetia and generic ezetimibe indicates a lack of cross-price elasticity with any of the alternative options Defendants seek to include. This includes several other generic **[*53]** cholesterol-lowering drugs that were far cheaper than Zetia before generic ezetimibe entered the market.

iii. The Court Can Rely Upon Plaintiffs' Studies of Cross-Price Elasticity Despite Jena's Critiques.

However, the dispute on this motion is not whether Plaintiffs' evidence shows cross-price elasticity, but rather whether Plaintiffs' evidence is sufficiently undisputed for summary judgment after Jena's critiques. See Defs.' Opp'n (ECF No. 1146, at 49) ("Plaintiffs have not met their burden . . . given the substantial flaws in [Plaintiffs'] experts' alleged cross-price elasticity studies, as illustrated by . . . Jena."). Jena's critiques focus mainly on Starr's methodology and data inputs. See Jena Rpt. ¶¶ 111, 114 (ECF No. 1090-1, at 60, 62). But his critiques occur at the margins of Starr's analysis, and they do not prevent the court from relying on Plaintiffs' abundant evidence showing cross-price elasticity only between Zetia and its AB-rated generic equivalents.

Regarding the natural experiments, Jena critiques Starr's use of aggregate date and any controls for market condition. See id. Jena asserts that Starr's analysis is thus "fundamentally flawed." Id. ¶ 111 (ECF No. 1090-1, **[*54]** at 60). But labeling something "flawed" is not the same as demonstrating it. In fact, while the minor adjustments Jena recommends might diminish the stark degree to which cross-price elasticity was lacking with other products, they would not cause Starr to find cross-price elasticity where there was none before. Cross-price elasticity must be substantial, not "small." *Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 612 n.31, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*; see also *SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1064 (3d Cir. 1978)* (requiring "significant positive cross-price elasticity" (emphasis added)).

Starr's decision to use aggregate data (as opposed to attempting to isolate new users of the drug) to reflect the "overall" market is also not misleading. Starr Rebut. ¶ 39 (ECF No. 1091-12, at 22-23); cf. Defs.' Opp'n (ECF No. 1146, at 49-51). The increased price sensitivity of "new" customers can certainly be relevant. See, e.g., *Solodyn, 2018 U.S. Dist. LEXIS 11921, 2018 WL 563144, at *41*. But the very definition of cross-price elasticity requires consideration of "old" customers. See *DuPont, 351 U.S. at 400* (discussing customers who "switch" products). Because aggregate data reflects all potential customers, "old" as well as "new," it is unlikely to be misleading in any analysis of relevant market. See Starr Rebut. ¶ 39 (ECF No. 1091-12, at 22-23).

Jena's critique of Starr's AIDS model fails to create material **[*55]** disputes of fact for similar reasons. Defendants criticize a variety of Starr's data inputs, see Defs.' Opp'n (ECF No. 1146, at 51-53), but fail to show how these adjustments could create more than "low" cross-price elasticity when none appeared initially. *Lundbeck, Inc., 650 F.3d at 1240* citing *H.J., Inc., 867 F.2d at 1538, 1540*. Defendants also criticize Starr's AIDS model for what they perceive are illogical results. See Defs.' Opp'n (ECF No. 1206, at 52). For example, they dislike Starr's characterization of statins as complements, not substitutes, for Zetia, when up to thirty-five percent of Zetia is prescribed as a monotherapy. See id.; Jena Rpt. ¶ 68 (ECF No. 1090-1, at 40-41). However, Plaintiffs have produced evidence that "Zetia is only used as a first-line treatment when statins are contraindicated," making them "not therapeutically interchangeable . . . . Miller Rebut. ¶ 100 (ECF No. 1199-5, at 45-46). Because Defendants' criticisms are based on perception, not proven contradiction,[14] they do not undermine Starr's AIDS model.

Lastly, Defendants claim that an HMT is inappropriate outside the Department of Justice's review of horizontal mergers. Defs.' Opp'n (ECF No. 1146, at 53). Plaintiffs cite *Victus, Ltd. v. Collezione Europa U.S.A., Inc., 26 F. Supp. 2d 772 (M.D.N.C. 1998)*, as endorsing the HMT in the antitrust **[*56]** context, Pls.' Reply (ECF No. 1206, at 44). This case, as well as others, appear to endorse application of the Horizonal Merger Guidelines to the product market definition. See *Victus, Ltd., 26 F. Supp. 2d at 785*; see also Pls.' Reply (ECF No. 1206, at 44 n.141) (citing cases). Defendants' other critiques of Starr's HMT are merely extensions of their other arguments (e.g., that Starr "fail[ed] to adequately control for non-price changes"), and therefore fail to create material disputes of fact for the same reasons. Defs.' Opp'n (ECF No. 1146, at 54-55).

It is also relevant that Defendants have not tried to exclude Starr. See Tr. 65:6-7 (ECF No. 1300, at 65). While Defendants argue that Starr made "a lot of mistakes," id. 65:5, they apparently concede that she is qualified to conduct these studies. Starr has extensive relevant education and expertise. Starr Rpt. ¶ 1 (ECF No. 1090-5, at 3). She has also "conducted economic and econometric analyses of . . . market definition" before, even testifying "on market definition in litigation alleging delayed generic entry" for another drug. Id. ¶ 3 (ECF No. 1090-5, at 34). Considering this, Jena's marginal critiques do not render her testimony unreliable.

Importantly, Starr's evidence **[*57]** does not present a marginal case or close call on relevant market. She analyzed at least six natural experiments, using reliable nation-wide sales figures, which demonstrate -- without exception -- that several of the supposed substitutes Defendants seek to include in the relevant market do not show any evidence of cross-price elasticity. See id. ¶¶ 82-90 (ECF No. 1090-5, at 52-58). And the AB-rated generic equivalents which were the target of the antitrust conduct alleged had profound price effects when they became available. Id. ¶ 82 (ECF No. 1095-5, at 53).

While this Report does not individually address every critique Defendants raise regarding Starr's work, after reviewing Jena's expert report in detail, I find it does not raise any criticism -- singly or in combination - that

[14] Defendants argue that the AIDS model also shows several statins as complements, but this comes from Jena's recalculations. *See* Defs.' Opp'n (ECF No. 1146, at 53).

undermines Plaintiffs' strong evidence of cross-price elasticity between only Zetia and its AB-rated generic equivalents. As the relevant market inquiry is a screening mechanism only, and cross-price elasticity is used to determine "whether an arrangement has the potential for genuine adverse effects on competition," this court is satisfied that Plaintiffs' evidence demonstrates that potential. *Dickson, 309 F.3d at 210* (quoting **[*58]** *Ind. Fed'n of Dentists, 476 U.S. at 460*).

iv. Defendants' Evidence Does Not Show Cross-Price Elasticity of Demand with Any Other Products.

Because Plaintiffs met their burden as the moving party to produce evidence sufficient to demonstrate entitlement to summary judgment on their part, Defendants must produce sufficient facts to show there is a genuine issue for trial. *Matsushita Elec. Indus. Co., 475 U.S. at 586-87*. Even considering Jena's opinion testimony, they cannot do so. There is no question that "Zetia competed in a broad, competitive market for cholesterol-lowering medications." Def. Opp'n (ECF No. 1146, at 33); see also id. at 31-33 (citing marketing actions). Merck contemplated the WAC price for other medications when pricing Zetia, Starr Dep. 129:10-15 (ECF No. 1144-11, at 9), considered discounting Zetia in relation to other medications, see, e.g., PX009 (ECF No. 1090-6, at 7), priced Zetia in line with other cholesterol medication, Jena Rpt. Ex. 6 (ECF No. 1090-1, at 155), and tracked prescription shares and volume for statins and non-statins, see, e.g., Defs.' Opp'n Ex. 21 (ECF No. 1147-9). But again, the target inquiry to define relevant market in an anti-trust case is not Defendants' competitive actions but their anti-competitive actions. See *Dickson, 309 F.3d at 210 (4th Cir. 2002)* (quoting **[*59]** *Ind. Fed'n of Dentists, 476 U.S. at 460 (1986)*). Evidence of ordinary competition in a broad market for cholesterol-lowering therapies is only relevant if the anti-trust conduct alleged, namely the Settlement Agreement, was alleged to confer monopoly power in that market. See id.; *It's My Party, Inc., 811 F.3d at 683* (quoting *Eastman Kodak Co., 504 U.S. at 469*).

Defendants' evidence, and particularly Jena's testimony, does not establish that Zetia had cross-price elasticity with any medication other than Zetia and its AB-rated generic equivalents. And Jena's testimony that Merck considered other drug prices or employed aggressive rebating strategies is simply evidence of ordinary competitive behavior -- none of which is alleged to have been targeted by the Settlement Agreement's term's, which Plaintiffs' allege delayed and limited generic competition for ezetimibe. See Jena Rpt. ¶¶ 79-90 (ECF No. 1090-1, at 45-51). Defendants argue that Jena considered cross-price elasticity, citing (1) findings of substitutability; (2) Jena's own-price elasticity of demand study; and (3) competition for formulary placement. Defs.' Opp'n (ECF No. 1146, at 59-60). None of this evidence demonstrates cross-price elasticity with respect to any other product. Instead, it shows only ordinary competition with other cholesterol-lowering **[*60]** medications.

Therapeutic substitutability is not the same as cross-price elasticity. Defendants argue that "an analysis of the relevant market necessarily must begin with an assessment of clinical alternatives for a given drug," emphasizing that "other cholesterol-lowering drugs were therapeutically substitutable with Zetia . . . ." Defs.' Opp'n (ECF No. 1146, at 37, 38). In 2010, several non-ezetimibe medications were available to treat high cholesterol, Fazio Rpt. ¶ 24 (ECF No. 1144-1, at 11-12), to which "Zetie's clinical effect is comparable . . . ." Talreja Rpt. ¶ 26 (ECF No. 1145-5, at 9); see also Fazio Rpt. ¶ 47 (ECF No. 1144-1, at 32) (noting that he "routinely considered whether to put patients on ezetimibe versus switching them to a more powerful statin"). For exactly this reason, Starr's series of natural experiments tested whether any of these therapeutically similar drugs constrained Zetia pricing above the competitive level. They did not. And Jena's report provides no empirical data to suggest that they did. "[S]omething more than mere therapeutic equivalency is required to define the relevant antitrust product market. There must be some showing of cross-price elasticity." **[*61]** *Lidoderm, 296 F. Supp. 3d at 1172* (emphasis in original).

Jena's own-price elasticity study similarly fails to prove cross-price elasticity because it is simply not the same measurement. Cross-price elasticity is intended to show "the responsiveness of the sales of one product to price changes of the other," and own-price elasticity has no inputs for non-Zetia drugs. *DuPont, 351 U.S. at 400*. Own-price elasticity also cannot help the fact finder determine market power "when market power is already being exercised" because supracompetitive prices are frequently sensitive to price increases. Starr Rebut. ¶ 77 (ECF No. 1091-12, at 44).

Lastly, formulary placement is not enough to show cross-price elasticity. Defendants place great weight on formulary placement as the key determining factor. See Tr. 47:9-12 (ECF No. 300, at 47) (arguing that "formulary competition . . . is the heart of competition"); id. 55:23-24 (ECF No. 300, at 55) (arguing that "the issue is the formulary competition"). But while other courts have discussed formulary placement, it is not determinative. See, e.g., *Fed. Trade Comm'n v. AbbVie Inc., 329 F. Supp. 3d 98, 131 (E.D. Pa. 2018)*, rev'd in part on other grounds, *976 F.3d 327 (3d Cir. 2020)* (cross-price elasticity undisputed); *Solodyn, 2018 U.S. Dist. LEXIS 11921, 2018 WL 563144, at *17* (mentioned as factual background only). Merck may have offered "significant rebates to ensure **[*62]** that it maintained its formulary status," but it is unclear from formulary status alone what "significant market share" would have been lost, and to which competitors. Defs.' Opp'n (ECF No. 1146, at 10).

Instead, seeking "preferred formulary placement" is an example of Merck (not the market) constraining Zetia's pricing. Defs.' Opp'n (ECF No. 1146, at 35). At least one court has reasoned that a manufacturer "increase[ing] its price concessions . . . does not necessarily show" cross-price elasticity but could also mean that Merck was "taking measures to increase the ultimate number of prescriptions" written. *Lidoderm, 296 F. Supp. 3d at 1175*. Merck's negotiations for "unrestricted" status support this conclusion. Jena Rpt. ¶ 83 (ECF No. 1090-1, at 47). Even if Merck "specifically attempted to negotiate a more favorable formulary placement as compared to" other cholesterol-lowering medications, and even if Merck "estimated" a profit from such a movement, this does not show cross-price elasticity in the relevant market targeted by the anti-trust conduct alleged. Defs.' Mem. (ECF No. 1146, at 47)). At most, this is ordinary competitive positioning.

Nowhere did Jena meaningfully address cross-price elasticity of demand. **[*63]** He admitted that he "did not compute an empirical figure for a cross-price elasticity." Jena Dep. 69:17-19 (ECF No. 1199-8, at 4); see also id. 283:10-14 (ECF No. 1199-8, at 5) (testifying he did "not estimate[] the cross-price elasticity between branded Zetia and generic ezetimibe to compare that cross-price elasticity with the cross-price elasticity of other products"). Although Defendants' brief emphasizes that Jena "[a]bsolutely" considered it, Defs.' Opp'n (ECF No. 1146, at 59) (quoting Jena Dep. 137:5-11 (ECF No. 1144-8, at 9)), their citations point only to Jena's labeling of his alternative analyses as evidence of cross-price elasticity. In fact, Jena's alternative analysis involves "how Merck was competing with the manufacturers of Crestor and Lipitor on price," which he then asserts "is essentially an analysis of cross-price elasticity," Jena Dep. 137:5-16 (ECF No. 1144-8, at 9) (emphasis added). Evidence of Merck's "internal projections" and corporate belief that Zetia participated in a broad market does not constitute evidence of cross-price elasticity necessary to define the relevant market in this anti-trust case; rather, this is more evidence of ordinary competition. **[*64]** Jena Rpt. ¶ 18 (ECF No. 1090-1, at 12-14).

Defendants contend that Jena's evidence should not be discounted simply because he uses a different economic analysis. Defs.' Opp'n (ECF No. 1146, at 46). Experts may "use[] a different economic analysis" that "explicitly considers the changes in effective pricing (i.e., accounting for coupons, discounts and rebates)" to describe cross-price elasticity of demand. *Solodyn, 2018 U.S. Dist. LEXIS 11921, 2018 WL 563144, at *9*. However, those experts still used some "models to examine how [the manufacturer]'s rebate programs and [the generic] 's launch impact[ed] the rate of new . . . prescriptions." Id. Jena provides no such alternative models.

Defendants are correct in asserting that they do not bear the burden of defining the relevant market on summary judgment. Defs.' Opp'n (ECF No. 1146, at 56); *Fed. R. Civ. P. 56*. However, Defendants refer repeatedly to the "total lipid" or "cholesterol-lowering" market, without identifying the specific drugs comprising these alternative relevant markets.[15] Defs.' Opp'n (ECF No. 1146, at 9). Not only would such a broad relevant market unfairly impede Plaintiffs, but Defendants' position indicates that the evidence does not support a narrow, workable relevant market without becoming too **[*65]** expansive and unwieldy for the current litigation. See *Int'l Wood Processors, 792 F.2d at 430* (quoting L. Sullivan, Handbook of the Law of Antitrust § 12, at 41 (1977)) (requiring "the narrowest market" with genuine competition); cf. *Times-Picayune Pub. Co., 345 U.S. at 612 n.31* ("For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range."). As such, Defendants' evidence fails to

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[15] Defendants provide some evidence of formulary placement for several specific medications (Crestor, simvastatin, and atorvastatin), claiming that it shows "significant cross-price elasticity between Zetia and these competitive cholesterol-lowering drugs." Defs.' Opp'n (ECF No. 1146, at 46-47). However, Defendants do not attempt to define the market as including only Zetia and these named drugs. In fact, Defendants' loose definition would seem to encompass drug and non-drug therapies.

create any dispute of material fact to overcome Plaintiffs' proof that the relevant market should be limited to Zetia and its AB-rated generic equivalents.

3. This is not a "single product" market.

Defendants accuse Plaintiffs of drawing the relevant market so narrowly that the relevant market is only the product itself. See Defs.' Opp'n (ECF No. 1146, at 7). ***Antitrust law*** permits a one-product market where the product is truly "unique" and "not interchangeable with [any] other product." *Queen City Plaza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 439 (3d Cir. 1997)*; *Eastman Kodak Co., 504 U.S. at 481-82* (allowing single-product markets). However, even if single-product markets were wholly impermissible, I do not agree that Zetia and its AB-rated generic equivalents constitute a single product.

When an item is sold by multiple manufacturers, each of the manufacturer's products constitute a separate product for this inquiry. See *Xerox Corp. v. Media Scis. Int'l, Inc., 511 F. Supp. 2d 372, 384 (S.D.N.Y. 2007)*. Plaintiffs define the relevant **[*66]** market as including all Zetia's AB-rated generic equivalents, which includes ezetimibe produced by all the generic drug makers eligible to produce it. Pls.' Reply (ECF No. 1206, at 39-40). Leaving aside the undisputed evidence that "multiple generics" entered the market after Glenmark's exclusivity period ended, Starr Rpt. ¶ 49 (ECF No. 1090-5, at 29), Zetia and Glenmark's generic would be sufficient to render the market broader than a single product.

4. This Recommendation Does Not Impermissibly Take the Issue Away from the Jury.

Defendants emphasize that "market definition is a highly complex and fact-laden question not susceptible to summary judgment." Defs.' Opp'n (ECF No. 1146, at 7); see also Tr. 39:18-20 (ECF No. 1300, at 39) (arguing that "all" cited "summary judgment decisions" find "that market power is a factual issue" for the jury). Indeed, courts have observed that generally "[t]he determination of a relevant product market . . . is a highly factual one best allocated to the trier of fact." *Intell. Ventures I LLC, 280 F. Supp. 3d at 701* (quoting *Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 199 (3d Cir. 1992)*). But these were not pharmaceutical patent cases where the anti-trust conduct alleged involved allegations that the patent holder sought to pay a generic competitor to prolong **[*67]** a patent monopoly. See *Actavis, Inc., 570 U.S. at 54* (analogizing reverse payments to "a purchase by the patentee of the exclusive right to sell its product, a right it already claims but would lose if the patent litigation were to continue"). The Supreme Court held such restraints have the potential for genuine adverse effects on competition, in part because "where a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely possesses the power to bring that harm about in practice." *Id. at 157*.

Plaintiffs can obtain summary judgment if they produce evidence entitling them to a directed verdict. See *Celotex Corp., 477 U.S. at 331*. Plaintiffs have met this burden. See supra. Defendants are therefore required to show more than "a scintilla of evidence" disputing Plaintiffs' evidence. *Anderson, 477 U.S. at 252*. Defendants have failed to meet this burden. See supra. Therefore, no matter how "hotly disputed" the facts have been in other relevant market cases, they are not so here. *Intell. Ventures I LLC, 280 F. Supp. 3d at 701*.

This recommendation, if adopted, does not decide the entire matter. Its extent is that "for the trial of the case," the relevant market is Zetia and its AB-rated generic equivalents. *J.E. Dunn Constr. Co., 115 F. Supp. 3d at 599* (quoting Rotorex Co., F. Supp. 2d at 571). Issues are thus "narrow[ed] . . . to those over which there is genuine dispute **[*68]** of material fact." Id. Under the facts in this record, "there was really never any controversy" over market definition, and any prolonged trial on the issue "would tend to confuse and complicate [this] lawsuit." *In re Norfolk, Balt. & Carolina Line, Inc., 478 F. Supp. at 386* (quoting *Lucia Steel, 9 F.R.D. at 481*)). As Plaintiffs have argued, deciding market power would take "days of testimony of highly intricate economic analysis," when the issue is not genuinely disputed. Tr. 12:2-6 (ECF No. 1300, at 12). Removing market definition as a triable issue will allow the jury to focus on many other matters genuinely disputed here.[16]

IV. RECOMMENDATION

For the foregoing reasons, this Report RECOMMENDS that the district court DENY Plaintiffs' Motion to exclude the proposed testimony of Dr. Anupam B. Jena (ECF Nos. 1066, 1070) and GRANT Plaintiffs' partial motion for summary judgment concerning the relevant market (ECF Nos. 1077, 1080).

V. REVIEW PROCEDURE

By copy of this Report and Recommendation, the parties are notified that pursuant to *28 U.S.C. § 636(b)(1)(C)*:

1. Any party may serve upon the other party and file with the Clerk written objections to the foregoing findings and recommendations within fourteen (14) days from the date of mailing of this Report to the objecting party, *28 U.S.C. § 636(b)(1)(C)*, computed pursuant to **[*69]** *Rule 6(a) of the Federal Rules of Civil Procedure*. A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof.

2. A district judge shall make a de novo determination of those portions of this report or specified findings or recommendations to which objection is made.

The parties are further notified that failure to file timely objections to the findings and recommendations set forth above will result in waiver of right to appeal from a judgment of this court based on such findings and recommendations. *Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*; *Carr v. Hutto, 737 F.2d 433 (4th Cir. 1984)*; *United States v. Schronce, 727 F.2d 91 (4th Cir. 1984)*.

/s/ Douglas E. Miller

United States Magistrate Judge

DOUGLAS E. MILLER,

UNITED STATES MAGISTRATE JUDGE

Norfolk, Virginia

November 1, 2021

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[16] For example, even with partial summary judgment in their favor, Plaintiffs still bear the burden of proving the existence of a reverse payment, whether any procompetitive benefits outweigh harms, and whether the unlawful conduct caused Plaintiffs injury. See *Actavis, 570 U.S. at 147-56*.

Nimbus Therapeutics, LLC v. Celgene Corp.

United States District Court for the Southern District of New York

November 8, 2021, Decided; November 8, 2021, Filed

21-cv-6850 (JSR)

Reporter
570 F. Supp. 3d 100 *; 2021 U.S. Dist. LEXIS 215305 **

NIMBUS THERAPEUTICS, LLC and NIMBUS LAKSHMI, INC., Plaintiffs & Counter-Defendants, -v- CELGENE CORP. and BRISTOL-MYERS SQUIBB CO., Defendants & Counter-Claimants.

Prior History: *Nimbus Therapeutics, LLC v. Celgene Corp., 2021 U.S. Dist. LEXIS 198588 (S.D.N.Y., Oct. 14, 2021)*

Core Terms

terminate, Merger, succeed, covenants, anti trust law, assign, Counterclaims, specific performance, antitrust, breached, acquire, inhibitor, parties, allosteric, preliminary injunction, pharmaceutical company, argues, acquisition, notice, assignment provision, cooperate, rights, injunction, purported, prevail, merits, anticompetitive, deucravacitinib, unilaterally, entitles

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

Contracts Law > Remedies > Election of Remedies

Business & Corporate Compliance > ... > Contracts Law > Breach > Nonperformance

HN1[] **Standards of Performance, Discharge & Termination**

Anticipatory repudiation occurs when, before the time for performance has arisen, a party to a contract declares his intention not to fulfill a contractual duty. The Second Circuit has held that under New York contract law, when confronted with an anticipatory repudiation, the non-repudiating party has two mutually exclusive options. He may (a) elect to treat the repudiation as an anticipatory breach and seek damages for breach of contract, thereby terminating the contractual relation between the parties, or (b) he may continue to treat the contract as valid and await the designated time for performance before bringing suit. The non-repudiating party must make an affirmative election, because it cannot at the same time treat the contract as broken and subsisting, for one course of action excludes the other. Once a party has elected a remedy for a particular breach, his choice is binding with respect to that breach and cannot be changed. When a party elects to treat the contract as valid and await the designated time for performance before bringing suit, it remains entitled to performance.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN2[] Injunctions, Preliminary & Temporary Injunctions

A party seeking a preliminary injunction must ordinarily establish (1) irreparable harm; (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party; and (3) that a preliminary injunction is in the public interest.

Civil Procedure > Remedies > Injunctions > Mandatory Injunctions

HN3[] Injunctions, Mandatory Injunctions

Confusion in breach of contract cases as to whether an injunction is mandatory or prohibitory may stem from the meaning of status quo. A plaintiff's view of the status quo is the situation that would prevail if its version of the contract were performed. A defendant's view of the status quo is its continued failure to perform as the plaintiff desires. To a breach of contract defendant, any injunction requiring performance may seem mandatory.

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

HN4[] Contract Conditions & Provisions, Conditions Precedent

Notice-and-cure provisions are generally enforced. Under New York law, where the contract specifies conditions precedent to the right of cancellation, the conditions must be complied with.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

HN5[] Standards of Performance, Discharge & Termination

Under New York law, a terminating party's failure to afford contractually-required notice and cure is excusable as futile only in limited circumstances. Among these are where the non-performing party (1) expressly repudiates the parties' contract or (2) abandons performance thereunder.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

HN6[] Standards of Performance, Discharge & Termination

Where a contract includes a termination provision setting forth certain procedures for the contract's cancellation, including a requirement for notice and an opportunity to cure, the general rule is that a party asserting nonperformance must afford a defaulting party any contractually-secured opportunity to cure prior to terminating a contract. Applying the clear New York rule requiring termination of a contract according to its terms, where a termination provision requires 30-day notice and an opportunity to cure an alleged breach. New York law is also clear that freedom of contract prevails in an arm's length transaction between sophisticated parties, and in the absence of countervailing public policy concerns there is no reason to relieve them of the consequences of their bargain. Courts will not rewrite contracts that have been negotiated between sophisticated, counseled commercial entities.

Business & Corporate Compliance > ... > Contract Conditions & Provisions > Waivers > Continued Performance

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Rescission

HN7[] **Waivers, Continued Performance**

It is well established in New York law that a party can waive any right to rescind a contract on a theory of breach when the allegedly injured party has failed to promptly assert its claim: Where a party to a contract asserts a right to rescind for breach of contract there can be no rescission where the breach of contract has been waived by the party who has been wronged; and, as a matter of law, right to rescind must be exercised promptly after the injured party learns of the wrong. Acceptance of benefit under the contract with knowledge of the wrong constitutes a waiver of the wrong. Notice of rescission for wrong which has been waived is, of course, a futile act. Recognition that the contract is still in force may prove such abandonment and constitute a waiver of a previous breach.

Business & Corporate Compliance > ... > Contract Conditions & Provisions > Waivers > Continued Performance

HN8[] **Waivers, Continued Performance**

Since waiver of a contract right must be proved to be intentional, the defense of waiver requires a clear manifestation of an intent by the party asserting breach to relinquish her known right and mere silence, oversight, or thoughtlessness in failing to object to a breach of the contract will not support a finding of waiver. And while intent to waive is usually a question of fact, knowing acceptance of payment without any effort to terminate justifies an inference that the contract remains in force.

Business & Corporate Compliance > ... > Contracts Law > Breach > Material Breach

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Substantial Performance

HN9[] **Breach, Material Breach**

Under New York law, a party's performance under a contract is excused where the other party has substantially failed to perform its side of the bargain or, synonymously, where that party has committed a material breach. Recission is therefore not permitted for a slight, casual, or technical breach, but, as a general rule, only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract.

Contracts Law > Remedies > Specific Performance

HN10[] **Remedies, Specific Performance**

Specific performance is an equitable remedy for a breach of contract, rather than a separate cause of action.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

HN11[] **Standards of Performance, Discharge & Termination**

The Second Circuit has recognized that a party's purported termination that does not follow contractually secured, applicable termination procedures may itself constitute an independent breach of the contract.

Contracts Law > Remedies > Specific Performance

HN12[] **Remedies, Specific Performance**

Under New York law, specific performance may be ordered where no adequate monetary remedy is available and that relief is favored by the balance of equities, which may include the public interest. There is no adequate monetary remedy and so specific performance is a proper remedy where the subject matter of the particular contract is unique and has no established market value, so the claimant would have difficulty in proving damages with reasonable certainty.

Antitrust & Trade Law > Sherman Act > Claims

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN13[] **Sherman Act, Claims**

To prove that a contract violates Section 1 of the Sherman Act, a plaintiff must establish (1) a contract, combination, or conspiracy exists that (2) unreasonably restrains trade. The Second Circuit presumptively applies the rule of reason analysis to determine whether contracts unreasonably restrain trade. The rule of reason analysis therefore requires a plaintiff to demonstrate that the particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful. Rule of reason analysis employs a burden-shifting framework: A plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market. After a prima facie case of anticompetitive conduct has been established, the burden shifts to the defendant to proffer procompetitive justifications for the agreement. Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means.

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

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

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

HN14[] **Actual Monopolization, Claims**

A Section 2 of the Sherman Act monopolization claim requires a plaintiff to establish (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. An attempted monopolization under Section 2 requires a plaintiff to prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

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

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN15[] **Clayton Act, Claims**

Section 7 of the Clayton Act prohibits a transaction if its effect may be substantially to lessen competition in any product or geographic market. Section 7 claims are generally analyzed under a three-step burden shifting framework. At the first step, a plaintiff establishes a prima facie case by showing that the transaction will significantly increase market concentration, thereby creating a presumption that the transaction is likely to substantially reduce competition. The defendant may then rebut that presumption by undermining the prediction of future anticompetitive effect; if this rebuttal succeeds, the plaintiff has a last-ditch effort to persuade the court that the transaction will substantially harm competition.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN16[] **Grounds for Injunctions, Irreparable Harm**

A party seeking a preliminary injunction must demonstrate both that it will suffer an irreparable injury if the injunction does not issue and that it will lack adequate remedies at law to redress those injuries.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN17[] **Injunctions, Preliminary & Temporary Injunctions**

For injunction purposes, even if damages are adequate in other respects, they will be inadequate if they cannot be collected by judgment and execution.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN18[] **Injunctions, Preliminary & Temporary Injunctions**

The final requirement is that issuance of the preliminary injunction would be in the public interest. There is a well-recognized public interest in enforcing contracts and upholding the rule of law. This is particularly true where the contract involves sophisticated counterparties who engaged in actual negotiation over the provisions at issue.

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Judges: JED S. RAKOFF, United States District Judge.

Opinion by: JED S. RAKOFF

Opinion

[*106] OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.:

Before the Court is the motion of Defendants and Counter-Claimants Celgene Corporation ("Celgene") and Bristol-Myers Squibb Company ("BMS") for a preliminary injunction. On October 14, 2021, the Court issued a short, "bottom-line" order granting Celgene and BMS's motion. That order preliminarily enjoined Plaintiffs and Counter-Defendants Nimbus Therapeutics, LLC and Nimbus Lakshmi, Inc. (collectively, "Nimbus") from selling, transferring, encumbering, or otherwise disposing of, in part or in whole, Nimbus Lakshmi or the intellectual property assets Nimbus Lakshmi holds that are associated with the allosteric Tyk2 inhibitor drug that Nimbus has developed with financing and assistance from Celgene. The order also prohibits Celgene from making any assignment of its right to purchase Nimbus Lakshmi or the intellectual property assets it holds. In this Opinion and Order, the Court sets forth its reasoning in detail for these determinations.

I. Factual Background

A. Nimbus and Celgene Create a Tyk2 Research & Development Partnership

Nimbus **[**3]** Therapeutics LLC is a biotechnology company that identifies molecules which have promise to become clinically significant drugs. It then seeks to partner with large, established pharmaceutical companies to develop the molecules, run clinical trials, obtain regulatory approval, and commercialize each drug candidate. Celgene is a large pharmaceutical company with a broad portfolio of clinical drugs. Celgene became a wholly-owned subsidiary of BMS in a 2019 merger transaction.

Celgene has entered two research and development ("R&D") partnerships with Nimbus related to two different drug candidates, one of which is unrelated to this suit and turned out to be unsuccessful after Celgene provided Nimbus with $25 million in R&D funding. ECF 15 ("Counterclaims") ¶ 37.[1] Through these **[*107]** partnerships, Celgene provides Nimbus both financing for its R&D efforts and its expertise on research, clinical trials, and pharmaceutical commercialization.

The drugs at issue in this case are allosteric inhibitors[2] of the tyrosine kinase 2 ("Tyk2"), which is an enzyme that mediates signaling in immune cells. Genetic studies have shown that reduction in Tyk2 activity reduces downstream immune signaling in a manner **[**4]** that can be protective in certain autoimmune and inflammatory diseases. ECF 1 ("Compl.") ¶ 18. Allosteric Tyk2 inhibitors therefore have promise as treatments for various rheumatological conditions including moderate-to-severe psoriasis, and they may be effective against other autoimmune conditions such as lupus and irritable bowel syndrome. Id. ¶ 2. Neither the Food and Drug Administration nor any other drug regulator has yet approved a Tyk2 inhibitor. Id. ¶¶ 18-23. Celgene previously owned the dominant oral treatment for moderate-to-severe psoriasis, Otezla (generic name, apremilast), which was launched in 2014. Id. ¶ 3. Once commercialized, allosteric Tyk2 inhibitors are expected to "erode virtually all of apremilast's sales." Id. ¶ 23.

In 2015, BMS began developing a new allosteric Tyk2 drug, deucravacitinib, and in April 2021 BMS announced that deucravacitinib had successfully completed phase 3 clinical trials. Id. ¶ 20. While other pharmaceutical companies had Tyk2 R&D programs, no companies other than BMS and Nimbus are expected to commercialize a competitive allosteric Tyk2 inhibitor, because the time to generic competition (and therefore reduced profits) will begin **[**5]** running once deucravacitinib is approved for use. Id. ¶ 21.

Celgene responded in 2017 to the threat of competition to apremilast by entering the Tyk2 R&D partnership with Nimbus to develop a Tyk2 inhibitor to compete with BMS's deucravacitinib. Id. ¶¶ 2-4. Celgene ultimately made two payments totaling almost $55 million to finance Nimbus's Tyk2 R&D: a $39.9 million upfront payment and a $15 million payment made in December 2019 following the FDA's acceptance of an Investigational New Drug Application submitted by Nimbus. Declaration of Elizabeth Mily ("Mily Decl.") ¶ 8, ECF 18; Ex. 1 to Mily Decl. ¶ 2.1(a) ("Warrant"). This collaboration was controlled by a Joint Steering Committee, the rules of which allegedly provide for Nimbus to retain ultimate control over the Tyk2 R&D program. Counterclaims ¶ 49.

a. **The Warrant**

The Nimbus-Celgene collaboration is governed by several interlocking contracts. The crucial contract for the present dispute is the Warrant, which took effect on September 21, 2017, governs the financial relationship between the companies, and provides for Celgene's option to acquire the Tyk2 assets. Specifically, the Warrant provides Celgene with the right to acquire the **[**6]** equity of the special purpose vehicle created to hold the intellectual property associated with the Tyk2 assets, plaintiff Nimbus Lakshmi. Mily Decl. ¶ 5. This purchase would be effected by Celgene purchasing 100% of Nimbus Lakshmi's Series B voting shares for $400 million after the earlier of (1) Nimbus completing **[*108]** its first Phase 1B clinical trial[3] or (2) the sixth anniversary of the Warrant's

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[1] Unless otherwise specified, all internal quotation marks, citations, omissions, alterations, and emphases are omitted from all sources cited herein.

[2] "Allosteric" regulation of an enzyme refers to the biochemical process of increasing or inhibiting an enzyme's activity through the binding of an effector molecule at a specific site on the enzyme other than the active site, which is the location on the enzyme where a substrate binds so the enzyme can trigger a chemical reaction. "Allosteric," OED Online, (June 2019), https://www.oed.com/view/Entry/5426.

issuance. Id. ¶ 9; Warrant §§ 1.1, 2.2(a)). Nimbus completed Phase 1B clinical trials on May 4, 2021 and sent Celgene a "Warrant Trigger Data Package" that same day containing data including the Phase 1B trial results, as contractually required. Counterclaims ¶¶ 75-77. This action triggered the following set of deadlines under the Warrant, as alleged by Celgene and BMS: Id. ¶ 78.

- June 1, 2021: Celgene to deliver Notice of Interest
- June 24, 2021: Numbus to deliver Financial and Diligence Packages
- August 27, 2021: Diligence period ends
- September 3, 2021: Nimbus delivers Update and Tender Package
- October 11, 2021: Review Period ends and Celgene must deliver notice of exercise
- February 11, 2022: Termination Date & Deadline for closing Transaction.

The Warrant (and federal ***antitrust law***) prohibits **[**7]** Celgene from closing on an acquisition of Nimbus Lakshmi unless the FTC has cleared the transaction under the HSR Act or allowed the HSR Act's waiting period to expire following the parties' satisfaction of the Second Request. Opp. 4; Warrant § 8.1(c). While parties seeking HSR Act approval have an incentive to quickly comply with a Second Request if they want to consummate the proposed transaction, neither the HSR Act nor the FTC sets a deadline for compliance. Nimbus avers that under the Warrant, if all closing conditions other than HSR Act approval or expiration of the HSR Act waiting period have been satisfied by the Termination Date (120 days after Celgene provides a written notice of exercise), then Celgene may unilaterally extend the Termination Date for an additional 360 days, to October 6, 2022. Opp. 5; Warrant § 10.1(e).

The Warrant generally prohibits nonconsensual assignment of rights and obligations. Mily Decl. ¶ 13; Warrant § 11.2(a). But Celgene may unilaterally assign its rights to "a Third Party in the pharmaceutical industry with financial resources and capabilities greater than or substantially similar to those of Celgene" when "a Governmental Authority shall have **[**8]** issued a [Hart-Scott-Rodino Act (HSR Act) Second Request to either Nimbus or Celgene] in connection with this Warrant." Id. ¶ 15; Warrant § 11.2(a)(iii)(z). Celgene and BMS allege that during the 2017 negotiations over the Warrant, Nimbus initially rejected Celgene's proposed assignment clause that provided it with the unilateral right to assign its Warrant rights following a Second Request; but Celgene ultimately prevailed on this point, and the assignment right was included as a hedge against the risk that the Celgene's acquisition of the Tyk2 assets would draw antitrust scrutiny. Counterclaims ¶¶ 34-36.

Article X provides for the parties to terminate the Warrant. In general, Celgene can unilaterally terminate the Warrant at any time (or let it expire without exercise). Warrant § 10.1(a). The parties may also terminate the Warrant on mutual written consent. Warrant § 10.1(b). The Warrants also terminates if a court or governmental authority issues a ruling or order that permanently prohibits the transaction from closing. Id. § 10.1(d). Finally, **[*109]** Nimbus may unilaterally terminate the Warrant:

> upon a material breach of any representation, warranty, covenant, or agreement on the part of Celgene **[**9]** set forth in this Warrant ... or if any representation or warranty of Celgene shall have become materially untrue, in either case such that the conditions set forth in [the closing conditions] would not be satisfied as of the time of such breach or as of the time such representation or warranty shall have become untrue.

Id. § 10.1(c). However, "if such inaccuracy in Celgene's representations and warranties or breach by Celgene is curable by Celgene prior to the Warrant Expiration Date through the exercise of reasonable efforts, then the Company may not terminate this Warrant ... prior to 30 days following the receipt of written notice from the Company to Celgene of such breach," during which time Celgene may attempt to cure the alleged breach. Id.

Among the warranties and covenants to which Celgene agreed is a commitment to comply with applicable law:

> The execution and delivery of this Warrant and the other Transaction Agreements and the consummation of the transactions contemplated hereby, will not ... (b) violate any Applicable Law or Court Order applicable to

[3] "Phase 1B clinical trials are human clinical trials of a drug aimed at determining the safety and tolerability of the drug following repeat dosing in patients." Counterclaims ¶ 74.

> Celgene, in each case, solely to the extent that such breach or violation would have a material adverse impact on Celgene's **[**10]** ability to consummate the transactions contemplated hereby.

Id. § 5.2(b). Nimbus and Celgene further covenanted to "coordinate and cooperate with one another and shall each use commercially reasonable efforts to comply with, and shall each refrain from taking any action that would impede compliance with, all Applicable Laws." Id. § 6.8(a). The Warrant provides that "'Applicable Law' shall mean any applicable federal, state, local or foreign law (including common law), statute, ordinance, rule, regulation or Court Order." Id. § 1.1. Nimbus argues that the obligation to comply with "Applicable Law" therefore includes the duty to comply with federal antitrust laws, Compl. ¶¶ 37-39, which Celgene and BMS do not dispute.

B. **BMS Acquires Celgene**

On January 3, 2019, BMS and Celgene announced that they had signed a merger agreement by which BMS would acquire Celgene for $74 billion (the "Merger"). Counterclaims ¶ 58. The Merger was subject to antitrust review by the FTC under the HSR Act. The FTC investigated the Merger's effects on competition, and this investigation addressed Celgene's rights to Nimbus's Tyk2 asset under the Warrant and BMS's own Tyk2 inhibitor, deucravacitinib. Id. ¶ 60. The **[**11]** FTC ultimately approved the merger, with the commissioners voting 3-2 on November 15, 2019 to approve a consent agreement in which Celgene and BMS would divest Celgene's worldwide Otezla (apremilast) business to Amgen, another pharmaceutical company. Id. ¶ 66.[4] The Merger closed on November 20, 2019, and Celgene became a wholly owned subsidiary of BMS. Id. ¶ 67.

[*110] Nimbus and Celgene continued their collaborative Tyk2 R&D program following the Merger, though the parties dispute whether and how the Merger effected the companies' relationship. Nimbus has submitted a declaration from its chief executive officer, Jeb Keiper. See ECF 23 ("Keiper Decl."). Keiper has been CEO of Nimbus since October 2018 and previously worked as its chief financial officer (2017-2018) and chief business officer (2014-2017). Id. ¶ 1. Keiper recounts a series of communications with Celgene by email and phone following the Merger announcement, which he describes as "attempts to solicit an agreement to terminate the [Warrant] once the BMS acquisition of Celgene was complete." Id. ¶ 4.

For instance, on Friday November 15, 2019 (the same day the FTC voted to approve the Merger), Keiper emailed Rupert Vessey at Celgene, **[**12]** writing:

> Just a courtesy note to let you know that our Tyk2 IND for NDI-034858 has been filed with FDA. As you know FDA have 30 calendar days to review and get back to us if any comments.... As I shared with you in summer, our understanding of the situation is that once the merger with BMS is finally closed shortly, you will have two Tyk2 compounds in clinical development as well as preclinical backups inside BMS beyond that. Given that, Nimbus understands and appreciates the 'need' for a Tyk2 has changed radically for you since we first did the deal in 2017, and **we would much prefer to have the rights back to the program and progress ourselves, avoiding the tension of engaging regularly with a fierce competitor that has a massive head start**. Please appreciate that we recognize the difference between the strategic position now and the people involved — we really love working with your teams, and have such fondness and respect for them, and frankly are sad that this period of positive engagement on Tyk2 is ending, but we remain buoyed by the opportunity of continuing to engage with HPK1, where any competitive efforts are likely much more parallel, and much better suited for collaboration. **[**13]**

ECF 23-2 at 3 (emphasis added).Vessey responded by email that "[w]e have a process in place with BMS to address the questions below." Id. at 2.

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[4] Each side quotes from various statements issued by FTC Commissioners in connection with this vote. None is dispositive and it is black letter law that the FTC's decision to settle and not to file a complaint seeking to block the merger does not establish that the merger was lawful under the Sherman and Clayton Acts. See *15 U.S.C. § 45(e)* ("No order of the Commission or judgement of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.").

Keiper describes his communication as "ask[ing] ... to terminate the relationship," Keiper Decl. ¶ 5, a characterization not wholly supported by the email quoted above. Celgene and BMS have submitted a declaration from Vessey explaining that he took the email "as a means to seek a dialogue to discuss and evaluate the parties' relationship post-BMS's acquisition of Celgene." Declaration of Rupert Vessey, ECF 26 ¶ 4. Vessey further explains that he "had additional conversations with Mr. Keiper" after that email and that he does not believe Keiper ever "purported to terminate the Warrant, claimed that Celgene had already violated ***antitrust law*** through its acquisition by BMS or had somehow already breached the Warrant," though Keiper "may have encouraged Celgene to voluntarily agree to terminate the Warrant" in view of potential FTC scrutiny should Celgene seek to acquire Nimbus Lakshmi. Id. ¶ 5. While Keiper also reports that Celgene and BMS cancelled the December 3, 2019 quarterly meeting of the Nimbus-Celgene Joint Steering Committee governing **[**14]** the Tyk2 collaboration, Keiper Decl. ¶ 5, subsequent Steering Committee meetings did occur, see Mily Decl. ¶ 29.

In December 2019, Celgene sent Nimbus the $15 million payment required within 10 days of the FDA's acceptance of Nimbus's Investigational New Drug Application. See Mily Decl. ¶ 26; Warrant § 2.1(a)(ii). **[*111]** Nimbus accepted the $15 million payment. Id. ¶ 27.

Then, on February 12, 2020, Celgene emailed Nimbus a list of three BMS employees with access to confidential information about BMS's deucravacitinib, who would be screened from information about Nimbus's allosteric Tyk2 inhibitor research. See id. ¶ 28; Ex. 6 to Mily Decl. Nimbus's vice president for business development wrote that Nimbus had "no objections" to this arrangement. See id.

Keiper also highlights a pair of conversations he had with Dr. Giovanni Caforio, the chief executive officer of BMS. First, on March 27, 2020, Keiper states that he "raise[d his] concerns about the risk of uncertainty for Nimbus" and that Nimbus's position was that if deucravacitinib was "successful in its Phase 3 trials ... the Warrant certainly needed to be terminated." Keiper Decl. ¶ 6. In his own declaration, Caforio denies that Keiper ever **[**15]** "purport[ed] to terminate the Warrant" or "assert that [the Merger] was itself an antitrust violation" or "a breach of the Warrant." Declaration of Dr. Giovanni Caforio, ECF 25 ¶ 5.

Finally, on February 3, 2021, Keiper and Caforio held a video call following BMS's announcement that deucravacitinib had successfully completed Phase 3 trials. Implicitly conceding that he had not previously done so, Keiper states that in this video call he "explicitly asked Dr. Caforio to terminate the relationship amicably." Keiper Decl. ¶ 9. Keiper reports that Caforio insisted on leaving the Warrant in place and that BMS would review Nimbus's Phase 1B trial results before deciding how to proceed. Id. ¶ 9. Caforio describes the conversation similarly. He recalls Keiper expressing doubts that the FTC would clear BMS to acquire Nimbus Lakshmi and "asked if Celgene would agree to give the molecule back to Nimbus," a request Caforio said he declined. Caforio Decl. ¶ 6. Caforio also recalls that Keiper "did express some concern about sharing the Phase 1b data with BMS, claiming BMS was a competitor." Id. ¶ 7. But Caforio denies that Keiper ever "purport[ed] to terminate the Warrant" or "claim[ed] that BMS's **[**16]** acquisition of Celgene was itself an antitrust violation" or "a breach of the Warrant." Id.

C. **Celgene Seeks to Exercise the Warrant**

Celgene delivered Nimbus the Notice of Interest on June 1, as required by the Warrant's timetable. Counterclaims ¶ 80. As part of this process, BMS has demanded access to review Nimbus's Tyk2 confidential business information, including sensitive research data, which Nimbus alleges BMS could use to harm Nimbus's ability to compete. The FTC subsequently issued an HSR Act Second Request, and the parties have apparently cooperated in responding to the Second Request. The parties adhered to the Warrant's other deadlines until August 13, 2021, when Nimbus delivered a letter to Celgene purporting to unilaterally terminate the Warrant on the ground that Celgene had breached its covenants and representations in the Warrant. See Ex. 10 to Mily Decl., ECF 18-10 ("August 13 Letter"). Nimbus filed this lawsuit the same day.

In the August 13 Letter, Nimbus cited Celgene's covenant not to "'violate any Applicable Law [including federal antitrust **[*112]** laws] ... solely to the extent that such breach or violation would have a material adverse impact on Celgene's ability to consummate **[**17]** the transactions contemplated hereby'" and Celgene's covenant to "'use commercially reasonable efforts to comply with, and [] refrain from taking any action that would impede compliance with, all Applicable Laws [including federal antitrust laws].'" Id. at 2 (quoting Warrant §§ 5.3, 6.8 (alterations in original)). Nimbus argued both that the 2019 merger of BMS and Celgene violated federal antitrust laws, because BMS controlled deucravacitinib, Nimbus's main competitor in the nascent market for allosteric Tyk2 inhibitors, and also that Celgene's exercise of the Warrant violated federal antitrust laws because it would allow Celgene and BMS to monopolize the allosteric Tyk2 inhibitor market. Id. at 3. Nimbus contends the August 13 Letter immediately terminated the Warrant. Celgene and BMS argue that Nimbus failed to terminate the Warrant, because Warrant § 10.1(c) requires that unless the alleged breach was incurable, Nimbus must provide Celgene with 30 days' notice and an opportunity to cure. Rather, Celgene and BMS allege that the August 13 Letter constitutes a breach of the Warrant by Nimbus. Counterclaims ¶¶ 118-129.

October 11, 2021, the day before argument was held on this motion, **[**18]** was Celgene's deadline under the Warrant to deliver a "notice of exercise." Id. ¶ 78. At argument, Celgene and BMS's counsel explained that Celgene had not delivered a notice of exercise by the October 11, 2021 deadline. Rather, in light of Nimbus's purported termination of the Warrant, Celgene "sent a letter on Friday, ... before that deadline, saying that we're reserving our rights with respect to that deadline" because Nimbus's counsel had previously indicated that it was "not intending to honor [Celgene's] notice of exercise." Tr. 3-4.

II. Procedural Posture

Nimbus filed its Complaint on August 13, 2021, the same day it purported to terminate the Warrant. The Complaint alleged essentially the same theory Nimbus outlined in its August 13 Letter and sought termination of the Warrant, an injunction prohibiting Celgene's exercise of the Warrant, and antitrust damages arising from the Merger and other conduct. ECF 1. Celgene and BMS then filed counterclaims on September 15, 2021, alleging, inter alia, that Nimbus's anticipatory repudiation of the Warrant was both ineffective and constituted breach and seeking specific performance of the assignment provision. ECF 15. Celgene and BMS simultaneously **[**19]** filed this motion for a preliminary injunction. ECF 16.

The Motion asks the Court to preserve the status quo by "preliminarily enjoining Nimbus from taking any actions inconsistent with the Warrant, including but not limited to, selling or otherwise transferring interests in the Tyk2 Asset or Nimbus Lakshmi to third parties, and tolling the time for Celgene or its assignee to exercise the Warrant from the date when Nimbus Lakshmi unilaterally claimed that the Warrant was terminated on August 13, 2021, through the pendency of this litigation." Mot. 25. In its opposition, Nimbus argues that the language of the requested injunction is vague and states that it has "no present interest to sell or transfer its allosteric TYK2 asset and [is] prepared to stipulate as such through the trial ready date," which is currently February 17, 2022. Opp. 2; ECF 19 at 1. However, the parties confirm that no such stipulation has been reached. See Reply 5 n. 7. Celgene and BMS, for their part, maintain that their objective is to preserve their entitlement to assign Celgene's purchase right under the Warrant after the conclusion of this litigation.

III. Validity of the Warrant

As a threshold matter, Nimbus **[**20]** argues that Celgene and BMS cannot obtain a preliminary injunction because Nimbus purports to have terminated the Warrant **[*113]** through its August 13, 2021 letter. Therefore, Nimbus argues, a preliminary injunction would involve "changing the status quo" by "effectively locking up Nimbus's asset until this litigation is over" through reimposition of contractual duties. Opp. 8. "The Court cannot enjoin the termination that has already happened," Nimbus contends, and "revival of the Warrant is not a remedy that can or should be granted on a motion for preliminary injunction." Id.

But the Court is not so constrained. Whether Nimbus's August 13 Letter was effective in terminating the contract depends in part on whether Nimbus was justified in asserting that Celgene had incurably and materially breached its covenants. See Warrant § 10.1(c). That is a dubious proposition for reasons explained further below. As Celgene and BMS argue, Nimbus's August 13 Letter amounts to an anticipatory repudiation of the Warrant. See Reply 4. ***HN1***[] "Anticipatory repudiation occurs when, before the time for performance has arisen, a party to a contract declares his intention not to fulfill a contractual duty. *Lucente v. Int'l Bus. Machines Corp., 310 F.3d 243, 258 (2d Cir. 2002)*. The Second **[**21]** Circuit has held that under New York contract law, "[w]hen confronted with an anticipatory repudiation, the non-repudiating party has two mutually exclusive options. He may (a) elect to treat the repudiation as an anticipatory breach and seek damages for breach of contract, thereby terminating the contractual relation between the parties, or (b) he may continue to treat the contract as valid and await the designated time for performance before bringing suit." *Id., 310 F.3d at 258*. The non-repudiating party must "make an affirmative election," because it "cannot at the same time treat the contract as broken and subsisting, for one course of action excludes the other.... Once a party has elected a remedy for a particular breach, his choice is binding with respect to that breach and cannot be changed." *Id. at 258-259*. Celgene pronounces in its reply brief that it "has elected to [treat the contract as valid and await the designated time for performance before bringing suit."[5] Reply 4. Where a party chooses this route, it remains entitled to performance. See, e.g., *Jamuna Fashion Wears v. Micom Trading Corp., 2012 U.S. Dist. LEXIS 201958, 2012 WL 13140780, at *4 (S.D.N.Y. Dec. 28, 2012)*.

The Court need not decide the ultimate effect of the August 13 letter now. It is enough at this juncture to conclude that Celgene and BMS are likely to succeed **[**22]** on the merits in demonstrating that Nimbus's August 13 Letter did not terminate the Warrant and so it erects no bar to granting Celgene and BMS's motion for a preliminary injunction.

IV. Preliminary Injunction

HN2[] "A party seeking a preliminary injunction must ordinarily establish (1) irreparable harm; (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party; and (3) that a preliminary injunction is in the public interest." *New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 650 (2d Cir. 2015)*.[6] Nimbus suggests **[*114]** the standard is elevated because the motion purportedly seeks a mandatory injunction that would change the status quo. Opp. 7-8. If so, Celgene and BMS would have to "show a 'clear' or 'substantial' likelihood of success on the merits and make a 'strong showing' of irreparable harm. Id.[7] The Second Circuit has recognized that the always-ambiguous distinction between mandatory and prohibitory injunctions is particularly murky in contract cases.[8] But as explained above, Nimbus's position depends on the premise that its August 13 Letter terminated the Warrant, a premise **[**23]** the Court has rejected for the purpose of deciding this motion. The ordinary preliminary injunction standard therefore applies, though it may be noted that the Court would grant the motion under either standard.

A. Likelihood of Success on the Merits

Celgene and BMS argue that it is likely to succeed in establishing that it is entitled to specific performance of the Warrant's assignment clause. This entails four constituent propositions, which Celgene and BMS assert they will succeed in proving on the merits: (i) the Warrant entitles Celgene to assign to another pharmaceutical company its

[5] Celgene does not explain how its decision to send Nimbus a "letter ... reserving [its]rights with respect to [the notice of exercise] deadline" rather than to deliver a notice of exercise on October 11, 2021 is consistent with the choice to treat the contract as valid. See Tr. 3. But the Court need not resolve that issue now.

[6] Neither party contends that the serious questions prong applies here. See *Actavis PLC, 787 F.3d at 650*.

[7] A higher standard also applies where the preliminary injunction would provide substantially all the relief the movant ultimately seeks and that relief cannot be undone if the non-movant prevails at trial. See *Tom Doherty Assocs., Inc. v. Saban Ent., Inc., 60 F.3d 27, 34 (2d Cir. 1995)*. Neither party argues that the instant motion implicates this issue.

[8] See *Tom Doherty Assocs., Inc., 60 F.3d at 34* ("Confusion in breach of contract cases as to whether an injunction is mandatory or prohibitory may stem from the meaning of 'status quo.' ***HN3***[] A plaintiff's view of the status quo is the situation that would prevail if its version of the contract were performed. A defendant's view of the status quo is its continued failure to perform as the plaintiff desires. To a breach of contract defendant, any injunction requiring performance may seem mandatory.").

rights to acquire the Tyk2 assets; (ii) Nimbus cannot repudiate the Warrant based on BMS's acquisition of Celgene; (iii) Celgene is likely to establish the predicates to specific performance of the Warrant; and (iv) granting specific performance of the assignment provision would not contravene the antitrust laws. As explained below, the Court concludes that Celgene and BMS are likely to succeed on all four issues.

a. **Celgene's Entitlement to Assign**

Section 11.2(a)(iii)(z) of the Warrant plainly entitles Celgene to assign its right to purchase the Tyk2 assets to another pharmaceutical company **[**24]** with similar or better resources in the event a federal antitrust enforcement agency issues the parties an HSR Second Request in connection with Celgene's demonstrated intent to exercise the Warrant. Nimbus disputes neither Celgene's construction of this assignment provision nor that it was triggered when the FTC issued the Second Request. See Opp. 19-20.

Instead, Nimbus suggests that "the Court should doubt the bona fides of Defendants' self-serving representation that they will assign the Warrant to a third party given [their] representations to the federal government in their HSR filing that they intend to acquire Nimbus's allosteric Tyk2 asset." Opp. 19. Nimbus argues that "Defendants have not taken any action that would bind them to assign, rather than acquire" the Tyk2 assets. But this is a red herring. The HSR Act bars Celgene from acquiring the Tyk2 assets unless the FTC clears the transaction as consistent with the federal antitrust laws. Separately, if Nimbus prevails in this litigation on its claim that Celgene's acquisition of the **[*115]** Tyk2 assets would violate the antitrust laws, then this Court could enter a permanent injunction prohibiting Celgene from closing on the transaction. **[**25]** But if Celgene prevails in demonstrating that its exercise of the Warrant would be legal under the antitrust laws, both before the FTC and in this litigation, then Celgene would be entitled to acquire the Tyk2 assets and the preliminary injunction preserving its rights under the Warrant would have prejudiced neither Nimbus nor the public interest. What matters at this juncture is whether Celgene will be likely to prevail in proving either that it may acquire the Tyk2 assets or that it may assign that right, since neither party has suggested that the preliminary relief necessary to preserve those rights would differ.[9]

Since Celgene and BMS will likely succeed in establishing that the Warrant entitles Celgene to assign the right to purchase the Tyk2 assets, then they will have established a likelihood of success on the merits overall by also demonstrating a likelihood of success in proving that the Warrant has not been terminated and should not be rescinded, that Nimbus breached the Warrant and specific performance is the appropriate remedy, and that Celgene's assignment of its right to acquire Nimbus Lakshmi would not contravene federal ***antitrust law***. So, the Court turns to these.

[26]** b. **Termination & Breach**

Nimbus asserts that it is no longer bound to perform under the Warrant, either because the August 13 Letter terminated the Warrant or because the Court should rescind the Warrant because Celgene allegedly breached its covenants. The Court, however, concludes that Celgene and BMS are likely to rebut both of Nimbus's termination arguments, and thus that the Warrant is likely still enforceable.

i. **The August 13 Letter**

Nimbus first argues that its August 13 Letter successfully terminated the Warrant. Nimbus presents this argument through the Complaint's first count, which seeks a declaration that the August 13 Letter terminated the Warrant. See Complaint ¶¶ 45-52. Celgene and BMS counter, inter alia, that Nimbus failed to provide the contractually required thirty-day notice and opportunity to cure, so the purported termination letter was a nullity. See Counterclaims ¶¶ 107-117 (first counterclaim, seeking declaratory judgment).

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[9] Specifically, Celgene argues that the relevant obligation arises from the parties' covenant to "use commercially reasonable efforts to take, or cause to be taken, all reasonable actions, and to do, or cause to be done, and to assist and cooperate with the other Party in doing, all things reasonably necessary, proper or advisable to consummate the transactions contemplated hereby." Warrant § 6.8(d); See Mot. 13-14.

The parties agree that the only potential basis for Nimbus to have unilaterally terminated the Warrant via the August 13 Letter would be under Section 10.1(c). That provision permits unilateral termination by Nimbus "upon a material breach of **[**27]** any representation, warranty, covenant, or agreement on the part of Celgene set forth in this Warrant ... or if any representation or warranty of Celgene shall have become materially untrue, in either case such that the conditions set forth in [the closing conditions] would not be satisfied as of the time of such breach or as of the time such representation or warranty shall have become untrue." Warrant § 10.1(c). But Nimbus must provide Celgene notice and a 30-day opportunity to cure unless the alleged breach is incurable. Id.

[*116] ***HN4***[] Such notice-and-cure provisions are generally enforced. "Under New York law, where the contract specifies conditions precedent to the right of cancellation, the conditions must be complied with." *Bausch & Lomb Inc. v. Bressler, 977 F.2d 720, 727 (2d Cir. 1992)* (affirming conclusion that party's failure to comply with 30-day notice and opportunity to cure provision constituted breach). Whether the August 13 letter could properly terminate the Warrant therefore turns in part on whether Celgene's alleged material breaches of the covenants were curable.

Nimbus naturally argues that Celgene had incurably breached by "pursuing the Tyk2 asset for themselves" and by merging with BMS, which Nimbus describes as having "attempted to **[**28]** monopolize or otherwise unlawfully restrain[] competition" in violation of the *Sherman Act*. Opp. 13-14 The Merger, Nimbus argues, "created an insurmountable antitrust issue for the exercise of the Warrant as early as late 2019." Id. Nimbus asserts that notice was unnecessary under the Warrant because it "would have been futile," since Celgene and BMS "rejected" Nimbus's prior attempts "to have BMS take some action to cure the anticompetitive relationship." Id. at 23. Celgene and BMS counter that the Warrant itself provides the cure to the alleged antitrust problem arising from Celgene's exercise of the Warrant's right to acquire Nimbus's Tyk2 assets: assignment. Reply 9.

The Court holds that Celgene is likely to succeed in showing that Nimbus's August 13 letter did not terminate the Warrant. Nimbus cannot evade the 30-day notice-and-opportunity-to-cure requirement by invoking the general doctrine of futility. ***HN5***[] "Under New York law, a terminating party's failure to afford contractually-required notice and cure is excusable as futile only in limited circumstances. Among these are where the non-performing party (1) expressly repudiates the parties' contract or (2) abandons performance thereunder." **[**29]** *Point Prods. A.G. v. Sony Music Entm't, Inc., 2000 U.S. Dist. LEXIS 10066, 2000 WL 1006236, at *4 (S.D.N.Y. July 20, 2000)*. Celgene never repudiated the Warrant. And Nimbus alleges no failure of performance, other than the Merger, which likely does not establish breach for the reasons explained below.

And even if the Merger did lead Celgene to breach its covenants by creating an antitrust obstacle to its own acquisition of Nimbus Lakshmi, Celgene and BMS are likely to prove that assignment was an appropriate cure, so the August 13 Letter was procedurally defective under Section 10.1(c) of the Warrant.

Nimbus responds that Celgene has taken no action that binds it to assign rather exercise the Warrant. Opp. 19-20. But that is irrelevant to whether assignment could cure the alleged breach. Nimbus also argues that assignment is not guaranteed to be procompetitive, but these contentions fail for reasons addressed in the discussion of Nimbus's antitrust defense to specific performance, discussed below. If Celgene attempted to scuttle Nimbus's Tyk2 asset through assignment, Nimbus might be able sue under the contract. But the prospect of Celgene acting in bad faith does not change the fact that the express purpose of the assignment provision is to cure antitrust issues that might arise preventing Celgene's own **[**30]** exercise of the Warrant.

Since a cure to the alleged breach was available, Celgene and BMS will likely prove that Nimbus was not entitled to unilateral termination, so the August 13 Letter did not terminate the Warrant.

ii. **Celgene's Alleged Breach of Covenants**

Nimbus has alleged that Celgene "breached the representations and warranties" **[*117]** not to break applicable law and to cooperate toward consummation of the transactions contemplated by the Warrant, because the Merger allegedly violated the Sherman and Clayton Acts, so Nimbus has sought recission and termination of the Warrant. See Compl. ¶¶ 53-57 (Count II: Breach of Contract). Thus, as relevant to this motion, Nimbus is effectively raising a contract defense to the counterclaim for specific performance, arguing that Celgene already breached so no performance is now due from Nimbus.

This breach of contract theory essentially repackages the allegations asserted in the August 13 Letter and the declaratory judgment claim. It therefore seeks cancellation of the contract in a manner calculated to circumvent the termination provisions of Article X of the Warrant. *HN6*[] As explained above, where a contract includes a termination provision setting **[**31]** forth certain procedures for the contract's cancellation, including a requirement for notice and an opportunity to cure, "the general rule is that a party asserting nonperformance must afford a defaulting party any contractually-secured opportunity to cure prior to terminating a contract." *Karabu v. Pension Benefit Guar. Corp., 1997 U.S. Dist. LEXIS 19582, 1997 WL 759462, at *8 (S.D.N.Y. Dec. 10, 1997)*. See also *Filmline (Cross-Country) Prods., Inc. v. United Artists Corp., 865 F.2d 513, 519 (2d Cir. 1989)* ("apply[ing] the clear New York rule requiring termination of a contract according to its terms," where a termination provision requires 30-day notice and an opportunity to cure an alleged breach). New York law is also clear that "[f]reedom of contract prevails in an arm's length transaction between sophisticated parties such as these, and in the absence of countervailing public policy concerns there is no reason to relieve them of the consequences of their bargain." *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co., 86 N.Y.2d 685, 695, 660 N.E.2d 415, 636 N.Y.S.2d 734 (1995)*. See also *Flag Wharf, Inc. v. Merrill Lynch Cap. Corp., 40 A.D.3d 506, 507, 836 N.Y.S.2d 406 (1st Dep't 2007)* ("Courts will not rewrite contracts that have been negotiated between sophisticated, counseled commercial entities."). Since accepting Nimbus's breach of contract claim would undermine Celgene's contractually secured right to cure an alleged default of any representation, covenant, or warranty, Nimbus's request for rescission is disfavored.

The Court concludes that Celgene and BMS will likely succeed in resisting **[**32]** Nimbus's attempt to obtain recission of the Warrant on either version of this theory.

First, Nimbus alleges that the Merger violated the Sherman and Clayton Acts, so Celgene allegedly committed a material breach of its covenants to follow applicable laws. See Complaint, Count II. Among Celgene's warranties, covenants, and representations in the Warrant is Section 6.8(a), which includes a mutual covenant that the parties shall "coordinate and cooperate with one another and shall each use commercially reasonable efforts to comply with, and shall each refrain from taking any action that would impede compliance with, all Applicable Laws." Nimbus's argument, therefore, is that by agreeing to the Merger, Celgene failed to "use commercially reasonable efforts to comply with" federal antitrust laws, because the Merger allegedly violated the Sherman and Clayton Acts. Another version is that by agreeing to the Merger, Celgene failed to "refrain from taking any action that would impede compliance with" federal antitrust laws when it came time for it to exercise the Warrant, since the Merger made it more likely that antitrust authorities would scrutinize Celgene's attempt to acquire Nimbus Lakshmi. **[**33]**

[*118] Celgene and BMS counter that Nimbus has waived its right to obtain recission or termination of the contract on this basis. According to Celgene and BMS's telling, Nimbus learned of the Celgene-BMS merger on January 3, 2019, when it was publicly announced, but it "did not seek to terminate the Warrant on the basis that this 2019 merger caused Celgene to breach the Warrant for thirty-one months, until its August 13 Letter." Mot. 21-22. Rather, Celgene and BMS assert that Nimbus "continued to act affirmatively as though the Warrant was in effect," including by "accept[ing] an additional $15 million payment under the Warrant by Celgene in December 2019 (a month after the merger had closed)," by agreeing to a screening protocol to prevent BMS employees working on deucravacitinib from learning confidential information about Nimbus's Tyk2 program, and by sending Celgene the data package with Phase 1B clinical trial results on May 4, 2021. Id.

HN7[] It is well established in New York law that a party can waive any right to rescind a contract on a theory of breach when the allegedly injured party has failed to promptly assert its claim:

> [W]here a party to a contract asserts a right to rescind for ... **[**34]** breach of contract ... there can be no rescission where the breach of contract ... has been waived by the party who has been wronged; and, as a matter of law, right to rescind must be exercised promptly after the injured party learns of the wrong. Acceptance of benefit under the contract with knowledge of the wrong constitutes a waiver of the wrong. Notice

> of rescission for wrong which has been waived is, of course, a futile act.... Recognition that the contract is still in force may prove such abandonment and constitute a waiver of a previous breach.

New York Tel. Co. v. Jamestown Tel. Corp., 282 N.Y. 365, 372-373, 26 N.E.2d 295 (1940).

Celgene and BMS argue that Nimbus continued to treat the Warrant as an intact contract after the Merger closed in November 2019. For instance, Nimbus accepted the $15 million payment from Celgene in December 2019, after its CEO asserts that he was cognizant of the "'tension of engaging regularly with a fierce competitor [BMS] that has a massive head start.'". Keiper Decl. ¶ 5 (quoting ECF 23-2 at 3 (alteration in original)). While Keiper expressed concerns about the Merger's implications for the Tyk2 collaboration, the current record reflects no assertion by Nimbus that the Merger had caused Celgene to have breached the Warrant. Rather, **[**35]** Celgene stated that it had "a process in place with BMS to address" the competition concerns Keiper had raised. See ECF 23-2 at 2. Then, in February 2020, Celgene proposed an information screening protocol to prevent BMS employees working on deucravacitinib from having access to confidential information about Nimbus's allosteric Tyk2 inhibitor. See Mily Decl. ¶ 28. Nimbus agreed to that protocol. See Ex. 6 to Mily Decl., ECF 18-6.

The record reflects that Nimbus never expressly sought termination of the Warrant until February 23, 2021 at the earliest, see, e.g., Keiper Decl. ¶ 9, nor did it assert that Celgene had breached the Warrant until the August 13 Letter. ***HN8***[] But since "waiver of a contract right must be proved to be intentional, the defense of waiver requires a clear manifestation of an intent by [the party asserting breach] to relinquish her known right and mere silence, oversight, or thoughtlessness in failing to object to a breach of the contract will not support a finding of waiver." *Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of New Jersey, Inc., 448 F.3d 573, 585* ***[*119]*** *(2d Cir. 2006)*. Nimbus maintains that it never waived any right to rescind. Instead, Nimbus argues, it raised concerns about the antitrust implications of the Merger for years and sought to "fix the anticompetitive **[**36]** relationship between the parties." Opp. 22.

But stating that Nimbus "would much prefer to have the rights back to the program and progress [itself]," ECF 23-2, is not the same as purporting to terminate the Warrant or alleging that Celgene had breached. And while "intent to waive is usually a question of fact, knowing acceptance of [payment] without any effort to terminate justifies an inference that" the contract remains in force. *Jefpaul Garage Corp. v. Presbyterian Hospital in New York, 61 N.Y.2d 442, 448, 462 N.E.2d 1176, 474 N.Y.S.2d 458 (1984)*. Nimbus's acceptance of the $15 million payment in December 2019 therefore justifies the inference that Nimbus intended the Warrant to remain in force notwithstanding the "tensions" introduced by the Merger. And Nimbus's agreement to the February 2020 screening protocol further supports that inference.

Concededly, the record is incomplete at this juncture; but the Court concludes that Celgene and BMS are likely to succeed in its position that Nimbus waived its right to obtain recission of the Warrant in response to Celgene's alleged breach of its covenants to comply with the federal antitrust laws.[10]

In any event, even if Celgene and BMS failed to prove Nimbus's waiver, so that the Court later reached the merits of Nimbus's breach of contract claim, Celgene **[**37]** and BMS would raise various potentially meritorious defenses to Celgene's alleged breach of its covenants. For instance, the covenant in section 6.8(a) "is heavily qualified by the commercially reasonable efforts standard, which means that Celgene 'was not required to do things that it was unable to do or that it would not have made commercial sense to do.'" Reply 8 (quoting *In re Condado Plaza Acquisition LLC, 620 B.R. 820, 833 (Bankr. S.D.N.Y. 2020)*. This, Celgene and BMS argue, differentiates Nimbus's claim from a straightforward question of whether a direct suit under the Sherman or Clayton Acts would have succeeded in blocking the Merger had it been filed at the time. The question instead might be whether it would have

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[10] Nimbus points out that it is separately "challenging the enforceability of the Warrant under various claims under the Sherman Act and the Clayton Act," and that these claims have four-year statutes of limitations. Opp. 22-23 (citing *15 U.S.C. § 15b*). But whether claims arising under the antitrust laws themselves are timely is a distinct issue from whether Nimbus may still assert a defense to a counterclaim for specific performance (or a claim for breach of contract) based on an alleged violation of the antitrust laws.

been commercially reasonable for Celgene to resist BMS's acquisition effort after the transaction received the FTC's approval following HSR Act review, or if the commercially reasonable approach would have been to resist the Merger entirely. Whatever the merits an action under the Clayton or Sherman Acts would have been, the covenant's "commercially reasonable efforts" qualification makes it more likely Celgene and BMS would succeed in resisting the Warrant's recission on this ground.

Celgene and BMS also argue that Nimbus has also failed **[**38]** to allege or argue that any breach of the Warrant by Celgene was material. ***HN9***[] "Under New York law, a party's performance under a contract is excused where the other party has substantially failed to perform its side of the bargain or, synonymously, where that party has committed a material breach." *Process Am., Inc. v. Cynergy Holdings, LLC, 839 F.3d 125, 136 (2d Cir. 2016)*. **[*120]** Recission is therefore "not permitted for a slight, casual, or technical breach, but, as a general rule, only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract." *Callanan v. Keeseville, Ausable Chasm & Lake Champlain R.R. Co., 199 N.Y. 268, 284, 92 N.E. 747 (1910)*. Here, however, Celgene and BMS argue that even assuming arguendo that the Merger did violate the antitrust laws, the consequent breach of its covenants was not "a failure which le[ft] the subject of the contract substantially different from what was contracted for." Id. Indeed, if Celgene were to assign to another similarly situated pharmaceutical company the right to acquire Nimbus Lakshmi for $400 million -- a transaction contemplated by the Warrant as a cure if Celgene's own acquisition of the Tyk2 asset invokes antitrust scrutiny -- Nimbus Therapeutics would likely be left in a substantially similar position **[**39]** to the one it contemplated at the time the Warrant was created: in receipt of $400 million and engaged in an ongoing business relationship with a large pharmaceutical company to commercialize the Tyk2 inhibitor molecule.

Therefore, the Court concludes that even if Nimbus prevailed on the waiver issue, Celgene and BMS would still likely succeed in resisting Nimbus's attempt to obtain recission of the Warrant because the Merger allegedly violated the antitrust laws.

Separately, Nimbus suggests that Celgene breached its Section 6.8(a) covenant to cooperate with Nimbus to achieve compliance with federal antitrust laws and that Celgene failed to use commercially reasonable efforts to achieve government approval for its exercise of the Warrant. Opp. 14-15. But the Court concludes that Nimbus will likely fail to establish that Celgene breached the Warrant by allegedly failing to cooperate.

Nimbus alleges that Celgene failed to cooperate in achieving compliance with antitrust laws because "Nimbus's efforts to fix the antitrust issues presented by [the Merger] were expressly and repeatedly rejected by BMS." Opp. 15. But as Celgene and BMS argue, "a covenant to cooperate is not a covenant to surrender; **[**40]** it does not oblige a party to give up its express rights under the contract." Reply 7. In any event, Nimbus does not identify any proposed "fix" that BMS rejected, other than termination of the Warrant. See generally Opp. 15-18; Keiper Decl.[11] Termination was first expressly requested in February 2021 and Nimbus has not explained why the covenant to cooperate obliged BMS to relinquish its contractual rights, particularly when its position is that the Warrant's assignment provision is the cure to any alleged antitrust issues arising from Celgene's acquisition of Nimbus Lakshmi. Therefore, Celgene and BMS are likely to succeed in repulsing Nimbus's claim that Celgene breached its obligation to cooperate in achieving compliance with federal antitrust laws.

Nimbus also argues that Celgene failed to coordinate and cooperate in obtaining FTC approval for its exercise of the Warrant. See Opp. 14-15. But Celgene and BMS cogently argue that since the Warrant entitles Celgene to assign its acquisition right after issuance of a Second Request, it has no "obligation to continue to work toward antitrust clearance of an exercise by Celgene and not an assignee," especially when Nimbus alleges Celgene's **[**41]** acquisition of Nimbus Lakshmi would be **[*121]** illegal under the federal antitrust laws. Reply 8. The Court concludes Celgene are BMS are likely to succeed on this issue as well.

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[11] To the contrary, the record reflects that to address tensions arising from the Merger, Celgene and BMS established an information screening protocol in February 2020, to which Nimbus consented without objections. See ECF 18-6.

In sum, the Court concludes that Nimbus is unlikely to prevail in either establishing that the Warrant was terminated via the August 13 Letter or that the Court ought to rescind the Warrant as a remedy for Celgene's alleged breaches of its covenants to comply with federal antitrust laws or to cooperate with Nimbus in achieving compliance. Celgene and BMS are thus likely to succeed on the merits of their first counterclaim, which seeks a declaration that the Warrant entitles Celgene to assign its right to acquire Nimbus Lakshmi and that the Warrant remains enforceable. See Counterclaims ¶¶ 107-117. Therefore, Celgene and BMS are likely to succeed on their counterclaim for specific performance of the assignment provision if Celgene and BMS will likely establish their entitlement to specific performance and unless Nimbus Celgene's use of the Warrant's assignment provision would likely be illegal under the federal antitrust laws. So, the Court now turns to these remaining two issues.

c. **Celgene's Entitlement to Specific [**42] Performance**

The Court has already found that Celgene and BMS will likely establish that the Warrant entitles Celgene to assign the right to acquire Nimbus Lakshmi and that the Warrant is neither terminated nor subject to recission. Therefore, leaving aside Nimbus's antitrust defenses for the moment, Celgene and BMS are likely to establish an entitlement to specific performance of the assignment clause if they will prove that Nimbus materially breached the contract and that the appropriate remedy for that material breach is specific performance.[12] See *Warberg Opportunistic Trading Fund, L.P. v. GeoResources, Inc., 112 A.D.3d 78, 86, 973 N.Y.S.2d 187 (1st Dep't 2013)* ("**HN10**[] [S]pecific performance is an equitable remedy for a breach of contract, rather than a separate cause of action."). The Court concludes that Celgene and BMS are likely to succeed on both issues.

First, Celgene and BMS are likely to establish that Nimbus materially breached the Warrant. Celgene and BMS allege, inter alia, that Nimbus breached two covenants by purporting to terminate the Warrant in its August 13, 2021 Letter, by filing the instant litigation, and by otherwise refusing to cooperate with Celgene's effort to make an assignment under the Warrant. See Counterclaims ¶¶ 124-125.

Celgene and BMS cite two covenants or representations. **[**43]** Section 6.8(d) requires the parties to "use commercially reasonable efforts to take, or cause to be taken, all reasonable actions, and to do, or cause to be done, and to assist and cooperate with the other Party in doing, all things reasonably necessary, proper or advisable to consummate the transactions contemplated [in **[*122]** the Warrant.]" Warrant § 6.8(d). Section 11.13 commits the parties "to execute, acknowledge and deliver such further instruments, and to do all such other acts, as may be reasonably necessary or appropriate in order to carry out the purposes and intent of this Warrant." Warrant § 11.13.

Celgene and BMS are likely to succeed in proving that Nimbus's purported termination and refusal to cooperate with an assignment amounted to a material breach of these representations. Nimbus' claim to have terminated the Warrant and its subsequent refusal to acknowledge Celgene's attempts to make an assignment impeded Celgene from obtaining any value from the Warrant, denying Celgene the benefit of its bargain. It plainly violated the commitment to cooperate in bringing about an assignment, which is clearly a "transaction contemplated" in the Warrant. Warrant § 6.8(d). Preventing Celgene **[**44]** from realizing the benefit of its bargain also frustrated the "purposes and intent of th[e] Warrant." Warrant § 11.13. And these breaches are likely material, because preventing Celgene from monetizing its successful investment in the Tyk2 R&D program defeats the fundamental purpose of the Warrant.

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[12] Celgene would also need to establish that it substantially performed under the Warrant. See *NML Cap., Ltd. v. Republic of Argentina, 699 F.3d 246, 261 n. 12 (2d Cir. 2012)* ("To be eligible for specific performance of a contractual provision, a party also needs to show that (1) a valid contract exists between the parties, (2) the plaintiff has substantially performed its part of the contract, and (3) plaintiff and defendant are each able to continue performing their parts of the agreement."). The only relevant aspect of Celgene's performance that Nimbus disputes is whether Celgene satisfied its covenants or breached them by consummating the Merger. Since the Court concluded that Celgene and BMS are likely to succeed in establishing that Celgene did not materially breach its covenants, the Court accordingly holds that it they also will likely prove that Celgene adequately performed its contractual duties under the Warrant.

Celgene and BMS are also likely to succeed in proving that Nimbus's purported termination amounts to an independent breach. ***HN11***[] The Second Circuit has recognized that a party's purported termination that does not follow contractually secured, applicable termination procedures may itself constitute an independent breach of the contract. See *Bausch & Lomb Inc., 977 F.2d at 727*. As explained above, Celgene and BMS are likely to demonstrate that the August 13 Letter failed to adhere to the enforceable termination procedures and so amounted to breach.

Celgene and BMS are also likely to succeed in demonstrating that Celgene is entitled to specific performance as a remedy for Nimbus's material breach of the Warrant. ***HN12***[] Under New York law, "[s]pecific performance may be ordered where no adequate monetary remedy is available and that relief is favored by the balance of equities, which may include the public interest." *NML Cap., Ltd. v. Republic of Argentina, 699 F.3d 246, 261 (2d Cir. 2012)*. There is no adequate **[**45]** monetary remedy and so "[s]pecific performance is a proper remedy ... where the subject matter of the particular contract is unique and has no established market value," so the claimant would have "difficulty [in] proving damages with reasonable certainty." *Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 415, 754 N.E.2d 184, 729 N.Y.S.2d 425 (2001)*. As explained further below in the discussion of irreparable harm, the Tyk2 asset held by Nimbus Lakshmi is a unique asset, still in development, with no established market value. Therefore, damages would be difficult to ascertain with reasonable certainty. Celgene would thus likely succeed in establishing that specific performance of the assignment provision is an appropriate remedy.

d. **Legality of the Assignment Provision Under the Antitrust Laws**

As to the final issue regarding likelihood of success on the merits, Nimbus's complaint alleges that Celgene's exercise of the Warrant to acquire Nimbus Lakshmi would be anticompetitive because it would give BMS control over both the leading allosteric Tyk2 inhibitor drug candidates, and so it must be invalidated as contrary to the Sherman and Clayton Acts. In the context of this motion, those arguments arise as antitrust defenses to Celgene's claim for specific performance. Celgene argues **[**46]** in support of its motion that assignment **[*123]** of its purchase rights to a similarly situated pharmaceutical company without a current allosteric Tyk2 inhibitor R&D program is a procompetitive cure to any antitrust concerns associated with Celgene exercising the Warrant's acquisition rights itself. Accordingly, Celgene and BMS argue that they are highly likely to succeed in their counterclaim for specific performance of the assignment clause and the Warrant's supporting and associated provisions.

Before analyzing each of the three statutory antitrust claims that Nimbus has levied against the Warrant, it is useful to discuss, and reject, two cross-cutting arguments Nimbus presents in its opposition.

First, as discussed above, Nimbus argues that "the Court should doubt the bona fides of Defendants' self-serving representation that they will assign the Warrant to a third party" since they "have not taken any action that would bind them to assign, rather than acquire, Nimbus's assets." Opp. 19. Again, whether Celgene has bound itself only to assign rather than to acquire is irrelevant to this motion, which seeks to preserve the conditions under which Celgene would be able to complete an assignment **[**47]** if it won its claim for specific performance of that provision. If this Court determines that Celgene is entitled to specific performance of the assignment provision, "the court ha[s] considerable latitude in fashioning the relief," so the "performance required by a decree need not ... be identical with that promised in the contract." *NML Capital, 699 F.3d at 262*. Therefore, the Court's permanent injunctive relief could limit Celgene only to making an assignment, if that were appropriate.

Second, Nimbus argues that assignment to a third-party pharmaceutical company would not necessarily be procompetitive, because it "would be inescapably plagued by the obvious conflict of interest [Celgene and BMS] face between acting for their own benefit (and selecting a weaker competitor) and acting for the benefit of the public (and selecting a stronger one)." Opp. 20. Nimbus also argues that Celgene could unreasonably delay assignment to give BMS more time without a commercial competitor to deucravacitinib. Id. at 19. These arguments are unlikely to succeed: Nimbus, a sophisticated and counseled entity, agreed to the assignment provision after extended, arms-length negotiation. The final assignment provision constrains Celgene **[**48]** to assign only to a pharmaceutical company "with financial resources and capabilities greater than or substantially similar to those of Celgene." Warrant § 11.2(a)(iii)(z). Crediting Celgene's reasonable representation that it is seeking to assign the

Warrant's purchase right to a third-party pharmaceutical company without an allosteric Tyk2 inhibitor program, making an assignment would increase the number of firms controlling competitors in this developing market. Nimbus is unlikely to succeed in showing that is anticompetitive.

Having addressed these two general arguments, the Court turns to whether Celgene and BMS are likely to succeed in defeating Nimbus's various arguments that Celgene's assignment of the Warrant would violate the antitrust laws. It finds that Celgene and BMS are likely to succeed in repulsing all three antitrust defenses.

i. ***Sherman Act* — Section 1**

HN13[] To prove that assignment under the Warrant violates *Section 1* of the *Sherman Act*, Nimbus "must establish (1) a contract, combination, or conspiracy exists that (2) unreasonably restrains trade." *1-800 Contacts, Inc. v. Fed. Trade Comm'n, 1 F.4th 102, 114 (2d Cir. 2021)* (per curiam). The first element is uncontested: **[*124]** The Warrant is "undeniably [a] contract[]." Id. As for the second element, the Second Circuit presumptively **[**49]** applies "rule of reason" analysis to determine whether contracts unreasonably restrain trade. Id. Nimbus does not contend that the Warrant is per se illegal under the *Sherman Act*, and there is no indication that this is one of those agreements that are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality," *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*.[13] The rule of reason analysis therefore requires Nimbus to "demonstrate that [the] particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*. Rule of reason analysis employs a burden-shifting framework:

> A plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market. After a prima facie case of anticompetitive conduct has been established, the burden shifts to the defendant to proffer procompetitive justifications for the agreement. Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means.

1-800 Contacts, 1 F.4th at 114.

As discussed above, the fact that **[**50]** Celgene may have a conflict of interest in choosing its assignee likely does not render the assignment provision anticompetitive, since the Warrant requires that the assignee have substantially similar or better resources for development of the Tyk2 assets than Celgene. See supra 24; Opp. 20. Nimbus opposes by arguing that Celgene and BMS "offer no support for the assertion that an assignment necessarily would be procompetitive." Opp. 19 (capitalization changed). But that assertion is not only wrong as a matter of fact -- the Motion offers several reasons why it would be procompetitive to assign the Tyk2 acquisition rights to a well-resourced pharmaceutical company without an allosteric Tyk2 R&D program -- but also ignores that Nimbus bears the burden of establishing a prima facie case of anticompetitive effect under the Rule of Reason burden shifting framework, regardless of whether the argument arises in the context of Nimbus's affirmative claims or as an antitrust defense to Celgene's counterclaim for specific performance of the assignment provision. Therefore, the Court holds that Nimbus will likely fail to establish that Celgene's assignment of the Warrant violates *Section 1* of the *Sherman Act*.

ii. **[**51]** ***Sherman Act* — Section 2**

Nimbus argues that Celgene's exercise of the Warrant violates *Section 2* of the *Sherman Act*, because it allegedly monopolizes the market for allosteric Tyk2 inhibitors. ***HN14***[] A *Section 2* monopolization claim requires a plaintiff to "establish '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 686-87 (2d Cir.*

[13] Nor is so-called "quick look" analysis appropriate, since the assignment provision is not an "inherently suspect" device where "the great likelihood of anticompetitive effects can be easily ascertained." *1-800 Contacts, 1 F.4th at 115*.

2009). Nimbus **[*125]** might have an argument that Celgene's exercise of the Warrant's Tyk2 acquisition rights would pose a threat of monopolization, but that is irrelevant for the purposes of this motion, which seeks to preserve Celgene's ability to make an assignment. As Celgene argues, "by assigning its rights to a third party that BMS and Celgene do not control and that does not have a Tyk2 asset, BMS and Celgene are *increasing* the number of competitors and thus *reducing* any potential power they might have in the relevant markets." Mot. 17. For the same reason, Celgene will also likely defeat the claim that assignment would amount to attempted monopolization under *Section 2*, which requires a plaintiff to prove "(1) that the defendant has engaged **[**52]** in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Actavis, 787 F.3d at 651*. Therefore, Nimbus will likely fail to establish that it would violate *section 2* of the *Sherman Act* for Celgene to make an assignment under the Warrant.

iii. ***Clayton Act***

HN15[] *Section 7* of the *Clayton Act* prohibits a transaction if its effect "may be substantially to lessen competition" in any product or geographic market. *United States v. Phila. Nat'l Bank, 374 U.S. 321, 355, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)*. *Section 7* claims are generally analyzed under a three-step burden shifting framework. At the first step, a plaintiff establishes a prima facie case by showing that the transaction will significantly increase market concentration, thereby creating a presumption that the transaction is likely to substantially reduce competition. See *F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 715, 345 U.S. App. D.C. 364 (D.C. Cir. 2001)*. The defendant may then rebut that presumption by undermining the prediction of future anticompetitive effect; if this rebuttal succeeds, the plaintiff has a last-ditch effort to persuade the court that the transaction will substantially harm competition. See id. Here, Nimbus is unlikely to succeed in establishing that assignment to a third-party pharmaceutical company will substantially lessen competition. Indeed, the fact that assignment would increase the **[**53]** number of well-resourced pharmaceutical companies positioned to develop allosteric Tyk2 inhibitor drugs makes it unlikely that Nimbus could even establish a presumption of anticompetitive effect at the first step of the *Section 7* burden shifting framework. Celgene and BMS will thus likely succeed in showing that assignment under the Warrant does not violate *Section 7* of the *Clayton Act*.

In sum, the Court holds that Celgene and BMS are likely to succeed on the merits in establishing each of the components necessary to prevail on their counterclaim for breach of contract and specific performance of the Warrant's assignment provision: (i) the Warrant likely entitles Celgene to make a unilateral assignment, since the FTC issued the parties an HSR Act Second Request; (ii) the August 13 Letter likely did not terminate the Warrant, and Nimbus will likely fail to obtain recission of the Warrant for Celgene's alleged breach of covenants to comply with antitrust laws and cooperate; (iii) Celgene is likely to establish that Nimbus breached the Warrant, including by purportedly terminating the Warrant in the August 13 Letter, and Celgene will likely obtain the remedy of specific performance for that breach; and (iv) Celgene **[**54]** will likely succeed in rebutting Nimbus's claims that the federal antitrust laws prohibit assignment to a third-party pharmaceutical company of the right to purchase Nimbus Lakshmi. The Court thus turns to the next requirement for a preliminary injunction.

[*126] B. **Irreparable Harm**

HN16[] A party seeking a preliminary injunction must demonstrate both that it will suffer an irreparable injury if the injunction does not issue and that it will lack adequate remedies at law to redress those injuries. See *Ticor Title Ins. Co. v. Cohen, 173 F3d 63, 68 (2d Cir. 1999)*. Celgene presents two types of arguments for irreparable harm: (i) that the parties agreed that a breach of the Warrant would result in irreparable harm and (ii) that if Nimbus were to dispose of the Tyk2 asset during this litigation, any money damages available at law would inadequately compensate Celgene and BMS, were they to prevail on their counterclaim for breach.

Celgene and BMS quote a provision of the Warrant in which the parties agree that injunctive relief and specific performance would be an appropriate remedy for breach: "The Parties hereby acknowledge that irreparable damage would occur in the event that any of the provisions of th[e] Warrant were not performed in accordance with their specific **[**55]** terms or were otherwise breached and that the Parties would not have any adequate remedy at law." Warrant § 11.12. This provision expressly states that the "parties shall be entitled to seek an injunction ... to prevent breaches or threatened breaches of this Warrant and to enforce specifically the terms and provisions of this Warrant, in addition to any and all other rights and remedies at law or in equity." Id.

Celgene and BMS further argue that they will suffer irreparable injury in practice for several reasons. Their injury would be irreparable, Celgene and BMS aver, because they would be unable to obtain a reasonably certain valuation of the Tyk2 inhibitor molecule to support a damages claim. The molecule is a unique asset that is still in development, meaning its clinical and commercial values are unknown and there remains a risk it will not ultimately receive FDA approval. Celgene and BMS also argue that the value of the right under the Warrant to acquire Nimbus Lakshmi is difficult to calculate at this time because there is no established market for Nimbus Lakshmi shares and this litigation has created significant uncertainty, preventing an accurate valuation by bid solicitation. **[**56]** Reply 5-6. They also contend that the Warrant purports to limit Celgene's monetary damages for breach to $55 million, which is the total amount Celgene invested, so it may be unable to obtain money damages adequate to compensate it for the lost business opportunity if Nimbus disposes of the Tyk2 assets and Celgene later prevails in obtaining a declaration that it is entitled to assign its rights under the Warrant. See Warrant § 9.5.

Celgene has established irreparable injury for reasons similar to those establishing that it will likely obtain specific performance as a remedy for Nimbus's alleged breach of the Warrant. Cf. *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp., 992 F.2d 430, 433 (2d Cir. 1993)* (comparing equitable standards for preliminary injunction and specific performance). While Nimbus cites caselaw for the proposition that "the contractual language declaring money damages inadequate in the event of a breach does not control the question whether preliminary injunctive relief is appropriate," *Baker's Aid, a Div. of M. Raubvogel Co. v. Hussmann Foodservice Co., 830 F.2d 13, 16 (2d Cir. 1987)*, that point is irrelevant because Celgene and BMS are relying on more than just the parties' agreement that an injunction is appropriate to prevent or respond to breach of the Warrant. Even though Nimbus is right that Celgene's interest in the assignment provision **[**57]** is ultimately financial, it does not disclaim Celgene and BMS's proposed construction of **[*127]** section 9.5 of the Warrant limiting failure-to-close money damages to $55 million, which would only reimburse Celgene's investment (without interest) but not compensate Celgene for the lost revenue from an assignment transaction. See Reply 6. ***HN17***[] "Even if damages are adequate in other respects, they will be inadequate if they cannot be collected by judgment and execution." *NML Cap., 699 F.3d at 262*. Finally, Nimbus fails to provide a satisfying response to the proposition that Celgene and BMS cannot reliably value the Tyk2 assets. See Opp. 10. Celgene and BMS's interactions with potential assignees are affected by the uncertainty created by this litigation, so it may not be a reliable valuation indicator. And Nimbus misses the mark with its cases asserting that there is no irreparable injury from a breach of a contract to acquire stock, since Nimbus Lakshmi's shares are illiquid, unlike the publicly traded stock in the cases cited by Nimbus. See Reply 6 n.12 (addressing Nimbus's cases). Finally, it is no answer to argue, as Nimbus does, that Celgene's "sales process could ... continue following trial in this case," since the **[**58]** question at this juncture is whether Celgene could obtain adequate money damages later on if Nimbus had already disposed of the Tyk2 assets before final judgment issued. See Opp. 10. In that scenario, Celgene could not restart a process to assign the right to purchase assets Nimbus had already disposed of.

Accordingly, the Court holds that if Nimbus sells or otherwise disposes of the Tyk2 assets during the pendency of this litigation Celgene and BMS will suffer irreparable harm, because money damages available at law would inadequately compensate Celgene and BMS were they to prevail on their counterclaims for breach.

C. **Public Interest**

HN18[] The final requirement is that issuance of the preliminary injunction would be in the public interest. See *Actavis PLC, 787 F.3d at 650*. Celgene and BMS argue that issuance of the injunction would serve the public interest for two reasons. First, "[t]here is a well-recognized public interest in enforcing contracts and upholding the rule of law." *Empower Energies, Inc. v. SolarBlue, LLC, 2016 U.S. Dist. LEXIS 130583, 2016 WL 5338555, at *13 (S.D.N.Y. Sept. 23, 2016)*. This is particularly true where, as here, the contract involves sophisticated counterparties who engaged in actual negotiation over the provisions at issue. Second, Celgene and BMS argue that vindicating Celgene's right to profit from its **[**59]** risky investment in Nimbus's allosteric Tyk2 inhibitor program advances the public interest in encouraging investment in pharmaceutical R&D. Letting Nimbus undermine Celgene's option to realize a profit from the success of a drug candidate whose development it financed would, Celgene and BMS argue, discourage future partnerships between large, experienced pharmaceutical companies and smaller biotechnology companies that need assistance and funding to bring new technologies to market.

The Court agrees. The value proposition undermining this model for pharmaceutical innovation requires that companies providing financing to early-stage drug candidates be able to realize profits when molecules show promise. It therefore serves the public interest to maintain the status quo while the Court determines whether Nimbus -- a sophisticated, counseled entity that is a repeat player in these contractual arrangements -- should be held to the terms of the financing arrangement it established with Celgene.

The Court also discounts Nimbus's argument that preserving Celgene's ability to assign the Tyk2 purchase rights disserves the public interest because it would violate **[*128]** the antitrust laws, since, as **[**60]** discussed above, Nimbus is unlikely to succeed in proving that assignment would be anticompetitive. See Opp. 24. In any event, if Nimbus prevails on Celgene and BMS's counterclaims, then Nimbus will regain the right to dispose of the Tyk2 assets in another way. Finally, to the extent Nimbus prevails on its substantive Sherman Act and Clayton Act claims, issuance of this preliminary injunction will do nothing to prevent Nimbus from obtaining antitrust damages arising from the Merger.

V. Conclusion

The Court holds that Celgene and BMS have established that they are likely to succeed on their counterclaim that Nimbus breached the Warrant and are likely to obtain specific performance of the Warrant's assignment provision as a remedy for that breach. The Court further holds that Celgene and BMS would be irreparably injured if Nimbus disposed of the Tyk2 assets before they obtained judgment on their counterclaim and that issuance of a preliminary injunction prohibiting Nimbus from disposing of the Tyk2 assets is in the public interest. The Court therefore grants Celgene and BMS's motion for a preliminary injunction to preserve the status quo.

The motion asks the Court to preserve the status **[**61]** quo by "preliminarily enjoining Nimbus from taking any actions inconsistent with the Warrant, including but not limited to, selling or otherwise transferring interests in the Tyk2 Asset or Nimbus Lakshmi to third parties, and tolling the time for Celgene or its assignee to exercise the Warrant from the date when Nimbus Lakshmi unilaterally claimed that the Warrant was terminated on August 13, 2021, through the pendency of this litigation." Mot. 25. In its opposition, Nimbus argues that the language of the requested injunction is vague, because a prohibition on "taking any actions inconsistent with the warrant" has an indeterminate scope, considering the many covenants and obligations set forth in the Warrant. See Tr. 20. Celgene and BMS, for their part, maintain that their objective is to preserve their entitlement to assign Celgene's purchase right under the Warrant after the conclusion of this litigation. Counsel for Celgene and BMS acknowledged at argument that it would be sufficient for their purposes to prohibit Nimbus from selling or encumbering the Tyk2 assets while litigation is pending, and he was unable to identify any other specific action Nimbus might take that it would **[**62]** ask the Court to enjoin. See Tr. 25. Therefore, the Court concludes that it is appropriate to enter an injunction narrower than the one requested in Celgene and BMS's motion.

Counsel for Celgene and BMS also acknowledged that Celgene and BMS contemplated only proceeding with an assignment after receiving a final judgment from this Court. See Tr. 6. Therefore, to preserve the status quo amid the flurry of claims and counterclaims, the Court prohibits Celgene from consummating an assignment transaction under the Warrant while this preliminary injunction remains in force.

The motion also asks the Court to "toll[] the time for Celgene or its assignee to exercise the Warrant from the date when Nimbus Lakshmi unilaterally claimed that the Warrant was terminated on August 13, 2021, through the pendency of this litigation." Mot. 25. Nimbus contends that BMS has an incentive to delay development of Nimbus's allosteric Tyk2 inhibitor drug, since that would give deucravacitinib a competitive advantage in the marketplace. If so, then BMS may try to drag out the Warrant's timelines, perhaps by extending the termination date under section 10.1(e), before assigning the purchase rights to **[*129]** another pharmaceutical **[**63]** company, Nimbus argues. The Court is loath to inadvertently enable such gamesmanship. Therefore, the Court denies Celgene and BMS's present request to toll the Warrants deadlines, without prejudice to revisiting the issue in the future. In any event, Celgene already decided not to deliver a notice of exercise on October 11, 2021, as required under the Warrant, so there is almost certainly going to be some future dispute over the timeliness of any assignment transaction that proceeds in the future. As Counsel for Celgene and BMS conceded, the Court could take up the issue of whether to extend Celgene' s time to complete an assignment transaction, if necessary, after rendering judgment on the counterclaims.

For the foregoing reasons, and as previously ordered on October 14, 2021, Nimbus is hereby preliminarily enjoined, from October 14, 2021 through issuance by this Court of a final judgment on the merits, from selling, transferring, encumbering, or otherwise disposing of, in part or in whole, Nimbus Lakshmi or the intellectual property assets Nimbus Lakshmi holds that are associated with the allosteric Tyk2 inhibitor drug under development. While this preliminary injunction is in place, **[**64]** Celgene shall not consummate an assignment of its purchase rights under the Warrant to any third party pharmaceutical company. The Court declines at this time to toll the deadlines set forth by the Warrant, although Celgene and BMS may raise this issue again should it ultimately prevail on the merits.

SO ORDERED.

New York, NY

November 8, 2021

/s/ Jed S. Rakoff

JED S. RAKOFF, U.S.D.J.

[Prevent USA Corp. v. Volkswagen AG](#)

United States Court of Appeals for the Sixth Circuit

October 21, 2021, Argued; November 8, 2021, Decided; November 8, 2021, Filed

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No. 21-1379

Reporter
17 F.4th 653 *; 2021 U.S. App. LEXIS 33234 **; 2021 FED App. 0254P (6th Cir.) ***

PREVENT USA CORPORATION; EASTERN HORIZON GROUP NETHERLANDS B.V., Plaintiffs-Appellants, v. VOLKSWAGEN AG; VOLKSWAGEN GROUP OF AMERICA, INC., Defendants-Appellees.

Prior History: [1]** Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 2:19-cv-13400—Bernard A. Friedman, District Judge.

Prevent USA Corp. v. Volkswagen, AG, 2020 U.S. Dist. LEXIS 43638 (E.D. Mich., Mar. 13, 2020)

Core Terms

forum non conveniens, antitrust, venue provision, courts, anticompetitive, acquire, lawsuit, district court, Sherman Act, factors, convenience, manufacturers, subsidiary, suppliers, alleges, grounds, venue, choice of forum, violations, deference, domestic, cases

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN1[] **Conflict of Law, Forum Selection**

In deciding whether to dismiss a case on the basis of forum non conveniens, the central focus is convenience. Three questions guide a district court's discretion: Is there an adequate alternative forum. Would the chosen forum be unduly burdensome to the defendant or court given the private and public considerations at play? Are there legitimate reasons for denying the plaintiff its choice of forum.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

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

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN2[] **Conflict of Law, Forum Selection**

In reviewing a forum non conveniens ruling, appellate courts ask whether the district court committed a clear abuse of discretion. They give substantial deference to district court decisions that get the process right—that account for all of the relevant public and private interest factors. Fresh review applies to questions of law, such as whether an adequate alternative forum exists.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN3[] **Conflict of Law, Forum Selection**

Under forum non conveniens, in the rare circumstances in which the remedy offered by the other forum is clearly unsatisfactory, American courts tend to keep the case.

Governments > Courts > Authority to Adjudicate

HN4[] **Courts, Authority to Adjudicate**

German ***antitrust law*** gives its courts jurisdiction over all restraints of competition having an effect within the area of application of this act, even if they were caused outside the area of application of this at.

Civil Procedure > ... > Voluntary Dismissals > Court Order > Dismissal Without Prejudice

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN5[] **Court Order, Dismissal Without Prejudice**

A dismissal without prejudice has no res judicata effect on a subsequent claim.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

Civil Procedure > ... > Venue > Motions to Transfer > Choice of Forum

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN6[] **Conflict of Law, Forum Selection**

Because forum non conveniens is designed to secure convenient trials, it makes sense to defer to a plaintiff's choice of forum based on an assumption that the plaintiff knows its self-interest better than anyone else and thus will choose a convenient forum. But that assumption is less valid in the case of a foreign plaintiff or a "shell corporation" set up primarily for suing within the United States, and when affiliates of the new American corporation have already tried and largely failed to win on similar grounds in a foreign forum.

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

Antitrust & Trade Law > Clayton Act > Scope

HN7[] **Clayton Act, Jurisdiction**

The Clayton Act says nothing about forum non conveniens dismissal. Although its special venue provision generously authorizes a plaintiff to sue in any district wherein defendant may be found or transacts business, nothing in that language indicates that the district court may not dismiss a case for refiling in a foreign country. *15 U.S.C.S. § 22*.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

Civil Procedure > Remedies > Damages > Punitive Damages

HN8[] **Venue, Forum Non Conveniens**

For forum non conveniens purposes, differences in the amount of recovery will not make a forum inadequate, even when it lacks punitive damages, as long as the forum provides some remedy.

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Judges: Before: SUTTON, Chief Judge; BATCHELDER and LARSEN, Circuit Judges.

Opinion by: SUTTON

Opinion

[*656] [*2]** SUTTON, Chief Judge. This litigation has had two chapters, so far. Chapter one grew out of a dispute between Volkswagen, a company based in Germany, and a group of companies based in Europe, called the Prevent Group, that specializes in turning around distressed automotive parts suppliers. The seeds of the dispute, from Volkswagen's vantage point, arose when the Prevent Group organized **[**2]** an effort to halt supplies of their car parts in order to obtain better terms from Volkswagen, and Volkswagen responded by opting not to do business with the affiliated companies. From the Prevent Group's vantage point, Volkswagen engineered a boycott of its companies and violated several German and European antitrust laws in the process. Begun in 2016, this litigation initially involved claims of unfair business practices and anticompetitive behavior under German and European law and was handled by a number of German trial and appellate courts. Volkswagen has prevailed in most of these suits, and one case is still pending before the Regional Court in Frankfurt.

Chapter two began in 2019 and was initiated by two members of the Prevent Group: Eastern Horizon Group, based in the Netherlands, and an American subsidiary (Prevent USA). The two of them sued Volkswagen and its American subsidiary in Michigan, alleging that the carmaker unfairly prevented them from acquiring distressed automotive-parts manufacturers. After determining that the Eastern Horizon Group and Prevent USA were trying to open another front on a dispute that should remain in Europe, the district court dismissed the complaint **[**3]** on the basis of forum non conveniens. Finding no errors of law or abuse of discretion in the district court's weighing of the relevant factors, we affirm.

I.

Eastern Horizon Group is part of a network of companies called the Prevent **[*657]** Group. The group is located in Europe, and the affiliated companies specialize in turning around failing or underperforming automotive-parts suppliers. Prevent USA Corporation is a subsidiary formed to acquire distressed manufacturers in the United States, and it is headquartered out of an apartment **[***3]** building in Pittsburgh, Pennsylvania. Prevent-owned companies have supplied Volkswagen, a German company, with parts for several years.

Roughly five years ago, the relationship soured. Eastern Horizon and Prevent USA (collectively Prevent USA from now on unless otherwise specified) claim that Volkswagen abruptly cancelled its contracts because the Prevent Group's acquisition of several manufacturers threatened Volkswagen's single-buyer status for car parts. Volkswagen used this position, Prevent USA claims, to keep the prices of its inputs low by buying only from small companies with little bargaining power. For its part, Volkswagen alleges that a Prevent company **[**4]** unexpectedly demanded millions of euros in additional payments in the middle of a contract and halted production when Volkswagen declined, prompting the carmaker to conclude that the Prevent Group could not be trusted as a business partner.

According to Prevent USA, Volkswagen launched a coordinated initiative called "Project 1" to impede well-resourced suppliers like the Prevent Group from acquiring distressed manufacturers. R.1 at 35. Volkswagen reportedly used a variety of means to frustrate the Prevent Group's acquisition of struggling parts manufacturers. One of them involved option agreements that gave Volkswagen the right to purchase the target company if Volkswagen objected to a prospective buyer. Prevent USA claims that it learned about Project 1 through internal documents, including presentations and spreadsheets, that a Volkswagen executive leaked. In response to this conduct, Prevent Group companies sued Volkswagen at least five times in German courts.

Prevent USA alleges that Volkswagen's anticompetitive efforts frustrated its plans to acquire struggling suppliers in the United States. When the Prevent Group attempted to buy the Brazilian manufacturing arm of the Michigan **[**5]** company Tower International, Tower's CEO informed it that Volkswagen would have to approve the Group's purchase of the Brazilian operations. Prevent USA also claims that Tower admitted to signing an option agreement to allow Volkswagen to purchase the Brazilian operations if a Prevent entity attempted to acquire them. Prevent USA infers that Project 1 likewise frustrated its efforts to acquire six other Michigan-based companies on a "Problematic Suppliers" list that Volkswagen kept. *Id.* at 45-46.

[*4]** Prevent USA sued Volkswagen in federal court, alleging violations of *§§ 1* and *2* of the Sherman Act and several state laws. Prevent USA alleges that Project 1 blocked the Prevent Group from profiting from potential American investments, "caused loss to Prevent's industry goodwill and market reputation, and substantially decreased the overall market valuation of the Prevent Group." *Id.* at 57.

Volkswagen moved to dismiss on forum non conveniens, among other grounds, arguing that the dispute should proceed in Germany. The district court agreed, reasoning that Germany was an adequate and available alternative forum, that the public and private interest factors favored dismissal, and that the choice **[**6]** of forum by the one American plaintiff (Prevent USA) merited little deference because it was merely a shell company acting as a "scouting party" for the Prevent Group. R.56 at 12-21.

[*658] II.

The phrase forum non conveniens (an "unfitting forum") may suggest a more venerable history than the cases reveal. As Latin phrases go, this one has a relatively recent vintage. Minted by a Scottish court in 1845, the common law doctrine, which allows a court to dismiss a case in favor of a more convenient forum, has attained by some accounts the status of "Scotland's most significant legal export in the field of private international law." Ardavan Arzandeh, *The Origins of the Scottish Forum Non Conveniens Doctrine*, 13 J. Priv. Int'l L. 130, 130-32 (2017). The doctrine gained popularity in the Anglo-American legal world after the House of Lords recognized it in 1926. *Société de Gaz de Paris v. Société Anonyme de Navigation*, 1926 SC (HL) 13. The U.S. Supreme Court mentioned forum non conveniens for the first time in the 1930s. *See* *Rogers v. Guar. Tr. Co. of N.Y., 288 U.S. 123, 151, 53 S. Ct. 295, 77 L. Ed. 652 (1933)* (Cardozo, J., dissenting); *Can. Malting Co. v. Paterson S.S., 285 U.S. 413, 423, 52 S. Ct. 413, 76 L. Ed. 837 (1932)* (explaining "[c]ourts of equity **[**7]** and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents, or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal").

But the Court did not provide a full explanation of the American common law doctrine and the factors bearing on its invocation until *Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)*. **[***5]** With Justice Jackson writing for the majority, *Gilbert* held that the district court's power to dismiss a case on forum non conveniens grounds is rooted in the reality that "a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Id. at 507*. Justice Black dissented, insisting that a court faced with a cognizable claim based on alleged violations of common law or statutory rights may not decline to exercise jurisdiction absent congressional authorization, no matter the inconvenience to the defendant. *Id. at 513-15* (Black, J., dissenting). Since then, the Court has stuck to Justice Jackson's path, authorizing trial courts to dismiss a case on forum non conveniens grounds. *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* **[**8]** ; *see* Lonny S. Hoffman & Keith A. Rowley, *Forum Non Conveniens in Federal Statutory Cases*, *49 Emory L.J. 1137, 1153-54 (2000)*.

HN1[] In deciding whether to dismiss a case on this basis, "the central focus" is "convenience." *Piper Aircraft, 454 U.S. at 249*. Three questions guide a district court's discretion: Is there an adequate alternative forum? Would the chosen forum be unduly burdensome to the defendant or court given the private and public considerations at play? Are there legitimate reasons for denying the plaintiff its choice of forum? *Jones v. IPX Int'l Eq. Guinea, S.A., 920 F.3d 1085, 1090 (6th Cir. 2019)*.

HN2[] In reviewing a forum non conveniens ruling, we ask whether the district court committed a "clear abuse of discretion." *Piper Aircraft, 454 U.S. at 257*. We give "substantial deference" to district court decisions that get the process right—that account for all of the "relevant public and private interest factors." *Id.; see* *Jones, 920 F.3d at 1093*. Fresh review applies to questions of law, such as whether an adequate alternative forum exists. *DRFP L.L.C. v. Republica Bolivariana de Venezuela, 622 F.3d 513, 518 (6th Cir. 2010)*.

[*659] 1. Is there an available **[**9]** and adequate alternative forum? Countries that have jurisdiction over the defendant typically qualify. *Piper Aircraft, 454 U.S. at 254 n.22*. ***HN3***[] In the "rare circumstances" in which "the remedy offered by the other forum is clearly unsatisfactory," American courts tend to keep the case. *Id.* But the reality that the foreign venue makes it more difficult to establish the claim or that the foreign law is less generous to prevailing plaintiffs does not establish unavailability. *See, e.g., id. at 249, 255*.

[*6]** Germany is an adequate forum to hear this case. ***HN4***[] German ***antitrust law*** gives its courts jurisdiction over "all restraints of competition having an effect within the area of application of this Act, even if they were caused outside the area of application of this Act." *Gesetz gegen Wettbewerbsbeschränkungen* [GWB] [Act against Restraints of Competition], § 185 (2), https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p1903 (Ger.). Prevent USA has adequately alleged an anticompetitive effect within Germany, as it identified antitrust injuries that arose from missed investment opportunities and its European parent's resulting stunted growth, all in contrast with Volkswagen's German-based **[**10]** market dominance during this period. On top of that, Prevent USA alleges that, as a result of Project 1, its parent company (based in Europe) missed out on key investment opportunities within Germany.

As between a Germany-based antitrust lawsuit and an American one, it appears that the German one would reach *more* conduct and more injuries. In Germany, the Prevent Group also may bring antitrust claims under European law. The Rome II Regulation, which regulates choice of law in private lawsuits within the European Union, provides a mechanism for bringing before a single member state's court anticompetitive behavior affecting many European states. Clay H. Kaminsky, *The Rome II Regulation: A Comparative Perspective on Federalizing Choice of Law*, *85 Tul. L. Rev. 55, 66 (2010)*. A plaintiff may bring an antitrust action alleging effects in multiple countries in the "court of the domicile of the defendant" based on that country's law, "provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition." Commission Regulation 864/2007, on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) 44. That means **[**11]** the Prevent Group could bring an action in German court for anticompetitive effects across the European Union. Not so for a Sherman Act claim, which would not reach foreign conduct that produces only anticompetitive harm abroad. Absent proof of domestic injury, Prevent USA could not recover for any of the alleged European antitrust violations in an American court. *F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)*. This factor favors a German court.

This approach, by the way, may not necessarily end Prevent USA's opportunity to sue in an American federal court. ***HN5***[] A dismissal without prejudice has no res judicata effect on a **[***7]** subsequent claim. 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2367 (4th ed. 2021). And it may be the case—we need not finally decide—that claims dismissed on forum non conveniens grounds may be refiled in federal court if the alternative forum itself declines to exercise jurisdiction or otherwise determines it lacks authority to address injuries located solely on American soil. *See* *Butler v. Denka Performance Elastomer LLC, 806 F. App'x 271, 274 (5th Cir. 2020)* (per curiam); **[*660]** *Sigalas v. Lido Mar., Inc., 776 F.2d 1512*, **[**12]** 1516 (11th Cir. 1985); *Fischer v. Magyar Allamvasutak Zrt., 777 F.3d 847, 852 (7th Cir. 2015)*.

2. Do the private and public interest factors favor an American or German court? Start with the private considerations: access to evidence, mechanisms for ensuring that unwilling witnesses participate, and costs of obtaining testimony from willing witnesses. *Gilbert, 330 U.S. at 508*; *Duha v. Agrium, Inc., 448 F.3d 867, 875 (6th Cir. 2006)*. The question through it all is whether these considerations "establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience." *Piper Aircraft, 454 U.S. at 241* (quotation omitted).

The district court reasonably weighed these private interest factors. German and Portuguese are the languages of choice of the documents purporting to establish Project 1, and the imperative of translation into the language of an American forum favors dismissal. *Duha, 448 F.3d at 876-77*. Most of the witnesses also reside in Europe. Prevent USA's allegations about the relevant presentations and spreadsheets, all directed at German executives, suggest that much of the evidence will be in German, and that the German courts will be able **[**13]** to access these documents and witnesses far more conveniently than American courts could. The district court reasonably thought as much, and not one major private consideration disrupts this balancing.

Turn to the public interest factors: local interest in the dispute, the location of the injury, the fullness of the court's docket, preference for trying cases in the place of the governing law, hesitance to apply foreign law, and desire to avoid conflict-of-law problems. *Wong v. PartyGaming Ltd., 589 F.3d 821, 832 (6th Cir. 2009)*. These factors ultimately speak to an American court's potential "administrative and legal problems" with trying the case. *Piper Aircraft, 454 U.S. at 241* (quotation omitted).

[*8]** The district court reasonably applied these considerations and followed a well-travelled path in doing so. It found that "Michigan jurors would have scant relation to this case" and that, based on Prevent USA's allegations, "Germany is the country with the greatest interest in the controversy." R.56 at 17-18. Both of the "local-interest considerations"—namely, "the parties' connections to the local forum and the location of the injury"—favor dismissal. *Hefferan v. Ethicon Endo-Surgery Inc., 828 F.3d 488, 500 (6th Cir. 2016)* **[**14]** . In truth, the only instance in which Prevent USA specifically alleged in its complaint that Volkswagen's anticompetitive behavior blocked its concrete efforts to acquire a company involved the *Brazilian* subsidiary of Tower International. Without more specific pleadings about blocked Prevent USA efforts to acquire the American operations of Michigan-based companies on the "problematic suppliers" list, we share the district court's concern over whether the plaintiffs have shown a meaningful connection between the alleged injury and the United States. No abuse of discretion occurred.

3. Are there legitimate reasons for denying Prevent USA its choice of forum? **HN6**[] Because forum non conveniens is designed to "secure convenient trials," it makes sense to "defer to a plaintiff's choice of forum based on an assumption that the plaintiff" knows its self-interest better than anyone else and thus "will choose a convenient forum." *Jones, 920 F.3d at 1094*. In the abstract, this consideration favors an American forum. But that assumption is less valid in the case of a **[*661]** foreign plaintiff or a "shell corporation" set up primarily for suing within the United States, **[**15]** *Rustal Trading US, Inc. v. Makki, 17 F. App'x 331, 338 & n.6 (6th Cir. 2001)*, and, worse in this instance, when affiliates of the new American corporation have already tried and largely failed to win on similar grounds in a foreign forum.

The convenience of handling this lawsuit in Michigan is not obvious, even from Prevent USA's perspective. Keep in mind that the Prevent Group brought five different actions in Germany before bringing this American lawsuit. And Prevent USA, a corporation designed to acquire American companies but that has not yet succeeded in doing so, has several hallmarks of a "shell company"—a place of business in an apartment, few employees, and little apparent presence or activity in this country—whose forum choice merits little deference. *See id.* Regardless of the exact size of Prevent USA's operations, the litigation history demonstrates that the real party in interest is the Prevent Group, which as a foreign plaintiff enjoys less deference **[***9]** in its choice of forum. *Piper Aircraft, 454 U.S. at 255*. It is difficult to be overly concerned that Volkswagen "will uproot plaintiffs as a form of litigation strategy," *Hefferan, 828 F.3d at 493*, given how many German roots **[**16]** this long-running dispute already has. The Prevent Group's own prior actions confirm as much, as it initially launched this litigation in 2016 in Germany, a forum choice that one long-standing member of the Prevent Group (Eastern Horizon) cannot fairly distance itself from and that the creation of an American subsidiary (Prevent USA) does not make go away.

Trying to fend off this conclusion, Prevent USA claims that antitrust actions may *never* be dismissed for forum non conveniens. It urges us to follow the Fifth Circuit's decision in *Industrial Investment Development Corp. v. Mitsui & Co., 671 F.2d 876, 890-91 (5th Cir. 1982)*, which reached that conclusion for two reasons. The Fifth Circuit first looked to *United States v. National City Lines, Inc., 334 U.S. 573, 68 S. Ct. 1169, 92 L. Ed. 1584 (1948)* (*National City Lines I*), which held that the broad venue provision of the *Clayton Act* precluded a federal court from dismissing a lawsuit on forum non conveniens grounds and making the claimant file it in a different federal district. The Fifth Circuit held that this precedent "appl[ied] fully" to foreign courts, not just domestic ones. *Mitsui, 671 F.2d at 890*. It made no difference to the Fifth Circuit that Congress **[**17]** repudiated *National City Lines I* later that year by enacting a domestic venue transfer statute, *28 U.S.C. § 1404(a)*, or that the Court recognized the impact of *§ 1404* and limited its decision in *United States v. National City Lines, 337 U.S. 78, 84, 69 S. Ct. 955, 93 L. Ed. 1226 (1949)* (*National City Lines II*). As the Fifth Circuit saw it, *National City Lines II* did not disturb its predecessor's holding that common law dismissal under forum non conveniens is inappropriate for antitrust actions. *Mitsui, 671 F.2d at 890 n.18*.

The Fifth Circuit next determined that, with or without *National City Lines I*, it would not apply forum non conveniens to Sherman Act claims. In its view, the Act's focus on penalizing and deterring monopolistic behavior made dismissal in favor of a foreign venue inappropriate because it risked placing anticompetitive violations "beyond the reach of the *Sherman Act*." *Id. at 891*.

We are not persuaded. *National City Lines I* for one does not control this case. **HN7**[] The Clayton Act says nothing about forum non conveniens dismissal. Although its special venue **[***10]** provision generously authorizes a plaintiff to sue "in any district wherein [defendant] may be found or transacts **[*662]** business," nothing in that language **[**18]** indicates that the district court may not dismiss a case for refiling in a foreign country. *15 U.S.C. § 22*. As then-Chief Judge Breyer reasoned about a similar special venue provision in a federal securities statute, "[*t*]*he language of such a statute does not forbid transfer*" but "simply adds to the number of courts *empowered* to hear a plaintiff's claim." *Howe v. Goldcorp Invs., Ltd., 946 F.2d 944, 949 (1st Cir. 1991)*. If a general venue statute like *§ 1404(a)* does not bar the international transfer of a lawsuit, as *Piper* confirms, it is hard to see why a special venue provision would do so implicitly. *Id. at 948-49*.

The Fifth Circuit also is not the only court of appeals to consider this question. The First Circuit, as suggested, took a different approach. It reasoned that *National City Lines I* had no role to play in view of the later enactment of *§ 1404* and the Supreme Court's decision in *National City Lines II*. *Id.* It explained that, under a special venue provision in the *Securities Act of 1934*, which allowed the plaintiff to sue in the jurisdiction "wherein any act or transaction constituting the violation occurred," the common law doctrine of forum non conveniens remained a viable **[**19]** option. *Id. at 948, 950*. Then-Chief Judge Breyer reasoned that the statute does not prohibit transfer explicitly or implicitly and thus does not end the common law tradition of allowing such transfers. *Id. at 949-50*.

The Second Circuit followed a similar path in the context of a claim just like this one, a Sherman Act complaint. *Cap. Currency Exch., N.V. v. Nat'l Westminster Bank PLC, 155 F.3d 603, 606 (2d Cir. 1998)*. It held that, even after *National City Lines I*, antitrust claims may be dismissed under forum non conveniens. *Id. at 608-09*. In doing so, it relied on the First Circuit's decision in *Howe*, concluding that the Supreme Court had "considered only domestic transfers; it did not consider international transfers at all." *Id. at 608* (quoting *Howe, 946 F.2d at 949*). It saw no good reason why *National City Lines I* required any particular approach in the international context because the Supreme Court's decision focused on domestic antitrust litigation.

Prevent USA invokes legislative history in an effort to show that the relevant antitrust and securities acts differ, offering a reason to distinguish *Howe* (but not *Capital Currency Exchange*). Two answers come to mind. The first is **[**20]** that the argument does little to counter the **[***11]** First Circuit's persuasive (and non-legislative-history-based) explanation why *National City Lines I* does not advance the plaintiffs' cause. The second is that the argument illustrates a vice of relying on legislative history. If accepted, this approach would require us to conclude that two statutes with materially identical venue provisions—the Sherman Act and the 1934 Securities Act—would somehow generate opposite conclusions about the continuing vitality of the common law doctrine of forum non conveniens. Whatever virtues this kind of argument advances, the rule of law is not among them. By creating a "hodge-podge" of different conclusions about a court's power to dismiss a case for statutes with similar special venue provisions, *Howe, 946 F.2d at 950*, we would sacrifice consistent and predictable decision making.

Confirming the risk, the Fifth Circuit has brought that prediction to fruition. *Mitsui*, as shown, barred a forum non conveniens dismissal of an antitrust lawsuit given the statute's special venue provision (*15 U.S.C. § 22*), which allows plaintiffs to sue "in any district wherein [defendant] may be found or transacts business." **[**21]** *671 F.2d at 890* & n.17 (quotation omitted). But other Fifth Circuit **[*663]** cases reach a different result with other federal statutes that have similar venue provisions. In one, the court upheld a forum non conveniens dismissal of a claim premised on the *Racketeer Influenced and Corrupt Organizations Act*, or RICO. *Kempe v. Ocean Drilling & Expl. Co., 876 F.2d 1138, 1144 (5th Cir. 1989)*. That statute has a special venue provision that allows plaintiffs to sue in "any district in which" defendant "resides, is found, has an agent, or transacts his affairs." *18 U.S.C. § 1965(a)*. In another, the court noted the availability of a forum non conveniens dismissal of a tort claim under the *Jones Act*, *In re Air Crash Disaster Near New Orleans, 821 F.2d 1147, 1163 n.25 (5th Cir. 1987)* (en banc), which had a since-repealed venue provision (46 U.S.C. § 688) that authorized jurisdiction "under the court of the district in which the defendant employer resides or in which his principal office is located." To give the Clayton Act's special venue provision different legal effect than similarly worded provisions of other statutes based on a handful of floor statements would be contrary to our duty to "interpret **[**22]** laws rather than reconstruct legislators' intentions." *I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 452-53, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987)* (Scalia, J., concurring in the judgment).

[*12]** One might wonder whether *Piper Aircraft*'s dismissal for forum non conveniens to international courts is limited to common law claims. That is a fair question. *Piper Aircraft* after all considered only the dismissal of common law tort claims. *454 U.S. at 239-40*. But nothing in the decision limits its holding to common law claims, and in many cases the type of tort claim at issue in *Piper Aircraft* is created by a statute, say a tort claim under the Jones Act. Court after court, moreover, has declined to draw this line, as shown by the many courts of appeals that have allowed forum non conveniens dismissals of federal statutory claims. *See Howe, 946 F.2d at 950 (Securities Act)*; *Cap. Currency Exch., 155 F.3d at 609 (Sherman Act)*; *Trotter v. 7R Holdings LLC, 873 F.3d 435, 442, 68 V.I. 818 (3d Cir. 2017)* (Jones Act); *Kempe, 876 F.2d at 1144 (RICO)*; *Gemini Cap. Grp., Inc. v. Yap Fishing Corp., 150*

F.3d 1088, 1092 (9th Cir. 1998) (RICO); *Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 952-53 (11th Cir. 1997)* (RICO).

Also unpersuasive **[**23]** are Prevent USA's other arguments for barring the use of forum non conveniens in antitrust claims. It overstates the risk that dismissing this lawsuit between competitors will prohibit anyone from challenging Volkswagen's alleged anticompetitive behavior. The U.S. Department of Justice, the fifty state attorneys general, and any consumers harmed by higher car prices could still sue the company under the Sherman Act and would be less likely to have their lawsuits dismissed under forum non conveniens. *15 U.S.C. §§ 4*, *15*. Nor is it obvious that the German and European antitrust protections lack teeth. Consider the increasingly sophisticated antitrust legislation being written in Europe and elsewhere today that offers private remedies between competitors. *See* Daniel J. Gifford & Robert T. Kudrle, *The Atlantic Divide in Antitrust: An Examination of US and EU Competition Policy* 1 (2015) (explaining "[t]he United States and the European Union have competition laws that are broadly similar").

Prevent USA separately argues that Germany is not an adequate alternative forum because the German courts would not apply the Sherman Act and consequently would not award treble damages for antitrust violations. **[**24]** But suing under German ***antitrust law*** instead of the Sherman Act does not "render the possible remedy so clearly inadequate that forcing **[*664]** a plaintiff to bring suit [in Germany] would be unjust." *Hefferan, 828 F.3d at 495*. ***HN8***[] Differences in the **[***13]** amount of recovery will not make a forum inadequate, even when it lacks punitive damages, *id.*, as long as the forum provides some remedy, *Piper Aircraft, 454 U.S. at 255*. That is amply true here.

Prevent USA adds that Germany is not an available forum because German courts would not be able to exercise jurisdiction over codefendant Volkswagen Group of America. But Volkswagen's German law expert explained that its American subsidiary could be held liable as a joint tortfeasor for inflicting intentional economic damage to the Prevent Group. Besides, we have affirmed dismissal for forum non conveniens even when the other forum lacked jurisdiction over one defendant where other affiliated corporate entities from whom the plaintiffs could recover were amenable to service. *Est. of Thomson ex rel. Est. of Rakestraw v. Toyota Motor Corp. Worldwide, 545 F.3d 357, 365 (6th Cir. 2008)*.

We affirm.

Teradata Corp. v. SAP SE

United States District Court for the Northern District of California

November 8, 2021, Decided; November 8, 2021, Filed

Case No. 18-cv-03670-WHO

Reporter

570 F. Supp. 3d 810 *; 2021 U.S. Dist. LEXIS 215825 **; 2021 WL 5178828

TERADATA CORPORATION, et al., Plaintiffs, v. SAP SE, et al., Defendants.

Subsequent History: Transferred by Teradata Corp. v. SAP SE, 2023 U.S. App. LEXIS 19721 (Fed. Cir., Aug. 1, 2023)

Prior History: Teradata Corp. v. SAP SE, 2018 U.S. Dist. LEXIS 209872, 2018 WL 6528009 (N.D. Cal., Dec. 12, 2018)

Core Terms

database, trade secret, cubes, abstract idea, customers, asserts, products, processing, Reply, documents, inventive, analytical, contends, mapping, marks, confidential, enterprises, methodology, license, software, Batched, conventional, argues, Merge, motion to exclude, responds, patent, cross-elasticity, routine, summary judgment

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Judges: William H. Orrick, United States District Judge.

Opinion by: William H. Orrick

Opinion

[*819] REDACTED — ORDER RE MOTIONS FOR SUMMARY JUDGMENT AND MOTIONS TO EXCLUDE EXPERT TESTIMONY

Re: Dkt. Nos. 466, 467, 470, 472, 474, 476, 480, 495

Defendants SAP SE, SAP America, **[**4]** Inc., and SAP Labs, LLC (collectively "SAP") **[*820]** move for summary judgment on plaintiffs Teradata Corporation, Teradata US, Inc., and Teradata Operations, Inc.'s (collectively "Teradata") technical trade secret claims, business trade secret claims, and tying claim. Teradata also moves for summary judgment and argues that counterclaim-plaintiff SAP SE's U.S. Patent No. 8,214,321 ("'321 Patent") is invalid under *35 U.S.C. § 101*. It argues that SAP is not entitled to damages for the alleged infringement of U.S. Patent Nos. 7,617,179 ("'179 Patent"), and 9,626,421 ("'421 Patent") before May 19, 2019. Teradata also moves to exclude portions of four of SAP's expert's opinions: Tim Kraska, Stephen Horn, Gregory Leonard and Ouri Wolfson, and Sharad Mehrotra. SAP moves to exclude portions of one of Teradata's expert's opinions, John Asker.

For the reasons explained below, SAP's motion for summary judgment on Teradata's technical trade secret claims and tying claim is GRANTED. Its motion related to Teradata's business trade secret claims under the DTSA is DENIED as moot. Its motion to exclude portions of Asker's report is GRANTED in part and DENIED in part. Teradata's motion for summary judgment on the invalidity of the '321 Patent is GRANTED. Its motion for partial summary judgment against an award of damages for infringement **[**5]** of the '179 and '421 Patents before May 21, 2019, is also GRANTED. Its motion to exclude portions of Kraska's expert report is DENIED as moot. Its motion to exclude portions of Horn's report is GRANTED in part and DENIED in part. Its motion to exclude portions of the Leonard and Wolfson reports is DENIED in part as moot and DENIED in part on the merits. Its motion to exclude portions of Mehrotra's report is DENIED.[1]

BACKGROUND

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[1] The parties have also filed 21 motions to seal. Dkt. Nos. 462, 465, 468, 471, 473, 475, 479, 506, 515, 518, 522, 524, 528, 531, 536, 550, 551, 554, 560, 568, 599. I will issue a separate order addressing these motions. Suffice it to say, the parties have sought to seal a great deal of information that does not meet the compelling interest standard that applies to dispositive motions. *See* *Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1096-99 (9th Cir. 2016)*, *cert. denied sub nom.* ***FCA U.S. LLC v. Ctr. for Auto Safety, 137 S. Ct. 38, 196 L. Ed. 2d 26 (2016)***. While I will address all of the sealing requests in a separate order, what is not sealed in this Order does not meet the applicable standard. Further, with respect to those portions of this Order that are sealed, the parties should not assume that I have concluded that they have provided a sufficient basis to seal the information. These redactions are preliminary and should not be taken as an indication about the merits of sealing.

I. FACTUAL HISTORY

Teradata conducts research, development, engineering, and other technical operations related to its Enterprise Data Analytics and Warehousing ("EDAW" or "EDW") products. *See* Dkt. No. 67 ("SAC") ¶ 4. Teradata's flagship product is the Teradata Database, a relational database management system designed for EDW. SAC ¶ 16. Teradata was the first commercial EDW vendor to utilize massively parallel processing ("MPP") through Teradata Database to execute high volumes of analytical queries on massive amounts of data for EDAW customers. Dkt. No. 528-9 ("Walter Decl.") ¶ 3.

SAP is best known for Enterprise Resource Planning ("ERP") software, historically designed to run on transactional databases such as those by Oracle, IBM, and Microsoft. Dkt. **[**6]** No. 462-5 ("Anicich Decl.") ¶ 39. SAP's ERP applications do not, and have never, run on top of Teradata's analytical database. Dkt. No. 467-5 ("Mehrotra Decl.") ¶ 127.

[*821] ERP Applications allow companies to manage data required to conduct their day-to-day operations across numerous aspects of the business enterprise and are typically designed around a relational transactional database that can ensure users have access to a uniform and current set of data. *Id.*; Dkt. No. 452-11 ("Stiroh Rep.") ¶ 10; Anicich Decl. ¶¶ 24-28. Transactional databases are also known as "online transactional processing" ("OLTP") databases and are typically "row-based," which is advantageous for processing transactions, such as pay roll data, and running a large number of simple transactions concurrently. Mehrotra Decl. ¶ 53.

In contrast, analytical applications are designed to run on a second type of database, known as an analytics or "OLAP" database. Dkt. No. 463-15 ("Sell Depo.") at 18-19. These databases typically store data in columns to optimize the running of a small number of queries with a large number of complex records. Mehrotra Decl. ¶ 60; Dkt. No. 562-6 ("Kraska Decl.") ¶ 22. There are three different **[**7]** types of analytical databases: (1) data marts; (2) enterprise data warehouses ("EDWs"); and (3) data lakes. Sell Depo. at 14. EDWs are large-structured analytics databases that draw data from different sources, e.g., transactional databases, across an enterprise. *Id.* at 13.

In 2009, SAP and Teradata entered into a partnership referred to as the "Bridge Project" to combine SAP's ERP Applications and SAP BW tool interface with Teradata's MPP architecture that it uses in Teradata Database for EDW. Kraska Decl. ¶ 161. During the Bridge Project, Teradata provided SAP with access to its confidential information. SAC ¶ 35. The parties executed two agreements to formalize the Bridge Project, the Software Development Cooperation Agreement ("SDCA") and the Technology Partner Agreement ("TPA"). SAC ¶ 32. These agreements restricted disclosures of each parties' confidential information. *Id.* The parties also entered into a mutual non-disclosure agreement ("Mutual NDA") in December 2008 and June 2009 ("NDAs"). *Id.*

Through the Bridge Project, SAP and Teradata jointly developed "Teradata Foundation" which enabled SAP's ERP applications to use Teradata for the transactional database and data-analytics **[**8]** for EDW activities. Dkt. No. 528-5 ("Graas Decl.") ¶¶ 6-9. While the Bridge Project was underway, SAP was developing another EDW product called SAP HANA ("HANA"). Dkt. No. 530-39 ("Primsch Depo.") at 362. By June 2011, HANA was commercially available. After nearly three years in the Bridge Project, and two months after HANA was made available, SAP unilaterally terminated the joint venture and stopped supporting, selling, and marketing Teradata Foundation. Dkt. No. 529-25 at 068.

In February 2015, SAP launched its latest version of ERP Application, SAP S/4HANA and combined its ERP Application and EDAW products into a single sales offering. S/4HANA is integrated to operate on top of SAP's HANA database, a translytical database with both transactional and analytical functionalities. Anicich Decl. ¶ 40. Customers can purchase HANA either with a full-use license, with no restrictions on how the data within HANA can be used, or a lower-cost limited-use "runtime" license, with database use limited to supporting S/4HANA. Dkt. No. 467-53 ("Zenus Depo.") at 105-115. In other words, if customers want to export their own data from HANA for use with third-party products, they must pay an additional **[**9]** license fee, i.e., an exit fee. Dkt. No. 532-41 at 583.

II. PROCEDURAL HISTORY

On June 19, 2018, Teradata filed a complaint against SAP alleging, among other **[*822]** things, misappropriation of its trade secrets and violation of antitrust laws.[2] Dkt. No. 1. On December 12, 2018, I granted in part and dismissed in part SAP's motion to dismiss. Dkt. No. 65 ("MTD Order"). On December 21, 2018, Teradata filed a second amended complaint alleging that SAP disingenuously entered a joint venture with it to steal its trade secrets and develop a competing product, HANA, misappropriating trade secrets, and violating antitrust laws in the process. *See* Dkt. No. 67 ("SAC"). The following claims remain at issue: whether SAP misappropriated Teradata's trade secrets related to the Batched Merge method and whether SAP unlawfully tied its ERP applications to its HANA product.[3] SAP answered on January 11, 2019 and filed counterclaims related to five of its patents on May 29, 2019. *See* Dkt. Nos. 72, 106. SAP's remaining patent infringement counterclaims concern the following patents: the '421 Patent, the '321 Patent, and the '179 Patent. On June 12, 2020, I held a claims construction hearing, and issued an order on July 15, 2020. Dkt. No. 279 ("Claim **[**10]** Construction Order"). On August 25, 2021, Teradata and SAP filed all of the motions at issue.

LEGAL STANDARD

I. SUMMARY JUDGMENT

A party is entitled to summary judgment where it "shows that there is no genuine dispute as to any material fact and [it] is entitled to judgment as a matter of law." *FED. R. CIV. P. 56(a)*. A dispute is genuine if it could reasonably be resolved in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A fact is material where it could affect the outcome of the case. *Id.*

The moving party has the initial burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine dispute of material fact. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Once the movant has made this showing, the burden shifts to the nonmoving party to identify specific evidence showing that a material factual issue remains for trial. *Id.* The nonmoving party may not rest on mere allegations or denials from its pleadings but must "cit[e] to particular parts of materials in the record" demonstrating the presence of a material factual dispute. *FED. R. CIV. P. 56(c)(1)(A)*; *see also* *Liberty Lobby, 477 U.S. at 248*. The nonmoving party need not show that the issue will be conclusively resolved in its favor. *Id. at 248-49*. All that is required is the **[**11]** identification of sufficient evidence to create a genuine dispute of material fact, thereby "requir[ing] a jury or judge to resolve the parties' differing versions of the truth at trial." *Id.* (internal quotation marks omitted). If the nonmoving party cannot produce such evidence, the movant "is entitled to . . . judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case." *Celotex, 477 U.S. at 323*.

On summary judgment, the court draws all reasonable factual inferences in favor of the nonmoving party. *Liberty Lobby, 477 U.S. at 255*. "Credibility determinations, the weighing of the evidence, **[*823]** and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* However, conclusory and speculative testimony does not raise a genuine factual dispute and is insufficient to defeat summary judgment. *See* *Thornhill Publ'g Co., Inc. v. GTE Corp., 594 F.2d 730, 738-39 (9th Cir. 1979)*.

II. FEDERAL RULES

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[2] This case is related to *Teradata v. SAP*, No. 20-CV-06127-WHO.

[3] The parties dispute whether Teradata asserted a new tying theory during the summary judgment briefing, i.e., that SAP unlawfully tied S/4HANA to HANA's analytical capabilities through licensing. *See infra* Part I.B.3.

Federal Rule of Evidence 702 allows a qualified expert to provide an opinion where:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and **[**12]** methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

Expert testimony is admissible under *Rule 702* "if it is both relevant and reliable." *See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. "[R]elevance means that the evidence will assist the trier of fact to understand or determine a fact in issue." *Cooper v. Brown, 510 F.3d 870, 942 (9th Cir. 2007)*. Under the reliability requirement, expert testimony must "relate to scientific, technical, or other specialized knowledge, which does not include unsubstantiated speculation and subjective beliefs." *Id.* To ensure reliability, the court must "assess the [expert's] reasoning or methodology, using as appropriate such criteria as testability, publication in peer reviewed literature, and general acceptance." *Primiano v. Cook, 598 F.3d 558, 565 (9th Cir. 2010)*. These factors are "helpful, not definitive," and a court has discretion to decide how to test reliability "based on the particular circumstances of the particular case." *Id.* (internal quotation marks and footnotes omitted).

The inquiry into the admissibility of expert testimony is "a flexible one" where "[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Id. at 564*. "When the methodology is sound, and the evidence **[**13]** relied upon sufficiently related to the case at hand, disputes about the degree of relevance or accuracy (above this minimum threshold) may go to the testimony's weight, but not its admissibility." *i4i Ltd. P'ship v. Microsoft Corp., 598 F.3d 831, 852 (Fed. Cir. 2010)*. The burden is on the proponent of the expert testimony to show, by a preponderance of the evidence, that the admissibility requirements are satisfied. *Fed. R. Evid. 702* advisory committee notes.

"Trial courts must exercise reasonable discretion in evaluating and in determining how to evaluate the relevance and reliability of expert opinion testimony." *United States v. Sandoval-Mendoza, 472 F.3d 645, 655 (9th Cir. 2006)*. A district court serves as "a gatekeeper, not a factfinder." *Id. at 654*.

DISCUSSION

I. SAP'S MOTION FOR SUMMARY JUDGMENT

SAP moves for summary judgment on Teradata's technical trade secret claims, business trade secret claims, attempted monopolization claim, and tying claim. Dkt. No. 467 ("SMSJ"). During the briefing, however, Teradata stipulated to the dismissal of its attempted monopolization claim. Dkt. No. 545. It also voluntarily dropped its federal Defend Trade Secrets Act ("DTSA") claim regarding its business trade secrets. Dkt. No. 542 ("Opp. SMSJ") **[*824]** at 25. It continues to assert claims related to trade secrets 54-56 under the *California Uniform Trade Secrets Act ("CUTSA")* ***[**14]***. *Id.* SAP's motion for summary judgment related to Teradata's attempted monopolization claim and business trade secret claims under the DTSA is therefore DENIED as moot. Teradata opposes SAP's motion related to its technical trade secret claims and its tying claim.

A. Trade Secret Claim

SAP moves for summary judgment on Teradata's technical trade secret claims. SMSJ at 2-12. Over the course of this case, Teradata's trade secret allegations have significantly narrowed and now focus on only one category of technical trade secrets: the Batched Merge method ("Asserted Trade Secret"), [TEXT REDACTED BY THE COURT] Dkt. No. 528-9 ("Walter Decl.") ¶¶ 3-12. SAP asserts that Teradata does not have standing to sue, it failed to mark the Asserted Trade Secret as confidential, as required by its agreements with Teradata, and that SAP is contractually authorized to use the product that incorporates Teradata's Asserted Trade Secret. SMSJ at 2-12.

1. Standing

SAP asserts that Teradata lacks standing to assert its technical trade secret claims because Teradata assigned the claims to Marlin Equity, a third-party firm. SMSJ at 10. On April 22, 2016, Teradata sold to Marlin a portion of its assets **[**15]** related to its "Marketing Execution and Marketing Operations" business, or Teradata's Marketing Applications Business ("TMA Business") as defined in the Asset Purchase Agreement ("APA"). Dkt. No. 543-3 ("APA") at 15. In the APA, Teradata assigned to Marlin contracts that were material to the TMA Business or "Material Contracts" as defined in the APA. *Id.* at 42. Teradata expressly identified the SDCA as a "Material Contract." Dkt. No. 464-26 at ("APA Schedule") at 163. In addition, Teradata's general counsel wrote to SAP that Teradata was assigning away "all of Teradata's rights, title and interests in, to, and under the" SDCA and that it "should deal solely" with Marlin. Dkt. No. 464-1 ("Lanier Decl., Ex. 58"). Teradata acknowledges that it provided the Asserted Trade Secret to SAP "[d]uring the Bridge Project, subject to the terms of the parties' agreements" such as the SDCA. SAC ¶ 34. SAP asserts that because the SDCA is material to the TMA Business under the APA, Teradata's alleged trade secrets claims are also material to the TMA Business and therefore that Teradata assigned all such claims to Marlin. SMSJ at 11.

Teradata contends that no assignment occurred because (1) any assignment **[**16]** required SAP's consent and SAP never consented and (2) the listing of the SDCA in the APA was a mistake and not part of the assignment. Opp. SMSJ at 11. Section 14.9 of the SDCA states that "Neither party may assign this Agreement . . . except with the express written consent of the other Party." SDCA ¶ 14.9. Similarly, Section 5.5(b) of the APA states, "Notwithstanding anything in this Agreement to the contrary, this Agreement shall not constitute an assignment, sale, transfer, conveyance etc., with respect to any Transferred Asset, or any right thereunder if an assignment, sale, transfer . . . without the Third-Party Consent of, or other action by, any third party, would constitute a breach or other contravention of the terms of such Transferred Asset." APA § 5.5(b); Dkt. No. 596 ("Hearing Tr.") at 6.

It is undisputed that SAP did not consent to the assignment of the SDCA under the APA. Dkt. No. 532-6 ("Weber Depo.") at 81-83. But SAP asserts that its consent is irrelevant to the issue of assignment under the SDCA's choice-of law, New York law. Reply SMSJ at 2-3. New **[*825]** York courts have "consistently held that assignments made in contravention of a prohibition clause [e.g., a contractual **[**17]** provision prohibiting assignments without the written consent of a party] in a contract are void if the contract contains clear, definite, and appropriate language declaring the invalidity of such assignments." *Sullivan v. Int'l Fid. Ins. Co., 96 A.D.2d 555, 465 N.Y.S.2d 235, 237 (1983)* (collecting cases); *see also Purchase Partners, LLC v. Carver Fed. Sav. Bank, 914 F. Supp. 2d 480, 505 (S.D.N.Y. 2012)*, *on reconsideration in part*, *2013 U.S. Dist. LEXIS 51850, 2013 WL 1499417 (S.D.N.Y. Apr. 10, 2013)* (holding that a transfer was valid because even though the agreement prohibited transfers or assignment without the written consent of the other party, it did not state that "any such transfer or assignment would be invalid or void."). The SDCA does not contain clear, definite, and appropriate language declaring the invalidity of an assignment made without SAP's consent. The assignment of the SDCA to Marlin is therefore valid.

Even if SAP had consented and its claims were subject to the assignment, Teradata contends that summary judgment should be denied because whether the SDCA was listed in the APA by mistake is a disputed factual issue and that the APA should be reformed to rectify the mistake. Opp. SMSJ at 11 n.15. It argues that because the SDCA is not related to the TMA Business, its inclusion in the APA was a mistake.

The APA is governed by Delaware law. APA § 11.3(a). "Claims for contract reformation require proof by clear **[**18]** and convincing evidence." *Parke Bancorp Inc. v. 659 Chestnut LLC, 217 A.3d 701, 710 (Del. 2019)*. In cases of unilateral mistake, reformation is permissible only when "the other party knew of the mistake but remained silent." *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Est. Fund, 68 A.3d 665, 680 (Del. 2013)*. In cases of mutual mistake, reformation is permissible only if the parties "came to a specific prior understanding ... that differed materially from the written agreement." *Parke Bancorp, 217 A.3d at 710*.

Teradata does not show by clear and convincing evidence that Marlin knew of Teradata's mistake and remained silent or that Marlin and Teradata expressed an intent to agree to terms that differed from the terms in the APA. Instead, it contends that Steven Weber, its Global Head of Deal Management, testified that the SDCA or the Teradata Database "does not have anything to do with the TMA products" and that the letter from Teradata's general counsel was sent in error. Opp. SMSJ at 11. But such self-serving testimony is not evidence that there was either a unilateral or mutual mistake necessary for contract reformation. Reply SMSJ at 3. The APA is unambiguous and so "the writing itself is the sole source for gaining an understanding of intent." *Penton Bus. Media Holdings, LLC v. Informa PLC, 252 A.3d 445, 461 (Del. Ch. 2018)*. Because Teradata fails to identify sufficient evidence to create a genuine dispute of material fact, whether the SDCA **[**19]** was listed in the APA by mistake cannot preclude summary judgment.

In contrast, Teradata contends that neither the APA nor the SDCA assigns Teradata's trade secrets to Marlin and "without a clear assignment of the underlying intellectual property," it cannot have assigned its trade secret claims to Marlin. *Id.*at 12. SAP asserts that the question about whether the APA assigned the Asserted Trade Secret itself is irrelevant; the relevant question is whether Teradata assigned the right to sue for misappropriation of the Asserted Trade Secret. Reply SMSJ at 3-4. It argues that Teradata did because it assigned to Marlin "[a]ll **[*826]** Intellectual Property that is Related to the TMA Business," e.g., "trade secrets and confidential proprietary business information" and Teradata's claim is based on trade secrets purportedly provided subject to the SDCA's terms, which is "primarily related" to the TMA business. APA § 2.1(e); APA at 8. It also assigned to Marlin "[a]ll rights to Any Actions of any nature available to or being pursued by any member of [Teradata] to the extent related to the TMA Business" and "[a]ll goodwill and the going concern value of the TMA Business or the Marks included in the **[**20]** Transferred IP, and the right to sue for and recover for damages and profits for past and future infringements and misappropriations by any third party of any part of any of the Transferred IP owned by any member of [Teradata]." *Id.* §§ 2.1(h), (k). Teradata responds that its trade secret claims are not primarily related to the SDCA because its claims are for misappropriation and not breach of contract. Hearing Tr. at 7-8. It also contends that no actual intellectual property was ever conveyed. *Id.*

At the very least, there is a genuine dispute of whether Teradata's trade secret claims fall outside the scope of the assignment. Teradata has standing to pursue its trade secret claims.

2. Marking the Asserted Trade Secret Communications as Confidential

SAP asserts that Teradata's Batched Merge method trade secret claims also fail, however, because Teradata never marked as confidential any of the communications that purportedly disclosed the trade secrets as required by the NDAs. SMSJ at 13. The NDAs governed the sharing of confidential information during the Bridge Project and stated that "Confidential Information" shall mean the following:

> "[A]ll information which Disclosing Party protects **[**21]** against unrestricted disclosure to others, furnished by the Disclosing Party . . . to the Receiving Party . . . in writing or in other tangible form and clearly identified as confidential or proprietary at the time of disclosure marked with an appropriate legend indicating that the information is deemed confidential or proprietary by the Disclosing Party . . . Where the Confidential Information has not been reduced to written or other tangible form at the time of disclosure, and such disclosure is made orally or visually, the Disclosing Party agrees to identify it as confidential or proprietary at the time of disclosure and to summarize the Confidential Information in writing and deliver such summary within thirty (30) calendar days of such oral or visual disclosure provided . . . ."

Dkt. No. 463-27 ("Mutual NDA 1") ¶ 2; Dkt. No. 463-28 ("Mutual NDA 2") ¶ 2.

There are two documents at issue, different versions of the same document created by John Graas, a Teradata employee, that were marked confidential ("Marked Document"). *See* Dkt. Nos. 464-3 (version 1), 463-24 (version 6). Teradata contends that the first version of the Marked Document from July 2008 identifies the Batched Merge method **[**22]** and explained how the method could resolve SAP's problems. Opp. SMSJ at 14. But its witness, Graas, concedes that the first version of the Marked Document "does not contain the details of the overall batched merge method that was conveyed — conveyed to SAP" and only "listed the batched merge method . . . as a reference." Dkt. No. 462-17 ("Graas Depo.") at 106, 109. He explained that "the entire explanation of the batched merge method . . . would not have been in writing" and that he would "have conveyed it verbally within the meeting explaining to [SAP] what I meant with the [batched merge method] and how it worked." *Id.* at 84, 105.

[*827] The sixth version from August 2010, however, explained the manner in which the Batched Merge method was implemented to address deficiencies that prevented SAP from processing large batches of data. Opp. SMSJ at 13; Dkt. No. 463-24 § 4.2. SAP does not dispute that the sixth version contains the details of the Batched Merge method but argues that there is no evidence that Graas ever sent the sixth version to SAP. Graas Depo. at 268 ("Q: Do you have any records, any evidence at all, of version 6 being shared with SAP in any way? A: I don't recall."). It relies **[**23]** on *Prostar Wireless Grp., LLC v. Domino's Pizza, Inc., 360 F. Supp. 3d 994 (N.D. Cal. 2018)*, to argue that because "there was *no* evidence that the defendant had access to the trade secrets" the sixth version of the Marked Document cannot be the basis for a trade secret claim. Reply SMSJ at 6 (citing *Prostar Wireless, 360 F. Supp. at 1002*). Teradata objects and contends that *Prostar Wireless* is distinguishable because SAP does not dispute that it received the five prior versions of the document. Opp. SMSJ at 13 n.17. But Section 4.2 of the sixth version, which conveys how the Batched Merge Method was implemented, is not in any other version. Reply SMSJ at 6 n.3; *see* Dkt. Nos. 530-19 at 224-25, 464-3, 529-27, 529-28, 529-29. The first version of the Marked Document therefore fails to put SAP on notice about the allegedly confidential Batched Merge Method; there is no evidence that SAP received the sixth version.

The question then is whether Teradata's trade secret claims fail because of its failure to mark as confidential the communications that allegedly conveyed the Batched Merge Method. Teradata contends that its claims do not fail because, as SAP admits, Graas testified that he conveyed the Batched Merge Method orally to SAP employees in relation to the first version of the Marked Document. Opp. SMSJ at 15-17. It argues **[**24]** that the MNDA does not require marking subsequent oral discussion of confidential information already marked as confidential and even if it did, the parties waived this requirement through their conduct. *Id.* at 17. SAP responds that its argument is not that the NDAs require marking subsequent oral discussions of confidential information already marked as confidential but that Graas never disclosed the claimed trade secret in a writing marked as confidential in the first place. Reply SMSJ at 6.

It also asserts that the parties have not waived the marking requirement through their conduct. *Id.* at 7. The NDAs contain no-waiver provisions and therefore "Teradata must prove that SAP intentionally relinquished the marking provision and the no-waiver provision itself." *Id.*; Mutual NDA 1 ¶ 15; Mutual NDA 2 ¶ 15. Under New York law, waiver "'should not be lightly presumed' and must be based on 'a clear manifestation of intent' to relinquish a contractual protection." *Kassab v. Kasab, 195 A.D.3d 832, 838, 151 N.Y.S.3d 94 (N.Y. App. Div. 2021)*.

There is no clear manifestation of intent to relinquish either provision here. Teradata contends that there is waiver based on the conduct of its and SAP's employees "that shows that the parties intended that subsequent oral discussions **[**25]** of information already identified as confidential would be treated confidentially." Opp. SMSJ at 17-18. In support, it emphasizes testimony from various SAP employees, including SAP's CTO, where they state that they were required to protect Teradata's confidential information. *See, e.g.*, Dkt. No. 532-1 ("Sikka Depo.") at 58-59 ("Q: So if it turned out that somebody on your team took Teradata confidential information and used it in the development of NewDB, would that . . . be consistent with your understanding of the confidentiality obligations between SAP and Teradata? **[*828]** [Objection to form] A: No, it would not be consistent with it."); Dkt. No. 530-25 ("Holetke Depo.") at 120 ("Q: So you cannot imagine sharing Teradata's confidential information with other groups at SAP? [Objection to form] A: Yes."); Dkt. No. 530-39 ("Primsch Depo.") at 354-55 ("Q: Employees working on the Bridge Project would not have shared [internal] information outside of SAP or Teradata? A: To -- to the extent, yes."). It also emphasizes an email from an SAP employee telling colleagues not to share "internal information of TD [Teradata]" with IBM. Dkt. No. 529-30 at 437. These are not evidence of a clear manifestation **[**26]** of SAP's intent to relinquish either provision in the Mutual NDAs. As SAP points out, it is not apparent from the testimonies what information was "confidential" under the Mutual NDAs, only that information reduced to writing and marked confidential is confidential. Reply SMSJ at 7-9.

SAP asserts that Teradata's trade secret claims therefore necessarily fail because Teradata failed to comply with its contractual obligation to designate information as confidential when it disclosed the alleged Batched Merge Method trade secret to SAP. It requests that I reconsider my analysis of *PQ Labs, Inc. v. Yang Qi, No. 12-CV-0450-CW, 2014 U.S. Dist. LEXIS 11769, 2014 WL 334453, at *4 (N.D. Cal. Jan. 29, 2014)* in the prior MTD Order, where I rejected SAP's arguments that failure to satisfy the contractual marking requirement requires the dismissal of Teradata's claims because I concluded that there may be other ways for Teradata to have disclosed its trade secrets to SAP. MTD Order at 8-9. For example, the Mutual NDAs "were only two of four contracts involved in the Bridge Project to ensure that Teradata's proprietary information would not be misappropriated or reverse engineered." *Id.* at 9. But with the record on summary judgment, it is clear that *PQ Labs* case is distinguishable **[**27]** from this case.

In *PQ Labs*, the court held that the marking requirement was irrelevant because PQ Labs had "presented evidence that it used other means to notify its employees and agents that its technological and customer information was confidential." *PQ Labs, 2014 U.S. Dist. LEXIS 11769, 2014 WL 334453, at *4*. But unlike this case, there was no contractual marking requirement in *PQ Labs*; instead, the marking requirement derived from non-precedential Tenth Circuit case law. *Id.*

In contrast, a case like *Convolve Inc. v. Compaq Computer Corp., 527 F. App'x 910 (Fed. Cir. 2013)* is more analogous. In *Convolve*, there was a contractual marking requirement "to confirm in writing, within twenty (20) days of the disclosure, that the information was confidential." *Id. at 923*. The Federal Circuit affirmed the district court's decision that there was no misappropriation of trade secrets because the appellant had failed to protect the confidentiality of its information. *Id. at 921-22*. It also held that there was no waiver or modification of the marking requirement because "the testimony of a single Seagate employee that he believed that all disclosures were confidential . . . is not indicative of the mutual intent of both parties." *Id. at 924*.

Likewise, Teradata's technical trade secret claims fail because it failed to protect the confidentiality of its information. Even if *PQ Labs* was **[**28]** analogous to this case, there is no evidence that Teradata notified SAP of the confidentiality of the Batched Merge method through other means. Reply SMSJ at 8-9.

3. Contractual Right to Use the Asserted Trade Secret in Any SAP Product

Even if Teradata had sufficiently protected the confidentiality of the Batched Merge method, SAP asserts that it is contractually **[*829]** authorized to use any "Confidential Information" under the NDAs in any product. SMSJ at 16. Teradata has sued SAP for "using the proprietary information conveyed by John Graas pertaining to Teradata's batched merge method." Dkt. No. 464-14 ("Lanier Decl., Ex. 72") at 8. The Batched Merge method "is alleged to have been incorporated into the Bridge Project software (the MaxDB Bridge, also called the Teradata Foundation)—and then allegedly into the interface between SAP applications and HANA ("Native FAE")," also known as the conceptual design. *Id.* at 17.

According to SAP, both the software and its conceptual design are SAP property. *Id.* Section 10 of the SDCA outlines the "Proprietary Rights of the Parties." SDCA § 10. It states that SAP owns all rights to "the Conceptual Design [and] the SAP Interface in the form originally supplied by SAP as well as any modified **[**29]** versions," and the "software code that is necessary to adapt its software to" Teradata's database, including SAP's Interface. *Id.* § 10.1. The "Conceptual Design" is defined as "the description of the functional specifications of the SAP Interface or any other architecture, guideline or specification developed by or with SAP concerning or related to the integration of the [Teradata Database] with the [SAP BW product]." *Id.* § 1.2. "SAP Interface" is defined as "an application interface developed by or with SAP that resides on or in the SAP Software and which, when activated will give access to the Partner's Solution [i.e., Teradata's database]." *Id.* § 1.11. And section 10.3 states that "any and all Intellectual Property Rights to or arising out of any Newly Developed Materials shall belong to SAP" and "Newly Developed Materials" is defined as "any software . . . developed by SAP and/or [Teradata] in connection with or as a result of a party's interaction with the other party within the context of this Agreement." *Id.* §§ 1.8, 10.3.

Teradata responds that SAP's arguments depend on the Batched Merge method falling under certain SDCA provisions, but resolving which provision applies depends **[**30]** on disputed factual issues. Opp. SMSJ at 21. It argues that the Batched Merge trade secrets are not part of SAP's Interface or Conceptual Design but rather

Partner Materials under the SDCA, and therefore when SAP ended the Bridge Project, its license to use the Batched Merge method terminated. *Id.* The SDCA defines "Partner Materials" as "any and all Intellectual Property Rights in any programs, tools, systems, data or materials utilized or made available by Partner [Teradata] in the course of the performance under this Agreement," which "shall remain vested exclusively in [Teradata]" but "[s]ubject to any rights expressly granted to SAP hereunder." SDCA § 10.2. Section 9.2 of the SDCA limits use of Teradata's Partner Materials to five specific purposes, none of which include the development of SAP's HANA product; therefore, SAP was only allowed to use these materials "during the Term" of the SDCA. Opp. SMSJ at 21-22. Section 9.2 provides SAP a limited license to "the Partner Solution, related Documentation, and any other programs, tools, or other materials provided by Partner to SAP under a Project Plan." SDCA § 9.2.

SAP points out that Teradata does not and cannot explain how Graas's **[**31]** suggestions are any of the above. Reply SMSJ at 11. Graas's suggestions are not the Partner Solution, which is defined as only the Teradata Database itself, not the Database, not the documentation related to the database such as manuals, not a program and not a tool. *See* SDCA § 1.9. As SAP asserts, Graas's suggestions do not fall under section 9.2, the purpose of which is to prevent SAP from using Teradata's Database itself. *Id.* Instead, section 9.4 encompasses **[*830]** Graas's input, as explained below.

Teradata argues that the Batched Merge method was neither developed in connection with or as a result of the parties' interactions within the context of the SDCA, nor developed by or with SAP as the Conceptual Design. Opp. SMSJ at 22; see SDCA §10.03. Accordingly, Section 10.3 ("Newly Developed Materials") could not apply because those intellectual property rights existed prior to the Bridge Project. But whether Teradata owned the Batched Merge method and incorporated it into its own software before the Bridge Project is irrelevant. SAP does not argue that it owns the Batched Merge method but rather that "it owns the new software that includes the optimizations based on SAP's interactions with Graas." **[**32]** *Id.* at 10.

Section 10.2, which provides an exception to the rights expressly granted to SAP under the SDCA, does not change the fact that Section 10.1 expressly licenses to SAP the right to use Graas's input—i.e., his conversation with SAP employees—in any product. SMSJ at 18. Both the SDCA and the Mutual NDAs permit SAP to use any Teradata feedback or input regarding SAP's products, even if such information was marked confidential. *Id.* (citing SDCA §§ 9.4, 12; Mutual NDA 1 § 7, Mutual NDA 2 § 7).

For example, Section 9.4 of the SDCA provides,

> "Partner [Teradata] grants to SAP a worldwide, nonexclusive, royalty-free fully paid up, perpetual and irrevocable license to use, reproduce, display, distribute, create derivative works, or sublicense any Input submitted by Partner [Teradata] to SAP with resect to any deliverables or other items that SAP provides or shall provide to the Partner . . . To the extent that any such Input is incorporated into an SAP product, any inherent disclosure of Confidential and/or trade secret Information of Partner through the exercise of the license grants set forth in this Section 9.4 shall not constitute a breach of this Agreement including, but not limited **[**33]** to, any agreement between the Parties with respect to such Confidential or trade secret information referenced herein."

SDCA § 9.4. The SDCA states that "Input" means "suggestions, comments, and feedback (whether in oral or written form), including any included ideas and know-how, voluntarily provided by one Party to the other Party with respect to the work performed under this Agreement." *Id.* § 1.6. Similarly section 7 of the Mutual NDAs state,

> "During the course of this Agreement, Company [Teradata] may provide or SAP may solicit Company's input regarding SAP's Software, products, services, business or technology plans, including, without limitation, comments or suggestions regarding the possible creation, modification, correction, improvement or enhancement of SAP Software, products and/or services . . . (collectively, 'Company Feedback') . . . In order for SAP to utilize such Company Feedback Company grants to SAP a non-exclusive, perpetual, irrevocable, worldwide, royalty-free license . . . SAP shall be entitled to use Company Feedback for any purpose without restriction or remuneration of any kind with respect to Company."

Mutual NDA 1 § 7, Mutual NDA 2 § 7.

According to SAP, Graas's **[**34]** suggestions to SAP engineers about how to approach a command/query coming from SAP applications to work more efficiently with the Teradata database qualifies as "Input" under the SDCA and "Company Feedback" under the Mutual NDAs. SMSJ at 18-19. Teradata does not dispute that Graas's disclosures fall within "input," but **[*831]** it argues that the Batched Merge method was not mere "Input." Opp. SMSJ at 23; Reply SMSJ at 10. It argues that the trade secret is a proprietary method developed over many years, is something that could not be fixed through a mere "thought" or "offhand comment," and took SAP more than a year to understand that it was necessary and months more to implement it. Opp. SMSJ at 23. As SAP points out, however, the license is not limited to thoughts or offhand comments but rather distinguishes Teradata software, which SAP could only use for the purposes of the Bridge Project, and changes made to SAP software, which could be used in any SAP product under section 9.3 of the SDCA. Reply SMSJS at 10-11. As a result, SAP has the right under the agreements to use the alleged Batched Merge method in its products outside of the Bridge Project. SMSJ at 19.

Finally, the parties dispute **[**35]** whether SAP's interpretation of the SDCA contradicts the implied covenant of good faith and dealing. "In every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract." *Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 188 N.E. 163, 164 (1933)*. But it cannot be used "to add contract terms that contradict the unambiguous provisions of the written contracts*." Atlas Equity, Inc. v. Chase Bank USA, N.A., 403 F. App'x 190, 192 (9th Cir. 2010)*. Teradata contends that the SDCA's purpose was to develop a joint solution that connects its hardware and software with SAP Business solutions and jointly promote the solution. SDCA, Preamble. According to Teradata, "SAP's interpretation of SDCA's license provisions—that it could use what it took from Teradata to develop and sell a competing product simultaneously—would destroy these benefits." Opp. SMSJ at 24. SAP responds that Teradata's argument contradicts its intent when it entered into the SDCA. Reply SMSJ at 12. Teradata knew that SAP was not working exclusively with Teradata on updates to its MaxDB database and knew that under the SDCA, all developments of SAP products would be owned by SAP even if made by Teradata. *See* **[**36]** SDCA § 2.3 ("This Agreement is not exclusive. SAP or Partner may enter into similar agreements with other partners."); SDCA § 10.1.

Accordingly, there is no genuine dispute of fact that Teradata not only failed to protect the confidentiality of its alleged trade secrets but also that SAP has a contractual right to use the alleged Batched Merge method in its own product. SAP's motion for summary judgment on Teradata's technical trade secret claims related to the Batched Merge method are GRANTED.

4. Related Motions to Exclude Expert Testimony

Two of Teradata's motions to exclude expert testimony relate to its trade secret claims. The first is Teradata's motion to exclude ten paragraphs in the report of SAP's computer science expert Tim Kraska. Dkt. Nos. 466, 495 at 1. Teradata asserts that Kraska improperly offers opinions regarding his interpretation of the SDCA and the Mutual NDAs. *Id.* Because none of Teradata's technical trade secret claims survive, I DENY Teradata's motion to exclude portions of Kraska's testimony as moot.

The second motion relates to Teradata's business trade secrets and seeks to exclude certain paragraphs in the report of SAP's data management expert Stephen Horn. **[**37]** Dkt. No. 474 ("Horn Mot.") at 1. Horn is SAP's rebuttal expert to Teradata's damages expert, Paul Meyer. Specifically, Teradata moves to exclude Horn's opinions on whether the allegedly stolen **[*832]** Teradata confidential information includes trade secrets, whether use of the confidential information contributed to any sales of SAP HANA, whether Teradata took reasonable measures to protect its confidential information, and what examples are of "reasonable" measures taken by data management companies to protect confidential information. *Id.* (citing Dkt. No. 473-4 ("Horn Reb. Rep.") ¶¶ 19, 21, 51-57, 63-84, 97-105).

First, Teradata asserts that Horn relies in part on documents that he and SAP refuse to produce, which Horn claims show that Teradata's trade secrets were publicly available. Horn Mot. at 4; *see* Dkt. No. 473-5 ("Horn Tr.") at 74 ("Q: Did you do any investigation to see if that information was publicly available in 2011? A: Yes. Actually I was able to use some of my own folders of information . . . Q: But your materials in your folders are not cited in this report; right? A: Correct, because I wanted to keep them confidential."). Teradata seeks to exclude Horn's opinions based on **[**38]** these documents in paragraphs 63-84. SAP responds that Horn bases his opinion on materials he referenced in his report as well as publicly available documents such as articles, websites, industry reports, laws, and statutes. Dkt. No. 523 ("Horn Opp.") at 2, 9. Further, SAP points out that under the parties' stipulation (Dkt. No. 235 ¶ 3), the parties are only required to produce materials underlying the expert report rather than all materials an expert ever considered and therefore Horn is not required to produce the documents at issue. *Id.* at 10. It contends that Horn does not and will not offer any opinion based on documents that are not available to Teradata. *Id.* at 2. With this understanding, Teradata's motion to strike paragraphs 63-84 because they allegedly include Horn's opinions based on unproduced documents is DENIED. Teradata may question Horn about this issue during cross examination as it goes to the weight of his testimony, but it is not a basis for excluding the testimony.

Second, Teradata argues that I should exclude Horn's opinions that present a legal conclusion based on a fundamental misunderstanding of the law. Horn Mot. at 1. Specifically, Teradata asserts that Horn **[**39]** should not be allowed to testify to what is or is not a trade secret because his understanding of the law is incorrect and to allow his testimony would mislead the jury and confuse the issues at trial. *Id.*

Under the CUTSA, "[c]ombinations of public information from a variety of different sources when combined in a novel way can be a trade secret." *O2 Micro Int'l Ltd. v. Monolithic Power Sys., 420 F. Supp. 2d 1070, 1089-90 (N.D. Cal. 2006)*, *aff'd*, *221 Fed. Appx. 996 (Fed. Cir. 2007)*. When asked whether "information that's collected through public sources or is otherwise public, when collected together, can still be [a] trade secret," Horn testified that this standard was "totally incorrect." Dkt. No. 473-5 ("Horn. Depo.") at 24. As a result, Teradata argues that Horn should be precluded from testifying about what types of information would be considered trade secrets and that the allegedly stolen confidential Teradata information cannot be a trade secret because he purportedly found snippets of information from those documents in various public or customer-facing documents. Horn Mot. at 8.

SAP responds that Horn does not provide any legal conclusions in his report and that he is allowed to challenge the factual issue of whether or not Teradata's alleged trade secrets could be ascertained by others outside Teradata. **[**40]** Horn Opp. at 2. But as Teradata points out, Horn does offer legal opinions that Teradata's information are not trade secrets or proprietary to Teradata. *See* Horn Reb. Rep. ¶¶ 73-74, 77, 82. Horn can address the **[*833]** factual issue of whether Teradata's purported trade secret information was ascertainable to others outside of Teradata, but he cannot testify that Teradata allegedly stolen confidential information are not trade secrets. Teradata's motion to exclude Horn's legal conclusions is GRANTED.

Third, Teradata asserts that Horn's opinion that its confidential information did not lead to sales of SAP HANA is insufficiently supported because he admits that he failed to conduct any investigation of the sales. Horn Mot. at 1. SAP contends that Horn is not required to replicate Meyer's investigation and that Horn properly relied on SAP's damages expert Leonard, who examined each of the six sales for purposes of his damages analysis. Horn Opp. at 2, 16. Teradata responds that Horn does not simply rely on Leonard's opinions but endorses them by opining that they "are consistent with the commonly prevailing principles in the industry, and with [his] experience and expertise." Horn Reb. Rep. ¶¶ **[**41]** 101-02. It asserts that in the cases on which SAP relies, the "courts have been careful to either require independent investigation or to strictly limit their testimony to critiquing methodology or assumptions of an opposing expert." Horn Opp. at 7 (citing *TCL Communs. Tech. Holdings Ltd. v. Telefonaktenbologet LM Ericsson, 2016 U.S. Dist. LEXIS 194814, 2016 WL 7042085, at *5 (C.D. Cal. Aug. 17, 2016)* (holding "it is proper for [rebuttal] experts to utilize their own independent analyses and methodologies to" rebut expert opinions); *Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, 80 F. Supp. 3d 1180, 1215 (E.D. Wash. 2015)* ("recogniz[ing] the limited bases for [rebuttal expert's] rebuttal opinions" given the lack of independent investigation)). Teradata's motion to exclude paragraphs 21, 99-105 of Horn's report is DENIED because Horn properly relies on Leonard's analysis, but Horn may not otherwise endorse or offer any affirmative opinions about Leonard's analysis.

Finally, Teradata argues that Horn is not qualified to opine on industry standards regarding the protection of confidential information. Horn Mot. at 1. According to Teradata, Horn has no experience drafting or developing protocols for the protection of confidential information, and therefore cannot base his opinions on what reasonable measures are taken by data management companies. *Id.* at 11. SAP responds that Horn has decades of experience implementing, **[**42]** applying, and working with confidentiality policies of data management companies and, based on that experience, has conducted a more than sufficient review to rebut Meyer's assumptions regarding the alleged confidentiality of Teradata's purported business trade secrets. Horn Opp. at 17-18. Even if Horn did not have the experience, lack of particularized expertise goes to weight rather than admissibility. Teradata's motion to exclude paragraphs 51-57 and 97 is DENIED.

B. Tying Claim

SAP moves for summary judgment on Teradata's tying claim. Before I address SAP's motion, I will address two motions to exclude expert testimony and Teradata's objections to SAP's reply evidence.

1. Motion to Exclude Asker Testimony

SAP moves to strike the opinions of Teradata's liability and damages expert, Dr. Asker. Dkt. No. 470 ("Asker Mot.") at 1. Asker opines that the relevant product market for the tying market is "core ERP products for large enterprises." Dkt. No. 468-20 ("Asker Rep.") ¶ 46. Market participants include SAP and Oracle, with Workday and Microsoft appearing as leaders of a fringe of participants. *Id.* He defines the tied market as "EDW products with OLAP capabilities for large enterprises" **[**43]** with **[*834]** market participants such as [TEXT REDACTED BY THE COURT] *Id.* ¶ 78. He opines that SAP has economically significant market power in the tying market, that SAP has caused harm to competition in the tied market, and that there are no procompetitive benefits of the alleged tie. *Id.* ¶¶ 12, 105, 171. Finally, he asserts that Teradata has lost significant profits and will experience significant future losses due to the alleged tying arrangement. *Id.* ¶¶ 181, 192.

a. Tying Product Market

SAP argues that Asker's methodology for defining the tying product market is unreliable because instead of showing cross-elasticity, Asker's primary methodology is "to interpret ordinary course documents produced in the case" and "buttress this qualitative approach with a quantitative 'aggregate diversion analysis'" of the Customer Relationship Management ("CRM") data from SAP and Oracle. Asker Mot. at 5-6; *see* Asker Rep. ¶¶ 63, 64, 70.

In a tying arrangement the seller conditions one product, the tying product, on the buyer's purchase of another product, the tied product, to extend its market power in a distinct product market. *See Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 912 (9th Cir. 2008)*. A tying arrangement is "forbidden on the theory that, if the seller has **[**44]** market power over the tying product, the seller can leverage this market power through tying arrangements to exclude other sellers of the tied product." *Id.*

i. Cross-Elasticity of Demand

First, SAP asserts that Asker's methodology is flawed because he failed to calculate the cross elasticities for demand among various ERP products. Asker Mot. at 5. As the Supreme Court has instructed, "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. The Ninth Circuit has recognized that "[t]he principle most fundamental to product market definition is 'cross-elasticity of demand' for certain products or services. Commodities which are 'reasonably interchangeable' for the same or similar uses normally should be included in the same product market for antitrust purposes." *Kaplan v. Burroughs Corp., 611 F.2d 286, 291-92 (9th Cir. 1979)*. Cross-elasticity of demand occurs where "an increase in the price of one product leads to an increase in demand for another"; in that circumstance, "both products should be included in the relevant product market." *Olin Corp. v. F.T.C., 986 F.2d 1295, 1298 (9th Cir. 1993)*. As I have previously acknowledged, "[n]umerous cases have recognized the importance **[**45]** of cross-elasticity to determining what products should be included in or excluded from the relevant antitrust market." United Food & Com. Workers Loc. 1776 & Participating Emps. Health & Welfare Fund v. Teikoku Pharma USA, 296 F. Supp. 3d 1142, 1167 (N.D. Cal. 2017) (collecting cases).

Teradata contends that Asker was not required to measure cross-elasticity of demand, especially where, as here, it was not possible to calculate cross-elasticities. Dkt. No. 537 ("Asker Opp.") at 7. It points to three district court cases where the court relied on an expert's methodology that did not use cross-elasticities and instead used "practical indicia" as outlined by the Supreme Court in Brown Shoe to determine the boundaries of a product market. *See* Epic Games, Inc. v. Apple Inc., No. 20-CV-05640-YGR, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *85 (N.D. Cal. Sept. 10, 2021); In re Live Concert Antitrust Litig., 863 F. Supp. 2d 966, 984-86 (C.D. Cal. 2012); Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc., 311 F. Supp. 2d 1048, 1082 **[*835]** (D. Colo. 2004). Teradata's reliance on these three cases, however, is misplaced.

In Epic Games, the court focused on practical indicia and not cross-elasticities when determining the submarket. Epic Games, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *85. This is proper under Brown Shoe and Ninth Circuit precedent. "In limited settings . . . the relevant product market may be narrowed beyond the boundaries of physical interchangeability and cross-price elasticity to account for identifiable submarkets or product clusters." Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989). "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, **[**46]** the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Brown Shoe, 370 U.S. at 325. Here, Asker is not defining a submarket but the tying product market. He also does not address the practical indicia under Brown Shoe.[4]

In *In re Live Concert*, the court held that "while calculating the cross-elasticity of demand (and supply) is the preferred methodology, it is not an absolute requirement" and found that "it is usually necessary to consider other factors that can serve as useful surrogates for cross-elasticity data" because "it is ordinarily quite difficult to measure cross-elasticities of supply and demand accurately." In re Live Concert, 863 F. Supp. 2d at 984. Likewise, in Clear Channel, the court found "that a plaintiff may, through sufficient evidence of other indicia of market definition, define a relevant market without economic study of cross-elasticity of demand, especially when economic analysis of cross-elasticity of demand is infeasible based on pricing data." Clear Channel, 311 F. Supp. at 1082. Both courts then evaluated the sufficiency of the expert's methodology that was based on the Brown Shoe practical indicia factors. *See, e.g.*, Clear Channel, 311 F. Supp. at 1083 (finding that the expert's methodology is sufficient). **[**47]** The court in *In re Live Concert* recognized that the Ninth Circuit "has never expressly held that . . . a plaintiff's expert economist[] can define the relevant product market exclusively by reference to these 'practical indicia.'" In re Live Concert, 863 F. Supp. 2d at 985, 986. But for the purposes of the motion, it assumed that an expert economist could and found that the expert's purported market definition was "neither sufficiently reliable nor sufficiently helpful to the trier of fact to warrant admission under Rule 702" because the expert's analysis (1) fails to comport with his "chosen methodology (i.e., the "SSNIP" methodology); (2) is effectively predicated on the analysis of a single Brown Shoe factor; and (3) fails to consider the cross-elasticity of supply." Id. at 994.

[*836] Teradata contends that it was "not possible to calculate cross-elasticities" here because third parties such as Oracle, IBM, and Microsoft were not "ordered to produce the type of granular data required to calculate cross-elasticities of demand." Asker Opp. at 7. It also argues that SAP's expert, Dr. Stiroh, admits that such data is unavailable. *Id.* at 8; *see* Dkt. No. 541-33 ¶ 62 ("Econometric methods include the estimation of the cross-price

[4] During the hearing, Teradata's counsel asserted for the first time that Asker's methodology was proper because market definition can be determined based on practical indicia. Hearing Tr. at 31. Its counsel expressly identified one factor, industry or public recognition of the market, as a separate economic entity. *Id.* But the case on which Teradata relies holds that, "[t]he existence of three or four of these indicia has been held 'sufficient to delineate a submarket,'" not one. In re Live Concert Antitrust Litig., 863 F. Supp. 2d at 989. As explained in the subsequent sections, there is no evidence of three or four of these practical indicia. *See* Brown Shoe, 370 U.S. at 325 (practical indicia are "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.").

elasticity of demand. However, I have **[**48]** not seen data in this case that can be used to reliably estimate actual lost sales and diversion ratios in response to price changes of different ERP products."). SAP responds that Teradata did not request any data from third parties that would have permitted analysis of cross-elasticity of demand. Dkt. No. 555 ("Asker Reply") at 2.

Regardless, Teradata contends that Asker does, in fact, analyze cross-elasticity of demand. Hearing Tr. at 29. According to Teradata, although Asker does not have an econometric estimation of cross-elasticity, he looks at cross-elasticity, i.e., substitutability, from a quantitative and qualitative standpoint. *Id.*

ii. Qualitative Analysis

SAP asserts that Asker's qualitative approach is unreliable because it is based on "his own subjective interpretation of ordinary course documents" and his inconsistent use of evidence. Asker Mot. at 5, 7. In particular, it criticizes Asker's definition of "core ERP" and "large enterprises" ("LEs") in his tying product market definition of "core ERP products for large enterprises," composed of SAP and Oracle. Asker Opp. at 9.

For "core ERP," SAP asserts that Asker changes its definition to fit his needs. *Id.* at 7. For example, **[**49]** Asker defines "core ERP" as products that "are identified with reference to the finance modules of ERP software." Asker Rep. ¶ 9. According to Exhibit 2 in Asker's initial report, however, only 30% of "core EP" is finance and the other 70% is human resources, procurement, R&D sales, supply chain, and travel. *See id.* at 33, Ex. 2. But Asker mainly focuses on finance when defining "core ERP." He explains that "[w]hile there are various core ERP definitions, a consistent feature of core ERP is that it includes finance." *Id.* ¶ 48. And none of SAP's three economic experts dispute Asker's relevant market definition. *See, e.g.*, Dkt. No. 532-3 ("Stiroh Depo.") at 108-09 ("Q: And you don't dispute in your report that Dr. Asker's opinion that the relevant product market for S/4HANA is limited to core ERP products; is that right? A: I don't take that on. . . . The opinions that I have in my report are not dependent on a specific definition of what is included or excluded in core ERP.").

Moreover, Asker's focus on finance in his definition of "core ERP" is supported by SAP's own witness testimony. SAP's Vice President for competitive market insights for business applications and industries testified **[**50]** that the solutions included within "core ERP" are "general ledger and some of the other financial — you know, financial close, that type of activity you start to — I'd also say that master data governance types of products are — may be considered part of digital core." Dkt. No. 530-16 ("Dover Depo.") at 30. Likewise, SAP's Senior Vice President of S/4HANA testified that when SAP decided to build S/4HANA it "obviously started in the finance area because that's the center of every ERP system." Dkt. No. 530-22 ("Grigoliet Depo.") at 24. Teradata's industry expert, Paul Pinto also opined that "large enterprises build their systems around their financial ERP, which is why it is often referred to as 'core ERP.'" Dkt. No. 528-8 ("Pinto Decl.") ¶ 31.

SAP also objects to Asker's use of applications such as "treasury management" **[*837]** "when it is expedient to do so" because it is outside his definition of core finance. Asker Mot. at 7 (citing Asker Rep. ¶ 122 (mentioning that SAP [TEXT REDACTED BY THE COURT]). The column titled "core ERP" in Exhibit 2 in Asker's report does not mention "treasury management." Asker Rep. at 33, Ex. 2. Teradata's own expert also testified that "treasury management" is **[**51]** not part of "core ERP." *See* Dkt. No. 555-3 ("Pinto Depo.") at 83 ("Q: What about cash and treasury management, would you consider that part of core ERP? A: I would not."). That said, column 1 in Exhibit 2 in Asker's report, titled "Digital Core" includes "Treasury Management" under "Core Finance." Asker Rep. at 33, Ex. 2. Asker also testified that he considered treasury management part of "core ERP." Dkt. No. 536-6 ("Asker Depo.") at 20-22 ("[T]he left-hand side column it — this is labeled . . . 'Digital Core.' It says 'Core Finance plus Enterprise Risk & Compliance, Treasury Management, Real Estate Management, Indirect Tax.' I interpret that as incorporating the articulation of "Core Finance" that's located in the middle column."). In addition, SAP's own documents include "treasury management" in its definition of "core ERP." Dkt. No. 536-12 at 69-70. As a result, contrary to SAP's assertion, Asker's definition of "core ERP" is proper.

Next, SAP argues that Asker's definition of "large enterprises" is problematic. Asker Mot. at 8. Asker defines "large enterprises" as "companies with over 1,000 or 1,500 employees and over 125 users of the ERP product"; his own sources, such as SAP's **[**52]** internal documents, show that there is no commonly accepted categorization of SAP's customers. *See, e.g.*, Asker Rep. ¶ 50 n.110-11 (SAP internal presentation defining large enterprise as "Revenue: €250 [million] + Size 250 employees"); *id.* ¶ 50 n.111 (SAP presentation defining large enterprises as companies with "over 1000, 5000, or 10K"); *id.* ¶ 38 n.84 (large enterprises: over 500 employees, $1 billion in annual revenue, and an ERP user count of over 250); *id.* ¶ 20 n.24 (large enterprise: companies with over $1 billion in revenues in North America and over $250 million or $500 million in Latin America).

Further, according to SAP, Asker testifies that there are approximately 100,000 companies in his proposed relevant market but he does not sufficiently explain why he then focuses only on documents discussing the largest 500 or 2,000 companies in the world, e.g., companies in Forbes Global 2000, Global Fortune 500, DAX stock index, and MDAX index. Asker Mot. at 8; *see* Dkt. No. 512-2 ("Asker Depo.") at 32 ("Q: And global . . . is fewer than 100,000 companies would qualify as large enterprises? A: It may be a little more than that . . . Q: So best estimate is, give or take, somewhere around **[**53]** a hundred thousand? A: [A]s I sit here today, that would be my sense, but I want to be very clear that it may be a fair bit less, it may be somewhat more."). Teradata responds that SAP mischaracterizes Asker's testimony and that he repeatedly testified that SAP does not count its own customers. Dkt. No. 536-6 ("Asker Depo.") at 30 ("I note that even in their own documents, SAP doesn't count customers; but, rather, they talk about total market opportunities). It also highlights SAP's own documents to its investors, which show that SAP relies on the Forbes Global 2000 index and the DAX stock index to assess and report its market position. *See* Dkt. No. 537-8 at 7 ("S/4 is further gaining market share, and we see positive software license growth and high double-digit cloud revenue growth. 80% of the DAX companies and 65% of the Forbes' Global 2,000 companies already rely on SAP S/4HANA.").

SAP also relies on *United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004)* to argue that a product market limited to "large" ERP customers is improper. **[*838]** Asker Reply at 3. In *Oracle*, the court evaluated evidence after a two-week trial and rejected the plaintiffs' product market that only included products sold by Oracle, PeopleSoft, and SAP, and did not include mid-market **[**54]** products. *Oracle, 331 F. Supp. at 1158*. The court rejected the proposed product market in part because there was "no 'quantitative metric' that could be used to determine the distinction between a high function product and a mid-market product." *Id.* For example, it found that Microsoft would be a viable substitute after examining its entry into the high function product market. *Id. at 1160*. Today, however, Microsoft [TEXT REDACTED BY THE COURT] Dkt. No. 543-44 at 7. Teradata asserts that the case is therefore distinguishable because the ERP market has changed since *Oracle*, e.g., mid-market competitors that the *Oracle* court relied on have now been acquired by larger ERP vendors or disappeared from the market. Asker Opp. at 11 (citing *Oracle, 331 F. Supp. at 1159-61*).

SAP contends that the case is persuasive for rejecting a proposed product market where, as here, "there is no clear line separating those companies or the products they buy from others." Asker Reply at 3. Despite Asker's admission that there is no common definition of "large enterprises," even among SAP's own internal documents, he concludes, without further explanation, that "'large enterprises' are generally companies with over 1,000 or 1,500 employees and over 125 users of the ERP product." Asker Rep. **[**55]** ¶ 50. He bases his conclusion on two SAP documents that show that it markets different ERP products based on customer size, namely S/4HANA to large enterprises that have over 1,000 employees. *See* Dkt. No. 537-6 at 572. But he ignores the other SAP documents that indicate otherwise. As a result, Asker's limitation of the product market to "large enterprise" customers "stands on infirm ground" because Teradata "makes no other effort to reconcile Dr. Asker's distinct separate market with the broad continuum of customers and varied and flexible approach to customer size taken by the industry." Asker Reply at 3.

iii. Quantitative Analysis

More importantly, Asker's quantitative analysis, which he uses to corroborate his qualitative analysis, is flawed because contrary to his claims, Asker does not apply a "hypothetical monopolist" test ("HMT") as contemplated in the Department of Justice and the Federal Trade Commission's ("FTC") Horizontal Merger Guidelines (the

"Guidelines").[5] Asker Mot. at 9. This test asks whether a hypothetical monopolist over a group of products could profitably impose a small but significant and non-transitory increase in price ("SSNIP") of 5%; if a significant number **[**56]** of customers respond to a SSNIP by purchasing substitute products, then the SSNIP would not be profitable and the market definition must be expanded to include those substitute products. *See Saint Alphonsus Med. **[*839]** Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 784 (9th Cir. 2015)*.

Asker states that he conducts a quantitative hypothetical monopolist test using aggregate diversion ("ADR") analysis of "Customer Relationship Management" ("CRM") data from SAP and Oracle, based on the number of times competitors are mentioned in sales representatives' sales report.[6] Asker Rep. ¶¶ 63, 64, 71. He opines that "CRM databases can be informative for market definition to the extent that they provide some information on how frequently a business encounters various potential competitors." Asker Rep. ¶ 65. But he admits that CRM data "may not always be a reliable indicator of the actual competitor faced by a company because the data is often incomplete or the salesperson may have only a limited view into competition." *Id.* He concedes that, "CRM databases may also lack detail that allow precise evaluations of specific markets" and that "this is the case in this matter, where every CRM data set [he has] examined has limitations." *Id.* As a result, he explains that he views the CRM data **[**57]** " as merely providing a way to corroborate the patterns that are present in the deposition testimony and documentary evidence on the record" and expresses caution about using the data to form conclusions. *Id.* That said, he concludes that the results of his analysis is "consistent with the deposition testimony and documentary record that is my primary foundation for concluding that SAP and Oracle are each other's primary competitors for core ERP opportunities for large enterprises. Asker Rep. ¶ 71.

SAP's expert, Stiroh, asserts that the ADR analysis is flawed because "[s]uch an analysis requires data and inputs that can be used to reliably estimate actual lost sales and diversion ratios in response to price changes of different ERP products" but such data was not available in this case. Dkt. No. 554-9 ("Stiroh Rep.") ¶ 58. Moreover, "[t]he CRM data that Asker uses to calibrate his ADR model do not show actual diversion from one company to another, do not reflect changes in purchasing patterns in response to price changes, and do not account for the competitive effects of emerging competitors and technologies or potential changes to SAP's expected competitive significance over the decade." **[**58]** *Id.* ¶ 59.

Teradata contends that ADR analysis is an accepted methodology and that disputes concerning an expert's decision about what data to use in their analysis "bear on the weight, not the admissibility, of expert testimony." *In re Qualcomm Antitrust Litig., 328 F.R.D. 280, 305 (N.D. Cal. 2018)* (collecting cases). Although courts often conclude that "'experts' decisions about what data to use' in their analysis bear on the weight, not the admissibility, of expert testimony," *id.*, ADR analysis has rarely been accepted by courts.

Teradata only cites to two district court cases that allowed an expert to use this methodology to determine a product market. Asker's ADR analysis, however, is distinguishable because the experts in those cases relied on data sets that measured a customer's response to changes in price, e.g., actual win/loss data or bidding data, when using ADR analysis. In *Federal Trade Commission v. Sysco Corp., 113 F. Supp. 3d 1 (D.D.C. 2015)*, the FTC moved to enjoin a potential merger between two food distribution companies. *Sysco, 113 F. **[*840]** Supp. 3d at 15*. FTC's

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[5] In its opposition to SAP's motion for summary judgment, Teradata asserts that SAP's argument—"that a product market must include economic substitutes, i.e., products that would see increased demand in response to a price increase in another product"—contravenes established economic principles. Dkt. No. 542 at 30. It argues that the Guidelines "make clear that even if a significant number of customers (even two thirds) would switch to other suppliers' products in response to a price increase, that does not require their inclusion in a properly defined relevant market." *Id.* (citing Dkt. No. 543-64 ("Guidelines") § 4.1). But the Guidelines do not say this. Instead, Section 4.1 of the Guidelines make clear that although a product market need not include every competitor, it must "contain enough substitute products" to satisfy the SSNIP test. Guidelines § 4.1; *see* Dkt. No. 552 at 20.

[6] "Aggregate diversion analysis finds the threshold where a hypothetical monopolist imposing a [SSNIP] would lose enough sales ('actual loss') compared the "critical loss" such that the SSNIP would be unprofitable for the hypothetical monopolist. When the estimated actual loss due to a SSNIP is smaller than the critical loss, the candidate market is considered a relevant antitrust market." Asker Rep. ¶ 71.

expert had "calculated the actual aggregate diversion based on three different data sets" and "built a database for each company that tracked, for each bidding opportunity, the incumbent distributor, the winning distributor, and the competing bidders." *Id. at 35*. Like SAP in this case, the **[**59]** defendants had objected to the expert's methodology in part because the data on which he relied did not describe whether the two companies "lost a customer for a price-based reason or some reason having nothing to do with price." *Id. at 36*. The court expressed its hesitancy to rely on the expert's findings but concluded that "when evaluated against the record as a whole" the expert's "conclusions are more consistent with the business realities of the food distribution market than" the defendants' expert. *Id. at 37*.

Similarly, in *Federal Trade Commission v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d 27 (D.D.C. 2018)*, the FTC moved to block a potential merger between two large providers of marine water treatment chemicals. *Wilh. Wilhelmsen, 341 F. Supp. 3d at 39*. FTC's expert "used three kinds of data—revenue information provided by marine suppliers, [] salesforce data, and [the providers'] win-loss data." *Id. at 57*. The court accepted the FTC expert's market definition in part because the defendants' expert did not contest that the FTC's expert's methodology was flawed, did not present any alternative calculations or HMT results, and "the gap between critical loss and aggregate diversion in every trial was so large as to ensure the stability of the HMT's qualitative result against any but the gravest of statistical errors." *Id.*

Teradata **[**60]** asserts that like both cases, Asker's methodology "confirmed the market realities evident in the record" and his findings ensured "the stability of the HMT's qualitative result against any but the gravest of statistical errors." Asker Opp. at 12 (citing Dkt. No. 468-21 ("Asker Reb. Rep.") ¶ 89) (opining that "the CRM data would have to overstate aggregate diversion by a factor of 2.5 to 3.2 for the conclusions for the aggregate diversion ratio analysis to change."). But Asker's methodology is less reliable than those of the FTC experts because unlike the FTC experts, Asker did not build a database of the type prices or rely on the price ultimately paid by the customer. *See* Asker Depo. at 66-67 ("My recollection is that the final pricing is not available in Oracle's CRM data, and my recollection is that it's not available in SAP's CRM data.); *id.* at 67 ("Q: And in instances in which a competitor is listed, neither SAP's nor Oracle's CRM data indicate the pricing offered by competitors; right? A: As I sit here today, that's my recollection of those data sets.").[7] His evaluation of CRM data did not and cannot consider pricing because the CRM data does not measure customer responses to **[**61]** changes in price. *Id.* at 68-69. As a result, Asker's ADR analysis of SAP's CRM data cannot measure the most fundamental principle in defining a market: cross-elasticity of demand.[8]

[*841] Teradata also contends that Asker conducts a robust quantitative analysis of SAP's pricing data to analyze price discrimination, which corroborates his conclusion that large enterprises form a separate market. Asker Opp. at 10. As the Guidelines state, "[t]he possibility of price discrimination influences market definition [], the measurement of market shares [], and the evaluation of competitive effects." Guidelines at 6. Teradata argues that even SAP's expert admits that there is price discrimination between large and small enterprises. *Id.* For pricing discrimination to exist there must be (1) differential pricing; and (2) limited arbitrage. Guidelines at 6. According to Teradata, Stiroh's pricing analyses [TEXT REDACTED BY THE COURT], and she does not dispute that there is limited arbitrage. Asker Rep. ¶ 79; Dkt. No. 532-3 ("Stiroh Depo.") at 109. But SAP points out that its differential pricing is unrelated to customer size. Asker Reply at 4. "Per-unit and per-user pricing confirm that SAP charges **[**62]** equivalent prices for large, mid-sized, and small companies."[9] *Id.* (citing Stiroh Rep. ¶¶ 48-57). Further, Teradata's argument

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[7] In fact, as opposed to the "hundreds of thousands" of entries in the CRM data used by the expert in Sysco, Asker relied on fewer than 7,700 entries in SAP's CRM data because almost 85% of the data lacked any competitor information. Asker Rep. at 46, Exhibit 14; *see* *Sysco, 113 F. Supp. 3d at 35*.

[8] Teradata contends that SAP's expert, Murphy confirmed the proprietary of Asker's methodology. Asker Opp. at 3 n.9; Hearing Tr. at 29. But Asker relied on CRM data, which addresses the "relative frequency with which those firms compete for Core ERP sales opportunities," whereas Murphy confirmed the methodology of looking at "win/loss" data to indicate substitutability. Asker Opp. at 3; see Dkt. No. 530-36 ("Murphy Depo.") at 44-45. SAP also points out that Murphy does not use the CRM data to define any antitrust markets. Hearing Tr. at 56.

that Asker does not need to demonstrate that SAP currently charges higher prices of large customers and only needs to demonstrate that future price discrimination is "feasible" and "reasonably likely" undermines its argument. Asker Reply at 4. If SAP can charge higher prices to larger customers in the future because SAP negotiated different prices with customers in the past, it could also charge higher prices to small customers. *Id.* But this does not make them antitrust markets; in the absence of evidence of actual current price discrimination against large customers there is no basis to assume that future price discrimination is feasible or likely. Stiroh Rep. ¶ 57.

Asker's methodology in defining the tying market is unreliable. Contrary to Teradata's assertion, he does not measure the cross-elasticity of demand or the substitutability of products based on reliable quantitative and qualitative analyses. Because his methodology for defining the relevant tying market is unreliable, his conclusions that SAP has market power in his proposed market should also **[**63]** be excluded.

b. Tied Product Market

Asker's proposed tied market is "EDW products with OLAP capabilities for large enterprises." Asker Rep. ¶ 10. For the same reasons as above, SAP objects to this definition; his qualitative analysis fails to consider the appropriate universe of documents and his quantitative analysis is not a result of any reliable methodology. Asker Mot. at 14.

First, SAP asserts that Asker fails to consider all of the relevant documents when determining the tied market. *Id.* For example, Asker excludes an EDW vendor Snowflake from the market because he found it did not compete for EDW use cases for large enterprises. Asker Rep. ¶ 91. But Teradata's documents show that Snowflake was one of Teradata's primary competitors, if not the largest competitor, in 2019. *See* Dkt. No. 468-22 at 8-9 [TEXT REDACTED BY THE COURT] ; Dkt. No. 468-23 at 4, 5-7 [TEXT REDACTED BY THE COURT]. **[*842]** But to claim that Asker ignored evidence regarding Snowflake is incorrect. Teradata responds that this one document is contrary to the testimony of SAP's competitive intelligence team and SAP documents which characterize Snowflake as a [TEXT REDACTED BY THE COURT] Opp. Asker at 17 (citing Dkt. No. 536-10 **[**64]** at 548; Dkt. No. 530-46 at 147-48 [TEXT REDACTED BY THE COURT]. Asker also analyzed the CRM data himself and recognized that Snowflake was not a significant competitor. Asker Depo. at 97-100.

SAP also asserts that Asker's conclusion that SAP's HANA is in his tied market is inconsistent with Teradata's own admissions. *Id.* at 15. Its Senior Vice President of Global Marketing, Chris Twogood, testified that Teradata does not compete frequently against HANA for sales of EDW because HANA was not "designed to be an enterprise data warehouse," and Teradata does not consider SAP to be a primary competitor in the EDW space. Dkt. No. 468-17 ("Twogood Depo.") at 20-22. Teradata points out that Twogood clarified, however, that once SAP tied HANA to S/4HANA, SAP was able to "leverage[] all their ERP customers to grow market share." Dkt. No. 543-38 ("Twogood Depo.") at 312, 315-16. But Twogood's testimony describes HANA being used as a transactional database under SAP ERP applications and S/4HANA, not as an EDW. Twogood Depo. at 314-15 ("[T]hey weren't successful with HANA only or HANA alone in the marketplace. So they bundled it in with their ERP solution and to really ride a leverage for (verbatim) **[**65]** install base and force people to the HANA platform.").

Teradata also emphasizes that SAP omits the testimony of Teradata witnesses and ordinary course documents identifying SAP as a key EDW competitor. *See, e.g.*, Dkt. No. 530-9 ("Boerger Depo.") at 303 ("IBM, Oracle, and SAP HANA compete for large enterprise data warehousing types of customers"); Dkt. No. 543-26 ("Lea Depo.") at 59 ("Q: Who are the primary competitors to Teradata Vantage, based on your experience today, with large enough customers looking for an EDW solution? A: It is more our traditional vendors, Oracle, IBM with Netezza and with

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[9] SAP points out that in his initial report, Asker also analyzes "per-unit prices" for large customers, based on the "'size' of installation (number of users)," and concludes that they vary. *See* Asker Rep. ¶ 76; *id.*, Ex. 7. Stiroh responded that the per user prices paid by small and mid-sized customers also vary, but tend to be higher than those paid by large customers, and therefore there is no evidence of price discrimination against large customers. Stiroh Rep. ¶¶ 51-57. In his reply report, Asker criticizes Dr. Stiroh for using "per-user" prices and claims that the appropriate measure is "total spend." Asker Reb. Rep. ¶ 77. According to SAP, "neither Dr. Asker nor Teradata explain this flip-flop." Asker Reply at 5.

Db2, and HANA"); Dkt. No. 543-37 ("Susag Depo.") at 20 ("Q: Who do you consider to be Teradata's main competitors in the enterprise data warehouse space? A: IBM, Oracle, SAP, Microsoft at the lower end of the enterprise data warehouse space."). As a result, Asker's conclusions are not inconsistent with Teradata's own admissions.[10]

Asker's methodology is once again unreliable because he conducts an ADR analysis on CRM data. Asker Rep. ¶ 95. His methodology is further problematic because it is inconsistent with his methodology when defining the relevant ERP market. Asker Reply at 8. For the ERP **[**66]** market, Asker applied his ADR analysis to determine the minimum number of market participants and concluded that the relevant market consisted of only Oracle and SAP. *Id.* But under this same approach, the tied market would have excluded SAP and therefore Asker included more than the minimum number of participants to bring SAP into the market definition. As a result, and for the same reasons above, Asker's testimony regarding the tied market **[*843]** should be excluded as unreliable and unhelpful to a jury.[11]

c. Alleged Harm to Competition and Benefits of Tie

Finally, SAP opposes Asker's claims that its alleged conduct caused harm to competition in his proposed tied market because it lacks support in the record and is based on a series of unwarranted assumptions. Asker Mot. at 16. Asker's opinion is the following: "In this case, the data and documents indicate that SAP's tie is causing sales of HAMA that otherwise would not have occurred. That is, SAP's conduct distorts purchasers' choices of EDW products, which harms purchasers and competitors competing for those sales." Asker Rep. ¶ 12.

First, SAP asserts that Asker presents no evidence of harm to competition. *Id.* Notably, he has not analyzed **[**67]** the impact of SAP's alleged conduct on the major competitors in his purported market for EDW products with OLAP capabilities. *Id.* at 17. He ignores the issue of harm to competition generally. He does not dispute that Oracle accounts for [TEXT REDACTED BY THE COURT] of database sales. Microsoft accounts for about [TEXT REDACTED BY THE COURT], IBM accounts for [TEXT REDACTED BY THE COURT], and Amazon accounts for [TEXT REDACTED BY THE COURT] Asker Reply at 10. In other words, despite the undisputed fact that Asker Mot. at 17.

Teradata responds that Asker is not required to quantify damages for every participant in the relevant market in order to opine that there are anticompetitive effects due to the tie. Asker Opp. at 21-22. It points to SAP's own economist, Murphy, who admits that database vendors like Oracle and IBM are losing sales for database products that include OLAP/EDW capabilities as a result of SAP's tie and that SAP's licensing restrictions have an anticompetitive effect, as they reduce customers' demand for using Teradata. Dkt. No. 530-36 ("Murphy Depo.") at 145-46; Dkt. No. 541-31 ("Murphy Rep.") ¶ 224. But Murphy's statement concerned transactional databases, not products **[**68]** that include OLAP/EDW capabilities. Asker Reply at 11.

Teradata asserts that "Tying arrangements are forbidden on the theory that, if the seller has market power over the tying product, the seller can leverage this market power through tying arrangements to exclude other sellers of the tied product." *Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 912 (9th Cir. 2008)*. It argues that "the injury

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[10] Further, Teradata asserts that SAP's contention that HANA does not compete with Teradata contradicts its prior statements. Hearing Tr. at 38-39; see, e.g., Dkt. No. 543-54 at 367 (a technical textbook explaining to customers how to use HANA as an EDW). SAP responds that the relevant question is not whether SAP tried to sell HANA as an EDW but whether customers purchase and use HANA for this purpose. It asserts that Asker's "false assumption that, because SAP tried to market SAP as an EDW, customers necessarily use it as an EDW, runs throughout Asker's EDW-related opinions and renders them unreliable." Reply at 8.

[11] Teradata cites two internal SAP documents but neither suggests Dr. Asker's proposed market is properly limited to just SAP and one competitor. Asker Reply at 20; *see, e.g.*, Dkt. 539-5 at 688-90 (concerns cloud competition and shows that while SAP considers Oracle its "main" competitor, it also loses business to Microsoft and Workday); Dkt. 543-44 at 7 (includes additional competitors like Infor, Sage, and Microsoft on the slide).

caused by an unlawful tying arrangement is 'whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie.'" Datagate, Inc. v. Hewlett-Packard Co., 60 F.3d 1421, 1425 (9th Cir. 1995) (internal citations omitted). For example, Asker relies on SAP revenue data [TEXT REDACTED BY THE COURT] as evidence of a distortion due to a tie and "not simply the result of competition on the merits. Asker Rep. ¶¶ 145,147. Asker reviewed evidence that also showed that customers are not allowed "to use S/4HANA and a third-party EDW without also purchasing HANA. In particular, the customer must still purchase the 'full use' HANA license in order for it to use a competing third-party EDW." *Id.* ¶ 158. He opined: "If a condition of purchasing a product is the simultaneous purchase of a product of a competitor, economic reasoning indicates that the **[*844]** product's competitive **[**69]** position is weakened." *Id.* Teradata therefore argues that Asker's opinions about the alleged harm to competition are proper.

There needs to be a showing of "substantial" harm; de minimis harm is not enough under rule of reason analysis.[12] *See* Qualcomm, 969 F.3d at 991 (Under § 1, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market."). Asker failed to show this; he presented no evidence of harm.

In addition, SAP asserts that Asker relies on a series of unwarranted assumptions, specifically that because HANA has OLAP capabilities, it is necessarily always sold as an EDW. Asker Reb. Rep. ¶ 127. When HANA is "sold together with S/4HANA, [it] is almost always bundled with S/4HANA under a runtime license," which precludes use of HANA as an EDW. SMSJ at 28. With a runtime license, HANA can be used only to support the SAP application running on top of it; in other words HANA is the transactional database that supports the application, S/4HANA. Stiroh Decl. ¶ 176. It cannot be an EDW, as defined by Teradata, because it does not bring data from multiple sources across an enterprise and then use sophisticated **[**70]** analytics tools to conduct analysis of that combined data. *See* SAC ¶ 16.

Teradata does not dispute that approximately 88% of SAP's customers have purchased HANA with a runtime license. SMSJ at 29. And it does not present any evidence that a single customer has taken S/4HANA together with HANA pursuant to a full use license and used that HANA installation as an EDW. *Id.* Teradata does not provide any instance where a customer who used Teradata Database replaced it with HANA for the same purpose. Because these undisputed facts render Asker's opinion unreasonable and because Teradata's opposition is based on an incorrect legal standard, SAP's motion to exclude portions of Asker's opinions related to alleged harm to competition is GRANTED.

SAP also objects to Asker's opinions that HANA's adoption is not being driven by any procompetitive benefits of the alleged tie. Asker Mot. at 4. According to SAP, Asker lacks the expertise necessary to evaluate evidence of the design benefits of S/4HANA and admits that he did not understand much of the relevant evidence. *Id.; see* Asker Rep. ¶ 171 ("I do not have the expertise to evaluate whether there is a technical benefit from combining S/4HANA with **[**71]** HANA."). Teradata responds that Asker is not opining that there are no technical benefits for the integration of S/4HANA and HANA but rather that the "documentary and deposition evidence indicates that there is no technical reason for the tie and that the decision to tie was made by SAP's board of directors on business grounds." Asker Opp. at 22-23. SAP replies that this distinction is nonsensical because if S/4HANA is designed to work with HANA such that S/4HANA "is wholly incompatible with other transactional databases" as Teradata alleges, then this is the technical reason why customers must license S/4HANA and HANA together. Asker Reply at 12.

Teradata asserts that no SAP witness or expert has provided a technical justification—or any justification—for tying S/3HANA to HANA's analytical capabilities.[13] Asker is qualified to assess the **[*845]** economic realities of SAP's

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[12] *See infra* Part I.B.4.a for discussion on the application of either the rule of reason or per se analysis to this case.

[13] The reason for this lack of evidence, however, is Teradata's allegation of a new tying theory during the summary judgment briefmg. *See infra* Part I.B.3.

business decisions to tie S/4HANA to the OLAP capabilities of HANA. Asker Depo. at 226. His testimony related to the alleged lack of procompetitive benefits should not be excluded.[14]

2. Motion to Exclude Mehrotra Testimony

Teradata's moved to exclude three out of four of SAP's expert, Dr. Sharad Mehrotra's opinions **[**72]** in sections VI and VII of his report, which rebut the opinions of Teradata's technical expert Hosagrahar Jagadish: (1) that SAP could achieve significant benefits by designing S/4HANA for its HANA database product; (2) that SAP could not have achieved these same or similar benefits by designing S/4HANA to run on other databases; and (3) that "porting" S/4HANA to third-party databases would be challenging. Dkt. No. 472 ("Mehrotra Mot.") at 1. It contends that Mehrotra lacks the necessary factual foundation for these opinions and that he did not follow any reliable methodology in reaching them. *Id.* It argues that Mehrotra never reviewed any of the source code for S/4HANA or HANA, has never used or examined the products, has never used or examined the third-party database products he compares to HANA, disregarded testimony from SAP executives, and relies on cherry-picked documents for sweeping conclusions. *Id.* at 2. SAP responds that Mehrotra's methodology is reliable, and that the rest of Teradata's arguments go to the weight and not the admissibility of evidence. Dkt. No. 533 ("Mehrotra Opp.") at 1.

First, Teradata argues that Mehrotra's opinion in section VI of his report—that SAP was **[**73]** able to realize multiple technical and practical benefits by designing S/4HANA to work closely with HANA—should be excluded because it is unsupported and unreliable. Mehrotra Mot. at 2. Mehrotra admits that he has never used or even examined the S/4HANA or HANA software, any SAP ERP applications, or source code. Dkt. No. 483-4 ("Mehrotra Depo.") at 42-44 ("Q: Have you ever used S/4 Hana? A: Personally, no . . . Q: Have you ever used any part of SAP's Business Suite? A: No, I have not. Q: Have you ever used SAP's HANA database? A: I have personally not used SAP HANA database. It's not an open source database. So it's not free."). When asked whether he had ever used any SAP ERP software, he responded, "No. I am an academic. We normally do not deal with the operational aspect of the problem, so where companies sort of run these things." *Id.* at 43-44. Teradata contends that SAP "is silent on the issue" and "cites no case where an expert was allowed to opine on the design, capabilities, performance, and compatibility of products without ever having even looked at them." Dkt. No. 551-4 ("Mehrotra Reply") at 1.

SAP does not respond directly to the argument that Mehrotra did not use any of **[**74]** the SAP products. It does assert, however, that Mehrotra reviewed the architecture and design of S/4HANA, relying on a series of 28 architectural guidelines of all of the versions starting with the first in May 2014 through March 2019. Mehrotra Opp. at 18. It also asserts that it was unfeasible and not useful for Mehrotra to review all 300 million lines of source code. *Id.* at 10. Teradata responds that the argument that Mehrotra "cannot look at everything does not mean it is proper to look at little to nothing" and at the very least, he "should have identified some representative queries in S/4HANA that would require porting **[*846]** to third-party database." Mehrotra Reply at 1.

Mehrotra did not have to review the source code because he reviewed the architecture and design of S/4HANA instead. Mehrotra Depo. at 147. For example, he stated that he is "intimately aware" of the "architectural aspects of things, but [] not [as] aware of the exact software implementation." *Id.* But he testified that source code is simply "one aspect of the system analysis" and that he understood "the system and its properties" by the architectural diagrams. *Id.* SAP contends that reviewing S/4HANA and HANA at a design **[**75]** and architectural level is "a common and accepted method of software analysis," as evidenced by the academic and expert works that Mehrotra cites in Appendix B of his report, which "rely on exactly this architectural level of analysis." Mehrotra Opp. at 11 (citing Dkt. No. 483-3 ("Mehrotra Rep."), Appendix B). Teradata responds that SAP does not point to any specific methodologies that are supposedly found in any of these works. Mehrotra Reply at 2. It asserts that "[t]he reality is that the cited works provide only general software background, not any methodology for the sort of software analysis required in this case." *Id.* SAP also, however, contends that Mehrotra's reliance on the

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[14] Because Teradata's tying claim fails, *see infra* Part I.B.4, I will not address SAP's motion to exclude Asker's analysis of lost profits due to the alleged tying arrangement.

architecture and design of S/4HANA is proper as evidenced by Teradata's expert Jagadish also relying on architecture-level analyses. Mehrotra Opp. at 11 (citing Dkt. No. 531-21 ("Jagadish Rep.") ns. 290-92,306,319-33,336,341-45,357-60,365-70). Teradata does not respond to this argument.[15]

The following cases provide a helpful analysis of whether Mehrotra's approach is proper. Teradata relies on a Seventh Circuit case in support of its argument that Mehrotra's approach is flawed, but the case is **[**76]** distinguishable. In *Autotech Tech. Ltd. P 'ship v. Automationdirect.com, 471 F.3d 745 (7th Cir. 2006)*, an expert testified "[biased on his 26 years of experience in software development, review of the EZTouch software, and review of advertisements about C—More . . . that the features of C—More could not be developed independently of EZTouch" but he had "never conducted tests on the product." *Autotech, 471 F.3d at 749*. The Seventh Circuit affirmed the district court's decision that this methodology was unreliable because "computer experts must do more than read advertisements." *Id.* The court held that "[t]o qualify as an expert on software, an expert should, at a minimum, examine the product and software upon which the expert bases his opinion." *Id.* In this case, while Mehrotra did not use the product or examine the source code, he reviewed the architecture and design of S/4HANA over the course of five years.

Iconics, Inc. v. Massaro, 266 F. Supp. 3d 461 (D. Mass. 2017) is more factually analogous to the case here. In *Iconics*, the court declined to exclude the expert's testimony regarding the "core architecture" of the software products, which was based on "three architectural diagrams," even though the expert failed to inspect the software code or review technical documents. *Iconics, 266 F. Supp. at 470*. The court held that because the expert "illuminates aspects of the core architecture **[**77]** trade secret" any challenge went to the **[*847]** credibility of the testimony and not admissibility. *Id.* Teradata contends that *Iconics* is distinguishable because there the expert relied on the same architecture documents that the plaintiff cited to whereas here Mehrotra relies on "hand-selected" documents by SAP's counsel and not Teradata's materials. Mehrotra Mot. at 4-5. But in *Iconics* the product at issue belonged to the plaintiff whereas here the S/4HANA product belongs to SAP. It is unclear why it is improper for Mehrotra to rely on technical documents from SAP itself when reviewing its product. Mehrotra Opp. at 18. As the *Iconics* court held, "[r]egardless of the benefits of any alternative approaches," for example those found in Jagadish's report, Mehrotra's opinion is sufficiently reliable. *Iconics, 266 F. Supp. at 470*. "Any questions on the comparative weight or credibility of these two analyses are questions for a jury to resolve." *Id.*

As for Teradata's other objections—"that Mehrotra could not identify with sufficient specificity the academic literature he relied on, did not cite to the particular documents that Teradata thinks he should have, and did not interview the individuals that Teradata thinks he should have"—all go to the **[**78]** weight of his testimony are not grounds for excluding his opinions. Mehrotra Opp. at 16; *In re Korean Ramen Antitrust Litig., 281 F. Supp. 3d 892, 931 (N.D. Cal. 2017)* (holding that an expert's failure to "address (or review) deposition testimony where defendants' employees testified to matters that purportedly undermine some of his opinions or assumptions does not make his testimony excludable. Those are grounds for cross-examination."). For example, Teradata asserts that Mehrotra's opinions are flawed in part because he did not interview the SAP employees that Rudolf Hois spoke with in preparation for his 30(b)(6) deposition. Mehrotra Mot. at 4. SAP responds that Mehrotra did not have to speak with the individuals that Hois spoke with because Hois's experience is in the area of ERP applications whereas Mehrotra's experience is in databases. Mehrotra Opp. at 23. SAP also points out that Mehrotra had the deposition transcripts of Hois and other SAP employees related to the interface of S/4HANA with HANA. *Id.* (citing Mehrotra Rep., Appendix B). Its argument is well-taken: Teradata's motion to exclude Section VI of Mehrotra's expert report is DENIED.

Finally, Teradata moves to exclude section VII of Mehrotra's report which opines that SAP could not have realized **[**79]** the same benefits by designing S/4 for multiple databases and that porting S/4HANA to another database would be challenging and unpredictable because it is unsupported and unreliable. Mehrotra Mot. at 8.

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[15] Teradata does assert that unlike Mehrotra, Jagadish examined the source code and software. Mehrotra Mot. at 10. SAP responds that nowhere in the sections of Jagadish's report, to which Mehrotra responds, does Jagadish refer to S/4HANA source code. Mehrotra Opp. at 13-14. Instead, Jagadish discusses the source code only in relation to trade secrets. *Compare* Jagadish Rep. § X.0 I 247-75 (discussing trade secrets) *with* Jagadish Rep. § X.E ¶¶336-77 (discussing antitrust opinions).

Teradata asserts that in support of his opinions, Mehrotra could and should have reviewed some of the analytical queries in S/4HANA in order to provide at least one specific example of a query that purportedly requires the use of HANA, and not another database. Mehrotra Reply at 5-6.

SAP contends that it is unclear how Mehrotra was supposed to do this or what purpose it would serve. Mehrotra Opp. at 14. Mehrotra and Jagadish do not dispute that [TEXT REDACTED BY THE COURT] *Id.* at 7; Mehrotra Reply at 5. But [TEXT REDACTED BY THE COURT] Mehrotra Opp. at 14 (citing Dkt. No. 531-8 ("Hois Depo.") at 14-16,70-74. [TEXT REDACTED BY THE COURT] Mehrotra Depo at 131-32. SAP points out that review of this code is unnecessary because both Jagadish and Mehrotra agree that the key issue is not how much code must be ported to another database but how difficult it would be. Mehrotra Opp. at 16 (citing Mehrotra Depo. at 186-88; Dkt. No. 531-14 ("Jagadish Depo.") at 227).

To determine how difficult porting **[**80]** would be, Mehrotra relies on "SAP's past experience porting Business Suite optimizations to Oracle and IBM databases, the **[*848]** more integrated design and architecture of S/4HANA on HANA compared to Business Suite on HANA, and the differences in the architectures and technologies of other databases" such as those of Oracle and IBM, to conclude that trying to port S/4HANA to a database other than HANA would be difficult, time-consuming, and unpredictable. Mehrotra Opp. at 7 (citing Mehrotra Rep. ¶¶ 177-98). Teradata objects to Mehrotra's reliance on SAP documents and testimony, arguing that SAP's counsel "cherry-picked" these documents for him Mehrotra Reply at 7. But Teradata "provides no basis for its insinuation that the SAP documents upon which Dr. Mehrotra relied are in any way biased." Mehrotra Opp. at 18. Mehrotra explained that he relied primarily on technical documents, not marketing documents. Mehrotra Depo. at 153-54, 156-57. Teradata responds that SAP's technical documents "can be biased or inaccurate" but such arguments go to weight and not admissibility of the opinions.

Teradata also asserts that Mehrotra's analysis is flawed because he improperly relied on "SAP's alleged experience **[**81]** porting its prior ERP applications (not S/4HANA) to databases prior to 2015 (not databases that exist today or even in the last five years)." *Id.* (citing Mehrotra Rep. ¶¶ 168, 177-78). Mehrotra admits that he has not used IBM's or Oracle's database software since 2006 and 1998 respectively and that he has not examined the current database products. Mehrotra Depo. at 44, 45, 47. According to Teradata, he also misunderstood capabilities of these third-party databases, e.g., misstating that HANA [TEXT REDACTED BY THE COURT] and wrongly assuming that IBM and Oracle's products were released after the development of S/4HANA. Mehrotra Rep. ¶ 9.c. SAP responds that Mehrotra correctly testified about the dates on which the IBM and Oracle databases were released because it is undisputed that Oracle did not release its database until six months after SAP began development of S/4HANA. Mehrotra Opp. at 20. Although IBM released a version of its database in the summer of 2013, Mehrotra relied on SAP documents that explained that [TEXT REDACTED BY THE COURT] . *Id.* at 21. Teradata makes the same objection that I rejected above—that this "is not Mehrotra's conclusion but SAP's allegation. parroted **[**82]** from SAP documents selected by SAP's counsel." Mehrotra Reply at 12. It also points out that Mehrotra failed to reconcile this allegation with results of [TEXT REDACTED BY THE COURT] as noted in Jagadish's opening report. *Id.* (citing Jagadish Rep. I 342, 372). But again, Mehrotra's failure to consider contrary evidence goes to weight and not admissibility. Teradata's motion to exclude portions of Mehrotra's expert report is therefore DENIED.

3. Teradata's Objections to SAP's Reply Evidence

The final preliminary matter I must address is Teradata's objections to SAP's reply evidence, namely its declaration of Rudolph Hois, Dkt. No. 552-1 ("Hois Declaration"). Dkt. No. 568-4 at 1. Teradata asserts that I should strike the declaration because it is impermissible and highly prejudicial. *Id.* The Hois Declaration concerns a key issue underlying Teradata's theory—that SAP's requirement that S/4HANA customers license HANA's analytical capabilities violates federal ***antitrust law***. *Id.* Teradata argues that even if it were true that SAP first heard of this theory from Asker's reply report, as it claims, SAP should have submitted the Hois declaration with its motion, a full month after Asker's reply **[**83]** report. *Id.* Instead, it asserts that SAP improperly waited until its reply brief to submit the evidence. *Id.*

SAP responds that the Hois Declaration was necessary because it was not aware **[*849]** of Teradata's new theory until its opposition to SAP's summary judgment motion. Dkt. No. 585 at 1. There, Teradata abandoned the tying theory pleaded in its complaint and asserted a new one, after the close of fact discovery. Dkt. No. 585 at 1. In the SAC, Teradata alleged that SAP tied S/4HANA to HANA by making it "wholly incompatible with other transactional databases," forcing customers that purchase S/4HANA to also adopt HANA. SAC ¶¶ 89, 132. But in SAP's summary judgment motion, SAP showed how it and other leading vendors achieved procompetitive benefits by integrating their ERP applications with their databases. Dkt. No. 585 at 1. Then, in its opposition, Teradata argued that the tie was different; it was between S/4HANA and HANA's analytical capabilities, which offer EDW functions. Dkt. No. 542 at 26. As a result, the mechanism at issue is no longer a technological incompatibility but licensing terms that SAP allegedly forces upon its customers. *Id.* at 31. Teradata asserts that SAP has failed **[**84]** to show procompetitive justifications for the licensing practices that tie S/4HANA to HANA's analytical capacities. *Id.* at 27.

In support of its argument that Teradata changed its tying theory, SAP points to Asker's opening expert report that expressly and repeatedly defined the "tied product" to mean HANA, not its analytical capabilities. Asker Rep. ¶¶ 5-6, 35. But in his reply report, Asker suggests that SAP should have to justify the tie of S/4HANA to the EDW capabilities of its HANA database. Asker Reb. Rep. ¶ 4. SAP contends that "this shift did not put SAP on notice that Teradata had changed its legal theory regarding the alleged tie" and therefore it did not file the Hois Declaration with its summary judgment motion. Dkt. No. 585 at 2.

Teradata maintains that its theory has not changed. It emphasizes paragraph 95 of the SAC, which states:

> "SAP's Top-Tier ERP Applications customers were free to choose how to manage their data needs, those locked-in customers will now be forced to adopt HANA. Given the costs of licensing, implementing, and maintaining EDAW products, the vast majority of large-scale customers will have no choice but to abandon their prior EDAW providers because they **[**85]** cannot support dual EDAW providers. Thus, because *HANA purports to offer some or all of the functionality offered by Teradata*, SAP is effectively coercing its customers into leaving Teradata and adopting the full stack of SAP products (including HANA)."

Dkt. No. 599 (quoting SAC ¶ 95) at 1. Teradata explains that throughout its complaint, the "functionality offered by Teradata" that HANA purports to offer to replace Teradata's products is HANA's *analytical* (or EDAW) functionality. *Id.*; *see, e.g.*, SAC ¶ 45 (HANA purports to provide "EDAW functionality that SAP claims can enable enterprise analytics similar to those offered by Teradata" and "[t]hus, with HANA . . . SAP now positions itself as a direct competitor in the EDAW market"). It contends that it has never alleged that HANA's transactional functionality competes with EDAW products. Dkt. No. 467 at 4.

Teradata's arguments do not address SAP's point—that Teradata initially challenged the technological integration of the ERP application and HANA, not the licensing practice. Teradata asserts that its allegation that SAP's "sales practice" is "directly contrary to the practices of other ERP applications" is regarding its licensing. But **[**86]** in actuality, the alleged "sales practice" in the SAC does not refer to **[*850]** licensing but a design change, i.e., "tying upgrades of customers' ERP Applications to customers' adoption of HANA (while ending support for older versions of ERP Applications)." SAC ¶ 58. Furthermore, references to "licensing" in the SAC concern the exit fee, not the licensing of HANA's analytical capabilities. *See, e.g.*, SAC ¶ 90 ("SAP's licensing agreements further restrict the ability of customers to read and copy S/4HANA ERP data to any other database); *id.* ¶ 151 ("This rate will only rise more rapidly as more customers upgrade to S/4HANA and are foreclosed from either licensing alternative EDAW products or accessing their SAP ERP data for use with Teradata's EDAW products.").

Teradata also claims that Hois Declaration contradicts his deposition as a corporate witness and should be struck as undisclosed expert testimony. Dkt. No. 568-4 at 3-5. It asserts that in his declaration, Hois explains HANA's capabilities as unique and opines about the comparisons between HANA and other databases. Hois Decl. ¶¶ 4-6. But during his deposition he repeatedly claimed that he lacked the requisite knowledge or expertise to **[**87]** compare the databases and deferred to other experts. Dkt. No. 568-6 ("Hois Depo.") at 64; Dkt. No. 568-8 ("Hois Depo.") at 12, 14, 18. In the his declaration, however, Hois is not comparing databases; instead, he explains a feature of Oracle databases in a manner that is consistent with his deposition testimony. *Compare* Hois Decl. ¶ 6 *with* Hois Depo. at 34-35. Moreover, Hois's high-level opinions are based on his personal knowledge and therefore are proper. Hois Decl. ¶¶ 2-3.

SAP contends that "Teradata cannot oppose summary judgment on the basis of an unpled, and prejudicially-late change in theory." Dkt. No. 552 at 13 (citing *Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1080 (9th Cir. 2008)* ("where . . . the complaint does not include the necessary factual allegations . . . raising such a claim in a summary judgment motion is insufficient to present the claim to the district court")). I agree. The Hois Declaration is proper, even though it is new evidence, as a "reasonable response to the opposition." *Hodges v. Hertz Corp., 351 F. Supp. 3d 1227, 1249 (N.D. Cal. 2018)*.

4. Motion for Summary Judgment

I will now turn to SAP's motion for summary judgment on Teradata's tying claim. To state a sufficient tying claim under *Section 1 of the Sherman Act*, Teradata must prove: (1) a contract, combination or conspiracy among two or more persons **[**88]** or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce []; (3) which actually injures competition." *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)*.

a. Per Se or Rule of Reason Analysis

The first dispute between the parties is whether the per se rule or rule of reason test applies in this case. To determine whether a practice unreasonably restrains trade, courts sometimes apply a "rule of reason" analysis. *Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1410 (9th Cir. 1991)*. Under the rule of reason test, courts "analyze the degree of harm to competition along with any justifications or pro-competitive effects to determine whether the practice is unreasonable on balance. The focus is on the actual effects that the challenged restraint has had on competition in a relevant market." *Id.* "Some practices, however, are so likely to interfere with competition that they violate the *Sherman Act* per se. In these cases, [courts] do not require evidence of any actual effects on competition because [they] consider the potential for harm to **[*851]** be so clear and so great." *Id.* Under the per se test, Teradata must prove: (1) that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying **[**89]** product market to coerce its customers into purchasing the tied product; and (3) that the tying arrangement affects a "not insubstantial volume of commerce" in the tied product market. *Cascade Health, 515 F.3d at 913*.

"Restraints that are not unreasonable per se are judged under the 'rule of reason.'" *Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 989 (9th Cir. 2020)*. "[N]ovel business practices—especially in technology markets—should not be conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id. at 990-91* (internal quotation marks omitted). "Because innovation involves new products and business practices, courts['] and economists' initial understanding of these practices will skew initial likelihoods that innovation is anticompetitive and the proper subject of antitrust scrutiny." *Id. at 991*. In this case, the rule of reason applies because this is not a case that "has so little redeeming virtue, and that there would be so very little loss to society from its ban, that an inquiry into its costs in the individual case [can be] considered [] unnecessary." *United States v. Microsoft Corp., 253 F.3d 34, 94, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (internal quotation marks and citations omitted).

Contrary to Teradata's argument, there are procompetitive justifications from SAP's **[**90]** design of S/4HANA to run on HANA rather than on multiple databases. Reply SMSJ at 14. For example, under Teradata's original theory, SAP's expert, Mehrotra, explains how SAP achieved efficiency gains such as improved performance and functionality with S/4HANA by designing it for only HANA. Mehrotra Rep. ¶¶ 138-98. Under its new theory, Teradata implies that there is no reason SAP could not separately license HANA's analytical capabilities, SMSJ Opp. at 35, but SAP explains that unlike Oracle and Microsoft, SAP lacks the ability to license analytical and transactional functionalities separately because they operate on the same set of data and are intertwined. Hois Decl. ¶¶ 5-6. It asserts that SAP "achieved procompetitive benefits by designing S/4HANA to run on all of HANA, including its analytical capabilities." SMSJ Reply at 15. That Teradata contends that the design of S/4HANA has no efficiency gains is irrelevant to the question of whether the rule of reason applies. Instead, these "purported efficiencies suggest that judicial 'experience' provides little basis for believing that" SAP's S/4HANA "lacked any redeeming virtue and therefore should be presumed unreasonable." *Microsoft, 253 F.3d at 90-91*. Rule of **[**91]** reason applies in this case.

b. Failure to Properly Define a Tied or Tying Market

That said, under either test, Teradata's tying claim fails. As established above, because Teradata has failed to properly define a tied market, there is no triable issue of fact whether the alleged tying arrangement harmed competition in the tied market under the rule of reason analysis. Likewise, because Teradata has failed to properly define a tying market, there is no triable issue of fact whether SAP has market power in a properly-defined tying market. *See* *Truck-Rail Handling Inc. v. BNSF Ry. Co., 2005 U.S. Dist. LEXIS 61300, 2005 WL 8178364, at *8 (N.D. Cal. Mar. 8, 2005)* (granting defendants' motion for summary judgment on market definition because plaintiff's evidence did not "assist in evaluating cross-elasticity of supply and demand").

[*852] Teradata contends that the issue of market definition should be decided by a jury. Opp. SMSJ at 32; *see* *High Tech. Careers v. San Jose Mercury News, 996 F.2d 987, 990 (9th Cir. 1993)* ("The process of defining the relevant market is a factual inquiry for the jury."). But where there is an absence of evidence to support Teradata's claim that SAP competes in the purported tying or tied market, summary judgment is appropriate. In *Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421 (9th Cir. 1995)*, the Ninth Circuit acknowledged "that the definition of the relevant market is a factual inquiry for the jury, and the court may not **[**92]** weigh evidence or judge witness credibility." *Rebel Oil, 996 F.2d at 1435*. It held, however, "that an issue is factual does not necessarily preclude summary judgment. If the moving party shows that there is an absence of evidence to support the plaintiff's case, the nonmoving party bears the burden of producing evidence sufficient to sustain a jury verdict on those issues for which it bears the burden at trial." *Id.* It also noted that when, as here, "an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict" and therefore summary judgment is appropriate. *Id. at 1436* (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*). Accordingly, SAP's motion for summary judgment on Teradata's tying claim is GRANTED.[16]

II. TERADATA'S MOTION FOR SUMMARY JUDGMENT

Teradata moves for summary judgment against SAP's counterclaims, which contend that Teradata infringes its '321 Patent, '179 Patent, and '421 Patent. Dkt. No. 472 ("TMSJ") at 1. Teradata asserts that the claims of the '321 Patent are invalid because they are directed to patent-ineligible subject matter under *35 U.S.C. § 101*. *Id.* Teradata also asserts that SAP is not entitled to damages for the alleged infringement **[**93]** of the '179 and '421 Patents before May 19, 2019, when it first informed Teradata of its infringement allegations because SAP had failed to give notice to the public that its products practice the claims of these patents prior to then. *Id.*; *see* *35 USC § 287*. SAP does not oppose Teradata's motion for summary judgment against an award of damages for infringement of the '179 and '421 Patents before May 21, 2019. Dkt. No. 520 ("Opp. TMSJ") at 1. SAP does, however, contend that the '321 Patent is valid. *Id.*

A. Legal Standard

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[16] Moreover, even if the tied market definition was proper, summary judgment would still be appropriate because Teradata cannot show that SAP has caused actual injury to competition in a market for "EDW products with OLAP capabilities for large enterprises." *See supra* Part I.B.1.b.

Under *Section 101 of the Patent Act*, "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor . . . ." *35 U.S.C. § 101*. The Supreme Court "has long held that this provision contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable." *Alice Corp. Pty. Ltd. v. CLS Bank Int'l, 573 U.S. 208, 216, 134 S. Ct. 2347, 189 L. Ed. 2d 296 (2014)*. The reason for the exception is clear enough—"such discoveries are manifestations of . . . nature, free to all men and reserved exclusively to none." *Mayo Collaborative Servs. v. Vometheus Labs., Inc., 566 U.S. 66, 71, 132 S. Ct. 1289, 182 L. Ed. 2d 321 (2012)* (internal quotation marks and citations **[*853]** omitted). The boundaries of the exception, however, are not so clear.

The *Alice* court highlighted "the concern that drives this exclusionary principle as one of pre-emption." **[**94]** *Alice, 573 U.S. at 216* (noting the delicate balance inherent in promoting progress, the primary object of patent law, and granting a monopoly, the means for accomplishing that goal). In other words, patents that seek to wholly preempt others from using a law of nature or an abstract idea—"the basic tools of scientific and technological work"—are invalid. *Id.* "Accordingly, in applying the *§ 101* exception, we must distinguish between patents that claim the buildin[g] block[s] of human ingenuity and those that integrate the building blocks into something more, thereby transform[ing] them into a patent-eligible invention." *Id. at 217* (internal quotation marks and citations omitted).

In evaluating whether claims are patent-eligible, I must first "determine whether the claims at issue are directed to one of those patent-ineligible concepts." *Alice, 573 U.S. at 217*. "[T]he 'directed to' inquiry applies a stage-one filter to claims, considered in light of the specification, based on whether their character as a whole is directed to excluded subject matter." *Enfish, LLC v. Microsoft Corp., 822 F.3d 1327, 1335 (Fed. Cir. 2016)* (internal quotation marks omitted). Although there is no bright-line rule for determining whether a claim is directed to an abstract idea, courts have articulated some guiding principles. When **[**95]** evaluating computer-related claims, courts look to whether the claims "improve the functioning of the computer itself," *Alice, 573 U.S. at 225*, or whether "computers are invoked merely as a tool" to implement an abstract process. *Enfish, 822 F.3d at 1336*.

If the claims are directed to a patent-ineligible concept, I must then "consider the elements of each claim both individually and 'as an ordered combination' to determine whether the additional elements 'transform the nature of the claim' into a patent-eligible application." *Id. at 1334* (internal citations omitted). This step entails the "search for an inventive concept—i.e., an element or combination of elements that is sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself." *Alice, 573 U.S. at 217-18* (internal quotation marks and citations omitted). An inventive concept "cannot simply be an instruction to implement or apply the abstract idea on a computer" and "must be significantly more than the abstract idea itself." *BASCOM Glob. Internet Servs., Inc. v. AT&T Mobility LLC, 827 F.3d 1341, 1350 (Fed. Cir. 2016)*.

"For the role of a computer in a computer-implemented invention to be deemed meaningful in the context of this analysis, it must involve more than performance of well-understood, routine, [and] conventional activities previously **[**96]** known to the industry." *Content Extraction & Transmission LLC v. Wells Fargo Bank, N.A., 776 F.3d 1343, 1347-48 (Fed. Cir. 2014)*. "[T]he mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention." *Id. at 1348*. However, "an inventive concept can be found in the non-conventional and non-generic arrangement of known, conventional pieces." *BASCOM, 827 F.3d at 1350*.

B. Whether the '321 Patent Is Invalid Under *35 U.S.C. § 101*

The '321 Patent is titled "Systems and Methods for Data Processing." Dkt. No. 124-1 ("'321 Patent"). SAP alleges that Teradata infringes at claims 1, 2, and 4 of **[*854]** the '321 Patent. Dkt. No. 461 at 1. Independent claim 1 and dependent claim 2 recite:

> "**1**. A data processing method comprising:
> providing a set of database tables in a data warehouse, each database table being assigned to an entity type and storing entities of its entity type;

> providing a set of online analytical processing cubes in a data warehouse, each online analytical processing cube specifying a layout for transactional data storage;
> providing at least one application program for processing at least one class of database tables and at least one class of online analytical processing cubes;
>
> mapping a sub-set of the set of database tables to the at least one class of database tables, the sub-set of database tables comprising database tables of **[**97]** one or more entity types;
> mapping a sub-set of the set of online analytical processing cubes to the at least one class of online analytical processing cubes;
> invoking an online analytical processing component to fill the online analytical processing cubes with transactional data;
> processing the entities stored in the sub-set of database tables and the transactional data stored in the sub-set of online analytical processing cubes by the application program; and
> providing analysis of the entities and the transactional data the application program to a user.
>
> **2**. The method of claim 1, comprising providing a set of application programs, whereby each application program of the set of application programs is adapted to process a set of classes of database tables and online analytical processing cubes."

'321 Patent at 7:12-42.

Independent claim 4 is a system claim that is similar to claim 1:

> "**4**. A data processing system comprising:
> a relational database of a data warehouse for storing a set of database tables, each database table being assigned to an entity type and storing entities of its entity type;
>
> a relational database of a data warehouse for storing a set of online analytical processing cubes, each online **[**98]** analytical processing cube specifying a layout for transactional data storage;
> at least one application program for processing at least one class of database tables and at least one class of online analytical processing cubes;
> a mapping table for mapping a sub-set of the set of database tables to the at least one class of database tables, the sub-set of database tables comprising database tables of one or more entity types;
> a mapping table for mapping a sub-set of the set of online analytical processing cubes to the at least one class of online analytical processing cubes; means for invoking an online analytical processing component to
> means for invoking an online analytical processing component to fill the online analytical processing cubes with transactional data;
> means for processing the entities stored in the sub-set of database tables and the transactional data stored in the sub-set of online analytical processing cubes with the application program; and
> means for providing analysis of the entities and the transactional data processed by the application program to a user."

[*855] *Id.* at 7:46-8:18. Claim 1 is representative because it is "substantially similar" to claim 4. TMSJ at 5; *see Content Extraction, 776 F.3d at 1348* (concluding **[**99]** that a claim is representative of other claims when they are "substantially similar and linked to the same abstract idea"). SAP does not oppose that claim 1 is representative.

1. The '321 Patent Is Directed to the Abstract Idea of "Organizing Information into Logical Groups"

Teradata asserts that the '321 Patent is directed to the abstract idea of "associating ('mapping') database tables and OLAP cubes with respective classes for use with application programs."[17] TMSJ at 7. When evaluating

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[17] In the Claim Construction Order, I rejected Teradata's proposal to construe "mapping" as "associating or assigning." Claim Construction Order at 14-15. Instead I construed "mapping" as "[c]reating and storing, in computer system memory or secondary

computer-related claims, the first step in the *Alice* inquiry "asks whether the focus of the claims is on the specific asserted improvement in computer capabilities" or "instead, on a process that qualifies as an 'abstract idea' for which computers are invoked merely as a tool." *Enfish, 822 F.3d at 1335-36*. Teradata argues that the "'mapping' to classes at the heart of the '321 patent is simply a practice of organizing information, a type of activity that courts have held to be abstract and ineligible for patent protection." TMSJ at 7. For example, even SAP's expert, Dr. David Maier, explains,

> "The '321 patent relates to ways to organize the tables and cubes used in databases so that they can be more easily and efficiently recognized and accessed. At a high level this organization **[**100]** is accomplished by assigning a table or cube to a particular class. These classes serve to group data structures storing related data, so an application can access the structures together."

Dkt. No. 472-2 ("Maier Reb. Rep.") ¶ 683.

SAP contends that "if there is an abstract idea, it is organizing information into logical groups." Opp. TMSJ at 3-6. Although its opposition assumes *arguendo* that the claims are directed to an abstract idea, SAP does not dispute that the claims are directed to an abstract idea. It "does not contest that the claims are directed to this idea of 'organizing information into logical groups' and that it is abstract." *Id.* at 4. Instead, it disputes Teradata's assertion that the claims are directed to the narrower abstract idea of "associating ('mapping') database tables and OLAP cubes with respective classes for use with application programs." TMSJ at 7.

SAP takes the unusual position as a patentee of asserting a broader definition of the abstract idea in order to contend that the physical-realm claim elements—i.e., database tables, OLAP cubes, application programs, and mapping—and their combination should be analyzed under *Alice* step two to determine that there is **[**101]** an inventive concept. *See* Opp. TMSJ at 6; Hearing Tr. at 60-61. An inventive concept "reflects something more than the application of an abstract idea using well-understood, routine, and conventional activities previously known to the industry. It must be enough to transform an abstract idea into a patent-eligible invention." *Cellspin Soft, Inc. v. Fitbit, Inc., 927 F.3d 1306, 1316 (Fed. Cir. 2019)*, *cert. denied sub nom. Garmin USA, Inc. v. Cellspin Soft, Inc., 140 S. Ct. 907, 205 L. Ed. 2d 459 (2020)* (internal quotation marks and citations omitted).

[*856] In *Berkheimer v. HP Inc., 881 F.3d 1360 (Fed. Cir. 2018)*, the Federal Circuit held that "[w]hether something is well-understood, routine, and conventional to a skilled artisan at the time of the patent is a factual determination." *Berkheimer, 881 F.3d at 1369*. The court held that the claims at issue were directed to the abstract ideas of parsing, comparing, storing, and editing data. *Id. at 1366*. The patentee argued that the specification described "an inventive feature that stores parsed data in a purportedly unconventional manner" which "eliminates redundancies, improves system efficiency, [and] reduces storage requirements" among other things. *Id. at 1369*. The Federal Circuit therefore held that the "improvements in the specification, to the extent they are captured in the claims, create a factual dispute regarding whether the invention describes well-understood, routine, and conventional **[**102]** activities." *Id.*

In contrast, in *BSG Tech LLC v. Buyseasons, Inc., 899 F.3d 1281 (Fed. Cir. 2018)*, the Federal Circuit held that the dispute about whether the claims recited "unconventional features that provides benefits over conventional prior art databases" was irrelevant because "a claimed invention's use of the ineligible concept to which it is directed cannot supply the inventive concept that renders the invention 'significantly more' than that ineligible concept." *BSG, 899 F.3d at 1289-91*. The court held that the claims at issue were directed to the abstract idea of "considering historical usage information while inputting data." *Id. at 1286*. The only alleged unconventional feature of the claims was "the requirement that users are guided by summary comparison usage information or relative historical usage information." *Id. at 1291*. The Federal Circuit held that "this simply restate[d]" what it had already determined was an abstract idea and therefore the question about whether this requirement was non-routine or unconventional was irrelevant. *Id.* "As a matter of law, narrowing or reformulating an abstract idea does not add 'significantly more' to it." *Id.* The Federal Circuit affirmed the district court's determination that the asserted claims lacked an inventive concept. *Id.*

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storage for a computer system, an association between data elements in the computer system such that a computer can locate a data element using that association." *Id.*

In this case, **[**103]** Teradata asserts that the abstract idea is "associating ('mapping') database tables and OLAP cubes with respective classes for use with application programs" because then SAP's purported inventive concept is simply a restatement of the abstract idea and arguably fails. In contrast, SAP contends that the abstract idea is "organizing information into logical groups" because then the combined elements of the database, OLAP cubes, application programs, and mapping arguably create an inventive concept and a genuine dispute of fact of whether the combination of these elements is non-routine or unconventional. I will now address which abstract idea the claims are directed towards.

SAP argues that "mapping" database tables and OLAP cubes with respective classes for use with application programs is not an abstract idea because database tables, OLAP cubes, and application programs are computer structures, not mere concepts, and "mapping" requires the creation of computer data structures. Opp. TMSJ at 4. Teradata cites no precedent holding that a database, OLAP cube, or application program is an abstract idea. *See id.* For "mapping," however, Teradata points to *Autodesk*, where the district court held that **[**104]** "it would be difficult to conceive of a more abstract concept than 'mapping,' when that concept is not tied to any particular object or method." *East Coast Sheet Metal Fabricating Corp. v. Autodesk, Inc., 2015 U.S. Dist. LEXIS 5536, 2015 WL 226084, at *6 (D.N.H. Jan. 15, 2015)*, *amended in part*, *2015 U.S. Dist. LEXIS 25668, 2015 WL 925614 (D.N.H. Mar. 3, 2015)*, **[*857]** *and aff'd*, *645 F. App'x 992 (Fed. Cir. 2016)*. Although SAP does not directly address *Autodesk*, it contends that "mapping" as construed by the Claim Construction Order is not abstract because it requires the creation of computer data structures: "[c]reating and storing, in computer system memory or secondary storage for a computer system, an association between data elements in the computer system such that a computer can locate a data element using that association." Claim Construction Order at 15. According to SAP, "[t]here is nothing abstract about a data structure that an application program running on a computer uses to locate particular data stored in other data structures in the computer system." Opp. TMSJ at 4.

Teradata responds that despite the claim construction, "mapping" is an abstract idea because "there is nothing in the claim language or specification that would materially distinguish a computerized mapping table from one that could be created with a pen and paper." TMSJ at 11. I agree. In *Intellectual Ventures I LLC v. Symantec Corp., 838 F.3d 1307 (Fed. Cir. 2016)*, the Federal Circuit held that the patent at issue was directed **[**105]** to the abstract idea of "receiving e-mail (and other data file) identifiers, characterizing e-mail based on the identifiers, and communicating the characterization—in other words, filtering files/e-mail." *Symantec Corp., 848 F.3d at 1313*. It held that the patent was invalid because "with the exception of generic computer-implemented steps, there is nothing in the claims themselves that foreclose them from being performed by a human, mentally or with pen and paper." *Id. at 1318*. In this case, SAP's expert, Maier, opined that "[a] folder or directory structure stored on a computer system [that] groups objects and allows them to be located . . . can be considered a mapping table." Dkt. No. 472-3 ("Appendix 3 to Maier Report") at 32. Because a computer folder "originated as a metaphor for paper folders," "mapping" is an abstract idea. TMSJ at 12.

Moreover, the claims are not focused on how "mapping" improves computer functionality. SAP's expert explains that the "ways to organize the tables and cubes used in databases," e.g., "assigning a table or cube to a particular class," makes the database tables and OLAP cubes "more easily and efficiently recognized and accessed." Maier Reb. Rep. ¶ 683. But the specification expressly states **[**106]** that the improvement is simplifying the "selection of database tables as input parameters and the selection of OLAP cubes" to make it "more *user* friendly." '321 Patent at 5:63-65 (emphasis added); *see also id.* at 2:40-44; 3:61-64; 4:8-19; 5:27-30; 5:35-44; 6:11-16 (references to how the value from "mapping" is a result of a human's choice to associate particular tables or cubes with classes, not from a new data structure or technological improvement). Further, neither the claims nor the specification recites any specific algorithms for mapping tables and cubes to classes, collecting data into OLAP cubes, processing the data, or analyzing the data. TMSJ at 14. Consequently, SAP only "conclusorily claims an improvement, but never identifies what the specific improvement is, despite the Federal Circuit's requirement that claims assert a 'specific asserted improvement.'" *MyMail, Ltd. v. OoVoo, LLC, No. 17-CV-04487-LHK, 2020 U.S. Dist. LEXIS 80972, 2020 WL 2219036, at *15 (N.D. Cal. May 7, 2020)*, *aff'd*, *2021 U.S. App. LEXIS 24764, 2021 WL 3671364 (Fed. Cir. Aug. 19, 2021)* (quoting *McRO, Inc. v. Bandai Namco Games Am. Inc., 837 F.3d 1299, 1314-15 (Fed. Cir. 2016)*). As a result, "mapping" is an abstraction.

Teradata also asserts that the presence of physical components—i.e., the computer data structures composed of the database, OLAP cubes, and application programs— **[*858]** do not save the claims from being directed to an abstract idea. **[**107]** Dkt. No. 559 ("Reply TMSJ") at 5-6. For example, in *In re TLI Commc'ns LLC Pat. Litig., 823 F.3d 607 (Fed. Cir. 2016)*, the Federal Circuit determined that the claim at issue was directed to an abstract idea even though the claims required "concrete, tangible components such as 'a telephone unit' and a 'server,'" because "the specification makes clear that the recited physical components merely provide a generic environment in which to carry out the abstract idea." *TLI, 823 F.3d at 611*.

But SAP does not dispute that the claims are directed to an abstract idea; instead it disputes the scope of the abstract idea. SAP persuasively contends that, contrary to Teradata's narrow characterization of multiple Federal Circuit decisions, the Federal Circuit "resists conflating a claim's abstract idea with its physical-realm elements." Opp. TMSJ at 6. For example, Teradata characterized the Federal Circuit's conclusion in *Capital One* as stating that the claims were directed to the abstract idea of "[s]ystems for manipulating XML documents by organizing data components into data objects and records and responding to modifications of the data." TMSJ at 8. Instead, the Federal Circuit concluded that "the patent claims are, at their core, directed to the abstract idea of collecting, **[**108]** displaying, and manipulating data." *Capital One, 850 F.3d at 1340*. Similarly, Teradata characterized the decision in *Electric Power Group* to hold that the claims at issue were directed to the abstract idea of "[s]ystems and methods for performing real-time monitoring of an electric power grid by collecting data from multiple data sources, analyzing the data, and displaying the results." TMSJ at 8. But the Federal Circuit held that the claims were focused on the following abstract idea: "a process of gathering and analyzing information of a specified content, then displaying the results." *Elec. Power Grp., 830 F.3d at 1354*.

Teradata points to *Intellectual Ventures I LLC v. Erie Indemnity Co., 850 F.3d 1315 (Fed. Cir. 2017)* as an example of the Federal Circuit including a physical-realm element in its articulation of the abstract idea. Reply TSMJ at 4. There, the Federal Circuit held that "the invention is drawn to the abstract idea of 'creating an index and using that index to search for and retrieve data.'" *Erie, 850 F.3d at 1327*. An "index" was a known structure in the field of database technology. The Federal Circuit, however, was not discussing the specific index in the field of database technology in its definition of the abstract idea, but indexes generally. *See id.* (explaining that "[t]his type of activity, i.e., organizing and accessing records **[**109]** through the creation of an index-searchable database, includes longstanding conduct that existed well before the advent of computers and the Internet. For example, a hardcopy-based classification system (such as library-indexing system) employs a similar concept as the one recited by" the patent).

Accordingly, I agree with SAP that the claims are directed to the abstract idea of "organizing information into logical groups".[18] But for the reasons explained below, the claims are patent-ineligible because they fail to encompass an inventive concept.

2. The '321 Patent Does Not Contain an Inventive Concept

Teradata asserts that the '321 Patent lacks an inventive concept because it "recites **[*859]** well-known, routine, and conventional database elements" and "uses these elements to perform well-understood, routine, and conventional functions of collecting, organizing, processing, or analyzing data." TMSJ at 13. An inventive concept "cannot simply be an instruction to implement or apply the abstract idea on a computer" and "must be significantly more than the abstract idea itself." *BASCOM, 827 F.3d at 1350*. "If a claim's only 'inventive concept' is the application of an abstract idea using conventional and well-understood techniques, the claim has **[**110]** not been transformed into a patent-eligible application of an abstract idea." *BSG, 899 F.3d at 1290-91 (Fed. Cir. 2018)*. But "an inventive concept can be found in the non-conventional and non-generic arrangement of known, conventional pieces." *BASCOM, 827 F.3d at 1350*.

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[18] Teradata asserts that whether I adopt SAP's or its articulation of the abstract idea, the *Section 101* analysis does not change because its articulation "is simply a form of organizing information into logical groups." Reply TMSJ at 7.

At the summary judgment stage, Teradata, as the movant, has the burden of showing that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law. *FED. R. CIV. P. 56(a)*. "[W]hether a claim limitation or combination of limitations is well-understood, routine, and conventional is a factual question." *BSG, 899 F.3d at 1290*. Because such a fact is "pertinent to the invalidity conclusion" it "must be proven by clear and convincing evidence." *Berkheimer, 881 F.3d at 1368*. "When there is no genuine issue of material fact regarding whether the claim element or claimed combination is well-understood, routine, conventional to a skilled artisan in the relevant field, this issue can be decided on summary judgment as a matter of law." *Id.* And if the only alleged unconventional feature is the abstract idea itself, summary judgment is appropriate. *BSG, 899 F.3d at 1291*.

a. Inventive Concept Identified During the Hearing

Notably, SAP did not assert what the inventive concept is in its opposition. When asked during the hearing, its counsel explained **[**111]** that the inventive concept is composed of three elements in claim 4:[19] (1) a relational database that stores both database tables and OLAP cubes ('321 Patent at 7:47-53); (2) an application program that accesses and processes those database tables and OLAP cubes, not individually, but as a class ('321 Patent at 7:54-56); and (3) the two mapping tables, which are data structures inside the computer, which associate the database tables and the OLAP cubes with a particular class ('321 Patent at 8:1-7). Hearing Tr. at 60-61. Its counsel contended that combining these elements constituted an improved database technique that simplified "the selection of database tables as input parameters and the selection of OLAP cubes" and made it "more user friendly." *Id.* at 62 (citing '321 Patent at 5:63-67). According to the '321 Patent, the improved database technique also "may enable non-expert users to perform complex transactional data processing and to integrate expert knowledge in the class definitions." *Id.*

Teradata's counsel responded that these elements do not create an inventive concept. For the first element, under the agreed claim construction, "a relational database of a data warehouse for storing a set of [OLAP] cubes" is "a database that stores **[**112]** information in tables of rows and columns of data located in a data warehouse that can store at least one [OLAP] cube." Dkt. No. 206 ("Joint Claim Construction Statement") at 2. In other words, the OLAP cube is not stored in the relational database as SAP's counsel explained, **[*860]** but in the data warehouse. Hearing Tr. at 64; *see also* '321 Patent at 4:58-60, Fig. 3 (showing that the data warehouse contains a set of OLAP cubes and not a relational database). And the specification admits that the storage of OLAP cubes in data warehouse systems is well-understood, routine, and conventional. *Id.* at 1:26-27 ("An OLAP cube is a multi-dimensional representation of a set of data. Such a cube is the basis for transaction data storage in prior art data warehouse systems.").

For the second element, Teradata's counsel pointed out that SAP admitted that application programs were well-known in the prior art. *See* Dkt. No. 211 ("SAP Opening Claim Construction Brief") at 20 ("Application programs were well-known to the POSITA at the time the '321 patent was filed."). And for the third element, Teradata's counsel asserted that "mapping" is "merely an abstraction" for the reasons explained above, e.g., there is nothing in the specification **[**113]** that would distinguish the mapping tables from what a person could do on pen and paper. Hearing Tr. at 66; *see supra* Part II.B.1.

SAP's counsel conceded that application programs, database tables, and OLAP cubes were well-known. Hearing Tr. at 68. But he argued that nothing in the specification or the record suggested that any of the three elements it identified were well-known or conventional in 2003, the patent's effective filing date. *Id.* This does not address, however, Teradata's argument that "mapping" is an abstraction. Because "mapping" simply restates what I have determined is an abstract idea, i.e., organizing information into logical groups, the question of whether the claim element is well-understood, routine, and conventional, is irrelevant. *BSG, 899 F.3d at 1291*.

SAP's response also does not address Teradata's argument that application programs, database tables, and OLAP cubes are generic software components that cannot supply an inventive concept. Reply TMSJ at 11; *see Content*

[19] SAP only addresses claim 4 but Teradata addresses the parallel elements of claims 1 and 4 together. Reply TMSJ at 9.

Extraction, 776 F. at 1348 ("[T]he mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention."). The specification does not identify any specific advancement over prior art. Instead, it explains **[**114]** that these physical elements were well-understood, routine, and conventional features of databases. As SAP's counsel explained, "mapping" is how the application program accesses the data in the database tables and OLAP cubes as a class and therefore because "mapping" is an abstraction, none of these elements can provide an inventive concept. *See* Hearing Tr. at 60-61.

Even though the question of conventionality is irrelevant, Teradata also points to examples in the prior art to argue that "mapping" is a well-understood, routine, and conventional element. *Id.* at 14-15. Some prior art patent applications contained the same process of classifying or assigning tables or cubes to logical groupings or classes, each associated with applications for processing. *See, e.g.*, Dkt. No. 472-4 ("'061 Colossi Reference") (U.S. Patent Application Publication No. US 2004/0139061) (Figure 3 showing a grouping of tables related to the measurement of sales by time, product, and region); Dkt. No. 472-5 ("Bakalash Reference") (U.S. Patent No. 6,385,604") (Figure 4A showing a grouping of tables by supplier, time period, part, and supplied parts); Dkt. No. 472-6 ("Colossi Article" or "Colossi Reference") (Figure 1 showing a class of **[**115]** OLAP cubes related to finance, market share, employees, and customers).

SAP contends that Teradata has not shown an absence of a genuine dispute of material fact because "[w]hether a particular technology is well-understood, routine, and conventional goes beyond what was **[*861]** simply known in the prior art. The mere fact that something is disclosed in a piece of prior art, for example, does not mean it was well-understood, routine, and conventional." *Berkheimer, 881 F.3d at 1369*. It argues that the prior art references do not support Teradata's argument because Teradata "cites no evidence that these references were widely read and understood by 2003, or adopted by others so widely that they became routine and conventional." Opp. TMSJ at 10. For example, the Colossi '061 reference was not published until 2004, after the '321 Patent's effective filing date and therefore "it cannot possibly show that others adopted its teachings to such an extent that they became conventional in 2003." *Id.* As for the other Colossi reference, it contends that Figure 1 of the 2002 Colossi article was simply a proposal and Teradata cites to no evidence showing that anyone adopted the proposal so that it became routine and conventional by 2003. *Id.* Similarly, **[**116]** it argues that there is no evidence that the Bakalash reference was widely read or understood by 2003. *Id.*

Further, SAP contends that Teradata has not met its burden of showing that the patent claims' combination of physical-realm elements was conventional, routine, and well-understood. *Id.* at 11. According to SAP, the prior art references show different claimed inventions than the one at issue in the '321 Patent. *Id.* For example, both the Colossi '061 reference and the Bakalash reference describe the claimed invention as a "star schema," a way to represent the logical structure of a relational base, which is not the claimed invention at issue here. *Id.* at 17; *see* Bakalash Reference at 3:54-57 ("An exemplary star schema is illustrated in FIG. 4A"); '061 Colossi Reference ¶ 0075 ("FIG. 3 illustrates a sample star-join schema"). Teradata does not contend that either reference shows any of the other '321 claim elements, e.g., any system in which both tables and cubes are mapped to classes, as required by the '321 Patent. *Id.* at 11-12. Similarly, SAP's expert opines that Figure 1 in the Colossi Reference describes cubes that are different from the construed definition of OLAP cubes in this case. Dkt. No. 520-2 ("Maier **[**117]** Reb. Rep.") ¶¶ 746-48.

These arguments are irrelevant, however, because under a *Section 101* analysis, as opposed to a *Section 102* or *103* analysis, Teradata does not have to compare each '321 claim to the prior art. Reply TMSJ at 10. As the Federal Circuit has explained,

> "The appropriate question is not whether the entire claim as a whole was 'well-understood, routine [and] conventional' to a skilled artisan (i.e., whether it lacks novelty), but rather, there are two distinct questions: (1) whether each of the [elements] in the claimed [product] (apart from the natural laws themselves) involve well-understood, routine, conventional activity previously engaged in by researchers in the field, and (2) whether all of the steps as an ordered combination add[ ] nothing to the laws of nature that is not already present when the steps are considered separately."

Chamberlain Grp., Inc. v. Techtronic Indus. Co., 935 F.3d 1341, 1348-49 (Fed. Cir. 2019), *cert. denied*, *141 S. Ct. 241, 208 L. Ed. 2d 19 (2020)* (internal citations and quotation marks omitted). Teradata explains that it was relying on the prior art references to show that "mapping" and "mapping tables," under my construction and as interpreted by SAP's expert, were well-known in the art. Reply TMSJ at 10-11. SAP does not address Teradata's arguments that the Colossi '061 and Bakalash references **[**118]** show mappings of tables to classes. Further, SAP's expert undermines its argument that there is no clear and convincing evidence that the Colossi and Bakalash references were widely circulated or understood **[*862]** by 2003; Maier opines that a POSITA would have understood how to implement certain claim elements at the time based on these three references. *See infra* Part II.B.2.b; *see* Maier Reb. Rep. ¶¶ 704, 715. SAP's argument that these three elements create an inventive concept fails.

b. Remaining Claim Elements

SAP's counsel clarified that SAP was not abandoning the seven physical-realm elements outlined in its opposition by focusing on the elements above. Hearing Tr. at 63. According to SAP, "even if each of the [] seven claim elements individually were known, Teradata submits no clear and convincing evidence that this particular combination of structural, physical-realm elements was conventional by 2003": the elements above and (1) "an OLAP component filling the OLAP cubes with transactional data and [a particular] means for invoking that component to perform that function; (2) "a [particular] means for processing with the application program the entities stored in the sub-set of database **[**119]** tables and the transactional data stored in the sub-set of OLAP cubes; and (3) "a [particular] means for providing analysis of those entities and transactional data processed by the application program." Opp. TMSJ at 9.

But these remaining claim limitations—"filling cubes with data, processing data, and providing analysis"—are also abstract and cannot provide an inventive concept. TMSJ at 14. Contrary to SAP's addition of the word "[particular]" in the elements,[20] these limitations are purely functional because the claims do not recite any specific algorithms for performing these steps; instead they simply claim a result and reflect abstract ideas. TMSJ at 14; *see Affinity Labs of Texas, LLC v. Amazon.com Inc., 838 F.3d 1266, 1269 (Fed. Cir. 2016)* ("The purely functional nature of the claim confirms that it is directed to an abstract idea, not to a concrete embodiment of that idea."). SAP does not respond to this argument. The question of whether these elements are well-understood, routine, and conventional is therefore irrelevant because these elements are abstract ideas and therefore cannot supply an inventive concept. *See BSG, 899 F.3d at 1290-91*.

In any event, Teradata argues that all of these steps are also well-understood, routine, and conventional, as SAP admits. *Id.* SAP's expert admits **[**120]** that filling cubes with data, processing data, and providing analysis are all well-known elements and would be familiar to a skilled artisan. *See, e.g.*, Maier Reb. Rep. ¶ 704 (arguing that the "Colossi and Colossi '061 references . . . further demonstrate that a POSITA would have been well aware of applications that utilized RDBMS components to fill OLAP cubes."); *id.* ¶ 715 (arguing that the "Colossi reference . . . further demonstrate[s] that a POSITA would have been well aware of applications that processed the entities stored in the sub-set of database tables and the transactional data stored in the sub-set of online and analytical processing cubes with the application program."); *id.* ¶ 719 (arguing that the structures for "providing analysis of the entities and the transaction data processed by the application program to a user" were "familiar to a skilled artisan"). Maier pointed to business intelligence tools such as "Microsoft Excel, BusinessObjects and Tableau" as examples of applications that were well-known that filled cubes with data, processed **[*863]** data, and provided analysis of data. *Id.* ¶¶ 701, 712, 719.

Furthermore, the specification is silent as to any purported improvement **[**121]** provided by the claimed combination. *See MyMail, 2020 U.S. Dist. LEXIS 80972, 2020 WL 2219036, at *19* (invalidating claims under *§ 101* in part because the specification was "entirely silent as to . . . how any inventive feature, alone or in an ordered combination, is used in an unconventional manner.") (internal quotation marks omitted). Because the claim

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[20] Teradata asserts that SAP's rewriting of claim 4 underscores that the ordered "combination" of elements in claim 4 cannot survive *Alice* step two. Reply TMSJ at 9. It argues that SAP (1) combines the first two elements; (2) moves the "mapping" limitations to follow the filling, processing, and providing analysis limitations; and (3) adds the word "[particular]" to make three claim elements seem less generic. *Id.*

elements simply apply the abstract idea of organizing information into logical groups using well-understood, routine, and conventional activities previously known to the industry, the claims do not make the abstract idea patent eligible. Cellspin Soft, 927 F.3d at 1316.[21] SAP's claims are directed to the abstract idea of organizing data into logical groups. There is no inventive concept that provides something more than the abstract idea itself. Teradata's motion for summary judgment is GRANTED.

III. MOTION TO EXCLUDE LEONARD AND WOLFSON TESTIMONY

Teradata's final motion to exclude expert testimony seeks to exclude portions of Dr. Wolfson and Dr. Leonard's reports. Dkt. No. 480 ("L&W Mot.") at 1. Teradata asserts that I should exclude Wolfson's apportionment opinions because they do not satisfy Rule 702 and Leonard's Profit Apportionment Method with respect to the '321 Patent, which relies on Wolfson's apportionment factors. *Id.* Because I conclude **[**122]** that the '321 Patent is invalid, any arguments related to it are DENIED as moot. Teradata also moves to exclude certain alternative calculations for reasonable royalties, such as damages before May 21, 2019 for the '421 and '179 Patents and damages related to an exhibit labeled as "Scenario 2." *Id.* SAP does not dispute these issues and therefore Teradata's motion in relation to these is GRANTED. *See* Dkt. No. 525 ("L&W Opp.") at 12, 15. As for the antitrust damages, Teradata moves to exclude Leonard's opinion that certain Teradata business decisions caused the damages. L&W Mot. at 2. Because I conclude that Teradata's tying claim fails, any argument about antitrust damages is DENIED as moot. The remaining issues, then, are whether Wolfson's apportionment analysis of the '421 and '179 Patents is unreliable and therefore whether Leonard's Profit Apportionment Method for the '421 and '179 Patents is unreliable.

Teradata asserts that Wolfson's apportionment analysis is flawed. *Id.* at 5. SAP explains that Wolfson "was tasked with estimating the value of Teradata's infringing technology by drawing on his more than 35 years of experience as a computer science professor and the president of a startup company in the data science field." L&W Opp. at 1 **[**123]** (citing Dkt. No. 488-6 ("Wolfson Rep.") ¶¶ 4-18). Teradata points out that Wolfson admits that he has never conducted an apportionment analysis before, and he could not provide examples of others apportioning revenues in the manner he did or any third-party resources that could guide his efforts. Dkt. No. 488 ("Wolfson Depo.") at 42-43, 46, 77-78.

Wolfson's analysis follows the same methodology affirmed by the Federal Circuit in Summit 6, LLC v. Samsung **[*864]** Elecs. Co. Ltd., 802 F.3d 1283, 1296-98 (Fed. Cir. 2015). *Id.* at 2-3. There, the expert determined the smallest salable patent-practicing unit for which revenue data is available and further apportioned the value of the claimed invention to take into account only those features that infringed. Summit 6, 802 F. 3d at 1297. In this case, Wolfson identified the smallest salable unit for each patent, e.g., the Teradata Columnar feature for the '421 Patent and the Teradata Database for the '179 Patent, and then undertook a "multi-step, quantitative apportionment specific to each patent." Id. at 1297. Teradata asserts that Summit 6 is distinguishable because there, an economist, not a technical expert, made opinions based on his careful quantitative review of objective financial and customer usage data. Dkt No. 561 ("L&W Reply") at 4. Here, Wolfson repeatedly confirmed that he had no **[**124]** data on customers' usage of the specific features. *See* Dkt. No. 560-6 ("Wolfson Depo.") at 98-110.

But Wolfson explains that he does not use such data because Teradata claims that it does not possess or maintain information about how its customers deploy or configure features such as the Teradata Columnar, for example. Wolfson Rep. ¶ 49. Instead, Wolfson "had information about how certain Teradata employees who are in direct contact with customers value various features that are related to '421 . . . ." Wolfson Depo. at 110. Like the expert in Summit 6, for the '421 Patent he determined the proportion of customers who would be expected to configure Teradata Columnar in an infringing manner based on Teradata's documentation and publications and then

[21] SAP also contends that Teradata has not shown a lack of genuine dispute that there are no other ways to implement the alleged abstract idea. Opp. TMSJ at 15-16. But Teradata does not have to show that SAP has preempted an entire idea for the '321 claims to be patent-ineligible. "While preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility." FairWarning IP, LLC v. Iatric Systems, Inc., 839 F.3d 1089, 1098 (Fed. Cir. 2016) (citation omitted).

subtracted non-infringing configuration options. Wolfson Rep. ¶¶ 48-69. For the '179 Patent, he approximated the value of Teradata's "complex query" processing components of the Teradata Database based on Teradata's internal spreadsheets. *Id.* ¶¶ 97-108. Wolfson then excluded use cases that do not involve the infringing subquery processing. *Id.* ¶¶119-22. His methodology is proper.

Teradata asserts that when asked how he came to determine or know what the alleged infringing **[**125]** conduct was, Wolfson responded that he did not "exactly recall how" he identified the exact piece that infringes and that "some of it is a hunch." Wolfson Depo. at 77-78. But the full context of his statement was that apportionment is not an "exact science," which has been acknowledged by courts. L&W Opp. at 4; *see* *Apple Inc. v. Motorola, Inc., 757 F.3d 1286, 1315, 1319 (Fed. Cir. 2014)*, *overruled on other grounds by* *Williamson v. Citrix Online, LLC, 792 F.3d 1339 (Fed. Cir. 2015)* (recognizing that estimating a "reasonable royalty" for example "is not an exact science" and holding that an expert's method of apportionment was admissible even if other reliable methods of estimating a reasonable royalty existed). Wolfson testified that he did not analyze the infringement, or the claim construction order himself and he never spoke to SAP's expert on infringement, Dr. Maier. *Id.* at 34, 84. But his analysis of the relative value of the infringing technology relies on Maier's opinions on patent infringement, which is common and appropriate. *Fujifilm Corp. v. Motorola Mobility LLC, No. 12-cv-03587-WHO, 2015 U.S. Dist. LEXIS 46106, 2015 WL 1737951, at *4 (N.D. Cal. Apr. 8, 2015)* (It is "reasonable to expect that experts will rely on the opinion of experts in other fields as background material for arriving at an opinion."). When asked when he received Maier's report, he stated that the earliest copy he had was from the same day that he signed his own report, **[**126]** but he testified that it was his impression that he had received something similar beforehand. *Id.* at 162-63. In addition, Wolfson testified that he relied upon SAP's infringement contentions, which were the basis of Maier's report, before finalizing his report. *See* Wolfson Depo. at 67-68, 157-61.

[*865] Teradata also emphasizes that "Wolfson's views on the patents are confused and plainly omit key elements of the claimed invention." L&W Mot. at 7. According to Teradata, he ignored the existence of a limitation in the '179 Patent that subqueries be optimized "without transformation" and only focused on whether there were subqueries to the queries being processed. *See* Dkt. No. 491-15 ("'179 Patent") at 39:3-5; *see* Wolfson Depo. at 126-27 (stating that he believed the question of "transformation" was "completely tangential" to his report and confirming that the word "transformation" was "not even in" his report). Because Wolfson "values only the prevalence of subqueries rather than subqueries that are optimized 'without transformation,'" Teradata asserts that his approach is inappropriate. L&W Mot. at 7. SAP responds that it is appropriate that Wolfson only considered the prevalence of subqueries because according **[**127]** to Maier, the "without transformation" limitation is met when a query contains a subquery. L&W Opp. at 5 (citing Dkt. No. 524-11 ("Appendix 4 of the Maier Expert Rep.") at 82-84). It contends that Teradata has cited no evidence otherwise and therefore Wolfson did not need to account for the "without transformation" limitation. *Id.* These arguments go to the weight and not the admissibility of Wolfson's opinions.

Finally, Teradata asserts that Wolfson's calculations "reflect a host of allegedly quantitative assumptions that do not connect to the qualitative documents on which he relies." L&W Mot. at 8. For example, Teradata argues that he assumes that 50-100% of Teradata's customers use a certain configuration of Columnar solely because Teradata "recommends" the configuration, but he has no basis for this assumption. *Id.* SAP points out that this is a rational analysis given that some customers may not follow Teradata's recommendation and therefore would be expected to choose both options equally (the 50% endpoint of the range). *Id.* at 5. And because customers are likely to follow a manufacturer's recommendation, this would result in the upper endpoint of the range (100%). *Id.* Teradata **[**128]** also argues that with the '179 Patent, Wolfson relied on a 50% estimate for the prevalence of queries containing subqueries "solely on a third-party paper," but SAP contends that the paper "analyzed a well-established industry performance benchmark, was peer-reviewed, [] was presented at a prestigious computer science conference," and Wolfson analyzed the benchmark independently. L&W Mot. at 8-9; L&W Opp. at 5-6; *see* Wolfson Rep. ¶ 121. These arguments go to the weight and not the admissibility of Wolfson's opinions.

Wolfson's apportionment analysis was based on reliable principles and guided by Federal Circuit case law. Leonard's Profit Apportionment Approach for the '421 and '179 Patents should not be excluded either.

CONCLUSION

For the reasons above, SAP's motion for summary judgment on Teradata's trade secret claims is GRANTED. Its motion related to Teradata's business trade secret claims under the DTSA is DENIED as moot. Its motion related to Teradata's tying claim is GRANTED. Teradata's motion for summary judgment on the invalidity of the '321 Patent is GRANTED. Its motion for partial summary judgment against an award of damages for infringement of the '179 and '421 Patents before May 21, 2019, is GRANTED. Its motion to exclude portions **[**129]** of Kraska's expert report is DENIED as moot. Its motion to exclude portions of Horn's report is GRANTED in part and DENIED in part. Its motion to exclude portions of the Leonard and Wolfson reports is DENIED in part as moot **[*866]** and DENIED in part on the merits. Its motion to exclude portions of Mehrotra's report is DENIED. SAP's motion to exclude portions of Asker's report is GRANTED in part and DENIED in part.

IT IS SO ORDERED.

/s/ William H. Orrick

William H. Orrick

United States District Judge

Dated: November 8, 2021

End of Document

In re Tank Antitrust Litigation

United States District Court for the Western District of Missouri, Western Division

November 9, 2021, Decided; November 9, 2021, Filed

MDL NO. 2567; Master Case No. 14-02567-MD-W-GAF

Reporter

2021 U.S. Dist. LEXIS 232424 *; 2021 WL 5632089

IN RE: PRE-FILLED PROPANE TANK ANTITRUST LITIGATION; INDIRECT PURCHASER ACTIONS

Prior History: *In re Pre-Filled Propane Tank Mktg. & Sales Practices Litig., 655 F. Supp. 2d 1354, 2009 U.S. Dist. LEXIS 94266 (J.P.M.L., Oct. 6, 2009)*

Core Terms

overcharge, retailers, tanks, regression, pricing, propane, Plaintiffs', customers, pass-through, predominance, class-wide, purchaser, class period, individualized, class certification, estimate, indirect, reduction, averages, studies, spare, fill, retail customer, variables, wholesale price, aggregated, negotiated, masking, class member, reliable

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Judges: GARY A. FENNER, UNITED STATES DISTRICT JUDGE.

Opinion by: GARY A. FENNER

Opinion

ORDER

Now before the Court is the Indirect Purchaser Plaintiffs' (hereinafter, "Plaintiffs") Motion for Class Certification (Doc. # 476). Defendant Ferrellgas L.P. ("Ferrellgas") opposes. (Doc. # 494). On September 23, 2021, the parties appeared before the Court for a hearing on Plaintiffs' Motion. (Doc. # 602). For the reasons set forth below, and upon consideration of the pleadings, evidence, and arguments presented, Plaintiffs' Motion for Class Certification is DENIED.

DISCUSSION [*7]

I. BACKGROUND

The Court has previously discussed the extensive factual and procedural background of this case. (*See* Master Case, Doc. ## 333, 355).[1] The Court thereby provides only the background relevant to Plaintiffs' instant motion for class certification.

This case involves portable propane exchange tanks and two of the nation's leading suppliers of them—Ferrellgas and AmeriGas. Portable propane exchange tanks are used in barbeques, patio heaters, generators, and other outdoor equipment. Unlike portable propane tanks that need to be refilled, propane exchange tanks offer customers the convenience of exchanging an empty propane tank for a new, filled tank at retail outlets such as big box stores, grocery chains, hardware stores, gas stations, and convenience stores. Two types of propane exchange tanks are available for purchase: (i) spare tanks, which are those where a customer purchases the cylinder itself and the propane in it; and (ii) exchange tanks, where a customer returns an empty cylinder and purchases a filled tank in exchange.

Plaintiffs seek to represent a putative class of customers who purchased AmeriGas and Blue Rhino branded portable propane exchange tanks from various **[*8]** retailers in 13 states.[2] In relation to Defendants AmeriGas and Ferrellgas (which sells tanks under the Blue Rhino brand), Plaintiffs are indirect purchasers of spare and exchange tanks. Retailers purchase spare and exchange tanks directly from AmeriGas and Ferrellgas at wholesale prices; those retailers then resell those tanks to the customers that comprise the putative class here.

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[1] Master Case refers to No. 4:14-md-02567-GAF (W.D. Mo.). All docket citations will be to the Master Case unless otherwise noted.

[2] Plaintiffs originally asserted a federal injunctive relief claim and state law claims from 24 different states. The Court dismissed Plaintiffs' federal injunctive relief claim, and that dismissal was affirmed on appeal by the Eighth Circuit. (Doc. # 283). Subsequently, Defendants moved for judgment on the pleadings on Plaintiffs' remaining state law claims and the Court granted the motion in part as to 11 of Plaintiffs' 24 state law claims. (Doc. # 355). Accordingly, Plaintiffs moved for class certification on their remaining 13 state law claims.

Plaintiffs allege that AmeriGas and Ferrellgas engaged in an ongoing conspiracy to fix the fill levels of their propane exchange tanks. (Doc. # 198 ("Complaint" ¶ 1)). They claim that in 2008, in response to a spike in the price of propane, AmeriGas and Ferrellgas agreed with each other to reduce the fill level of their propane exchange tanks from 17 to 15 pounds without a corresponding reduction in wholesale price. (*Id.* at ¶¶ 50-92). The alleged purpose and effect of this agreement was to raise the wholesale price at which AmeriGas and Ferrellgas sold their propane exchange tanks. (*Id.* at ¶ 93).

A prior action was brought in 2009 by a putative class of indirect purchasers against AmeriGas and Ferrellgas based upon the same alleged 2008 fill-reduction conspiracy. *See In re: Pre-Filled Propane Tank Marketing* ***[*9]*** *& Sales Practices Litig.*, No. 4:09-md-2086-GAF (W.D. Mo.) ("*Propane I*"). AmeriGas settled that lawsuit on December 1, 2009, and Ferrellgas settled on October 14, 2011. (*See Propane I*, Doc. ## 38-3, 250-1, 289).

The current action was filed on May 30, 2014. Plaintiffs allege that despite the prior class-wide settlements with indirect purchaser plaintiffs in the *Propane I* actions, the conspiracy persisted. (*See* Master Case, Complaint, ¶¶ 96, 100). Following years of motion practice and an appeal to the Eighth Circuit, what remains are state law claims brought on behalf of a putative class of indirect purchasers from 13 states. Prior to the commencement of class certification briefing, on September 18, 2020, AmeriGas settled with Plaintiffs, leaving Ferrellgas as the only remaining defendant. (Doc. ## 471, 541).

Plaintiffs moved to certify a multi-state damages class under *Federal Rule of Civil Procedure 23(b)(3)* consisting of all persons in Arizona, Nevada, North Carolina, New Mexico, Maine, Minnesota, Michigan, South Dakota, Utah, California, Iowa, North Dakota, and West Virginia who purchased (i) AmeriGas spare or exchange tanks between December 1, 2009 and the date judgment is entered in this action or (ii) Blue Rhino spare **[*10]** or exchange tanks between October 14, 2011 and the date judgment is entered in this action.[3] (Doc. # 476 at p. 5). In support of their motion, and as their proposed common proof of class-wide injury and damages, Plaintiffs offered economic analyses and opinions by Professor Daniel A. Ackerberg, a professor of economics at the University of Texas. (Doc. # 476-1).

Professor Ackerberg put forth an analysis purporting to show that common evidence and methods demonstrate that the 2008 fill reduction by Ferrellgas and AmeriGas caused all of the indirect purchaser class members to uniformly pay supracompetitive per-gallon prices for AmeriGas and Ferrellgas propane exchange tanks throughout the alleged class period. (*See generally id.*).[4] Professor Ackerberg offered regression analyses to determine a set of common, average overcharges that he claims represent the average inflated prices per gallon of propane paid by AmeriGas's and Ferrellgas's direct retailer customers for both spares and exchange tanks due to the 2008 fill reduction. (*Id.*). Instead of calculating overcharges allegedly incurred by each of Ferrellgas's and AmeriGas's individual retailers (or even certain of their largest **[*11]** ones), Professor Ackerberg's method averaged all of the wholesale prices for AmeriGas and Blue Rhino tanks to calculate an average price per gallon, from which he then calculated an average per-gallon overcharge for AmeriGas and Blue Rhino spare and exchange tanks. (*Id.*).

Professor Ackerberg also conducted pass-through studies for three retailers, and used those studies as the basis to opine that all of AmeriGas's and Ferrellgas's thousands of retailer customers passed on overcharges at a "conservative" rate of 100% to their customers (and the putative class members) who purchased AmeriGas and Blue Rhino propane tanks during the class period. Based on these analyses, Professor Ackerberg initially estimated

[3] Plaintiffs also sought conditionally to certify a multi-state class of supposed end customers who "directly" purchased AmeriGas and Blue Rhino spare and exchange tanks during the same alleged class period. (*See* Doc. # 476 at p. 5). At the time Plaintiffs moved for class certification, their motion for leave to amend their complaint to add "direct purchaser" claims based on customer purchases of tanks from AmeriGas and Blue Rhino vending machines was then pending. (Doc. ## 426, 427). The Court subsequently denied Plaintiffs' motion for leave to amend, thereby mooting their alternative request to certify a "direct purchaser" class. (*See* Doc. # 491).

[4] By way of introduction, the Court generally cites to the expert reports. However, specific cites to expert opinions referenced are provided in the "Analysis" section of this Order.

$117 million as a reasonable measure of classwide damages (before trebling) to the putative indirect purchaser class. (*Id.*).

Ferrellgas opposed certification, primarily on the ground that Plaintiffs failed to satisfy their burden of establishing predominance under *Rule 23(b)(3)*. (Doc. # 494). In support, Ferrellgas submitted an expert declaration by Professor Kevin Murphy, a Professor of Economics at the University of Chicago. (Doc. # 494-1). Professor Murphy conducted an independent analysis of **[*12]** the market, including Defendants' pricing to their various customers throughout the proposed class period, and then provided a number of critiques and conducted economic analyses to test the reliability of the common proof of a class-wide overcharge to the putative class advanced by Professor Ackerberg. (*See generally id.*). Among other things, Professor Murphy conducted various pricing analyses, all of which indicated how the wholesale prices-per gallon of AmeriGas's and Ferrellgas's spares and exchange tanks varied widely amongst retailers throughout the class period and changed constantly due to individualized pricing negotiations. (*Id.*). Professor Murphy also ran Professor Ackerberg's own overcharge regressions with individualized retailer data, rather than average wholesale prices, to opine that Professor Ackerberg's use of a single average overcharge estimate wrongly attributed an overcharge to significant percentages of sales of AmeriGas's and Ferrellgas's propane tanks during the class period—sales for which there was in fact insufficient evidence of any overcharges. (*Id.*).

Professor Murphy further opined on various design flaws within Professor Ackerberg's average overcharge **[*13]** regressions, all of which Professor Murphy claims undermine the reliability of whether Professor Ackerberg's regressions are capable of determining and isolating the impact of an anticompetitive overcharge due to the alleged conspiracy, as opposed to myriad other non-collusive factors that could have affected the wholesale per-gallon prices of AmeriGas's and Ferrellgas's spare and exchange tanks. (*Id.*). As for Professor Ackerberg's pass-through studies, Professor Murphy opined that they are unreliable because they do not actually measure a pass-through rate or isolate whether (and the extent to which) a cost *change* at the wholesale level causes a *change* in the retail price to consumers. (*Id.*). Further, Professor Murphy opined that Professor Ackerberg's pass-through studies, based on data from just three retailers, is not representative and cannot be used to infer a common pass-through rate for thousands of retail customers. (*Id.*).

On reply, Plaintiffs offered a supplemental analysis by Professor Ackerberg. (*See* Doc. # 540-1). Professor Ackerberg purported to address the various critiques advanced by Professor Murphy, and offered new overcharge regressions that continued to estimate **[*14]** an average overcharge paid by Ferrellgas's and AmeriGas's retailer customers through January 31, 2015. (*Id.* pp. 9-10 ¶ 36). This revised overcharge regression corresponded with revisions made by Plaintiffs to their proposed class period, which they limited on reply to the end of January 31, 2015. (Doc. # 540, p. 10 n.19). Plaintiffs made these adjustments to reflect the Court's January 21, 2020, Order denying Plaintiff's motion to compel documents and data post January 2015.[5] Beyond the revised regression analysis, Professor Ackerberg's reply declaration included new opinions and evidence. (*See generally* Doc. # 540-1). Plaintiffs also submitted 37 additional exhibits. (*Id.*). Because of the altered class period, Professor Ackerberg also adjusted his estimated class-wide damages number from $117 million to $54 million (before trebling). (*Id.* at p. 63).

Ferrellgas moved for and the Court granted it leave to file a sur-reply and a corresponding declaration by Professor Murphy to address the new and additional analyses and evidence set forth by Plaintiffs and Professor Ackerberg on reply. (Doc. # 587).

With Plaintiffs' adjustments on reply limiting their class period through the end of **[*15]** January 2015, the operative proposed class that Plaintiffs now seek to certify consists of the following:

> All persons who, in Arizona, Nevada, North Carolina, New Mexico, Maine, Minnesota, Michigan, South Dakota, Utah, California, Iowa, North Dakota, and West Virginia, purchased a filled propane exchange tank or paid to

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[5] After moving for class certification, Plaintiffs requested additional discovery from Ferrellgas relating solely to post-2015 damages. The Court concluded that Plaintiffs' belated discovery request was foreclosed by the Eighth Circuit's prior decision in *In re Pre-Filled Propane Tank Antitrust Litigation, 893 F.3d 1047 (8th Cir. 2018)*. (*See* Doc. # 547, pp. 11-12).

exchange their already-purchased propane exchange tank, and whose tank was provided by AmeriGas between December 1, 2009, and January 31, 2015, or by Blue Rhino between October 14, 2011, and January 31, 2015.

(Doc. # 476 at p. 5, Doc. # 540, p.10 n.19; Doc. # 540-1 p. 9 ¶ 36 & n.10).

On September 23, 2021, the Court held a lengthy hearing on Plaintiffs' motion for class certification. (Doc. # 602). Both Plaintiffs' expert, Professor Ackerberg, and Ferrellgas's expert, Professor Murphy, were present at the hearing.

II. LEGAL STANDARD

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of individual named parties only." *Comcast Corp. v. Behrend, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)* (citations and quotation marks omitted). "*Rule 23* does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*. "No class action may be certified unless the party seeking certification 'affirmatively demonstrate[s] his compliance with **[*16]** *Rule 23*.'" *In re State Farm Fire & Cas. Company, 872 F.3d 567, 572 (8th Cir. 2017)* (quoting *Comcast, 569 U.S. at 33*). "*Rule [23]* imposes stringent requirements for certification that in practice exclude most claims." *Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 234, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013)*.

"To be certified as a class, plaintiffs must meet all of the requirements of *Rule 23(a)* and must satisfy one of the three subsections of *Rule 23(b)*." *Postawko v. Mo. Dep't of Corr., 910 F.3d 1030, 1036 (8th Cir. 2010)* (citations and internal quotation marks omitted). "Under *Rule 23(a)*, a district court may certify a class only if it is satisfied, after a rigorous analysis, that the four threshold requirements are met: numerosity of plaintiffs, commonality of legal or factual questions, typicality of the named plaintiff's claims or defenses, and adequacy of representation by class counsel." *Ebert v. Gen. Mills, Inc., 823 F.3d 472, 477 (8th Cir. 2016)* (citations and internal quotation marks omitted).

Plaintiffs here seek to certify a *Rule 23(b)(3)* class. "For certification under *Rule 23(b)(3)*, the party must show that 'questions of law or fact common to class members predominate over any questions affecting only individual members.'" *Hudock v. LG Electronics U.S.A., Inc., 12 F.4th 773, 2021 WL 4029769, at *1 (8th Cir. 2021)* (quoting *Comcast, 569 U.S. at 34*). "An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016)*. "What matters **[*17]** to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart, 564 U.S. at 350* (quotation marks omitted). Predominance is lacking in circumstances where a plaintiff's common proof of impact fails to show that all or nearly all class members were in fact injured. *See In re Asacol Antitrust Litig., 907 F.3d 42, 53 (1st Cir. 2018)* (if there are class members who "in fact suffered no injury," the "need to identify those individuals will predominate"); *In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252, 406 U.S. App. D.C. 371 (D.C. Cir. 2013)* (similar).

In an antitrust case such as this one, the issue of antitrust "impact often is critically important for the purposes of evaluating *Rule 23(b)(3)*'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof." *In re Modafil Antitrust Litig., 837 F.3d 238, 262 (3d Cir. 2016)*; *see also In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 204, 211 (3d Cir. 2008)* (same). "A plaintiff seeking treble damages under ... *§ 4* of the Clayton Act must establish an antitrust violation (here, the alleged conspiracy to fix prices) and the fact of damage or injury, i.e., impact." *Blades v. Monsanto Co., 400 F.3d 562, 569 (8th Cir. 2005)*. "[P]roof of conspiracy is not proof of common injury." *Id. at 569*. Plaintiffs must do more than present "common evidence that defendants colluded to raise [prices]"; they "must also show that they can prove, through **[*18]** common evidence, that all class members were in fact injured by the alleged conspiracy. Otherwise, individual trials are necessary to establish whether a particular [plaintiff] suffered harm from the [conspiracy]." *In re Rail Freight Fuel Surcharge*

Antitrust Litig., 725 F.3d 244, 252, 406 U.S. App. D.C. 371 (D.C. Cir. 2013) (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623-24, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)); *see also* Sykes v. Mel S. Harris & Assocs. LLC, 780 F.3d 70, 82 (2d Cir. 2015) (same); In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 20 (1st Cir. 2008) ("In antitrust class actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be established through common proof.").

With respect to whether Plaintiffs have satisfied their burdens under Rule 23(a) and (b)(3), the law is now clear that district courts must rigorously scrutinize the evidence and proof offered by Plaintiffs in support of class certification, and must find, by a preponderance of the evidence, that Rule 23's requirements are met. *See* Cope v. Let's Eat Out, Inc., 319 F.R.D. 544, 551 (W.D. Mo. 2017) ("The preponderance of the evidence standard applies to evidence proffered to establish the requirements of Rule 23."); *see also* Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 191 (3d Cir. 2020); In re Nexium Antitrust Litig., 777 F.3d 9, 27 (1st Cir. 2015); Messner v. Northshore Univ. Healthsystem, 669 F.3d 802, 811 (7th Cir. 2012). Following the Supreme Court's decisions in Wal-Mart and Comcast, "[i]t is now indisputably the role of the district court to scrutinize the evidence before granting certification, even when doing so 'requires inquiry into the merits of the claim." Rail Freight, 725 F.3d at 253 (D.C. Cir. 2013) (quoting Comcast, 569 U.S. at 28); *see also* Wal-Mart, 564 U.S. at 351-52.

As for the kind of economic evidence offered by Plaintiffs, the Court must scrutinize **[*19]** it rigorously to ensure that it is capable of demonstrating impact on a class-wide basis: "[i]t is now clear ... that Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it." Rail Freight, 725 F.3d at 255; *see also* Lamictal, 957 F.3d at 193 (holding that a district court abused its discretion in refusing to "address [plaintiff's] multi-leveled microeconomic analysis" in determining whether predominance under Rule 23(b)(3) was satisfied). Practically, this standard "requires district courts to closely scrutinize factual evidence and expert reports that demonstrate that impact can be proven on a classwide basis"; the Court "must determine not only the admissibility of expert evidence that forms the basis of the methodology that demonstrates [predominance]," but also "whether that expert evidence is persuasive, which may require the Court to resolve methodological disputes." In re High-Tech Employee Antitrust Litig., 985 F. Supp. 2d 1167, 1186-87 (N.D. Cal. 2013); *see also* In re Mushroom Direct Purchaser Antitrust Litig., 319 F.R.D. 158, 201 (E.D. Pa. 2016) ("[The Court is] required to weigh [the plaintiff's expert's] analysis ... and determine whether it supports a finding that plaintiffs' theory of impact is susceptible to common proof a trial through available evidence common to the class."); In re Photochromic Lens Antitrust Litig., No. 8:10-CV-00984-T-27EA, 2014 U.S. Dist. LEXIS 46107, 2014 WL 1338605, at *25 (M.D. Fla. Apr. 3, 2014) (rejecting plaintiffs' contention that a magistrate judge **[*20]** applied "an unnecessarily strict standard by critiquing [their expert's] choices in structuring [his] methodology [for demonstrating common impact] and regressions" as "inconsistent with recent class certification jurisprudence").

The Supreme Court has also made clear that whether representative evidence offered by a plaintiff can be used to "establish classwide liability will depend on the purpose for which the sample is being introduced and the underlying cause of action." Tyson, 577 U.S. at 460. Because class certification requires that "each member [of the proposed class] have standing and show injury in fact," Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 778 (8th Cir. 2013), representative or aggregate evidence fails Rule 23 if it masks individualized issues or predicts injury where none otherwise exists. *See* In re Processed Egg Prod. Antitrust Litig., 312 F.R.D. 124, 159 (E.D. Pa. 2015) ("The case law understandably allows for averages and aggregations, but only if the court is convinced that the averages and aggregations are not masking individualized issues that are likely to predominate."); Rail Freight, 725 F.3d at 252 ("[A] methodology [that] detects injury where none could exist ... shred[s] the plaintiffs' case for certification.").

And, because the Rules Enabling Act precludes Rule 23 from being applied to "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b), the Supreme Court has rejected a **[*21]** "Trial by Formula" approach to certification, explaining that "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defense to individual claims." Wal-Mart, 564 U.S. at 367. Accordingly, the Supreme Court has made clear representative evidence or a "sample relied upon [by Plaintiffs] is a permissible method of proving classwide liability" only if "each class member could have relied upon that sample to *establish liability* if he or she had brought an individual action." Tyson, 577 U.S. at 455 (emphasis added); *see* id. at 458 (explaining that the "underlying question" in determining the permissibility of representative evidence is "whether the sample at issue could have been used to establish liability in an individual action," and that the sample in Wal-Mart failed because it could not meet this test). It is not enough, therefore, for the representative evidence to simply be *admissible* in the individual proceeding. Rather, such evidence must on its own be "sufficient to sustain a jury finding ... if it were introduced in each [] individual action." Id. at 459; Tyson, 577 U.S. at 456-57 (noting that reliance on representative evidence "did not deprive petitioner of its ability to litigate individual defenses" only because "there **[*22]** were no alternative means for the employees to establish their hours worked," and thus liability).

III. ANALYSIS

Plaintiffs have taken on the burden of trying to demonstrate, through common proof, that an alleged conspiracy between Defendants to reduce the fill levels of their propane exchange tanks in 2008 resulted in (i) an overcharge (an unlawfully inflated price per gallon) paid by all or nearly all of Defendants' thousands of retail customers that (ii) was subsequently passed on to all or nearly all of the end consumers who purchased propane exchange tanks from those retail customers in the 13 remaining class states. Plaintiffs claim that the putative class suffered common impact and damages in the form of inflated prices on AmeriGas and Blue Rhino branded propane exchange tanks stemming from the 2008 fill reduction on purchases throughout a class period that ends in January, 2015. Ferrellgas's challenge to Plaintiffs' motion for class certification is one directed at their ability to satisfy the predominance requirement under Rule 23(b)(3), the failure of which alone suffices to defeat class certification. The Court's analysis therefore focuses on whether Plaintiffs' have met their burden of **[*23]** establishing predominance.

As a putative class of indirect purchasers, Plaintiffs have a two-part burden in establishing predominance. They must first demonstrate a common impact—in the form of an overcharge—incurred by all or nearly all retailers who directly purchased AmeriGas and Blue Rhino propane exchange tanks throughout the class period. Plaintiffs must then demonstrate that this impact—those overcharges—were passed on by the retailers to all or nearly all of the end customers who purchased AmeriGas and Blue Rhino propane exchange tanks. *See* In re Fla. Cement & Concrete Antitrust Litig., 278 F.R.D. 674, 682 (S.D. Fla. 2012) (IPPs "have a double burden ... [of] first prov[ing] common impact on direct purchasers who bought ... from the Defendants, and then show[ing[that impact was passed through to the indirect purchaser class."); Somers v. Apple Inc., 258 F.R.D. 354, 358 (N.D. Cal. 2009) ("Recovery in an indirect purchaser case under state law requires a demonstration that a defendant 'overcharged [its] direct purchasers for [the product at issue] and that those direct purchasers passed on the overcharge to [the] plaintiffs." (quoting In re Graphics Proceeding Units Antitrust Litig., 253 F.R.D. 478, 499 (N.D. Cal. 2008)); In re Optical Disk Drive Antitrust Litig., No. 3:10-md-2143, 2016 U.S. Dist. LEXIS 15899, 2016 WL 467444, at *7 (N.D. Cal. Feb. 8, 2016) (same). The failure to satisfy either element fails the predominance requirement.

As the Court explains below, Plaintiffs and their expert have failed to carry their burden of demonstrating **[*24]** that class-wide impact and damages can be established with common proof, as is required under Rule 23(b)(3). The Court's analysis proceeds in three parts. First, the Court summarizes the relevant evidence bearing on the class certification issues. Second, the Court analyzes Plaintiffs' proffered common proof with respect to overcharge to retailers. Third, the Court analyzes Plaintiffs' proffered common proof that overcharges were passed through by retailers to plaintiffs resulting in class-wide overcharges.

A. Overview of the Evidence

1. Defendants Sell to Thousands of Diverse Retail Customers

Throughout the class period, AmeriGas and Ferrellgas sold exchange and spare tanks to thousands of individual retail customers for resale to end customers. For example, in 2008, Ferrellgas sold tanks to over 45,000 retail locations in the U.S., with over 12,000 of them located in the 13 remaining class states. (*See* Doc. # 494-46, p. 5 ¶ 15). Over time, the number of retailers increased; in 2017, Ferrellgas sold propane tanks to over 50,000 different retail locations with over 13,000 of them in the 13 class states. (*Id.*).

Defendants' retail customers also varied substantially in type, size, location and volumes **[*25]** of tanks purchased. For instance, Ferrellgas's retail customers include national big-box stores (e.g., Walmart, Sears), home centers (e.g., Lowe's), grocery stores (e.g., Delhaize, Safeway), drug stores (e.g., Walgreens), fuel centers (e.g., Valero), convenience stores (e.g., 7-Eleven), national and local hardware stores (e.g., Ace Hardware and thousands of local stores), and small mom-and-pop shops. (*Id.* at pp. 4-5 ¶ 13).

B. Overcharge

The first step of Plaintiffs' burden to establish predominance is showing, through common proof, that all or nearly all of the thousands of AmeriGas and Ferrellgas direct retailer customers suffered impact—via unlawful overcharges—on the propane tanks that those retailers purchased from AmeriGas and Ferrellgas for resale to the proposed class members. Aside from disputed allegations regarding a one-time fill-level reduction in 2008, Plaintiffs do not proffer any evidence or mechanism for how pricing throughout the entire class period was subject to ongoing collusion. As their expert, Professor Ackerberg, admitted, he has not seen evidence of pricing coordination throughout the class period. (Doc. # 494-3, 44:10-15). Plaintiffs' theory, therefore, is that **[*26]** an inflated price effect on AmeriGas and Blue Rhino propane exchange and spare tanks continued unimpeded and market-wide since the 2008 fill-level change despite: (i) divergent and individually negotiated prices for exchange and spare tanks paid by AmeriGas's and Ferrellgas's retail customers throughout the class period, (ii) the absence of any evidence of communications with respect to pricing between Defendants during the class period, and (iii) the fact that the proposed class periods extend years after the 2008 fill-level adjustment, throughout which time Defendants have been continuously subject to a government investigation and class action lawsuits.

As noted above, Plaintiffs rely on the economic evidence offered by Professor Ackerberg to establish a classwide overcharge. Professor Ackerberg cites to market characteristics, including that propane is a commodity product and that AmeriGas and Ferrellgas are two large suppliers with substantial market share, and opines that common evidence of classwide injury is shown through his overcharge regression, which demonstrates that all or nearly all of AmeriGas's and Ferrellgas's retailer customers incurred a positive and statistically **[*27]** significant overcharge. (*See e.g.* Doc. # 476-1, p. 17 ¶ 43, p. 23 ¶ 63). Professor Ackerberg's regression model combined the revenues and gallons of all retailers in a given month to compute a singular weighted "average" measure of revenues per gallon. (*Id.* at p. 19 ¶¶ 49-50, p. 21 ¶ 57, p. 26 ¶ 64, p. 56; Doc. # 540-1, p. 63). Professor Ackerberg then purported to control for all factors that impact pricing—utilizing just three types of control variables (contemporary costs, seasonality differences, and two catch-all time trend variables for any unobserved factors that impact price over time)—and measured an average impact of the fill-level reduction across Defendants' sales transactions. (Doc. # 476-1, pp. 26-27 ¶¶ 73-80). The result of Professor Ackerberg's regression model consists of four average overcharge estimates—one each for AmeriGas and Ferrellgas's spares and exchange tanks. (Doc. # 540-1, pp. 48, 63). Professor Ackerberg and Plaintiffs contend that, while these average overcharge amounts measured by his regression are not reflective of actual overcharge amounts incurred by any one retailer, they are adequate common proof that all retailers in fact paid a supracompetitive **[*28]** overcharge during the class period. (Doc. # 540, pp. 5-8).

In response, Ferrellgas claims that Professor Ackerberg's regression model is flawed by design and cannot show classwide impact. (*See generally* Docs. ## 494, 589). Ferrellgas argues that, even accepting Professor Ackerberg's regression model, which pools all data across all customers to estimate an "average" overcharge, the model masks the pricing variation that exists in the market and therefore is a methodology that is designed to assume, rather than to assess, the "common impact" that Plaintiffs have the burden of showing at class certification. (Doc. # 494, pp. 14-19; Doc. # 589, pp. 6, 8-10). Professor Murphy ran a series of sub-regressions that disaggregate Professor Ackerberg's model to test for the existence of any measured overcharge for individual retailers by applying Professor Ackerberg's model separately for AmeriGas's and Ferrellgas's ten largest retailers. (Doc. # 494-1, pp. 65-66 ¶¶ 127-130; Doc. # 589-1, pp. 4-6 ¶¶ 8-11). Such disaggregation is a common economic method for testing whether an aggregated overcharge model like that offered by Professor Ackerberg is in fact capable of demonstrating that all retailers **[*29]** were impacted. (*See* Doc. # 494-1, pp. 65-66 ¶¶ 127-130). The results of Murphy's disaggregation demonstrate that significant proportions (over 30%) of the at-issue class sales did not exhibit an overcharge, even though Professor Ackerberg's application of that same model on "aggregated" data otherwise indicates that all of those sales were subject to an overcharge. (Doc. # 589-1, pp. 4-6 ¶¶ 8-11).

Ferrellgas argues that Professor Ackerberg's regression exhibited another fundamental problem: it relies on two sets of variables that measure the passage of time, but Professor Ackerberg arbitrarily interprets one set as measuring the effect of the alleged conspiracy and the other as capturing the effect of all other "unobserved demand or cost shifters" that impact pricing. (Doc. # 589, pp. 12-13) (citing Doc. # 494-1, pp. 73-74 ¶¶ 157-159). Ferrellgas contends that the unreliability of Professor Ackerberg's regression is confirmed by the fact that his predicted overcharges only (and illogically) *increase* after Professor Ackerberg purportedly addressed the analytical and design flaws that Professor Murphy identified. (Doc. # 589, pp. 12-13).

Plaintiffs insist that the Court need not weigh **[*30]** Professor Ackerberg's economic evidence. (Doc. # 476, p. 17). That is incorrect. The law requires the Court to rigorously scrutinize Plaintiffs' proffered evidence in support of class certification, and to resolve contested issues and economic evidence to make findings as to whether Plaintiffs have met their burden of demonstrating *Rule 23*'s requirements by a preponderance of the evidence. *See, e.g., Cope, 319 F.R.D. at 551*; *Lamictal, 957 F.3d at 191*. Accordingly, the Court engages in a rigorous analysis of Plaintiffs' proffered common proof and Ferrellgas's expert evidence. The Court finds that Plaintiffs have not satisfied their burden of establishing a common overcharge.

1. Professor Ackerberg's Use of Averaging and Aggregated Data Masks Variation and Skews the Evidentiary Record

By pooling the revenues and gallons of all retailers in a given month and estimating an "average" overcharge, Professor Ackerberg's overcharge regression masks unequivocal record evidence and data that wholesale prices were regularly negotiated, individually set, and highly dispersed among AmeriGas' and Ferrellgas's individual retail customers. Professor Ackerberg admits that his aggregated regression model cannot account for retailer differences that impact **[*31]** pricing, such as size, type, purchase volume, negotiating leverage, proximity to distribution centers, localized competition, or any other difference among retailers. (*See* Doc. # 494-3, 72:10-76:20). These limitations are problematic because they reflect that Professor Ackerberg's average overcharge models are concealing record evidence of individualized issues.

An example of this involves one of Defendants' major retail customers—Walmart. The record indicates that shortly after the fill level change in 2008, Walmart sought to obtain—and received—pricing concessions from AmeriGas and Ferrellgas beginning in 2009. (Doc. # 494-1, p. 93 ¶ 207; Doc. # 494-28 (Ferrellgas offering to reduce pricing on exchange and spare tanks); Doc. # 494-29, 98:23-99:12). The Walmart buyer responsible for negotiating and purchasing propane exchange tanks testified those reductions constituted the cost concession Walmart wanted at that time. (*See* Doc. # 494-29, 98:23-99:12). Later in 2009, Walmart again negotiated with its suppliers for further cost reductions, which led Ferrellgas to offer another price reduction in January 2010. (*See* Doc. # 494-30). By pooling Defendants' pricing and sales to Walmart with **[*32]** that of all other retail customers, Professor Ackerberg's overcharge regressions mask this evidence of Walmart's individual negotiating leverage and the resulting individualized prices paid by Walmart.

Individualized evidence bearing on whether retail customers in fact paid an overcharge is not limited to just large buyers. There is also evidence in the record that Ferrellgas made cost concessions in May 2009 to hundreds of its independent retailers in California (one of the 13 class states), because Ferrellgas wanted to "stop the rising number of losses we have experienced in California" given "a very competitive environment" and other suppliers' efforts to "steal" Blue Rhino customers. (*See* Doc. # 494-27). Once again, Professor Ackerberg admits that his regression is "not able to isolate regional competition" impacts on pricing. (*See* Doc. # 494-3, 245:11-12). By using averages and estimating an average overcharge for all of Defendant's retail customers, Professor Ackerberg's regression masks such individualized evidence.

Overcharge models that rely on averaging of this sort can be problematic because, by design, they conceal variation in pricing and other individualized issues that **[*33]** may predominate. *See* ABA Section of ***Antitrust Law***, Econometrics: Legal, Practical, & Technical Issues § 13.B.1.c.2 (2d ed. 2014) ("[A]verages may hide substantial differences among customers or products, which may be critical for determining whether there is individual impact."). That is demonstrated here by comparing the results of Professor Ackerberg's average overcharge regression with the actual, individualized evidence in the record. Courts accordingly have held that markets characterized by individualized pricing negotiations are generally incompatible with common proof of impact. In *Blades v. Monsanto, 400 F.3d 562, 572 (8th Cir. 2005)*, the Eighth Circuit held that the plaintiffs' use of average seed prices to demonstrate class-wide impact in the form of supracompetitive seed prices due to a genetically modified seed price-fixing conspiracy failed to satisfy predominance. Because the "market for seeds [was] highly individualized," and the prices for genetically modified seeds "varied widely," the use of an average inflated price was not adequate common evidence "to show inflation through the whole range of [seed] list prices." *Id. at 572, 575*. Similarly, in *In re Lamictal Direct Purchaser Antitrust Litigation, 957 F.3d 184 (3d Cir. 2020)*, the plaintiffs' reliance on average prices could not show class-wide impact in the **[*34]** form of inflated prices for the drug lamotrigine. Given that the lamotrigine "market [was] characterized by individual negotiations and a discounted-brand competition strategy," the Third Circuit vacated the district court's decision to certify the class and remanded the case for a more rigorous analysis of whether the use of averages was masking otherwise individualized injury. *See id. at 188, 192-94*. "Numerous [other] courts have rejected the use of average price differentials to show evidence of antitrust impact that is common to the class." *In re Pharmacy Benefit Mgrs. Antitrust Litig., No. CV 03-4730, 2017 U.S. Dist. LEXIS 6987, 2017 WL 275398, at *21 (E.D. Pa. Jan. 18, 2017)* (collecting cases).

Here, Professor Ackerberg's aggregated overcharge regression suffers from a similar problem: it does not employ common or class-wide evidence capable of demonstrating that any given retailer was overcharged. Nor does it account for the undisputed and highly individualized issues with respect to retailer pricing. Instead, the regression model, designed to arrive at a single "average" overcharge that Plaintiffs contend shows class-wide injury, conceals the significant and undisputed variation in pricing that exists among Defendant's retail customers. That is not a way to solve for individualized issues that predominate with respect to an overcharge. **[*35]** Rather, it is merely a proposal to disregard them, akin to the impermissible methodologies that various courts have rejected as insufficient to carry Plaintiffs' burden under *Rule 23(b)(3)*.

2. Professor Ackerberg's Use of Averaging and Aggregated Data Covers Up the Existence of Numerous Uninjured Class Members

Professor Ackerberg contends that the actual, individually negotiated wholesale prices charged to Walmart—data that is available in the case and part of the record—are less reliable for measuring an overcharge to Walmart compared to pooling and averaging the wholesale prices paid by *all* of Ferrellgas' or AmeriGas's retailer customers, as he does with his average overcharge regression. (Doc. # 540-1, p. 20 ¶ 79). On its face, this argument does not make sense. Given the undisputed evidence of dispersed and varied pricing in this industry, it is questionable that Professor Ackerberg did not study whether his regression model would predict an overcharge for even the largest individual retailers whose purchases comprise significant portions of the class.

Furthermore, Professor Ackerberg's contention regarding statistical noise can be tested, yet it is something he did not do. Professor Murphy, however, **[*36]** tested whether applying Professor Ackerberg's own regressions to disaggregated data for the top ten retailers would introduce statistical noise, and confirmed that it did not. (Doc. # 563-2 pp. 9-10 ¶ 18). Such testing is a common economic technique. (*See id.* ¶¶ 18-19 & n.21). Professor Ackerberg's unsupported suggestion that pricing at non-Walmart stores offers a better estimate of what Walmart was overcharged compared to what is reflected in Walmart's own data is illogical.

Plaintiffs seek to undermine the disaggregated results of Professor Ackerberg's own regression by downplaying the importance of *p*-values, which they claim are "arbitrary." (Doc. # 540, p. 8). *P*-values are an important statistic for understanding whether the results of a regression are reliable evidence of impact. (Doc. # 563-2, pp. 13-14 ¶ 27 & n. 28, 33). They essentially estimate the risk of false positives. (*Id.*). The point estimate for Home Depot's purchases of AmeriGas exchange tanks (which account for approximately 17.4% of all class sales) is illustrative. That point estimate shows a slightly positive overcharge (of $0.02, much lower than the estimate of $0.31 produced by Professor Ackerberg's aggregation **[*37]** of the data) and the associated *p*-value is 0.82, meaning that there is an 82% probability that Professor Ackerberg's regression would estimate an overcharge of $0.02 or larger even if there was in fact no overcharge at all. (*Id.* at p. 6 ¶ 9 & n.10). Such a high percentage, as reflected in the *p*-value, means that the regression result is not reliable economic evidence of whether Home Depot paid an overcharge on its purchases of AmeriGas propane exchange tanks. (*Id.*). Plaintiffs' contention that this Court can simply overlook the significance of a *p*-value, and what it reflects regarding the reliability of a regression's results as proof of impact, is without merit.

There is also no basis for finding *p*-values as high as 0.29 (Ace Hardware exchanges), 0.39 (Home Depot spares), and 0.82 (Home Depot exchanges) to be statistically significant, and Professor Ackerberg's attempt to characterize these results as evidence of an overcharge is inconsistent with his published work outside of litigation and contradicted by the various publications that he references. (*See* Doc. # 589 p. 12 n.5; Doc. # 589-1, p. 11 ¶ 24 & n.25). Professor Ackerberg's willingness to now accept *p*-values at unreliably **[*38]** high values is not credible given the contrary positions regarding *p*-values that he takes in his original class certification declaration and his peer-reviewed work. Plaintiffs cannot avoid the empirical and substantive evidence confirming that Professor Ackerberg's use of a pooled regression to calculate a classwide average overcharge is impermissibly masking individualized differences among class members that bear directly on whether class members suffered any injury. That is not sufficient evidence to carry Plaintiffs' burden of establishing predominance under Rule 23(b)(3).

3. Professor Ackerberg's Overcharge Model Suffers from Other Design Flaws That Render it Unreliable and Incapable of Satisfying Plaintiffs' Rule 23 Burden

A reliable regression isolates the non-collusive factors that affect price to determine whether, and to what extent, differences in prices between a benchmark period and the at-issue period may be attributed to alleged collusion. (Doc. # 494-1, p. 61 ¶ 116 & n. 145, p. 69, ¶ 141). Following a rigorous analysis, the Court is unconvinced that Professor Ackerberg's regression accomplishes this goal. The indicator (or "dummy") variables used for the alleged conduct periods, which Professor **[*39]** Ackerberg interprets as capturing solely the effect of the alleged collusive conduct, in fact capture the effects of *other* factors that influence price, such as undisputed increases in demand over time and inflation. (*Id.*).

As stated in a popular econometrics textbook, "[t]he general linear multiple regression model is a particular specification of some economic process in which the values of a dependent variable (or regressand) are determined by several explanatory variables (or regressors)." (Doc. # 494-3, p. 61 ¶ 116) (citing Mirer, Thad W., *Economic Statistics and Econometrics*, Third Edition). In Professor Ackerberg's regression model, the dependent variable is price per gallon, and he claims his regression can evaluate price per gallon as a function of explanatory variables that purportedly represent "costs, demand, and the nature of competition." (Doc. # 476-1, p. 26, ¶¶ 73-74). However, given the individualized prices negotiated by Ferrellgas's and AmeriGas's tens of thousands of customers, Professor Ackerberg's overcharge regression model is notably bare with respect to variables that purport to control for all factors impacting price other than the alleged conduct. (*Id.*). The **[*40]** regression contains only variables that control for costs, the seasons, and "time trend," variables that supposedly capture every other "unobserved" factor that impact pricing to all customers, across all states, and over the multi-year class period. *Id.* Professor Ackerberg attributes any changes to the "predicted" prices in the conduct period to a dummy (or "conspiracy") variable that his regression turns on at a specified time period corresponding with the beginning of the alleged class period. *Id.*

Further, Professor Ackerberg designs his dummy variable to turn on beginning on specific dates that are dictated by the settlement releases from *Propane I* (*i.e.*, December 2009 for AmeriGas and October 2011 for Ferrellgas). (*Id.* at pp. 26-27 ¶ 76). So while he purports to study the price effects of the 2008 fill reduction, which Plaintiffs claim was the result of collusion, his regression is designed in such a way as to only estimate for the existence of impact beginning with the start of a class period that is set entirely by the *Propane I* settlement release dates. (*Id.*). However, even as a matter of sheer logic, if the effect of the 2008 fill-level reduction was going to dissipate, it **[*41]** would dissipate gradually over time. It wouldn't just disappear suddenly on one date. In particular, it wouldn't disappear on the release date magically.

C. Pass Through

Because Plaintiffs' common proof with respect to overcharge fails, that itself suffices to defeat predominance. The Court nevertheless addresses the issue of pass-through. As their common proof of class-wide pass-through, Plaintiffs offered pass-through studies conducted by Professor Ackerberg. (*See e.g.* Doc. # 476-1, pp. 28-29, ¶¶ 83-91). His studies were limited to just three of AmeriGas's and Ferrellgas's thousands of individual retail customers—Walmart, UNFI, and Dollar General. (*Id.*). For each of these retailers, Professor Ackerberg compared the average wholesale prices paid and retail prices charged for AmeriGas and Blue Rhino propane exchange tanks before and after the 2008 fill reduction. (*Id.* at p. 28 ¶ 83). Based on those calculations, he concludes that all of AmeriGas's and Ferrellgas's thousands of retail customers passed on an overcharge at a "conservative" rate of 100%. (*Id.* at p. 30, ¶ 96). Further, although the class period ends in January, 2015, Professor Ackerberg's pass-through studies end in 2012—nearly **[*42]** three years before the end of the class period, because, as he himself acknowledges, "the empirical effect of Defendants' coordinated fill reduction is less likely to be captured farther away from the event date." (*Id.* at p. 29 ¶ 90).

After careful consideration, the Court concludes that Professor Ackerberg's pass through studies cannot satisfy *Rule 23(b)(3)*'s predominance requirement. As an initial matter, the Court has serious doubt over whether Professor Ackerberg's analysis can reliably isolate and measure the pertinent inquiry: whether (and the extent to which) a wholesale cost *change* causes a *change* in retail price. His studies just employ a formula to capture whether there was a change in the retail price per gallon relative to a change in wholesale price per gallon for the propane exchange tanks purchased and resold by three retailers. That does not actually measure whether a cost change *due to an overcharge* as opposed to some other reason was passed-on by these retailers to their customers.

Setting that aside, the fundamental problem with Professor Ackerberg's pass-through analysis is that its reliance on averages and its miniscule sampling of retailer data cannot reliably account for the **[*43]** variation in wholesale and retail prices across AmeriGas's and Ferrellgas's thousands of retailer customers. The evidence is undisputed that those retailer customers paid individually negotiated wholesale prices and then resold AmeriGas and Blue Rhino propane exchange tanks at individually-set retail prices. Professor Ackerberg's pass-through studies do not account for any of this variation, and he even admitted that his pass-through studies "cannot target individual cases," since his "conclusions are about averages." (Doc. # 494-3, 349:3-351:6).

Courts have consistently rejected such pass-through methodologies because their use of averaging and sampling to assume a singular pass-through rate by all intermediaries, without underlying evidentiary support, can mask individualized questions that otherwise predominate. For example, in *In re Processed Eggs Products Antitrust Litigation, 312 F.R.D. 124, 160 (E.D. Pa. 2015)*, class certification was denied because the indirect purchaser plaintiff's "pass-through model improperly assume[d], without adequate support, that because one retailer passed through the overcharge at a certain rate averaged across its stores, all retailers *nationwide* shared that overcharge rate or, at least, passed along some positive overcharge." (Emphasis **[*44]** in original). While "[t]he case law understandably allows for averages and aggregations," it must be "convinced that the averages and aggregations are not masking individualized issues that are likely to predominate"—a test which plaintiffs' expert's pass-through model failed. *Id.; see also In re Methionine Antitrust Litig., 204 F.R.D. 161, 164-65 (N.D. Cal. 2001)* (denying certification where indirect purchasers' expert's "method assume[d] that there is a single pass-through rate for all direct and indirect resellers, yet ... point to nothing in the record that suggest that such an assumption is valid"); *In re Flash Memory Antitrust Litig., No. C 07-0086 SBA, 2010 U.S. Dist. LEXIS 59491, 2010 WL 2332081, at *12-13 (N.D. Cal. June 9, 2010)* (finding indirect purchaser plaintiffs failed to satisfy *Rule 23(b)(3)* where their expert's regression "simply assume[d] that the pass through rates for all personal media players are the same and are equal to the average pass through rate for all products").

Professor Ackerberg's pass-through studies suffer from the same flaw. Based on a study of sales to only three retailers that ends three years before the end of the class period (and therefore comprise less than 10% of sales to the putative class), Professor Ackerberg makes the inferential leap that *all* of AmeriGas's and Ferrellgas's thousands of retailers similarly passed on an overcharge, and at the same rate. **[*45]** The only evidence in the record, however, casts doubt on whether there was any pass-through at all. For example, Walmart—one of the three retailers that Professor Ackerberg did study—indicated that it would not always pass on price increases or decreases from a supplier to its customers. (Doc. # 494-31, 130:18-132:5). And although Ferrellgas lowered its wholesale prices for propane exchange tanks sold to Walmart between 2009 and 2010, Walmart kept its retail prices for those tanks the *same* throughout that period, further undercutting any possible conclusion that Wal-Mart could have passed on any overcharges.[6] (*Id.* at 155:6-19; Doc. # 494-1, p. 85 ¶ 202). Evidence from another retailer, Fry's, indicated that it maintained the same retail price for AmeriGas propane exchange tanks for a long time, despite changes in the cost. (Doc. # 589-3, p. 8-15 (Exhibit 2)). There is no other retailer evidence in the record.[7]

Professor Ackerberg's pass-through studies not only fail to account for any of this evidence, but when weighed against the actual evidence in the record, are clearly masking this and other individualized issues relating to pass-through by employing a common, pass-through rate **[*46]** for all the thousands of Ferrellgas's and AmeriGas's retailer customers. This cannot satisfy *Rule 23(b)(3)*'s predominance standard. *See* *In re Processed Eggs Prods. Antitrust Litig., 312 F.R.D. at 160*.

The final infirmity that defeats predominance is the fact that Professor Ackerberg's pass-through studies are limited to the end of 2012, when the alleged class period here goes through the end of January, 2015. A pass-through analysis that purports to estimate class-wide impact but falls short of the alleged class period by nearly three years cannot satisfy Plaintiffs' burden under *Rule 23(b)(3)*. Indeed, Professor Ackerberg admitted as much in his own report—that his pass-through analysis ends in 2012 because "the empirical effect of Defendants' coordinated fill reduction is less likely to be captured farther away from the event date" (Doc. # 476-1, p. 29 ¶ 90)—i.e., the 2008 fill reduction.[8] But that is precisely what *Rule 23* requires Plaintiffs to show—that all or nearly all of Defendants' retailer customers passed-on overcharges to the indirect purchaser plaintiffs throughout the class period. A set of pass-through studies for three retailers through the end of 2012 cannot satisfy Plaintiffs' burden of demonstrating class-wide pass-through for a class period that ends in January, **[*47]** 2015. Plaintiffs have not satisfied their burden of demonstrating that common issues predominate as to impact to the proposed indirect purchaser class.

CONCLUSION

For the reasons set forth in this Order, and following this Court's rigorous analysis of Plaintiffs' proffered proof and expert analyses, the Court concludes that Plaintiffs have not met their burden of demonstrating that common issues will predominate as to their claims. Plaintiffs' motion for class certification is therefore DENIED.

IT IS SO ORDERED.

/s/ Gary A. Fenner

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6 [ILLEGIBLE FOOTNOTE]

7 Plaintiffs on reply offered the opinion that "cost-plus" pricing is "prevalent" in the industry, such that "there is no reason to think that any overcharge would not be passed through," (Doc. # 540 at 11), but that is nothing more than conjecture, unsupported by any actual evidence in the record. It is not something that can be relied upon as common proof of class-wide pass-through. *See* *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* (expert opinion is "useful as a guide to interpreting market facts, but it is not a substitute for them").

8 Plaintiffs sought to undo this admitted limitation of Professor Ackerberg's pass-through studies by pointing to how Professor Ackerberg also analyzed data beyond 2012 for robustness. But the fact that Professor Ackerberg undertook such a robustness analysis and nevertheless concluded, based on his expertise, to limit his opinions and conclusions regarding pass-through on data only through 2012 just confirms that his studies cannot serve as proof of any impact beyond 2012.

GARY A. FENNER, JUDGE

UNITED STATES DISTRICT COURT

DATED: November 9, 2021

Oj Commerce LLC v. Kidcraft, Inc.

United States District Court for the Southern District of Florida

November 15, 2021, Decided; November 15, 2021, Entered on Docket

CASE NO. 19-60341-CIV-COOKE/SNOW

Reporter
2021 U.S. Dist. LEXIS 220356 *; 2021 WL 8087044

OJ COMMERCE LLC and NAOMI HOME, INC., Plaintiffs, vs. KIDCRAFT, INC. and MIDOCEAN PARTNERS IV, L.P., Defendants.

Subsequent History: Adopted by, in part, Motion denied by *Oj Commerce Llc v. Kidkraft Lp, 2022 U.S. Dist. LEXIS 47859 (S.D. Fla., Mar. 16, 2022)*

Prior History: *Oj Commerce Llc v. Kidkraft, Inc., 2020 U.S. Dist. LEXIS 253059, 2020 WL 9173498 (S.D. Fla., Mar. 30, 2020)*

Core Terms

attorney's fees, costs, damages, good faith, final judgment, undersigned, hourly rate, parties, offers, Plaintiffs', punitive damages, particularity, Defendants', settlement, partial, anti trust law, pre-empted, antitrust, expenses, settle, claim for punitive damages, nontaxable, discovery, billing, counts

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Judges: LURANA S. SNOW, UNITED STATES MAGISTRATE JUDGE.

Opinion by: LURANA S. SNOW

Opinion

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on the Defendant MidOcean Partners IV, L.P.'s Motion for Attorneys' Fees and Litigation Costs (ECF No. 266),which was referred to United States Magistrate Judge, Lurana S. Snow. The Motion is fully briefed and ripe for consideration.

I. PROCEDURAL BACKGROUND

The Plaintiffs brought this action by Complaint filed February 7, 2019 against the Defendants for alleged violations of the *Sherman Act*. (ECF No. 1) They asserted that MidOcean Partners IV, L.P. ("MidOcean") violated the Act by conspiracy to commit concerted refusal to deal (Count IV), and also asserted a state law claim of tortious interference with a contract and business relationship (Count V). These claims arose from the alleged marketplace actions of Co-Defendant Kidcraft, Inc. ("Kidcraft"), a portfolio company of MidOcean. MidOcean was not named in Counts I-III of the Complaint, which contained *Sherman Act* claims against Kidcraft only. MidOcean and Kidcfaft were jointly represented by the law firms of Gibson Dunn and Ackerman.

On November 27, 2019, MidOcean offered the Plaintiffs **[*3]** $1,000.00 to settle the case as the Plaintiffs' Count V (the state law claim), which was declined. On March 31, 2021, the Defendants' Motion for Summary Judgment was granted on all claims against both Defendants. (ECF No. 255) The Order granting the Motion notes that the Plaintiffs' Count V claim for tortious interference with contract and business relations depended on their success on the antitrust claim asserted in Count IV. Since that claim had failed, the Plaintiffs could not prevail on the state law claim. Id. at 8. MidOcean bases its claim for fees and expenses on the Florida Offer of Judgment Statute, *Fla. Stat. § 768.79*, which authorizes such a claim when a party fails to recover at least 75% of the opponent's offer of judgment. MidOcean seeks attorney and paralegal fees in the total amount of $4,087,135.01, representing an average billing rate $680.40 per hour for 4,020.6 hours of work by Gibson Dunn and an average hourly rate of $381.25 for 1,526.60 hours of work by Ackerman. MidOcean also seeks nontaxable costs in the amount of $983,739.44, for a total fees and claim of $5,070,874.45 (ECF No. 266 at 9)

To establish the reasonableness of these requests, MidOcean states:

> Antitrust litigation **[*4]** is . . . expensive to defend against claims of the nature of those launched by Plaintiffs against Defendants, particularly when Plaintiffs pursue discovery as extensive as they sought here against MidOcean and Kidcraft.
> Morever, the stakes in this case were very high. . . . Plaintiffs' initial damage disclosures claimed over $79 million in compensatory damages which, if successful, would have been trebled under the antitrust laws for a potential recovery in excess of $237 million.

Id. at 12. MidOcean contends that the instant Motion should be granted summarily based on the Plaintiff's failure to comply with Local Rule 7.3.

In response, the Plaintiffs argue that MidOcean's offer of judgment was defective for several reasons: (1) Florida's Offer of Judgment statute is pre-empted by the *Sherman Act*; (2) MidOcean's offer did not comply with the statute because it would not have resolved all damages that otherwise would have been awarded in a final judgment and because it excluded punitive damages, and (3) the Offer is unenforceable because it was not made in good faith. The Plaintiffs also contend that MidOcean is not entitled to "fees on fees" for litigating the amount of attorneys' fees to which it is entitled; **[*5]** Gibson Dunn's hourly rates exceed those charged by comparable South Florida attorneys; the hours claimed are excessive and duplicative, and the billing statements are inadequate because of consistent block billing. The Plaintiffs also argue that MidOcean's claimed costs are not recoverable or should be greatly reduced. The Plaintiffs do not address their own alleged failure to comply with Local Rule 7.3.

II. DISCUSSION

A. Fla. Stat. § 768.59

The Defendants contend that they are entitled to an award of attorneys' fees pursuant to *Fla. Stat. § 768.79* (2021), Florida's offer of judgment statute. The Defendants correctly point out that this statute is substantive, and thus applies in federal diversity cases. *Southeast Floating Docks, Inc. v. Auto-Owners Ins. Co., 82 So. 3d 73 (Fla. 2012)*. Pursuant to *Fla. Stat. § 768.79 (6)(a)*,

> If a defendant serves an offer which is not accepted by the plaintiff and if the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer, the defendant shall be awarded reasonable costs, including investigative expenses, and attorneys' fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served. . . .

Since the judgment awarded to the Plaintiff was $0, it clearly was less than 25% of the $1,000.00 offer of judgment extended **[*6]** by the Defendants.

Subsection (2) of the statute requires that the offer "state with particularity the amount offered to settle a claim for punitive damages, if any," that the offer "shall be construed as including all damages which may be awarded in a final judgment." Moreover, offers made under *§ 768.79* are governed by *Fla. R. Civ. P. 1.442(c) (1)-(2)*, which requires that the offer be in writing and identify the Florida law under which it is being made, and that it

> (A) name the party or parties making the proposal and the parties to whom the proposal is being made;
>
> (B) state that the proposal resolves all damages that would otherwise be awarded in a final judgment in the action in which the proposal is served, subject to *subdivision (F)*;
> (C) state with particularity any relevant conditions;
> (D) state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;
> (E) state with particularity the amount proposed to settle a claim for punitive damages, if any;
> (F) state whether the proposal includes attorney's fees and whether attorneys' fees are part of the legal claim; and
> (G) include a certificate of service in the form required by Florida Rule of Judicial Administration 2.516.

The Court may refuse to award fees and costs if it determines that the offer was not made **[*7]** in good faith. *Fla. Stat. § 768.79 (7)(a)*. In the instant case, the Plaintiffs contend that MidOcean's offer of judgment was not tendered in good faith, and also that it violated *§ 768.79* and *Rule 1.442(c)(2)(B)* and *(E)* because it did not resolve all damages that would otherwise be awarded in a final judgment in the action and did not state with particularity the amount proposed to settle a claim for punitive damages. The Plaintiffs also argue that *§ 768.79* is pre-empted by federal ***antitrust law***.

1. Resolution of All Damages in the Case

The Plaintiffs' most persuasive argument is that MidOcean's Offer of Judgment (ECF No. 285-2) did not state that it resolved all damages that would otherwise be awarded in a final judgment in the action. The Offer states, in pertinent part:

> 3. This Offer seeks to fully and finally settle and resolve OJC's claim made for Tortious Interference With Contract and Business Relationship against MidOcean (Count V of the Complaint), including any and all claims for economic damages, including compensatory damages, special damages and consequential damages, court costs, prejudgment interest, and any requests for other relief from the Court in connection with the claim asserted in Count V of the Complaint that would otherwise **[*8]** be awarded in a final judgment for OJC and against MidOcean.

Id. at 1. There is no mention of the federal claim in Count IV of the Complaint, alleging violation of the *Sherman Act* by MidOcean, and the Plaintiffs argue that this omission is fatal. MidOcean's response, by way of a footnote, is that "[a]n offer of judgment cannot include federal claims, therefore only the tortious interference claim could be included." (ECF No. 266 at 7 n.9) MidOcean reasons that because the offer of judgment encompassed all claims it was permitted to include, it was sufficient under the applicable statute and rule. Id.

This reasoning is circular, if not disingenuous. In *Harrington v. Roundpoint Mortg. Servicing Corp.*, the plaintiff alleged that the defendants violated the federal *Telephone Consumer Protection Act (TCPA)* and the Florida Consumer Collection Practices Act (FCCPA), and the court entered judgment in favor of the Defendants on both counts. *Harrington v. Roundpoint Mortg. Servicing Corp., No. 2:15-cv-322-FtM-28MRM, 2018 U.S. Dist. LEXIS 146260, 2018 WL 4100957 (M.D. Fla. Aug. 9, 2019)*. The Defendants sought an award of attorneys' fees and costs pursuant to *Fla. Stat. § 768.79* based on an offer judgment that was explicitly limited to the state FCCPA claim. The Plaintiff argued that the offer was invalid because it failed to encompass the federal claim.

The court first noted that while the Eleventh Circuit had held *§ 768.79* to be substantive in nature and thereby **[*9]** applicable under *Erie R.Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)*, it had not made a determination on the nature of *Rule 1.442(c)(2)(B)*. However, in *Primo v. State Farm Mut. Ins. Co.*, the appellate court stated that while it need not decide the issue, "*Rule 1.442(c)(2)(B)* is likely substantive." *Primo v. State Farm Mut. Ins. Co., 661 F. App'x 661, 664 n.4 (11th Cir. 2016)*. The *Harrington* court found both the statute and the rule to be substantive law, and applied the "'outcome determinative test' to evaluate whether the Rule's application would be so important to the outcome that failure to apply it would unfairly discriminate against citizens of the forum State, or be likely to cause a plaintiff to choose federal court." *Harrington, 2018 U.S. Dist. LEXIS 146260, 2018 WL 4100957 at * 4* (citing *Horowitch v. Diamond Aircraft Indus., Inc., 645 F.3d 1254, 1258 (11th Cir. 2011)*). The court found that the question posed by this test must be answered in the affirmative because without a statement that an offer resolves all damages, "an offeree cannot properly evaluate an offer because certain claims remain unresolved." Id. Accordingly, the court found the Defendants' partial offer of judgment which applied only to the state claim was unenforceable.

Harrington is consistent with the Florida Supreme Court's order *In re Amendments to Fla. R. Civ. P., 131 So. 3d 643, 643-44 (Fla. 2013)*, adopting the 2013 amendment to *Rule 1.442* which deleted "the requirement that the proposal for settlement 'identify the claim or claims the proposal is attempting to resolve' and replace[d] it with the requirement that the proposal 'state that **[*10]** [it] resolves all damages that would otherwise be awarded to a final judgment in the action.'" The Supreme Court noted that there were two purposes for this substitution: to curtail partial proposals for settlement and to ensure that the rule comported with the corresponding provision of *§ 768.79*, which states that an offer of judgment is construed as including all damages which could be awarded in a final judgment. *Id. at 644*. Moreover, the Florida Supreme Court has held that because the language of *§ 768.79* and Rule 1.422 are in derogation of common law, it must be strictly construed, and even a technical violation will invalidate an offer. *Campbell v. Goldman, 959 So. 2d 223, 226-27 (Fla. 2007)*.

In the instant case, MidOcean implicitly acknowledges the weakness of its argument on this issue by mischaracterizing the purpose of the statute by stating, "*Section 768.79* provides a mechanism for encouraging early settlement (*or partial settlement*) of cases by allowing for the recovery of fees from the date an offer under the statute is made." (ECF No. 289 at 4) (emphasis added) Instead, as noted above, the purposes of the 2013 amendment to *Rule 1.442* were to *curtail* partial settlements and to conform the rule to the provisions of the offer of judgment statute. Indeed, even before the 2013 amendment, **[*11]** Florida courts have held that offers of judgment which do not encompass all claims for relief are invalid. See, e.g., *Palm Beach Polo Holdings v. Equestrian Club Estates Prop. Owners Ass'n, 22 So. 3d 140 (Fla. 4th DCA 2009)*; *Bayley Products, Inc. v. Cole, 720 So. 2d 550 (Fla. 4th DCA 1998)*.

The undersigned concludes that because MidOcean's Offer of Judgment failed to resolve all damages which would otherwise be awarded in a final judgment in the case, it violated the provisions of *Fla. Stat. § 768.79* and *Fla. R. Civ. P. 1.442(c)(2)(B)* and is unenforceable. The fact that the federal *Sherman Act* claim could not have been included in the offer under this statute is immaterial, since the Florida statute and rule must be strictly construed and were designed to eliminate partial settlements. Moreover, this case was filed in federal court, where the appropriate vehicle is an offer of judgment under *Fed. R. Civ. P. 68*. The fact that MidOcean was unable to avail itself of a more favorable state procedure is not a basis to award attorneys' fees and expenses in derogation of common law.

2. Bad Faith

The Plaintiffs also contend that MidOcean's $1,000.00 offer of judgment, made early in the litigation, was not made in good faith, noting that proof of the state claim was dependent on the Plaintiff's ability to prove the *Sherman Act* claim. Thus, "the fact that MidOcean is really seeking its fees for defending an antitrust case is undeniable; had OJC accepted **[*12]** MidOcean's offer of judgement, nothing at all about MidOcean's defense would have changed as it would have needed to do the exact amount of work to defend against the antitrust claims." (ECF No. 285 at 4) (emphasis omitted)

As noted earlier, this Court may refuse to award fees and costs if it determines that the offer was not made in good faith. *Fla. Stat. § 768.79 (7)(a)*. "Although 'nominal offers are suspect where they are not based on any assessment of liability and damages,' they can be valid if the offerors have 'a reasonable basis at the time of the offer to conclude that their exposure was nominal.'" *McMahan v. Toto, 311 F.3d 1077, 1083 (11th Cir. 2002)* (quoting *Fox v. McCaw Cellular Commc's of Fla., Inc., 745 So. 2d 330, 332 (Fla. 4th DCA 1998)*). This is because "the good faith requirement of *§ 768.79(7))(a)* does not 'demand that an offeror necessarily possess, at the time he makes an offer or demand under the statute, the kind or quantum of evidence needed to support a judgment. The obligation of good faith merely insists that the offeror have some reasonable foundation on which to base the offer.'" *McMahan, 311 F.3d at 1083* (quoting *Schmidt v. Fortner, 629 So. 2d 1036, 1039 (Fla. 4th DCA 1993)*).

Nevertheless, an "offer of judgment ought to fairly account for the risk of litigation, the costs and fees at stake, and the other components of uncertainty that sophisticated persons assay when deciding whether to settle," and "should be sufficient **[*13]** to cause a temperate and knowledgeable attorney to pause and carefully evaluate his client's stance." *Stouffer Hotel Co. v. Teachers Ins., 432 F. Supp. 874, 875 (M.D.Fla. 1995)*. Although not controlling on this issue, the reasonableness of the Defendants' assessment of their exposure may be bolstered by the fact that they obtained a favorable judgment. *McMahan, 311 F.3d at 1083-84*. The burden of proving that an offer was not made in good faith is on the offeree. *Id. at 1083*; *Schmidt, 629 So. 2d at 1041 n.6*.

The Plaintiffs cite several cases which they contend support a finding of bad faith in this case. In *JES Props., Inc. V. USA Equestrian, Inc., 432 F. Supp. 2d 1283 (M.D. Fla. 2006)*, the complaint contained several counts alleging violation of the Sherman Act, the Florida Antitrust Act and the Florida Deceptive and Unfair Trade Practices Act (FDUPTA). The defendants tendered offers of judgment proposing to settle five of these claims for $500 each.

The court rejected the defendants' motion for attorneys' fees and costs under *§ 768.79*, noting first that the Defendants had failed to state the basis for their belief that their exposure was nominal. *Id. at 1295*. The court went on to point out that "[t]he Florida Supreme Court recognizes 'that attorney fees awarded pursuant to the offer of judgment are sanctions. . . for unreasonable rejections of offers of judgment,'" and "'unnecessarily continuing the litigation.'" Id. (quoting **[*14]** *Sarkis v. Allstate Ins. Co., 863 So. 2d 210, 218, 222 (Fla. 2003)*). The court further observed that the case before it was "a complex antitrust case with multiple parties and numerous allegations, requiring lengthy and substantial discovery," and at the time the offers of judgment were served, substantial discovery remained to be completed. Id. The court concluded that "given the novelty and difficulty of the issues in this case, and the timing and amount of the . . . offers of judgment, that the offers of judgment were not in good faith." Id. [1]

In the instant case, the Plaintiffs point out that MidOcean's Offer of Judgment was served just eight days after this Court denied its motion to dismiss, before any meaningful discovery had been performed and six months before any depositions were taken. Moreover, no experts had been engaged at the time of the Offer. The undersigned notes that although MidOcean responds that it had a good faith belief that it would prevail at the time the offer of judgment was made, MidOcean simultaneously justifies its claim for attorneys fees and costs on the ground that this was a complex case involving federal and state law, multiple experts, significant research and nine months of

[1] The JES Properties court also held that *§ 768.79* was pre-empted by federal ***antitrust law*** and that the offers of judgment were invalid because they were ambiguous and failed to address the plaintiffs' claims for injunctive relief. *JES Props., 432 F. Supp. 2d at 1293-94*.

extensive discovery, with **[*15]** a potential exposure of $237 million. (ECF No. 266 at 3, 17) MidOcean should not be permitted to have it both ways.

It is important to note that MidOcean's Offer of Judgment applied only to one state law count against one defendant, while the Complaint contains five state and federal counts against two defendants. Additionally, the parties agree that proof of the state law claim against MidOcean in Count V was wholly dependent on proof of the *Sherman Act* claim in Count IV, which was not covered by the offer of judgment. As a result, acceptance of the offer by the Plaintiffs would not have saved either party or the court any time or expense. MidOcean stood to benefit only if the Plaintiffs rejected the offer and lost the case, creating the opportunity for MidOcean to claim its fees and costs for defending both Defendants on all counts, as it now has done.

Clearly an offer which confers no benefit on anyone unless it is rejected cannot have been made in good faith. Both state and federal courts have refused to countenance this type of ploy, recognizing that the "spirit of the offer of judgment statute is to encourage litigants to resolve cases early to avoid incurring substantial amounts of court **[*16]** costs and attorneys' fees" by imposing "a penalty for parties who fail to act reasonably and in good faith in settling lawsuits." *Eagleman v. Eagleman, 673 So. 2d 946, 947 (Fla. 4th DCA 1996)*. Thus, "an offer of judgment or offer of settlement or the same thing by another name ought to be more than a carefully crafted, cleverly calculated and disingenuous attempt to shift the economic burden of litigation." *Stouffer Hotel v. Teachers Ins., 944 F. Supp. 874, 875 (M.D. Fla. 1995)*. "The point of the statute is not to force plaintiffs into accepting unreasonable offers for fear of having to pay defendants' attorneys fees should they refuse and ultimately obtain a lesser judgment." *James v. Wash Depot Holdings, Inc., 489 F.Supp. 2d 1336, 1340 (S.D.Fla. 2007)*.

Offers such as the one tendered by MidOcean in this case "are not made in a sincere attempt to settle the plaintiffs' claims." Hendrix v. Evenflo Co., This is a good example of why a partial offer of judgment such as the Offer in this case is not permitted under Florida law, as discussed in the preceding section. The undersigned finds that MidOcean's $1000.00 offer of judgment was not made in good faith and should not be enforced.

3. Other arguments

The Plaintiffs also argue that MidOcean's offer of judgment was unenforceable because it excluded punitive damages and was ambiguous, and because *§ 768.79* is pre-empted by federal ***antitrust law*** which does **[*17]** not explicitly permit an award of attorneys' fees to successful defendants.

Regarding the issue of punitive damages, the Offer of Judgment states, "[a]t the present time, there is no claim for punitive damages pending, and thus, no portion of the amount offered . . . is being offered to settle a claim for punitive damages." (ECF No. 285-2 at 2) The Plaintiffs point out that Count V of the Complaint does include a claim for punitive damages (ECF No. 1 at 13), and argue that MidOcean's Offer was ambiguous because it failed to state whether a separate offer to resolve the punitive damages claim would be forthcoming. MidOcean responds that the Plaintiffs waived their right to punitive damages by failing to include them in their *Rule 26(a)(1)* disclosures. Thus, a ruling on the Plaintiffs' argument would require this Court to decide whether a claim for punitive damages is extinguished by a plaintiff's failure to include those damages in its *Rule 26(a)(1)* disclosures.

With respect to preemption, the Eleventh Circuit has not resolved the issue of whether *§ 768.79* is preempted by federal ***antitrust law***. However, in *Snyder v. Accord Corp., 811 F. App'x 447, 464 (10th Cir. 2020)*, the Tenth Circuit rejected the appellant's claim that a Colorado statute permitting a fee award was preempted by **[*18]** federal RICO and antitrust laws. MidOcean emphasizes that the Sherman/*Clayton Act* is silent on the issue of fee awards to prevailing defendants, and in a case cited by the court in Snyder, *Smith v. Psychiatric Sols, Inc., 750 F.3d 1253, 1257 (11th Cir. 2014)*, the Eleventh Circuit found that a federal statute's silence does not serve as an implicit prohibition against awarding attorneys' fees when authorized elsewhere. Based on this reasoning, the undersigned believes it likely that the Eleventh Circuit, if presented with the issue, would hold that federal ***antitrust law*** would not preempt the Florida Offer of Judgment statute.

The parties have advanced colorable arguments on both sides of these two issues. Since the undersigned believes that MidOcean's Offer of Judgment clearly was invalid because it fails to include all of the damages which could have been included in a final judgment and because it was not made in good faith, it does not appear to be necessary to resolve these close questions. Should the District Judge disagree, the Motion can be re-referred for a supplemental Report and Recommendation addressing these issues.

B. Local Rule 7.3

MidOcean contends that this Court should grant the instant Motion in its entirety because the Plaintiffs did not comply with the requirements **[*19]** of Local Rule 7.3 because they failed to submit an affidavit regarding their counsel's hourly rates, and failed to make specific objections to the time entries of MidOcean's counsel. The procedure for obtaining an award of attorneys' fees and costs is governed by the Local Rules for this District. *S.D. Fla. R. 7.3(a)* sets out the "mechanism to assist parties in resolving fee and costs disputes by agreement" and states that "a motion for an award of attorneys fees and/or non-taxable expenses and costs arising from the entry of a final judgment or order shall not be filed until a good faith effort to resolve the motion, as described in paragraph (b) below, has been completed."

The Rule also sets forth the procedure for filing a response to a fees motion, which requires the respondent to "describe with reasonable particularity each time entry or nontaxable expense to which it objects, both as to issues of entitlement and as to amount," and to "provide supporting legal authority." If the respondent objects to an hourly rate, "its counsel must submit an affidavit giving its firm's hourly rates for the matter and include any contingency, partial contingency, or other arrangements that could change the effective hourly rate."

Local Rule 7.3(b) requires **[*20]** the movant to serve a draft motion for fees to the respondent within 30 days after entry of the final judgment or order. The parties must then confer and attempt in good faith to agree on entitlement to and the amount of fees and expenses not taxable under *28 U.S.C. § 1920*. Once again, the respondent must "describe in writing and with reasonable particularity each time entry or nontaxable expense to which it objects, both as to issues of entitlement and as to amount, and shall provide supporting legal authority.

The Plaintiffs do not contest MidOcean's assertion that they failed to submit an affidavit pertaining to their counsel's hourly rates, or that prior to the filing of the instant Motion they failed to provide specific objections to the time entries of MidOcean's attorneys. The undersigned notes, however, that the Plaintiffs did file an Expedited Motion to Bifurcate Entitlement and Amount and Other Relief (ECF No. 267). The undersigned denied the request to bifurcate as untimely, but in light of the significant amount of fees requested by Defendant, an extension of time to respond to the Motion was granted. For the same reason, the undersigned found that the Plaintiffs failure to comply with **[*21]** all of the requirements of Local Rule 7.3 would not result in a waiver of all their objections to the hourly rates and hours claimed by counsel for the Defendant. (ECF No. 274 at 2)

Thus, the Court already has ruled that the Plaintiffs were entitled to object to the hourly rates and hours claimed by counsel for MidOcean. The undersigned will expand the prior ruling to excuse the Plaintiffs' failure to submit an affidavit as the hourly rates of their attorneys. Especially in view of the undersigned's conclusion that MidOcean is not entitled to any award of attorneys' fees and litigation expenses, MidOcean's argument that the instant Motion should be granted based on the Plaintiffs' violation of Local Rule 7.3 is rejected.

C. Claimed Attorneys' Fees and Nontaxable Costs

Finally, the Plaintiffs contend that MidOcean is not entitled to "fees on fees" for litigating the amount of attorneys' fees to which it is entitled; Gibson Dunn's hourly rates exceed those charged by comparable South Florida attorneys; the hours claimed are excessive and duplicative, and the billing statements are inadequate because of consistent block billing. The Plaintiffs also argue that MidOcean's claimed costs are not recoverable or should be **[*22]** greatly reduced.

The undersigned notes that the supporting documents in this case comprise hundreds of pages of billing statements and receipts, covering more than 5,500 hours of work and a total claim exceeding $5 million. (ECF Nos. 266-2; 266-3) The amount of time required for the Court to review these records and evaluate the Plaintiffs' objections would be considerable, to say the least. Therefore, the undersigned will address MidOcean's claimed fees and costs upon re-referral if the District Judge determines that MidOcean is entitled to an award.

III. CONCLUSION

This Court having considered carefully the papers, arguments of counsel, and the applicable case law, it is hereby

RECOMMENDED that the Defendant MidOcean Partners IV, L.P.'s Motion for Attorneys' Fees and Litigation Costs (ECF No. 266) be DENIED.

The parties will have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable Marcia Cooke, United States District Judge. Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar **[*23]** the parties from attacking on appeal unobjected-to factual and legal conclusions contained therein, except upon grounds of plain error if necessary in the interest of justice. See *28 U.S.C. § 636(b)(1)*; *Thomas v. Arn, 474 U.S. 140, 149, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*; *Henley v. Johnson, 885 F.2d 790, 794 (1989)*; *11th Cir. R. 3-1*.

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 15th day of November, 2021.

/s/ Lurana S. Snow

LURANA S. SNOW

UNITED STATES MAGISTRATE JUDGE

In re January 2021 Short Squeeze Trading Litig.

United States District Court for the Southern District of Florida

November 17, 2021, Decided; November 17, 2021, Entered on Docket

CASE NO. 21-2989-MDL-ALTONAGA/Torres

Reporter

2021 U.S. Dist. LEXIS 221509 *; 2021 WL 5359731

In re: JANUARY 2021 SHORT SQUEEZE TRADING LITIGATION. This Document Relates to the Antitrust Actions

Prior History: *In re January 2021 Short Squeeze Trading Litig., 2021 U.S. Dist. LEXIS 96552, 2021 WL 1997091 (S.D. Fla., May 3, 2021)*

Core Terms

trading, alteration, Clearing, Brokerage, restrictions, Investors, conspiracy, quotation, marks, positions, collateral, communications, allegations, firms, stock, email, prices, Retail, orders, shares, Introducing, broker, buy, transactions, Defendants', purchasing, motive, market volatility, coconspirators, conspire

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For Patrick Young, Omar Alsaedi, Ethan Arellano, Travis Elliott, Jessica Hines, Michelle del Valle, Michael Ridpath, Charles Fellows, Bryan Joyner, Christine Bukowski, Carolyn Collier, Amanda Giuliani, Chastity Woodward, Matt Scime, William Urrutia, Consol Plaintiffs: James L. Ferraro, James Louis Ferraro, Jr., LEAD **[*2]** ATTORNEYS, The Ferraro Law Firm, Miami, FL; Jeffrey E. Kwatinetz, LEAD ATTORNEY, The Law Office of Jeffrey Kwatinetz pC, Encino, CA; Natalia Maria Salas, LEAD ATTORNEY, The Ferraro Law Firm, P.A., Miami, FL; Sean Alexander Burstyn, LEAD ATTORNEY, Burstyn Law PLLC, Miami, FL.

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For Timothy A. Nordeen, and all members of the public who are similarly situated, Aaron Kolysko, and all members of the public who are similarly situated, Consol Plaintiffs: Gary Richard Carlin, LEAD ATTORNEY, Carlin & Buchsbaum, LLP, Long Beach, CA.

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For Apex Clearing Corporation, Consol Defendant: Angela Daker, LEAD ATTORNEY, White & Case, Miami, FL; Bryan Daniel Gant, LEAD ATTORNEY, White and Case LLP, New York, NY; Heather Marie Burke, LEAD ATTORNEY, White and Case LLP, Palo Alto, CA; Jack E. Pace, III, LEAD ATTORNEY, White and Case LLP, New York, MY; John Mark Gidley, LEAD ATTORNEY, White & Case LLP, Washington, DC.

For eToro USA Securities, Inc., Fumi Holdings, Inc., Consol Defendants: Rachel Maimin, LEAD ATTORNEY, Lowenstein Sandler LLP, New York, NY; Ana Jara, Lowenstein Sandler LLP, Washington, DC.

For Sequoia Capital Operations LLC, Consol Defendant: Harry Arthur Olivar , Jr., LEAD ATTORNEY, Quinn Emanuel Urquhart & Sullivan, LLP, Los Angeles, CA; Korinna Stefel Anderson, LEAD ATTORNEY, Quinn Emanuel Urquhart **[*19]** and Sullivan, Los Angeles, CA; Linda Jane Brewer, LEAD ATTORNEY, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, LLP, San Francisco, CA.

For FF Trade Republic Growth, LLC, Consol Defendant: Paul T. Llewellyn, LEAD ATTORNEY, Lewis & Llewellyn LLP, San Francisco, CA.

For Robinhood Crypto, LLC, Consol Defendant: Antony L. Ryan, LEAD ATTORNEY, PRO HAC VICE, Cravath Swaine & Moore LLP, New York, NY; Brittany L. Sukiennik, Kevin J. Orsini, LEAD ATTORNEYS, Cravath Swaine & Moore LLP, New York, NY; Carl Brandon Wisoff, LEAD ATTORNEY, Farella Braun & Martel LLP, San Francisco, CA; Eric D. Monek Anderson, LEAD ATTORNEY, Farella Braun Martel LLP, San Francisco, CA.

Judges: CECILIA M. ALTONAGA, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: CECILIA M. ALTONAGA

Opinion

ORDER

THIS CAUSE came before the Court on Defendants'[1] Motion to Dismiss the Antitrust Tranche Complaint [ECF No. 408]. Plaintiffs[2] filed a [Response] in Opposition [ECF No. 413], to which Defendants filed a Reply [ECF No. 419]. The Court has carefully considered The Corrected Consolidated Class Action Complaint (the "CCAC") [ECF No. 416], the parties' written submissions, the record, and applicable law. For the following reasons, the Motion is granted.

I. BACKGROUND [*20]

This putative class action is brought on behalf of individual investors (the "Retail Investors") who suffered losses as a result of Defendants' response to a "short squeeze" — a situation in which stocks or other assets rise sharply in value, distressing short positions.[3] (*See id.* ¶ 12). This short squeeze occurred in late January 2021, as the Retail Investors rapidly purchased the Relevant Securities,[4] exposing those with short positions in the Relevant Securities to "massive potential losses[.]" (*Id.* ¶ 7 (alteration added); *see id.* ¶ 6). According to Plaintiffs, Defendants conspired to prevent these losses by "artificially constrict[ing] the price appreciation of the Relevant Securities," in violation of the *Sherman Act, 15 U.S.C. § 1*. (CCAC ¶ 16 (alteration added); *see id.* ¶¶ 494-507).

The parties.

The Defendants. The CCAC categorizes Defendants into three[5] groups: the Clearing Defendants, the Brokerage Defendants, and the Market Maker Defendants. (*See id.* ¶¶ 51-75).

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[1] The Defendants are E*Trade Securities LLC; E*Trade Financial Holdings, LLC; Interactive Brokers LLC; Robinhood Markets, Inc.; Robinhood Financial LLC; Robinhood Securities, LLC; Citadel Securities LLC; Apex Clearing Corp.; Electronic Transaction Clearing, Inc.; and PEAK6 Investments LLC (collectively, "Defendants"). (*See* CCAC ¶¶ 51-75).

[2] The Plaintiffs are Angel Guzman, Burke Minahan, Christopher Miller, and Terell Sterling (collectively, "Plaintiffs"). (*See* CCAC ¶¶ 23-41).

[3] A "short" seller borrows a security believing the price of the security will decrease. (*See* CCAC ¶ 8). If the price of the security drops, the short seller buys the security back at a lower price and returns it to the lender. (*See id.*). Because the difference between the sell price and the buy price is the short seller's profit, the short seller loses money if the price of the security increases. (*See id.*).

[4] The "Relevant Securities" are certain stocks the Retail Investors believed would increase in price: GameStop (GME), AMC Entertainment (AMC), Bed Bath & Beyond (BBBY), BlackBerry (BB), Express (EXPR), Koss (KOSS), Nokia (NOK), Tootsie Roll Industries (TR), and Trivago NV (TRVG). (*See* CCAC ¶ 6).

[5] In the CCAC, Plaintiffs allege there was a fourth group called the Introducing Brokerage Defendants (*see* CCAC ¶¶ 42-50), but they have since voluntarily dismissed those Defendants (*see* [ECF No. 380] (Stash Financial, Inc.); [ECF No. 396] (Open to the Public Investing, Inc.); [ECF No. 397] (Ally Financial Inc.); [ECF No. 398] (Alpaca Securities, LLC); [ECF No. 400] (Dough LLC); [ECF No. 401] (Tastyworks, Inc.); [ECF No. 402] (Webull Financial LLC); [ECF No. 404] (SoFi Securities LLC)). The Court refers to this group as the "Introducing Brokerages."

The Introducing Brokerages provide financial trading services through an electronic trading platform. (*See* CCAC ¶¶ 42-44, 46, 47, 49, 50). During the relevant period, each Introducing Brokerage restricted and/or limited the ability of investors to purchase the Relevant Securities. (*See id.*).

Because the Introducing Brokerages are only introducing brokerages — as opposed to self-clearing brokerages — they contract with an independent clearing firm to handle the execution and settlement of securities trade orders from clients or their own trading desks, rather than handle the process themselves. (*See id.* ¶¶ 105, 111). The independent clearing firm receives

The Clearing Defendants. Defendants, Apex Clearing Corporation ("Apex") and Electronic Transaction Clearing, Inc. ("ETC"), are, collectively, the "Clearing Defendants[.]"[6] (*Id.* ¶¶ 66-75 (alteration **[*21]** added)).

The Clearing Defendants are independent clearing firms: they handle the back-office details of securities transactions for broker-dealers, such as the Introducing Brokerages. (*See id.* ¶ 105). Independent clearing firms are supervised by the Financial Industry Regulatory Authority ("FINRA") and the Depository Trust and Clearing Corporation ("DTCC").[7] (*See id.* ¶¶ 96-97, 108, 110). Apex and ETC acted as the clearing firms for one or more of the Introducing Brokerages. (*See id.* ¶¶ 42-44, 46, 47, 49, 50).

The Brokerage Defendants. Defendants, E*Trade;[8] Interactive Brokers LLC; and Robinhood,[9] are, collectively, the "Brokerage Defendants[.]" (*Id.* ¶¶ 51-63 (alteration added)).

The Brokerage Defendants act as self-clearing brokers: they act as both an introducing broker and as their own clearing firm. (*See id.* ¶¶ 54, 56, 63, 113). In other words, the Brokerage Defendants handle orders to buy and sell securities, as well as execute and settle orders, maintain custody of securities and other assets, and maintain the paperwork associated with clearing and executing a transaction. (*See id.* ¶ 113). Self-clearing brokers are subject to DTCC rules and regulations. **[*22]** (*See id.* ¶ 116).

The Market Maker Defendant.[10] Defendant, Citadel Securities LLC, is the only named "Market Maker Defendant[] [.]" (*Id.* ¶¶ 64-65 (alterations added)).

Citadel Securities is a market maker: it acts as a market participant by providing bid prices and ask prices for securities; maintaining an inventory of securities from its own trading; and matching incoming buy and sell orders to fill those orders. (*See id.* ¶ 118). Relevant here, "if a market maker receives an order to buy a certain security, it may route that order to an exchange or it may execute the orders off-exchange in its capacity as a dealer by transacting against the buy orders with contra-side sell order, either from its own inventory or by selling the security

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payments and maintains custody of the security. (*See id.* ¶ 111). At all relevant times, each Introducing Brokerage used a Clearing Defendant as its clearing firm. (*See id.* ¶¶ 42-44, 46, 47, 49, 50).

[6] Apex Clearing Holdings LLC and Defendant, PEAK6 Investments LLC, are the parent corporations of Defendants, Apex and ETC. (*See* CCAC ¶¶ 67, 70).

[7] The DTCC is a holding company that owns and operates three clearing agencies registered with the U.S. Securities and Exchange Commission ("SEC"): the National Securities Clearing Corporation ("NSCC"), the Fixed Income Clearing Corporation ("FICC"), and the Depository Trust Company ("DTC"). (*See* CCAC ¶ 96). The NSCC is the central counterparty that clears cash transactions in the U.S. equities markets by netting securities deliveries and payments among NSCC's clearing members and guaranteeing the completion of trades, even if one party to the transaction defaults. (*See id.* ¶ 98). It takes two business days for the NSCC to transfer the security to the buyer and the cash to the seller. (*See id.* ¶ 101). If a clearing member defaults on its settlement obligations, the NSCC guarantees the delivery of cash and securities to its non-defaulting members. (*See id.* ¶ 102).

In line with the CCAC and the parties' briefings, the Court refers to the DTCC and NSCC interchangeably.

[8] Defendant, E*Trade Financial Holdings, LLC (*see* CCAC ¶ 52), is the parent corporation of Defendant, E*Trade Securities LLC (*see* Mot. 22 n.9; Resp. 47). The Court refers to these two Defendants collectively as "E*Trade[.]" Doing so has no impact on the Court's analysis.

The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings.

[9] Defendants, Robinhood Markets, Inc.; Robinhood Financial LLC; and Robinhood Securities, LLC, are, collectively, "Robinhood[.]" Robinhood Financial LLC and Robinhood Securities, LLC are wholly-owned subsidiaries of Robinhood Markets, Inc. (*See* CCAC ¶¶ 58, 60). Defendants dispute the inclusion of Robinhood as a self-clearing broker, arguing Robinhood Financial LLC is an introducing broker entity separate from Robinhood Securities, LLC, the clearing entity. (*See* Mot. 13, 14 n.2). This distinction, however, has no impact on the Court's analysis.

[10] Although Plaintiffs refer to "Market Maker Defendants" (*see, e.g.*, CCAC ¶ 92), Plaintiffs name only one Market Maker Defendant (*see id.* ¶¶ 64-65).

short." (*Id.* ¶ 124). Citadel Securities took short positions in the Relevant Securities during the relevant period. (*See id.* ¶ 65).

Agents and co-conspirators. Defendants' alleged acts "were authorized, ordered or performed by the Defendants' respective officers, agents, employees, representatives, or shareholders while actively engaged in the management, direction, or control of the Defendants' businesses or affairs." (*Id.* ¶ 76). The Defendant **[*23]** parent entities exercise dominance and control over all their subsidiary entities; and the Defendant subsidiary entities have a unity of purpose and interest with their respective parents. (*See id.* ¶¶ 76-78). In addition, "[e]ach Defendant acted as the principal, agent, or joint venture of, or for other Defendants with respect to the acts, violations, and common course of conduct alleged[.]" (*Id.* ¶ 80 (alterations added)). Plaintiffs allege there may be various persons and/or firms that have participated as co-conspirators but are unknown at this time. (*See id.* ¶ 79).

The Plaintiffs. The named Plaintiffs are four individual investors who were subject to trading limitations imposed on the Relevant Securities between January 28, 2021 and February 4, 2021 (the "Class Period"). (*See id.* ¶¶ 23-41). Each Plaintiff held shares of one or more of the Relevant Securities at the close of the stock market on January 27, 2021. (*See id.* ¶¶ 23, 28, 33, 38). The next day, January 28, 2021, each Plaintiff was prohibited from purchasing the Relevant Securities on Robinhood's trading platform. (*See id.* ¶¶ 24, 29, 34, 39).

That same day, Guzman and Miller applied for accounts with Charles Schwab, Fidelity, **[*24]** and TD Ameritrade — who were not prohibiting customers from purchasing the Relevant Securities — but were unable due to the amount of time required to set up the accounts. (*See id.* ¶¶ 25, 35). Minahan successfully applied for an account with Fidelity and was able to purchase a share of GameStop Corp. stock that day. (*See id.* ¶ 30). Each Plaintiff then sold his or her shares of the Relevant Securities on Robinhood between January 28, 2021 and February 4, 2021. (*See id.* ¶¶ 26-27, 31-32, 36-37, 40-41).

Injury and proposed class. According to the named Plaintiffs:

> As a direct and intended result of Defendants [sic] contract, combination, agreement and restraint of trade or conspiracy, Defendants caused injury to Plaintiffs by restricting purchases of Relevant Securities. The Brokerage Defendants deactivated the buy option on their platforms and left Plaintiffs with no option but to sell shares of the stocks on their platforms. Plaintiffs and Class members, faced with an imminent decrease in the price of their positions in the Relevant Securities due to the inability of Retail Investors to purchase shares, were induced to sell their shares in the Relevant Securities at a lower price than **[*25]** they otherwise would have, but for the conspiracy, combination, agreement and restraint of trade.

(*Id.* ¶ 501).

The named Plaintiffs seek to certify the following class:

> All persons or entities in the United States that held shares of stock or call options in GameStop Corp. (GME), AMC Entertainment Holdings Inc. (AMC), Bed Bath & Beyond Inc. (BBBY), BlackBerry Ltd. (BB), Express, Inc. (EXPR), Koss Corporation (KOSS), Nokia Corp. (NOK), Tootsie Roll Industries, Inc. (TR), or Trivago N.V. (TRVG) as of the close of market on January 27, 2021, and sold the above-listed securities from January 28, 2021 up to and including February 4, 2021 (the "Class Period").

(*Id.* ¶ 81).

The alleged facts.

Mechanics of securities trading. Individual investors' market share of U.S. equity trading has steadily increased since 2019 and has recently accounted for a third of all U.S. stock market trading. (*See id.* ¶¶ 130-31). When individual investors make investments on their own behalf, they execute their personal trades through websites, apps, and trading platforms provided by brokerage firms or other investment service providers. (*See id.* ¶ 2). After an individual investor places a trade order with a brokerage **[*26]** firm, the brokerage sends the order to an independent clearing firm for clearing services if it is only an introducing broker, or the brokerage firm performs the clearing services itself if it is a self-clearing broker. (*See id.* ¶¶ 105, 108, 111, 129). The independent clearing firm or self-clearing broker then executes the trade order itself or sends the order to a market maker for execution. (*See id.* ¶¶ 105, 113, 122).

Market makers are market participants who provide bid prices and ask prices and match incoming buy and sell orders to fill those orders. (*See id.* ¶ 118). Market makers fill these orders from their own inventory, by routing the order to an exchange, or by taking the other side of a transaction (*e.g.*, selling a security short in response to receiving an order to buy the security). (*See id.* ¶¶ 118, 123-24). Once an order is filled, the market makers pocket the difference between the bid and ask prices, which is known as the "spread." (*See id.* ¶ 118). While the spreads may be small, they become significant due to the large volume of orders filled. (*See id.*).

Although individual investors historically had to pay a fee or commission to their brokerages for executing personal **[*27]** trades, today most brokerages do not charge their investors a fee per transaction. (*See id.* ¶ 3). Instead, in exchange for routing the order to the market maker, brokerages earn revenue through rebates, kickbacks, and other payments — these payments are collectively known as payment for order flow. (*See id.* ¶¶ 3, 133-35). Clearing firms also generate a significant portion of their revenue from payment for order flow. (*See id.* ¶ 107).

After an order is filled, the details of the executed order are sent to the NSCC for clearinghouse and settling services. (*See id.* ¶¶ 101, 129). Securities trades submitted to the NSCC take two days to settle — *i.e.*, it takes two business days for the cash and the securities to be electronically exchanged. (*See id.* ¶ 101). As stated, because there is a risk that a party to a securities transaction defaults before the trade is completed, the NSCC guarantees the delivery of cash and securities to its non-defaulting members. (*See id.* ¶ 102).

The NSCC collects clearing fund contributions, or margin, from clearing members at the start of each day and intraday in volatile markets. (*See id.* ¶ 103). The margin protects the NSCC and all market participants against **[*28]** clearing member defaults, and margin requirements must be met by clearing members on a timely basis. (*See id.*). Margin requirements are based in part on market volatility and risk. (*See id.* ¶ 470). The rules for calculating the contribution requirements and the timing of collection of contributions are known to every clearing member; and the NSCC provides reporting tools, calculators, and documentation to allow the members to monitor their risk in near real-time and estimate clearing fund contribution requirements. (*See id.* ¶ 103).

January 2021 market volatility. The Retail Investors exchange investment information via online discussion forums such as the WallStreetBets financial discussion forum on Reddit. (*See id.* ¶¶ 141, 180). WallStreetBets is characterized by a particular culture centered around discussion of financial investments and memes; many of its users are sophisticated, financially savvy individual investors with business acumen. (*See id.* ¶ 180).

Beginning in 2019, the Retail Investors, through these online discussion forums, developed the hypothesis that shares of GameStop's stock were trading at lower prices than they should have been based on GameStop's publicly available **[*29]** financial disclosures and prospects. (*See id.* ¶ 141). The Retail Investors deduced that GameStop was undervalued for a variety of reasons, including because large financial institutions had taken substantial short positions in GameStop stock. (*See id.* ¶ 142). These substantial short positions would bear significant costs if the outlook on GameStop improved and the short positions had to be exited. (*See id.*). The Retail Investors saw similar investment opportunities in the other Relevant Securities. (*See id.* ¶¶ 143-44).

Leading up to January 27, 2021, the Retail Investors, through stock brokerages, including the Brokerage Defendants, purchased long positions in the Relevant Securities with the expectation that the stocks would increase in value. (*See id.* ¶¶ 6, 91, 148). As more investors purchased the Relevant Securities and "out of the money" call options[11] in the Relevant Securities, the market prices for the stocks rose due to supply and demand. (*See id.* ¶¶ 146, 162). The Relevant Securities started appreciating to "unprecedented levels." (*Id.* ¶ 14).

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[11] A call option gives the holder the right to buy the asset at a stated fixed price or the "strike price." (*See* CCAC ¶ 166). An "out of the money" option has a strike price unfavorable in comparison to the market price for the underlying asset. (*See id.* ¶ 169).

To illustrate this rapid growth, a share of GameStop stock was worth $3.00 in 2019 (*see id.* ¶ 142); $43.03 on January 21, 2021 **[*30]** (*see id.* ¶ 185); $76.79 on January 25, 2021 (*see id.*); $147.98 on January 26, 2021 (*see id.* ¶ 188); and $380.00 on January 27, 2021 (*see id.* ¶ 190). GameStop's stock price reached a closing high of $347.51 on January 27, 2021 — a 134.84% increase from the previous day. (*See id.*). Other Relevant Securities experienced similar surges; for example, AMC's and Express's share prices increased over 300% and 200%, respectively. (*See id.*).

As Retail Investors increased long positions in the Relevant Securities, those who held short positions in the Relevant Securities, such as Citadel Securities (*see id.* ¶¶ 7, 195-96), were caught in a short squeeze. (*See id.* ¶¶ 162-63). Investors with these short positions were faced with a rapid increase in the shorted assets' values, exposing short sellers to increased and theoretically limitless losses because the short sellers must at some point buy back the stocks to return them to their lenders. (*See id.* ¶¶ 8, 12, 163).[12]

Around 5:00 p.m. on January 27, 2021, the SEC released a statement indicating it was "aware of and actively monitoring the on-going market volatility in the options and equities markets," but neither the SEC **[*31]** nor any other government agency issued any directive to restrict trading in the Relevant Securities. (*Id.* ¶ 200 (quotation marks omitted)).

Events of January 28, 2021. Analytics reveal a significant volume of GameStop short position transactions during after-hours trading immediately before the markets opened on January 28, 2021. (*See id.* ¶ 212). Because retail brokers do not allow individual investors to engage in after-hours trading to the same extent as institutional investors, it is likely that this increase in short volume was the result of institutional investors, like Citadel Securities, taking new short positions. (*See id.* ¶ 213). Additionally, failure to delivers ("FTDs") rose dramatically in the period leading up to January 28, 2021, a phenomenon consistent with increasing short interest by market makers like Citadel Securities.[13] (*See id.* ¶ 218).

This increase in short positions was counterintuitive, considering chatter in various financial discussion forums indicated high excitement and motivation on the part of Retail Investors to continue investing in the Relevant Securities. (*See id.* ¶ 228). Many Retail Investors had announced plans to increase long positions **[*32]** in the Relevant Securities on January 28, 2021. (*See id.*).

Around 1:00 a.m. EST on January 28, 2021, Robinhood informed its users that in "light of unprecedented volatility surrounding [GameStop] and AMC [stock], and in an effort to help reduce risk, all [GameStop] and AMC options with expirations of January 29[], 2021 [would] be set to closing transactions only." (*Id.* ¶ 229 (alterations added)). Customers would be able to close out their positions in GameStop and AMC but could not make new investments. (*See id.*).

At 5:11 a.m. EST, Robinhood received an email from the NSCC titled "NSCC Daily Margin Statement" indicating that Robinhood had a collateral requirement deficit of over $3 billion. (*Id.* ¶ 231). At 8:00 a.m. EST, Gretchen Howard, Robinhood's COO, messaged internally that Robinhood had a "major liquidity issue" and it was moving the Relevant Securities to Position Close Only ("PCO"), *i.e.*, Robinhood users could sell the Relevant Securities but

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[12] Another phenomenon known as a "Gamma squeeze" occurred as the prices of the Relevant Securities increased. (*See* CCAC ¶¶ 162, 164). Options are priced based on a variety of risk variables, including one called "Gamma," which increases as the option nears its expiration date or as the option approaches its strike price (*i.e.* "being in the money"). (*See id.* ¶¶ 170, 172-74, 177). When a security experiences a sharp price increase, the Gamma increases; stated differently, options that were previously unlikely to reach their strike prices before expiration become more likely to. (*See id.* ¶ 176-78). As the Gamma increases, market makers hedge by purchasing more of the underlying security, which further drives the price of the security higher and creates a feedback loop as even deeper out of the money options approach their strike price. (*See id.* ¶ 178).

[13] An FTD occurs when one party in a trading contract, such as in a short transaction, does not deliver on its obligations. (*See* CCAC ¶ 214). FTDs are indicative of naked short selling, which occurs when a short seller does not actually possess the security it is supposed to borrow. (*See id.* ¶ 215). This practice is largely inaccessible to individual investors but accessible to market makers. (*See id.* ¶ 217).

could not buy them. (*Id.* ¶ 233 (quotation marks omitted)). Shortly thereafter, in an internal Robinhood message, a manager asked David Dusseault, Robinhood Financial's President and COO, whether Robinhood made AMC and GameStop stocks PCO, **[*33]** to which Dusseault responded: "[Robinhood Securities] received a very large call — confidentially, all firms on street Jim is saying [sic] are doing [the] same thing[.]" (*Id.* ¶ 244 (alterations added; quotation marks omitted)).

Robinhood moved the Relevant Securities to PCO by the time the markets opened on January 28, 2021. (*See id.* ¶¶ 232-34). Robinhood users were no longer able to purchase the Relevant Securities — the "buy" button was deactivated as a feature, leaving users with no option but to sell or hold their securities. (*See id.* ¶¶ 235-36). On Robinhood's web platform and mobile app, users were blocked from searching for the Relevant Securities' ticker symbols. (*See id.* ¶ 239). Robinhood also canceled overnight purchase orders of the Relevant Securities placed on January 27, 2021 and queued to move forward when the markets opened on January 28, 2021. (*See id.* ¶ 237).

Customers were not given advance notice of the restriction of the Relevant Securities to PCO. (*See id.* ¶ 234). Robinhood announced the news on January 28, 2021 by tweeting that it was restricting the Relevant Securities to PCO due to market volatility. (*See id.* ¶¶ 248, 251-53).

The other Brokerage Defendants similarly **[*34]** prevented the Retail Investors from opening new positions in one or more of the Relevant Securities on January 28, 2021. (*See id.* ¶ 246). Around 9:05 a.m. on January 28, 2021, Interactive Brokers announced that it placed AMC, BB, EXPR, GME, and KOSS option trading into liquidation due to the "extraordinary volatility" in the markets. (*Id.* ¶ 249). E*Trade halted GME and AMC, citing "extraordinary volumes" as the reason. (*Id.* ¶ 250 (quotation marks omitted)).

While not all brokerages restricted the purchase of the Relevant Securities, the Introducing Brokerages restricted trading because the Clearing Defendants raised fees to purchase the Relevant Securities or otherwise instructed the brokerages not to consummate purchase orders. (*See id.* ¶¶ 270-71, 273, 278). For instance, Anthony Denier, Webull Financial's CEO, blamed Webull's clearing firm, Apex, for its restrictions on trading in the Relevant Securities placed on January 28, 2021. (*See id.* ¶ 274). Apex informed Denier that Webull needed to shut off the ability to open new positions in certain stocks after Apex learned that the DTCC was increasing the collateral needed to settle trades for the Relevant Securities. (*See id.*). Several **[*35]** other Introducing Brokerages also reported that Apex instructed them to halt all opening transactions of GameStop, AMC, and Koss on their platforms, while ETC prohibited Alpaca from allowing its users to purchase the Relevant Securities. (*See id.* ¶¶ 275-77). Apex cited increasing collateral requirements for the restrictions it imposed on trading, including through the Introducing Brokerages. (*See id.* ¶ 479).

Altogether, numerous brokerages blocked the Retail Investors from purchasing the Relevant Securities. (*See id.* ¶¶ 254, 269). Some restricted the Retail Investors from buying or opening new long positions in securities altogether, whereas others restricted purchasing options only. (*See id.* ¶ 269).

This broad prohibition on buying the Relevant Securities led to a massive sell-off, which in turn resulted in a steep decline in the prices of the Relevant Securities. (*See id.* ¶ 255). For example, on January 28, 2021, GameStop shares reached an intraday peak of $483.00 before dropping down to a closing price of $193.60 — a 44.29% drop from the closing price of $347.51 the day before. (*See id.* ¶ 256). Similarly, AMC shares dropped 56.63%, EXPR shares fell 50.79%, and BBBY shares declined **[*36]** 36.40%. (*See id.*). The Retail Investors who wanted to take advantage of the price drops to buy more shares of the Relevant Securities were unable to do so due to the prohibition on purchasing. (*See id.*).

While individual investors were prohibited from purchasing the Relevant Securities, institutional investors were not. (*See id.* ¶ 267). Large investment firms were able to purchase the Relevant Securities at artificially reduced prices because they had access to private stock exchanges known as "dark pools."[14] (*See id.*). Citadel Securities and

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[14] Private stock exchanges are known colloquially as "dark pools" or "dark exchanges" because they do not disseminate public quotations of securities prices. (*See* CCAC ¶¶ 151-54). Through these private exchanges, institutional investors can discreetly

other firms with short positions bought the Relevant Securities at artificially reduced prices to close out their positions by returning the borrowed securities they had sold short. (*See id.* ¶¶ 267-68).

Events after January 28, 2021. As the market opened on January 29, 2021, nearly all the Brokerage Defendants had lifted their trading restrictions and permitted individual investors to open new long positions in the Relevant Securities; even so, the Brokerage Defendants continued to heavily restrict such purchases. (*See id.* ¶¶ 319, 321). Robinhood, for example, placed limitations on the number of new positions its users could open in the **[*37]** Relevant Securities, including by limiting purchases of GameStop stock to two shares. (*See id.* ¶¶ 323-24). The next day, January 30, as the Relevant Securities began to regain their value, Robinhood instituted a one share limit on certain Relevant Securities, including GME and AMC. (*See id.* ¶ 325). Robinhood maintained trading limitations on certain securities through February 4, 2021. (*See id.* ¶ 336). Restrictions like these continued to suppress the value of the Relevant Securities and pressured investors to sell these stocks. (*See id.* ¶¶ 321, 325, 331).

On January 31, 2021, Vlad Tenev, Robinhood's CEO, explained in an opinion piece published in USA TODAY that Robinhood maintained trading restrictions because clearinghouse-mandated deposit requirements were "increased ten-fold." (*Id.* ¶ 338 (quotation marks omitted)). Robinhood had announced two days earlier that it raised more than $1 billion to help meet rising demands for cash and shore up its balance sheet. (*See id.* ¶ 336). This money raised was on top of $500 million Robinhood accessed through credit lines to ensure it had the capital required to allow its clients to trade the Relevant Securities. (*See id.*). On February 1, 2021, **[*38]** Robinhood announced it raised an additional $2.4 billion in funding above the $1 billion it had already raised. (*See id.*). Weeks later, while testifying before the U.S. House Committee on Financial Services, Tenev testified that Robinhood met its revised deposit requirements a little after 9:00 a.m. on January 28, 2021. (*See id.* ¶ 340).

Apex also initially cited increased collateral requirements as the reason for the restrictions it imposed on trading, including through other Brokerage Defendants. (*See id.* ¶ 479). Later, on February 9, 2021, Apex sent a letter to the New Jersey Office of the Attorney General, stating that it imposed the restrictions due "to the potential future collateral requirement that NSCC appeared it may impose on Apex[.]" (*Id.* ¶ 480 (alteration added)). Tricia Rothschild, Apex's president, explained in an interview with Financial Planning on March 4, 2021, that Apex had "headroom in terms of the capital available" and "lines of credit that" it could call on, but still restricted trading on January 28, 2021 "due to anomalous information." (*Id.* ¶ 481 (quotation marks omitted); *see id.* ¶ 341).

In the period following January 28, 2021, the SEC continued to closely **[*39]** monitor the price volatility of the Relevant Securities. (*See id.* ¶ 337). On February 1, 2021, then acting SEC Chair Allison Herren Lee stated that the SEC would "closely review actions taken by regulated entities that may disadvantage investors or otherwise unduly inhibit their ability to trade certain securities." (*Id.* (quotation marks omitted)). She also specified that the SEC was investigating the role that short selling may have played in the recent events. (*See id.*).

Publicly available data reveals short interests in the Relevant Securities generally climbed leading up to January 28, 2021 (*see id.* ¶¶ 346-47, 361), and then decreased because of the trading restrictions imposed during the Class Period, with the sharpest and most significant decreases occurring after the restrictions imposed on January 28, 2021 (*see id.* ¶¶ 342-49). FINRA data shows significant increases in dark pool trading activity for each of the Relevant Securities on and around January 28, 2021, during the period when restrictions were first placed on the Relevant Securities. (*See id.* ¶¶ 350-56). Given that the Retail Investors are generally not able to trade in dark pools and dark exchanges, this trading activity **[*40]** indicates high institutional investor trading activity consistent with the exiting of short positions. (*See id.* ¶ 357).

More specifically, given the scale of Citadel Securities' business, the FINRA data indicates that the bulk of the trading activity can be attributed to Citadel Securities. (*See id.* ¶¶ 358-61). Because Citadel Securities accounts for about 50% of dark trading activity, a large shift in the percentage of sales represented by short trades is likely to be caused by a shift in Citadel Securities' position from long to short or vice versa. (*See id.* ¶ 360).

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buy or sell securities in large blocks, mitigating some of the price impacts that their buying or selling activity would otherwise have on a "lit," or public, national securities exchange. (*See id.* ¶ 154).

Collusion among Defendants. The CCAC alleges "Defendants were aware that they were acting in concert to collude and manipulate the market." (*Id.* ¶ 279).

Motive to collude. According to the CCAC, "Defendants shared a common motive to conspire — to prevent themselves, and their peers, from hemorrhaging losses totaling potentially billions of dollars." (*Id.* ¶ 406).

Citadel Securities possessed significant short positions in the Relevant Securities during the period in question. (*See id.*). As the prices of the Relevant Securities surged to unprecedented levels, Citadel Securities was exposed to potentially infinite losses. (***[*41]*** *See id.* ¶¶ 14, 406). As of December 31, 2020, Citadel Securities reported $57.5 billion in "securities sold, not yet purchased, at fair value" — which the CCAC asserts are "likely representative of Citadel Securities's short position." (*Id.* ¶ 407 (quotation marks omitted)).

Each of the Brokerage Defendants and Clearing Defendants earns revenue from payment for order flow sold to market makers. (*See id.* ¶¶ 412, 416-18). Robinhood, for example, earns somewhere between 60% and 70% of its revenue by selling its order flow — the primary purchaser of which is Citadel Securities. (*See id.* ¶ 417). As for the other Brokerage Defendants and the Clearing Defendants, Citadel Securities is either the largest or one of the largest payors for order flow. (*See id.* ¶ 418).

Communications among Defendants. In the lead up to, during, and after January 28, 2021, high-level executives of Citadel Securities were able to communicate with brokerages, including Robinhood, due to pre-existing relationships among them. (*See id.* ¶ 296).

On January 20, 2021, Citadel Securities' Head of Execution Services extended an unknown proposition to Josh Drobnyk, Robinhood's Vice President of Corporate Relations and Communications, **[*42]** who conferred with Daniel Gallagher and Lucas Moskowitz, Robinhood's Chief Legal Officer and Deputy General Counsel, respectively. (*See id.* ¶¶ 297-98). The Citadel Securities executive and Drobnyk had a prior relationship through Drobnyk's employment at FINRA. (*See id.* ¶ 297). On January 25, 2021, Drobnyk responded via email "[w]e are on board" and that Moskowitz would be the central point of contact for Robinhood. (*Id.* ¶ 300 (quotation marks omitted)). The Citadel Securities executive responded to Moskowitz with an offer to chat, emphasizing the "strong relationship between the firms[.]" (*Id.* ¶ 302 (alteration added)). The details of the ensuing January 26, 2021 phone call have not been disclosed. (*See id.* ¶¶ 302-03).

On January 27, 2021, the day before the trading restrictions were implemented, Citadel Securities and Robinhood high-level employees exchanged several communications. (*See id.* ¶ 304). In an internal conversation around 4:40 p.m., Howard informed Tenev that she, along with Gallagher and Jim Swartwout, President and CEO of Robinhood Securities, would be joining "a call with Citadel" at 5:00 p.m. that day. (*Id.* ¶ 307; *see id.* ¶ 305). Howard indicated she believed Citadel **[*43]** Securities would make demands on limiting payment for order flow. (*See id.* ¶¶ 305, 307). Tenev responded that "[m]aybe this would be a good time for me to chat with Ken [G]riffin" and told Howard, "[y]ou guys can mention that[.]" (*Id.* ¶ 307 (quotation marks omitted; alterations added)). Tenev noted that he had never met Griffin, the CEO of Citadel Securities, before. (*See id.*).

Shortly thereafter, around 6:25 p.m., Robinhood's Senior Director of Clearing Operations informed Swartwout in an internal chat that there is "[a]necdotal evidence that several 'very large' firms are having really bad nights too." (*Id.* ¶ 308 (quotation marks omitted)). Swartwout replied, "everyone is. [Y]ou wouldnt [sic] believe the conv[ersation] we had with Citadel. [T]otal mess[.]" (*Id.* (alterations added)). At 8:16 p.m., Swartwout updated a Citadel Securities employee that he was "[s]till looking for the new Citadel numbers." (*Id.* ¶ 310 (alteration added)). The Citadel Securities employee responded, "[f]irming up right now in light of the follow up conversation between Gallagher and [redacted.]" (*Id.* (alterations added)).

At 8:29 p.m. that evening, the Citadel Securities Vice President of Business Development **[*44]** notified Swartwout that one of its executives, who Tenev had met before, was available to speak to Tenev that night. (*See id.* ¶¶ 311, 313). Swartwout replied, "[b]ecause of our partnership, Vlad would like to have a discussion with Ken [Griffin] at some point, just given our relationship. Not specific to this crazy issue[.]" (*Id.* ¶ 313 (alterations added); *see id.* ¶ 312). Swartwout emailed in the same chain later that night that he was "beyond disappointed in how this went down[,]" and that it is "difficult to have a partnership when these kind[s] of things go down this way." (*Id.* ¶ 313 (alterations added)).

On the morning of January 28, 2021, Robinhood Securities executives participated in "a very large call — confidentially." (*Id.* ¶ 244 (quotation marks omitted)). Swartwout told Dusseault that "all firms on street . . . are doing [the] same thing[.]" (*Id.* (alterations added)). Later that day, employees of Citadel Securities communicated with high-level employees of E*Trade to ensure certain orders were cancelled. (*See id.* ¶¶ 315-16).

Plaintiffs allege two specific communications among Defendants in the days following January 28, 2021. (*See id.* ¶¶ 327-35). First, on January 29, 2021, **[*45]** Apex notified Robinhood about a post on WallStreetBets indicating that the Retail Investors found a loophole allowing them to purchase shares of the Relevant Securities above Robinhood's imposed limitations. (*See id.* ¶ 330). This assistance came even though Apex had already lifted its restrictions and did not have an economic relationship with Robinhood at the time. (*See id.* ¶¶ 457-58).

Second, on January 30, 2021, a Citadel Securities executive sent an email to Drobnyk, stating he "wanted to generally coordinate messaging[.]" (*Id.* ¶ 335 (alteration added); *see id.* ¶ 333). The Citadel Securities executive also introduced Drobnyk to someone who was "running point on this narrative for [them]" and copied company lawyers "as an FYI and for privilege." (*Id.* ¶ 335 (alteration added); *see id.* ¶ 333).

Actions against unilateral self-interest. The Brokerage Defendants and Clearing Defendants sell order flow. (*See id.* ¶ 427). Firms that sell order flow, like Robinhood, benefit the more investors transact on their platforms. (*See id.* ¶¶ 420, 423, 425). Because these entities earn order flow revenue — which is generated by volume — restricting trading is an action against their unilateral self-interest. **[*46]** (*See id.* ¶¶ 420, 426).

Likewise, Citadel Securities, who pays for order flow and earns revenue through spreads, benefits from a large volume of transactions. (*See id.* ¶ 428). If any entity that sells it order flow restricts trade, Citadel Securities will lose revenue from the reduced volume of orders and the number of spreads it can pocket. (*See id.*).

In addition to lost order flow revenue, when Apex restricted trading in the Relevant Securities, it was unable to generate revenue from users purchasing the shares and from using those shares as stock loans to generate even further revenue. (*See id.* ¶ 422).

Opportunities to coordinate and collude. Along with the referenced communications between some of the Defendants, the CCAC states certain features of the financial services industry potentially afford Defendants opportunities to coordinate and collude. (*See id.* ¶¶ 442-58). The industry is close-knit and built on preexisting relationships; and it is replete with specialized jargon, terms of art, and specialized terminology, providing those in the industry a common language. (*See id.* ¶ 445). Further, individuals within the industry frequently move from one market participant to another **[*47]** or invest financial resources in other market participants. (*See id.* ¶ 446).

Evidence of concealment and pretext. Plaintiffs allege that many of the communications between certain Defendants were verbal or telephonic to avoid detection. (*See id.* ¶ 460).

In addition, Plaintiffs claim that both Robinhood and Apex provided "changing and conflicting explanations for the trading restrictions." (*Id.* ¶ 465; *see id.* ¶ 478). On January 28, 2021, Robinhood explained that it restricted trading due to market volatility. (*See id.* ¶ 466). Tenev also told the media that the shutdowns were unrelated to Robinhood's liquidity and Robinhood did not have a liquidity problem. (*See id.* ¶ 467). Later, Robinhood blamed the trading restrictions on being unable to meet the deposit requirements imposed by clearinghouses. (*See id.* ¶ 468).

More specifically, when Tenev testified before the House Financial Services Subcommittee, he explained that the trading restrictions were put in place to meet regulatory deposit requirements imposed by the DTCC affiliate, the NSCC. (*See id.* ¶ 469). Michael Bodson, the President of the DTCC, testified to the House Financial Services Subcommittee that the decision to restrict trading **[*48]** was internal to Robinhood and the DTCC and NSCC did not have discussions about restricting securities. (*See id.* ¶ 472). Further, Plaintiffs assert that Robinhood Securities would have at all times known how much collateral the DTCC may ask it to post to cover customer trades. (*See id.* ¶¶ 470-71).

As for Apex's conflicting explanation, on January 28, 2021, Apex cited increasing collateral requirements for the restrictions it imposed on trading, including through the Introducing Brokerages. (*See id.* ¶ 479). On March 4, 2021, however, Rothschild stated that Apex restricted trading "due to anomalous information" and that "it was not a similar situation to Robinhood." (*Id.* ¶ 481 (quotation marks omitted)).

Government Investigations. Several governmental entities have investigated the trading restrictions imposed on January 28, 2021. (*See id.* ¶¶ 486-93). The Congressional House Financial Services Committee issued subpoenas and held three highly publicized hearings regarding the restrictions, and the Senate Banking Committee also held hearings on the topic. (*See id.* ¶¶ 487-88). The fraud division of the Department of Justice and the San Francisco U.S. Attorney's office have also sought information **[*49]** about the restrictions from brokers and social media companies. (*See id.* ¶¶ 489, 492). And according to GameStop's 10-Q report dated June 9, 2021, the SEC is investigating the trading restrictions imposed on January 28, 2021. (*See id.* ¶ 490).

Robinhood's Focus Report filed with the SEC on February 26, 2021 confirms many of these investigations and reveals that Robinhood received inquiries related to the trading restrictions from the U.S. Attorney's Office of the Northern District of California, the SEC's Division of Examinations, FINRA, the New York Attorney General's Office, the offices of other states' Attorneys General, and Congress. (*See id.* ¶ 491). On June 30, 2021, FINRA announced that Robinhood was ordered to pay a record financial penalty of $70 million for "systemic supervisory failures and significant harm suffered by millions of customers." (*Id.* ¶ 493 (quotation marks omitted)).

Structure and characteristics of the market. According to the CCAC, the "structure and characteristics of the market for securities, and in particular the lack of disclosure of short interest positions at any given time, make it conducive to collusion and anticompetitive conduct." (*Id.* ¶ 362).

High ***[*50]*** *barriers to entry*. An entrant to the financial services industry seeking to become a broker-dealer or a clearing firm would need specialized knowledge, several licenses, and memberships, including memberships in organizations such as FINRA. (*See id.* ¶ 365). In addition to licensure costs, compliance costs to adhere to industry and regulatory standards are significant. (*See id.*). Entrants would also need significant amounts of cash or capital to deposit at clearinghouses such as the DTCC as collateral. (*See id.* ¶ 366). And entrants would need to have the necessary technological infrastructure and expertise to navigate the digital market. (*See id.* ¶ 367).

High fixed costs and low variable costs. The markets for broker-dealers, clearing firms, and market makers are defined by high fixed costs and low variable costs. (*See id.* ¶ 368). These market participants benefit greatly from scale, particularly with regard to online broker-dealers and clearing firms. (*See id.*). Online broker-dealers, for example, require significant IT infrastructure, software, and data security infrastructure to develop and maintain the applications through which investors trade. (*See id.* ¶ 369). Clearing firms require **[*51]** similar infrastructures and software to facilitate the digital clearing and custodial services they provide to online broker-dealers. (*See id.* ¶ 370). Market makers — in particular, high frequency trading market makers — must invest significant effort and resources to increase the speed of trading technology to maximize their profits. (*See id.* ¶¶ 371-72).

Commoditization. The Relevant Securities are homogenous products: one share in a Relevant Security is identical to another share in that security and thus can be substituted for another. (*See id.* ¶ 374). Competition in trading the Relevant Securities is purely based on price, which is determined by current market conditions. (*See id.*). The determinant of price is the relative supply and demand in investors who want to buy or sell shares in the Relevant Security, and price at one point in time is identical globally. (*See id.* ¶¶ 375-76).

Captive market. In the short run, an investor in the securities market is generally locked into the broker-dealers it already invests with. (*See id.* ¶ 379). The process to open a trading account with a broker-dealer may take several days. (*See id.* ¶ 380). If coordinated trading restrictions occur in a **[*52]** short time window, investors do not have the opportunity to switch or change broker-dealers. (*See id.* ¶ 381). Even investors with multiple trading accounts may be without a short-term trading option if multiple broker-dealers restrict trading at the same time. (*See id.* ¶ 385).

Opaque market. While financial markets are generally regulated, important aspects of these are opaque. (*See id.* ¶ 386). Specifically, it is generally impossible to know who owns a short interest at any given time despite the prevailing regulatory regime. (*See id.* ¶¶ 387, 399). While an investor may voluntarily disclose its short positions, this does not occur often. (*See id.* ¶¶ 388, 399).

To provide transparency to investors and the public, the SEC requires investment managers who have at least $100 million in assets under management to file a Form 13F up to 45 days after the end of every quarter. (*See id.* ¶¶ 389, 394). Disclosures in Form 13F filings, however, are limited: investors must only report long positions, put options, and call options, but not short positions; and 13F filings do not require the reporting of when a particular position was purchased, or in the case of put or call options, the strike price **[*53]** or expiry date. (*See id.* ¶¶ 391, 394-95).

FINRA also requires member firms to report short interest positions in all equity securities twice a month, typically on the 15th and the last day of each month. (*See id.* ¶ 396). Even though FINRA publishes short interest reports publicly, it takes several days before the information is published — the number of shares sold short in the market may have changed dramatically in that time. (*See id.* ¶ 397).

Although it is not possible to detect which specific investors are in large exposed short positions, the companies issuing securities can and sometimes do confirm if their stock has been significantly shorted or subject to a short squeeze. (*See id.* ¶ 400). For example, GameStop disclosed in its Form 10-K filed on March 23, 2021 that a large proportion of its stock had been sold short and that it experienced a short squeeze. (*See id.* ¶ 401).

The CCAC and Defendants' Motion. The CCAC alleges a violation of *section 1 of the Sherman Act, 15 U.S.C. § 1*, against all Defendants. (*See* CCAC ¶¶ 494-507). Plaintiffs' overarching theory is that "Citadel Securities conspired with the Brokerage Defendants and the Clearing Defendants to prevent retail investors from purchasing shares of the **[*54]** Relevant Securities to artificially suppress share prices so that Citadel Securities could cover its short positions and mitigate its potential losses." (Resp. 11).

Defendants move to dismiss the CCAC. (*See generally* Mot.). They argue: (1) Plaintiffs fail to sufficiently plead that Defendants agreed to conspire; (2) Plaintiffs fail to plead the remaining elements of a *Sherman Act section 1* claim; and (3) Plaintiffs' antitrust theory is precluded by federal securities laws. (*See generally* Mot.; Reply).

II. LEGAL STANDARD

"To survive a motion to dismiss [under *Federal Rule of Civil Procedure 12(b)(6)*], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (alteration added; quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). Although this pleading standard "does not require 'detailed factual allegations,' . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (alteration added; quoting *Twombly, 550 U.S. at 555*). Pleadings must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (citation omitted). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal, 556 U.S. at 679* (alteration added; citing *Twombly, 550 U.S. at 556*).

To meet this **[*55]** "plausibility standard," a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id. at 678* (alteration added; citing *Twombly, 550 U.S. at 556*). "The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss." *Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1261 (11th Cir. 2009)* (citation omitted), *abrogated on other grounds by Mohamad v. Palestinian Auth., 566 U.S. 449, 132 S. Ct. 1702, 182 L. Ed. 2d 720 (2012)*. When considering a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and take the factual allegations as true. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir. 1997)* (citing *SEC v. ESM Grp., Inc., 835 F.2d 270, 272 (11th Cir. 1988)*).

III. ANALYSIS

As stated, Plaintiffs assert one claim under section 1 of the Sherman Act, *15 U.S.C. § 1*. (*See* CCAC ¶¶ 494-507).

Section 1 of the Sherman Act provides "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1* (alterations added). "Despite the different terminology, there is no magic unique to each term in *[section] 1*; the terms 'contract,' 'combination,' and 'conspiracy' are used interchangeably to capture the concept of concerted action, that is an 'agreement.'" *Am. Contractors Supply, LLC v. HD Supply Constr. Supply, Ltd., 989 F.3d 1224, 1233 (11th Cir. 2021)* (alteration added; some quotation marks and citation omitted).

"The purpose of the *Sherman Act* is to protect consumers from injury that results **[*56]** from diminished competition." *Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 334-35 (7th Cir. 2012)* (citation omitted). "[T]he Supreme Court has long concluded that Congress intended only to prohibit 'unreasonable' restraints on trade." *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co., 917 F.3d 1249, 1260 (11th Cir. 2019)* (alteration added; citation omitted). Thus, *section 1* "prohibits (1) conspiracies that (2) unreasonably (3) restrain interstate or foreign trade." *Id.* (citation omitted).

In their Motion, Defendants start by attacking the sufficiency of the allegations directed at the first requirement — that Plaintiffs plead a conspiracy among Defendants. (*See* Mot. 22-35). Defendants next dispute whether Plaintiffs adequately plead that the alleged agreement among Defendants unreasonably restrained trade. (*See id.* 35-40). Lastly, Defendants assert that Plaintiffs' antitrust theory is precluded by federal securities laws. (*See id.* 41-46). Because Plaintiffs fail to plead a conspiracy, the Court declines to reach the second and third suggested grounds for dismissal.

Conspiracy. "The first inquiry[] in any *section 1* claim . . . is to locate the agreement that restrains trade." *Tidmore Oil Co., Inc. v. BP Oil Co./Gulp Prods. Div., a Div. of BP Oil Co., 932 F.2d 1384, 1388 (11th Cir. 1994)* (alterations added). Adequately stating a *section 1* claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Twombly, 550 U.S. at 556*. The "crucial question" **[*57]** with regard to a conspiracy claim under *section 1* "is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express[.]" *Id. at 553* (alteration added; other alteration adopted; quotation marks and citation omitted). To allege an antitrust conspiracy, the plaintiff "should present direct or circumstantial evidence that reasonably tends to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* (alteration added; quotation marks and citations omitted).

Plaintiffs contend they have plausibly alleged facts, both direct and circumstantial, that "Citadel Securities conspired with the Brokerage Defendants and the Clearing Defendants to prevent retail investors from purchasing shares of the Relevant Securities to artificially suppress share prices so that Citadel Securities could cover its short positions and mitigate its potential losses." (Resp. 11; *see id.* 12-29). The Court examines these allegations that purport to support the existence of a conspiracy directly or circumstantially.

Allegations of direct evidence of an agreement. "[I]t is only in rare cases that a plaintiff can establish **[*58]** the existence of a conspiracy by showing an explicit agreement; most conspiracies are inferred from the behavior of the alleged conspirators." *Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1573-74 (11th Cir. 1991)* (alteration added; citation omitted). According to Plaintiffs, "[t]his is one of those rare cases" that involves "direct evidence of [an] unlawful agreement." (Resp. 14 (alterations added)). The Court disagrees.

"Direct evidence of an agreement is explicit and requires no inferences to establish the proposition or conclusion being asserted." *In re Loc. TV Advert. Antitrust Litig., No. 18 C 6785, 2020 U.S. Dist. LEXIS 208215, 2020 WL 6557665, at *7 (N.D. Ill. Nov. 6, 2020)* (quotation marks and citations omitted); *see also* *Mayor & City Council of Balt. v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013)* ("[A] plaintiff may . . . assert direct evidence that the defendants entered into an agreement in violation of the antitrust laws. . . . Such evidence would consist, for example, of a recorded phone call in which two competitors agreed to fix prices at a certain level." (alterations added; citation omitted)). The CCAC contains several allegations that Plaintiffs claim constitute direct evidence. Upon further examination, each allegation requires an inference to establish that an unlawful agreement was entered into between Defendants and therefore cannot be direct evidence.

To begin, Plaintiffs allege that "high-level executives of Citadel Securities regularly **[*59]** communicated with and coordinated with high-level executives of Robinhood and others in the lead up to, during and after the restrictions imposed on or around January 28, 2021." (CCAC ¶ 296; *see also* Resp. 14). Yet, by Plaintiffs' own admission, "[t]he written communications appear deliberately vague and do not describe the contents of what was agreed to in the communications." (Resp. 14 n.6 (alteration added)). Indeed, the alleged communications between Citadel Securities and Robinhood merely show that high-level executives at both firms agreed to "chat" and "work[] together." (CCAC ¶¶ 299, 302 (alteration added); *see id.* ¶¶ 297-307, 452-53). The CCAC does not detail any subsequent discussions because "these communications have not been disclosed[.]" (*Id.* ¶ 303 (alteration added)). These unknown discussions have no relevance at all unless one *infers* that Citadel Securities requested that Robinhood restrict trading in the Relevant Securities and Robinhood agreed.[15]

Similarly, Plaintiffs claim that "on January 28, 2021, high level employees of [] E*Trade communicated with employees of Citadel Securities to ensure certain orders were cancelled." (CCAC ¶ 315 (alteration added); *see also* ***[*60]*** Resp. 14). As support, the CCAC contains a screenshot of a January 28, 2021 email between the Senior Manager for Trading Operations for E*Trade and a Citadel Securities employee titled, "RE: Potential open orders[.]" (CCAC ¶ 316 (alteration added)). The E*Trade executive lists a number of securities and asks: "[c]an you confirm you're out on these?" (*Id.* (alteration added)). The Citadel Securities employee responds, "[c]anceled[.]" (*Id.* (alterations added).

As described by Defendants, this appears to be "no more than a routine daily trading account reconciliation email canceling ten trade orders, and Plaintiffs fail to allege that the email even pertains to the Relevant Securities." (Reply 9). To conclude this email evidences an unlawful agreement to restrain trade requires an exercise in incredible leaping logic in which the Court declines to engage.

Plaintiffs also assert that Apex "instructed" several Introducing Brokerages "to halt all opening transactions of GameStop, AMC and Koss on their platforms" (CCAC ¶ 276; *see id.* ¶¶ 274-75), which purportedly is direct evidence of an unlawful agreement to restrain trade (*see* Resp. 14). The only specific details provided in the CCAC about **[*61]** these instructions are: (1) the CEO of Webull explained that the brokerage restricted trading in the Relevant Securities on January 28, 2021 because "the collateral required by Apex for GameStop increased by 100% and Apex had informed him that Webull needed to shut off the ability to open new positions in certain stocks[,]" and "Apex was instructed by the DTCC that it was increasing the collateral needed to settle trades for the Relevant Securities" (CCAC ¶ 274 (alteration added)); (2) SoFi informed users that its clearing partner, Apex, "ha[d] prevented purchases in GME" (*id.* ¶ 275 (alteration added)); (3) Dough LLC tweeted, "our clearing has notified us that we must set GME, AMC, and KOSS to closing only. We will comply." (*id.* ¶ 276 (alteration adopted; quotation marks omitted)); and (4) Public.com tweeted, "our clearing firm, Apex Holdings, has decided to halt the buying of $KOSS, $GME, and $AMC" (*id.* (alteration adopted; quotation marks omitted)).

According to Plaintiffs, these Introducing Brokerages' statements show an explicit agreement between Apex and the Introducing Brokerages to *unlawfully* restrain trade; curiously an alternative explanation for the trading restrictions is **[*62]** provided by the CEO of Webull himself and appears in the pleading's factual allegations — "the DTCC . . . was increasing the collateral needed to settle trades for the Relevant Securities." (*Id.* ¶ 274 (alteration added)). The CCAC provides further support for this alternative explanation: "on February 9, 2021, in its letter to the

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[15] Plaintiffs find no support in *In re Insurance Brokerage Antitrust Litigation, 618 F.3d 300, 324 n.23 (3d Cir. 2010)*. (*See* Resp. 14). There, the court explained that direct conspiracy includes "document[s] or conversation[s] explicitly manifesting the existence of the agreement in question[.]" *In re Ins. Brokerage Antitrust Litig., 618 F.3d at 324 n.23* (alterations added; citations omitted). As Plaintiffs concede, the alleged conversations between Citadel Securities and Robinhood were "vague and do not describe the contents of what was agreed to in the communications" — in other words, the opposite of explicit. (Resp. 14 n.6).

New Jersey Office of the Attorney General, Apex stated" that "[t]he reason for the temporary trading restrictions [it] imposed regarding purchases of AMC, GME and KOSS relates directly to the potential future collateral requirement that NSCC appeared it may impose on Apex as part of the margin system NSCC maintains to comply with the SEC's standards for covered clearing agencies." (*Id.* ¶ 480 (alterations added)). This explanation makes sense because NSCC clearing members can "monitor their risk in near real-time and estimate clearing fund contribution requirements." (*Id.* ¶ 103). Plaintiffs thus ask the Court to *infer* that the publicly stated explanations recited in the CCAC are untrue.

It is important to remember that Plaintiffs' conspiracy theory is that Citadel Securities influenced the Clearing Defendants and Brokerage Defendants to restrain trading in **[*63]** the Relevant Securities to protect itself from a short squeeze. Therefore, if the Introducing Brokerages' statements are to have any relevance to the alleged conspiracy at all, one must also *infer* that the true reason Apex instructed the Introducing Brokerages to restrict trading was to benefit Apex's business partner, Citadel Securities. These statements clearly cannot constitute direct evidence of an unlawful agreement given the chain of inferences that must be made for them to have relevance.

Plaintiffs proffer several other pieces of purported "direct evidence that Defendants acted in concert": "an internal Robinhood communication . . . discussing that others were doing the same"; "Robinhood['s] deci[sion] to impose purchasing restrictions on the Relevant Securities shortly after the NSCC margin call"; Defendants' "homogenous public statements to explain the events"; and Apex's warning to Robinhood "of efforts by investors to purchase the Restricted Securities even though Apex had no business relationship with Robinhood." (Resp. 14-15 (alterations added; footnote call numbers omitted)). Yet, by Plaintiffs' own admission, these allegations — at the most — "*demonstrate*[] that the **[*64]** coordinated trading restrictions imposed by Defendants were not the result of happenstance or independent decision-making[.]" (*Id.* 15 (emphasis and alterations added; footnote call number omitted)). Put differently, one can only *infer* an unlawful agreement was entered into based on these alleged facts.

Taken together, Plaintiffs fall far short of providing allegations "explicitly manifesting the existence of the agreement in question[.]" *In re Ins. Brokerage Antitrust Litig., 618 F.3d at 324 n.23* (alteration added; citations omitted). Certainly, "the complaint leaves no doubt that [P]laintiffs rest their *[section] 1* claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among [Defendants]." *Twombly, 550 U.S. at 564* (alterations added). "Although in form a few stray statements speak directly of agreement, on fair reading these are merely legal conclusions resting on the prior allegations. . . . The nub of the complaint, then, is [Defendants'] parallel behavior, . . . and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience." *Id. at 564-65* (alterations added; footnote call numbers omitted).

Allegations of circumstantial evidence of an agreement. As an alternative to alleging direct evidence, **[*65]** a plaintiff "may present circumstantial facts supporting the inference that a conspiracy existed." *Gamm v. Sanderson Farms, Inc., 944 F.3d 455, 465 (2d Cir. 2019)* (quotation marks and citation omitted). A conspiracy "may be inferred on the basis of conscious parallelism,[16] when such interdependent conduct is accompanied by circumstantial evidence and plus factors such as defendants' use of facilitating practices." *Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001)* (alteration added; citations omitted). In other words, "[a]llegations of parallel conduct . . . are insufficient standing alone to raise an inference of conspiracy[;]" rather, "a plaintiff must allege sufficient plus factors to make the parallel conduct more probative of conspiracy than of conscious parallelism." *Auto. Alignment & Body Serv., Inc. v. State Farm Mut. Auto. Ins. Co., 953 F.3d 707, 726 (11th Cir. 2020)* (alterations added; quotation marks and citations omitted). Such plus factors "may include: a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Citigroup, Inc., 709 F.3d at 136* (quotation marks, citation, and footnote call number omitted); *see also* *In re Delta/AirTran Baggage Fee Antitrust Litig., 733 F. Supp. 2d 1348, 1360 (N.D.*

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[16] Conscious parallelism is a "process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* (citation omitted).

Ga. 2010) (explaining circumstantial evidence can include "speeches at industry conferences, announcements of future prices, statements on earnings calls, **[*66]** and in other public ways" (collecting cases)).

Parallel conduct. "A plaintiff establishes parallel conduct when it pleads facts indicating that the defendants acted similarly." *SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 427 (4th Cir. 2015)* (quotation marks and citations omitted). "Parallel conduct occurs when competitors act similarly or follow the same course of action — for example, adopting similar policies at or around the same time in response to similar market conditions." *Jones v. Micron Tech. Inc., 400 F. Supp. 3d 897, 915 (N.D. Cal. 2019)* (citations omitted). Examples of parallel conduct allegations that suffice under the *Twombly* standard include "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties[;]" and "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason[.]" *Twombly, 550 U.S. at 556 n.4* (alterations added; quotation marks and citations omitted).

Defendants argue the allegedly parallel conduct was not, in fact, parallel because it "varied in material ways, both before and after the NSCC's collateral calls on January 28, 2021." (Mot. 26). Indeed, "each Defendant put in place restrictions for **[*67]** different stock symbols, for different durations and for varying types of trades." (Reply 11 (footnote call number omitted)). On January 28, 2021, Robinhood set to position-closing only AMC, BB, BBBY, EXPR, GME, KOSS, NOK, TR, and TRVG (*see* CCAC ¶ 252); E*Trade "halted GME and AMC" (*id.* ¶ 250); Interactive Brokers "put AMC, BB, EXPR, GME, and KOSS option trading into liquidation only" (*id.* ¶ 249); and Apex instructed the Introducing Brokerages to "halt all opening transactions of GameStop, AMC and Koss on their platforms" (*id.* ¶ 276). As for ETC, the only allegation regarding its conduct is the general assertion that it "prohibited Alpaca from allowing its users to purchase the Relevant Securities." (*Id.* ¶ 277).

The restrictions among Defendants also varied in duration. For example, Apex lifted restrictions on trading by January 29, 2021 (*see id.* ¶ 327), while Robinhood maintained trading limitations on certain securities through February 4, 2021 (*see id.* ¶ 336). And one firm — Citadel Securities — did not impose any trading restrictions at all. (*See generally* CCAC; *see* Mot. 27).

While the Court disagrees with Plaintiffs' characterization of these restrictions as "virtually identical" **[*68]** (Resp. 17), Plaintiffs have at least alleged Defendants acted "similarly." *SD3, LLC, 801 F.3d at 427* (quotation marks omitted; quoting *Petruzzi's IGA Supermarkets, Inc. v. Darling-Del. Co., Inc., 998 F.2d 1224, 1243 (3d Cir. 1993)*; other citation omitted). The key parallel conduct allegation here is that on January 28, 2021 the Brokerage Defendants and the Clearing Defendants each restricted trading in one or more of the Relevant Securities. (*See, e.g.*, CCAC ¶¶ 14-15). As a result, the prices of the Relevant Securities decreased. (*See id.* ¶ 331). That the Brokerage Defendants and the Clearing Defendants did not restrict trading in the exact same manner or stock is not fatal to Plaintiffs' allegations of parallelism. *See* *Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 191 (2d Cir. 2012)* (disagreeing with the district court's holding that the plaintiff's "conspiracy claim was implausible because [the] defendants had a variety of reactions" and instead finding that "the *key* parallel conduct allegation was that all of the publisher and distributor defendants ceased doing business with [the plaintiff]" (alterations added; quotation marks, emphasis, and citation omitted));[17] *Jones, 400 F. Supp. 3d at 916* ("That these adjustments are not alleged to have occurred simultaneously is immaterial, and the available case law does not suggest any firm temporal limitation on 'parallel.'" (citing *Interstate Cir. v. United States, 306 U.S. 208, 227, 59 S. Ct. 467, 83 L. Ed. 610 (1939)*)).

Further, the fact that Citadel Securities did not itself restrict trading is inconsequential. Plaintiffs allege the Brokerage Defendants and the Clearing Defendants restricted trading to benefit Citadel Securities, who executed

[17] Defendants' reliance on *Anderson News, L.L.C. v. American Media, Inc., 899 F.3d 87 (2d Cir. 2018)*, is inapt. (*See* Mot. 28). There, after initially finding at the motion-to-dismiss stage that the varied responses by the defendants were inconsequential to a finding of parallel conduct, *see* *Anderson News, L.L.C., 680 F.3d at 191*, the Second Circuit held at the summary judgment stage that the defendants' conduct "was not, in fact, parallel" because "*evidence **[*69]** presented at summary judgment* undercut[] th[e] allegation" of parallel conduct. *Anderson News, L.L.C., 899 F.3d at 105* (alterations and emphasis added).

short trades in the Relevant Securities on January 27, 2021, "in anticipation of the Relevant Securities declining in price on January 28, 2021." (CCAC ¶ 13). Plaintiffs contend they have pleaded a "hub-and-spoke conspiracy" wherein Citadel Securities "coordinate[d] [] horizontal agreement[s] to restrict markets or to fix prices." (Resp. 34 (alterations added; citations omitted)). In these scenarios, it is obvious that the "hub" would not necessarily take the same action as the "spoke."

In all, Plaintiffs adequately allege that Defendants engaged in parallel conduct.[18] But because Plaintiffs' parallel conduct allegations are "insufficient standing alone to raise an inference of conspiracy[,]" the Court turns to whether Plaintiffs "allege sufficient plus factors to make the parallel conduct more probative of conspiracy than of conscious parallelism." *Auto. Alignment & Body Serv., 953 F.3d at 726* (alteration added; quotation marks and citations omitted).

Plus Factors. "[A]ny showing **[*70]** by [plaintiffs] that tends to exclude the possibility of independent action can qualify as a plus factor." *Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1301 (11th Cir. 2003)* (alterations added; other alteration adopted; quotation marks and citation omitted); *see also In re Delta/AirTran Baggage Fee Antitrust Litig., 245 F. Supp. 3d 1343, 1371 (N.D. Ga. 2017)* ("There is no finite list of potential plus factors."). The Court examines below each of the plus factors identified by Plaintiffs. (*See* Resp. 18-29).

Common motive to conspire. The CCAC details an intricate plot in which Citadel Securities purchased short positions in the Relevant Securities — even as the Retail Investors' trading activity increased the price of the Relevant Securities to extreme, historic levels — and then "leverage[d] its relationships" with the other Defendants "to halt trading of GameStop and other Relevant Securities and artificially depress their share price[s]." (CCAC ¶ 409 (alterations added)).

As an initial matter, Defendants argue any allegation that Citadel Securities held short positions in the Relevant Securities during the relevant time period is based on "[p]ure speculation[.]" (Mot. 28 (alterations added; quotation marks omitted; citing *United Am. Corp. v. Bitmain, Inc., No. 18-cv-25106, 530 F. Supp. 3d 1241, 2021 U.S. Dist. LEXIS 69525, 2021 WL 1807782, at *13 (S.D. Fla. Mar. 31, 2021)* ("Pure speculation does not make out a plus factor."))). Notably, the CCAC admits "it is not possible to ascertain **[*71]** which investor has a short position in a particular security at any particular time unless the position is voluntarily publicly disclosed by the holder of the short position." (CCAC ¶ 399; *see also id.* ¶ 387). Plaintiffs instead rely on publicly available data.

As detailed in the CCAC, "FINRA data shows notable and significant increases in dark pool trading activity for each of the Relevant Securities on and around January 28, 2021" (*id.* ¶ 353), and short volume reporting shows a significant shift from shares sold long to shares sold short during that time (*see id.* ¶ 361). Given that individual investors generally cannot engage in dark trading (*see id.* ¶ 357), and "Citadel Securities represents about 50% of the dark trading activity [during that time], a large shift in the percentage of sales represented by short trades is highly likely to be caused by a shift in Citadel Securities's position from long to short or vice versa" (*id.* ¶ 360 (alteration added)). Plaintiffs' methodology is appropriate given the circumstances. *See In re Plasma-Derivative Protein Therapies Antitrust Litig., 764 F. Supp. 2d 991, 1002 n.10 (N.D. Ill. 2011)* ("If private plaintiffs, who do not have access to inside information, are to pursue violations of the law, the pleading standard must take into account the fact **[*72]** that a complaint will ordinarily be limited to allegations pieced together from publicly available data."). That Citadel Securities held short interests in the Relevant Securities is a reasonable inference to be drawn in Plaintiffs' favor. *See Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc., 376 F.3d 1065, 1069 n.1 (11th Cir. 2004)*.

Plaintiffs' theory regarding the Brokerage Defendants and Clearing Defendants' motive is more attenuated. According to the CCAC, the Brokerage Defendants and Clearing Defendants agreed to halt trading to benefit Citadel Securities because Citadel Securities "is either the largest or one of the largest payors for order flow for most of them." (CCAC ¶ 418). To illustrate, in 2020, "34% of Robinhood's revenue derived from transactions with

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[18] While the varied restrictions do not preclude a finding of parallel conduct at this stage, they do influence the Court's plausibility analysis.

Citadel Securities" (*id.* ¶ 135); and "Apex sent 23.26% of all 'non-directed' order flow to Citadel Securities in S&P 500 stocks and 13.26% of all 'non-directed' order flow for non-S&P500 stocks to Citadel Securities in January 2021" (*id.* ¶ 140). Plaintiffs conclude that "[t]he preservation of [the] Brokerage and Clearing Defendants' mutually beneficial and highly lucrative payment for order flow relationships alone provides sufficient motive to conspire." (Resp. 20 (alterations added)).

In essence, Plaintiffs **[*73]** ask the Court to infer the Brokerage Defendants and Clearing Defendants had a common motive to illegally restrain trade simply because Citadel Securities is an important business partner of the other Defendants and might have suffered losses as a result of its short positions in the Relevant Securities. Yet, as discussed below, Plaintiffs also maintain that "restrict[ing] trading in the Relevant Securities is against the Brokerage and Clearing Defendants' self-interest" because they earn revenue from each transaction and because the trading restrictions create a risk of "both immediate and long-term reputational harm[.]" (Resp. 20, 22 (alterations added; quotation marks omitted)). As Defendants note, there are no allegations that Citadel Securities threatened or suggested it would cut off business relationships with any other Defendants if they did not impose trading restrictions, and Plaintiffs fail to otherwise explain why each Defendant would not simply use another market maker in such a scenario. (*See* Reply 13). The mere fact that Citadel Securities is an important business partner of the other Defendants does not provide sufficient motive to conspire.

Plaintiffs' proffered motive **[*74]** theory is even less plausible given that the CCAC provides an "obvious alternative explanation" for imposing the trading restrictions provided in the CCAC: increased collateral requirements caused by market volatility. *Iqbal, 556 U.S. at 682* (quotation marks omitted; quoting *Twombly, 550 U.S. at 567*). As clearing entities, each of the Brokerage Defendants and Clearing Defendants is a member of the DTCC and therefore subject to its collateral requirements. (*See* CCAC ¶¶ 110, 116). "The DTCC collateral requirement changes depending on the perceived risk of the order, since if one side of the trade defaults, and the broker cannot cover the loss, DTCC member firms are on the hook for completing the trade." (*Id.* ¶ 413).

As stated in the CCAC, the markets for the Relevant Securities were extremely volatile in the days leading up to January 28, 2021. (*See id.* ¶¶ 200-209). "On the morning of January 28, [the] DTCC demanded that its member clearing agents supply additional collateral to support these trades [in the Relevant Securities]." (*Id.*¶ 414 (alterations added)). For example, "[a]t 5:11 a.m. Eastern Standard Time, Robinhood received an email from NSCC indicating that Robinhood had a deficit of roughly $3 billion dollars." (*Id.* ¶ 231 **[*75]** (alteration added)).

Robinhood and multiple other Defendants cited the extraordinary market volatility and/or collateral requirements as the motivation for their trading restrictions. (*See, e.g., id.* ¶¶ 249-51, 274, 338-40, 479-80). The fact that each Defendant implemented varying trading restrictions gives support to their stated reasons because each Defendant would have its own unique risk tolerance and collateral requirements. And considering the CCAC itself states that firms *not alleged to be part of the conspiracy* also restricted transactions in the Relevant Securities and similarly cited "unprecedented market conditions[,]" the Court finds Plaintiffs' theory regarding motive implausible. (*Id.* ¶ 198 (alteration added); *see id.* ¶ 199).

To recap, Plaintiffs adequately explain Citadel Securities' motive for allegedly orchestrating the trading restrictions imposed by the Brokerage Defendants and Clearing Defendants. But the Court is unconvinced that Plaintiffs have set forth a coherent common motive as to the Brokerage Defendants and Clearing Defendants. This plus factor does not weigh in Plaintiffs' favor.

Actions against unilateral self-interest. "It is firmly established that actions **[*76]** that are contrary to an actor's economic interest constitute a plus factor[.]" *Williamson Oil, 346 F.3d at 1310* (alteration added; citation omitted). Nonetheless, courts "must exercise prudence in labeling a given action as being contrary to the actor's economic interests, lest we be too quick to second-guess well-intentioned business judgments of all kinds." *Id.* (citation omitted). "[E]xtreme action against self-interest . . . may suggest prior agreement — for example, where individual action would be so perilous in the absence of advance agreement that no reasonable firm would make the challenged move without such an agreement." *In re Musical Instruments and Equip. Antitrust Litig., 798 F.3d 1186, 1195 (9th Cir. 2015)* (alterations added); *see also* *City of Tuscaloosa v. Harcros Chems. Inc., 158 F.3d 548, 570 n.33 (11th Cir. 1998)* (citations omitted).

Defendants concede the trading restrictions imposed on January 28, 2021 were against their self-interest because the restrictions (1) "create[d] a real risk of both immediate and long-term reputational and financial harm (including this Action)" and (2) "cost each broker revenue — fewer trades mean fewer payments for order flow (or fewer commissions) for the Clearing and [Brokerage] Defendants, and less spread capture for the Market Makers[.]" (Mot. 30-31 (alterations added); *see* Resp. 21-22).

Nevertheless, the CCAC itself "provides ample **[*77]** independent business reasons" why each of the Brokerage Defendants and Clearing Defendants would have restricted trading without assurances that all other brokerages and clearing firms would restrict trading. *In re Musical Instruments, 798 F.3d at 1195* (finding no action against self-interest at the motion-to-dismiss stage). These Defendants faced historic market volatility and increased NSCC collateral requirements resulting from the volatility. Based on these allegations, Plaintiffs cannot credibly argue that "no reasonable firm" would have restricted trading in such circumstances. *Id.* In fact, the CCAC itself identifies firms *not alleged to be part of the conspiracy* that implemented restrictions on certain transactions involving the Relevant Securities on January 28, 2021. (*See* CCAC ¶¶ 198-99). Plaintiffs fail to make out a plus factor here.

Opportunity to coordinate and collude. Plaintiffs contend Defendants had ample opportunity to conspire because "[t]he financial industry is close-knit and secretive, replete with specialized jargon and terminology[,]" and "[i]ndividuals within the industry frequently move from one company to another and often work closely with competitors." (Resp. 23 (alterations added)). These are generic **[*78]** descriptions of features that many industries share. While it is perhaps necessary to allege some opportunity to conspire to infer a conspiracy, "the mere opportunity to conspire among antitrust defendants does not, standing alone, permit the inference of conspiracy." *Williamson Oil, 346 F.3d at 1319* (quotation marks and citation omitted); *see also* *Twombly, 550 U.S. at 567 n.12*.

Interfirm communications.[19] (*See* Resp. 23). "[E]vidence of a high level of interfirm communications" may constitute a plus factor. *Citigroup, 709 F.3d at 136* (alteration added; footnote call number, quotation marks, and citation omitted). The CCAC alleges several interfirm communications, some of which warrant consideration here, while others do not.

Beginning with those that do not — first, Apex warned Robinhood that the Retail Investors found a loophole around some of the trading restrictions imposed by Robinhood. (*See* CCAC ¶¶ 327-30). The CCAC explains "Apex had lifted restrictions on trading" by January 29, 2021. (*Id.* ¶ 327). While Plaintiffs claim this shows Apex was "policing the conspiracy" (*id.*), they fail to explain how this makes sense considering Apex had already lifted its trading restrictions by then. In any event, helping a competitor prevent fraudulent conduct is not an antitrust violation. **[*79]** *See* *Cement Mfrs.' Protective Ass'n v. United States, 268 U.S. 588, 604, 45 S. Ct. 586, 69 L. Ed. 1104 (1925)*.

Second, the CCAC includes what appears to be a routine email between E*Trade and Citadel Securities (*i.e.*, a brokerage and its market maker) about cancelling a securities order between them. (*See* CCAC ¶¶ 315-16). Plaintiffs do not explain the email's relevance.

Third and finally, several of the Introducing Brokerages reported that Apex "instructed them to halt all opening transactions of GameStop, AMC and Koss on their platforms." (*Id.* ¶ 276; *see id.* ¶¶ 274-75, 443-44). Given that Apex served as these firms' clearing entity and "was instructed by the DTCC that it was increasing the collateral needed to settle trades for the Relevant Securities[,]" these instructions are neither here nor there. (*Id.* ¶ 274 (alteration added); *see id.* ¶¶ 275-76).

Now, the communications that do warrant consideration. Embedded in the CCAC are several vague and ambiguous emails between high-level executives of Robinhood and Citadel Securities and internal Robinhood emails discussing external conversations that, given the timing and overall context, could be inferred to relate to the trading restrictions imposed on January 28, 2021.

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[19] This section addresses Plaintiffs' arguments raised in their Response under both the "ample opportunity to coordinate and collude" and "acts [] inconsistent with unilateral conduct" sections. (Resp. 22-24, 28-29 (alteration added)).

On January 20, 2021, Citadel Securities' Head of Execution Services emailed **[*80]** Josh Drobnyk, Robinhood's Vice President of Corporate Relations and Communications, stating he was happy they "will be working together" and asking Drobnyk to "let [him] know if [they are] interested and who the main contact should be." (*Id.* ¶ 299 (alterations added; quotation marks omitted)). On January 25, 2021, Drobnyk replied "[w]e are on board" and copied Lucas Moskowitz, Robinhood's Deputy General Counsel, who was "going to be [Robinhood's] central point of contact[.]" (*Id.* ¶ 300 (alterations added)). Moskowitz and the Citadel Securities executive then arranged a call for the morning of January 26, 2021 — the details of which are unknown. (*See id.* ¶¶ 302-03). Considering the CCAC admits the details of this agreement or discussion are unknown, these emails are only relevant given their timing.

Around 4:40 p.m. EST on January 27, 2021, Gretchen Howard, Robinhood's COO, messaged Vlad Tenev, Robinhood's CEO, that she, along with Daniel Gallagher and Jim Swartwout, Robinhood's Chief Legal Officer and Robinhood Securities' President and CEO, would be joining "a call with Citadel" at 5 p.m. that day. (*Id.* ¶ 307; *see id.* ¶ 305). Howard told Tenev that she believed Citadel Securities would **[*81]** "make some demands on limiting [payment for order flow] across the board" but that they "won't agree to anything[.]" (*Id.* ¶ 307 (alterations added)). Tenev told Howard that although he had never met Ken Griffin, the CEO of Citadel Securities, she could mention on the call that "this would be a good time for [Tenev] to chat with [] Griffin[.]" (*Id.* (alterations added)). The request from a market maker to limit the order flow sent to it is not equivalent to a demand to restrict trading in certain securities; however, the timing and the involvement of high-level executives render these emails relevant.

Roughly two hours later, Swartwout received an internal message stating there was "[a]necdotal evidence that several 'very large' firms are having really bad nights too"; to which Swartwout replied, "everyone is. [Y]ou wouldnt [sic] believe the conv[ersation] we had with Citadel. [T]otal mess[.]" (*Id.* ¶ 308 (alterations added)). Around 8:30 p.m. that night, Swartwout emailed Citadel Securities' Vice President of Business Development to offer to set up a call that night with Tenev, and mentioned Tenev would like to have a discussion with Griffin at some point, given their relationship, but **[*82]** "[n]ot specific to this crazy issue[.]" (*Id.* ¶ 313 (alterations added); *see id.* ¶¶ 311-12). After the Citadel Securities executive asked Swartwout if Tenev would like to have the call that night, Swartout declined and said: "[j]ust looking for your dictated schedule and caps. I have 20 minutes until batch so whatever it is we are not going to be able to address it tomorrow given the notice. I have to say I am beyond disappointed in how this went down. It's difficult to have a partnership when these kind[s] of things go down this way." (*Id.* ¶ 313 (alterations added)). Again, these emails are vague and ambiguous, and are only relevant considering the timing and those involved.

On the morning of January 28, 2021, after Robinhood set AMC and GME to PCO, David Dusseault, Robinhood Financial's President and COO, informed Robinhood's Manager of Market Operations that "[Robinhood Securities] received a very large call — confidentially. [A]ll firms on street . . . are doing [the] same thing[.]" (*Id.* ¶ 244 (quotation marks omitted; alterations added)). The CCAC does not assert who was on this call.

Lastly, on January 30, 2021, a Citadel Securities executive informed Drobnyk that he "wanted to **[*83]** generally coordinate messaging" and copied on the email Robinhood's "[General Counsels] as an FYI and for privilege." (*Id.* ¶ 335 (alteration added); *see id.* ¶¶ 332-33). The two then arranged an "[u]rgent" phone call. (*Id.* ¶ 335 (alteration added)). Given the context of the preceding communications and the fact that this request to coordinate messaging occurred even as Robinhood continued to restrict trading in the Relevant Securities, these emails — while vague and ambiguous — do lend some credence to Plaintiffs' conspiracy theory.

Defendants insist each of these communications between Citadel Securities and Robinhood "reflect[s] ordinary business dealings between a Market Maker and its client." (Mot. 32 (alteration added; footnote call number omitted)). But given the timing, the players involved, and the fact that each of these emails could be inferred to relate to the trading restrictions imposed on January 28, 2021, Plaintiffs' allegations of interfirm communications are supportive of a conspiracy.

The support is thin, however. Plaintiffs cite to the undersigned's opinion in *In re Salmon, No. 19-21551-Civ, 2021 U.S. Dist. LEXIS 54321, 2021 WL 1109128 (S.D. Fla. Mar. 23, 2021)*, but the allegations here are hardly comparable. (*See* Resp. 22-24). There, the plaintiffs "point[ed] to bilateral **[*84]** and multilateral agreements not to compete and a high level of communications among [d]efendants," including complete details of multiple meetings, such as who was in attendance, when the meetings occurred, and the contents of those communications. *In re Salmon, 2021 U.S. Dist. LEXIS 54321, 2021 WL 1109128, at *15* (alterations added). Here, Plaintiffs concede they do not know what was discussed during the several calls between Robinhood and Citadel Securities executives.

In addition, the CCAC lacks specific allegations of interfirm communications between any other alleged co-conspirator. The Court thus finds no support here for a reasonable inference of a conspiracy involving any other Defendants.

In sum, Plaintiffs establish a plus factor here supporting, albeit weakly, an inference of a conspiracy between Robinhood and Citadel Securities.

Evidence of concealment and pretext. Plaintiffs contend "[u]nrecorded communications between coconspirators are hallmarks of antitrust conspiracies[,]" suggesting the simple fact that Robinhood and Citadel Securities[20] arranged to have discussions over the phone instead of exchanging information via email supports an inference of an illegal conspiracy. (Resp. 24-25 (alterations added; citations omitted)). The Court **[*85]** is not convinced such a proposition supports plausibility on a motion to dismiss.

In this regard, Plaintiffs cite *In re Flat Glass Antitrust Litigation, 385 F.3d 350, 364-65 (3d Cir. 2004)*, wherein the court noted a coconspirator asked another coconspirator to call him — one minor fact among a litany of allegations. (*See* Resp. 24). It is not clear that the phone call was important to the court's analysis.

Plaintiffs also cite *In re Urethane Antitrust Litigation, 913 F. Supp. 2d 1145, 1154-56 (D. Kan. 2012)*. (*See* Resp. 24-25). There, at summary judgment the court did find persuasive circumstantial evidence "that the alleged conspirators undertook to maintain the secrecy of their communications, particularly those involving pricing." *913 F. Supp. 2d at 1155*. The court relied on numerous, detailed facts indicating efforts to maintain secrecy, for example: coconspirators made calls "from a pay phone at a gas station using a prepaid credit card"; at a particular meeting with competitors, coconspirators "went outside to discuss pricing, in order to avoid listening devices in the facility"; the coconspirators' "reports of the meeting excluded their pricing discussion"; at the same meeting, coconspirators shared documents containing pricing information after "assurances that the document would be destroyed"; and coconspirators left trade association meetings to "conduct **[*86]** future price discussions at an off-site coffee shop so that the men could talk in confidence[.]" *Id. at 1155-56* (alteration added); *see* *id. at 1161-63*.

The only similarity between the allegations in the present case and the record in *In re Urethane* is that alleged coconspirators made phone calls around the time the alleged anticompetitive conduct occurred. Upon further examination, however, even this shared fact is not helpful to Plaintiffs.

The coconspirators in *In re Urethane* were direct competitors conspiring to fix prices — the fact that they would have numerous phone calls around the time of price increase announcements is highly suspicious. *See* *id. at 1149, 1155-56*. Here, Citadel Securities is Robinhood's most important business partner. It surely is not unusual for two firms in an ongoing business relationship to have conversations over the phone; and Plaintiffs admit they do not know the substance of these conversations. (*See* CCAC ¶ 461). The Court will not infer a conspiracy simply because two business partners chose to use phones to communicate.

In addition to these allegations of concealment, Plaintiffs insist they have set forth "pretextual statements" made by Robinhood and Apex "that provide evolving, inconsistent and **[*87]** conflicting explanations for the trading restrictions." (Resp. 25 (footnote call number omitted)). Plaintiffs first point to the fact that Robinhood "initially attributed the trading restrictions to market volatility, only to later assert that clearinghouse collateral requirements forced Robinhood to impose said restrictions." (*Id.*). Defendants counter that those statements were not inconsistent and conflicting because "market volatility led to the increased collateral requirements." (Reply 14). Defendants have the better argument.

[20] In their Response, Plaintiffs also refer to phone calls between Apex and the Introducing Brokerages it serves. (*See* Resp. 24). As explained, absent animating details, the Court declines to find these phone calls suggestive of an illegal agreement.

Indeed, the CCAC itself explains that collateral requirements change because "the DTCC may assign a volatility multiplier on certain securities which the DTCC perceives as having more risk." (CCAC ¶ 470). And the fact that Robinhood continued to impose restrictions after meeting its collateral requirements is of no moment because the trading restrictions "reduce[d] the volatility multiplier on the collateral that Robinhood Securities was required to post with the NSCC." (Reply 15 (alteration added); *see* Resp. 25; CCAC ¶ 470). It is not suspicious for Robinhood to strive to avoid higher collateral requirements.

Plaintiffs next cite several Robinhood statements **[*88]** that they assert conflict with its COO, Gretchen Howard's internal message that Robinhood had a "major liquidity issue" as it set certain Relevant Securities to PCO in the early morning of January 28, 2021. (CCAC ¶ 233; *see* Resp. 25). Later that day, "Robinhood posted on its blog that market volatility was the reason for the restrictions." (CCAC ¶ 466). In addition, Robinhood's CEO, Vlad Tenev, publicly stated "that the shutdowns were unrelated to Robinhood's liquidity and that Robinhood did not have a liquidity problem." (*Id.* ¶ 467). Tenev later testified before the House Financial Services Subcommittee "that trading restrictions were put in place to meet regulatory deposit requirements imposed by DTCC affiliate NSCC." (*Id.* ¶ 469; *see also id.* ¶ 340).

These statements are not conflicting because Howard's internal message stating Robinhood had a "major liquidity issue" came shortly after Robinhood "received an email from NSCC indicating that Robinhood had a deficit of roughly $3 billion dollars." (*Id.* ¶¶ 231, 233). Even viewing the pleading in the light most favorable to Plaintiffs, Howard was likely referring to Robinhood's ability to pay the increased collateral requirements caused **[*89]** by the market volatility, which is consistent with Robinhood later placing the blame on these collateral requirements.

Finally, Plaintiffs again refer to Apex's "conflicting explanations as to why it restricted trading." (Resp. 25). According to Plaintiffs, "[a]lthough Apex cited increased collateral requirements as the reason for the restrictions, Apex later admitted that it was not subject to any heightened collateral requirements but rather made the decision to restrict trade based solely on a 'potential future' collateral requirement despite having sufficient capital and available lines of credit." (*Id.* (alteration added)).

As further explained in the CCAC, Apex had told state regulators it imposed restrictions because of "the potential future collateral requirement that NSCC *appeared* it may impose on Apex" (CCAC ¶ 480 (emphasis added)); and Apex's President explained that Apex restricted "due to anomalous information" (*id.* ¶ 481 (quotation marks omitted)). Considering Apex lifted its restrictions after one day, this explanation makes sense. (*See id.* ¶ 327). As Defendants put it: "the market volatility in late January 2021 was extraordinary, with events occurring quickly to meet **[*90]** market and clearinghouse demands. Therefore, it is understandable that earlier-in-time internal Robinhood and Apex communications, as Plaintiffs identified, did not reflect final information later presented publicly." (Reply 15).[21]

In total, Plaintiffs do not make out a plus factor here.

Government investigations. Plaintiffs maintain the investigations of "the events concerning the January 28, 2021 trading restrictions" by "[t]he [SEC], FINRA, Congress, the Department of Justice, the San Francisco U.S. Attorney's Office, and the Attorneys General of various states" are indicative of collusion among Defendants. (Resp. 26 n.20 (alterations added)). The CCAC does not allege, however, that any of these authorities is investigating possible *collusion* among Defendants. (*See* CCAC ¶¶ 486-93). In fact, Plaintiffs concede "there is simply no evidence to suggest that the SEC is investigating the claims of concerted activity at issue here." (Resp. 45 (footnote call number and citation omitted)).

Defendants do not disagree that government investigations can bolster conspiracy allegations. (*Compare* Mot. 33, *and* Reply 15, *with* Resp. 26). They instead correctly note that where "allegations are **[*91]** sparse, the existence of

[21] Contrary to Plaintiffs' suggestion, the fact that government regulators did not directly call on Defendants to restrict trading is inconsequential (*see* Resp. 25 n.18), because the restrictions lowered the volatility multiplier that determines DTCC collateral requirements (*see, e.g*, CCAC ¶ 470).

government inquiries is insufficient to raise an inference of conspiracy." (Mot. 33 (alteration adopted; quotation marks and citations omitted)); *see also e.g., In re Loc. TV Advert., 2020 U.S. Dist. LEXIS 208215, 2020 WL 6557665, at *8* (collecting cases). Such is the case here. Given the thin allegations overall, and the fact that Plaintiffs have not alleged an investigation specifically into concerted activity among Defendants, Plaintiffs fail to establish a plus factor here.

Structural characteristics of the market. Plaintiffs contend they have alleged "economic market factors [that] paint a picture of a market whose characteristics make it ripe for collusion in violation of the ***antitrust law***." (Resp. 28 (alteration added)). While the CCAC does allege the existence of several characteristics that each tend to make a market susceptible to anticompetitive conduct and unlawful collusion, Plaintiffs present an incoherent market definition. (*See* CCAC ¶¶ 362-405).

In their Response, Plaintiffs argue that "the CCAC makes clear that the relevant market to which [they] refer is the securities market." (Resp. 26 (alteration added)). But the CCAC is hardly a model of clarity on this point. (*See* Mot. 34). Although Plaintiffs do not elaborate, **[*92]** it appears from the CCAC that Plaintiffs are attempting to define multiple markets — one for each Relevant Security — by stating "[t]he Relevant Securities are commodity (homogenous) products." (CCAC ¶ 374 (alteration added)). To complicate matters further, the CCAC also confusingly discusses characteristics of "[t]he markets for broker dealers, clearing firms and market making[.]" (*Id.* ¶ 368 (alterations added)). The Court is thus unable to discern from the CCAC what the alleged market definition is.

Moreover, Plaintiffs fail to grapple with Defendants' argument that the case is unlike the typical price-fixing conspiracies where this plus factor is invoked. (*See* Mot. 34). In each of the cases cited by Plaintiffs — all of which involve price-fixing conspiracies — the defendants utilized their market power to raise the prices of goods they sold. (*See* Resp. 26-28 (citing *In re Salmon, 2021 U.S. Dist. LEXIS 54321, 2021 WL 1109128, at *14*; *In re Disposable Contact Lens Antitrust, 215 F. Supp. 3d 1272, 1295-96 (M.D. Fla. 2016)*; *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 681 F. Supp. 2d 141, 169 (D. Conn. 2009)*; *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 656-58 (7th Cir. 2002)*)). Here, Plaintiffs allege that the Brokerage Defendants and Clearing Defendants restricted output to lower prices for securities they are not alleged to have bought or sold for their own accounts, all to benefit the Market Maker Defendant who actually engages in such transactions. Plaintiffs do not address this **[*93]** distinction at all and do not provide any legal authority supporting the application of this plus factor to their novel anticompetitive theory.

In short, Plaintiffs fail to coherently define a market and persuade the Court that this plus factor weighs in their favor.

* * *

What factual allegations are left standing that support a plausible inference of a conspiracy? Well, there are none — other than an allegation of parallel conduct — with respect to Defendants, E*Trade, Interactive Brokers, Apex, ETC, and PEAK6. Each of these Defendants therefore must be dismissed because "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice" to state a *section 1* claim. *Twombly, 550 U.S. at 556*.

That leaves Robinhood and Citadel Securities. High-level executives at these firms exchanged various vague and ambiguous emails immediately before and after Robinhood imposed trading restrictions on the Relevant Securities on January 28, 2021. These emails set up telephone discussions between the executives, the substance of which is unknown to Plaintiffs. Admittedly, these emails may be somewhat suspicious given the participants and their timing. But are a few vague and ambiguous emails between two firms in an **[*94]** otherwise lawful, ongoing business relationship enough to "nudge[] [Plaintiffs'] claims across the line from conceivable to plausible[?]" *Id. at 570* (alterations added). The Court thinks not.

Accordingly, the CCAC is dismissed.

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that Defendants' Motion to Dismiss the Antitrust Tranche Complaint **[ECF No. 408]** is **GRANTED**. The Corrected Consolidated Class Action Complaint **[ECF No. 416]** is **DISMISSED without prejudice**. Plaintiffs have until **December 20, 2021** to file their final amended complaint in the Antitrust Tranche of this Multidistrict Litigation.

Plaintiffs' Motion to Strike Defendant Citadel Securities LLC's Notice of Supplemental Authority **[ECF No. 437]** is **DENIED as moot**.

DONE AND ORDERED in Miami, Florida, this 17th day of November, 2021.

/s/ Cecilia M. Altonaga

CECILIA M. ALTONAGA

CHIEF UNITED STATES DISTRICT JUDGE

Lifewatch Servs. v. Highmark, Inc.

United States Court of Appeals for the Third Circuit

October 14, 2021, Argued; November 17, 2021, Filed

No. 21-1142

Reporter

2021 U.S. App. LEXIS 35044 *; 2021 WL 5492811

LIFEWATCH SERVICES, INC., Appellant v. HIGHMARK, INC.; BLUE CROSS AND BLUE SHIELD ASSOCIATION; WELLPOINT, INC.; HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY; BLUE CROSS AND BLUE SHIELD OF SOUTH CAROLINA; BCBSM, INC., d/b/a BLUE CROSS BLUE AND SHIELD OF MINNESOTA

Notice: NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT.

PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: **[*1]** On Appeal from the United States District Court for the Eastern District of Pennsylvania. (D.C. No. 2-12-cv-05146). District Judge: Honorable Eduardo C. Robreno.

LifeWatch Servs. v. Highmark, Inc., 509 F. Supp. 3d 356, 2020 U.S. Dist. LEXIS 242562 (E.D. Pa., Dec. 28, 2020)

Core Terms

regulated, insurer, insurance business, insurance industry, state law, anti trust law, antitrust, prong, Uniformity Rule, pharmacies, telemetry, entities, argues, exempt, horizontal, subscriber, spread

LexisNexis® Headnotes

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

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > McCarran-Ferguson Act

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN1[] **Horizontal Refusals to Deal, Boycotts**

An insurance practice receives McCarran-Ferguson immunity from federal antitrust liability if it (1) constitutes the business of insurance, (2) is regulated by state law, and (3) does not amount to a boycott, coercion, or intimidation. 15 U.S.C.S. § 1012(b). Under the first prong, a court must examine an insurance practice against three criteria to determine whether it constitutes the business of insurance: (a) whether the practice has the effect of transferring or spreading a policyholder's risk; (b) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (c) whether the practice is limited to entities within the insurance industry. Under the second prong, state regulation need not mirror federal ***antitrust law*** to trigger McCarran-Ferguson's exemption, rather, general prohibitions designed to guarantee certain standards of conduct are sufficient to show regulation by the state so long as they are not mere pretense. Finally, exemptions from the antitrust laws are to be narrowly construed.

Insurance Law > ... > Insurance Company Operations > Company Representatives > Brokers

HN2[] **Company Representatives, Brokers**

The Third Circuit has held that an arrangement where brokers steered clients to particular insurers in exchange for payment was not the business of insurance because that conduct did not affect whether or to what extent a prospective insurance purchaser would transfer risk to an insurer, but merely to which insurer that risk would be transferred.

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Equal Bargaining Power

HN3[] **Policy Interpretation, Equal Bargaining Power**

It has long been established that the policy relationship between the insurer and insured relates to the type of policy which could be issued, its reliability, interpretation, and enforcement. At the outset, there is a distinction between vertical agreements—such as an agreement between an insurer and a provider—and a horizontal agreement, such as an agreement among insurers to engage in cooperative ratemaking and underwriting.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN4[] **Scope, Exemptions**

Regarding whether an insurance practice receives McCarran-Ferguson immunity from federal antitrust liability, the test is not whether an arrangement is limited to insurance companies or insurers, but whether it is limited to entities within the insurance industry.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > McCarran-Ferguson Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN5[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: provided, that the federal antitrust laws shall be applicable to the business of insurance to the extent that such business is not regulated by state law. 15 U.S.C.S. § 1012(b). The first sentence deals with all federal statutes, while the second focuses specifically on federal antitrust laws.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN6[] **Scope, Exemptions**

A state's regulatory scheme need not regulate an insurance practice in the particular; so long as a state's scheme is not mere pretense, an insurance practice will not lose McCarran-Ferguson's antitrust immunity. Similarly, the Third Circuit has rejected the argument that, to exempt conduct from the federal antitrust laws, state regulation must parallel the Sherman Act. Had Congress desired this type of regulation, it could simply have continued the applicability to insurance companies of the Sherman Act itself. The Fourth and Sixth Circuits have held the same.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN7[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

When a court applies the first sentence of 15 U.S.C.S. § 1012(b) to an insurance practice (i.e., when it is dealing with a federal law outside the antitrust context), it must determine whether there is a conflict between the federal law and the law of the state in question. However, when a court applies the second sentence of § 1012(b), the test is whether the state in which the insurance practice is challenged has enacted non-pretextual regulations of its insurance industry.

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Judges: Before: SHWARTZ, NYGAARD and FISHER, Circuit Judges.

Opinion by: FISHER

Opinion

OPINION[*]

FISHER, *Circuit Judge*.

Appellant LifeWatch Services, Inc. is a large seller of telemetry monitors, which are outpatient heart monitors used primarily for detecting arrhythmias. Appellee Blue Cross Blue Shield Association licenses the Blue Cross/Blue

[*] This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Shield trade name to approximately 36 separate, locally operated health insurers **[*2]** called Blue Plans. LifeWatch alleges that the Association and Blue Plans have a horizontal agreement not to cover telemetry and that this agreement violates the Sherman Act, which prohibits conspiracies that restrain trade. The District Court dismissed LifeWatch's complaint, holding that the agreement between the Association and Blue Plans is exempt from federal antitrust liability under the McCarran-Ferguson Act. LifeWatch now appeals. We will affirm.[1]

HN1[] An insurance practice receives McCarran-Ferguson immunity from federal antitrust liability if it (1) constitutes the "business of insurance," (2) is "regulated by state law," and (3) does not "amount to a boycott, coercion, or intimidation." *Union Lab. Life Ins. Co. v. Pireno, 458 U.S. 119, 124, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982)* (internal quotation omitted); *see also* *15 U.S.C. § 1012(b)*. Only the first and second prongs are at issue here. Under the first prong, a court must examine an insurance practice against three criteria to determine whether it constitutes the business of insurance: (a) "whether the practice has the effect of transferring or spreading a policyholder's risk"; (b) "whether the practice is an integral part of the policy relationship between the insurer and the insured"; and (c) "whether the practice is limited to entities within the **[*3]** insurance industry." *Pireno, 458 U.S. at 129*. Under the second prong, state regulation need not mirror federal ***antitrust law*** to trigger McCarran-Ferguson's exemption, *Travelers Ins. Co. v. Blue Cross of W. Pa., 481 F.2d 80, 83 n.10 (3d Cir. 1973)*; rather, "general prohibition[s] designed to guarantee certain standards of conduct" are sufficient to show regulation by the state so long as they are not "mere pretense." *FTC v. Nat'l Cas. Co., 357 U.S. 560, 564 (1957)*. Finally, "exemptions from the antitrust laws are to be narrowly construed." *Grp. Life & Health Ins. Co. v. Royal Drug, Co., 440 U.S. 205, 231, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979)* (citation omitted).

LifeWatch argues that the horizontal agreement between the Association and Blue Plans not to cover telemetry, which it dubs the Uniformity Rule, fails both of McCarran-Ferguson's first two prongs and is therefore not immune from federal antitrust liability. We disagree.

According to LifeWatch's complaint, the Uniformity Rule works as follows. The Association and Blue Plans create a model medical policy, which is made up of directions for the Blue Plans on what claims to cover. The model medical policy is set by a Medical Policy Panel and voted on by each Blue Plan. The Association and Blue Plans then "agree to require substantial conformity" by Blue Plans with the model medical policy. J.A. 49. The Association, LifeWatch alleges, enforces the Uniformity Rule through "audits" **[*4]** to ensure that each Blue Plan substantially complies with the model medical policy. *Id.* The gravamen of LifeWatch's argument is that the Blue Plans have "repeatedly voted on the model medical policy that requires blanket denial of telemetry coverage," *Id.*, and that the Uniformity Rule enforcing this decision does not constitute the business of insurance. This argument does not pass muster when assessed against the three "business of insurance" criteria. *Pireno, 458 U.S. at 129*.

First, the arrangement between the Association and Blue Plans "has the effect of transferring or spreading a policyholder's risk," *id.*, because, according to LifeWatch's complaint, it is an agreement "not to compete on the package of services offered." J.A. 52. McCarran-Ferguson "was intended primarily to protect '*intra*-industry cooperation' in the underwriting of risks." *Pireno, 458 U.S. at 133* (emphasis in original) (quoting *Royal Drug, 440 U.S. at 221*). The arrangement here keeps the risk of the cost for telemetry services with the insured when it might otherwise be borne by an insurer as "medically necessary," and thus transfers the policyholder's risk. It is precisely the intra-industry cooperation in underwriting Congress contemplated. Thus, this arrangement is readily distinguishable **[*5]** from ones that the Supreme Court and we have found not to constitute the business of insurance.

For example, in *Royal Drug* the Supreme Court held that an agreement between an insurer and participating pharmacies did not spread risk. There, the defendant insurer's policy promised subscribers prescription drug coverage at $2 per prescription, with the insurer reimbursing the pharmacy for the balance. *440 U.S. at 209*. To fulfill its obligations, the insurer entered a separate "Pharmacy Agreement" with participating pharmacies. *Id.* If a

[1] The District Court had jurisdiction under *28 U.S.C. §§ 1331* (federal questions), *1337* (commerce and antitrust regulations). This Court has jurisdiction under *28 U.S.C. § 1291* (final judgments).

subscriber filled a prescription at a participating pharmacy, the insurer covered the cost according to the terms of the policy; however, if a subscriber filled a prescription at a non-participating pharmacy, he or she had to pay full price and the insurer would only reimburse him or her for 75% of the amount over $2. *Id.* This arrangement, the Court held, did not spread risk, but "serve[d] only to minimize the costs [the insurer] incur[red] in fulfilling its underwriting obligations." *Id. at 213*. Similarly, in *Pireno*, the Court held that a defendant-insurer's use of a peer-review committee to determine whether a subscriber's claim for chiropractic care was "necessary" and "reasonabl[y]" priced **[*6]** under the policy did not spread risk because it was "logically and temporally unconnected to the transfer of risk accomplished" by the policy itself. *458 U.S. at 130*.

HN2[] We have held that an arrangement where brokers steered clients to particular insurers in exchange for payment was not the business of insurance because that conduct did not affect "*whether* or *to what extent* a prospective insurance purchaser would transfer risk to an insurer, but merely to *which* insurer that risk would be transferred." *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 311-13, 357 (3d Cir. 2010)* (emphasis in original).

Here, the arrangement between the Association and Blue Plans bears "on the package of services offered" to insureds through the Blue Plans' respective policies. J.A. 52. This is not "merely [an] arrangement[] for the purchase of goods or services," *Royal Drug, 440 U.S. at 214*, or a post-execution determination of benefits "unconnected to the transfer of risk," *Pireno, 458 U.S. at 130*, but rather an agreement as to "the type of coverage [prospective policyholders can] obtain," *Ins. Brokerage, 618 F.3d at 357*. Accordingly, the arrangement between the Association and Blue Plans meets *Pireno*'s first criterion of risk-spreading.

Second, the arrangement between the Association and Blue Plans is "an integral part of the policy relationship" between the Blue Plans and their **[*7]** insureds. *See Pireno, 458 U.S. at 129*. ***HN3***[] It has long been established that the policy relationship between the insurer and insured relates to the "type of policy which could be issued, its reliability, interpretation, and enforcement." *SEC v. Nat'l Sec., Inc., 393 U.S. 453, 460 (1969)*. At the outset, there is a distinction between vertical agreements—such as an agreement between an insurer and a provider—and a horizontal agreement, such as an agreement among insurers to engage in cooperative ratemaking and underwriting. *See Restraint of Trade, Black's Law Dictionary* (11th ed. 2019) (defining "horizontal restraint" as "[a] restraint of trade imposed by an agreement between competitors at the same level of distribution"). For this reason, the arrangement in question here is far afield from the arrangements in *Royal Drug* and *Pireno* that the Supreme Court held as not integral to the insurer-insured relationship. The challenged relationships in those cases involved vertical agreements with entities wholly outside the insurance industry, and in both cases the Court reasoned that agreements with such entities were too attenuated from the insurer-insured relationship to be integral to it. *Royal Drug, 440 U.S. at 216*; *Pireno, 458 U.S. at 131*. Here, the arrangement between the Association and Blue Plans determines the "type of coverage" **[*8]** that an insured may receive. *Ins. Brokerage, 618 F.3d at 357*. Therefore, the arrangement between the Association and Blue Plans satisfies *Pireno*'s second criterion because it is integral to the insurer-policyholder relationship.

Third, the Association and Blue Plans are "entities within the insurance industry." *Pireno, 458 U.S. at 129*. LifeWatch concedes that the Blue Plans, which are health insurers, are in the insurance industry, but it argues that the Association is not. LifeWatch's argument cannot be squared with the allegations in its complaint that, in addition to licensing the Blue Cross/Blue Shield trade name, the Association also "negotiat[es] . . . benefits and premiums" for "Blue Cross health insurance [for] 5.3 million federal employees," and "establish[es] medical policies affecting subscribers and providers." J.A. 34-35. Moreover, the Supreme Court in *Royal Drug* and *Pireno* held that the arrangements in those cases did not constitute the business of insurance in part because they included entities "wholly outside the insurance industry." *Royal Drug, 440 U.S. at 231*; *Pireno, 458 U.S. at 132*. ***HN4***[] The test is not whether an arrangement is limited to "insurance companies" or "insurers," but whether it is limited to "entities within the insurance industry." *Pireno, 458 U.S. at 129*.

In short, the Association is dissimilar to the **[*9]** pharmacies in *Royal Drug* and the peer-review committee in *Pireno*. As the Association and Blue Plans correctly point out, "LifeWatch does not allege the Association is involved in any activities unrelated to Blue Plans." Appellee's Br. 30. And according to LifeWatch's complaint, the Association, in collaboration with the Blue Plans, sets the very model medical policy at issue here. It follows that the arrangement between the Association and Blue Plans is limited to entities within the insurance industry under Pireno's third criterion.

Analyzed against the three Pireno criteria, the Uniformity Rule meets the first requirement for McCarran-Ferguson antitrust exemption: it constitutes the business of insurance.

The second prong of McCarran-Ferguson at issue here is whether the Uniformity Rule is "regulated by State Law." 15 U.S.C. § 1012(b). The relevant portion of the statute in effect during the time of the conduct alleged here provides:

> **HN5**[] No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That . . . [the **[*10]** federal antitrust laws] . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

15 U.S.C. § 1012(b). The first sentence deals with all federal statutes, while the second focuses specifically on federal antitrust laws. LifeWatch offers two interpretive theories to argue that the District Court erred in concluding that the arrangement between the Association and Blue Plans is regulated within the meaning of McCarran-Ferguson. Neither theory is persuasive, even under a narrow construction of the statute.

First, LifeWatch argues that the District Court did not place proper weight on the statutory phrase "to the extent that." Focusing on that phrase, LifeWatch argues that "the business of insurance *is* exempt only '*to the extent that*' it is controlled, by rule or restriction, by state law." Appellant's Br. 24 (emphasis in original) (footnote omitted) (quoting 15 U.S.C. § 1012(b)). Therefore, LifeWatch argues that federal ***antitrust law*** applies up to the point that the challenged conduct is regulated by state law. According to LifeWatch, a court must take a practice-by-practice approach and look to whether an individual insurance practice—like the exclusion of telemetry **[*11]** through the Uniformity Rule—is regulated by the state to determine whether McCarran-Ferguson applies.

No court has embraced this interpretation of the statutory text. Indeed, the Supreme Court rejected substantially the same argument in FTC v. National Casualty Co., 357 U.S. 560, 78 S. Ct. 1260, 2 L. Ed. 2d 1540 (1957). There, the petitioner argued that the "regulated by state law" prong of McCarran-Ferguson was not met because "a general prohibition designed to guarantee certain standards of conduct is too 'inchoate' to be 'regulation' until that prohibition has been crystallized into 'administrative elaboration of these standards and application in individual cases.'" Id. at 564. The Supreme Court rejected this position. *See* id. at 564-65. **HN6**[] A state's regulatory scheme need not regulate an insurance practice in the particular; so long as a state's scheme is not "mere pretense," id. at 564, an insurance practice will not lose McCarran-Ferguson's antitrust immunity.

Similarly, we have rejected the argument that, "to exempt conduct from the federal antitrust laws, state regulation must parallel the Sherman Act." Travelers Ins. Co., 481 F.2d at 83 n.10. "[H]ad Congress desired this type of regulation, it could simply have continued the applicability to insurance companies of the Sherman Act itself." *Id.* The Fourth and Sixth Circuits have held the same. *See* Crawford v. Am. Title Ins. Co., 518 F.2d 217, 218 (4th Cir. 1975) (per **[*12]** curiam) ("[McCarran-Ferguson] renders the federal antitrust laws inapplicable when state legislation generally proscribes, permits, or otherwise regulates the conduct in question and authorizes enforcement through a scheme of administrative supervision." (citing Nat'l Cas., 357 U.S. at 564-65)); Ohio AFL-CIO v. Ins. Rating Bd., 451 F.2d 1178, 1182 (6th Cir. 1971) ("[W]e are convinced that the controlling test is . . . whether the state has generally authorized or permitted certain standards of conduct." (internal quotation omitted)).

Here, every state in which the arrangement between the Association and Blue Plans is challenged has health insurance regulations on the books. What's more, every state in question specifically regulates unfair trade practices, methods of competition, or unfair acts in the insurance industry. LifeWatch does not argue that these regulations are pretextual—just that they do not deal specifically with horizontal agreements in the telemetry market. This argument is foreclosed by controlling case law. *See, e.g., Travelers, 481 F.2d at 83 n.10*. LifeWatch's first argument on the state regulation prong fails.

For its second interpretive theory, LifeWatch argues that the statute's clauses have been bifurcated when they should be read together. The sole case that LifeWatch cites in support **[*13]** of this argument is *Humana Inc. v. Forsyth, 525 U.S. 299, 119 S. Ct. 710, 142 L. Ed. 2d 753 (1999)*. There, the Supreme Court applied McCarran-Ferguson's first clause to hold that, because the Racketeer Influenced and Corrupt Organizations (RICO) Act—which is not an ***antitrust law***—did not "invalidate, impair, or supersede" state law on unfair trade practices, it could be applied "in harmony with the State's regulation." *Humana, 525 U.S. at 303*. Based on this holding, LifeWatch argues that federal ***antitrust law*** should apply to the insurance industry so long as it does not "invalidate, impair, or supersede" state law.

This argument overplays its hand. The Court in *Humana* noted the differences in language between the first and second sentences of *§ 1012(b)*, and these differences played a key part in its decision. *525 U.S. at 309* ("Congress could have provided, as it did with respect to the Sherman, Clayton, and Federal Trade Commission Acts . . . that federal legislation generally, or RICO in particular, would be 'applicable to the business of insurance [only] *to the extent that* such business *is not regulated* by State law.'" (second alteration in original) (quoting *§ 1012(b)*). Thus, when a court applies the first sentence of *§ 1012(b)* to an insurance practice (*i.e.*, when it is dealing with a federal law outside the antitrust context), **[*14]** it must determine whether there is a conflict between the federal law and the law of the state in question. ***HN7***[] However, when a court applies the second sentence of *§ 1012(b)*, the test is whether the state in which the insurance practice is challenged has enacted non-pretextual regulations of its insurance industry. *See id.* (noting the difference in language and application between McCarran-Ferguson's first and second clauses). LifeWatch's second argument on the state regulation prong fails as well.

* * *

The challenged arrangement between the Association and Blue Plans, the Uniformity Rule, constitutes the business of insurance under the three criteria set forth in *Pireno*. In addition, the arrangement is regulated by the states within the meaning of McCarran-Ferguson because each state in which it is challenged regulates its health insurance industry by permitting and proscribing certain conduct. Accordingly, the challenged arrangement is accorded McCarran-Ferguson immunity from federal antitrust liability.[2]

For these reasons, we will affirm.

End of Document

[2] The Competitive Health Insurance Reform Act of 2020 was enacted after the District Court dismissed LifeWatch's Third Amended Complaint. Accordingly, this opinion does not resolve the question of whether CHIRA applies to LifeWatch's prayer for injunctive relief. That issue was not a part of this dispute.

Neurelis, Inc. v. Aquestive Therapeutics, Inc.

Court of Appeal of California, Fourth Appellate District, Division One

November 17, 2021, Opinion Filed

D077984, D078186

Reporter

71 Cal. App. 5th 769 *; 286 Cal. Rptr. 3d 631 **; 2021 Cal. App. LEXIS 965 ***; 2021 WL 5355958

NEURELIS, INC., Plaintiff and Respondent, v. AQUESTIVE THERAPEUTICS, INC., Defendant and Appellant.NEURELIS, INC., Plaintiff and Appellant, v. AQUESTIVE THERAPEUTICS, INC., Defendant and Respondent.

Prior History: **[***1]** APPEAL and cross-appeal from an order of the Superior Court of San Diego County, No. 37-2019-00064665-CU-BT-CTL, No. 37-2019-00064665-CU-BT-CTL, John S. Meyer, Judge.

Neurelis, Inc. v. Aquestive Therapeutics, Inc., 2021 U.S. App. LEXIS 30158, 2021 WL 4618526 (Fed. Cir., Oct. 7, 2021)

Disposition: Affirmed in part, reversed in part, and remanded with directions.

Core Terms

anti-SLAPP, citizen's petition, petitions, commercial speech, investors, Patent, cause of action, prior art, probable cause, diazepam, argues, defamation, patients, nasal, comments, litigation privilege, pharmaceuticals, audience, prevail, exemption, products, spray, malicious prosecution claim, lack of probable cause, superior court, drugs, malicious prosecution, reasonable likelihood, second prong, new drug

LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN1[] **Fundamental Freedoms, Freedom to Petition**

California's anti-SLAPP statute is designed to protect defendants from meritless lawsuits that might chill the exercise of their rights to speak and petition on matters of public concern. To that end, the statute authorizes a special motion to strike a claim arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Evidence > Burdens of Proof > Allocation

HN2[] Freedom of Speech, Strategic Lawsuits Against Public Participation

A court evaluates an anti-SLAPP motion in two steps. Initially, the moving defendant bears the burden of establishing that the challenged allegations or claims arise from protected activity in which the defendant has engaged. If the defendant carries its burden, the plaintiff must then demonstrate its claims have at least minimal merit. If the plaintiff fails to meet that burden, the court will strike the claim.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN3[] Fundamental Freedoms, Freedom to Petition

A defendant's first-step burden is to identify the activity each challenged claim rests on and demonstrate that that activity is protected by the anti-SLAPP statute. A claim may be struck only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted. To determine whether a claim arises from protected activity, courts must consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability. Courts then must evaluate whether the defendant has shown any of these actions fall within one or more of the four categories of acts protected by the anti-SLAPP statute.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN4[] Freedom of Speech, Strategic Lawsuits Against Public Participation

The second step of the anti-SLAPP analysis has been described as a summary-judgment-like procedure. The court determines whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. The plaintiff may not rely solely on its complaint, even if verified; instead, its proof must be made upon competent admissible evidence. The defendant may submit evidence in support of its motion. However, the court does not weigh evidence or resolve conflicting factual claims. Rather, the court accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. Claims with the requisite minimal merit may proceed.

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

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN5[] Standards of Review, De Novo Review

An order granting an anti-SLAPP motion is reviewed de novo.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN6[] Freedom of Speech, Strategic Lawsuits Against Public Participation

Malicious prosecution arises from an underlying lawsuit and involves allegations that the defendant committed a tort by engaging in the underlying action. A malicious prosecution claim meets the requirement of the first prong of the anti-SLAPP analysis as it constitutes protected activity under *Code Civ. Proc., § 425.16*.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN7[] Freedom of Speech, Strategic Lawsuits Against Public Participation

A mixed claim, in the context of an anti-SLAPP motion, is a claim based on protected and unprotected conduct.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN8[] Freedom of Speech, Strategic Lawsuits Against Public Participation

Code Civ. Proc., § 425.17, seeks to accomplish the goal of curbing abuse of the anti-SLAPP statute by expressly excluding several categories of claims from the scope of *Code Civ. Proc., § 425.16*.

Constitutional Law > ... > Freedom of Speech > Commercial Speech > Advertising

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Constitutional Law > ... > Freedom of Speech > Commercial Speech > Misleading Speech

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN9[] Commercial Speech, Advertising

The legislative history of *Code Civ. Proc., § 425.17*, indicates it was drafted to track constitutional principles governing regulation of commercial speech. Three elements distinguish commercial speech from noncommercial speech: the speaker, the audience, and the content of the message.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN10[] Freedom of Speech, Strategic Lawsuits Against Public Participation

Code Civ. Proc., § 425.17, subd. (c), establishes an exclusion from anti-SLAPP protection for claims concerning some commercial speech. The exemption applies when: (1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services; (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in *§ 425.17, subd. (c)(2)*.

Constitutional Law > ... > Freedom of Speech > Commercial Speech > Misleading Speech

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN11[] **Commercial Speech, Misleading Speech**

The burden of proof as to the applicability of the *Code Civ. Proc., § 425.17*, commercial speech exemption falls on the party seeking the benefit of it. As a statutory exception to *Code Civ. Proc., § 425.16*, *§ 425.17* must be narrowly construed. Under the two-pronged test of *§ 425.16*, whether a *§ 425.17* exemption applies is a first prong determination. The court does not consider whether the plaintiff is likely to prevail on the merits. The court independently reviews the applicability of the commercial speech exemption.

Constitutional Law > ... > Freedom of Speech > Commercial Speech > Advertising

Constitutional Law > ... > Freedom of Speech > Commercial Speech > Misleading Speech

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN12[] **Commercial Speech, Advertising**

Mentioning a competitor or a competitor's product is not required under the *Code Civ. Proc., § 425.17*, commercial speech exemption. It is enough that the statements relate to the speaker's own product. *§ 425.17, subd. (c)(1)*.

Governments > Courts > Judicial Precedent

HN13[] **Courts, Judicial Precedent**

A decision does not stand for a proposition not considered by the court.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

Constitutional Law > ... > Freedom of Speech > Commercial Speech > Advertising

Constitutional Law > ... > Freedom of Speech > Commercial Speech > Misleading Speech

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN14[] **False Advertising, Lanham Act**

Code Civ. Proc., § 425.17, subd. (c), does not use the word "advertising," but instead provides its own explanation regarding what the commercial speech exception covers. Accordingly, cases construing claims under the Lanham Act are not instructive in construing the commercial speech exception to the anti-SLAPP statute.

Constitutional Law > ... > Freedom of Speech > Commercial Speech > Misleading Speech

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN15[] **Commercial Speech, Misleading Speech**

Code Civ. Proc., § 425.17, subd. (c)(2), identifies the audience to whom the defendant must make the statement for it to fall under the commercial speech exception. The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN16[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

A citizen petition is a means afforded by the U.S. Food and Drug Administration (FDA) for raising concerns about products the FDA reviews; any individual may file such a petition concerning scientific or legal issues before or while the product is on the market. Through this petition process, the FDA permits private entities to provide comments and opinions on draft guidance by filing these petitions. *21 C.F.R. § 10.30 (2021)*. A petition can request that the FDA issue, amend, or revoke a regulation or order or take or refrain from taking any other form of administrative action. A citizen petition must describe the FDA action the petitioner requests and must include a certification by the petitioner that the petition includes all information and views on which the petition relies, and that it includes representative data and information known to the petitioner which are unfavorable to the petition. As such, a citizen petition is a means by which the FDA explicitly allows private entities to express safety, scientific, or legal concerns regarding a product. Alternatively stated, the citizen petition is a mechanism wherein a private entity can petition the government (a government agency) for redress.

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

Governments > Legislation > Initiative & Referendum

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

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

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN17[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

A citizen petition is classic protected activity under the anti-SLAPP statute. *Code Civ. Proc., § 425.16, subd. (e)(2)*. And the right to petition has been called an essential attribute of governing, vital to a basic process in California's constitutional scheme—direct initiation of change by the citizenry through initiative, referendum, and recall. Moreover, under the Noerr-Pennington doctrine, statements made in a citizen petition are generally immune from civil liability.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN18[] **Freedom of Speech, Strategic Lawsuits Against Public Participation**

A party asserting mixed causes of action need only establish a probability of prevailing on its claims based on protected conduct under the anti-SLAPP statute. If it cannot do so, then the allegations concerning the protected conduct must be stricken. However, the court disregards allegations concerning unprotected conduct. As such, the party does not have to prove a probability of success on the merits to the extent its claims are based on unprotected conduct.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN19[] **Freedom of Speech, Strategic Lawsuits Against Public Participation**

Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN20[] **Freedom of Speech, Strategic Lawsuits Against Public Participation**

In employing a summary-judgment-like procedure for the second prong of the anti-SLAPP analysis, a court determines whether the plaintiff's prima facie showing is enough to win a favorable judgment. This threshold is not high. Claims with minimal merit proceed.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Evidence > Burdens of Proof > Allocation

HN21[] **Freedom of Speech, Strategic Lawsuits Against Public Participation**

During the second prong of a court's anti-SLAPP analysis, a defendant bears the burden of proving a privilege's applicability.

Torts > ... > Defenses > Privileges > Absolute Privileges

HN22[] **Privileges, Absolute Privileges**

Civ. *Code, § 47, subd. (b)*, renders absolutely privileged communications made as part of a judicial or quasi-judicial proceeding. The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.

Torts > ... > Defenses > Privileges > Absolute Privileges

HN23[] **Privileges, Absolute Privileges**

The principal purpose of the litigation privilege is to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. Stated differently, it exists to protect citizens from the threat of litigation for communications to government agencies whose function it is to investigate and remedy wrongdoing. Thus, the crux of the litigation privilege is that it covers communications made as part of a judicial or quasi-judicial proceeding.

Torts > ... > Defenses > Privileges > Absolute Privileges

HN24[] **Privileges, Absolute Privileges**

One invoking the litigation privilege must do more than simply point to the allegedly privileged document.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

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

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

HN25[] **Scope, Exemptions**

The Noerr-Pennington doctrine, which arose in the context of ***antitrust law***, holds that those who petition government for redress are generally immune from antitrust liability. The doctrine has since been applied beyond the antitrust context and generally shields a defendant's petitioning activity before courts as well as administrative and other government agencies.

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

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

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

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

HN26[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

An exception to the Noerr-Pennington doctrine arises when efforts to influence government are merely a sham; such efforts are not protected by the Noerr-Pennington doctrine. There is a two-part test for determining whether a defendant's petitioning activity falls outside the Noerr-Pennington doctrine. First, it must be objectively baseless in the sense that no reasonable litigant could realistically expect success of the merits; second, the litigant's subjective motivation must conceal an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon. To meet this test, the defendant's petitioning activities thus must be a sham both objectively and subjectively.

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Record on Appeal

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN27[] **Appeals, Appellate Briefs**

It is not the role of an appellate court to scour the record and make a party's arguments.

Torts > ... > Malicious Prosecution > Elements > Malice

HN28[] **Elements, Malice**

An action for malicious prosecution has three required elements: (1) the defendant brought (or continued to pursue) a claim in the underlying action without objective probable cause, (2) the claim was pursued by the defendant with subjective malice, and (3) the underlying action was ultimately resolved in the plaintiff's favor.

Torts > ... > Elements > Lack of Probable Cause > Determinations of Probable Cause

Torts > ... > Elements > Lack of Probable Cause > Evidence

HN29[] **Lack of Probable Cause, Determinations of Probable Cause**

An action is deemed to have been pursued without probable cause, for purposes of malicious prosecution, if it was not legally tenable when viewed in an objective manner as of the time the action was initiated or while it was being prosecuted. A prior action was not initiated without probable cause merely because it was ultimately found to lack merit; it was initiated without probable cause only if all reasonable lawyers would agree that the suit, at the time of filing, was totally and completely without merit based on the facts known to the defendant at the time the suit was filed. Probable cause is a low threshold designed to protect a litigant's right to assert arguable legal claims even if the claims are extremely unlikely to succeed.

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

Patent Law > US Patent & Trademark Office Proceedings > Appeals

Patent Law > US Patent & Trademark Office Proceedings > Examinations > Office Actions

HN30[] **US Patent & Trademark Office Proceedings, Reexamination Proceedings**

35 U.S.C. § 325(d) provides the Patent Trial and Appeal Board of the United States Patent and Trademark Office (PTO) with the discretion to deny a petition for inter partes review but does not require the board to deny the petition even if the petition is simply repeating previously made arguments. And, under the statute, the board can appropriately exercise its discretion to grant a petition even though it raises claims based on the same prior art or arguments previously made to the PTO. Therefore, it is mere speculation to baldly conclude that a denial of a petition per the board's discretion under § 325(d) establishes a lack of probable cause to satisfy the corresponding element of a cause of action for malicious prosecution.

Headnotes/Summary

Summary

[*769] CALIFORNIA OFFICIAL REPORTS SUMMARY

The superior court granted in part and denied in part a company's anti-SLAPP special motion to strike (Code Civ. Proc., § 425.16) a competitor's defamation, unfair competition, and malicious prosecution claims. (Superior Court of San Diego County, Nos. 37-2019-00064665-CU-BT-CTL and 37-2019-00064665-CU-BT-CTL, John S. Meyer, Judge.)

The Court of Appeal affirmed in part, reversed in part, and remanded. The court held that the commercial speech exception to the anti-SLAPP statute (Code Civ. Proc., § 425.17, subd. (c)) applied to statements the company made to potential investors about development of a drug because the investors were in a position to influence future buyers by investing to bring the drug to market. A request to stay federal approval of the competitor's drug was protected conduct (§ 425.16, subd. (e)(2)) because it was petitioning activity, and although the litigation privilege (*Civ. Code, § 47, subd. (b)*) was not shown to apply, defamation and unfair competition claims arising from the request lacked minimal merit because the *Noerr-Pennington* doctrine provided immunity. A probability of prevailing was not shown as to the malicious prosecution claim because the denial of a petition challenging the competitor's patent did not establish lack of probable cause. (Opinion by Huffman, J., with McConnell, P. J., and O'Rourke, J., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] (1)

Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Protected Activity.

California's anti-SLAPP statute is designed to protect defendants from meritless lawsuits that might chill the exercise of their rights to speak and petition on matters of public concern. To that end, the statute authorizes a special motion to strike a claim arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.

CA(2)[] (2)

Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Two-step Analysis.

A court evaluates an anti-SLAPP motion in two steps. Initially, the moving defendant bears the burden of establishing that the challenged allegations or claims arise from protected activity in which the defendant has engaged. If the defendant carries its burden, the plaintiff must then demonstrate its claims have at least minimal merit. If the plaintiff fails to meet that burden, the court will strike the claim.

CA(3)[] **(3)**

Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Protected Activity.

A defendant's first-step burden is to identify the activity each challenged claim rests on and demonstrate that that activity is protected by the anti-SLAPP statute. A claim may be struck only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted. To determine whether a claim arises from protected activity, courts must consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability. Courts then must evaluate whether the defendant has shown any of these actions fall within one or more of the four categories of acts protected by the anti-SLAPP statute.

CA(4)[] **(4)**

Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Probability of Prevailing.

The second step of the anti-SLAPP analysis has been described as a summary-judgment-like procedure. The court determines whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. The plaintiff may not rely solely on its complaint, even if verified; instead, its proof must be made upon competent admissible evidence. The defendant may submit evidence in support of its motion. However, the court does not weigh evidence or resolve conflicting factual claims. Rather, the court accepts the plaintiff's evidence as **[*771]** true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. Claims with the requisite minimal merit may proceed.

CA(5)[] **(5)**

Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Review.

An order granting an anti-SLAPP motion is reviewed de novo.

CA(6)[] **(6)**

Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Protected Activity—Malicious Prosecution Claim.

Malicious prosecution arises from an underlying lawsuit and involves allegations that the defendant committed a tort by engaging in the underlying action. A malicious prosecution claim meets the requirement of the first prong of the anti-SLAPP analysis as it constitutes protected activity under *Code Civ. Proc., § 425.16*.

CA(7)[] **(7)**

Pleading § 94—Motions and Objections—Motion to Strike—Anti-SLAPP—Mixed Claim.

A mixed claim, in the context of an anti-SLAPP motion, is a claim based on protected and unprotected conduct.

CA(8)[] **(8)**

Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Scope—Excluded Claims.

Code Civ. Proc., § 425.17, seeks to accomplish the goal of curbing abuse of the anti-SLAPP statute by expressly excluding several categories of claims from the scope of *Code Civ. Proc., § 425.16*.

CA(9)[] **(9)**

Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Commercial Speech Exemption.

The legislative history of *Code Civ. Proc., § 425.17*, indicates it was drafted to track constitutional principles governing regulation of commercial speech. Three elements distinguish commercial speech from noncommercial speech: the speaker, the audience, and the content of the message.

CA(10)[] **(10)**

Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Commercial Speech Exemption.

Code Civ. Proc., § 425.17, subd. (c), establishes an exclusion from anti-SLAPP protection for claims concerning some commercial speech. The exemption applies when: (1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services; (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's **[*772]** goods or services or in the course of delivering the person's goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in *§ 425.17, subd. (c)(2)*.

CA(11)[] **(11)**

Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Commercial Speech Exemption.

The burden of proof as to the applicability of the *Code Civ. Proc., § 425.17* commercial speech exemption falls on the party seeking the benefit of it. As a statutory exception to *Code Civ. Proc., § 425.16*, *§ 425.17* must be narrowly construed. Under the two-pronged test of *§ 425.16*, whether a *§ 425.17* exemption applies is a first prong determination. The court does not consider whether the plaintiff is likely to prevail on the merits. The court independently reviews the applicability of the commercial speech exemption.

CA(12)[] **(12)**

Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Commercial Speech Exemption.

Mentioning a competitor or a competitor's product is not required under the *Code Civ. Proc., § 425.17* commercial speech exemption. It is enough that the statements relate to the speaker's own product (*§ 425.17, subd. (c)(1)*).

CA(13)[] **(13)**

Courts § 38—Decisions and Orders—Doctrine of Stare Decisis—Identity of Law and Fact—Propositions Not Considered.

A decision does not stand for a proposition not considered by the court.

CA(14)[] **(14)**

Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Commercial Speech Exemption.

Code Civ. Proc., § 425.17, subd. (c), does not use the word "advertising," but instead provides its own explanation regarding what the commercial speech exception covers. Accordingly, cases construing claims under the *Lanham Act (15 U.S.C. § 1125(a)(1)*) are not instructive in construing the commercial speech exception to the anti-SLAPP statute.

CA(15)[] **(15)**

Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Commercial Speech Exemption.

Code Civ. Proc., § 425.17, subd. (c)(2), identifies the audience to whom the defendant must make the statement for it to fall under the commercial speech exception. The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation.

CA(16)[] **(16)**

Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Commercial Speech Exemption.

Comments made to potential investors related to a company's development of a drug. To this end, **[*773]** the company emphasized that the drug was further along in development than other competing drugs, discussed patients' response rate to the drug, and highlighted the need for federal approval. At the time these statements were made, the company had not taken the drug to market. Thus, there were no consumers that would have been able to purchase the drug when the comments were made. However, clearly the audience of the statements was in a position to otherwise influence a potential buyer by investing in the company to help ensure that the company brought the drug to market before other competing drugs. Under these unique circumstances, the statements were commercial speech and fell under the exception to the anti-SLAPP statute (*Code Civ. Proc., § 425.17, subd. (c)*) in a lawsuit brought by a competitor alleging defamation, malicious prosecution, and unfair competition.

[Cal. Forms of Pleading and Practice (2021) ch. 376, Motions to Strike: Anti-SLAPP, § 376.16; 1 Wagstaffe Group, Matthew Bender Practice Guide: Cal. Pretrial Civil Procedure (2021) § 25-III.]

CA(17)[] **(17)**

Administrative Law § 22—Administrative Actions—Practice and Procedure—Petition for Adoption or Repeal of Regulation—Citizen Petition to U.S. Food and Drug Administration.

A citizen petition is a means afforded by the U.S. Food and Drug Administration (FDA) for raising concerns about products the FDA reviews; any individual may file such a petition concerning scientific or legal issues before or while the product is on the market. Through this petition process, the FDA permits private entities to provide comments and opinions on draft guidance by filing these petitions (*21 C.F.R. § 10.30 (2021)*). A petition can request that the FDA issue, amend, or revoke a regulation or order or take or refrain from taking any other form of administrative action. A citizen petition must describe the FDA action the petitioner requests and must include a certification by the petitioner that the petition includes all information and views on which the petition relies, and that it includes representative data and information known to the petitioner which are unfavorable to the petition. As such, a citizen petition is a means by which the FDA explicitly allows private entities to express safety, scientific, or legal concerns regarding a product. Alternatively stated, the citizen petition is a mechanism wherein a private entity can petition the government (a government agency) for redress.

CA(18)[] **(18)**

Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Protected Activity—Petitioning.

A citizen petition is classic protected activity under the anti-SLAPP statute (*Code Civ. Proc., § 425.16, subd. (e)(2)*). And the right to petition has been called an essential attribute of governing, vital to a basic process in California's **[*774]** constitutional scheme—direct initiation of change by the citizenry through initiative, referendum, and recall. Moreover, under the *Noerr-Pennington* doctrine, statements made in a citizen petition are generally immune from civil liability.

CA(19)[] **(19)**

Pleading § 94—Motions and Objections—Motion to Strike—Anti-SLAPP—Probability of Prevailing—Mixed Claim.

A party asserting mixed causes of action need only establish a probability of prevailing on its claims based on protected conduct under the anti-SLAPP statute. If it cannot do so, then the allegations concerning the protected conduct must be stricken. However, the court disregards allegations concerning unprotected conduct. As such, the party does not have to prove a probability of success on the merits to the extent its claims are based on unprotected conduct.

CA(20)[] **(20)**

Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Two-step Analysis.

Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.

CA(21)[] **(21)**

Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Probability of Prevailing.

In employing a summary-judgment-like procedure for the second prong of the anti-SLAPP analysis, a court determines whether the plaintiff's prima facie showing is enough to win a favorable judgment. This threshold is not high. Claims with minimal merit proceed.

CA(22)[] **(22)**

Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Burden of Proof.

During the second prong of a court's anti-SLAPP analysis, a defendant bears the burden of proving a privilege's applicability.

CA(23)[] **(23)**

Libel and Slander § 18—Privileged Communications—Absolute Privilege—Legislative and Judicial Proceedings—Litigation Privilege—Elements.

Civ. *Code, § 47, subd. (b)*, renders absolutely privileged communications made as part of a judicial or quasi-judicial proceeding. The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.

CA(24)[] **(24)**

Libel and Slander § 18—Privileged Communications—Absolute Privilege—Legislative and Judicial Proceedings—Litigation Privilege—Purpose and Scope.

The principal purpose of the litigation privilege is to afford **[*775]** litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. Stated differently, it exists to protect citizens from the threat of litigation for communications to government agencies whose function it is to investigate and remedy wrongdoing. Thus, the crux of the litigation privilege is that it covers communications made as part of a judicial or quasi-judicial proceeding.

CA(25)[] **(25)**

Libel and Slander § 18—Privileged Communications—Absolute Privilege—Legislative and Judicial Proceedings—Litigation Privilege—Burden of Proof.

One invoking the litigation privilege must do more than simply point to the allegedly privileged document.

CA(26)[] **(26)**

Monopolies and Restraints of Trade § 5—Actions—Noerr-Pennington Immunity.

The *Noerr-Pennington* doctrine, which arose in the context of ***antitrust law***, holds that those who petition government for redress are generally immune from antitrust liability. The doctrine has since been applied beyond the antitrust context and generally shields a defendant's petitioning activity before courts as well as administrative and other government agencies.

CA(27)[] **(27)**

Monopolies and Restraints of Trade § 5—Actions—Noerr-Pennington Immunity—Sham Exception.

An exception to the *Noerr-Pennington* doctrine arises when efforts to influence government are merely a sham; such efforts are not protected by the *Noerr-Pennington* doctrine. There is a two-part test for determining whether a defendant's petitioning activity falls outside the *Noerr-Pennington* doctrine. First, it must be objectively baseless in the sense that no reasonable litigant could realistically expect success of the merits; second, the litigant's subjective motivation must conceal an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon. To meet this test, the defendant's petitioning activities thus must be a sham both objectively and subjectively.

CA(28)[] **(28)**

Appellate Review § 109—Briefs—Form and Requisites—Argument and Authority—Noncompliance.

It is not the role of an appellate court to scour the record and make a party's arguments.

CA(29)[] **(29)**

Malicious Prosecution § 3—Essentials to Maintenance of Action—Three Required Elements.

An action for malicious prosecution has three required elements: (1) the defendant brought (or continued to pursue) a claim in the underlying action without objective probable cause, (2) the claim was pursued by the defendant with subjective malice, and (3) the underlying action was ultimately resolved in the plaintiff's favor.

[*776] *CA(30)*[] **(30)**

Malicious Prosecution § 6—Essentials to Maintenance of Action—Want of Probable Cause—Tenability.

An action is deemed to have been pursued without probable cause, for purposes of malicious prosecution, if it was not legally tenable when viewed in an objective manner as of the time the action was initiated or while it was being prosecuted. A prior action was not initiated without probable cause merely because it was ultimately found to lack merit; it was initiated without probable cause only if all reasonable lawyers would agree that the suit, at the time of filing, was totally and completely without merit based on the facts known to the defendant at the time the suit was filed. Probable cause is a low threshold designed to protect a litigant's right to assert arguable legal claims even if the claims are extremely unlikely to succeed.

CA(31)[] **(31)**

Malicious Prosecution § 6—Essentials to Maintenance of Action—Want of Probable Cause—Unsuccessful Petition Challenging Patent.

Tit. *35 U.S.C. § 325(d)* provides the Patent Trial and Appeal Board of the United States Patent and Trademark Office (PTO) with the discretion to deny a petition for inter partes review but does not require the board to deny the petition even if the petition is simply repeating previously made arguments. And, under the statute, the board can appropriately exercise its discretion to grant a petition even though it raises claims based on the same prior art or arguments previously made to the PTO. Therefore, it is mere speculation to baldly conclude that a denial of a petition per the board's discretion under *§ 325(d)* establishes a lack of probable cause to satisfy the corresponding element of a cause of action for malicious prosecution.

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Steptoe & Johnson, Jason Levin, Melanie A. Ayerh and Jamie L. Lucia for Defendant and Appellant and for Defendant and Respondent.

Judges: Opinion by Huffman, J., with McConnell, P. J., and O'Rourke, J., concurring.

Opinion by: Huffman, J.

Opinion

[636] HUFFMAN, J.**—Neurelis, Inc. (Neurelis), and Aquestive Therapeutics, Inc. (Aquestive), are pharmaceutical companies developing their own respective **[*777]** means to administer diazepam, a drug used to treat acute repetitive seizures (ARS). Neurelis was further along in the development process than Aquestive. Thus, according to Neurelis, Aquestive engaged in a "multi-year, anticompetitive campaign to derail the Food and Drug Administration" (FDA) **[***2]** from approving Neurelis's new drug. Based on Aquestive's alleged conduct, Neurelis sued Aquestive for defamation, malicious prosecution, and violation of the unfair competition law (UCL; *Bus. & Prof. Code, § 17200 et seq.*). In response, Aquestive brought a special motion to strike the complaint under the anti-SLAPP (strategic lawsuit against public participation) statute, *Code of Civil Procedure section 425.16*.[1]

The superior court granted in part and denied in part Aquestive's motion, finding that the defamation cause of action could not withstand the anti-SLAPP challenge. However, the court denied the motion as to Neurelis's other two causes of action.

Aquestive appeals, contending the court erred by failing to strike the malicious prosecution action as well as the claim for a violation of the UCL. Neurelis, in turn, cross-appeals from the order, maintaining that the conduct giving rise to its defamation cause of action was not protected under the anti-SLAPP statute.

We agree that at least some of the conduct giving rise to the defamation action is covered by the commercial speech exception (*§ 425.17, subd. (c)*) and not subject to the anti-SLAPP statute. Accordingly, we determine the superior court erred in granting the anti-SLAPP motion as to the defamation action. Some of **[***3]** this same conduct also gives rise to the UCL claim and is not subject to the anti-SLAPP statute as well. However, we note that Neurelis bases part of two of its causes of action on Aquestive's petitioning activity. That activity is protected conduct under the anti-SLAPP statute, and Neurelis has not shown a likelihood to prevail on the merits. Thus, allegations relating to this petitioning conduct must be struck. Finally, we determine that Neurelis has not shown a probability of success on the merits regarding its malicious prosecution claim. As such, that claim should be struck under the anti-SLAPP statute.

In summary, the superior court's order is affirmed in part and reversed in part. We will remand this matter back to the superior court with instructions to enter an order striking the allegations relating to Aquestive's petitioning activity, striking the malicious prosecution action, and denying the motion as to the UCL and defamation causes of action to the extent they are based on unprotected conduct.
[*778]

FACTUAL AND PROCEDURAL BACKGROUND

The Operative Complaint

Neurelis is a Delaware corporation with its principal place of business in San Diego. Its focus is to develop pharmaceuticals **[***4]** to treat central nervous system disorders. Aquestive is a Delaware corporation with its principal place of business in New Jersey. Both Neurelis and Aquestive were working to develop a drug to treat patients with epilepsy who suffer from ARS. For over 20 years, Diastat® was the only approved drug on the market to treat ARS, but it requires rectal administration. Therefore, Neurelis and Aquestive were **[**637]** trying to develop a new method to administer the needed medicine.

To this end, Neurelis formed in 2007 with the aim of combining various technologies to find an effective way to create an intranasal delivery system for an ARS treating drug (diazepam). In 2008, Neurelis had developed a novel formation for nasal delivery of the drug diazepam, which would be named Valtoco®.

In 2011, after initial nonclinical studies, Neurelis began discussions with the FDA regarding Valtoco as an investigational new drug. That same year, Neurelis conducted the first human proof-of-concept study. It announced the completion of dosing on April 20, 2011. Two months later, Neurelis publicly announced the results from this

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[1] Statutory references are to the Code of Civil Procedure unless otherwise specified.

phase 1 study that demonstrated a bioavailability[2] of 96 percent when comparing Valtoco with **[***5]** intravenous diazepam.

Based on these results, Neurelis scheduled a preinvestigational new drug application with the FDA, which was conducted in November 2011. On February 6, 2012, Neurelis publicly announced the FDA's acceptance of the NRL-1 (Valtoco) investigational new drug application. Per the direction of the FDA, Neurelis continued working toward the development of Valtoco throughout 2012, 2013, and 2014.

On December 22, 2015, Neurelis announced the receipt of orphan drug designation from the FDA for Valtoco for management of ARS. Such designation may be obtained when a rare disorder or condition meets criteria specified by the *Orphan Drug Act of 1983* and the FDA's implementing regulations. This designation did not indicate that Valtoco was safe or effective for public use but, instead, operated to qualify Neurelis for various development incentives, like tax credits and potential exclusivity for seven years if the FDA ultimately approved Valtoco.
[*779]

On January 5, 2017, Neurelis announced receipt of fast track designation from the FDA for Valtoco. That designation allows for the potential expedited or priority review from the FDA once the new drug application has been submitted. It also provides **[***6]** for prioritized interactions with the FDA during the clinical development program.

On September 24, 2018, Neurelis announced the filing of a new drug application for Valtoco as a treatment for ARS. At the time of filing the operative complaint (Dec. 9, 2019), the FDA was still considering that application.

While Neurelis was in the process of developing Valtoco and seeking FDA approval, Aquestive also was working toward the development of its own drug to treat ARS, Libervant®. However, Aquestive was not as far along in the process as Neurelis. Indeed, at various times, Aquestive approached Neurelis about partnering in the development process, but Neurelis declined.

Libervant has a different delivery system than Valtoco. Although Valtoco is administered nasally, Libervant utilizes “fast-melt strips” for a “buccal delivery of diazepam.” So, the drug is delivered by placing a soluble strip in the patient's mouth against the cheek, which would quickly dissolve for oral administration. Libervant obtained orphan drug designation on November 10, 2016.

In June 2017, Aquestive's chief executive officer, Keith Kendall, and its chief operating officer, Dan Barber, met with Neurelis's chief executive **[***7]** officer, Craig **[**638]** Chambliss, to discuss “the two companies' diazepam programs and … to forge a potential strategic partnership between Aquestive and Neurelis.” Chambliss explained Neurelis's historical efforts to bring Valtoco to market as well as his views of the importance of formulating a nasal administration of diazepam to treat ARS for the epilepsy community. Kendall interrupted Chambliss's explanation, stating, “‘Look, let's be honest here. We don‘t care about the patients, epilepsy, or any of this. We are not here for patients, we are here for our investors and need to show them a return.’” After these comments, Chambliss left the meeting.

Kendall and Barber requested another meeting with Chambliss in January 2018. Chambliss agreed in the hopes of discussing “some type of proposal about other products[] because the significant gap in progress between the two diazepam programs would not make a good partnership.” However, at the meeting, Chambliss came to believe that Kendall and Barber were merely trying to obtain competitive intelligence on Neurelis and Valtoco. Kendall “attempted to insert Aquestive into a strategic partnering process with Neurelis,” but Chambliss explained **[***8]** that Aquestive was not an appropriate partner for Neurelis.
[*780]

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[2] Bioavailability means “the rate and extent to which the active ingredient or active moiety is absorbed from a drug product and becomes available at the site of drug action.” (*21 C.F.R. § 314.3 (2021)*.)

Aquestive completed its initial public offering on July 24, 2018. Before the offering, Aquestive filed a form S-1 (Form S-1) with the Securities and Exchange Commission (SEC). In that form, Libervant was featured prominently. Although development of Libervant was not as far along as Valtoco, Aquestive represented that it was “further along” than other companies who were developing “other routes of administration” of diazepam for the treatment of ARS, including companies developing intranasal and subcutaneous implementations. However, Aquestive admitted that if any of these other companies obtained FDA approval for their formulations of diazepam for the treatment of ARS before Aquestive, then Aquestive would be barred from marketing Libervant in the United States for seven years.[3]

In a subsequent filing with the SEC, Aquestive did not claim that it was further along in the development of Libervant than other companies developing their diazepam products, but it still admitted that if a company were to get its product approved by the FDA before Libervant then Aquestive would most likely not be able to market Libervant in the United States **[***9]** for seven years.

Because Aquestive encountered multiple obstacles in the development of Libervant and its stock value decreased significantly, Aquestive threatened to file three inter partes review (IPR) petitions with the Patent Trial and Appeal Board (Board) of the United States Patent and Trademark Office (PTO) unless Neurelis signed a waiver of its orphan drug exclusivity. These petitions challenged the validity of claims from an issued United States patent belonging to Neurelis. Prompted by this threat, Chambliss agreed to meet with Kendall and Barber on January 9, 2019. Kendall would not consent to share the contents of the proposed petitions unless Neurelis agreed to “work together” with Aquestive. Chambliss had brought a Neurelis board member as well as an intellectual property **[**639]** attorney to the meeting. Yet, no agreement was reached.

Two days later, Aquestive's leadership and legal counsel had a phone call with Chambliss and Neurelis's legal counsel to discuss the threatened petitions. During the call, Aquestive stated that it would not share details of the petitions unless Neurelis signed a waiver of orphan drug exclusivity. Chambliss responded that the proposal was “ridiculous” **[***10]** and there was no need for further discussions.
[*781]

At a followup discussion the next week, Aquestive shared some details of the threatened petitions. Neurelis‘s legal counsel then determined the petitions were meritless. As such, Neurelis concluded that the petitions were proposed solely to extort it to sign an orphan drug exclusivity waiver. Chambliss therefore explained to Kendall on January 23, 2019, that Neurelis would not sign any waiver and given the frivolousness of the petitions, the money the parties would spend on litigation would be better served invested in the epilepsy community. To this end, Chambliss encouraged Kendall to “‘do the right thing here,’” but Kendall indicated Aquestive would move forward with the petitions.

On January 29, 2019, Aquestive filed the three IPR petitions with the Board, challenging the validity of all the claims of Neurelis's U.S. Patent No. 9,763,876 (’876 Patent). The Board denied institution of a review for one of the petitions because Aquestive's petition failed to demonstrate a reasonable likelihood of prevailing on showing invalidity of a claim. The Board also denied institution of a review for another one of the petitions, under *35 United States Code section 325(d)*, because that petition asserted the same or substantially **[***11]** the same prior art or arguments that had already been presented to the PTO during the original prosecution of the ’876 Patent. As to the third petition, the Board instituted a review on August 13, 2019. At the time of the filing of the operative complaint, the petition remained pending.

In addition to filing the three petitions with the Board, Aquestive also filed a citizen petition with the FDA on November 1, 2019, requesting that the FDA stay approval of Neurelis's new drug application for Valtoco “‘until additional clinical studies have been conducted that would allow for adequate labeling as requested in this petition.’”

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[3] Neurelis alleges that, at the time of the filing of Aquestive's Form S-1, Aquestive had not yet completed any clinical trials for Libervant. Although Aquestive did not mention Neurelis or Valtoco by name, Neurelis avers Aquestive made its statements “with Neurelis in mind.” Moreover, because Neurelis was further along in the development of Valtoco than Aquestive was with Libervant, Neurelis claims Aquestive's factual representations in the Form S-1 were false.

Aquestive additionally requested that the FDA determine that Valtoco was neither clinically superior to other diazepam products nor offered a "'major contribution to patient care.'" According to Neurelis, such a determination would be tantamount to the FDA not giving Valtoco orphan drug exclusivity. Neurelis argues that none of Aquestive's claims against Valtoco were accurate, but instead, they were "founded on misleading, inaccurate, and incomplete data."

Neurelis filed a responsive letter to the FDA on November 22, 2019, explaining why Aquestive's FDA petition was meritless. **[***12]** Aquestive then submitted a supplemental petition asking the FDA to require Neurelis to reformulate Valtoco because it contains Vitamin E. Again, Neurelis contends the claims in Aquestive's supplemental filing were based on "inaccurate data and misinformation."

Moreover, on a November 6, 2019 quarterly investors call, Kendall stated, "'Based on patient survey data, Libervant is preferred by 80-plus percent of **[*782]** patients when compared to nasal sprays. Once approved by the FDA, Libervant will be the only treatment option usable by and delivering a consistent, predictable dose to virtually all patients to whom it's prescribed.'"

Because of Aquestive's actions, Neurelis brought suit, alleging causes of action for **[**640]** violations of the UCL, defamation, and malicious prosecution.

The Anti-SLAPP Motion

In response to the operative complaint, Aquestive filed an anti-SLAPP motion. In that motion, Aquestive argued the three causes of action were based on speech protected under *subdivision (e)(1)*, *(2)*, and *(3) of section 425.16*. Neurelis opposed the motion arguing that Aquestive's private threats were not protected under the anti-SLAPP statute and that any causes of action arising out of the statements to investors and the citizen petition were **[***13]** not protected because they fell under the commercial speech exemption. In addition, Neurelis contended that it had a probability of succeeding on the merits on each cause of action and Aquestive failed to carry its burden on any affirmative defense.

After considering the papers and evidence submitted in support of and in opposition to the motion as well as entertaining oral argument, the superior court asked the parties to submit supplemental briefing on two issues, whether: (1) the investor statements qualify for the commercial speech exemption and (2) the denial of the petitions filed with the Board could give rise to a malicious prosecution claim.

The court then considered the supplemental briefs and issued its ruling, denying in part and granting in part the anti-SLAPP motion. Specifically, the court struck the defamation cause of action, but allowed the UCL and malicious prosecution causes of action to stand. In doing so, the court found that the comments made to the investors did not fall under the commercial speech exception codified in *section 425.17, subdivision (c)(2)*. In addition, the court determined that the denial of two of the petitions filed with the Board could serve as the basis for the malicious prosecution **[***14]** action. Regarding the probability of success on the merits, the court concluded that Neurelis did not satisfy its burden as to the defamation action but did so as to the UCL and malicious prosecution claims.

Appeals

Aquestive appeals the court's order as to its denial of the anti-SLAPP motion regarding the UCL and malicious prosecution causes of action. **[*783]** Neurelis appeals the order as to the granting of the motion concerning the defamation cause of action. On our own motion, we consolidated the two appeals.

DISCUSSION

I

THE ANTI-SLAPP MOTION

A. Legal Standards

CA(1)[] **(1)** “Enacted by the Legislature in 1992, ***HN1***[] the anti-SLAPP statute is designed to protect defendants from meritless lawsuits that might chill the exercise of their rights to speak and petition on matters of public concern. [Citations.] To that end, the statute authorizes a special motion to strike a claim ‘arising from any act of that person in furtherance of the person's *right of petition or free speech under the United States Constitution* or the *California Constitution* in connection with a public issue.’” (*Wilson v. Cable News Network, Inc. (2019) 7 Cal.5th 871, 883–884 [249 Cal. Rptr. 3d 569, 444 P.3d 706] (Wilson)*.)

HN2[] ***CA(2)***[] **(2)** “A court evaluates an anti-SLAPP motion in two steps. ‘Initially, the moving defendant bears the burden of establishing that the challenged **[***15]** allegations or claims “aris[e] from” protected activity in which the defendant has engaged. [Citations.] If the defendant carries its burden, **[**641]** the plaintiff must then demonstrate its claims have at least “minimal merit.”’ [Citation.] If the plaintiff fails to meet that burden, the court will strike the claim.” (*Wilson, supra, 7 Cal.5th at p. 884*.)

HN3[] ***CA(3)***[] **(3)** “The defendant's first-step burden is to identify the activity each challenged claim rests on and demonstrate that that activity is protected by the anti-SLAPP statute. A ‘claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted.’ [Citation.] To determine whether a claim arises from protected activity, courts must ‘consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability.’ [Citation.] Courts then must evaluate whether the defendant has shown any of these actions fall within one or more of the four categories of ‘“act[s]”’ protected by the anti-SLAPP statute.” (*Wilson, supra, 7 Cal.5th at p. 884*.)

[*784]

HN4[] ***CA(4)***[] **(4)** The second step of the anti-SLAPP analysis has been described as a summary-judgment-like **[***16]** procedure. (*Sweetwater Union High School Dist. v. Gilbane Building Co. (2019) 6 Cal.5th 931, 940 [243 Cal. Rptr. 3d 880, 434 P.3d 1152] (Sweetwater Union)*.) The court determines whether “‘the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment.’” (*Ibid.*) The plaintiff “‘may not rely solely on its complaint, even if verified; instead, its proof must be made upon competent admissible evidence.’” (*Ibid.*) The defendant may submit evidence in support of its motion. (*1-800 Contacts, Inc. v. Steinberg (2003) 107 Cal.App.4th 568, 585 [132 Cal. Rptr. 2d 789]*.) However, “‘[t]he court does not weigh evidence or resolve conflicting factual claims.’” (*Sweetwater Union, at p. 940*.) Rather, the court “‘accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.] “[C]laims with the requisite minimal merit may proceed.”’” (*Ibid.*)

HN5[] ***CA(5)***[] **(5)** We review an order granting an anti-SLAPP motion de novo. (*Sweetwater Union, supra, 6 Cal.5th at p. 940*.)

B. First Prong of the Anti-SLAPP Analysis

CA(6)[] **(6)** In the instant action, Neurelis alleges three causes of action against Aquestive—violation of the UCL, defamation, and malicious prosecution. As to the last cause of action, ***HN6***[] malicious prosecution arises from an underlying lawsuit and involves allegations that the defendant committed a tort by engaging in the underlying action. (See *Jarrow Formulas, Inc. v. LaMarche (2003) 31 Cal.4th 728, 734–735, 740–741 [3 Cal. Rptr. 3d 636, 74 P.3d 737] (Jarrow Formulas)* [concluding **[***17]** that malicious prosecution is not exempt from anti-SLAPP scrutiny and explaining that “every Court of Appeal that has addressed the question has concluded that malicious prosecution causes of action fall within the purview of the anti-SLAPP statute”].) Because the malicious prosecution claim meets the requirement of the first prong as it constitutes protected activity under *section 425.16*, we will address the parties' respective arguments as to that cause of action under the second prong of our anti-SLAPP analysis, *post*. In considering the first prong of the anti-SLAPP motion, we shall focus on the UCL and defamation claims.

[642]**

CA(7)[] **(7)** As a threshold matter, we note that the UCL cause of action is ***HN7***[] a mixed claim; that is, it is based on protected and unprotected conduct. (See *Baral v. Schnitt (2016) 1 Cal.5th 376, 396 [205 Cal.Rptr.3d 475, 376 P.3d 604]* (*Baral*).) Thus, the UCL claim relies on Aquestive's “extortionist behavior using litigation as leverage to force Neurelis into waiving [o]rphan [d]rug [e]xclusivity" as well statements Aquestive made in the citizen petition and representations it made to investors. Aquestive admits in its opening brief that **[*785]** the anti-SLAPP motion was not aimed at Aquestive's threats to Neurelis. As such, as to the **[***18]** UCL cause of action only, the anti-SLAPP motion could not have struck that entire cause of action. Therefore, at least the portion of the UCL claim based on the private threats is not part of this appeal and survives regardless of the outcome here. (*Baral, at p. 396*.)

So, we are left with Aquestive's statements in the citizen petition and its representations to investors, both of which form the basis of Neurelis's causes of action for violation of the UCL and defamation. Aquestive maintains these statements and representations are protected conduct under the anti-SLAPP statute; thus, we must move on to the second prong of our analysis. Neurelis does not argue that the challenged statements do not concern an issue of public interest and, as such, are not covered under the anti-SLAPP statute for that reason. Instead, it counters that the conduct is not protected because it falls under the commercial speech exception found in *section 425.17, subdivision (c)*. We accept the implicit concession by Neurelis that the statements concern an issue of public interest and turn to analyzing whether the commercial speech exception applies.

1. The Commercial Speech Exception

CA(8)[] **(8)** In 2003, the Legislature enacted *section 425.17* to curb "a disturbing abuse of *Section 425.16* **[***19]** … which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of *Section 425.16*." (*§ 425.17, subd. (a)*.)[4] ***HN8***[] *Section 425.17* seeks to accomplish that goal by expressly excluding several categories of claims from the scope of *section 425.16*.

HN10[] ***CA(10)***[] **(10)** *Section 425.17, subdivision (c)* establishes such an exclusion for claims concerning some commercial speech. As our high court explained, the exemption applies when: "(1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services; (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or **[*786]** leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in *section 425.17(c)(2)*." (*Simpson Strong-Tie Co., Inc. v. Gore (2010) 49 Cal.4th 12, 30 [109 Cal. Rptr. 3d 329, 230 P.3d 1117] (Simpson)* **[**643]** ; see *Demetriades v. Yelp, Inc. (2014) 228 Cal.App.4th 294, 308–309 [175 Cal. Rptr. 3d 131] (Demetriades)*.)

HN11[] ***CA(11)***[] **(11)** The burden of proof as to the applicability of *section 425.17*'s commercial speech exemption **[***20]** falls on the party seeking the benefit of it, in this case, Neurelis. (*Simpson, supra, 49 Cal.4th at p. 26*.) As a statutory exception to *section 425.16*, *section 425.17* must be narrowly construed. (*Simpson, at p. 22*; *JAMS, supra, 1 Cal.App.5th at p. 992*.) "Under the two-pronged test of *section 425.16*, whether a *section 425.17* exemption applies is a first prong determination." (*Demetriades, supra, 228 Cal.App.4th at p. 308*.) We do not consider whether the plaintiff is likely to prevail on the merits. (*JAMS, at p. 993*.) We independently review the applicability of the commercial speech exemption. (*Simpson, at p. 26*.)

a. Aquestive's Comments to Investors

We first consider whether Aquestive's comments to investors fall under the commercial speech exception. Neurelis maintains that the first requirement of the exception is satisfied because Aquestive is "primarily engaged in the

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[4] ***HN9***[] ***CA(9)***[] **(9)** "[T]he legislative history of *section 425.17* indicates it was drafted to track constitutional principles governing regulation of commercial speech based upon guidelines discussed in *Kasky v. Nike, Inc. (2002) 27 Cal.4th 939 [119 Cal.Rptr.2d 296, 45 P.3d 243]* (*Kasky*). (See Assem. Com. on Judiciary, Analysis of Sen. Bill No. 515 (2003–2004 Reg. Sess.) as amended June 27, 2003, p. 8.)" (*JAMS, Inc. v. Superior Court (2016) 1 Cal.App.5th 984, 994 [205 Cal. Rptr. 3d 307], fn. omitted (JAMS)*.) In *Kasky*, our high court observed that three elements distinguish commercial speech from noncommercial speech: the speaker, the audience, and the content of the message. (*Kasky, at p. 960*.)

business of selling" "goods," including both pharmaceuticals and "securities." (See *§ 425.17, subd. (c)*.) Aquestive does not contest this point, nor could it effectively do so.

Neurelis also argues that *section 425.17, subdivision (c)(1)* is satisfied because the investor statements relate to Aquestive, Neurelis, and their respective ARS drugs. Therefore, the statements concern Aquestive's "or a business competitor's business operations, goods, or services." (See *§ 425.17, subd. (c)(1)*.) For example, in a 2018 Form S-1 filed with the SEC, Aquestive stated that Libervant was "further along in development than **[***21]** … other companies' versions of diazepam." Similarly, in a November 6, 2019, investor call, Aquestive stated that "[b]ased on patient survey data, Libervant is preferred by 80-plus percent of patients when compared to nasal sprays." These statements explicitly refer to Libervant and implicitly Valtoco, another "compan[y's] version[] of diazepam" and the only nasal spray then in development at that time.

CA(12)[] **(12)** Aquestive suggests that *subdivision (c)(1) of section 425.17* may not be satisfied because the investor statements do not specifically mention Neurelis or Valtoco by name. However, ***HN12***[] mentioning a competitor or a competitor's product under the subdivision is not required. It is enough that **[*787]** the statements relate to Aquestive's own product. (See *§ 425.17, subd. (c)(1)*.) That said, the statements implicitly refer to Neurelis ("other companies") and its product ("nasal spray"). We thus reject Aquestive's argument that Neurelis has not carried its burden as to this factor of the commercial speech exception.

Additionally, Neurelis contends that the investor statements were made to an "intended audience" of "actual or potential buyer[s] or customer[s]" of Aquestive's pharmaceuticals and securities or to people "likely to repeat the statement to, or **[***22]** otherwise influence, … actual or potential buyer[s] or customer[s]" of Aquestive's pharmaceuticals and securities. (See *§ 425.17, subd. (c)(2)*.) To this end, Neurelis notes that Aquestive made statements at the H.C. Wainwright Conference to industry and business development executives, public and private companies, institutional investors, and private equity firms. Further, Aquestive has admitted that its investor calls were a "public forum." Finally, **[**644]** Neurelis points out that the investor statements were also made in "the context of a regulatory approval process, proceeding, or investigation." (*§ 425.17, subd. (c)(2)*.)

Aquestive insists that Neurelis is incorrect that the intended target of the investor representations is sufficient to bring the investor statements under the auspice of the commercial speech exception because there is no evidence that the intended audience of the representations was "'physicians, hospitals or others in the medical community, who may be interested in purchasing Libervant or Valtoco.'" Instead, the representations were made to investors who buy Aquestive's stock not its products. As such, Aquestive contends the commercial speech exception cannot apply under the facts here.

Further, Aquestive **[***23]** contends that the commercial speech exception only applies to a certain subset of commercial speech, namely comparative advertising. (See *FilmOn.com Inc. v. DoubleVerify Inc. (2019) 7 Cal.5th 133, 147–148 [246 Cal. Rptr. 3d 591, 439 P.3d 1156] (FilmOn.com)*.)[5] Although we acknowledge that many of the reported cases addressing the commercial **[*788]** speech exception have involved false or misleading advertising (see, e.g., *JAMS, supra, 1 Cal.App.5th at pp. 996–998*; *L.A. Taxi Cooperative, Inc. v. The Independent Taxi Owners Assn. of Los Angeles (2015) 239 Cal.App.4th 918, 930–932 [191 Cal. Rptr. 3d 579]*), none of these cases addressed a situation similar to what we have here—a defendant who makes allegedly false statements about itself and/or its product as well as that of a competitor to current and potential investors and the general public.

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[5] ***CA(13)***[] **(13)** The California Supreme Court noted that "certain commercially oriented statements will fall outside the scope of *section 425.17, subdivision (c)*." (*FilmOn.com, supra, 7 Cal.5th at p. 148*.) The court further observed that "the language of *section 425.17, subdivision (c)* and subsequent case law indicate that the provision exempts 'only a subset of commercial speech'—specifically, comparative advertising." (*Id. at p. 147*.) However, in that case, the court was not considering whether certain speech fell under *subdivision (c)*. (*FilmOn.com, at p. 147, fn. 4*.) Instead, the court discussed *section 425.17, subdivision (c)* for the purpose of interpreting the "catchall" provision of *section 425.16, subdivision (e)(4)*. (*FilmOn.com, at pp. 142–143, 147–148*.) We read nothing in *FilmOn.com* that precludes the applicability of the commercial speech exception under the facts before us. (See ***HN13***[] ***Nolan v. City of Anaheim (2004) 33 Cal.4th 335, 343 [14 Cal. Rptr. 3d 857, 92 P.3d 350]*** ["A decision, of course, does not stand for a proposition not considered by the court"].)

CA(14)[] **(14)** In the absence of any California cases on point, Aquestive relies on three federal district court cases to support its position: *Allergan, Inc. v. Merz Pharmaceuticals, LLC (C.D.Cal., Nov. 14, 2011, No. SACV 11-446 AG (Ex)) 2011 WL 13323246*; *Tercica, Inc. v. Insmed Inc.* (N.D.Cal., June 9, 2006, No. C 05-5027 SBA) 2006 WL 1626930; *RPost Holdings, Inc. v. Trustifi Corp. (C.D.Cal., May 11, 2012, No. CV 10-1416 PSG (SHx)) 2012 WL 12952728*. Specifically, Aquestive maintains that these three cases stand for the proposition that statements to investors cannot be considered commercial speech. However, none of these cases addresses the commercial speech exception codified in *section 425.17, subdivision (c)*. Instead, these cases concern what is actionable commercial speech under *15 United States Code section 1125(a)(1)*, the *Lanham Act*. The false advertising prohibition in the *Lanham Act* applies only to "commercial advertising or promotion" (*15 U.S.C. § 1125(a)(1)(B)*), a term not defined under the act. Federal courts have limited the term to "advertising" intended to **[***24]** influence "consumers." **[**645]** (*Rice v. Fox Broad Co. (9th Cir. 2003) 330 F.3d 1170, 1181*.) ***HN14***[] *Section 425.17, subdivision (c)* does not use the word "advertising," but instead, provides its own explanation regarding what the commercial speech exception covers. Indeed, *subdivision (c)* explicitly lists "securities" among the "goods or services" covered under the exception. (*§ 425.17, subd (c)*.) Accordingly, these cases cited by Aquestive, construing claims under the *Lanham Act*, are not instructive here.

The only case cited by either party addressing the application of the commercial speech exception under the anti-SLAPP statute to representations made to investors is *Neuralstem, Inc. v. StemCells, Inc. (D.Md., Aug. 4, 2009, Civil Action No. AW-08-CV-1173) 2009 WL 2412126*. There, StemCells claimed that Neuralstem had "made false statements about the value or quality of StemCells' patents in order to devalue and injure the intellectual property of StemCells, to impugn the business honesty of StemCells, and to engage in unfair competition." (*Id. at p. *5*.) Neuralstem argued that its statements were protected conduct under the anti-SLAPP statute; however, in applying California law, the court found the commercial speech exemption under *subdivision (c) of section 425.17* applied. (*Neuralstem, at p. *5*.) The court determined that the public "statements were directed toward an audience of actual or potential buyers" because "Neuralstem is a publicly **[*789]** traded company and concedes these **[***25]** public statements were made to a specific target audience comprised of existing and potential investors." (*Id. at p. *7*.)

Neurelis relies on *Neuralstem*, maintaining it is analogous to the instant matter. Like StemCells and Neuralstem, Neurelis and Aquestive are business competitors. Similar to Neuralstem, Aquestive made statements of fact to its investors about its product as well as Neurelis's product (e.g., Libervant is further along in development than these other versions of diazepam and Libervant is preferred by 80-plus percent of patients when compared to nasal sprays). And both Neuralstem and Aquestive made their respective statements to investors and potential investors.

Despite Neurelis's reliance on *Neuralstem*, Aquestive does not discuss or even mention that case in its briefs. Instead, Aquestive argues that the commercial speech exception only applies if it had made the subject comments to customers or potential customers of its products (here, drugs) and not investors, who only buy its stock. Aquestive further points out that it is not in the busines of selling securities and securities are just the means by which it finds investment for its "true business" of "selling … pharmaceuticals **[***26]** for medical conditions." Therefore, Aquestive contends that if we adopt Neurelis's argument and find the commercial speech exception applicable here, then we will be improperly expanding the "narrowly construed commercial speech exemption." In other words, Aquestive all but concedes that the investor statements at issue would be considered speech if they were made to an audience of potential buyers of their drugs. But as they are aimed at investors (i.e., those who would give Aquestive money to develop the drugs to sell), the statements are protected under the anti-SLAPP statute.

CA(15)[] **(15)** Here, we do not believe Aquestive's distinction between investors who buy stock and consumers who would purchase its drugs carries the day, at least under the facts of this case. ***HN15***[] *Subdivision (c)(2) of section 425.17* identifies the "audience" to whom the defendant must make the statement for it to fall under the commercial **[**646]** speech exception. That subdivision provides, in relevant part: "The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval **[***27]** process, proceeding, or investigation …" (*§ 425.17, subd. (c)(2)*). Neurelis points out that some of the investor statements were made to industry and business development executives, public and private companies, institutional investors, and private equity firms. Then Neurelis claims, "[a]t the very least, this audience could have been expected to share what they learned with 'physicians, hospitals or others in the medical community, who may be interested in purchasing Libervant or Valtoco.'" Alternatively stated, Neurelis argues it can be **[*790]** inferred or assumed that the audience would repeat what they heard to potential consumers. Yet, under the plain language of the statute and the facts of this case, we do not need to make any such assumption or inference.

CA(16)[] **(16)** Here, the subject investor comments relate to Aquestive's development of Libervant. To this end, Aquestive emphasizes that Libervant is further along in development than other competing drugs. Aquestive discusses patients' "response rate" to Libervant. Aquestive states that more than 80 percent of the patients prefer Libervant to nasal sprays. Moreover, the comments highlight the need to get FDA approval of Libervant before the competing drugs to ensure **[***28]** Aquestive is not barred from marketing Libervant for a seven-year period. And Aquestive admits that it made the subject statements to investors as a means to encourage investment in its business (by way of the purchase of securities) so it can fund its "true business" of "selling … pharmaceuticals for medical conditions." At the time these statements were made, Aquestive had not taken Libervant to market but was seeking additional funding to obtain FDA approval and begin offering Libervant as a treatment for ARS. Thus, there were no consumers that would have been able to purchase Libervant when the comments were made. However, clearly the audience of Aquestive's statements was in a position to "otherwise influence" a "potential buyer" of Libervant by investing in Aquestive to help ensure that company brought Libervant to market before other competing drugs, like Valtoco. Under these unique circumstances, we determine the subject investor statements are commercial speech and fall under the exception to the anti-SLAPP statute under *section 425.17, subdivision (c)*.

Our conclusion is not inconsistent with the Second Appellate District's statement that "the legislative history of the commercial speech exemption to **[***29]** the anti-SLAPP statute confirms the Legislature's intent to except from anti-SLAPP coverage disputes that are purely commercial." (*Taheri Law Group v. Evans (2008) 160 Cal.App.4th 482, 491 [72 Cal. Rptr. 3d 847]*; accord, *Brill Media Co., LLC v. TCW Group, Inc. (2005) 132 Cal.App.4th 324, 342 [33 Cal. Rptr. 3d 371]* [*§ 425.17* "was intended to apply to commercial disputes"].) The instant action does not involve a plaintiff attempting to limit a defendant's constitutionally protected free speech rights. (See *Rusheen v. Coheen (2006) 37 Cal.4th 1048, 1055–1056 [39 Cal.Rptr.3d 516, 128 P.3d 713]*.) To the contrary, here, we have two rival pharmaceutical companies competing for FDA approval of their respective drugs that treat the same condition. Neurelis has sued Aquestive, claiming that Aquestive has attempted to extort Neurelis and lied about Neurelis and Valtoco as well as its own **[**647]** drug (Libervant) while trying to bring its drug to market. This is not the type of case for which the anti-SLAPP statute was intended. (See *No Doubt v. Activision Publishing, Inc. (2011) 192 Cal.App.4th 1018, 1026 [122 Cal. Rptr. 3d 397]* ["The purpose of the statute is 'to provide a procedural **[*791]** remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights'"].) Instead, it is the type of case to be covered by the commercial speech exception of *section 425.17, subdivision (c)*. (See *Taheri, at p. 491*; *Brill Media, at p. 342*.)

2. The Citizen Petition

In somewhat cursory fashion, Neurelis also contends that the citizen petition falls under the commercial speech exception. To this end, Neurelis observes: **[***30]** (1) Aquestive is primarily engaged in the business of selling goods; (2) the petition contained representations of fact; and (3) the petition was filed within the context of a regulatory approval process, proceeding, or investigation. In addition, Neurelis claims that *section 425.17, subdivision (c)* was specifically focused on overturning *DuPont Merck Pharmaceutical Co. v. Superior Court (2000) 78 Cal.App.4th 562 [92 Cal. Rptr. 2d 755] (DuPont)*, which involved a pharmaceutical company's "'false statements and conduct before a regulatory agency.'" Therefore, Neurelis argues the citizen petition here is analogous to the defendant in *DuPont* making "false statements before regulatory bodies, the medical profession, and to the public in connection with one of its pharmaceutical products." (*Id. at p. 564*.)

Aquestive insists the commercial speech exception does not apply to the citizen petition because the petition does not concern its own drug but, instead, focuses on Neurelis's drug. Thus, the petition cannot constitute advertising subject to the commercial speech exception. Also, Aquestive maintains that it could not be considered to be submitting the petition as part of the regulatory approval process because that process only pertains to the approval of its own drug. As Aquestive did not discuss Libervant in the citizen petition but only **[***31]** Valtoco, it argues that the petition was not part of the regulatory approval process as required under *subdivision (c)(2) of section 425.17*.

CA(17)[] **(17)** Absent from either party's discussion of whether the commercial speech exception applies is any explanation of the citizen petition process. ***HN16***[] A citizen petition is "a means afforded by the FDA for raising concerns about products the FDA reviews; any individual may file such a petition concerning scientific or legal issues before or while the product is on the market." (*Apotex Inc. v. Acorda Therapeutics, Inc. (2d Cir. 2016) 823 F.3d 51, 57 (Apotex)*.) Through this petition process, the FDA permits private entities to provide comments and opinions on draft guidance by filing these petitions. (*21 C.F.R. § 10.30 (2021)*.) A petition can request that the FDA "issue, amend, or revoke a regulation or order or take or refrain from taking any other form of administrative action." (*Ibid.*) A citizen petition must describe the FDA action the petitioner requests and must include a certification by the petitioner that **[*792]** the petition "includes all information and views on which the petition relies, and that it includes representative data and information known to the petitioner which are unfavorable to the petition." (*Ibid.*) As such, a citizen petition is a means by which the FDA explicitly **[***32]** allows private entities to express safety, scientific, or legal concerns regarding a product. Alternatively stated, the citizen petition is a mechanism wherein a private entity, like **[**648]** Aquestive, can petition the government (here, a government agency) for redress.

Neurelis offers no argument that even suggests the commercial speech exception can trump a party exercising its *First Amendment* right to petition the government. It does claim that the proponents of the commercial speech exception "were specifically focused on overturning *DuPont*." Yet, even if we agree with this representation, there remains no basis on which to apply the commercial speech exception to a citizen petition based on *DuPont*. That case did concern allegations that the "defendant made false statements before regulatory bodies, the medical profession, and to the public in connection with one of its pharmaceutical products." (*DuPont, supra, 78 Cal.App.4th at p. 564*.) And the appellate court found those statements protected under the anti-SLAPP statute. (*Id. at p. 567*.) Further, the court summarized the alleged false statements falling into two categories: "(1) lobbying and other activities seeking to influence the decisions of regulatory and legislative bodies and (2) advertising, marketing, and **[***33]** public relations activities directed at the medical profession and the general public." (*Id. at pp. 565–566*.) However, there is no indication in *DuPont* that the plaintiffs were basing any of their claims against the defendant for filing a citizen petition.

CA(18)[] **(18)** Additionally, we are not persuaded that the commercial speech exception could apply to the citizen petition in any event. ***HN17***[] The citizen petition is classic protected activity under the anti-SLAPP statute. (See *§ 425.16, subd. (e)(2)* ["any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law"].) And the right to petition has been called "an essential attribute of governing. … vital to a basic process in the state's constitutional scheme—direct initiation of change by the citizenry through initiative, referendum, and recall." (*Robins v. Pruneyard Shopping Center (1979) 23 Cal.3d 899, 907–908 [153 Cal. Rptr. 854, 592 P.2d 341]*, citations & fn. omitted, affd. *sub nom.* *PruneYard Shopping Ctr. v. Robins (1980) 447 U.S. 74 [64 L.Ed.2d 741, 100 S.Ct. 2035]*; accord, *United States v. Cruikshank (1875) 92 U.S. 542, 552 [23 L.Ed. 588, 591]* ["The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances"].) Moreover, under the *Noerr-Pennington* doctrine, **[***34]** the statements made in the citizen petition are generally immune from civil liability. (See *California Motor* ***[*793]*** *Transport Co. v. Trucking Unlimited (1972) 404 U.S. 508, 510–511 [30 L.Ed.2d 642, 92 S.Ct. 609]* (*California Transport*); *Ludwig v. Superior Court (1995) 37 Cal.App.4th 8, 21, fn. 17 [43 Cal. Rptr. 2d 350] (Ludwig)* ["the principle applies to virtually any tort, including unfair competition and interference with contract"].)[6]

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[6] To the extent an exception applies to the *Noerr-Pennington* doctrine, we will consider it during our second prong analysis of the anti-SLAPP motion.

In short, the citizen petition is protected under the anti-SLAPP statute and the commercial speech exception does not apply. Therefore, to the extent any claim relies on the citizen petition, we must proceed with the second prong analysis of those claims.[7]

[649]**

C. Second Prong of the Anti-SLAPP Analysis

CA(20)[] **(20)** We turn to the second prong of the anti-SLAPP analysis to consider whether Neurelis has met its burden to establish a probability it would prevail on the merits. (*Baral, supra, 1 Cal.5th at p. 384*; *§ 425.16, subd. (b)(1)*.) ***HN19***[] "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten (2002) 29 Cal.4th 82, 89 [124 Cal. Rptr. 2d 530, 52 P.3d 703]*.)

HN20[] *CA(21)*[] **(21)** In employing a summary-judgment-like procedure for the second prong, we determine whether Neurelis's prima facia showing is enough to win a favorable judgment. (*Sweetwater Union, supra, 6 Cal.5th at p. 940*.) This threshold is "not high." (*Greene v. Bank of America (2013) 216 Cal.App.4th 454, 458 [156 Cal. Rptr. 3d 901]*.) Claims with minimal merit proceed. (*Sweetwater Union, at p. 940*.)

1. The Citizen Petition

Below, **[***35]** the superior court found that the statements in the citizen petition were protected under the litigation privilege, and Neurelis did not prove such **[*794]** statements were not privileged. (See *Civ. Code, § 47, subd. (b)*.) Neurelis insists the superior court erred in reaching this conclusion because the court improperly placed the burden on Neurelis to establish the absence of the privilege instead of requiring Aquestive to prove the privilege applies. Neurelis then argues that Aquestive "fell far short" of establishing the applicability of the litigation privilege to the citizen petition.

In response, Aquestive argues the only evidence it needed to provide to prove applicability of the litigation privilege was the citizen petition itself. To this end, Aquestive claims the petition was filed as part of an official proceeding pursuant to federal law. (Cf. *People ex rel. Gallegos v. Pacific Lumber Co. (2008) 158 Cal.App.4th 950, 958–959 [70 Cal. Rptr. 3d 501] (Pacific Lumber)* ["allegedly fraudulent conduct in communicating information to government agencies … fall[s] squarely within the scope of the litigation privilege"].) In addition, Aquestive maintains, in any event, it was not its burden to prove the privilege but Neurelis's burden to disprove the privilege.

CA(22)[] **(22)** Neurelis has the better argument regarding who bears the burden in establishing **[***36]** the applicability of the litigation privilege. ***HN21***[] During the second prong of a court's anti-SLAPP analysis, a defendant bears the burden of proving a privilege's applicability. (*Hawran v. Hixson (2012) 209 Cal.App.4th 256, 278 [147 Cal. Rptr. 3d 88]*; *Carver v. Bonds (2005) 135 Cal.App.4th 328, 348–349 [37 Cal. Rptr. 3d 480]*.) Here, Aquestive insists it has done enough to prove the applicability of the privilege simply **[**650]** by pointing to the citizen petition. It has not.

HN22[] *CA(23)*[] **(23)** *Civil Code section 47, subdivision (b)* renders absolutely privileged communications made as part of a "judicial or quasi-judicial proceeding." (*Silberg v. Anderson (1990) 50 Cal.3d 205, 212 [266 Cal. Rptr. 638, 786 P.2d 365] (Silberg)*; *Civ. Code, § 47, subd. (b)*; *Action Apartment Assn., Inc. v. City of Santa Monica*

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[7] *CA(19)*[] **(19)** Here, we observe that two of Neurelis's causes of action are mixed, meaning they rely on both protected and unprotected conduct. The UCL claim is based on Aquestive's private threats, its investor statements, and the citizen petition. Similarly, the defamation claim is based on the investor statements and the citizen petition. As we discussed *ante*, only the citizen petition is protected conduct under the anti-SLAPP statute. ***HN18***[] As such, Neurelis need only establish a probability of prevailing on its UCL and defamation claims based on the citizen petition. If it cannot do so, then the allegations concerning the citizen petition must be stricken. (See *Baral, supra, 1 Cal.5th at p. 395*.) However, we disregard the allegations concerning the unprotected conduct. (*Id. at p. 396*; *Sheley v. Harrop (2017) 9 Cal.App.5th 1147, 1171 [215 Cal. Rptr. 3d 606]*.) As such, Neurelis does not have to prove a probability of success on the merits as to the UCL and defamation claims to the extent they are based on the private threats and/or investor statements.

(2007) 41 Cal.4th 1232, 1241 [63 Cal. Rptr. 3d 398, 163 P.3d 89] (Action Apartment).) "The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (Silberg, at p. 212.)

HN23[] ***CA(24)***[] **(24)** "'The principal purpose of [the litigation privilege] is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. [Citations.]'" (Action Apartment, supra, 41 Cal.4th at p. 1241.) Stated differently, it "exists to protect citizens from the threat of litigation for communications to government agencies whose function it is to investigate **[*795]** and remedy wrongdoing. [Citation.]" (Wise v. Thrifty Payless, Inc. (2000) 83 Cal.App.4th 1296, 1303 [100 Cal. Rptr. 2d 437].)

Thus, the crux of the **[***37]** litigation privilege is that it covers communications made as part of a judicial or quasi-judicial proceeding. Here, Aquestive has not argued that the citizen petition is part of a judicial or quasi-judicial proceeding. Indeed, it does not describe the process whatsoever except to note that the citizen petition was "filed as part of an official proceeding pursuant to federal law." Further, Aquestive's reliance on Pacific Lumber is not helpful here. There, the appellate court concluded that communications made to government agencies during a California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.) administrative proceeding were covered by the litigation privilege. (Pacific Lumber, supra, 158 Cal.App.4th at pp. 958–959.) However, Aquestive has not explained why a CEQA proceeding is analogous to the citizen petition process with the FDA. And although some courts have defined "judicial or quasi-judicial" proceedings to include "all kinds of truth-seeking proceedings" (see Silberg, supra, 50 Cal.3d at p. 213), Aquestive makes no argument here why its statements in the citizen petition warrant protection under the litigation privilege codified in *subdivision (b) of Civil Code section 47*. Instead, it merely assumes it is privileged. Consequently, Aquestive has not done enough to establish that the litigation privilege applies.[8]

CA(26)[] **(26)** Next, Aquestive maintains that even if the litigation privilege **[***38]** does not apply, Neurelis cannot overcome the *Noerr-Pennington* doctrine. ***HN25***[] "The *Noerr-Pennington* doctrine, which arose in the context of ***antitrust law***, holds that '[t]hose who petition government for redress are generally immune from antitrust liability.'" (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn. (2006) 136 Cal.App.4th 464, 478 [39 Cal. Rptr. 3d 43] (Premier Medical)*.) **[**651]** The doctrine has since been applied beyond the antitrust context and generally shields a defendant's petitioning activity before courts as well as administrative and other government agencies. (See California Transport, supra, 404 U.S. at pp. 510–511; Ludwig, supra, 37 Cal.App.4th at pp. 21–22.)

CA(27)[] **(27)** However, ***HN26***[] "[a]n exception to the doctrine arises when efforts to influence government are merely a sham; such efforts are not protected by the *Noerr Pennington* doctrine … ." (Hi-Top Steel Corp. v. Lehrer (1994) 24 Cal.App.4th 570, 575 [29 Cal. Rptr. 2d 646].) There is a two part test for **[*796]** determining whether a defendant's petitioning activity falls outside the *Noerr-Pennington* doctrine. "[F]irst, it 'must be objectively baseless in the sense that no reasonable litigant could realistically expect success of the merits'; second, the litigant's subjective motivation must 'conceal an attempt to interfere *directly with the business relationships of a competitor … through the use [of] the governmental process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.'" (BE&K Construction Co. v. National Labor Relations Board (2002) 536 U.S. 516, 526 [153 L.Ed.2d 499, 122 S.Ct. 2390] (BE&K), quoting Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc. (1993) 508 U.S. 49, 60–61 [123 L.Ed.2d 611, 113 S.Ct. 1920].) To meet this **[***39]** test, the defendant's petitioning activities thus "must be a sham both objectively and subjectively." (BE&K, at p. 526, italics omitted.)

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[8] ***CA(25)***[] **(25)** We note the limited nature of our conclusion here. We are not determining, as a matter of law, that statements made in a citizen petition to the FDA are not covered by the litigation privilege. We merely find that Aquestive has not carried its burden of showing the application of the privilege on the record before us. ***HN24***[] One invoking the privilege must do more than simply point to the allegedly privileged document.

Neurelis argues that Aquestive has not carried its burden of proving the applicability of the *Noerr-Pennington* doctrine. (See *Premier Medical, supra, 136 Cal.App.4th at p. 478* [as part of the second prong of the anti-SLAPP analysis, "[d]efendants bear the burden of establishing a probability of prevailing on those defenses"].) However, the burden for Aquestive, here, is not high. Neurelis is basing two of its causes of action, in part, on statements Aquestive made in the citizen petition itself. The citizen petition is a procedure by which private entities can petition the FDA to take a specific action. (See *Apotex, supra, 823 F.3d at p. 57*; *21 C.F.R. § 10.30 (2021)*.) Therefore, Aquestive, through the citizen petition, was petitioning the government for redress and the *Noerr-Pennington* doctrine applies (see *California Transport, supra, 404 U.S. at pp. 510–511*) unless the petition was a sham (*BE&K, supra, 536 U.S. at p. 526*).

Having concluded that the *Noerr-Pennington* doctrine applies to the citizen petition, the burden shifts to Neurelis to prove the citizen petition was a sham. On the record before us, Neurelis has not carried its burden.

Neurelis argues Aquestive's submitted the citizen petition for the purpose of delaying approval of Valtoco, and, as such, **[***40]** Aquestive's "'subjective motivation'" was to use the petition process "'as an anticompetitive weapon.'" The FDA seemed to agree, to some extent, commenting that it "appear[ed] to be the case here" that the petition "was submitted for the primary purpose of delaying approval of" a new drug application. Yet, we conclude that Neurelis has not shown that the petition was "objectively baseless." Neurelis contends the FDA noted that "'publicly available information on the general characteristics of nasal spray product[]' showed that 'it [was] unlikely'" that Aquestive's complaints about Valtoco had any merit. Based on this statement from the FDA, Neurelis asserts the citizen petition was objectively baseless. But Neurelis overstates **[**652]** the importance of the **[*797]** quoted language. The FDA observed the existence of "publicly available information on the general characteristics of nasal spray products that would show it is unlikely that droplets generated by a nasal spray product would reach the alveoli of the lungs." It also noted that Aquestive did not include any such information in its supplemental citizen petition. The FDA then indicated that the omission of this publicly available and pertinent **[***41]** data further suggested that the petition "was submitted with the primary purpose of delaying approval." However, the FDA did not conclude, as Neurelis claims, that the omitted publicly available data somehow proved that none of Aquestive's complaints in the petition had any merit. Indeed, the subject publicly available information about nasal spray products does not appear to be relevant to other issues raised in the citizen petition.[9]

CA(28)[] **(28)** Instead, the FDA determined that it could not summarily deny the citizen petition as requested by Neurelis because it was "unable to conclude that the petition does not, on its face, raise valid scientific or regulatory issues." (See *21 U.S.C. § 355(q)(1)(E)*.) Now, it may be that a petition does not have to be summarily denied to be "objectively unreasonable" under the sham exception to the *Noerr-Pennington* doctrine, but Neurelis makes no such argument. Additionally, Neurelis has not discussed the other requests in the citizen petition and explained why they support a determination that the petition was objectively unreasonable. And ***HN27***[] it is not the role of this court to scour the record and make Neurelis's arguments. (See *Keyes v. Bowen (2010) 189 Cal.App.4th 647, 655–656 [117 Cal. Rptr. 3d 207]*; *Bains v. Moores (2009) 172 Cal.App.4th 445, 455 [91 Cal. Rptr. 3d 309]*.)[10]

2. Malicious Prosecution

a. Background

Neurelis bases **[***42]** its malicious prosecution action on the three IPR petitions. To this end, in the operative complaint, Neurelis alleges that Aquestive had no reasonable belief that its three IPR petitions were based on reasonable grounds, "at least because Neurelis told Aquestive as much"; the Board denied instituting proceedings based on two of the petitions (Neurelis predicted the third IPR petition would terminate in its favor); Aquestive brought **[*798]** the petitions to pressure Neurelis into giving up orphan exclusivity for Valtoco; Aquestive initiated

[9] For example, Aquestive requested that the FDA require Neurelis to conduct a bridging study comparing Valtoco and Diastat as well as a food effect study. In addition, Aquestive asked the FDA to determine "that Valtoco is not clinically superior to nor offers a major contribution to patient care when compared to Diastat." Neurelis neither discusses these requests of the citizen petition nor explains how the publicly available information about nasal sprays renders these requests objectively without merit.

[10] In denying the citizen petition, the FDA indicated that it had approved the new drug application for Valtoco.

the petitions with malice; and Neurelis was harmed because it spent "considerable money and resources" as well as "lost executive time" responding to the petitions.

Because the malicious prosecution claim concerns the IPR petitions, we briefly discuss that petition process. Pursuant to the Leahy-Smith America Invents Act, the IPR proceeding replaces the PTO's previous inter partes reexamination. (35 U.S.C. §§ 311–319.) Congress, in enacting the IPR procedure, sought "'to establish a more efficient and streamlined patent system that [would] improve patent quality and limit unnecessary and counterproductive **[**653]** litigation costs'" and "'to create a timely, cost-effective alternative **[***43]** to litigation.'" (Milwaukee Electric Tool Corp. v. Snap-On Inc. (E.D.Wis. 2017) 271 F.Supp.3d 990, 1027.) "The purpose of this reform was to 'convert[] inter partes reexamination from an examinational to an adjudicative proceeding.'" (Abbott Labs. v. Cordis Corp. (Fed. Cir. 2013) 710 F.3d 1318, 1326.) Under the new procedure, any party other than the patent owner may request to cancel one or more claims of a patent; in doing so, the petitioner is limited to grounds that could be raised under 35 United States Code sections 102 and/or 103 and only based on prior art consisting of patents and printed publications. (35 U.S.C. § 311(a)–(b).)

Under the IPR process, a party that wants to challenge a patent must file "a petition to institute an inter partes review of [a] patent." (35 U.S.C. § 311(a).) The petition must identify "each claim challenged," the grounds for the challenge, and the evidence supporting the challenge. (35 U.S.C. § 312(a)(3).) Within three months of the filing of the petition, the patent owner may file a preliminary response setting forth arguments as to why the Board should not institute a review; alternatively the patent owner may waive the preliminary response to expedite the proceeding. (35 U.S.C. § 313; 37 C.F.R. § 42.107(a)–(b) (2021).) For the Board to institute an IPR proceeding, the petitioner must show "that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition," **[***44]** a higher burden than in the predecessor reexamination proceedings where the requester was only required to show a "substantial new question of patentability." (35 U.S.C. §§ 314(a), 304.) However, if it finds no reasonable likelihood of success then it must deny the petition and notify the petitioner and patent owner in writing. (35 U.S.C. § 314(a), (c).) That determination is "final and nonappealable." (35 U.S.C. § 314(d).) The Board must decide whether to institute the IPR within three months after the patent owner's preliminary response or by the last date on which the response could have been filed if the patent owner did not file a response. (35 U.S.C. § 314(b).)

If the Board institutes the review, the proceeding is conducted before three technically trained administrative patent judges. (See 35 U.S.C. §§ 6(a)–(c), **[*799]** 311.) The Board must issue its final IPR determination within one year, extendable for good cause for not more than six months. (35 U.S.C. § 316(a)(11).) Final determinations are appealable to the Federal Circuit. (35 U.S.C. §§ 141(c), 319.) To streamline later litigation and reduce the likelihood of inconsistent judgments, the petitioner is estopped from later asserting that a "claim is invalid on any ground that the petitioner raised or reasonably could have raised during that inter partes review." (35 U.S.C. § 315(e)(2).)

Here, Aquestive **[***45]** filed three IPR petitions but all three challenged claims under the '876 Patent. And the three petitions were filed on the same day. In case No. IPR2019-00449, the petition ('449 Petition) challenged a subset of claims of the '876 Patent on anticipation and obviousness grounds based on specific prior art. The petition filed in case No. IPR2019-00450 ('450 Petition) challenged all of the claims of the '876 Patent and did so only on obviousness grounds based on different combinations of prior art. And the petition filed in case No. IPR2019-00451 ('451 Petition) challenged all the claims of the '876 Patent on obviousness grounds as well but based on a different combination of prior art.

In the instant matter, each of Aquestive's IPR petitions was over 90 pages long **[**654]** and included more than 200 pages of expert declarations and dozens of exhibits. Neurelis submitted substantive responses that were each more than 25 pages and were also accompanied by multiple exhibits.

On August 1, 2019, the Board declined to institute review in the '449 and '450 Petitions. With respect to the '449 Petition, a three-judge panel issued a unanimous 26-page decision, in which it found no "reasonable likelihood that [Aquestive] would prevail" on even one of the claims. **[***46]** With respect to the '450 Petition, the same three-judge panel issued a unanimous 22-page decision declining to institute review. There, the Board relied primarily on

35 United States Code section 325(d) and concluded that the same prior art arguments raised by Aquestive had already been considered (and rejected) by the PTO during prosecution of the ’876 Patent. As the Board explained, “[i]t is simply not an efficient use of the Board's time and resources to revisit the same prior art disclosures that were examined in detail by the Examiner over eight years of patent prosecution.”

On August 13, 2019, the Board instituted review of the ’451 Petition. When the trial court decided the anti-SLAPP motion at issue here, the review on the ’451 Petition was still pending. However, on August 6, 2020, the Board declared the ’876 Patent invalid. (*Aquestive Therapeutics, Inc. v. Neurelis, Inc.* (Board, Aug. 6, 2020, Dec. No. IPR2019-00451) p. 68.) Neurelis appealed that decision to the Federal Circuit, and the Federal Circuit **[*800]** affirmed the decision. (*Neurelis, Inc. v. Aquestive Therapeutics, Inc. (Fed.Cir., Oct. 7, 2021, No. 21-1038) 2021 U.S.App. Lexis 30158* (*per curiam*).)

b. Analysis

HN28[] ***CA(29)***[] **(29)** An action for malicious prosecution has three required elements: “(1) the defendant brought (or continued to pursue) a claim in the underlying action without objective probable cause, (2) the claim was pursued by the defendant with subjective **[***47]** malice, and (3) the underlying action was ultimately resolved in the plaintiff's favor.” (*Lane v. Bell (2018) 20 Cal.App.5th 61, 67 [228 Cal. Rptr. 3d 605]*.) The superior court determined that Neurelis established a probability of success as to each of these three elements and denied the anti-SLAPP motion as to the malicious prosecution claim. Aquestive claims the court erred in reaching this conclusion because: (1) the denial of an IPR petition cannot serve as a malicious prosecution predicate (i.e., it does not constitute an underlying action); (2) the IPR petitions did not terminate in Neurelis's favor; and (3) Neurelis did not submit sufficient evidence that Aquestive filed the IPR petitions without probable cause.

CA(30)[] **(30)** Although the parties spend the lion's share of their respective briefs disputing whether a denial of an IPR petition could serve as a predicate act for a malicious prosecution claim, we need not weigh in on that issue because Neurelis has not offered evidence that Aquestive brought the petitions without probable cause. ***HN29***[] “An action is deemed to have been pursued without probable cause if it was not legally tenable when viewed in an objective manner as of the time the action was initiated or while it was being prosecuted.” (*Sycamore Ridge Apartments, LLC v. Naumann (2007) 157 Cal.App.4th 1385, 1402 [69 Cal. Rptr. 3d 561]*.) “A prior **[***48]** action was not initiated without probable cause merely because it was ultimately found to lack merit; it was initiated without probable cause only if ‘*all* reasonable lawyers’ would ‘agree’ that the suit, at the time of filing, was ‘totally and completely without merit’ [based on] … . ‘the facts known to the **[**655]** defendant’ ‘at the time the suit was filed.’” (*Gruber v. Gruber (2020) 48 Cal.App.5th 529, 537–538 [261 Cal. Rptr. 3d 819]*, quoting *Jarrow Formulas, supra, 31 Cal.4th at p. 743, fn. 13* & *Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal.3d 863, 878 [254 Cal. Rptr. 336, 765 P.2d 498]*; see *Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal.4th 260, 292 [46 Cal. Rptr. 3d 638, 139 P.3d 30]* [“‘A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him’”].) “Probable cause is a low threshold designed to protect a litigant's right to assert arguable legal claims even if the claims are extremely unlikely to succeed.” (*Plumley v. Mockett (2008) 164 Cal.App.4th 1031, 1047 [79 Cal. Rptr. 3d 822]*.)

[*801]

Below, the superior court found: “Based on the PTO decisions, [Aquestive] failed to demonstrate a reasonable likelihood of prevailing on those petitions, supporting the element that the petitions were meritless and without probable cause.” In making this finding, Aquestive maintains the court improperly conflated the first two elements of a malicious prosecution claim. It further argues that a favorable termination **[***49]** of an underlying claim does not establish a lack of probable cause. (See, e.g., *Crowley v. Katleman (1994) 8 Cal.4th 666, 686 [34 Cal. Rptr. 2d 386, 881 P.2d 1083]* [noting “[p]rior opinions have stressed that the two elements of the tort serve different purposes”]; *Nicholson v. Lucas (1994) 21 Cal.App.4th 1657, 1665 [26 Cal. Rptr. 2d 778]* [“Mere proof of favorable termination does not create a conflict on the issue of probable cause, nor does proof of the existence of malice”].)

Neurelis counters that the court made no such mistake. To this end, Neurelis insists “[t]he court held that Aquestive's petitions were not just ‘meritless,’ but also that they were brought ‘without probable cause.’” Yet, in making this argument, Neurelis glosses over the fact that the court found a lack of probable cause based on the denial of the petitions only. The court's order points to no other "evidence" establishing a lack of probable cause. And Neurelis does not cite to any evidence in the record purporting to establish a lack of probable cause. Rather, Neurelis's claim that it has shown a lack of probable cause begins and ends with the two written decisions of the Board denying the ’449 and ’450 Petitions without granting a review.

Regarding the ’449 Petition, Neurelis argues that the Board denied the petition because Aquestive did "not show that there is a reasonable **[***50]** likelihood that [it] would prevail with respect to at least one of the claims." Neurelis, however, does not explain why this denial showed that Aquestive lacked probable cause to bring the ’449 Petition. It simply asks us to assume it is so. Aquestive points out that "no reasonable likelihood of prevailing" is a higher standard than "probable cause." As such, it argues that the Board's finding that Aquestive had not shown a reasonable likelihood of prevailing on the petition is not the same as establishing Aquestive did not have probable cause to bring the petition. Neurelis claims such a distinction does not matter here because Aquestive did not have probable cause to bring the ’450 Petition. Neurelis further argues it is sufficient to satisfy its burden here to show that Aquestive did not have probable cause to bring the ’450 Petition only. (See *Cuevas-Martinez v. Sun Salt Sand, Inc. (2019) 35 Cal.App.5th 1109, 1121 [248 Cal. Rptr. 3d 200]* ["a prima facie case" that the defendants "lacked probable cause for at least two of the claims in the prior action is more than sufficient to carry his anti-SLAPP **[**656]** burden"].) We read Neurelis's argument as a tacit admission that we should focus on the Board's decision on the ’450 **[*802]** Petition as evidence of a lack of probable cause.[11] Nonetheless, Neurelis directs **[***51]** us to a couple of comments in the Board's denial of the ’449 Petition, claiming that such comments suggest a lack of probable cause.

For example, Neurelis notes that the Board stated that Aquestive had relied on "bald assertions" with insufficient record support and ignored key statements made in both the European Patent Office (for "nearly identical claims") and the PTO. However, these comments are not as significant as Neurelis represents. True, the Board did refer to "bald assertions" made by Aquestive and its expert witness, but those assertions specifically related to a single argument "that the ’876 [P]atent ‘does not disclose any unexpected effect’ for the claimed ethanol and benzyl alcohol ranges." Specifically, it found those assertions "to be insufficiently supported by the evidence of record." Nevertheless, Neurelis does not discuss the other challenges asserted in the ’449 Petition and how the Board's rejection of those other challenges showed a lack of probable cause. Such an omission is fatal to Neurelis's argument that Aquestive lacked probable cause to bring the ’449 Petition. It is not enough for Neurelis to direct us to a couple sentences in a 26-page decision that reject one of the arguments **[***52]** made by Aquestive and extrapolate from those sentences that Aquestive lacked probable cause to bring the petition.

Turning to the ’450 Petition, Neurelis maintains the Board denied that petition because the same prior art arguments raised by Aquestive had already been considered (and rejected) by the PTO during prosecution of the ’876 Patent. Neurelis also emphasizes that the Board explained it was a waste "of the Board's time and resources to revisit the same prior art disclosures that were examined in detail by the Examiner over eight years of patent prosecution." Neurelis therefore insists the Board's reasoning in denying the ’450 Petition is evidence that Aquestive lacked probable cause to bring the ’450 Petition. We disagree.

The Board issued a 22-page decision denying the ’450 Petition and not granting a review. In that decision, the Board explained that the institution of inter partes review was discretionary. (See *Harmonic Inc. v. Avid Tech, Inc. (Fed. Cir. 2016) 815 F.3d 1356, 1367*.) Further, the Board noted that, under *35 United States Code section 325(d)*, it could take into account and reject a **[*803]** petition because "‘the same or substantially the same prior art or arguments previously were presented to the Office.’"[12] **[**657]** The Board set forth "several non-exhaustive factors"

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[11] We note that Neurelis's malicious prosecution claim has evolved during its opposition to the anti-SLAPP motion. The operative complaint bases the malicious prosecution cause of action on all three IPR petitions. Yet, the ’451 Petition resulted in the Board invalidating the ’876 Patent. Therefore, Neurelis essentially tells us to ignore that petition. However, Neurelis all but concedes that it has no evidence that Aquestive lacked probable cause to bring the ’449 Petition. These meaningful shortcomings undermine the theory that Neurelis's advances as to the IPR petitions, that they were brought only to extort Neurelis to give up orphan drug exclusivity as to Valtoco. Clearly, the Board did not share Neurelis's conclusion about the validity of the petitions.

it considered in evaluating whether to **[***53]** exercise its discretion under *35 United States Code section 325(d)*, which included:

"(a) the similarities and material differences between the asserted art and the prior art involved during examination;

"(b) the cumulative nature of the asserted art and the prior art evaluated during examination;

"(c) the extent to which the asserted art was evaluated during examination, including whether the prior art was the basis of the rejection;

"(d) the extent of the overlap between the arguments made during the examination and the manner in which Petitioner relies on the prior art or Patent Owner distinguishes the prior art;

"(e) whether Petitioner has pointed out sufficiently how the Examiner erred in its evaluation of the asserted prior art; and

"(f) the extent to which additional evidence and facts presented in the Petition warrant reconsideration of the prior art or arguments."

In applying these factors to the petition, the Board reviewed the prosecution history of the '876 patent family. After doing so, it found that *factors (a)*, *(c)*, and *(d)* "strongly favor[ed] exercising [its] discretion to deny the Petition under *35 U.S.C. § 325(d)*." In addition, it found that *factors (e)* and *(f)* were, "at best, neutral with respect to exercising discretion under *[section] 325(d)*." Also, **[***54]** although the Board acknowledged that Aquestive offered "additional evidence in the form of the declaration testimony" of its expert witness that was not previously considered in examining the '876 Patent, the court concluded the "presence of [the] declaration" was not "sufficient to warrant reconsideration of the same prior art that was before the Examiner during prosecution." Moreover, the Board similarly was not persuaded that a review should be granted because Aquestive and its expert witness "formulate[d] **[*804]** new hypothetical compounds." Simply put, the Board was not swayed that it should consider the same or similar arguments that were previously addressed in the prosecution of the '876 Patent.

CA(31)[] **(31)** We see nothing in the Board's decision denying the '450 Petition that even suggests Aquestive lacked probable cause to bring the petition. Ultimately, the Board used its discretion to deny the petition because "the same or substantially the same prior art or arguments previously were presented to the [PTO]." (*35 U.S.C. § 325(d)*.) However, we note that ***HN30***[] *35 United States Code section 325(d)* provides the Board with the *discretion* to deny the petition but does not require Board to deny the petition even if the petition is simply repeating previously made arguments. And, under **[***55]** the statute, the Board could appropriately exercise its discretion to grant a petition even though it raises claims based on the same prior art or arguments previously made to the PTO. Therefore, it is mere speculation to baldly conclude that a denial of a petition per the Board's discretion under *35 United States Code section 325(d)* establishes a lack of probable cause to satisfy the corresponding element of a cause of action for malicious prosecution. (Cf. *Shandralina G. v. Homonchuk (2007) 147 Cal.App.4th 395, 411 [54 Cal. Rptr. 3d 207]* [an inference can **[**658]** serve as substantial evidence for a factual finding on appeal, but ""the inference must be a reasonable conclusion from the evidence and cannot be based upon suspicion, imagination, speculation, surmise, conjecture or guesswork"""]; *Gilbert v. Sykes (2007) 147 Cal.App.4th 13, 26–27 [53 Cal. Rptr. 3d 752]* [In the SLAPP context, we disregard evidence that is "argumentative, speculative, impermissible opinion, hearsay, or conclusory"].) What is missing here is any evidence or explanation that the petition was so completely lacking in merit that no reasonable attorney would have thought it tenable. (See *Wilson v. Parker, Covert & Chidester (2002) 28 Cal.4th 811, 817 [123 Cal. Rptr. 2d 19, 50 P.3d 733]* ["Only those actions that '"any reasonable

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[12] *35 United States Code section 325(d)* states: "Notwithstanding *sections 135(a)*, *251*, and *252*, and chapter 30, during the pendency of any post-grant review under this chapter, if another proceeding or matter involving the patent is before the Office, the Director may determine the manner in which the post-grant review or other proceeding or matter may proceed, including providing for the stay, transfer, consolidation, or termination of any such matter or proceeding. In determining whether to institute or order a proceeding under this chapter, chapter 30, or chapter 31, the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office."

attorney would agree [are] totally and completely without merit"' may form the basis for a malicious prosecution suit"].)

In the instant matter, apart from selective quotations **[***56]** from the Board's decision on the petitions, Neurelis offers no evidence that Aquestive filed any of the IPR petitions without probable cause. Instead, Neurelis simply argues the petitions were meritless and, thus, "factually and legally untenable." As we addressed *ante*, Neurelis has not provided any evidence to support these assertions. Consequently, the malicious prosecution action cannot survive the anti-SLAPP motion.

DISPOSITION

The order is affirmed in part and reversed in part. This matter is remanded to the superior court with instructions to enter a revised order consistent with **[*805]** this opinion, denying the anti-SLAPP motion as to the UCL and defamation causes of action to the extent such claims are dependent on unprotected conduct, including statements to investors. The anti-SLAPP motion is to be granted as to the malicious prosecution claim. All allegations concerning the citizen petition should be stricken as well. The parties are to bear their own costs on appeal.

McConnell, P. J., and O'Rourke, J., concurred.

Casey v. General Motors, LLC

United States District Court for the Southern District of California

November 19, 2021, Decided; November 19, 2021, Filed

Case No.: 20-cv-299-WQH-MSB

Reporter

2021 U.S. Dist. LEXIS 224078 *; 2021 WL 5417041

REBECCA CASEY, individually, and on behalf of a class of similarly situated individuals, Plaintiff, v. GENERAL MOTORS, LLC; and DOES 1-10, inclusive, Defendants.

Core Terms

alleges, engine, fuse block, unfair, stalling, warranty, motion to dismiss, contends, prong, manufacturer, Song-Beverly Act, terminal, repairs, motor vehicle safety, express warranty, consumers, Bulletin, implied warranty, regulations, relay, displayed, emissions, predicate, message

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Judges: Hon. William Q. Hayes, United Slates District Court.

Opinion by: William Q. Hayes

Opinion

ORDER

HAYES, Judge:

The matter before the Court is the Motion to Dismiss Plaintiff's Second Amended Class Action Complaint filed by Defendant General Motors, LLC. (ECF No. 38).

I. PROCEDURAL BACKGROUND

On February 18, 2020, Plaintiff Rebecca Casey filed a Class Action Complaint against Defendant General Motors, LLC ("GM"). (ECF No. 1). On September 15, 2020, Casey filed an Amended Class Action Complaint against Defendants GM and Does 1 through 10. (ECF No. 14). On April 13, 2021, the Court granted GM's Motion to Dismiss for failure to state a claim and dismissed the Amended Class Action Complaint without prejudice. (ECF No. 26).

On July 19, 2021, the Court granted Casey's Motion **[*2]** for Leave to File Second Amended Complaint. (ECF No. 36). On July 20, 2021, Casey filed a Second Amended Class Action Complaint ("SAC") against Defendants GM and Does 1 through 10. (ECF No. 37). The SAC alleges that that Defendants violated California state law by failing to adequately acknowledge or remedy a defect located in the engine bay fuse blocks of certain vehicles manufactured by GM between 2013 and 2017.

On August 3, 2021, GM filed a Motion to Dismiss the SAC for failure to state a claim. (ECF No. 38). On August 24, 2021, Casey filed an Opposition to the Motion to Dismiss. (ECF No. 39). On August 30, 2021, GM filed a Reply. (ECF No. 40).

II. ALLEGATIONS IN THE AMENDED COMPLAINT

On December 9, 2016, Casey purchased a used 2014 Buick Enclave ("Vehicle") from GM franchise dealership Hoehn Buick, GMC, Cadillac ("Hoehn") in Carlsbad, California. The Vehicle had previously been "sold new" on October 13, 2013. (ECF No. 37 ¶ 2).

> At the time the [ ] Vehicle was sold new, the [ ] Vehicle came with a 4-year 50,000-mile basic warranty, a 6-year 70,000-mile powertrain warranty, a 7-year 70,000-mile California emissions warranty, an 8-year 80,000-mile federal emissions warranty for certain **[*3]** emissions related components, and a 6-year unlimited mileage warranty for certain types of rust.

(*Id.* ¶ 2). When Casey purchased the Vehicle, it had been driven 70,657 miles. "Thus, at the time that Casey purchased the [ ] Vehicle, the [ ] Vehicle was still covered by portions of the original factory warranty." (*Id.*). Before deciding to purchase the Vehicle, "Casey reviewed the window sticker and relied on its advertisements, including details of the existence and length" of the Vehicle's factory warranty. (*Id.* ¶ 3).

On April 30, 2018, at 89,373 miles, Casey brought the Vehicle to Hoehn for repair. On approximately five occasions, the Vehicle lost power, and the "stability and traction warning illuminated," requiring Casey to pull over and restart the Vehicle. (*Id.* ¶ 66). Hoehn "identified Fault Code P1682, and found that the fuse block ignition bus, also known as both Terminal 51 and the Engine Relay, was loose." (*Id.* ¶ 68). Hoehn attempted to fix the problem by reinstalling and resecuring the engine bay fuse block. "The repair did not work, and the [ ] Vehicle was brought back by Casey on June 20, 2018 with the same symptoms." (*Id.*). Hoehn diagnosed the engine bay fuse block as "defective" **[*4]** and replaced it. (*Id.* ¶ 69). Casey was required to pay for the repairs.

In certain GM vehicles, including Casey's Vehicle, there is an engine bay fuse block located on the passenger side under the hood. The function of a fuse block is to control and distribute electrical energy from a vehicle's battery or generator throughout the vehicle. The engine bay fuse block provides electrical energy to different engine components using a relay. The relay plugs into the engine bay fuse block "like a power cord plugs into a power outlet in the wall of a home." (*Id.* ¶ 21). To function properly, there must be adequate tension so that the relay's metal prongs fit tightly into the engine bay fuse block. If the relay is loose, the vehicle can fail to start or can stall, which can cause "the loss of acceleration, the loss of power steering, the loss of power brakes, and several other very unsafe conditions." (*Id.* ¶ 25). "A properly designed and constructed fuse block should last the life of a vehicle." (*Id.* ¶ 19).

The engine bay fuse blocks for the following GM products have "virtually the identical layout and design:" 1) the 2007-2010 Saturn Outlook; 2) the 2008-2017 Buick Enclave—including Casey's **[*5]** Vehicle; 3) the 2009-2017 Chevrolet Traverse; 4) the 2007-2016 Chevrolet Acadia; and 5) the 2017 Chevrolet Acadia Limited (collectively, "class vehicles"). (*Id.* ¶ 31). There is a "Fuse Block Defect" in the design, materials, and assembly of these engine bay fuse blocks "wherein the fuse block terminals fail to maintain sufficient tension, resulting in relays which are mounted on fuse blocks being loose." (*Id.* ¶ 32).

The Fuse Block Defect "causes engine stalling, as well as intermittent no crank/no start, intermittent malfunction indicator lamp (MIL) illumination, intermittent service lamp illumination and intermittent service messages being displayed." (*Id.* ¶ 57). "[I]f a Class Vehicle stalls while the Class Vehicle is being driven on the roadway, the stalling creates an extremely unsafe and unacceptably dangerous condition for the occupants of the Class Vehicle, and the pedestrians and other vehicle occupants in the general vicinity." (*Id.* ¶ 58).

GM "had actual knowledge of issues regarding poor terminal connection in the fuse block as early as 2010." (*Id.* ¶ 34). A series of GM service bulletins published starting in 2010 "describe the symptoms of the Fuse Block Defect and how to diagnose **[*6]** it, and purport to offer a repair." (*Id.* ¶ 33). Before 2019, GM offered "band-aid solutions" to the Fuse Block Defect, including "to pack the area with dielectric lubricant, or blame the problem on after market equipment, to attempt to remedy or at least explain away the poor terminal connection." (*Id.* ¶¶ 35, 51). GM "failed to take any action to resolve the problem because, based upon a cost benefit analysis, GM has not been financially motivated to resolve the problem." (*Id.* ¶ 52).

On December 12, 2019, GM issued Technical Service Bulletin 19-NA-276. The bulletin applies to the 2013-2017 Buick Enclave, 2013-2017 Chevrolet Traverse, 2013-2016 Chevrolet Acadia, and 2017 Chevrolet Acadia Limited, which share the common fuse block design. The bulletin states: "Subject: Potential reduced engine power message displayed and/or engine stall with DTCs P1682 and/or P0689 set," "Condition: Some customers may comment that the engine stalled and/or a reduced engine power message was displayed. The technician may find DTCs P1682 and/or P0689 stored," "Cause: The cause of the condition may be poor terminal tension on terminal 51 in X50A Fuse Block - underhood X3." (*Id.* ¶ 65).

As a result of GM's **[*7]** conduct, Casey and other consumers have expended money for repairs, have not received the value for which they bargained when they purchased their vehicles, and have experienced a diminished resale value of their vehicles.

Casey seeks to represent the following class:

> All Persons in the State of California who purchased or leased model year 2013 through 2017 Buick Enclave, model year 2013 through 2017 Chevrolet Traverse, model year 2013 through 2016 Chevrolet Acadia, and model year 2017 Chevrolet Acadia Limited vehicles ("Class Vehicles").
> Excluded from the Class are: (1) Defendants, any entity or division in which Defendants has a controlling interest, and its legal representatives, officers, directors, assigns, and successors; (2) the Judge to whom this case is assigned and the Judge's staff; and (3) persons who have suffered personal injuries as the result of the facts alleged herein.

(*Id.* ¶ 85).

Casey and the class bring the following claims against Defendants: 1) violation of the California Song-Beverly Consumer Warranty Act ("Song-Beverly Act"), *Cal. Civ. Code § 1790, et seq.*; and 2) violation of the California Unfair Competition Law ("UCL"), Cal. Civ. Code § 17200, *et seq.* Casey and class seek injunctive relief, declaratory relief, damages, **[*8]** and attorneys' fees and costs.

III. LEGAL STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits dismissal for "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. In order to state a claim for relief, a pleading "must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. Dismissal under *Rule 12(b)(6)* "is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1041 (9th Cir. 2010)*.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* However, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (alteration in original) (quoting *Fed. R. Civ. P. 8(a)*). A court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable **[*9]** inferences." *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*. "In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009)*.

IV. DISCUSSION[1]

GM contends that "Plaintiff's Song-Beverly claim fails as a matter of law because she purchased her [V]ehicle used." (ECF No. 38-1 at 15). GM contends that even if the *Song-Beverly Act* was applicable, Casey's Vehicle was merchantable due to "extensive trouble-free use" and because repairs "solved" the Vehicle's problems. (*Id.* at 18). GM contends that its actions do not fall within the "unlawful" UCL prong because Casey's claim is not premised on any viable independent legal violation. GM contends that Casey's "unfair" prong UCL claim should be dismissed because a Vehicle part that "functions throughout the term of its express warranty cannot be characterized as causing a substantial injury to consumers." (*Id.* at 23). GM contends that Casey's UCL claim should be dismissed because Casey has an adequate remedy at law.

Casey contends that the Song-Beverly Act applies because the Vehicle was still partially covered by the original factory warranty. **[*10]** Casey contends that her Vehicle is not considered a used vehicle because she had previously leased the Vehicle and subsequently purchased the Vehicle pursuant to an option in her lease. Casey contends that the Vehicle was not merchantable because the "inherent design flaw" in a part alleged to last the life of the Vehicle "cause[d] the [V]ehicle[] to fail during [its] useful life" and rendered the Vehicle "not fit for ordinary use." (ECF No. 39 at 15-16). Casey contends that GM's conduct was unlawful under the UCL because GM violated the Song-Beverly Act and federal regulations issued by the National Highway Traffic Safety Administration ("NHTSA"). Casey contends that GM's conduct was unfair under the UCL. Casey contends that she is permitted to plead her equitable UCL claim in the alternative.

California's Song-Beverly Act provides an implied warranty that requires goods to be "fit for the ordinary purposes for which such goods are used." *Cal. Civ. Code § 1791.1(a)(2)*. To be fit for its ordinary purpose, a vehicle must be "safe," "reliable," and "substantially free from defects." *Goldstein v. Gen. Motors LLC, 445 F. Supp. 3d 1000, 1016 (S.D. Cal. 2020)* (collecting cases).

The SAC alleges that Casey "purchased a used 2014 Buick Enclave . . . from Hoehn Buick, GMC, Cadillac . . . ." (ECF **[*11]** No. 37 ¶ 1). The SAC alleges that the Vehicle had previously been "sold new." (*Id.* ¶ 2). The SAC alleges that "[a]t the time of purchase, the [ ] Vehicle had already been driven 70,657 miles." (*Id.* ¶ 1). The SAC alleges that "at the time that Casey purchased the [ ] Vehicle, the [ ] Vehicle was still covered by portions of the original factory warranty," namely, "an 8-year 80,000-mile federal emissions warranty for certain emissions related components" (*Id.* ¶ 2). The SAC alleges that the Class Vehicles "contained an inherent defect at the time of sale that causes the Class Vehicles to experience stalling and other unsafe driving conditions." (*Id.* ¶ 94). The SAC alleges that, because of the defect, GM "breached the implied warranty that the Class Vehicles were of merchantable quality and fit for [ ] use in violation of *California Civil Code §§ 1792* and *1791.1*." (*Id.* ¶ 98).

The Song-Beverly Act does not generally impose implied warranty obligations on manufacturers in sales of used vehicles. *See* *Cal. Civ. Code § 1795.5* ("It shall be the obligation of the distributor or retail seller making express

[1] GM requests that the Court take judicial notice of eight documents filed concurrently with its Motion to Dismiss. (ECF No. 38-2). Casey requests that the Court take judicial notice of one document filed concurrently with her Opposition to the Motion to Dismiss. (ECF No. 39-1). Judicial notice of all requested documents is denied, as judicial notice of the documents is unnecessary to this Order.

warranties with respect to used consumer goods (and not the original manufacturer, distributor, or retail seller making express warranties with respect **[*12]** to such goods when new) . . . ."); *see also* Potts v. Ford Motor Co., No. 21-cv-256-BEN-BGS, 2021 U.S. Dist. LEXIS 136995, 2021 WL 3112471, at *4 (S.D. Cal. July 21, 2021); Goldstein, 445 F. Supp. 3d at 1018 ("[T]he distributor or retailer is liable for the sale of used products, not the original product manufacturer."). *But see* Kiluk v. Mercedes-Benz USA, LLC, 43 Cal. App. 5th 334, 340, 256 Cal. Rptr. 3d 484 (2019) (making an exception where the manufacturer offers a *new* express warranty at the time the used vehicle is resold because the manufacturer in such a scenario "acts in the capacity of a retailer"). This is true even where a vehicle is resold with a balance remaining on the *original* express manufacturer warranty. *See* Victorino v. FCA US LLC, 326 F.R.D. 282, 301 (S.D. Cal. 2018) (declining to impose an implied warranty under such circumstances and distinguishing Jensen v. BMW of N. Am., 35 Cal. App. 4th 112, 41 Cal. Rptr. 2d 295 (1995), on the basis that, in Jensen, the plaintiff sought relief under an express warranty, not an implied warranty). The SAC's allegation that Casey purchased a used Vehicle from an authorized dealership that was still partially covered by the balance of GM's original manufacturer warranty fails to establish that GM owed any implied warranty obligations to Casey.[2] GM's Motion to Dismiss Casey's Song-Beverly Act claim is granted.

"The UCL broadly prohibits 'unfair competition,' defined as 'any unlawful, unfair or fraudulent business practice.'" Friedman v. AARP, Inc., 855 F.3d 1047, 1051 (9th Cir. 2017) (quoting Cal. Bus. & Prof. Code § 17200). "Because the statute is written in the disjunctive, it is violated if a **[*13]** defendant violates any of the unlawful, unfair or fraudulent prongs." *Id.* (citing Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1168 (9th Cir. 2012)).[3]

The "unlawful" prong of the UCL "'borrows violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable." Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999) (quoting State Farm Fire & Cas. Co. v. Superior Court, 45 Cal. App. 4th 1093, 1103, 53 Cal. Rptr. 2d 229 (1996)). "[V]irtually any state, federal, or local law can serve as the predicate." Friedman, 855 F.3d at 1052.

The SAC alleges that GM's conduct is independently actionable under the "unlawful" prong of the UCL due to violations of two predicate laws. The first alleged predicate is GM's violation of the Song-Beverly Act. However, the Song-Beverly Act cannot serve as a predicate for Casey's UCL claim because the Court has concluded that the SAC does not state a claim for relief under the Song-Beverly Act.

The SAC also alleges that GM's violation of a regulation issued by the NHTSA—"49 C.F.R. [§] 573.6 (and Federal Motor Vehicle Safety Standard 'FMVSS' 573)"—serves as a predicate for Casey's UCL claim. (ECF No. 37 ¶ 64). That regulation requires vehicle manufacturers to "furnish a report to the NHTSA for each defect in [their] vehicles or in [their] items of original or replacement equipment that [they] or the Administrator determines to be related to motor vehicle safety, and **[*14]** for each noncompliance with a motor vehicle safety standard in such vehicles or items of equipment which either [they] or the Administrator determines to exist." 49 C.F.R. § 573.6.

The SAC alleges that GM breached "a duty under the regulations" because "GM [ ] determined that there was a safety related defect" and failed to act. (ECF No. 37 ¶ 65). The SAC alleges that GM's determination of a safety related defect is evidenced by a "plain reading" of Technical Service Bulletin 19-NA-276. (*Id.*). The SAC alleges that the bulletin states: "Subject: Potential reduced engine power message displayed and/or engine stall with DTCs P1682 and/or P0689 set," "Condition: Some customers may comment that the engine stalled and/or a reduced engine power message was displayed. The technician may find DTCs P1682 and/or P0689 stored," "Cause: The cause of the condition may be poor terminal tension on terminal 51 in X50A Fuse Block - underhood X3." (*Id.*).

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[2] The Court does not address Casey's argument that the Song-Beverly Act applies because the Vehicle was purchased pursuant to an option in a prior lease, as there are no facts concerning any prior lease alleged in the SAC. *See* Schneider v. Cal. Dept. of Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) ("'[N]ew' allegations contained in [Plaintiffs'] opposition motion, however, are irrelevant for Rule 12(b)(6) purposes.").

[3] Casey does not contend in her Opposition or allege in the SAC that GM has violated the fraudulent prong of the UCL.

The United States Code for Motor Vehicle Safety defines motor vehicle safety as

> the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance **[*15]** of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle.

49 U.S.C. § 30102(a)(9). In assessing whether a vehicle condition that results in engine stalling poses an "unreasonable risk," *id.*, and is thus "related to motor vehicle safety," *49 C.F.R. § 573.6*, the NHTSA considers several factors, including

> the speeds at which stalling may occur, the ability of the driver to restart the vehicle, the warning available to the driver prior to stalling, the effects of engine stall on vehicle controllability, when and where the stalling will occur and the effects of the condition on other safety systems of the vehicle.

Denial of Motor Vehicle Defect Petition, 80 Fed. Reg. 18935-01 (Apr. 8, 2015). The text of Technical Service Bulletin 19-NA-276 does not adequately support an inference that GM determined that the alleged defect related to motor vehicle safety. Absent such a determination by GM or the Administrator, GM had no duty to act under *49 C.F.R. § 573.6*. GM's Motion to Dismiss Casey's "unlawful" UCL claim is granted.

The "unfair" prong of the UCL prohibits "practice[s] [that] may be deemed unfair even if not specifically proscribed by some other law." *Cel-Tech Commc'ns, 20 Cal. 4th at 180*.

> Under the UCL's unfairness prong, courts consider either: (1) whether the **[*16]** challenged conduct is tethered to any underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of an ***antitrust law***; (2) whether the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers; or (3) whether the practice's impact on the victim outweighs the reasons, justifications and motives of the alleged wrongdoer.

Doe v. CVS Pharm, Inc., 982 F.3d 1204, 1214-15 (9th Cir. 2020), *reh'g en banc denied* (Jan. 15, 2021); *cert. granted, in part, on other grounds, CVS Pharm., Inc. v. Doe, 141 S. Ct. 2882, 210 L. Ed. 2d 990, 2021 U.S. LEXIS 3572 (July 2, 2021)*. Determining whether a defendant's conduct was unfair "raises of questions of fact that are appropriate for resolution on a motion to dismiss only in rare situations." *Friedman, 855 F.3d at 1055* (quoting *Reid v. Johnson & Johnson, 780 F.3d 952, 958 (9th Cir. 2015)*).

The SAC alleges that "[i]t is unfair for GM to fail to acknowledge the Fuse Block Defect or offer an adequate or permanent solution for the problem . . . ." (ECF No. 37 ¶ 114). The SAC alleges that "[i]t is also unfair for GM to charge customers for the resulting repairs . . . ." (*Id.*). The SAC alleges that Casey suffered financial harm, including reduced fuel efficiency "resulting in having to buy more gas" and having to "pay out of pocket for the diagnosis and repairs" of **[*17]** the alleged defect. (*Id.* ¶ 115). The SAC alleges that GM's conduct is tethered to legislative policies declared in the Song-Beverly Act and in NHTSA regulations.

GM's alleged conduct is not "tethered to any underlying constitutional, statutory or regulatory provision," *Doe, 982 F.3d at 1214-15*, because the Court has already concluded that the SAC fails to allege facts to support an inference that GM's conduct violated the Song-Beverly Act or NHTSA regulations. GM's failure to acknowledge or remedy a defect that occurred outside any applicable express warranty period cannot plausibly be characterized as "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *See Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1026-27 (9th Cir. 2008)* ("[T]he failure to disclose a defect that might, or might not, shorten the effective life span of an automobile part that functions precisely as warranted throughout the term of its express warranty cannot be characterized as causing a substantial injury to consumers, and accordingly does not constitute an unfair practice under the UCL." (quoting *Daugherty v. Am. Honda Motor Co., Inc., 144 Cal. App. 4th 824, 839, 51 Cal. Rptr. 3d 118 (2006)*). The SAC alleges that "the gravity of the consequences of GM's conduct . . . outweighs the justifications . . . ." (ECF No. 37 ¶ 119). The SAC alleges that weighing the relevant **[*18]** factors "is fact intensive and requires a full factual record." (*Id.*). These conclusory allegations are insufficient to support a UCL "unfair" prong claim. *See Doe, 982 F.3d at 1215* (affirming dismissal of UCL "unfair" prong claim because "conclusory recitation of one of the UCL's legal standards does not clarify what conduct [the plaintiffs] claim is unfair, or on what allegations in the complaint [the plaintiffs] rely for this claim"). GM's Motion to Dismiss the "unfair" UCL claim is granted.

V. CONCLUSION

IT IS HEREBY ORDERED that the Motion to Dismiss Plaintiff's Second Amended Class Action Complaint filed by Defendant General Motors, LLC (ECF No. 38) is granted. The Second Amended Class Action Complaint (ECF No. 37) is dismissed without prejudice.[4] No later than thirty (30) days from the date of this Order, Plaintiff Rebecca Casey may file any motion for leave to amend pursuant to Civil *Local Rules 7.1* and *15.1(c)*. If no motion is filed, the case will be closed.

Dated: November 19, 2021

/s/ William Q. Hayes

Hon. William Q. Hayes

United Slates District Court

[4] GM contends that the SAC should be dismissed with prejudice. Although Casey does not dispute this contention in her Opposition, dismissal with prejudice is inappropriate because the Court cannot conclude that further amendment would be futile at this point in time.

In re Ranbaxy Generic Drug Application Antitrust Litig.

United States District Court for the District of Massachusetts

November 22, 2021, Decided; November 22, 2021, Filed

MDL No. 19-md-02878-NMG

Reporter

573 F. Supp. 3d 459 *; 2021 U.S. Dist. LEXIS 224655 **; 2021 WL 5493675

In re: Ranbaxy Generic Drug Application Antitrust Litigation, This Document Relates To: Cross-Motions for Summary Judgment

Core Terms

generic, damages, issue preclusion, tentative approval, plaintiffs', brand, manufacturers, defendants', antitrust, prices, drugs, purchasers, preclusion, monopoly power, material fact, letters, parties, prior litigation, summary judgment, relevant market, injuries, courts, anticompetitive, asserting, delayed, burden of proof, genuine dispute, pharmaceuticals, relitigating, overcharges

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

Opinion by: Nathaniel M. Gorton

Opinion

[*464] MEMORANDUM & ORDER

GORTON, J.

This multi-district litigation involves five actions which were centralized in this Court and divided into two classes against Ranbaxy Inc. and Sun Pharmaceutical Industries Limited (collectively, "Ranbaxy" or "defendants") for allegedly causing the delayed market entry of three generic drugs.

The two plaintiff classes are composed of direct purchaser plaintiffs ("DPPs") and end-payor plaintiffs ("EPPs"). DPPs, such as wholesalers and distributors, purchase **[**4]** generic drugs directly from drug manufacturers. EPPs are third-party payors, such as health plans and insurance companies, that indirectly purchase and/or provide reimbursement for generic drugs at the end of the distribution chain from retailers and other intermediaries. The DPPs and EPPs (collectively, "plaintiffs") bring claims against Ranbaxy for violations of federal and state ***antitrust law***, the federal Racketeer Influenced and Corrupt Organizations Act ("RICO") and state consumer protection statutes.

Pending before the Court are cross motions for summary judgment under *Federal Rule of Civil Procedure 56*. For the reasons that follow, both the defendants' and plaintiffs' motions will be denied.

I. Background

A. Factual Background

Both the Court and the parties are well acquainted with the facts, which are described in detail in the Report and Recommendation of United States Magistrate Judge M. Page Kelley on Ranbaxy's motion to dismiss the complaint of the plaintiffs in the original action in this Court prior to centralization. See *Meijer, Inc. v. Ranbaxy, Inc., No.1:15-cv-11828-NMG, 2016 U.S. Dist. LEXIS 120998 (D. Mass. Sept. 7, 2016)*. For purposes of completeness, however, the Court provides the following abbreviated summary of the background relevant to the pending motions.

In the early 2000s, Ranbaxy filed a series **[**5]** of applications with the United States Food and Drug Administration ("FDA") seeking approval to manufacture and market generic versions of various pharmaceuticals. Under the *Hatch-Waxman Act, Pub. L. No. 98-417, 98 Stat. 1585 (1984)*, the first generic drug manufacturer to submit a substantially complete Abbreviated New Drug Application ("ANDA") is entitled to a 180-day period of exclusivity during which no other manufacturer is permitted to market a generic version of the subject drug. The FDA may, however, revoke the exclusivity period if the generic manufacturer fails to obtain tentative approval from the FDA within 30 months of submission, among other reasons. Tentative approval, which requires the manufacturer to demonstrate that its facilities comply with current good manufacturing practices, effectively means that the ANDA meets all the substantive requirements for final approval, but the FDA is barred from formally approving the application due to preexisting patents.

In 2004 and 2005, Ranbaxy submitted the first substantially complete ANDAs for the three brand drugs at issue here: Diovan, Nexium and Valcyte. Ranbaxy subsequently **[*465]** obtained tentative approval for each of those drugs in 2007 and 2008. Despite its early success, **[**6]** Ranbaxy failed to secure final approval for its generic version of Diovan until June, 2014 and did not bring that generic to market until July, 2014. Before defendants could secure final approval for its generic Nexium and Valcyte ANDAs, the FDA revoked its tentative approval for both drugs. Ranbaxy's generic versions of these two drugs were never brought to market.

Plaintiffs allege that Ranbaxy violated RICO, federal and state antitrust laws and state consumer protection laws by submitting multiple ANDAs with missing, incorrect or fraudulent information, thereby wrongfully acquiring exclusivity periods and delaying the market entry of generic Diovan, Nexium and Valcyte. Plaintiffs assert that but for defendants' allegedly anti-competitive conduct, generic versions of those three drugs would have entered the market and been available at lower prices much sooner. As a result, plaintiffs contend they paid artificially inflated prices for Diovan, Nexium and Valcyte during the Class Periods.

B. Relevant Procedural History

The five actions comprising this multidistrict litigation were centralized in this Court in February, 2019. In April, 2019, the Court consolidated for pretrial purposes **[**7]** all direct purchaser actions and all end-payor actions that were centralized in this District and assigned to this Court, thereby creating two putative class actions. Amended complaints were filed by the DPPs and EPPs later that month. The EPPs further amended their complaint in February, 2020 and March, 2021. The DPPs also amended their complaint in March, 2021. After oral argument, this Court certified two sets of classes, one for DPPs and EPPs, in May, 2021. Each set is composed of three nationwide classes, one for each of the pharmaceuticals at issue.

Shortly thereafter, the parties filed cross motions for summary judgment. Parties have submitted oppositions to these motions, which have, in turn, engendered sur-replies. This Court heard oral argument on the motions in October, 2021.

II. Legal Standard

The role of summary judgment is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991)* (quoting *Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990)*). The burden is on the moving party to show, through the pleadings, discovery and affidavits, "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*.

A fact is material if **[**8]** it "might affect the outcome of the suit under the governing law...." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A genuine issue of material fact exists where the evidence with respect to the material fact in dispute "is such that a reasonable jury could return a verdict for the nonmoving party." Id.

If the moving party satisfies its burden, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine, triable issue. *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The Court must view the entire record in the light most favorable to the non-moving party and make all reasonable inferences in that party's favor. *O'Connor v. Steeves, 994 F.2d 905, 907 (1st Cir. 1993)*. Summary judgment is appropriate if, after viewing the record in the non-moving party's favor, **[*466]** the Court determines that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Celotex Corp., 477 U.S. at 322-23*.

III. Analysis

A. Ranbaxy's Motion for Summary Judgment

Defendants contend that summary judgment is appropriate for a variety of reasons and, in the alternative, partial summary judgment on damages is required.

1. FDCA Preclusion

This Court has previously rejected Ranbaxy's contention that the authority to enforce violations of the Federal Food, Drug, and Cosmetic Act ("FDCA") belongs exclusively to **[**9]** the FDA, recognizing that the issue is one of first impression in this Circuit. While Ranbaxy yet again asserts the relevance of *Buckman v. Plaintiffs' Legal Committee, 531 U.S. 341, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001)*, defendants have failed to provide any persuasive reason for the Court to reexamine its prior analysis, which concluded that the *Buckman* decision did not directly resolve the matter. See *Arizona v. California, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318*, supplemented by *466 U.S. 144, 104 S. Ct. 1900, 80 L. Ed. 2d 194 (1984)* ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."). Neither party cites new case law addressing FDCA preclusion of federal antitrust claims involving fraud on the FDA and the Court has found none. See *Naser Jewelers, Inc. v. City of Concord, N.H., 538 F.3d 17, 20 (1st Cir. 2008)* ("Narrow exceptions to the doctrine exist if the initial ruling was made on an inadequate record or was designed to be preliminary; if there has been a material change in controlling law; if there is newly discovered evidence bearing on the question; and if it is appropriate to avoid manifest injustice." (citations omitted)).

Accordingly, the Court relies upon its prior reasoning and finds the plaintiffs' claims are not precluded by the FDCA.

2. RICO Predicate Offenses

Citing the recent decision in *Kelly v. United States, 140 S. Ct. 1565, 206 L. Ed. 2d 882 (2020)*, Ranbaxy urges this Court to reconsider its determination that the plaintiffs **[**10]** have provided evidence sufficient to allege the predicate offenses of mail and/or wire fraud under RICO. As the Court has previously articulated, mail and wire fraud require proof of: (1) a scheme or artifice to defraud, (2) knowing and willing participation in that scheme with the specific intent to defraud, and (3) the use of interstate mail or wire communications in furtherance of the scheme. *Sanchez v. Triple-S Mgmt., Corp., 492 F.3d 1, 9-10 (1st Cir. 2007)*. Both statutes are "limited in scope to the protection of property rights." *Cleveland v. United States, 531 U.S. 12, 18, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000)* (citation omitted). In other words, the thing obtained by fraud must be "property in the hands of the victim." *Id. at 15*. Defendants allege that plaintiffs have provided no cognizable property upon which to ground their RICO claims. Defendants seek to draw a distinction between Ranbaxy's regulatory interests and property rights.

The Court has already rejected this reasoning. In its order on defendants' motion to dismiss, the Court found the plaintiffs had sufficiently pled a predicate offense under RICO by asserting that Ranbaxy's fraud affected the interests of individuals and entities other than the government. *Kelly*, in which the Supreme Court distinguished between property sufficient for a **[*467]** fraud claim and "run-of-the-mine...regulatory **[**11]** power," even when such regulatory power causes foreseeable loss to third parties, does not change this calculus. *140 S. Ct. at 1573*. *Kelly* is a straightforward application of the holding in *Cleveland*, which this Court previously determined did not bar plaintiffs' claims. In both *Kelly* and *Cleveland*, a scheme to alter the government's regulatory choice did not implicate a property right.

Here, by contrast, the object of the scheme was not simply the government's regulatory choice but rather the property rights implicated by that choice. See *In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig., 497 F.*

Supp. 3d 552, 615 (N.D. Cal. 2020) (finding Kelly did not foreclose plaintiffs' RICO claims where "the scheme was to secure the money and property of the end consumer"). As this Court has previously articulated, the victims of the alleged fraud need not be the parties upon whom the defendants' fraud was perpetrated. See United States v. Hatch, 926 F.2d 387, 392 (5th Cir. 1991) ("The focus of the mail fraud statute is upon the use of the mail to further a scheme to defraud, not upon any particular kind of victim."). Nor is there a requirement in the mail or wire fraud statutes that the victim who is deprived of money or property be the party who was deceived by the defendants' scheme. See id.; accord. United States v. Valencia, No. CRIM. H-04-514-SS, 2006 U.S. Dist. LEXIS 90298, 2006 WL 3716657, at *4 (S.D. Tex. Dec. 14, 2006), aff'd, 600 F.3d 389 (5th Cir. 2010); United States v. Howard, 619 F.3d 723, 727 (7th Cir. 2010).

Defendants suggest no other legal or factual deficiencies to undermine **[**12]** the Court's prior ruling.

3. Causation

Defendants assert that plaintiffs' theory of causation hinges on two premises: (1) Ranbaxy's alleged fraud induced the FDA to grant tentative approval for Diovan, Nexium and Valcyte before the expiration of the 30-month deadline to earn tentative approval for each drug, and (2) the FDA would have revoked Ranbaxy's period of exclusivity for generic Diovan if Ranbaxy had failed to obtain tentative approval within 30 months. Ranbaxy takes issue with both premises.

On the first issue, defendants argue that none of the tentative approvals was induced by fraud, as evidenced by the FDA's communications with Ranbaxy. More specifically, Ranbaxy points to a 2012 consent decree between the defendants and the FDA that established new practices and offices to ensure Ranbaxy's regulatory compliance, withdrew certain ANDAs and submitted other ANDAs to new audits. Diovan, Nexium and Valcyte were among those pharmaceuticals subject to new audits. After those audits, the FDA sent three letters to Ranbaxy informing it that those applications did not appear to contain any "untrue statements of material fact" or "data irregularities" and, based upon those findings, the **[**13]** FDA resumed consideration of whether those ANDAs were eligible for final approval. Ranbaxy now asserts that those letters prove that the FDA's tentative approvals of Diovan, Nexium, and Valcyte were not induced by fraud and, thus, that plaintiffs cannot prove that the fraud alleged caused plaintiffs' injuries.

Ranbaxy further contends that the record disproves causation with respect to generic Diovan because, after Ranbaxy submitted its application but before the FDA granted Ranbaxy tentative approval, the FDA altered the requirements for approval of that application, thus invoking a statutory exception. The applicable provision, known as the "change-based exception", indicates that a first filer will forfeit **[*468]** its exclusionary period if it does not obtain tentative approval within 30 months,

> unless the failure is caused by a change in or a review of the requirements for approval of the application imposed after the date on which the application is filed.

21 U.S.C. § 355(j)(5)(D)(i)(IV). Ranbaxy contends that the exception applies because a change in the brand drug's USP monograph was one reason why Ranbaxy failed to obtain approval within 30 months of filing. Therefore, Ranbaxy explains, any alleged fraud was not the **[**14]** reason for the delay that resulted in the plaintiffs' alleged injury, i.e. the delay was inevitable and excusable.

"[A]n antitrust plaintiff must prove that he or she suffered damages from an antitrust violation and that there is a causal connection between the illegal practice and the injury." In re Intuniv Antitrust Litig., 496 F. Supp. 3d 639, 672 (D. Mass. 2020) (quoting In re Nexium (Esomeprazole) Antitrust Litig., 42 F. Supp. 3d 231, 267 (D. Mass. 2014)). An antitrust violation may, however, still cause the plaintiffs' injury "even if there are additional independent causes of the injury." In re Nexium, 42 F. Supp. 3d at 267 (quoting In re Flonase Antitrust Litig., 798 F. Supp. 2d 619, 627-28 (E.D. Pa. 2011)). "Once a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct, the burden shifts to the defendant to rebut this causal inference." In re Neurontin Mktg. and Sales Practices Litig., 712 F.3d 21, 45 (1st Cir. 2013) (internal quotation and citation omitted). "Defendants have a high bar to meet, because causation is generally a question best left for the jury." *In re Loestrin 24 Fe Antitrust Litig., 433 F. Supp. 3d 274, 323 (2019)* (citations omitted); see also *Peckham v. Continental Cas. Ins. Co., 895 F.2d 830, 837 (1st Cir. 1990)* ("Causation questions of this sort are normally grist for the jury's mill.")

Defendants have failed to rebut compellingly the plaintiffs' causal inferences on either of the issues addressed.

First, defendants' description of the subject letters as "no fraud" letters is misguided and inaccurately characterizes their significance. Plaintiffs have presented **[**15]** sufficient evidence to suggest that, in reaching the conclusion that the ANDAs

> [did] not appear to contain any untrue statements of material fact [nor] contain a pattern or practice of data irregularities affecting approval[,]

the FDA did not assess all the evidence now available to the Court. Moreover, as clearly articulated in the letters, the FDA's determinations of wrongdoing were constrained by the relevant consent decree and did not restrict the "FDA's ability to raise additional data integrity concerns regarding the review process" at a later time. These letters are not the conclusive exculpation that defendants confidently submit.

Even assuming, arguendo, that these letters are evidence that the FDA determined that defendants did not fraudulently secure tentative approval for the relevant drugs, that determination does not preclude the Court from making its own independent assessment. In the context of administrative decision-making, federal courts give the decisions of an administrative agency, such as the FDA, preclusive effect

> when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate **[**16]** opportunity to litigate.

B & B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 148, 135 S. Ct. 1293, 191 L. Ed. 2d 222 (2015) (quoting *Univ. of Tennessee* **[*469]** *v. Elliott, 478 U.S. 788, 798, 106 S. Ct. 3220, 92 L. Ed. 2d 635 (1986)*). These conditions can, however, only be met "insofar as the proceeding resulting in the determination entailed the essential elements of adjudication." *Restatement (Second) of Judgments § 83(2)(b)* (1982); see *Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 109-10, 111 S. Ct. 2166, 115 L. Ed. 2d 96, (1991)* ("Although administrative estoppel is favored as a matter of general policy, its suitability may vary according to...the relative adequacy of agency procedures."). Here, the FDA process that resulted in the relevant letters did not include any sort of "adjudicative scheme...sufficient to trigger the doctrine of collateral estoppel." *Ríos-Piñeiro v. United States, 713 F.3d 688, 692 (1st Cir. 2013)*. Compare *Rios-Pineiro, 713 F.3d. at 692* (granting preclusive effect to agency decision where agency adjudication was alternative to Federal Court of Claims and procedures included limited discovery and examination of witnesses at hearing) with *Johnson v. Vilsack, 833 F.3d 948, 957 (8th Cir. 2016)* (declining to grant preclusive effect to agency decision that was based on selective information and parties had limited rights to present evidence or argument). For this reason, these letters carry no preclusive effect in the present litigation and cannot conclusively disprove causality.

Nor does the change-based exception undermine the plaintiffs' contention of causality. As an initial matter, while defendants argue that the FDA's tentative approval **[**17]** of generic Diovan in 2007 would have been delayed due to that change independent of any alleged fraud, they do not address causality in the context of Ranbaxy's initial, 2004 generic Diovan application. Ranbaxy was eligible for the tentative approval at issue only because it was the first filer in 2004 and plaintiffs contend that such initial eligibility was fraudulently based. Thus, to the extent the purported injuries stem from Ranbaxy, rather than from another manufacturer, securing the coveted first-filer status for generic Diovan, the monograph change did not break the "causal connection between the illegal practice and the injury." *Sullivan v. Nat'l Football League, 34 F.3d 1091, 1103 (1st Cir. 1994)*, as amended on denial of reh'g (Oct. 26, 1994).

Moreover, as noted above, the possibility that plaintiffs' injuries resulted from multiple, independent causes does not exculpate the defendants. They have proffered insufficient evidence to rebut the inference that the alleged fraud, alone or in concert with the monograph change, caused plaintiffs' injuries with respect to generic Diovan. "Plaintiffs need not prove that the antitrust violation was the sole cause of their injury, but only that it was a material cause." *In re Nexium (Esomeprazole) Antitrust Litig., 42 F. Supp. 3d at 267 (D. Mass. 2014)* (quoting *Engine Specialties, Inc.*

v. Bombardier Ltd., 605 F.2d 1, 14 (1st Cir. 1979)); see also In re Nexium (Esomeprazole) Antitrust Litig., 309 F.R.D. 107, 141 (D. Mass. 2015), as amended **[**18]** (Aug. 7, 2015), aff'd, 842 F.3d 34 (1st Cir. 2016), and cases cited. The parties' experts present diverging perspectives with respect to the import of the change-based exception relative to the award of the exclusionary period to Ranbaxy. In light of that disagreement, "the evidence raises a genuine dispute of material fact on this causation theory." In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. CV 14-MD-02503, 2018 U.S. Dist. LEXIS 11921, 2018 WL 563144, at *16 (D. Mass. Jan. 25, 2018).

4. Proof of Monopoly Power

Plaintiffs assert two claims under the *Sherman Act*: monopolization and attempted monopolization.

> **[*470]** To successfully prove a monopolization offense, a plaintiff must show that defendant (1) has monopoly power and (2) the defendant has engaged in impermissible exclusionary practices with the design or effect of protecting or enhancing its monopoly position.

Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 195 (1st Cir. 1996) (internal quotation and citation omitted). To prove attempted monopolization, a plaintiff must similarly prove predatory or anticompetitive conduct but need only demonstrate that there was "a dangerous probability of achieving monopoly power" and "a specific intent to monopolize." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. With regard to both claims, "[m]onopoly power is the power to control prices or exclude competition." *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*.

Plaintiffs may prove such power with two kinds of evidence: direct, such as super-competitive prices or restricted output, **[**19]** or circumstantial. See *Coastal Fuels, 79 F.3d at 196-97* (citations omitted); accord. *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007)*. Some courts have, by implication, limited the circumstantial evidence that can support a claim of monopoly power to the defendant's market share in the relevant market. See *Heerwagen v. Clear Channel Communications, 435 F.3d 219 (2d Cir. 2006)* ("Indirect proof of market power, that is, proof that the defendant has a large percentage share of the relevant market, is a 'surrogate' for direct proof of market power."); *Arani v. TriHealth Inc., 77 Fed. Appx. 823, 826 (6th Cir. 2003)* ("The existence of monopoly power can be established by either: (1) presenting direct evidence of a defendant's exercise of control over prices or the actual exclusion of competitors; or (2) showing that a defendant has a high market share in a defined market."). Others, including the First Circuit Court of Appeals, have not done so. See *Diaz Aviation Corp. v. Airport Aviation Servs., Inc., 716 F.3d 256, 265 (1st Cir. 2013)* ("[M]onopoly power is *typically* proven by defining a relevant market and showing that the defendant has a dominant share of that market." (emphasis added)); *Coastal Fuels, 79 F.3d at 197* ("Market power *may* be proved circumstantially by showing that the defendant has a dominant share in a well-defined relevant market and that there are significant barriers to entry in that market and that existing competitors lack the capacity to increase their output in the short run." (emphasis **[**20]** added)).

The Court therefore rejects defendants' assertions that the fact that Ranbaxy never sold Valcyte and Nexium, and thus never maintained a significant share of the relevant market, is dispositive of the *Sherman Act* claims. While an antitrust defendants' share of the relevant market is typically used as evidence of monopoly power, typicality is not necessary here. Within the highly regulated market for pharmaceuticals, plaintiffs have proffered sufficient evidence to create a genuine dispute of material fact as to whether Ranbaxy maintained monopoly power due to its first-filer status and the resulting exclusionary periods. This holistic assessment provides strong evidence that Ranbaxy maintained the "ability to lessen or destroy competition in the relevant market," the determining factor in assessing monopoly power. *Sterling Merch., Inc. v. Nestlé, S.A., 656 F.3d 112, 125 (1st Cir. 2011)* (internal quotation and citations omitted); see also *Geneva Pharms. Tech. Corp. v. Barr Lab'ys Inc., 386 F.3d 485, 500-01 (2d Cir. 2004)*. "[A]fter full consideration of the relationship between market **[*471]** share and other relevant market characteristics," *Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 98 (2nd Cir. 1998)*, the fact that Ranbaxy never sold Valcyte and Nexium is not dispositive. See *F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)* ("the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for **[**21]** genuine adverse effects on competition" (internal quotation and citation omitted)). These unique circumstances reveal that Ranbaxy's decision not to enter those markets is reflective, rather than dispositive, of the market power that the defendants allegedly wielded.

Defendants' argument that Ranbaxy did not have monopoly power in the Diovan market because of the presence of brand Diovan and the brand company's authorized generic ("AG") is equally unpersuasive. There is no dispute that the brand drug, the AG and Ranbaxy's generic version were, from a medical perspective, undifferentiated substitutes. Nor do plaintiffs contend that the entrance of generic Diovan into the market had no impact on the brand price. It is, however, undisputed that:

> Substitutability with other drugs shows a lack of market power only if it effectively limits the price to the competitive level or something slightly above, and if that is the case, then entry of new competitors should not have a substantial effect on average price.

In re Aggrenox Antitrust Litig., 199 F. Supp. 3d 662, 668 (D. Conn. 2016) (quotation and citations omitted). Here, plaintiffs have proffered compelling, though disputed, evidence that Ranbaxy charged super-competitive prices during their period of exclusivity **[**22]** for generic Diovan. That pricing data provides evidence that the medical substitutability of available alternatives was of limited import in this context.

Furthermore, contrary to defendants' assertion, courts have recognized the potential for monopoly power where the relevant market is limited to the generic version of the product and generic prices demonstrate a degree of independence from brand-name competition. See *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 496 (2d Cir. 2004)* (holding that, while "[i]t may seem paradoxical," the relevant product market was only the generic drug because "in examining the competitive pressures that affect the ability of a lone generic manufacturer to raise prices or reduce output, we are persuaded that competition among generics creates those restraints"); *In re Lorazepam & Clorazepate Antitrust Litig., 467 F. Supp. 2d 74, 82 (D.D.C. 2006)*. Where there are disagreements "about the products that make up the market capable of constraining [defendant's] profit margins and price to a competitive level," as here, summary judgment is inappropriate. *In re Loestrin 24 Fe Antitrust Litig., 433 F. Supp. 3d at 299*.

5. Standing to Recover "Brand-Brand" Damages

As this Court previously articulated, although it is true that "[c]ompetitors and consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs" in an antitrust action, **[**23]** *Breiding v. Eversource Energy, 344 F. Supp. 3d 433, 452 (D. Mass. 2018)* (quoting *Serpa Corp. v. McWane, Inc., 199 F.3d 6, 10-11 (1st Cir. 1999)*), it does not follow that consumers who are outside of that market necessarily lack standing. Rather, standing depends on whether the injury suffered "flows from that which makes defendants' acts unlawful." *Serpa Corp., 199 F.3d at 10* (internal citation omitted).

[*472] Ranbaxy's contention that plaintiffs necessarily lack antitrust standing to recover for alleged brand-brand injury because their experts defined the relevant antitrust market as limited to ANDA-based generics is therefore unavailing. Brand-brand injuries are those stemming from transactions in which class members actually purchased brand drugs and would have also purchased brand drugs absent Ranbaxy's alleged wrongdoing.

Plaintiffs have provided evidence sufficient to create a genuine dispute as to whether Ranbaxy's activities caused brand purchasers to pay higher drug prices due to delayed generic entry. Plaintiffs' experts have proffered opinions that Ranbaxy's alleged delays allowed brand manufacturers to avoid the competitive pressure of generics for longer than would have otherwise been possible. As the defendants point out, plaintiffs' expert suggests that the cross-price elasticity of demand between brand and generic drugs is low. Low **[**24]** is not, however, the same as nonexistent. Other courts have countenanced recovery based upon similar theories. See *In re Nexium (Esomeprazole) Antitrust Litig., 296 F.R.D. 47, 56 (D. Mass. 2013)* (recognizing entry of generic drug would result in price decline of both brand and generic); *Teva Pharms. USA, Inc. v. Abbott Lab'ys, 252 F.R.D. 213, 228 (D. Del. 2008)* (considering brand-brand damages); *In re Niaspan Antitrust Litig., 397 F. Supp. 3d 668, 690 (E.D. Pa. 2019)* (same).

Thus, while brand-brand injuries rest upon transactions outside the generic markets in which Ranbaxy participated, its alleged anticompetitive behavior may still have caused damages to these plaintiffs. Plaintiffs have presented sufficient evidence of those damages to survive defendants' motion for summary judgment.

6. Partial Summary Judgment on Damages

Ranbaxy urges that the defendants are entitled to partial summary judgment based upon four alleged errors in the damages methodology used by plaintiffs. Those errors purportedly do not implicate a genuine dispute of material fact.

a. Damages for generic Nexium purchases

Three nationwide RICO classes of EPPs have been certified by this Court, one for each of the pharmaceuticals at issue. For Diovan and Valcyte, the classes include EPPs who purchased, paid or provided reimbursement for the relevant drug and/or AB-rated generic versions of the drug from the defendants during the relevant class **[**25]** period. In contrast, the Nexium class includes only those EPPs who purchased, paid or provided reimbursement for the AB-rated generic version of the drug, not the brand drug. As a result, plaintiffs' damages expert did not factor in brand rebates on purchases of Nexium in her calculation of damages, in contrast to her calculations for Diovan and Valcyte.

Claiming that neither plaintiffs nor their damages experts provides any justification for the inconsistency, defendants contend that the proffered calculations exaggerate the damages of Nexium EPPs because they do not account for rebates from brand manufacturers. At the hearing on the motion, defendants proposed that the Nexium EPPs were actually better off as a result of Ranbaxy's alleged anti-competitive conduct because brand Nexium prices were lower than generic prices. Defendants argued that the delayed market entry of generic Nexium therefore saved class members money.

The problem with defendants' contention is that the class definition excludes EPPs who purchased brand Nexium and, thus, excludes EPPs who received the rebates at **[*473]** issue. Defendants' reliance on *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 791 F.2d 1356 (9th Cir. 1986)*, is misplaced. In that case, the Ninth Circuit Court of Appeals found **[**26]** that:

> plaintiff's gross recovery for the antitrust violation must be reduced by any benefits that plaintiff would not have received had there been no anticompetitive conduct by the defendant.

791 F.2d at 1366. In that case, however, plaintiffs were the parties who benefited from the supposed misconduct. Here, in contrast, the EPPs who benefited from the subject rebates are excluded from the relevant class. These rebates are, thus, simply irrelevant. To conclude otherwise would create an untenable disconnect between the plaintiffs' case for liability and their case for damages. See *Comcast Corp. v. Behrend, 569 U.S. 27, 35, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)* (citations omitted).

b. Manufacturers launching generic Diovan in September, 2012

Plaintiffs allege that, but for Ranbaxy's illegal and anticompetitive behavior, generic Diovan could have been marketed as early as September, 2012. Based on that timeline, plaintiffs' experts calculate the damages for two but-for scenarios, one in which three manufacturers would have launched generic Diovan between September, 2012 and April, 2013, and another in which at least five generic manufacturers would have launched the drug in September, 2012. Defendants take issue with the latter scenario, asserting that plaintiffs have not proffered **[**27]** evidence sufficient to conclude that five generic manufacturers would have been able to launch the pharmaceutical at that time.

"Expert testimony without...a factual foundation cannot defeat a motion for summary judgment." *In re Nexium (Esomeprazole) Antitrust Litig., 42 F. Supp. 3d. at 248* (citations omitted). Testimony, including the testimony of expert witnesses, can, however, be based on "probable and inferential as well as direct and positive proof." *In re Asacol Antitrust Litig., 323 F.R.D. 451, 488 (D. Mass. 2017)*, rev'd and remanded, *907 F.3d 42 (1st Cir. 2018)*. "Any other rule would...be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain." *Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264, 66 S. Ct. 574, 90 L. Ed. 652 (1946)*.

Plaintiffs appropriately rely on such probable and inferential evidence, the only kind of evidence available given the counterfactual under consideration, and defendants do not substantively refute their logic. In fact, the defendants' own uncertainty regarding the precise number of market entrants in the but-for world highlights the genuine dispute as to this issue, which renders it unsuitable for resolution on a motion for summary judgment. Moreover, this is not a circumstance in which the plaintiffs' logic

> rest[s] solely on an expert's bottom line conclusion, without some underlying facts and reasons, **[**28]** or a logical inference process to support the expert's opinion.

In re Nexium (Esomeprazole) Antitrust Litig., 42 F. Supp. 3d at 248. Rather, plaintiffs have supplied sufficient evidence regarding the interest of other generic manufacturers in producing generic Diovan before, during and after Ranbaxy's alleged anticompetitive behavior, to survive defendants' motion for summary judgment.

c. Brand-generic damages after actual generic entry date

Plaintiffs' damages calculations include brand-generic overcharges after generics entered the market. They allege **[*474]** that the conversion from the brand to generic product is not immediate and that Ranbaxy's anticompetitive practices delayed the conversion. The defendants take issue with this logic, suggesting that the plaintiffs cannot show that Ranbaxy's conduct prevented them from purchasing generics once they had come to market and, more specifically, that the difference in the generic volume between the actual world and but-for world was caused by Ranbaxy's alleged activity.

Defendants do not substantively address the plaintiffs' rebuttal that it can take several months, or more, for generic substitutes to penetrate the market fully and for brand prices to stabilize after generics are introduced. While plaintiffs **[**29]** were, of course, theoretically able to purchase generics once they became available, there is a genuine dispute of material fact as to whether Ranbaxy's alleged behavior resulted in artificially inflated drug prices even after there were generic options in the market. See, e.g., *In re Nexium (Esomeprazole) Antitrust Litig., 296 F.R.D. 47, at 55-56 (D. Mass. 2013)* (noting that brand erosion after generic entry is generally accepted to increase over time).

d. Overcharges for indirect purchasers

Finally, defendants allege that, even among the DPPs, very few members of the plaintiff classes purchased the drugs at issue directly from Ranbaxy. Ranbaxy avers that, under precedent stemming from *Hanover Shoe Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*, those indirect purchasers can recover only based upon their net injuries, rather than from alleged overcharges at the time of purchase. Plaintiffs base their damages calculations upon those alleged overcharges which are higher than net injuries because plaintiffs passed along at least some of the super-competitive pricing to customers.

The proposition that indirect purchasers removed from an antitrust violator in a distribution chain may not seek damages against the alleged wrongdoer, see *Illinois Brick Co. v. Illinois, 431 U.S. 720, 746-747, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, is, however, inapposite to the case at hand. Plaintiffs here do not seek damages based upon overcharges **[**30]** extracted by Ranbaxy directly but rather by other manufacturers that benefited from Ranbaxy's alleged malfeasance. In such circumstances, the distribution link between the defendants and plaintiffs is irrelevant because purchasers are "neither direct nor indirect purchasers." *In re Namenda Direct Purchaser Antitrust Litig., 331 F. Supp. 3d 152, 212 (S.D.N.Y. 2018)*; see also *In re Loestrin 24 Fe Antitrust Litig., No. 1:13-MD-2472, 2019 U.S. Dist. LEXIS 118308, 2019 WL 3214257, at *8-10 (D.R.I. July 2, 2019)*.

Moreover,

> [o]vercharges, the difference between the actual price and the presumed competitive price multiplied by the quantity purchased, provide what the Supreme Court has long recognized as the principal measure of damages for plaintiffs injured as customers, rather than as competitors.

In re Relafen Antitrust Litig., 218 F.R.D. 337, 344 (D. Mass. 2003) (quotations and citations omitted). Courts have countenanced such damages based upon overcharges when the injury stems alleged from delayed generic entry. See *In re Nexium (Esomeprazole) Antitrust Litig., 42 F. Supp. 3d 231, 296-297 (D. Mass. 2014)*, aff'd, *842 F.3d 34 (1st Cir. 2016)* ("[T]his Court discerns no requirement that antitrust damages be demonstrated only by "lost profit" methodologies.); *In re Solodyn, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *10*; *In re Loestrin 24 Fe Antitrust Litig., 2019 U.S. Dist. LEXIS 118308, 2019 WL 3214257, at *5 n.10*. The cases cited by Ranbaxy for the proposition **[*475]** that antitrust plaintiffs may recover only to the extent of net injuries are unconvincing on this point because they concern competitors seeking lost profits, rather than overcharges.

B. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs seek partial summary judgment to preclude **[**31]** defendants from relitigating issues allegedly decided in prior litigation between Ranbaxy and the FDA ("the *Burwell* litigation"). See *Ranbaxy Lab'ys, Ltd. v. Burwell, 82 F. Supp. 3d 159, 181 (D.D.C. 2015)*. In that litigation, Ranbaxy sought to invalidate the 2014 decisions of the FDA rescinding tentative approvals of the ANDAs for Ranbaxy's Nexium and Valcyte. After Ranbaxy unsuccessfully moved for a temporary restraining order, the FDA moved for summary judgment. In a thorough opinion, United States District Judge Beryl A. Howell of the District of Columbia granted the FDA's motion for summary judgment. Although Ranbaxy initially appealed that decision, it later withdrew its appeal before it was decided.

Issue preclusion, also known as collateral estoppel, "bars parties from relitigating issues of either fact or law that were adjudicated in an earlier proceeding." *Vargas-Colón v. Fundación Damas, Inc., 864 F.3d 14, 25 (1st Cir. 2017)* (citation omitted); see also *Taylor v. Sturgell, 553 U.S. 880, 892, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008)*. The doctrine may be used defensively, to prevent plaintiffs from asserting a previously litigated claim against the defendant, or offensively, to foreclose the defendant from re-litigating an issue that it previously lost. See *Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n.4, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)*. Offensive use of issue preclusion does, however, raise concerns of fairness. See *Enica v. Principi, 544 F.3d 328, 337 (1st Cir. 2008)*. Application is non-mutual where "the party asserting preclusion **[**32]** was not a party to the prior case." *Brown v. Colegio de Abogados de Puerto Rico, 613 F.3d 44, 48 (1st Cir. 2010)*. Non-mutual offensive issue preclusion, the variety of preclusion plaintiffs seek to apply here, "historically spawned the greatest misgivings among jurists." *Acevedo-Garcia v. Monroig, 351 F.3d 547, 573 (1st Cir. 2003)*. See generally *Parklane Hosiery, 439 U.S. at 329-31 (1979)*. Despite these concerns, the Supreme Court has granted district courts broad discretion to apply non-mutual offensive issue preclusion. See *id. at 331*.

Federal common law provides the standard with which to assess the applicability of issue preclusion in this case because the prior litigation was adjudicated by a federal district court. See *Negron—Fuentes v. UPS Supply Chain Solutions, 532 F.3d 1, 7 (1st Cir. 2008)*. Thus, "[i]ssue preclusion requires that (1) both proceedings involve[] the same issue of law or fact, (2) the parties actually litigated that issue [in the prior proceeding], (3) the prior court decided that issue in a final judgment, and (4) resolution of that issue was essential to judgment on the merits." *Global NAPs, Inc. v. Verizon New Eng. Inc., 603 F.3d 71, 95 (1st Cir. 2010)*. "Collateral estoppel is not limited to ultimate issues: necessary intermediate findings can now be used to preclude relitigation," *Rodriguez-Garcia v. Miranda-Marin, 610 F.3d 756, 771 (1st Cir. 2010)* (quoting *Biggins v. Hazen Paper Co., 111 F.3d 205, 210 (1st Cir.1997)* (emphasis original)); see also *Restatement (Second) of Judgments § 27, cmt. j*. Litigants are not, however, precluded from relitigating an issue if it came "under consideration only collaterally or incidentally." *Norton*

v. Larney, 266 U.S. 511, 517, 45 S. Ct. 145, 69 L. Ed. 413 (1925); see also C. Wright, A. Miller, **[**33]** & E. Cooper, **[*476]** Federal Practice and Procedure § 4421 (2d ed. 2002). "Under modern preclusion doctrine, the central question is whether a party has had a full and fair opportunity for judicial resolution of the same issue." Manganella v. Evanston Ins. Co., 700 F.3d 585, 591 (1st Cir. 2012).

Plaintiffs seek to preclude Ranbaxy from contradicting or relitigating the following facts:

(1) By regulation and policy, the FDA conditions tentative approval on a finding of compliance with the current good manufacturing practices;

(2) The FDA did not alter that policy when it granted tentative approval to Ranbaxy's ANDAs;

(3) As of June 19, 2007 and based on information provided by Ranbaxy, the FDA's compliance staff believed that the compliance issues at Paonta Sahib had been resolved and therefore recommended tentative approval for two applications; for later applications, the FDA relied on earlier approvals to recommend tentative approval despite the compliance hold;

(4) The FDA's mistakes in granting tentative approval were caused in substantial part by Ranbaxy's malfeasance (including taking one year to turn over necessary audit reports, providing summaries that deceived the FDA into believing, as of June 19, 2007, that compliance issues at Paonta Sahib had been **[**34]** resolved, concealing the extent of Ranbaxy's non-compliance, and affirmatively interfering with the FDA's ability to recognize and rectify its mistakes);

(5) The Medicare Modernization Act provides a forfeiture mechanism with respect to exclusivity to prevent first applicants from "parking" their exclusivity rights, creating a bottleneck and stopping low-cost generic drugs from reaching the market; and

(6) The letters of August 10, 2012 and November 4, 2014, sent pursuant to the consent decree, allowed the FDA to resume consideration of whether Ranbaxy's ANDAs were eligible for approval but did not evaluate Ranbaxy's eligibility for tentative approval.

Prior to addressing the applicability of issue preclusion to each of these facts individually, however, defendants contend that issue preclusion is entirely unavailable to plaintiffs due to fundamental differences between the prior litigation and the instant case. More specifically, defendants argue that issue preclusion is inappropriate because: (1) Ranbaxy bore the burden of proof in the prior litigation, whereas plaintiffs bear the burden here, (2) the standard of review applied in the earlier case was more deferential to the FDA's view **[**35]** of the facts and law than the applicable standard of review here, and (3) Ranbaxy's procedural opportunities to develop the administrative record and take discovery in the prior litigation were severely limited.

Each of these objections and the precedent upon which they rely stem from

> the well-established principle that failure to carry a higher standard of proof on an issue does not preclude a subsequent attempt to satisfy a lower standard as to the same issue.

Fed. Practice and Procedure § 4422. Thus, Ranbaxy generally should not be foreclosed from relitigating an issue if it had the burden of proof in the prior litigation and that burden has shifted away from it in the subsequent litigation, see Medtronic, Inc. v. Mirowski Fam. Ventures, LLC, 571 U.S. 191, 200, 134 S. Ct. 843, 187 L. Ed. 2d 703 **[*477]** (2014), the applicable standard of review is more demanding in the second action, see FPL Energy Maine Hydro LLC v. F.E.R.C., 551 F.3d 58, 64 (1st Cir. 2008), or defendants may benefit from substantial differences in the availability or admissibility of evidence, see Worcester v. Comm'r, 370 F.2d 713, 717 (1st Cir. 1966). See generally Fed. Practice and Procedure § 4422; Restatement (Second) of Judgments § 28(4). In each of these circumstances, courts have recognized that there are sufficient differences between the relevant cases that the defendant did not have previously "a full and fair opportunity for judicial resolution of the same issue." Rodríguez—García, 610 F.3d at 771 (quoting Fiumara v. Fireman's Fund Ins. Cos., 746 F.2d 87, 92 (1st Cir. 1984)).

The **[**36]** first two of these considerations weigh heavily in favor of Ranbaxy.

In the Burwell litigation, Ranbaxy bore the burden of proving that the rescission by the FDA of tentative approvals for its Nexium and Valcyte ANDAs was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," id. *§ 706(2)(C)*, or "without observance of procedure required by law," id. *§ 706(2)(D)*; see *Otis Elevator Co. v. Sec'y of Labor, 762 F.3d 116, 120-21, 412 U.S. App. D.C. 116 (D.C. Cir. 2014)*. Here, in contrast, the plaintiffs bear the burden. Ranbaxy failed to satisfy its burden in the prior litigation but that does not require a finding that plaintiffs will satisfy their burden here. Thus, preclusion is unavailable in these circumstances because its application might inappropriately expand the holdings of the original court. See, e.g., *Clarke v. Spencer, 585 F. Supp. 2d 196, 207 (D. Mass. 2008)* ("[D]ifferences in burdens of proof also preclude application of collateral estoppel."), aff'd, *582 F.3d 135 (1st Cir. 2009)*.

The relevant standards of review in these cases are also readily distinguishable. The FDA in *Burwell* had to prove only there was a rational basis for its action and the Court deferred to the FDA's view of the facts. In contrast, this Court is not required to defer to plaintiffs' facts, **[**37]** nor can they succeed by a showing of mere rationality. Rather, plaintiffs must demonstrate that their allegations are more likely true than not true. Correspondingly, Ranbaxy's burden in this case is much lower than in the *Burwell* litigation because it need demonstrate only that its contentions are as plausible as those of the plaintiffs. Preclusion is inappropriate in such circumstances. *Cinelli v. City of Revere, 820 F.2d 474, 479-480 (1st Cir. 1987)* (recognizing an exception to collateral estoppel where the party against whom preclusion is sought had a significantly heavier burden of persuasion the first time around).

Plaintiffs rely upon *Bath Iron Works Corp. v. Dir., Office of Worker's Comp. Programs, 125 F.3d 18 (1997)* for the proposition that shifting the burden of proof does not necessarily defeat the application of issue preclusion in a subsequent case. The Court agrees but notes that the decision in that case blends the analysis of applying issue preclusion in the context of different burdens of proof and standards of review. The *Bath Iron Works* decision is, however, markedly different from the case at hand. First, the party seeking issue preclusion in the second adjudication in *Bath Iron Works* was a party to the prior litigation, as was the defendant. Morever, issue preclusion was asserted defensively in *Bath Iron Works*. To the contrary, plaintiffs here seek to apply **[**38]** non-mutual offensive issue preclusion. While neither of these elements is dispositive, both non- **[*478]** mutuality and the offensive application of issue preclusion is treated with greater caution than the variety of issue preclusion at issue in Bath Iron Works. See *Acevedo-Garcia, 351 F.3d at 573*.

Relatedly, the party in *Bath Iron Works* seeking to avoid issue preclusion bore the burden of proof in the second action. In essence, the plaintiff in the second case was seeking a second bite at the apple on his claim, which had already been decided. The situation here is different: Ranbaxy opposes issue preclusion but plaintiffs bear the burden of proof. It is also relevant to note that the example provided by the court in *Bath Iron Works* of circumstances in which collateral estoppel may be denied, i.e. "where the victor in the first case has a greater burden in the second," is just that, an example. *125 F.3d at 21*. Plaintiffs inaccurately portray that example as dispositive.

The Court is also not convinced that Ranbaxy had a full and fair opportunity to litigate the facts upon which plaintiffs seek preclusion because the *Burwell* court made clear that, in assessing whether the FDA's rescission was arbitrary and capricious, it

> need not and ought not engage in lengthy fact finding, **[**39]** since generally speaking, district courts reviewing agency action under the APA's arbitrary and capricious standard do not resolve factual issues, but operate instead as appellate courts resolving legal questions

Ranbaxy Lab'ys, Ltd. at 181 (D.D.C. 2015) (internal quotation and citations omitted). The *Burwell* court assessed the FDA's decision only "for a rational connection between the facts found and the choice made" and granted broad discretion to the facts as found by the FDA. *Id. at 184* (citation omitted). Plaintiffs attempt to rebut the relevancy of that discretion by asserting that this Court would approach the FDA's determinations with the same deference as the *Burwell* court. However, due to that deference, a question remains as to whether the Burwell court actually decided the facts upon which the plaintiffs now seek preclusion, as required under the relevant standard to determine the application of issue preclusion described above.

More generally, the Court is unpersuaded that the issues upon which the plaintiffs seek issue preclusion are those addressed by the decision in Burwell. See Federal Practice and Procedure § 4422 (1981) ("As with all matters of issue preclusion, it remains important to make sure that the same issue is involved."); **[**40]** *Galen Hosp. Alaska, Inc. v. Azar, 474 F. Supp. 3d 214, 227-228 (D.D.C. 2020)*. The plaintiffs seek to interpret each factual finding in the *Burwell* decision as an independent issue that was necessary to the ultimate conclusion for the purpose of issue preclusion. In opposition, Ranbaxy would have this Court confine the import of that opinion to its holding that the rescission of Ranbaxy's ANDAs was not arbitrary and capricious.

Although the Court has not located relevant precedent regarding application of issue preclusion in the wake of a district court's analysis as to whether a determination of an administrative agency was "arbitrary and capricious," the decision of the Ninth Circuit Court of Appeals in *Resolution Trust Corporation v. Keating, 186 F.3d 1110 (9th Cir. 1999)*, lends support to narrowly prescribing the impact of such a determination. There, the plaintiff sought to attach preclusive effect to the factual findings of a district court that had previously reviewed whether the rulings of the Federal Home Loan Board were arbitrary and capricious. The Appeals Court declined to ascribe preclusive effect to those findings, concluding that the only determination necessary to the outcome of the prior litigation concerned whether the agency's action was arbitrary and capricious **[*479]** and, thus, that it was only that determination that could **[**41]** support the application of issue preclusion. See *id. at 1116*. The Court reaches the same conclusion here.

ORDER

For the foregoing reasons,

1. the motion of defendants for summary judgment as to Direct Purchaser Plaintiffs (Docket No. 414) is **DENIED**;

2. the motion of defendants for summary judgment as to End Payor Plaintiffs (Docket No. 415) is **DENIED**; and

3. the motion of plaintiffs for partial summary judgment (Docket No. 417) is **DENIED**.

So ordered.

/s/ Nathaniel M. Gorton

Nathaniel M. Gorton

United States District Judge

Dated November 22, 2021

Rite Aid Corp. v. Am. Express Travel Related Servs. Co. (In re Am. Express Anti-Steering Rules Antitrust Litig.)

United States Court of Appeals for the Second Circuit

December 16, 2020, Argued; November 22, 2021, Decided

No. 20-1766

Reporter

19 F.4th 127 *; 2021 U.S. App. LEXIS 34626 **

IN RE AMERICAN EXPRESS ANTI-STEERING RULES ANTITRUST LITIGATION, LAJOLLA AUTO TECH, INC., QWIK LUBE LLC, Plaintiffs-Appellants, RITE AID CORPORATION, WALGREEN CO., FIREFLY AIR SOLUTIONS, LLC, PLYMOUTH OIL CORPORATION, RITE AID HEADQUARTERS CORP., JASA, INC., ON BEHALF OF THEMSELVES AND ALL SIMILARLY SITUATED PERSONS, ANIMAL LAND, INC., ROOKIES, INC., ITALIAN COLORS RESTAURANT, COHEN RESE GALLERY, INC., LOPEZ-DEJONGE, INC., BAR HAMA LLC, MEIJER, INC., PUBLIX SUPER MARKET, INC., RALEY'S, SUPERVALU INC., CVS PHARMACY, INC., BI-LO, LLC, H.E.B. GROCERY COMPANY, THE KROGER CO., SAFEWAY INC., AHOLD U.S.A. INC., ALBERTSON'S LLC, HY-VEE, INC., THE GREAT ATLANTIC & PACIFIC TEA COMPANY INC., TREEHOUSE, INC., IL FORNO, INC., NATIONAL SUPERMARKETS ASSOCIATION, INC., ON BEHALF OF ITS MEMBERSHIP, AND ALL OTHER SIMILARLY SITUATED PERSONS, PLAINTIFFS, ALL CLASS PLAINTIFFS, THE MARCUS CORPORATION, BILL MCCAULEY, READ MCCAFFREY, HILLARY JAYNES, ANTHONY OLIVER, BERNADETTE MARTIN, BRYAN HUEY, JAMES EATON, PAUL KASHISHIAN, GIANNA VALDES, CHAD TINTROW, MATTHEW MORIARTY, ANDREW AMEND, IGOR GELMAN, ZACHARY DRAPER, SHAWN O'KEEFE, FRANCISCO ROBLETO, JR., MICHAEL THOMAS REID, PLYMOUTH OIL CORP., CLAM LAKE PARTNERS LLC, Plaintiffs, v. AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., AMERICAN EXPRESS COMPANY, Defendants-Appellees, SUSAN BURDETTE, Defendant, CIRCUIT CITY LIQUIDATING TRUST, THE RSH LIQUIDATING TRUST, HOLIDAY COMPANIES, GANDER MOUNTAIN COMPANY, COMMONWEALTH HOTELS, INC., KEILA RAVELO, Intervenors.*

Prior History: **[**1]** On Appeal from the United States District Court for the Eastern District of New York.

The plaintiffs-appellants are commercial merchants that sought monetary and injunctive relief under both federal and California antitrust laws against the defendants-appellees—American Express Travel Related Services Co., Inc., and American Express Co.—alleging that the appellees' anti-steering rules caused merchant fees to rise across the market. The appellants do not accept American Express cards and therefore proceeded under an "umbrella" theory of liability. The district court considered the four "efficient enforcer" factors, concluded that the appellants lacked antitrust standing, and dismissed the claims. The appellants challenge that holding, arguing that the four efficient-enforcer factors support antitrust standing for the "umbrella" plaintiffs in this case.

We disagree. The efficient-enforcer factors structure a proximate cause analysis according to which there must be a sufficiently close relationship between the alleged injury and the alleged antitrust violation to establish antitrust standing. Here, that relationship is lacking. After considering the efficient-enforcer factors and the relevant **[**2]** state laws, we AFFIRM.

In re Am. Express Anti-Steering Rules Antitrust Litig., 433 F. Supp. 3d 395, 2020 U.S. Dist. LEXIS 7095, 2020 WL 227425 (E.D.N.Y., Jan. 14, 2020)

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* The Clerk of Court is directed to amend the caption as set forth above.

Core Terms

antitrust, merchants, damages, cards, Anti-Steering, appellants', district court, anti trust law, efficient-enforcer, antitrust violation, proximate cause, speculative, steering, factors, first step, enforcers, umbrella, cardholders, networks, prices, competitors, indirect, injuries, credit card company, credit card, proximately, first-step, customers, duplicate, Non-Amex

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN1[] **Standing, Requirements**

To determine whether a party can sue under the antitrust laws—whether the party has antitrust standing—the appellate court applies the efficient enforcer test. In cases of economic harm, proximate cause is demarcated by the first step rule, which limits liability to parties injured at the first step of the causal chain of the defendants' actions.

Banking Law > Consumer Protection > Credit Card Agreements > Liability for Accounts & Transactions

HN2[] **Credit Card Agreements, Liability for Accounts & Transactions**

No credit-card transaction can occur unless both the merchant and the cardholder simultaneously agree to use the same credit-card network.

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

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

HN3[] **Standards of Review, De Novo Review**

The appellate court reviews a district court's grant of a motion to dismiss de novo, accepting as true all factual claims in the complaint and drawing all reasonable inferences in the plaintiff's favor.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN4[] **Clayton Act, Claims**

The Clayton Act provides a private right of action for injuries by reason of anything forbidden in the antitrust laws, 15 U.S.C.S. § 15(a).

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN5[] **Standing, Clayton Act**

It is a well-established principle that, while the United States is authorized to sue anyone violating the federal antitrust laws, a private plaintiff must demonstrate standing. Antitrust standing is a threshold, pleading-stage inquiry and that when a complaint by its terms fails to establish this requirement the appellate court must dismiss it as a matter of law. This requirement prevents private plaintiffs from recovering damages under the Clayton Act merely by showing injury causally linked to an illegal presence in the market.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN6[] **Remedies, Damages**

To demonstrate antitrust standing, a private plaintiff must show both that (1) it suffered a special kind of antitrust injury and that (2) it is a suitable plaintiff to pursue the alleged antitrust violations and thus is an efficient enforcer of the antitrust laws. Whether a plaintiff is an efficient enforcer depends on the four factors the Supreme Court identified in AGC. Those factors are (1) the directness or indirectness of the asserted injury; (2) the existence of more direct victims or the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the extent to which the claim is highly speculative; and (4) the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other. The weight to be given the various factors will necessarily vary with the circumstances of particular cases.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN7[] **Remedies, Damages**

The first efficient-enforcer factor asks whether the violation was a direct or remote cause of the injury. This factor turns on familiar principles of proximate causation. Proximate cause stands for the proposition that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing. It encompasses the judicial tools used to limit a person's responsibility for the consequences of that person's own acts and reflects ideas of what justice demands, or of what is administratively possible and convenient. This principle limits antitrust liability beyond a certain point. Given the ripples of harm that antitrust violations may have in the economy, the Supreme Court has said that it is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN8[] Clayton Act, Claims

In the context of antitrust standing, proximate cause generally follows the first-step rule. When the Clayton Act was enacted, the Supreme Court has explained, Congress understood the judicial gloss expressed by Justice Holmes: The general tendency of the law, in regard to damages at least, is not to go beyond the first step. The first-step rule requires some direct relation between the injury asserted and the injurious conduct alleged. Under the rule, injuries that happen at the first step following the harmful behavior are considered proximately caused by that behavior. Accordingly, directness in the antitrust context means close in the chain of causation. The Supreme Court's interpretation of § 4 has adhered to Justice Holmes' observation that the general tendency of the law, in regard to damages at least, is not to go beyond the first step.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN9[] Standing, Requirements

The second efficient-enforcer factor considers the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement. For this factor, we ask whether denying the plaintiff a remedy on the basis of its allegations is likely to leave a significant antitrust violation undetected or unremedied. The presence of plaintiffs who are better situated to vindicate the antitrust laws, though not dispositive, is relevant to this second factor. The existence of such plaintiffs diminishes the justification for allowing a more remote party to perform the office of a private attorney general.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Torts > Remedies > Damages > Proof

HN10[] Standing, Clayton Act

The third efficient-enforcer factor concerns the extent to which the claim is highly speculative. Highly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement. Under this factor, the appellate court asks whether there would be a high degree of speculation in a damages calculation. When an injury is derivative rather than direct, the potential recovery is often highly speculative. The appellate court also considers whether the alleged effects on the plaintiff may have been produced by independent factors.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN11[] **Standing, Clayton Act**

The four efficient-enforcer factors need not be given equal weight, and the relative significance of each factor will depend on the circumstances of the particular case. In particular, the Supreme Court has noted that the potential difficulty in ascertaining and apportioning damages is not an independent basis for denying standing where it is adequately alleged that a defendant's conduct has proximately injured an interest of the plaintiff's that the statute protects because this factor is a touchstone for the proximate-cause requirement.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN12[] **Standing, Clayton Act**

The fourth efficient-enforcer factor stresses the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other. This factor reflects an administrative concern: massive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits. The concern arises when the damages to which the plaintiff lays claim are exactly the same damages other parties could have claimed.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Torts > ... > Causation > Proximate Cause > Foreseeability of Harm

HN13[] **Standing, Clayton Act**

While the fourth factor addresses a strong interest in keeping the scope of complex antitrust trials within judicially manageable limits, the efficient-enforcer inquiry remains, fundamentally, one into proximate cause.

Governments > Courts > Judicial Precedent

HN14[] **Courts, Judicial Precedent**

The appellate court considers the language of the state intermediate appellate courts to be helpful indicators of how the state's highest court would rule.

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Eric F. Citron, Goldstein & Russell, P.C., Bethesda, MD, for Amici Curiae Eighteen Professors of ***Antitrust Law***.

Judges: Before: CHIN, BIANCO, and MENASHI, Circuit Judges.

Opinion by: MENASHI

Opinion

[*134] MENASHI, *Circuit Judge*:

The appellants, on behalf of a class of commercial merchants, allege that the Anti-Steering Rules promulgated by the appellees, the American Express Company and American Express Travel Related Services Company, Inc. (together, "Amex"), violate the antitrust laws.

The appellants do not accept American Express cards but claim to be harmed by Amex's policies nevertheless. These merchants "seek monetary and injunctive relief for overcharges paid to Visa, MasterCard, and Discover," not to Amex, "caused by Amex's imposition of 'Anti-Steering Rules' in its agreements with merchants who accept Amex cards." Appellants' **[**3]** Br. 1-2. The appellants claim that "Amex's Anti-Steering Rules have stifled interbrand competition throughout the relevant market, causing the credit card transaction fees charged to Appellants by Visa, MasterCard, and Discover to prevail at supracompetitive levels under Amex's pricing umbrella." *Id.* at 2.

The U.S. District Court for the Eastern District of New York (Garaufis, J.) dismissed the appellants' claims under *Federal Rule of Civil Procedure 12(b)(6)* and ruled that the class lacked antitrust standing because it did not include "efficient enforcers" of the antitrust laws relative to Amex's challenged anticompetitive conduct. *In re Am. Express Anti-Steering Rules Antitrust Litig., 433 F. Supp. 3d 395, 407-13 (E.D.N.Y. 2020)*. The appellants "seek reversal of the district court's dismissal of their claims because Amex's anticompetitive conduct has directly injured them, and recognizing their standing would ensure efficient enforcement of the antitrust laws." Appellants' Br. 2. Amex contends that the district court was correct that the appellants "lack antitrust standing because they are not efficient enforcers" of the antitrust laws and the alleged damages are "too indirect" and "speculative." Appellees' Br. 3-4.

We affirm the district court's judgment. ***HN1***[] To determine whether a party can sue under the antitrust laws—whether **[**4]** the party has "antitrust standing"—we apply the "efficient enforcer" test. The efficient-enforcer test is an elaboration on the proximate cause requirement of *Associated General Contractors of California, Inc. v. California State Council of Carpenters (AGC), 459 U.S. 519, 535-36, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. In cases of economic **[*135]** harm, proximate cause is demarcated by the "first step" rule, which limits liability to parties injured at the first step of the causal chain of the defendants' actions. *See id. at 534*. Here, at the first step, Amex restrained trade to raise its own prices; only later did its competitors follow suit. Because the appellants were harmed at that later step, the claims here fail the first-step test. After considering the four *AGC* factors, we conclude that—taking the allegations of the complaint as true—the appellants are not efficient enforcers of the antitrust laws and therefore lack antitrust standing.

BACKGROUND[1]

The appellants challenge Amex's Anti-Steering Rules, or what Amex calls its non-discrimination provisions, contained in its Card Acceptance Agreement with merchants. The appellants allege that "Amex's Anti-Steering

[1] For purposes of this appeal, we accept as true all facts alleged in the second amended complaint ("SAC"). *Henry v. County of Nassau, 6 F.4th 324, 328 (2d Cir. 2021)*.

Rules unreasonably restrain interbrand price competition with the other major [credit card] networks because the Rules: (1) stifle interbrand competition among the networks; (2) impose supracompetitive **[**5]** merchant fees, without corresponding offsetting credit card user economic benefits; (3) cause the overall price of credit card transactions to rise above competitive levels marketwide, because the other credit card networks would not benefit competitively by reducing their merchant fees; and (4) raise consumer retail prices throughout the economy, thereby reducing output." Appellants' Br. 4; *see also* *Am. Express Anti-Steering, 433 F. Supp. 3d at 401*.

I

The credit card industry is divided among four competing networks: Amex, Visa, MasterCard, and Discover. *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2282, 201 L. Ed. 2d 678 (2018)*. The market is characterized by high barriers to entry. New entrants face a "chicken-and-egg" problem because "merchants value a payment system only if a sufficient number of cardholders use it and cardholders value a payment card only if a sufficient number of merchants accept it."[2]

Credit card networks such as Amex "operate what economists call a 'two-sided platform,'" which "offers different products or services to two different groups who both depend on the platform to intermediate between them." *Ohio, 138 S. Ct. at 2280*.[3] Amex provides credit-card services to both "merchants," who accept Amex as payment, "and cardholders," **[**6]** who use Amex to make payments. *Ohio, 138 S. Ct. at 2279-80*. ***HN2***[] Both parties are necessary; "no credit-card transaction can occur unless both the merchant and the cardholder simultaneously agree to use the same credit-card network." *Id. at 2280*.

While credit card companies often charge cardholders an annual fee, all credit card companies charge merchants a fee for every transaction processed.[4] According **[*136]** to the appellants, Amex charges higher merchant fees than its competitors. To avoid the higher fees, merchants—in the absence of any restraint prohibiting the practice—might "steer" their customers toward using another form of payment. "Steering" could be done in different ways, such as simply by asking, offering benefits for using other payment methods, or imposing a surcharge on the use of Amex cards.[5]

Steering allows for price signals between merchant and customer. Without steering, "consumers do not internalize the full costs of their choice of payment system."[6] Steering also may prevent Amex from charging higher fees because merchants will steer customers toward cards with lower **[**7]** fees. In sum, "American Express dislikes steering; the merchants like it; and the shoppers may benefit from it, whether because merchants will offer them incentives to use less expensive cards or in the form of lower retail prices overall." *Ohio, 138 S. Ct. at 2292* (Breyer, J., dissenting).

Amex has discouraged steering by inserting anti-steering provisions into its contracts with merchants. Pursuant to Amex's Anti-Steering Rules, merchants may not:

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[2] Benjamin Klein, Andres V. Lerner, Kevin M. Murphy & Lacey L. Plache, *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 ANTITRUST L.J. 571, 584 (2006).

[3] *See also* D. Daniel Sokol, *Rethinking the Efficiency of the Common Law*, *95 Notre Dame L. Rev. 795, 803 (2019)* ("The value of the two-sided market (or platform) is the ability to make matches across both sides of the market.").

[4] *See* Timothy J. Muris, *Payment Card Regulation and the (Mis)application of the Economics of Two-Sided Markets*, *2005 Colum. Bus. L. Rev. 515, 522 (2005)*.

[5] *See* Klein et al., *supra* note 2, at 586-87.

[6] Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, *45 Harv. J. on Legis. 1, 11 (2008)*; *see also id.* at 3 ("[S]ome consumers end up paying higher or lower prices for the transaction than they would have if the merchant charged prices that varied with the cost of accepting payment.").

• indicate or imply that they prefer, directly or indirectly, any Other Payment Products over Amex Cards;
• try to dissuade cardholders from using their Amex Card;
• criticize or mischaracterize the Amex Card or any of Amex's services or programs;
• try to persuade or prompt cardholders to use any Other Payment Products or any other method of payment (e.g., payment by check);
• impose any restriction, conditions, or disadvantages when the Card is accepted that are not imposed equally on all Other Payment Products, except for ACH funds transfer, cash, and checks;
• engage in activities that harm Amex's business or the American Express Brand (or both);

• or promote any Other Payment Products (except **[**8]** the Merchant's own private label card that they issue for use solely at their Establishments) more actively than the Merchant promotes Amex.

Am. Express Anti-Steering, 433 F. Supp. 3d at 404 (alterations omitted).

The appellants allege that these Anti-Steering Rules, when combined with Amex's higher merchant fees, have raised fees throughout the industry. Competing networks "have no economic incentive to compete in the market by offering lower merchant fees [because] merchants cannot educate cardholders and [steer] transactions to the cards with lower fees." Appellants' Br. 7. Because "lower-fee competitor[s] cannot gain market share" by competing on price, all competing networks raise prices. *Id.* This effect is widespread because "most large merchants, according to Plaintiffs, do accept Amex, meaning that the credit card companies would have little incentive to tailor contracts for relatively insignificant individual merchants who do not." *Am. Express Anti-Steering, 433 F. Supp. 3d at 415*.

[*137] II

The Anti-Steering Rules have been litigated for over a decade. Merchants have been filing suits since the 2000s. *See generally* Rite-Aid Corp. v. Am. Express Travel Related Servs. Co., 708 F. Supp. 2d 257, 260 (E.D.N.Y. 2010). "In October 2010, the Department of Justice and the attorneys general of eighteen states filed the Government Action against Amex, MasterCard, and Visa" challenging **[**9]** each company's version of the Anti-Steering Rules. *In re Am. Express Anti-Steering Rules Antitrust Litig.*, No. 08-CV-2315, 2016 U.S. Dist. LEXIS 3332, 2016 WL 748089, at *2 (E.D.N.Y. Jan. 7, 2016). "Visa and MasterCard entered into consent decrees with the Government on the same day that the Government Action was initiated. Only Amex remained as a defendant." 2016 U.S. Dist. LEXIS 3332, [WL] at *2 n.5. After a bench trial, the district court ruled for the government, concluding that it had shown by a preponderance of the evidence that the Anti-Steering Rules violated *§ 1 of the Sherman Act*. *United States v. Am. Express Co., 88 F. Supp. 3d 143, 238 (E.D.N.Y. 2015)*. Our court reversed that judgment, holding that the district court erred in not requiring the government to show harm to consumers "accounting for consumers on both sides of the platform." *United States v. Am. Express Co., 838 F.3d 179, 206-07 (2d Cir. 2016)*. The Supreme Court then affirmed. *Ohio, 138 S. Ct. at 2290*.

"Following the Supreme Court's affirmance of the dismissal of the Government Action, matters resumed in the [Merchant Plaintiff] Actions." *Am. Express Anti-Steering, 433 F. Supp. 3d at 405*. The merchant plaintiffs—including the appellants here—filed the SAC on December 17, 2018. The SAC sought monetary and equitable relief "on behalf of two putative classes: (1) a class of merchants who accept Amex cards ... (the 'Amex Class'); and (2) a class of merchants who do not accept Amex cards and who have no contract with Amex (the 'Non-Amex Class')." *Id. at 401*. Within both classes, subclasses of plaintiffs sought relief under California **[**10]** law. *Id. at 402, 405*.

On January 15, 2020, the district court ruled in Amex's favor. *Id. at 417*. It first granted Amex's motion to compel arbitration of the Amex Class's claims. *See id. at 405-07*. It then granted Amex's motion to dismiss the Non-Amex Class's claims. *See id. at 407-16*. Specifically, the district court held that "the Non-Amex Class has not established federal antitrust standing." *Id. at 413*. Applying the "efficient enforcer" test, *id. at 408*; *see* Balaklaw v. Lovell, 14 F.3d 793, 797 n.9 (2d Cir. 1994) (endorsing the efficient-enforcer test), the district court concluded that all four efficient-enforcer factors indicated that the appellants lacked antitrust standing. *Am. Express Anti-Steering, 433 F. Supp. 3d at 407-13*. For similar reasons, the district court concluded that the appellants lacked antitrust standing under California's Cartwright Act and Unfair Competition Law as well. *Id. at 413-16*. On May 14, 2020, the district court entered an order of partial final judgment pursuant to *Federal Rule of Civil Procedure 54(b)*. On June 8, 2020, the appellants timely appealed.

DISCUSSION

HN3[] "We review a district court's grant of a motion to dismiss *de novo*, accepting as true all factual claims in the complaint and drawing all reasonable inferences in the plaintiff's favor." *Henry, 6 F.4th at 328* (internal quotation marks omitted). The appellants argue that the district court erred when it dismissed their claims under the **[**11]** *Clayton Act* and under California ***antitrust law***. We address each claim in turn.

I

The appellants contend that the district court erred in dismissing their federal antitrust **[*138]** claim. ***HN4***[] The appellants brought that claim under the Clayton Act, which provides a private right of action for injuries "by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15(a)*. The district court dismissed the claim on the ground that the appellants lacked antitrust standing. *See* *Am. Express Anti-Steering, 433 F. Supp. 3d at 407-08*. We agree with the district court's conclusion.

HN5[] "It is a well-established principle that, while the United States is authorized to sue anyone violating the federal antitrust laws, a private plaintiff must demonstrate 'standing.'" *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 436 (2d Cir. 2005)*. We have explained that "[a]ntitrust standing is a threshold, pleading-stage inquiry" and that "when a complaint by its terms fails to establish this requirement we must dismiss it as a matter of law." *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 75 (2d Cir. 2013)* (quoting *NicSand, Inc. v. 3M Co., 507 F.3d 442, 450 (6th Cir. 2007)* (en banc)). This requirement "prevents private plaintiffs from recovering damages under" the Clayton Act "merely by showing injury causally linked to an illegal presence in the market." *Id. at 76* (internal quotation marks and alteration omitted).

HN6[] To demonstrate antitrust standing, a private plaintiff must show both that (1) "it suffered a special **[**12]** kind of antitrust injury" and that (2) "it is a suitable plaintiff to pursue the alleged antitrust violations and thus is an efficient enforcer of the antitrust laws." *Id.* (internal quotation marks omitted). Whether a plaintiff is an "efficient enforcer" depends on the four factors the Supreme Court identified in *AGC*. *459 U.S. at 540-45*. Those factors are (1) "the directness or indirectness of the asserted injury"; (2) "the existence of more direct victims" or the "existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement"; (3) the extent to which the claim is "highly speculative"; and (4) "the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Id.; see also* *Gelboim v. Bank of Am. Corp., 823 F.3d 759, 772 (2d Cir. 2016)*. "[T]he weight to be given the various factors will necessarily vary with the circumstances of particular cases." *Daniel, 428 F.3d at 443*.

In this case, the appellants claim to have antitrust standing under a so-called "umbrella" theory. The classic "umbrella" scenario occurs when "[a] cartel cuts output, which elevates price throughout the market." *U.S. Gypsum Co. v. Ind. Gas Co., 350 F.3d 623, 627 (7th Cir. 2003)*. Because of that price umbrella, **[**13]** "customers of fringe firms (sellers that have not joined the cartel) pay this higher price, and thus suffer antitrust injury, just like customers of the cartel's members." *Id.* In other words, the umbrella theory "seeks to hold price-fixers liable for harm allegedly flowing from the illegal conduct even though the price-fixing defendants received none of the illegal gains and were uninvolved in their competitors' pricing decisions." *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 691 F.2d 1335, 1339 (9th Cir. 1982)*. The appellant merchants in this case do not have a contractual relationship with Amex such that the Anti-Steering Rules apply to the appellants directly. Rather, the appellants argue that—as in a classic umbrella scenario—Amex's practices provide an umbrella under which the other credit card companies that do have a relationship with the appellants also raise prices.

[*139] The district court declined to determine whether the appellants had established an antitrust injury because it concluded that the appellants were not efficient enforcers of the antitrust laws and for that reason lacked antitrust standing. We likewise need not address antitrust injury. Because the four efficient-enforcer factors do not establish antitrust standing, we affirm the district court's **[**14]** judgment.

A

HN7[] The first efficient-enforcer factor asks whether "the violation was a direct or remote cause of the injury." *Gelboim, 823 F.3d at 772*. This factor turns on "familiar principles of proximate causation." *Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 412 (2d Cir. 2014)*.

Proximate cause stands for the proposition that "the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing." *AGC, 459 U.S. at 536*. It encompasses "the judicial tools used to limit a person's responsibility for the consequences of that person's own acts" and "reflects ideas of what justice demands, or of what is administratively possible and convenient." *Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)* (internal quotation marks omitted). This principle limits antitrust liability beyond a certain point. Given the "ripples of harm" that antitrust violations may have in the economy, the Supreme Court has said that "[i]t is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *Blue Shield of Va. v. McCready, 457 U.S. 465, 476-77, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*. Therefore, "despite the broad wording of *§ 4 [of the Clayton Act]* there is a point beyond which the wrongdoer should not be held liable." *Id. at 477* (quoting *Ill. Brick Co. v. Illinois, 431 U.S. 720, 760, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)* (Brennan, J., dissenting)).

HN8[] In the context of antitrust standing, **[**15]** proximate cause generally follows the first-step rule. When the Clayton Act was enacted, the Supreme Court has explained, Congress understood "the judicial gloss" expressed by Justice Holmes: "The general tendency of the law, in regard to damages at least, is not to go beyond the first step." *AGC, 459 U.S. at 534* (quoting *S. Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533, 38 S. Ct. 186, 62 L. Ed. 451 (1918)* (Holmes, J.)).[7] The first-step rule requires **[*140]** "some direct relation between the injury asserted and the injurious conduct alleged." *Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1306, 197 L. Ed. 2d 678 (2017)* (quoting *Holmes, 503 U.S. at 268*). Under the rule, injuries that happen at the first step following the harmful behavior are considered proximately caused by that behavior. Accordingly, "[d]irectness in the antitrust context means close in the chain of causation." *Gatt Commc'ns, 711 F.3d at 78* (quoting *IBM Corp. v. Platform Sols., Inc., 658 F. Supp. 2d 603, 611 (S.D.N.Y. 2009)*). As Justice Stevens, the author of *AGC*, observed, the Supreme Court's "interpretation of *§ 4* has ... adhered to Justice Holmes' observation that the 'general tendency of the law, in regard

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[7] In other words, the law "does not attribute remote consequences to a defendant," even if those consequences are foreseeable. *Darnell-Taenzer, 245 U.S. at 533*. Barring liability for foreseeable harms is not unusual. Such limits on liability can be found, for example, in the economic loss rule, *see* ***Akron Corp. v. M/T Cantigny, 706 F.2d 151, 153 (5th Cir. 1983)*** (noting that "a party may not recover for economic losses not associated with physical damages" so as "to prevent limitless liability for negligence and the filing of law suits of a highly speculative nature"); *see also* Restatement (Third) of Torts: Liab. for Econ. Harm § 1 cmt. c(1) (Am. L. Inst. 2020) (noting that one of the rationales for limiting tort liability for economic loss is that "[e]conomic losses proliferate more easily than losses of other kinds" even though such losses "may be at least generally foreseeable to the person who commits the negligent act"), and other limitations on liability for negligence, *see* *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 96 N.Y.2d 280, 289, 750 N.E.2d 1097, 727 N.Y.S.2d 49 (2001)* ("Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm."), and for negligent misrepresentation, *see* *Restatement (Third) of Torts: Liab. for Econ. Harm § 5 cmt. b* ("Liabilities that expand as easily as words travel would ... become indeterminate and unduly widespread in many cases."). Even when the law extends a right to recover for derivative injury—such as emotional distress from witnessing another's accident—that right is often confined to close relations and excludes others in ways unrelated to foreseeability. Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, *37 Stan. L. Rev. 1513, 1522 (1985)*. The "specter of collateral claims, virtually unlimited in number, as a result of any given accident"—not foreseeability—informs these limitations. *Id. at 1525*.

to damages at least, is not to go beyond the first step.'" *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 417, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (Stevens, J., concurring in the judgment) (quoting *S. Pac. Co., 245 U.S. at 533*).

Our court has repeatedly followed the first-step rule in the antitrust context. In *Paycom Billing Services. v. MasterCard International,* ***[**16]*** *Inc.*, we held that a merchant, Paycom, did not suffer a direct injury from MasterCard's practice of forbidding its member banks from dealing with other card companies. *467 F.3d 283, 293 (2d Cir. 2006)*. Paycom's theory was that, absent that practice, MasterCard would have faced more competition from Discover and American Express, and it would have then adopted more favorable policies toward Paycom. *Id.* That was not enough to establish antitrust standing; we concluded that "any injury suffered by Paycom was indirect and flowed from the injuries suffered by Discover and American Express." *Id.* We similarly held that the injury suffered in *Gatt Communications* was indirect. *711 F.3d at 78-79*. In that case, Gatt Communications alleged that PMC Associates had formed a price-fixing conspiracy for the sale of Vertex radio equipment to government agencies, and when Gatt sought to defect, its "Dealer Agreement"—through which it was able to sell that brand of radio equipment in the first place—was terminated. *Id. at 71-73*. Gatt argued that it was entitled to damages for the commissions it would have received absent the anticompetitive conduct. *Id. at 74*. We held that Gatt was harmed "only incidentally" and that "[i]f there are direct victims of the alleged conspiracy, **[**17]** they are the state agencies, not Gatt." *Id. at 78-79*. Most recently, in *IQ Dental Supply, Inc. v. Henry Schein, Inc.*, we determined that IQ Dental Supply, though injured by a boycott of the third-party online portal through which IQ sold its goods, lacked antitrust standing to challenge that boycott. *924 F.3d 57, 65 (2d Cir. 2019)*. Because the harm to IQ "resulted from injury" to the third-party portal, the antitrust claims were "derivative and indirect." *Id.*

In this case, the appellants did not suffer a direct injury from the alleged antitrust violation. At the first step, Amex raised the price for Amex-accepting merchants through the Anti-Steering Rules. Amex did not raise the appellants' fees. Nor could it have: the appellants do not accept American Express cards. Similar to **[*141]** the holdings in *Gatt Communications* and *IQ Dental Supply*, if there are "direct victims," those victims are the merchants to which Amex's Anti-Steering Rules applied. *Gatt Commc'ns, 711 F.3d at 78-79*; *IQ Dental Supply, 924 F.3d at 65*. The appellants were allegedly injured when Amex's competitors, covered by Amex's price umbrella, raised their own prices. In the appellants' words, Amex's imposition of increased merchant fees "enabled" the competitor companies "to increase their own merchant fees." Appellants' Br. 10. **[**18]** Yet Amex "enabl[ing]" other credit card companies to raise the appellants' fees does not establish the "direct relation" between injury and antitrust violation that the first-step rule requires. *Bank of Am. Corp., 137 S. Ct. at 1306*.

Given the allegations in the SAC, we hold that the appellants' injuries did not occur at the first step following Amex's conduct. The injuries, therefore, were not proximately caused by Amex; the alleged antitrust violation was instead a "remote" cause of the injuries.

B

HN9[] The second efficient-enforcer factor considers the "existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement." *IQ Dental Supply, 924 F.3d at 65* (quoting *Daniel, 428 F.3d at 443*). For this factor, we ask whether "[d]enying the [plaintiff] a remedy on the basis of its allegations" is "likely to leave a significant antitrust violation undetected or unremedied." *AGC, 459 U.S. at 542*; *see also* *Paycom, 467 F.3d at 294*. "[T]he presence of plaintiffs who are better situated to vindicate the antitrust laws," though not dispositive, "is relevant to this second factor." *IQ Dental Supply, 924 F.3d at 66*. The existence of such plaintiffs "diminishes the justification for allowing a more remote party ... to perform the office of a private attorney general." *AGC, 459 U.S. at 542*.

This factor also **[**19]** counsels against antitrust standing here. In *IQ Dental Supply*, we concluded that antitrust standing based on the second factor was unlikely because "IQ [was] further removed from the harm caused by the Defendants than the parties directly affected by the boycott that have already sued the Defendants." *IQ Dental Supply, 924 F.3d at 66*. The same argument applies here. As noted, the merchants who have a relationship with

Amex *were* harmed at the first step by Amex's Anti-Steering Rules. And those merchants have already sued Amex. Am. Express Anti-Steering, 433 F. Supp. 3d at 401-02. We follow our precedent in holding that "the second efficient-enforcer factor weighs against ... antitrust standing" in this case. IQ Dental Supply, 924 F.3d at 66.

C

HN10[] The third efficient-enforcer factor concerns the extent to which the claim is "highly speculative." AGC, 459 U.S. at 542. "[H]ighly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement." Gelboim, 823 F.3d at 779. Under this factor, we ask whether there would be "a high degree of speculation in a damages calculation." IQ Dental Supply, 924 F.3d at 66-67. When an injury is "derivative" rather than direct, the potential recovery is often "highly speculative." Id. at 67. We also consider whether the "alleged effects on the [plaintiff] may have been produced by independent factors." AGC, 459 U.S. at 542.

Whether this factor weighs **[**20]** in favor of antitrust standing is a close question. **[*142]** The SAC presents a compelling prima facie case of foreseeable damages, given the allegation that Amex exercises market power and the district court's finding in the Government Action that the "prohibitions on merchant steering" have "enabled ... higher all-in fees." Am. Express Co., 88 F. Supp. 3d at 216.[8] Yet the fact that the appellants have suffered an "indirect" injury, and the accompanying uncertainty of how eliminating Amex's Anti-Steering Rules would affect its competitors' merchant fees, suggest that a damages calculation would rely on some speculation. *See* AGC, 459 U.S. at 542.

In any event, the third factor does not confer antitrust standing on the appellants. **HN11**[] The four efficient-enforcer factors "need not be given equal weight," and "the relative significance of each factor will depend on the circumstances of the particular case." IQ Dental Supply, 924 F.3d at 65. In particular, the Supreme Court has noted that the "potential difficulty in ascertaining and apportioning damages is not ... an *independent* basis for denying standing where it is adequately alleged that a defendant's conduct has proximately injured an interest of the plaintiff's that the statute protects" because this factor is a touchstone **[**21]** for "the proximate-cause requirement." Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 135, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014).

Even if the injury is not speculative here, it does not establish proximate cause. The appellants' injury may have been foreseeable, predictable, and even calculable, but proximate cause—especially in the economic harm context—requires more than foreseeability. *See* McCready, 457 U.S. at 476-77. In light of the other efficient-enforcer factors, the third factor does not confer antitrust standing.

D

HN12[] The fourth efficient-enforcer factor stresses the importance of "avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." AGC, 459 U.S. at 543-44. This factor reflects an administrative concern: "massive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits." Id. at 545. The concern arises when

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[8] In making this finding, the district court in the Government Action explained that from 1997 to 2009, "prohibitions on merchant steering" enabled Visa and MasterCard to "increase their average all-in merchant rates ... by more than 20% ... without fear of other networks undercutting their prices in order to gain [market] share." 88 F. Supp. 3d at 216. Discover was "forced to abandon its low-price strategy as a result of" prohibitions on merchant steering and "was able to raise its rates with virtual impunity, relying on the restraining effect of anti-steering rules to ensure that it would not be undercut by a competitor offering a lower price to merchants." *Id.* "These examples provide further support for the [district] court's finding that without affording merchants the ability to influence their customers' credit and charge card decisions" through steering, "there is little, if any, downward pressure on the price charged to merchants." *Id. Ohio* did not question this finding.

"[t]he damages to which [the plaintiff] lays claim" are "exactly the same damages [other parties] could have claimed." *IQ Dental Supply, 924 F.3d at 67*.

There is no risk of duplicate recoveries or complex reapportionment of damages here. The damages that the Amex and Non-Amex Classes seek do not overlap; each class alleges that the respective card companies charged separately. **[*143]** This case does not involve pass-on theories **[**22]** that would require a court to divide damages from the same violation among multiple plaintiffs. *See Ill. Brick Co., 431 U.S. at 737-38*; *Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 493, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. Apportionment of damages here would neither "burden[] the courts" nor "undermine[] the effectiveness of treble-damages suits." *AGC, 459 U.S. at 545*.[9]

But the appellants' success on this factor does not establish antitrust standing. In *AGC* itself, the fourth factor was non-dispositive. *AGC, 459 U.S. at 545 n.52*. Even though the Court recognized that the "policy against duplicative recoveries may not apply" to a harm the plaintiffs allegedly suffered, "the remote and obviously speculative character of that harm [was] plainly sufficient to place it beyond the reach of *§ 4*." *Id.* ***HN13***[] While the fourth factor addresses a "strong interest ... in keeping the scope of complex antitrust trials within judicially manageable limits," *id. at 543*, the efficient-enforcer inquiry remains, fundamentally, one into proximate cause, *Lotes, 753 F.3d at 412*; *McCready, 457 U.S. at 476-77*. Here, as in *AGC*, that the line between the Amex plaintiffs' and non-Amex plaintiffs' damages presents no additional difficulties does not pull back the appellants' injury from "beyond the reach of *§ 4*." *459 U.S. at 545 n.52*. We therefore conclude that, given the allegations of the SAC, the four efficient-enforcer factors do not establish antitrust standing. **[**23]** [10]

In short, it is not the appellants' status as umbrella plaintiffs or otherwise that resolves the antitrust standing question but "the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1058 (9th Cir. 1999)*. We employ the efficient-enforcer test to evaluate the relevant relationship. The key principle underlying that test is proximate cause, and here the appellants fail to show the required direct connection between the harm and the alleged antitrust violation. The appellants are not efficient enforcers of the antitrust laws and therefore lack antitrust standing.[11]

[*144] II

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[9] The district court held that this fourth factor counseled against antitrust standing, and in its discussion of the factor expressed concern over the "obvious risk of disproportionate damages." *Am. Express Anti-Steering, 433 F. Supp. 3d at 412* (quoting *In re London Silver Fixing, Ltd., Antitrust Litig., 332 F. Supp. 3d 885, 906 (S.D.N.Y. 2018)*). Yet the fourth efficient-enforcer factor concerns not the size of the damages awarded but the difficulty courts might face in dividing an award. We do not see such difficulty here.

[10] The appellants also seek injunctive relief under *§ 16 of the Clayton Act*, *15 U.S.C. § 26*. The appellants must demonstrate antitrust standing for that requested relief. *Eastman Kodak Co. v. Henry Bath LLC, 936 F.3d 86, 94 (2d Cir. 2019)*. The Supreme Court has said that "the difference in the remedy each section provides means that certain considerations relevant to a determination of standing under *§ 4* are not relevant under *§ 16*." *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 111 n.6, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. In particular, "standing under *§ 16* raises no threat of multiple lawsuits or duplicative recoveries." *Id.* Given that no damages are awarded under *§ 16*, the third factor's inquiry into whether there is a "high degree of speculation in a damages calculation" is inapplicable. *IQ Dental Supply, 924 F.3d at 66*. Because the difference in remedies does not affect the proximate clause analysis, we hold that the appellants lack antitrust standing for the request for injunctive relief.

[11] This result does not mean that Amex could never be liable for allegedly raising prices throughout the market. As the district court noted, the Amex Class members can still litigate the Anti-Steering Rules through the arbitration process. *Am. Express Anti-Steering, 433 F. Supp. 3d at 411*. In addition, at least one circuit court has held that an antitrust defendant may be held liable for umbrella effects on prices. *See In re Processed Egg Prods. Antitrust Litig., 881 F.3d 262, 276 (3d Cir. 2018)*.

Dismissal of the appellants' federal antitrust claims does not necessarily require the dismissal of their claims under the California Unfair Competition Law ("UCL") and California ***antitrust law***, known as the *Cartwright Act*. *See Aryeh v. Canon Bus. Sols., Inc., 55 Cal. 4th 1185, 151 Cal. Rptr. 3d 827, 292 P.3d 871, 877 (Cal. 2013)* ("Interpretations of federal ***antitrust law*** are at most instructive, not conclusive, when construing the Cartwright Act."). Still, we conclude that the appellants' California law claims fail for similar reasons as the federal claims.

HN14[] "[W]e consider the language of the state intermediate appellate courts to be helpful indicators of how the state's highest court would **[**24]** rule." *DiBella v. Hopkins, 403 F.3d 102, 112 (2d Cir. 2005)*. The California district courts of appeals have discussed antitrust standing under the Cartwright Act at length. In *Kolling v. Dow Jones & Co.*, the California court noted that "[t]he plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries." *137 Cal. App. 3d 709, 187 Cal. Rptr. 797, 807 (Cal. Ct. App. 1982)*. In the same opinion, that court described the "standing to sue" requirement as preventing suits from parties only "incidentally injured" by an antitrust violation. *Id.* More recently, a California court observed that "[o]ne of the elements of standing to seek antitrust damages ... is a sufficient showing of injury with respect to," among other things, "the directness of the injury," "the speculative measure of the harm," and "the risk of duplicative recovery." *Wholesale Electricity Antitrust Cases I & II, 147 Cal. App. 4th 1293, 55 Cal. Rptr. 3d 253, 265 (Cal. Ct. App. 2007)*.

These decisions indicate that the California legislature, like Congress, was "familiar with the common-law rule" of proximate cause, and California courts will not assume that the legislature intended "to displace it *sub silentio*." *Lexmark, 572 U.S. at 132*. Accordingly, the lack of proximate cause in this case means that the appellants cannot state a claim under the Cartwright Act.[12]

* * *

For these reasons, we **AFFIRM** the judgment of the district **[**25]** court.

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[12] The district court properly concluded that "dismissal of an underlying antitrust claim mandates dismissal of the UCL claim as well." *Am. Express Anti-Steering, 433 F. Supp. 3d at 416*. "The UCL permits any person acting for the interests of itself, its members or the general public to initiate an action ... against a person or business entity who has engaged in any unlawful, unfair, or fraudulent business act or practice." ***Quelimane Co. v. Stewart Title Guar. Co., 19 Cal. 4th 26, 77 Cal. Rptr. 2d 709, 960 P.2d 513, 521-22 (Cal. 1998)*** (internal quotation marks and citations omitted). Because the UCL claim is predicated on violations of the Sherman and Cartwright Acts, we affirm the dismissal of that claim as well.

Abuelhawa v. Santa Clara Univ.

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

November 29, 2021, Decided; November 29, 2021, Filed

Case No. 20-CV-04045-LHK

Reporter
2021 U.S. Dist. LEXIS 229335 *; 2021 WL 5584759

LILAS ABUELHAWA, et al., Plaintiffs, v. SANTA CLARA UNIVERSITY, Defendant.

Subsequent History: Appeal dismissed by *Abuelhawa v. Santa Clara Univ., 2022 U.S. App. LEXIS 6646 (9th Cir. Cal., Mar. 15, 2022)*

Prior History: *Abuelhawa v. Santa Clara Univ., 529 F. Supp. 3d 1059, 2021 U.S. Dist. LEXIS 61263, 2021 WL 1176689 (N.D. Cal., Mar. 29, 2021)*

Core Terms

SCU, parking, promise, in-person, implied-in-fact, motion to dismiss, prong, on-campus, unfair, moot, law student, refund, credits, fair dealing, allegations, semester, contract claim, law school, tuition, exempt, facilities, breached, campus, Reply, first amended complaint, parking permit, argues, judicial notice, bulletins, fails

LexisNexis® Headnotes

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

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

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

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

A defendant may move to dismiss for lack of subject matter jurisdiction pursuant to *Fed. R. Civ. P. 12(b)(1)*. While lack of statutory standing requires dismissal for failure to state a claim under *Rule 12(b)(6)*, lack of U.S. Const. art. III standing requires dismissal for want of subject matter jurisdiction under *Rule 12(b)(1)*.

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

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

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

HN2[] Motions to Dismiss, Failure to State Claim

A *Fed. R. Civ. P. 12(b)(1)* jurisdictional attack may be facial or factual. In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. The court resolves a facial attack as it would a motion to dismiss under *Rule 12(b)(6)*. Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction. In a factual attack, on the other hand, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction. In resolving a factual attack on jurisdiction, the court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. The court need not presume the truthfulness of the plaintiff's allegations in deciding a factual attack. Once the defendant has moved to dismiss for lack of subject matter jurisdiction under *Rule 12(b)(1)*, the plaintiff bears the burden of establishing the court's jurisdiction.

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

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

HN3[] Motions to Dismiss, Failure to State Claim

Fed. R. Civ. P. 8(a)(2) requires a complaint to include a short and plain statement of the claim showing that the pleader is entitled to relief. A complaint that fails to meet this standard may be dismissed pursuant to *Fed. R. Civ. P. 12(b)(6)*. *Rule 8(a)* requires a plaintiff to plead enough facts to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. For purposes of ruling on a *Rule 12(b)(6)* motion, the court accepts factual allegations in the complaint as true and construes the pleadings in the light most favorable to the nonmoving party. The court, however, need not assume the truth of legal conclusions merely because they are cast in the form of factual allegations. Additionally, mere conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss.

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN4[] Motions to Dismiss, Failure to State Claim

If a court determines that a complaint should be dismissed, it must then decide whether to grant leave to amend. Under *Fed. R. Civ. P. 15(a)*, leave to amend shall be freely given when justice so requires, bearing in mind the underlying purpose of *Rule 15* to facilitate decisions on the merits, rather than on the pleadings or technicalities. When dismissing a complaint for failure to state a claim, a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN5[] **Judges, Discretionary Powers**

Leave to amend generally shall be denied only if allowing amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the moving party has acted in bad faith. At the same time, a court is justified in denying leave to amend when a plaintiff repeatedly fails to cure deficiencies by amendments previously allowed. Indeed, a district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint.

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

Evidence > Judicial Notice > Adjudicative Facts > Public Records

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN6[] **Adjudicative Facts, Facts Generally Known**

The court may take judicial notice of matters that are either generally known within the trial court's territorial jurisdiction or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. *Fed. R. Evid. 201(b)*. Moreover, courts may consider materials referenced in the complaint under the incorporation by reference doctrine, even if a plaintiff failed to attach those materials to the complaint. Documents on publicly available websites and public records are proper subjects of judicial notice.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

Evidence > Burdens of Proof > Allocation

HN7[] **Preclusion of Judgments, Law of the Case**

Under the law of the case doctrine, a court will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case. Under this standard, the prior decision should be followed unless: (1) the decision is clearly erroneous and its enforcement would work a manifest injustice; (2) intervening controlling authority makes reconsideration appropriate; or (3) substantially different evidence was adduced at a subsequent trial. Put another way, the law of the case doctrine allows the court to impose a heightened burden on the plaintiff—to show clear error, changed law, new evidence, changed circumstances, or manifest injustice.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN8[] **Preclusion of Judgments, Law of the Case**

The law of the case doctrine is inapplicable when the district court dismisses a claim without prejudice. The amended complaint is a new complaint, entitling the plaintiff to judgment on the complaint's own merits. In these circumstances, the district court is not bound by any law of the case. Although the district court is not so bound, if it determines the amended complaint is substantially the same as the initial complaint, the district court is free to follow the same reasoning and hold that the amended claims suffer from the same legal insufficiencies. Doing so allows the district court to correct any errors or misunderstandings without having to find that its prior decision was clearly erroneous.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN9[] Contract Interpretation, Good Faith & Fair Dealing

Under California law, every contract imposes on each party a duty of good faith and fair dealing in each performance and in its enforcement. The covenant is based on general contract law and the long-standing rule that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. To establish a breach of the covenant of good faith and fair dealing, a plaintiff must show: (1) the parties entered into a contract; (2) the plaintiff fulfilled his obligations under the contract; (3) any conditions precedent to the defendant's performance occurred; (4) the defendant unfairly interfered with the plaintiff's rights to receive the benefits of the contract; and (5) the plaintiff was harmed by the defendant's conduct.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

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

HN10[] Subject Matter Jurisdiction, Jurisdiction Over Actions

In resolving a factual attack on jurisdiction, the court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. The court need not presume the truthfulness of the plaintiff's allegations in deciding a factual attack.

Civil Procedure > ... > Justiciability > Mootness > Real Controversy Requirement

HN11[] Mootness, Real Controversy Requirement

A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party. As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot. If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot. Put another way, a claim becomes moot when a plaintiff actually receives complete relief on a claim. Complete relief includes requested interest, attorney's fees, or costs.

Civil Procedure > ... > Justiciability > Mootness > Real Controversy Requirement

HN12[] Mootness, Real Controversy Requirement

The mootness inquiry based on plaintiff obtaining relief changes when a refund is provided after the lawsuit is filed. In these circumstances, courts look to the complaint to determine what relief plaintiff is seeking beyond simply damages.

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

HN13[] Breach of Contract Actions, Elements of Contract Claims

In order to state a claim for breach of contract, a plaintiff must plead the existence of a contract, his performance of the contract or excuse for nonperformance, the defendant's breach and resulting damages. In addition, the complaint must identify the specific provision of the contract allegedly breached by the defendant.

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

Civil Procedure > Pleading & Practice > Motion Practice > Opposing Memoranda

HN14[] **Motions to Dismiss, Failure to State Claim**

In determining the propriety of a *Fed. R. Civ. P. 12(b)(6)* dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss.

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN15[] **Trade Practices & Unfair Competition, State Regulation**

California's Unfair Competition Law prohibits unlawful, unfair or fraudulent business acts or practices. *Cal. Bus. & Prof. Code § 17200*. Each adjective, or prong, captures a separate and distinct theory of liability. The unlawful prong borrows violations of other laws and treats them as unlawful practices independently actionable. The unfair prong is more complicated, consisting of three distinct tests: (1) whether the challenged conduct is tethered to any underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of an ***antitrust law***; (2) whether the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers; or (3) whether the practice's impact on the victim outweighs the reasons, justifications and motives of the alleged wrongdoer.

Governments > Legislation > Interpretation

HN16[] **Legislation, Interpretation**

When the legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination.

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

Governments > Courts > Judicial Precedent

HN17[] **Federal & State Interrelationships, Erie Doctrine**

A federal district court sitting in diversity must follow the decision of the intermediate appellate courts of the forum state unless there is convincing evidence that the highest court of the state would decide differently.

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

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

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

HN18[] **State Regulation, Claims**

Because California's Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, borrows violations from other laws, the violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong.

Counsel: **[*1]** For Lilas Abuelhawa, Kelly Wynne, Leonardo Kim, Plaintiffs: L. Timothy Fisher, Joel Dashiell Smith, Bursor & Fisher, P.A., Walnut Creek, CA; Sarah N Westcot, Bursor & Fisher PA, Miami, FL.

For Santa Clara University, Defendant: Karen G. Johnson-McKewan, LEAD ATTORNEY, Orrick Herrington & Sutcliffe LLP, San Francisco, CA; Sarah Kate Mullins, Orrick, San Francisco, CA.

Judges: LUCY H. KOH, United States District Judge.

Opinion by: LUCY H. KOH

Opinion

ORDER GRANTING MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT WITH PREJUDICE

Re: Dkt. No. 58

Plaintiffs, on behalf of themselves and others similarly situated, allege that Defendant Santa Clara University ("SCU") violated California law by halting in-person education in response to the COVID-19 pandemic. Plaintiffs specifically claim that SCU (1) breached an implied-in-fact contract; and (2) violated the "unfair" and "unlawful" prongs of *California's Unfair Competition Law, Cal. Bus. & Profs. Code §§ 17200 et seq.* ECF No. 52. Before the Court is SCU's motion to dismiss Plaintiffs' second amended complaint. ECF No. 58. Having considered the parties' submissions, the relevant law, and the record in this case, the Court GRANTS SCU's motion to dismiss with prejudice.

I. BACKGROUND

A. Factual Background

On February **[*2]** 7, 2020, a woman in Santa Clara County died of COVID-19, becoming the first known COVID-19 death in the United States. *See* *Abuelhawa v. Santa Clara University, 529 F. Supp. 3d 1059, 1061 (N.D. Cal. 2021) (hereafter "Abuelhawa I")*. On March 4, 2020, Governor Gavin Newsom declared a state of emergency in California. *Id. at 1061-62*. Thus, on March 10, 2020, SCU temporarily suspended in-person classes and moved to online instruction. *See* Second Am. Compl. ("SAC") ¶ 4, ECF No. 52.

Days later, on March 16, 2020, the Santa Clara County Health Officer issued a shelter-in-place order. *Abuelhawa I, 529 F. Supp. 3d at 1062*. Under the order, schools such as SCU could open only "for purposes of facilitating distance learning or performing essential functions," not in-person instruction. Request for Judicial Notice ("RJN") No. 10 at §10(f)(xi), ECF No. 59. To follow the order, SCU announced on March 16, 2020 that its educational experience would remain online for the Spring 2020 term. SAC ¶ 4. SCU's announcement preceded the March 30, 2020 start of SCU's Spring 2020 Quarter for all SCU schools except SCU's Law School and SCU's Jesuit School of Theology. Those two schools operate on the semester system rather than the quarter system. Thus, except for students of the Law School and the Jesuit School of Theology, SCU students had over two-weeks' **[*3]** notice that the Spring 2020 Quarter would be held remotely.

Plaintiffs are three SCU law students who bring a putative class action against SCU for SCU's temporary suspension of in-person instruction. Specifically, Plaintiffs Lilas Abuelhawa, Kelly Wynne, and Leonardo Kim seek to represent the following class: "all SCU law students who paid SCU Spring 2020 Semester tuition and/or fees for in-person educational services that SCU failed to provide, and whose tuition and fees have not been refunded."[1] SAC ¶ 46.

At first, Plaintiffs sought to represent all SCU students, not just those on the semester system. *See id.* ¶ 3 (defining "semester" to include "quarter" and "any academic period"). However, Plaintiffs abandoned their claims on behalf of all SCU students after SCU moved to dismiss the first amended complaint. Instead, Plaintiffs sought to represent a class and subclass of only "those students on the semester system"—that is, students of the Law School and the Jesuit School of Theology. ECF No. 33 at 11 n.3. Now, in the SAC that class definition is further narrowed to include only students of the Law School. SAC ¶ 46.

Plaintiffs do not challenge the allegedly "inferior learning experience" **[*4]** of online classes. SAC ¶ 46. The "gravamen of this action" is instead that Plaintiffs "paid SCU for in-person classes and the availability of on-campus facilities and experiences, and did not receive what they paid for." *Id.* Under this theory of the case, Plaintiffs assert two claims: (1) breach of an alleged implied-in-fact contract; and (2) violation of *California's Unfair Competition Law ("UCL"), Cal. Bus. & Profs. Code §§ 17200 et seq.*, as the result of SCU's alleged "unfair" or "unlawful" practices. *Id.* ¶¶ 56-67, 68-74. The breach of implied-in-fact contract claim is based on three theories: (i) SCU broke its alleged promises to provide in-person instruction, SAC ¶¶ 59-61; (2) a breach of the implied covenant of good faith and fair dealing based on SCU denying law students access to on-campus facilities while allowing undergraduate students to use the same facilities, *id.* ¶ 62; and (3) a breach of an implied parking contract, *id.* ¶¶ 6, 63. The UCL claim in turn is based on two theories: (i) violation of the "unfair prong" due to SCU breaking its alleged promises to provide in-person instruction, *id.* ¶ 71; and (ii) violation of the "unfair" and "unlawful" prongs due to SCU violating *California Education Code § 94897(d)*.

Plaintiffs allege that SCU promised **[*5]** in-person instruction in its course materials, student bulletins, and website. *See id.* at ¶¶ 17, 21-34. Course materials allegedly promised in-person instruction by distinguishing between in-person and online instruction. If SCU offered a course in person, SCU allegedly identified the on-campus location of the course and sometimes required a "mandatory in-person class session" to confirm a student's enrollment in the class. *Id.* ¶¶ 21, 31.

Student bulletins allegedly "refer to the in-person nature of the Spring 2020 semester." *Id.* ¶ 23. Plaintiffs specifically cite certain statements in the law student bulletin. That bulletin notifies students that they must complete 64 credit hours "at the law school" and that teachers "may utilize class attendance" in grading. *Id.* The law student bulletin also mentions certain on-campus facilities. *Id.*

Lastly, SCU's website advertises SCU's on-campus experience. *Id.* ¶ 24. Specifically, the website praises SCU's faculty, libraries, and campus life. As for faculty, the website touts SCU's "connected & engaged faculty." *Id.* As for libraries, SCU's website describes libraries as "much more than book repositories; they're inspiring spaces for research, collaboration, **[*6]** and reflection." *Id.* ¶ 25. As to campus life, the website advertises "special places on campus" and "organization[s] on campus." *Id.* ¶¶ 26-28.

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[1] "Specifically excluded from the Class are Defendant, Defendant's officers, directors, agents, trustees, parents, children, corporations, trusts, representatives, employees, principals, servants, partners, joint ventures, or entities controlled by Defendant, and their heirs, successors, assigns, or other persons or entities related to or affiliated with Defendant and/or Defendant's officers and/or directors, the judge assigned to this action, and any member of the judge's immediate family." SAC ¶ 48.

In sum, Plaintiffs' claims rely on these statements in course materials, student bulletins, and SCU's website. Plaintiffs allege that these statements constitute SCU's promises to either (1) hold in-person instruction; or (2) to refund Plaintiffs' tuition. FAC ¶¶ 35-46.

Yet Plaintiffs fail to mention other statements in SCU's course materials or student bulletins. As for course materials, the "online course portal" that Plaintiffs allege viewing contains financial terms and conditions. SAC ¶ 17. "Students are required to accept the financial terms and conditions outlined by the University in order to continue their enrollment at SCU." RJN No. 2. These terms and conditions specifically provide that SCU's hyperlinked "tuition refund schedule" governs refunds:

> I accept full responsibility to pay all tuition, room and board, fees, and other associated costs as a result of enrollment at Santa Clara University . . . . I have reviewed the published tuition refund schedule at www.scu.edu/bursar/refund and understand that if I drop or withdraw from some **[*7]** or all of the classes for which I enroll, *I will be responsible for paying all or a portion of tuition and fees in accordance with the University's tuition refund schedule*. . . . I have read the above and agree to assume all financial responsibility associated with my enrollment at Santa Clara University.

RJN No. 2 (emphasis added). As for student bulletins, all bulletins except for the Jesuit School of Theology's bulletin state that "*[n]o tuition refunds* are made because of curtailed services resulting from strikes, *acts of God*, civil insurrection, riots or threats thereof, *or other causes beyond the control of the University*." RJN No. 4 (emphasis added). Thus, this language is in the law student bulletin.

B. Procedural History

Plaintiffs filed their initial complaint on June 17, 2020. ECF No. 1. On September 28, 2020, SCU moved to dismiss that complaint. ECF No. 21.

On October 12, 2020, Plaintiffs filed the first amended complaint. The parties then stipulated to SCU filing a new motion to dismiss the first amended complaint, and on October 23, 2020, the Court granted that stipulation. ECF No. 27.

On November 9, 2020, SCU again moved to dismiss. ECF No. 32. Plaintiffs filed their opposition **[*8]** on December 14, 2020. ECF No. 33. On January 8, 2021, SCU filed its reply. ECF No. 35. On March 29, 2021, the Court granted SCU's motion, but gave Plaintiffs leave to amend the breach of implied-in-fact contract and UCL claims. *See* *Abuelhawa I, 529 F. Supp. 3d at 1072*.

On April 27, 2021, Plaintiffs filed the SAC. ECF No. 52. SCU filed the instant motion to dismiss and an unopposed request for judicial notice on May 28, 2021. ECF Nos. 58 ("Mot."), 59 ("RJN"). On June 25, 2021, Plaintiffs filed their opposition to the instant motion to dismiss. ECF No. 60 ("Opp'n"). In their opposition, Plaintiffs requested judicial notice of a state court decision. Opp'n at 1 n.1. SCU filed its reply supporting the instant motion, and another unopposed request for judicial notice on July 12, 2021. ECF Nos. 61 ("Reply"), 62 ("Reply RJN"). SCU also filed a statement of recent decision on August 2, 2021. ECF No. 66.

II. LEGAL STANDARD

A. Motion to Dismiss under *Rule 12(b)(1)*

HN1[] A defendant may move to dismiss for lack of subject matter jurisdiction pursuant to *Rule 12(b)(1) of the Federal Rules of Civil Procedure*. While lack of statutory standing requires dismissal for failure to state a claim under *Rule 12(b)(6)*, lack of Article III standing requires dismissal for want of subject matter jurisdiction under *Rule 12(b)(1)*. *See* *Maya v. Centex Corp., 658 F.3d 1060, 1067 (9th Cir. 2011)*.

HN2[] "A *Rule 12(b)(1)* jurisdictional **[*9]** attack may be facial or factual." *Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)*. "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* The court "resolves a facial attack as it would a motion to dismiss under *Rule 12(b)(6)*: Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Leite v. Crane Co., 749 F.3d 1117, 1121 (9th Cir. 2014)*. "[I]n a factual attack," on the other hand, "the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone, 373 F.3d at 1039*. "In resolving a factual attack on jurisdiction," the court "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Id.* The court "need not presume the truthfulness of the plaintiff's allegations" in deciding a factual attack. *Id.* Once the defendant has moved to dismiss for lack of subject matter jurisdiction under *Rule 12(b)(1)*, the plaintiff bears the burden of establishing the court's jurisdiction. *See Chandler v. State Farm Mut. Auto Ins. Co., 598 F.3d 1115, 1122 (9th Cir. 2010)*.

B. Motion to Dismiss Under *Rule 12(b)(6)*

HN3[] *Rule 8(a)(2) of the Federal Rules of Civil Procedure* requires a complaint to include "a short and plain **[*10]** statement of the claim showing that the pleader is entitled to relief." A complaint that fails to meet this standard may be dismissed pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. The United States Supreme Court has held that *Rule 8(a)* requires a plaintiff to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted). For purposes of ruling on a *Rule 12(b)(6)* motion, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)*. The Court, however, need not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Fayer v. Vaughn, 649 F.3d 1061, 1064 (9th Cir. 2011)* (per curiam) (internal quotation marks omitted). Additionally, mere "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Adams v. Johnson, 355 F.3d 1179, 1183 (9th Cir. 2004)*.

C. Leave to Amend [*11]

HN4[] If a court determines that a complaint should be dismissed, it must then decide whether to grant leave to amend. Under *Rule 15(a) of the Federal Rules of Civil Procedure*, leave to amend "shall be freely given when justice so requires," bearing in mind "the underlying purpose of *Rule 15* to facilitate decisions on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)* (en banc) (alterations and internal quotation marks omitted). When dismissing a complaint for failure to state a claim, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Id. at 1130* (internal quotation marks omitted).

Accordingly, *HN5*[] leave to amend generally shall be denied only if allowing amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the moving party has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 532 (9th Cir. 2008)*. At the same time, a court is justified in denying leave to amend when a plaintiff "repeated[ly] fail[s] to cure deficiencies by amendments previously allowed." *See Carvalho v. Equifax Info. Servs., LLC, 629 F.3d 876, 892 (9th Cir. 2010)*. Indeed, a "district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1058 (9th Cir. 2011)* (quotation marks **[*12]** omitted).

III. JUDICIAL NOTICE

SCU requests judicial notice of materials from SCU's website, government orders on the COVID-19 pandemic, and court filings. ECF Nos. 59, 62 ("RJNs"). Plaintiffs request judicial notice of a state court decision, *Grant v. Chapman Univ.*, Orange Cty. Superior Ct. Case No. 30-2020-01146699, Jan. 22, 2021. Opp'n at 1 n.1. All requests for judicial notice are unopposed. The Court previously granted SCU's request for judicial notice for RJN Nos. 1-4, ECF No. 59. *See Abuelhawa v. Santa Clara University, 529 F. Supp. 3d 1059, 1061 n.1 (N.D. Cal. 2021)*. ***HN6***[] The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)*. Moreover, courts may consider materials referenced in the complaint under the incorporation by reference doctrine, even if a plaintiff failed to attach those materials to the complaint. *Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005)*. Documents on "publicly available websites" and public records are proper subjects of judicial notice. *See, e.g., Calhoun v. Google LLC, 526 F. Supp. 3d 605, 2021 WL 1056532, at *5 (N.D. Cal. 2021)* (collecting cases).

Accordingly, the Court GRANTS the parties' unopposed requests for judicial notice.

IV. DISCUSSION

Plaintiffs allege two causes of action in the Second **[*13]** Amended Complaint against SCU: (1) breach of implied-in-fact contract and (2) violation of California's Unfair Competition Law ("UCL") under the "unfair" and "unlawful" prongs. SCU moves to dismiss the SAC because SCU contends the claims (1) are identical to claims this Court has previously dismissed and thus either the law of the case applies or the claims should again be dismissed for the same reasons; (2) are moot because the Plaintiffs and the proposed class have already received the relief they are requesting; or (3) fail to state a cognizable claim for relief. Mot. at 1. The Court first considers whether the law of the case doctrine applies and then considers in turn whether Plaintiffs' breach of contract claim and UCL claim survive SCU's motion to dismiss.

A. The Law of the Case Doctrine Does Not Apply

SCU moves to dismiss because "[t]he vast majority of the SAC realleges the very same allegations that this Court previously rejected as insufficient to state a claim for breach of contract or for a violation of the UCL." Mot. at 9. SCU argues that "this Court's prior decision is law of the case and none of the factors that would warrant departure from that decision apply here." **[*14]** Mot. at 10. In opposition, Plaintiffs argue the law of the case doctrine is inapplicable here under Ninth Circuit law. Opp'n at 1-2. On reply, SCU contends that Plaintiffs "mischaracterize SCU's position" on law of the case doctrine and argues that Plaintiff's opposition is a stealth motion for reconsideration and should be rejected. Reply at 2-4. Although SCU appears to abandon its law of the case argument on reply, the Court briefly addresses whether the law of the case doctrine applies before analyzing whether the standard for a motion for reconsideration applies.

HN7[] "Under the law of the case doctrine, a court will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case." *Gonzalez v. Arizona, 677 F.3d 383, 390 n.4 (9th Cir. 2012)*, *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1, 133 S. Ct. 2247, 186 L. Ed. 2d 239 (2013)* (citing *Jeffries v. Wood, 114 F.3d 1484, 1488-89 (9th Cir. 1997)* (en banc)). Under this standard, the prior decision should be followed unless: (1) "the decision is clearly erroneous and its enforcement would work a manifest injustice;" (2) "intervening controlling authority makes reconsideration appropriate"; or (3) "substantially different evidence was adduced at a subsequent trial." *Id.* (quoting *Jeffries, 114 F.3d at 1489*). Put another way, "the law of the case doctrine allows the court to impose a heightened **[*15]** burden on the plaintiff—to show clear error, changed law, new evidence, changed circumstances, or manifest injustice." *Atkins v. U.S. Dep't of Homeland Sec., 899 F.3d 1035, 1043 (9th Cir. 2018)*

However, *HN8*[] the law of the case doctrine is inapplicable when the district court dismisses a claim without prejudice. *See id.* ("The amended complaint is a new complaint, entitling the plaintiff to judgment on the complaint's own merits."). In these circumstances, "[t]he district court is not . . . bound by any law of the case." *Id.* Although the district court is not so bound, if it "determines the amended complaint is substantially the same as the initial complaint, the district court is free to follow the same reasoning and hold that the amended claims suffer from the same legal insufficiencies." *Id.* Doing so allows "the district court . . . to correct any errors or misunderstandings without having to find that its prior decision was "clearly erroneous."' *Id.* (quoting *United States v. Cuddy, 147 F.3d 1111, 1114 (9th Cir. 1998)*).

Here, the Court is not bound "by any law of the case" because, like the district court in *Atkins*, the Court dismissed Plaintiff's breach of implied-in-fact contract and UCL claims without prejudice. *Abuelhawa I, 529 F. Supp. 3d at 1072*; *Atkins, 899 F.3d at 1043*. SCU's arguments that Plaintiffs have submitted a stealth motion for reconsideration are similarly unavailing **[*16]** because viewing the Plaintiff's opposition through that lens would similarly impose "a heightened burden on the plaintiff," contrary to the Ninth Circuit's directive in *Atkins*. *Id.*

As such, the Court will review the SAC and Plaintiff's opposition without imposing a "heightened burden on the plaintiff," but mindful that it may "follow the same reasoning and hold that the amended claims suffer from the same legal insufficiencies." *Id.*

B. Plaintiffs Fail to State a Breach of Implied-in-Fact Contract Claim

Plaintiffs allege a single breach of implied-in-fact contract claim under three distinct theories: (1) SCU broke its alleged promises to provide in-person instruction, SAC ¶¶ 59-61; (2) a breach of the implied covenant of good faith and fair dealing based on SCU denying law students access to on-campus facilities while allowing undergraduate students to use the same facilities, *id.* ¶ 62; and (3) a breach of an implied parking contract, *id.* ¶¶ 6, 63. SCU moves to dismiss Plaintiffs' contract claim because the claim inadequately alleges a specific promise, and is mooted, inadequately pled, or duplicative. Mot at 9, 12-18. The Court considers each theory for breach of implied-in-fact contract in **[*17]** turn.

1. Plaintiffs again inadequately plead a specific promise.

On March 29, 2021, the Court granted SCU's motion to dismiss Plaintiffs' first amended complaint ("March 29, 2021 Order"). *Abuelhawa I, 529 F. Supp. 3d at 1072*. In the March 29, 2021 Order, the Court held that Plaintiffs' breach of implied-in-fact contract claim failed because Plaintiffs inadequately pled a specific promise by SCU to provide in-person instruction. *Id. at 1065-70*. The Court concluded that the statements identified by Plaintiffs were at most "'general promises or expectations,' which do not create contractual obligations." *Id. at 1066* (quoting *Kashmiri v. Regents. of the Univ. of Cal., 156 Cal. App. 4th 809, 828, 67 Cal. Rptr. 3d 635 (2007)*).

SCU moves to dismiss because it argues that Plaintiffs failed to include in the SAC any new factual allegations about specific promises "that SCU made to provide in-person instruction or services." Mot. at 10. Because Plaintiffs have merely re-pled the same statements that the Court previously found inadequate, SCU contends the breach of implied-in-fact contract claim should again be dismissed for the same reasons. *Id.* at 9-10.

Instead of identifying new statements by SCU about in-person instruction in the SAC, Plaintiffs' opposition to the instant motion to dismiss asks for reconsideration of the Court's March 29, 2021 Order **[*18]** in light of new authorities and three alleged errors in the Order. Opp'n at 1-5 (asking "the Court to review the issue again in light of the additional authorities and arguments briefly presented here."). Plaintiffs effectively concede that the SAC pleads no new facts that SCU made a specific promise to provide in-person instruction. Plaintiffs' redline comparison of the SAC to Plaintiffs' first amended complaint also confirms that the SAC contains no new factual allegations to support Plaintiff's theory that SCU made a specific promise to provide in-person instruction. *See* ECF No. 53. The Court first determines whether Plaintiffs have adequately pled a specific promise in the SAC, and then addresses Plaintiffs' three claims of error and new authorities.

As with Plaintiffs' first amended complaint, the Court finds that none of the statements identified by Plaintiffs in the SAC "constitutes a 'definite, specific, or explicit' promise that SCU would continue on-campus instruction despite a global pandemic." *Abuelhawa I, 529 F. Supp. 3d at 1066* (quoting *Kashmiri, 156 Cal. App. 4th at 828* (cleaned up)). "At most, these statements are 'general promises or expectations,' which do not create contractual obligations." *Id.* (quoting *Kashmiri, 156 Ca. App. 4th at 828*). Plaintiffs thus inadequately **[*19]** plead a specific promise to provide in-person instruction for the same reasons the Court articulated in the March 29, 2021 Order. *See generally id. at 1065-70*.

Plaintiff's opposition arguments fare no better. Plaintiffs' unpersuasive opposition to the instant motion to dismiss relies on three purported errors in the March 29, 2021 Order. Opp'n at 2-5. Plaintiffs first argue that "the question of whether SCU made a specific promise to provide an on-campus education though its conduct, course of dealings, and custom is a question of fact that cannot be resolved on the pleadings." Opp'n at 2-3. Second, Plaintiffs argue that the Court erroneously concluded that Plaintiffs' position leads to absurd results. *Id.* at 3-4. Lastly, Plaintiffs contend that the Court misconstrued Plaintiffs' specific promise allegations by concluding that Plaintiffs failed to allege a specific promise by SCU to provide on-campus instruction during a pandemic. *Id.* at 4-5.

On the first point, "an issue of fact can only arise if Plaintiffs first meet their obligation to plead the terms of the alleged contract." *UC Remote Cases*, No. JCCP5112, at 16-17 (Cal. Super. Ct. Jul. 29, 2021) (slip op.) (collecting state law cases sustaining dismissals for failure to plead breach of implied contract claims). **[*20]** Here Plaintiffs inadequately pled a specific promise, and thus there is no triable issue of fact. Plaintiffs moreover misstate the law in arguing that *Kashimiri* "held that 'custom and usages can also become specific terms by implication.'" Opp'n at 2 (quoting *Kashmiri, 156 Cal. App. 4th at 828*). In *Kashmiri*, the court stated that "state courts in other jurisdictions," not California, concluded custom and usage may be relevant. *156 Cal. App. 4th at 828, 831-33*. In fact, the *Kashmiri* Court had no occasion to consider any relevant custom and usages. *Id. Kashmiri* thus does not support Plaintiff's argument that custom and usages can become specific terms under California law. However, even if custom and usage were relevant here, the custom and usage references Plaintiffs identify "merely memorialize the pre-pandemic practice; they offer[] no guarantee that it would continue indefinitely," *In re Columbia Tuition Refund Action, 523 F. Supp. 3d 414, 423 (S.D.N.Y. 2021)*. As such, no issue of fact exists on these pleadings.

Plaintiffs' second argument also misses the mark. In the March 29, 2021 Order, the Court quoted a portion of SCU's prior motion to dismiss that Plaintiffs *did not contest* in Plaintiffs' prior opposition, *see* ECF No. 33. The Court explained that "under Plaintiff's contractual theory, 'students would have a contractual claim if their **[*21]** course was later reassigned to a different classroom or building' than the one listed in the course catalog." *Abuelhawa I, 529 F. Supp. 3d at 1066* (quoting ECF No. 32 at 16). Plaintiffs argue this conclusion is erroneous because their position is defensible under "the doctrine that courts do not consider trifling matters." *Id.* at 3. Setting aside that Plaintiffs did not raise this argument in response to SCU's prior motion to dismiss, Plaintiffs' argument fails to cure the central flaw identified by the Court in Plaintiffs' pleadings—a failure to identify a *specific* promise about in-person instruction by SCU.

Even if the Court should not consider trifling matters, the breach of implied-in-fact contract claim must still be anchored in a *specific* promise SCU breached. *Abuelhawa I, 529 F. Supp. 3d at 1065* (noting the parties agree the breach of implied-in-fact contract claim "must identify a *specific* promise that SCU breached.") Plaintiffs failed to identify such a promise in the first amended complaint. Lacking any new factual allegations, Plaintiffs again fail to identify such a promise in the SAC. At best, the statements on which Plaintiffs rely merely show SCU's general expectation that in-person classes are the norm. *See In re Columbia, 523 F. Supp. 3d at 423* (explaining school statements **[*22]** about in-person instruction "merely memorialize the pre-pandemic practice") Furthermore, Plaintiffs' attempt to rely on these statements is what the California Supreme Court cautioned against—an "attempt to use catalogues or similar published material to freeze the academic relationship into a rigid mold.'" *Paulsen v. Golden Gate Univ., 25 Cal. 3d 803, 812, 159 Cal. Rptr. 858, 602 P.2d 778 (1979)*. Thus, even if Plaintiffs' position does not lead to absurd results, Plaintiffs still fail to identify any specific promises that unequivocally promise in-person instruction.

Plaintiffs' last argument also fails for similar reasons. Plaintiffs argue that the "Court erred by framing the issue not simply in terms of whether SCU promised to provide on-campus instruction." Opp'n at 4. Plaintiffs read the Court's prior order to hold that Plaintiffs must allege a specific promise by SCU to "continue on-campus instruction *despite a global pandemic*." *Id.* at 4 (quoting *Abuelhawa I, 529 F. Supp. 3d at 1066*). Not so. The flaw the Court previously identified in Plaintiffs' first amended complaint is that the statements Plaintiffs rely on "are 'general promises or expectations' which do not create contractual obligations." *Abuelhawa I, 529 F. Supp. 3d at 1066*. Or said another way, "the statements Plaintiffs cite are too general to impose contractual duties on SCU." **[*23]** *Id.* These statements impose *no* contractual duties, including for in-person instruction. Moreover, the Court's March 29, 2021 Order specifically concluded that the statements Plaintiffs identify in the "course catalog and policy *fail to promise in-person instruction*." *Id.* at 10-11 (emphasis added). The Court did not condition this conclusion on the existence of a global pandemic.

In addition, the Court explained that the "purported promises that Plaintiffs cite here are vaguer than those found inadequate in" *Regents of University of California v. Superior Court, 240 Cal. App. 4th 1296, 193 Cal. Rptr. 3d 447, 471 (Ct. App. 2015)*, *rev'd on other grounds*, *4 Cal. 5th 607, 634 n.8, 230 Cal. Rptr. 3d 415, 413 P.3d 656 (2018)*. *Abuelhawa I, 529 F. Supp. 3d at 1068*. In *Regents*, the California Court of Appeal found statements made by the University of California, Los Angeles ("UCLA") about on-campus student safety to be insufficient to support an implied-in-fact contract between a UCLA student and UCLA. *Abuelhawa I, 529 F. Supp. 3d at 1068*. The UCLA student relied on two UCLA statements and a surcharge as the sources of the implied-in-fact contractual duties. *Id.* The student alleged that UCLA had: (1) stated in a school publication that the school was "committed to providing a safe work environment for all faculty, staff and students—one that is free from violence or threats of harm." *Id.* (quoting *Regents, 193 Cal. Rptr. 3d at 471*); (2) stated in the Student Conduct Code that "any individual **[*24]** who commits an act of violence or has threatened to commit such an act may be suspended from the university and barred from its property." *Id.* (quoting *Regents, 193 Cal. Rptr. 3d at 471 n.12*); and (3) imposed "an individual surcharge to pay for student mental health services." *Id.* (quoting *Regents, 193 Cal. Rptr. 3d at 471-72*). The *Regents* Court, applying *Kashmiri*, analyzed each source and rejected the implied-in-fact contract claim. *Id.*

In the March 29, 2021 Order, the Court compared the alleged statements made by SCU to the statements made by UCLA in *Regents* and found that "[n]one of [SCU's] statements are as specific as UCLA's." *Id.* Plaintiffs fail to distinguish, or even address, *Regents* in their opposition to the instant motion.

To avoid any doubt, the Court construes the SAC to allege that SCU made a specific promise to provide in-person instruction for the Spring 2020 semester. *See* SAC ¶ 47 (defining the class as "all SCU law students who paid SCU Spring 2020 Semester tuition and/or fees for in-person educational services that SCU failed to provide, and whose tuition and fees have not been refunded"). However, this construction is substantially similar to the Court's construction of the allegations in the first amended complaint. *See* ECF No. 25 ¶ 45 (Plaintiffs sought to represent **[*25]** students, including law students, "who paid SCU Spring 2020 Semester tuition and/or fees for in-person educational services that SCU failed to provide."). As such, the Court follows its prior reasoning in the March 29, 2021 Order to conclude that Plaintiffs again inadequately plead a specific promise by SCU to provide in-person instruction. *See* *Abuelhawa I, 529 F. Supp. 3d at 1065-70*. Plaintiffs' argument thus lacks merit.

Lastly, Plaintiffs also argue that the "weight of authority" points in favor of "students on 12(b)(6) motions or demurrers" and string cite several California district court and state court decisions, including cases the Court already found unpersuasive in its prior order, as well as one out-of-state decision. Opp'n at 1. SCU in turn points to a state court decision that agreed with the Court's prior order, as well as multiple out-of-state decisions ruling against students in Covid-19 tuition related cases. Reply at 3, 3 n.2. The Court's view remains unchanged. None of the California district or state court cases Plaintiffs discuss *Regents of University of California v. Superior Court, 240 Cal. App. 4th 1296, 193 Cal. Rptr. 3d 447 (Ct. App. 2015)*, or even the Court's March 29, 2021 Order.

For all the above reasons, Plaintiffs' theory of breach of implied-in-fact contract fails.

2. Plaintiffs Fail to Plead a Breach of [*26] the Implied Covenant of Good Faith and Fair Dealing.

Plaintiffs' second theory for breach of implied-in-fact contract flows from the covenant of good faith and fair dealing. Plaintiffs allege that SCU "breach[ed] the implied covenant of good faith and fair dealing by denying SCU law students access to on-campus law school facilities and buildings, while making those same law school facilities and buildings available to undergraduate students." *Id.* ¶¶ 7, 45. SCU moves to dismiss this theory for two reasons. First, SCU argues the "claim for breach of covenant of good faith and fair dealing should be dismissed because it is duplicative of Plaintiffs' breach of contract claim." Mot. at 15-16. Second, SCU argues that Plaintiffs fail to plead "that SCU unfairly interfered with Plaintiffs' rights to receive contractual benefits." Mot. at 16-18. Because the Court agrees with SCU that Plaintiffs fail to plead a breach of the covenant of good faith and fair dealing, the Court need not determine whether this theory is duplicative.

HN9[] Under California law, "[e]very contract imposes on each party a duty of good faith and fair dealing in each performance and in its enforcement." *Carson v. Mercury Ins. Co., 210 Cal. App. 4th 409, 429, 148 Cal. Rptr. 3d 518 (Ct. App. 2012)* (internal quotation **[*27]** marks and citations omitted). "The covenant 'is based on general contract law and the long-standing rule that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.'" *Rosenfeld v. JPMorgan Chase Bank, N.A., 732 F. Supp. 2d 952, 968 (N.D. Cal. 2010)* (*quoting* *Waller v. Truck Ins. Exchange, Inc., 11 Cal. 4th 1, 36, 44 Cal. Rptr. 2d 370, 900 P.2d 619 (1995)*). To establish a breach of the covenant of good faith and fair dealing, a plaintiff must show: "(1) the parties entered into a contract; (2) the plaintiff fulfilled his obligations under the contract; (3) any conditions precedent to the defendant's performance occurred; (4) the defendant unfairly interfered with the plaintiff's rights to receive the benefits of the contract; and (5) the plaintiff was harmed by the defendant's conduct." *Rosenfeld, 732 F. Supp. 2d at 968* (citing Judicial Council of California Civil Jury Instruction 325).

In the SAC Plaintiffs allege that SCU "breached and continues to breach the implied covenant of good faith and fair dealing by denying SCU law students access to on-campus law school facilities and buildings while making those same law school facilities and buildings available to undergraduate students." SAC ¶ 62. Effectively, Plaintiffs allege that SCU breached the covenant by treating law and undergraduate students unequally. Not so. Plaintiffs fail **[*28]** to plead any facts in the SAC showing that SCU treated undergraduate and law school students unequally during the Spring 2020 semester—the relevant period of time that SCU Law Students paid "SCU Spring 2020 Semester tuition and/or fees for in-person educational services that SCU failed to provide." *Id.* ¶ 47 (defining representative class). In fact, the SAC contains no allegations that undergraduate students used campus facilities during Spring 2020.

SCU explains why. During Spring 2020 shelter-in-place orders "prevented SCU from holding *any* classes in person from mid-March 2020 until the end of the Spring 2020 semester or quarter." Mot at 18. Accordingly, during the relevant period, neither law students nor undergraduate students used on-campus facilities. With no factual allegations that such unequal treatment occurred, Plaintiffs' theory lacks merit.

To salvage their claim, Plaintiffs argue in their opposition to the instant motion to dismiss that SCU misconstrues Plaintiffs' breach of the implied covenant of good faith and fair dealing theory. Plaintiffs point to the SAC's allegation that SCU "*continues* to breach the implied covenant of good faith and fair dealing" and thus contend **[*29]** the SAC sufficiently alleges that Plaintiffs' breach of the implied covenant of good faith and fair dealing theory is not limited to the Spring 2020 term. Opp'n at 8-9 (citing SAC ¶ 62). However, this argument also lacks factual support because Plaintiffs fail to plead any factual allegations for the Fall 2020 and Spring 2021 terms. For example, Plaintiffs fail to plead that they "entered into a contract" with SCU for the Fall 2020 or Spring 2021 semesters and that they "fulfilled [their] obligations under the contract" for the Fall 2020 and Spring 2021 semesters, such as paying the required fees. Reply at 10. Both are necessary elements to establish that defendant breached the covenant of good faith and fair dealing. *See* *Rosenfeld, 732 F. Supp. 2d at 968* (plaintiff in part must show that "the parties entered into a contract" and that "the plaintiff fulfilled his obligations under the contract"). SCU again explains why. For Fall 2020 and Spring 2021 semesters, SCU expressly specified that courses would take place online. Reply at 10; Reply RJN No. 13-14. As such, there could be no unequal treatment when SCU made no promise to law students about on-campus facility use for these semesters. Moreover, Plaintiffs limit **[*30]** the class definition in the SAC to law students who paid the Spring 2020 semester tuition and in exchange did not receive the allegedly promised in-person services during the Spring 2020 semester. SAC ¶ 47. The SAC does not allege that SCU made any promises for Fall 2020 or Spring 2021 to law students who paid Spring 2020 tuition fees.

Because Plaintiffs fail to plead the necessary elements of a claim for breach of the covenant of good faith and fair dealing, Plaintiffs' theory of breach of the covenant of good faith and fair dealing must fail.

3. Plaintiffs' parking claim is inadequately pled.

Plaintiffs' third theory for breach of implied-in-fact contract focuses on parking permit fees. Plaintiffs allege that SCU breached "an implied contract to provide parking" by denying "Plaintiffs Abuelhawa and Wynne [who] paid $400 for a year-long parking pass" the benefit of their bargain. SAC ¶¶ 44; *see also id.* ¶ 6. Plaintiff Kim did not buy a parking permit during the relevant time period, ECF No. 58-2 ("Kenney Decl.") ¶ 10, and thus cannot allege this breach of implied-in-fact contract theory. SCU moves to dismiss because: (1) the claim is moot because Plaintiffs Abuelhawa and Wynne received **[*31]** a refund for Spring 2020; (2) the refund policy bars the claim; and (3) Plaintiffs fail to plead a breach because they do not allege they were prohibited from parking on campus during Spring 2020. Mot. at 12-14. The Court first addresses mootness, and concludes on this record that the claims are not moot. Because the Court ultimately concludes that Plaintiffs failed to plead a breach of implied-in-fact contract for the parking fees, the Court need not decide whether SCU's refund policy bars the claim.

a. Plaintiffs' parking claims are not moot.

SCU moves to dismiss for lack of federal court jurisdiction under *Federal Rule of Civil Procedure 12(b)(1)* because the parking claim is moot. *See* *Nance v. Miser, No. CV 14-00500-PHX-SMM, 2018 U.S. Dist. LEXIS 57519, 2018 WL 10667052, at *3 (D. Ariz. Apr. 3, 2018)*, *aff'd*, *768 Fed. Appx. 742 (9th Cir. 2019)* (explaining that "a mootness defense equates to a lack of subject-matter jurisdiction defense under Federal *Rule 12(b)(1)*"). SCU argues the parking claim is moot because "Plaintiffs have received what they are requesting: a refund for the fees they paid for parking they 'could not use.'" Mot at 13. Plaintiffs disagree. Opp'n at 5-6 (arguing that Plaintiffs did not obtain "a full refund of parking fees paid.").

To show that Plaintiffs have received a refund for the parking fees and the claim is moot, SCU submits evidence challenging the factual **[*32]** allegations in the SAC that Plaintiffs did not obtain a full refund. SCU thus brings a factual attack on jurisdiction. *See* *Safe Air for Everyone, 373 F.3d at 1039* (explaining that in a factual attack "the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction."). ***HN10***[] "In resolving a factual attack on jurisdiction," the court "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Id.* The court "need not presume the truthfulness of the plaintiff's allegations" in deciding a factual attack. *Id.* The Court first explains when a claim is moot, then briefly summarizes the parties' relevant allegations and evidence, and finally discusses the parties' legal arguments.

HN11[] "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Employees Int'l Union, Local 1000, 567 U.S. 298, 307, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012)* (internal quotation marks omitted). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin, 568 U.S. 165, 173, 133 S. Ct. 1017, 185 L. Ed. 2d 1 (2013)* (internal quotation marks and citations omitted). "If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point **[*33]** during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 72, 133 S. Ct. 1523, 185 L. Ed. 2d 636 (2013)* (internal quotation marks omitted). Put another way, "a claim becomes moot when a plaintiff *actually receives* complete relief on [a] claim." *Chen v. Allstate Ins. Co., 819 F.3d 1136, 1138 (9th Cir. 2016)* (emphasis added). Complete relief includes "requested interest, attorney's fees, or costs." *T.K. v. Adobe Sys. Inc., No. 17-CV-04595-LHK, 2018 U.S. Dist. LEXIS 65557, 2018 WL 1812200, at *10-12 (N.D. Cal. Apr. 17, 2018)* (collecting cases).

Plaintiffs' allegations are simple. In the SAC Plaintiffs allege that: (1) "Plaintiffs Abuelhawa and Wynne paid $400 for a year-long parking pass"; (2) "SCU told Plaintiff Abuelhawa she would receive a $117 refund, and told Plaintiff Wynne she would receive a $120 credit"; and (3) Plaintiffs Abuelhawa and Wynne "have not received those credits." SAC ¶¶ 63, 44. Plaintiffs also seek money damages for the breach of implied-in-fact contract claim, *id.* ¶¶ 64, 67 and also "prejudgment interest" and "attorney's fees and expenses and costs of suit," *id.* at 14-15 ("Prayer For Relief").

SCU's evidence and explanation of its parking permit refund and credit policy is more complicated. SCU seeks to show that Plaintiffs Abuelhawa and Wynne obtained a full refund of the parking fees, thus mooting the breach of implied-in-fact contract claim based on the parking permits. **[*34]** SCU's evidence shows that two types of credits were provided by SCU and the Law School at different times. The key issue is when these credits were provided to Plaintiffs and whether the credits constituted a full refund.

As relevant here, SCU first provided students a credit based on the length of time students held the parking permit, and the type of permit owned (e.g. annual). Mot. at 7. Based on this formula, Plaintiff Abuelhawa received a $50 credit and Plaintiff Wynne received a $120 credit, and both were notified of their credits on June 11, 2020. Kenney Decl. ¶ 8. These credits could be used "toward a future parking permit." Mot. at 7. These credits would also be refunded to the student upon graduation. Kenney Decl. ¶ 9. The Court will refer to these credits as "parking credits."

SCU's Law School later provided additional credits to law students because some law students were unhappy with the amount of parking credit they received from SCU. ECF No. 58-3 ("Wang Decl.") ¶ 4. The Court will refer to these credits as "pro-rata credits." As relevant here, using a different formula than SCU, the Law School determined that law students with annual permits, like Plaintiffs Abuelhawa **[*35]** and Wynne, were entitled to a credit value of up to $117. Wang Decl. ¶ 5-6. Thus, Plaintiff Abuelhawa received a $67 pro-rata credit on top of the $50 parking credit she already obtained. *Id.* ¶ 7. Plaintiff Wynne did not receive a pro-rata credit because her $120 parking credit was more than the Law School's $117 credit value. *Id.* ¶ 8. Unlike the parking credits, the pro-rata credits were posted to a student's financial account and would be immediately paid to the student upon the student's request. *Id.* ¶¶ 6-7, 10. The Law School notified Plaintiff Abuelhawa of her pro-rata credit on April 23, 2021. *Id.* ¶ 6-7.

To further complicate matters, in early June 2021, SCU's Law School effectively converted all law students' parking credits to pro-rata credits. ECF No. 61-2 ("Kenney Reply Decl.") ¶ 4. Plaintiffs Abuelhawa and Wynne received their converted pro-rata credits on June 17, 2021. ECF No. 61-1 ("Calderone Decl.") ¶ 6-7. This meant that as of June 17, 2021, Plaintiffs Abuelhawa and Wynn could immediately seek a refund of the full $117 and $120 credit amounts in their financial accounts, rather than wait upon graduation to seek a refund of the parking credits.

To sum up, on June 17, 2021, **[*36]** Plaintiffs Abuelhawa and Wynne each received a $117 and $120 pro-rata credit, respectively, in their financial accounts. This credit amount would be immediately paid to the student upon the student's request. The Court now turns to the parties' legal mootness arguments.

SCU's mootness argument fails because the record does not show that Plaintiffs have obtained complete relief. Here, Plaintiffs seek not just damages for the breach of implied-in-fact contract, SAC ¶ 67, but also at minimum, "prejudgment interest" and "attorney's fees and expenses and costs of suit," *id.* at 14-15 ("Prayer For Relief"). SCU has not "paid the requested interest, attorney's fees, or costs" and thus have not offered Plaintiffs "complete relief." *Adobe Sys. Inc., 2018 U.S. Dist. LEXIS 65557, 2018 WL 1812200, at *12*. Plaintiffs' parking claims are therefore not moot based on evidence in the record.

SCU's argument to the contrary lacks merit because SCU relies on inapplicable case law. SCU argues that "[w]hen a defendant provides a full refund for a product or service, and the plaintiff is entitled to no other relief, courts dismiss the plaintiff's claims as moot." Mot. at 12. True, but irrelevant. SCU relies on case law where the defendant provided the refund *prior* to plaintiff **[*37]** filing suit. *See, e.g., Lepkowski v. CamelBak Prods., LLC, No. 19-CV-04598-YGR, 2019 U.S. Dist. LEXIS 214555, 2019 WL 6771785, at *2-4 (N.D. Cal. Dec. 12, 2019)* (finding plaintiff "was fully compensated . . . prior to the initiation of any lawsuit"). However, ***HN12***[] the inquiry changes when a refund is provided after the lawsuit is filed. In these circumstances, courts look to the complaint to determine what relief Plaintiff is seeking beyond simply damages. *See, e.g., Adobe Sys. Inc., 2018 U.S. Dist. LEXIS 65557, 2018 WL 1812200, at *11* (finding a claim was not mooted in part because plaintiff sought interest, attorney's fees, or costs).

Here the record shows that SCU did not provide a full refund of the parking fees until Plaintiffs Abuelhawa and Wynne obtained the converted pro-rata credits on June 17, 2021. Prior to that date, Plaintiffs Abuelhawa and Wynne had $50 and $120 in parking credits that SCU concedes could not be immediately paid to the Plaintiffs. Mot. at 7. Accordingly, the record shows that at best Plaintiffs received a full refund almost two months after Plaintiffs filed the SAC, and at worst a full year after Plaintiffs initially filed their lawsuit. ECF Nos. 53, 1. Either date renders the cases on which SCU relies inapplicable.

The Court thus cannot conclude on this record that Plaintiffs' parking claims are moot.

b. Plaintiffs inadequately plead a breach of implied parking [*38] contract claim.

Although Plaintiffs' parking claims are not moot, the claims are inadequately pled. SCU moves to dismiss because it argues that Plaintiffs "have failed to plead facts indicating that SCU breached its agreement with students by revoking their permission to park on campus." Mot. at 14-15. Plaintiffs have no reply and thus implicitly concede this point. Instead, Plaintiffs argue that "[t]his argument defies common sense" because "[t]he only rational reason to buy on-campus parking is to use it while on the campus" and contend that Plaintiffs "have been deprived of the benefits of the parking contract" because "Plaintiffs and other law students have been singled out from the rest of the student body for continued remote learning." Opp'n at 7.

HN13[] "In order to state a claim for breach of contract, a plaintiff must plead the existence of a contract, his performance of the contract or excuse for nonperformance, the defendant's breach and resulting damages." *Donohue v. Apple, Inc., 871 F. Supp. 2d 913, 930 (N.D. Cal. 2012)* (citing *Otworth v. Southern Pac. Transp. Co., 166 Cal. App. 3d 452, 458, 212 Cal. Rptr. 743 (Ct. App. 1985)*). In addition, "[t]he complaint must identify the specific provision of the contract allegedly breached by the defendant." *Id.* (citing *Progressive West Ins. Co. v. Superior Court, 135 Cal.App.4th 263, 281, 37 Cal.Rptr.3d 434 (2005)*).

Plaintiffs fail to identify any specific provisions of the contract in the SAC, **[*39]** only alleging that Plaintiffs Abuelhawa and Wynne entered into an implied parking contract with SCU and paid "$400 for a year-long parking pass." SAC ¶ 63. SCU includes relevant provisions of the parking contract, which is entitled the Parking & Transportation Plan ("Parking Plan"), with its motion to dismiss.[2] The Court finds the Parking Plan is incorporated by reference because Plaintiffs' parking claim relies on Plaintiffs' purchase of a parking permit, which is governed by the Parking Plan. *See Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998)* (explaining that the purpose of the incorporation by reference doctrine is to "[p]revent[] plaintiffs from surviving a *Rule 12(b)(6)* motion by deliberately omitting references to documents upon which their claims are based.").

In the Parking Plan SCU explains that "Parking at [SCU] and on lands owned or controlled by the University is regulated by this Parking and Traffic Plan and is enforced through the issuance of parking permits." RJN No. 5 ("Chapter 2: Parking Permits" heading). The Plan further explains that "[a]n SCU parking permit is just that; permission to park in designated areas on campus and on University lands." ECF No. 58-1 at 132. SCU argues that Plaintiffs failed to allege that **[*40]** SCU revoked permission to park on campus, "in contravention of the Parking Plan." Mot. at 14. SCU points out that allegations that "SCU closed all residence halls, closed campus facilities and cancelled all on-campus events" do not allege that SCU prohibited Plaintiffs from parking on campus. *Id.*

Plaintiffs do not contest this characterization or cite any factual allegation in the SAC showing that SCU prohibited students from parking on campus after classes shifted to remote instruction. Rather, Plaintiffs argue the "only rational reason to buy on-campus parking is to use it while on the campus." Opp'n at 7. Maybe so, but under

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[2] The Court granted SCU's unopposed request for judicial notice of this document. *See* Section III, *supra*. 23

California law Plaintiffs must plead that SCU breached the parking contract. Here, Plaintiffs allege in the SAC that "SCU . . . breached an implied contract to provide parking" because "SCU was to provide a year of on-campus parking" and "[a]s a result of closure, SCU did not provide a year of on-campus parking." SAC ¶ 63. Plaintiffs also allege in the SAC that "[w]hen SCU shut down its campus, it charged students for parking they could not use." *Id.* ¶ 44. However, the Plan, which Plaintiffs do not contest governs the contract between Plaintiffs and SCU, does **[*41]** not make such guarantees or promises, ECF No. 58-1 at 132. *See* *Herskowitz v. Apple Inc., 940 F. Supp. 2d 1131, 1141 (N.D. Cal. 2013)* ("Under California contract law, 'if the language [of a contract] is clear and explicit, and does not involve an absurdity,' the language must govern the contract's interpretation."). The permit merely allows Plaintiffs to park on SCU property. *Id.* Plaintiffs have not alleged that SCU prohibited Plaintiffs from parking, or interfered with Plaintiffs' ability to park, on-campus.

Lastly, Plaintiffs attempt to save the parking claim by alleging in their opposition to the instant motion to dismiss that SCU violated "the duty of good faith and fair dealing" regarding the parking permit fees. Opp'n at 7. But this allegation does not appear in the SAC. Plaintiffs only plead in the SAC that SCU breached the implied covenant of good faith and fair dealing "by denying SCU law students access to buildings and facilities at SCU's law school." SAC ¶¶ 7, 62. The SAC makes no mention of parking fees when alleging SCU's breach of the implied covenant. The Court cannot look beyond the pleadings. *See* *Schneider v. Cal. Dep't of Corrs., 151 F.3d 1194, 1197 n.1 (9th Cir. 1998)* (***HN14***[] "In determining the propriety of a *Rule 12(b)(6)* dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum **[*42]** in opposition to a defendant's motion to dismiss.").

Accordingly, Plaintiffs fail to state a breach of implied-in-fact contract based on the parking permit fees.

C. Plaintiffs Fail to Plead a UCL Claim

Plaintiffs allege that SCU violated the "unfair" and "unlawful" prongs of California's Unfair Competition Law ("UCL"). *See* SAC ¶¶ 71-72. ***HN15***[] "The UCL prohibits 'unlawful, unfair or fraudulent business act[s] or practices[s].'" *Doe v. CVS Pharmacy, Inc., 982 F.3d 1204, 1214 (9th Cir. 2020)* (quoting *Cal. Bus. & Prof. Code § 17200*). Each adjective, or prong, "captures a separate and distinct theory of liability." *Id.* (internal quotation marks and citation omitted). The "unlawful" prong "borrows violations of other laws and treats them as unlawful practices independently actionable." *Id.* (cleaned up). The "unfair" prong is more complicated, consisting of three distinct tests: "(1) whether the challenged conduct is tethered to any underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of an ***antitrust law***; (2) whether the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers; or (3) whether the practice's impact on the victim outweighs the reasons, **[*43]** justifications and motives of the alleged wrongdoer." *Id. at 1214-15* (cleaned up).

Plaintiffs contend SCU violated the "unfair" prong of UCL by "charging students full tuition and fees without providing the on-campus services and facilities SCU was required to provide," SAC ¶ 71, and by "violating *Cal. Education Code § 94897(d)*," *id.* ¶ 72. Plaintiffs also allege that SCU violated the UCL "unlawful" prong by "violating *Cal. Education Code § 94897(d)*." *Id.* ¶ 72. SCU moves to dismiss the UCL claim because the Court already dismissed this claim previously and because SCU is exempted from *California Education Code § 94897(d)*. Mot. at 19-20. The Court addresses each UCL prong below.

1. Plaintiffs fail to plead an "unfair" practice.

Plaintiffs allege a violation of the "unfair" prong of the UCL under two distinct theories: (1) failure to provide in-person instruction, and (2) violation of *California Education Code § 94897(d)*, which requires certain educational entities to disclose if the "educational programs are delivered by means of distance education" in their advertising and promotional materials. SCU argues the first theory is identical to the one dismissed by the Court in the March 29, 2021 Order and the second theory fails because SCU is exempt from *California Education Code § 94897(d)*. Mot. at 19-20. The Court agrees.

In the March 29, 2021 Order, the Court dismissed **[*44]** Plaintiffs' failure to provide in-person instruction theory under the UCL because Plaintiffs failed to allege a specific promise by SCU to provide such instruction. *Abuelhawa I, 529 F. Supp. 3d at 1070*. Here, the Court has again found that Plaintiffs inadequately pled a specific promise by SCU to provide in-person instruction. *See* Section IV-B *supra*. Accordingly, Plaintiffs once again fail to plead a violation of the UCL under the failure to provide on-campus instruction theory.

Plaintiffs have no response and effectively concede that lack of a specific promise dooms their UCL claim based on the same theory. Plaintiffs instead contend that a breach of contract claim is sufficient to support a claim under the "unfairness" prong of the UCL. Opp'n at 12-13 (quoting *In re Facebook PPC Advertising Litig., 2010 U.S. Dist. LEXIS 87769, 2010 WL 3341062, at *8 (N.D. Cal. Aug. 25, 2010)*. However, Plaintiffs' UCL claim fails here precisely because Plaintiffs have failed to state a breach of implied-in-fact contract claim. *See* Section IV-B *supra*.

Plaintiff's second theory, premised on a violation of *California Education Code § 94897(d)*, also fails. Plaintiffs argue that the statute prohibits the behavior that "occurred here." Opp'n at 12. Plaintiffs further contend that under the "tethering test" of the UCL "unfair prong" Plaintiffs need not plead any direct violations of the statute. **[*45]** Opp'n at 11-12. According to Plaintiffs, they "need merely show that the effects of [defendant]'s conduct are comparable to or the same as a violation of the law, or otherwise significantly threaten or harm competition." *Id.* (quoting *In re Zoom Video Comms. Inc. Privacy Litig., 525 F. Supp. 3d 1017, 2021 WL 930623, at *23 (N.D. Cal. 2021)*).

SCU argues that SCU is exempt from the *California Private Postsecondary Education Act of 2009*, which includes *California Education Code § 94897(d)*, because SCU falls within two exemptions in the Act. Mot. at 19-20 (noting the Act exempts accredited law schools and accredited post-secondary institutions); RJN Nos. 6-9. As such, SCU contends that it cannot violate the UCL claim "tethered" to the underlying statute because SCU is exempt from *California Education Code § 94897(d)*. In their opposition brief, Plaintiffs do not dispute that SCU is exempt from *Section 94897(d)*, and thus concede this point. Accordingly, for the reasons below, Plaintiffs' theory fails because SCU is exempt from *Section 94897(d)*, the "tethered" statute.

The California Court of Appeal's analysis in *Lori Rubinstein Physical Therapy, Inc. v. PTPN, Inc., 148 Cal. App. 4th 1130, 1142, 56 Cal. Rptr. 3d 351 (2007)*, is instructive. In *Lori Rubinstein*, like here, plaintiffs alleged that defendant's conduct was "unfair" under the UCL because this conduct violated "the policy or spirit of the" relevant statute. *Id.* Thus, the *Lori Rubinstein* plaintiffs, like Plaintiffs here, argued that even if their claim under the relevant statute "fails, they have stated **[*46]** an unfair competition claim because the conduct they allege violates the policy and spirit of" the relevant statute and thus is "unfair" under the UCL. *Id.* The *Lori Rubinstein* Court rejected this argument. *Id.* The *Lori Rubinstein* Court explained that the Legislature may "limit the judiciary's power to declare conduct unfair" under the UCL. *Id. at 1142*. Specifically, ***HN16***[] when "the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination." *Id.* The *Lori Rubinstein* Court explained that the Legislature exempted the alleged conduct from enforcement under the relevant statute. *Id.* Accordingly, defendants could not be liable under the "general unfair competition law" because defendant's conduct was expressly exempted from the relevant "tethered" statute. *Id.*

So too here. Plaintiffs allege that SCU violated the "policy or spirit of" *California Education Code § 94897(d)* and thus have adequately pled that SCU violated the "unfair" prong of the UCL. Opp'n at 11-12. However, just like in *Lori Rubeinstein*, the California Legislature expressly exempted SCU's conduct from the prohibitions in *section 94897(d)*. Because SCU, like defendants in *Lori Rubinstein*, is exempt from the **[*47]** prohibited conduct in the "tethered" statute, Plaintiffs cannot show that SCU's conduct was "unfair" under the UCL. *See* *Lori Rubinstein, 148 Cal. App. 4th at 1142*.

Plaintiffs' reliance on *In re Zoom Video Comms. Inc. Privacy Litig., 525 F. Supp. 3d 1017 (N.D. Cal. 2021)*, and *In re Adobe Systems, Inc. Privacy Litig., 66 F. Supp. 3d 1197 (N.D. Cal. 2014)*, is unpersuasive. Opp'n at 11-12. In both cases, this Court explained that "Plaintiffs do not need to plead any direct violations of a statute" to successfully allege a claim under the "unfair" prong of the UCL. *In re Zoom, 525 F. Supp. 3d at 1047-48* (quoting *In re Adobe, 66 F. Supp. 3d at 1227*). However, the Court did not hold in either case that plaintiffs can successfully allege a UCL claim under the "unfair" prong when the defendant is expressly exempt from the "tethered" statute. Neither the *In re*

Zoom defendant, nor the *In re Adobe* defendant, argued it was exempt from the relevant statutes and thus the issue was not before the Court. Accordingly, these cases are inapposite.

Moreover, as published Ninth Circuit precedents have long required, ***HN17***[] this Court sitting in diversity "must follow the decision of the intermediate appellate courts of the state unless there is convincing evidence that the highest court of the state would decide differently." *Daniel v. Ford Motor Co., 806 F.3d 1217, 1222 (9th Cir. 2015)* (quoting *In re Schwarzkopf, 626 F.3d 1032, 1038 (9th Cir. 2010)*); *accord, e.g., Cmty. Nat. Bank v. Fid. & Deposit Co. of Maryland, 563 F.2d 1319, 1321 n.1 (9th Cir. 1977)* (same). Plaintiffs present no evidence that the California Supreme Court would disagree with the *Lori Rubinstein* Court.

Plaintiffs **[*48]** thus fail to state a claim under the "unfair" prong of the UCL.

2. Plaintiffs fail to plead "unlawful" conduct.

Plaintiffs' claim that SCU violated the "unlawful" prong of the UCL similarly fails. Plaintiffs allege that SCU violated the "unlawful" prong of the UCL because SCU violated *California Education Code § 94897(d)*. SCU argues that there can be no violation because SCU is exempt from that statute. Mot. at 19. Plaintiffs have no rejoinder and have thus abandoned this claim. *See Diamond S.J. Enter., Inc. v. City of San Jose, No. 18-CV-01353-LHK, 2018 U.S. Dist. LEXIS 185066, 2018 WL 5619746, at *4 (N.D. Cal. Oct. 29, 2018)* ("An opposition brief's failure to address a motion to dismiss' challenges to a claim constitutes abandonment of that claim.").

Moreover, SCU is correct on the law. ***HN18***[] Because the UCL borrows violations from other laws, the "violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong." *Berryman v. Merit Property Mgmt., Inc., 152 Cal. App. 4th 1544, 1554-55, 62 Cal. Rptr. 3d 177 (Ct. App. 2007)*. Here, as discussed above, SCU is exempt from *California Education Code § 94897(d)*. Therefore, there can be no predicate violation under *section 94897(d)*, and without such a violation Plaintiffs fail to plead a cause of action under the "unlawful" prong of the UCL.

Perhaps realizing the futility of their *section 94897(d)* arguments, Plaintiffs pivot and instead argue in their opposition brief that a "breach of an implied contract can support a claim under the unlawful prong of the UCL." Opp'n **[*49]** at 12. Even if true, Plaintiffs have inadequately pled breach of implied-in-fact contract. *See* Section IV-B, *supra*. With no breach of implied-in-fact contract, Plaintiffs cannot show a violation of the UCL under the "unlawful" prong.

Plaintiffs also face two additional hurdles. First, Plaintiffs already abandoned this exact theory in their opposition to SCU's prior motion to dismiss. Plaintiffs' first amended complaint alleged that SCU violated the "unlawful" prong of the UCL because SCU breached the implied-in-fact contract, and was liable for conversion and unjust enrichment. *See* ECF No. 25 ¶ 68. However, Plaintiffs then withdrew Plaintiffs' unlawful prong UCL claim in its opposition to SCU's prior motion to dismiss. *See* ECF No. 33 at 2 (stating that Plaintiffs "withdraw . . . the "claim under the 'unlawful' prong of the UCL.")

Second, and more important, Plaintiffs *have not* alleged in the SAC that SCU violated the "unlawful" prong of the UCL by breaching an implied-in-fact contract. The Court cannot look to the opposition for new allegations. *See Schneider, 151 F.3d 1194 at n.1* ("In determining the propriety of a *Rule 12(b)(6)* dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum **[*50]** in opposition to a defendant's motion to dismiss.").

As such, Plaintiffs inadequately plead a UCL claim.

V. CONCLUSION

Plaintiffs' three complaints have all alleged the same two claims: (1) SCU breached an implied-in-fact contract; and (2) SCU violated the UCL under the "unfair" and "unlawful" prongs. *See* ECF Nos. 1, 25, 52. Prior to the Court's March 29, 2021 Order, SCU twice pointed out the deficiencies in Plaintiff's breach of implied-in-fact contract and UCL claims in two separate motions to dismiss. *See* ECF Nos. 21, 32. Subsequently, in the March 29, 2021 Order, the Court dismissed Plaintiff's first amended complaint with leave to amend the breach of implied-in-fact contract and UCL claims. *See* *Abuelhawa I, 529 F. Supp. 3d at 1072*. However, the Court warned Plaintiffs that "failure to cure the deficiencies identified in this order or SCU's motion to dismiss will result in dismissal of the deficient claims with prejudice." *Id.*

SCU's third motion to dismiss persuasively points out that the SAC, which is Plaintiffs' third complaint, fails to cure the deficiencies identified in the Court's March 29, 2021 Order. In the SAC, Plaintiffs made *no* new factual allegations about SCU's specific promises to provide in-person instruction, **[*51]** the only theory Plaintiffs pled in the first amended complaint to support the breach of implied-in-fact contract and UCL claims. *See* ECF No. 53 (Plaintiffs' redline comparing SAC to prior complaint). Instead, Plaintiffs' SAC pleads new, unpersuasive theories to support the breach of implied-in-fact contract and UCL claims. In their opposition to the instant motion to dismiss, Plaintiffs also largely request reconsideration of the March 29, 2021 Order. Opp'n at 1. However, none of Plaintiffs' new theories cure the deficiencies in the breach of implied-in-fact contract or UCL claims. Thus far, Plaintiffs have already filed three complaints, and SCU has already filed three motions to dismiss. Plaintiffs' failure to adequately plead their claims in three attempts shows that further amendment is futile. *See Carvalho, 629 F.3d at 892* (courts may deny leave to amend when Plaintiff "repeated[ly] fail[s] to cure deficiencies by amendments previously allowed."); *see also* *Leadsinger, 512 F.3d at 532* (leave to amend generally shall be denied if further amendment would be futile). Allowing further amendment would also result in undue delay and prejudice to SCU by making SCU file and litigate a *fourth* motion to dismiss when Plaintiffs effectively **[*52]** failed to allege any new facts in its third complaint, *see* ECF No. 53. *See* *Leadsinger, 512 F.3d at 532* (leave to amend generally shall be denied if allowing further amendment would result undue delay and prejudice to the defendant).

For the foregoing reasons, the Court GRANTS SCU's motion to dismiss Plaintiffs' Second Amended Complaint with prejudice.

IT IS SO ORDERED.

Dated: November 29, 2021

/s/ Lucy H. Koh

LUCY H. KOH

United States District Judge

JUDGMENT

On November 29, 2021, the Court dismissed the instant action with prejudice. ECF No. 70. Judgment is entered in favor of the defendant. The Clerk shall close the file.

IT IS SO ORDERED.

Dated: November 29, 2021

/s/ Lucy H. Koh

LUCY H. KOH

United States District Judge

United States v. Jindal

United States District Court for the Eastern District of Texas, Sherman Division

November 29, 2021, Decided; November 29, 2021, Filed

Civil Action No. 4:20-CR-00358

Reporter

2021 U.S. Dist. LEXIS 227474 *; 2021 WL 5578687

UNITED STATES OF AMERICA, v. NEERAJ JINDAL (1) JOHN RODGERS (2)

Subsequent History: Reconsideration denied by *United States v. Rodgers, 2022 U.S. Dist. LEXIS 54486 (E.D. Tex., Mar. 25, 2022)*

Motion denied by *United States v. Jindal, 2022 U.S. Dist. LEXIS 61784, 2022 WL 997174 (E.D. Tex., Apr. 1, 2022)*

Motion granted by *United States v. Rodgers, 2022 U.S. Dist. LEXIS 65793 (E.D. Tex., Apr. 8, 2022)*

Core Terms

Indictment, price-fixing, non-prosecution, price fixing, Sherman Act, conspiracy, declaration, alleges, oral agreement, buyers, terms, per se violation, essential terms, per se rule, antitrust, courts, parol evidence rule, wage fixing, cooperate, lenity, prices, motion to dismiss, horizontal, interview, parties, sellers, fix prices, quotations, ambiguity, argues

Counsel: **[*1]** For Neeraj Jindal, Defendant: Paul Edward Coggins, LEAD ATTORNEY, Bradley Carroll Weber, Brendan Patrick Gaffney, Locke Lord LLP - Dallas, Dallas, TX.

For John Rodgers, Defendant: Brian Daniel Poe, Brian D. Poe, Attorney at Law, PLLC, Fort Worth, TX.

For USA, Plaintiff: Jariel A Rendell, LEAD ATTORNEY, US Department of Justice, Antitrust Division, Washington, DC; Matthew William Lunder, LEAD ATTORNEY, Doha Gamal Mekki, Rachel Danielle Kroll, US Department of Justice, Antitrust Division, Washington, DC.

Judges: AMOS L. MAZZANT, UNITED STATES DISTRICT JUDGE.

Opinion by: AMOS L. MAZZANT

Opinion

MEMORANDUM OPINION AND ORDER

Pending before the Court is Defendant Neeraj Jindal's Motion to Dismiss Count One of the First Superseding Indictment (Dkt. #36), and Defendant John Rodgers' Motion to Dismiss the Superseding Indictment (Dkt. #45). Having considered the motions and the relevant pleadings, the Court finds the motions should be **DENIED**.

FACTUAL BACKGROUND

One December 12, 2020, the Government filed an indictment against Neeraj Jindal ("Jindal") (Dkt. #1), and on April 15, 2021, the Government filed the First Superseding Indictment (hereinafter "Indictment") as to Neeraj Jindal and John Rodgers ("Rodgers") (Dkt. #21). Pursuant **[*2]** to the Indictment, Defendants were charged with violating the following statutes: 1) *15 U.S.C. § 1* (Antitrust Conspiracy: Price Fixing under the *Sherman Act*); 2) *18 U.S.C. § 371* (Conspiracy to Commit Offense); and 3) *18 U.S.C. §§ 1505* and *2* (Obstruction of Proceedings before the Federal Trade Commission).

The complexity of this case warrants a recitation of the events leading up to the Indictment. Jindal owned a therapist staffing company, which the Indictment refers to as "Company A" (Dkt. #21 ¶ 5). Rodgers was a physical therapist who contracted with Company A and was a clinical director of Company A (Dkt. #21 ¶ 6). Rodgers reported to Jindal in his work (Dkt. #21 ¶ 6).

Company A contracted with physical therapists ("PTs") and physical therapist assistants ("PTAs") to provide in-home physical therapy to patients (Dkt. #21 ¶ 7). Therapist staffing companies such as Company A receive patient referrals from home health agencies and act as "middlemen," staffing their PTs or PTAs to provide in-home patient care (Dkt. #21 at ¶¶ 1-2). Therapist staffing companies compete with each other to contract with or employ PTs and PTAs (Dkt. #21 ¶ 4). Each PT and PTA who contracted with Company A had set prices (a "rate" or "pay rate") that Company A paid **[*3]** them for providing in-home care visits (Dkt. #21 ¶ 7). Company A billed home health agencies set prices (the "bill rate") for providing the services (Dkt. #21 ¶ 7). The difference between the pay rates that Company A paid to its PTs and PTAs and the bill rates that it billed to the home health agencies constituted Company A's margin (Dkt. #21 ¶ 7).

Count One of the Indictment charges Defendants with violating *15 U.S.C. § 1 of the Sherman Act*. More specifically, Count One states:

> From in or around March 2017 to in or around August 2017 (the Relevant Period"), in the Eastern District of Texas and elsewhere, Jindal, Rodgers, and co-conspirators knowingly entered into and engaged in a conspiracy to suppress competition by agreeing to fix prices by lowering the pay rates to PTs and PTAs. The conspiracy engaged in by Jindal, Rodgers, and co-conspirators was a *per se* unlawful, and thus unreasonable, restraint of interstate trade and commerce in violation of *Section 1 of the Sherman Act* (*15 U.S.C. § 1*).

(Dkt. #21 ¶ 11).

The Indictment alleges that on March 10, 2017, Rodgers, acting on behalf of Jindal and Company A, texted with the owner of a competing staffing company, Individual 2, regarding the rates that Company A and Individual 2's staffing company paid **[*4]** their PTs and PTAs (Dkt. #21 ¶ 12(a)). During the text exchange, Rodgers texted Individual 2, asking, "[h]ave you considered lowering PTA reimbursement" and stating, "I think we're going to lower PTA rates to $45" (Dkt. #21 ¶ 12(a)). Individual 2 responded, "[y]es I agree" and "I'll do it with you" (Dkt. #21 ¶ 12(a)). Rodgers responded with a "thumbs up" emoji and texted, "I feel like if we're all on the same page, there won't be a bunch of flip flopping and industry may stay stable" (Dkt. #21 ¶ 12(a)). According to the Indictment, Rodgers reported back to Jindal regarding this text message conversation with Individual 2 (Dkt. #21 ¶ 12(a)).

The Indictment further alleges that, following the text exchange between Rodgers and Individual 2, Jindal texted the owners of other therapist staffing companies to recruit additional competitors to join the conspiracy to collectively lower rates (Dkt. #21 ¶ 12(b)). Specifically, on March 10, 2017, Jindal separately texted at least four other owners of therapist staffing companies, saying "I am reaching out to my counterparts about lowering PTA rates to $45. What are your thoughts if we all collectively do it together?" (Dkt. #21 ¶ 12(b)). Jindal **[*5]** further texted each owner that he had Individual 2's company "on board" (Dkt. #21 ¶ 12(b)).

The Indictment then references another text exchange between Rodgers and Individual 2 that took place on March 17, 2017 (Dkt. #21 ¶ 12(c)). Rodgers stated: "FYI we made rate changes effective next payroll Monday decreasing PT's and PTA's" (Dkt. #21 ¶ 12(c)). Individual 2 responded: "Well I can join in where did u go" (Dkt. #21 ¶ 12(c)). According to the Indictment, Rodgers and Individual 2 subsequently exchanged text messages regarding their companies' pay rates for PTs and PTAs (Dkt. #21 ¶ 12(c)). And, pursuant to the agreement, Company A thereafter paid lower rates to certain PTs and PTAs (Dkt. #21 ¶ 12(d)).

On May 25, 2021, Jindal filed his Motion to Dismiss Count One of the First Superseding Indictment (Dkt. #36). On June 18, 2021, Rodgers filed his Motion to Dismiss the Superseding Indictment (Dkt. #45). In Rodgers' motion, he incorporated the arguments in Jindal's motion and added a separate argument alleging the Government's prosecution of him breached an oral agreement (Dkt. #45). The United States Responded to Jindal's Motion on June 22, 2021 (Dkt. #46) and responded to Rodgers' Motion **[*6]** on July 16, 2021 (Dkt. #48). Jindal filed a Reply on July 6, 2021 (Dkt. #47). Rodgers filed a Reply on July 30, 2021 (Dkt. #50).

STATUTORY BACKGROUND

Since Count One of the Indictment charges Defendants with violating *§ 1 the Sherman Act*, the Court finds it helpful to provide an overview of the Sherman Act before turning to Defendants' arguments. The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. The Supreme Court, however, "has not taken a literal approach" in interpreting this language. *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*. Instead, the Supreme Court has found *§ 1* "outlaw[s] only *unreasonable* restraints." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)* (emphasis added). In determining whether a restraint is unreasonable, and thus unlawful, courts use one of two rules of decision. *MM Steel, L.P. v. JSW Steel (USA) Inc., 806 F.3d 835, 848 (5th Cir. 2015)*.

Most restraints under *§ 1* are analyzed under the so-called rule of reason. *Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. As its name suggests, the rule of reason requires a context-specific inquiry to "distinguish[] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. Rule of reason analysis involves "analyzing the facts peculiar to the business, **[*7]** the history of the restraint, and the reasons why it was imposed." *Nat'l Soc'y of Prof. Eng'r v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*.

A smaller group of restraints under *§ 1* are at the outset "deemed unlawful *per se*" dispensing with the need for case-by-case evaluation. *Kahn, 522 U.S. at 10*. These restraints are unreasonable *per se* because the conduct at issue is "manifestly anticompetitive" and "always or almost always tend[s] to restrict competition and decrease output." *Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)* (internal citations omitted). *Per se* treatment is reserved for "only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *Dagher, 547 U.S. at 5* (internal citations omitted). Thus, "the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue" in order to determine whether it has the requisite "manifestly anticompetitive effect[]." *Leegin, 551 U.S. at 886* (quotation omitted).

"Typically only 'horizontal' restraints—restraints 'imposed by agreement between competitors'—qualify as unreasonable *per se*." *Ohio v. Am. Express Co., 138 S.Ct. 2274, 2283-84, 201 L. Ed. 2d 678 (2018)* (quoting *Bus. Elecs., 485 U.S. at 730*). Courts have found three types of horizontal restraints to be *per se* violations of the Sherman Act: price fixing, market allocation, and bid rigging.[1] *See, e.g., Dagher, 547 U.S. at 5* (price fixing); *Palmer v. BRG of Ga, Inc., 498 U.S. 46, 49-50, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)* (market allocation); *United States v. Young Brothers Inc., 728 F.2d 682, 687 (5th Cir. 1984)* (bid rigging). **[*8]** If a naked trade restraint falls in one of these forms, it is summarily condemned *per se* illegal.

The Sherman Act is enforced both criminally and civilly. *See United States v. U.S. Gypsum Co., 438 U.S. 422, 438, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)* ("Both civil remedies and criminal sanctions are authorized with regard to

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[1] Certain types of group boycotts have also been found to be *per se* illegal, but "precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors." *NYNEX Corp. v. Discon, Inc. 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*.

the same generalized definitions of the conduct proscribed."). But the Department of Justice has a longstanding policy of only bringing criminal antitrust prosecutions based on *per se* violations of the Act. *See* *United States v. Kemp & Assocs, Inc. 907 F.3d 1264, 1274 (10th Cir. 2018)* (noting that the United States Attorney's Antitrust Manual states that "current Antitrust Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements."). Whether the allegations in an Indictment constitute a *per se* violation is a legal question for the court. *MM Steel, 806 F.3d at 847* ("The decision to analyze the conspiracy under a per se theory of liability is a question of law . . . ."); *see also* *Maricopa Cnty, 457 U.S. at 337 n.3, 354*.

LEGAL STANDARD

An indictment is subject to dismissal for the Government's failure to state an offense. *See* *FED. R. CRIM. P. 12(b)(3)(B)*. This means that, taking the Government's allegations as true, *United States v. Fontenot, 665 F.3d 640, 644 (5th Cir. 2011)*, the indictment must state the elements of each offense and facts "sufficient to permit the defendant to plead former jeopardy in a subsequent **[*9]** prosecution." *United States v. Contris, 592 F.2d 893, 896 (5th Cir. 1979)*. Indictments are read as a whole, and "[t]he sufficiency of an indictment is to be tested by practical rather than technical considerations." *Id.* Indeed, "the law does not compel a ritual of words." *United States v. Ratcliff, 488 F.3d 639, 643 (5th Cir. 2007)* (citation omitted). As such, an indictment will not be dismissed based on minor deficiencies or because it "could have been more artfully or precisely drawn." *Contris, 592 F.2d at 896*. Courts generally measure the sufficiency of an indictment "by whether (1) each count contains the essential elements of the offense charged, (2) the elements are described with particularity, without any uncertainty or ambiguity, and (3) the charge is specific enough to protect the defendant against a subsequent prosecution for the same offense." *United States v. Threadgill, 172 F.3d 357, 366 (5th Cir. 1999)* (citation omitted).

ANALYSIS: JINDAL'S MOTION

In the present motion, Jindal argues that Count One of the Indictment should be dismissed for two main reasons (Dkt. #36). First, he argues that Count One fails to state an offense under *Federal Rule of Criminal Procedure 12(b)(3)(B)(v)* because it does not identify a *per se* Sherman Act violation (Dkt. #36 at p. 1). Second, Jindal argues that Count One violates due process under the *Fifth* and *Sixth Amendments* because he did not receive "fair warning" the conduct was criminal, and the *per se* designation **[*10]** improperly promotes a presumption of intent (Dkt. #36 at pp. 13-14). Rodgers adopts Jindal's arguments for Count One and also moves to dismiss the Indictment on the basis that the Government has breached an alleged oral agreement not to prosecute him. Because both Defendants move to dismiss Count One on the same grounds, the Court will address the arguments pertaining to Count One in Jindal's motion first before addressing Rodgers' separate argument.

I. Sufficiency of the Indictment—Do the Allegations in the Indictment Constitute a *Per Se* Violation of the Sherman Act?

In Count One of the Indictment, Defendants were charged with conspiracy to fix prices in violation of *§ 1 of the Sherman Act*. The Indictment further alleges that the alleged conspiracy was a *per se* violation of the Sherman Act (Dkt. #21 ¶ 11) ("The conspiracy engaged in by Jindal, Rodgers, and co-conspirators was a *per se* unlawful, and thus unreasonable, restraint of interstate trade and commerce in violation of *Section 1 of the Sherman Act*."). Accordingly, in the Government's view, to obtain conviction, it does not need to prove market power, intent, or any anticompetitive effects on trade—it simply must prove the bare fact that an agreement existed. This is further reflected by the Indictment—it does not allege any of the elements of a rule-of-reason offense. Thus, the Indictment can only stand if the allegations in it constitute a *per se* violation of the Sherman Act. Stated **[*11]** differently, the Indictment must be dismissed if it fails to state a cognizable *per se* offense under the Sherman Act. Whether the allegations in the Indictment constitute a *per se* violation is a question of law for the Court. *MM Steel, 806 F.3d at 847*.

For over 100 years, the Supreme Court has consistently held that price-fixing agreements are unlawful *per se* under the Sherman Act. *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*. In fact, the Supreme Court has stated that "[n]o antitrust offense is more pernicious than price fixing." *Fed. Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621, 639, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)*. Defendants do not dispute that the Supreme Court has designated price fixing as a *per se* Sherman Act violation (Dkt. #47 at p. 3). But Defendants do dispute that the Indictment in-fact alleges a price-fixing agreement (Dkt. #47 at p. 4).

The core of Defendants argument is that the Indictment does not allege a price-fixing agreement because it "[a]t most[] alleges an agreement to fix wages" (Dkt. #36 at p. 13). According to Defendants, though the Indictment uses the word "prices" to refer to the "pay rates" for the PTs and PTAs, the "appropriate word" to describe the "pay rates" is "wages" because the rates constitute compensation for the PTs' and PTAs' labor (Dkt. #36 at p. 13). Thus, Defendants argue that the "Indictment does not allege any agreement to **[*12]** fix 'prices'" because "[w]ages do not fall within the definition of 'price fixing,' which is defined as 'fixing . . . the price of a commodity'" (Dkt. #36 at p. 12-13). Further, according to Defendants, "[m]erely substituting the word 'prices' for 'wages' does not transform the factual allegations from alleging a wage-fixing agreement to alleging a price-fixing agreement" (Dkt. #47 at p. 4). But Defendants' narrow view of horizontal price-fixing agreements reveals the flaw in their arguments.

A. Price-Fixing Agreements Come in Many Forms.

The scope of conduct found to constitute horizontal price-fixing agreements warranting application of the *per se* rule is broad. For example, courts have applied the *per se* rule to price-fixing agreements: 1) establishing minimum prices, *United States v. Trenton Potteries Co., 273 U.S. 392, 401, 47 S. Ct. 377, 71 L. Ed. 700 (1927)*; 2) setting maximum prices, *Maricopa Cnty., 457 U.S. at 335*; 3) fixing credit terms, *Catalano, Inc. v. Target Sales Inc., 446 U.S. 643, 648, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980)*; 4) setting fee schedules, *Goldfarb v. Va. State Bar, 421 U.S. 773, 783, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)*; 5) purchasing surplus product to keep it off the market, *Socony-Vacuum, 310 U.S. at 167*; 6) refusing to advertise prices, *United States v. Gasoline Retailers Ass'n, 285 F.2d 688, 691 (7th Cir. 1961)*; and 7) excluding purchasers unless they increased the price they paid for a service, *FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 436 n.19, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990)*. Thus, contrary to Defendants' argument, "price fixing" has not been limited to conduct that literally directly "fix[es] . . . the price of a commodity." (**[*13]** *See* Dkt. #36 at p. 13). Instead, as the above cases and many more have recognized, the definition of horizontal price-fixing agreements cuts broadly. As such, any naked agreement among competitors—whether by sellers or buyers—that fixes components that affect price meets the definition of a horizontal price-fixing agreement. *See* *Socony-Vacuum, 310 U.S. at 221* ("Any combination which tampers with price structures is engaged in an unlawful activity."); *Jacobi v. Bache & Co., Inc., 377 F. Supp 86, 95-96 (S.D.N.Y 1974)* ("When the purpose of an agreement is to fix or stabilize prices, even if the means used affects only one element of the price structure, or only indirectly affects prices, the agreement is illegal per se . . . .")

The Court recognizes that the facts of this case do not present those typical of a price-fixing agreement. For example, the classic horizontal price-fixing scheme involves an agreement among sellers to fix the prices of goods they sell. But just because the typical price-fixing conspiracy involves certain hallmarks does not mean that other less prevalent forms of price-fixing agreements are not likewise unlawful. Indeed, Courts have not limited price-fixing conspiracies to agreements concerning the purchase and sale of goods but have found them to cover the **[*14]** purchase and sale of services. *See* *Goldfarb, 421 U.S. at 783* (finding that minimum fee schedule for lawyers services' "constitute[d] a classic illustration of price fixing"); *Superior Ct. Trial Laws. Ass'n, 493 U.S. at 423* (finding that lawyers' boycott aimed at forcing increase of compensation paid to them was "the essence of 'price fixing[.]'"). More importantly, courts have also not only found price-fixing agreements among sellers, but also among buyers. *See* *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)* ("It is clear that the agreement is the sort of combination condemned by the Act, even though the price-fixing was by purchasers, and the persons specially injured . . . are sellers, not customers or consumers."); *Nat'l Macaroni Mfrs. Ass'n v. Fed. Trade Comm'n., 345 F.2d 421, 426-27 (7th Cir. 1995)* (finding a price-fixing agreement among manufacturers to standardize the composition of their product in an effort to depress the price of an essential raw material to be illegal *per se*). In sum, price-fixing agreements come in many forms and include agreements among competing buyers of services.

B. The Sherman Act Prohibits Conspiracies Among Buyers of Labor.

The Supreme Court has made clear that the Sherman Act applies equally to all industries and markets—to sellers and buyers, to goods and services, and consequently to buyers of services—otherwise known as employers in the labor market. *See* *Anderson v. Shipowners' Ass'n of Pac. Coast, 272 U.S. 359, 361-65 , 47 S. Ct. 125, 71 L. Ed. 298(1926)*. More than **[*15]** a century ago, the Supreme Court recognized that the Sherman Act applies to labor markets. *Id.* In *Anderson*, along with other restraints that were imposed on the seamen to control their employment, the "[shipowners] fix[ed] the wages which shall be paid to the seamen." *272 U.S. at 362*. The Court found that this conduct, along with the other restraints on labor by the employers, violated the Sherman Act. *Id. at 365*. Thus, there is little doubt that "[t]he Sherman Act . . . applies to abuse of market power on the buyer side . . . ." *Todd v. Exxon Corp., 275 F.3d 191, 201 (2d Cir. 2001)* (Sotomayor, J); *see also* *All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc., 135 F.3d 740, 747 (11th Cir. 1998)* ("That price fixing is equally violative of antitrust laws whether it is done by buyers or sellers is also undisputed.").

C. The Indictment Alleges a Price-Fixing Agreement That Is *Per Se* Illegal.

With these principles in mind, the Court turns to the Indictment to determine if it alleges a price-fixing agreement that is *per se* illegal. *MM Steel, 806 F.3d at 847*. The Indictment alleges that "Jindal, Rodgers, and co-conspirators knowingly entered into and engaged in a conspiracy to suppress competition by agreeing to fix prices by lowering the pay rates to PTs and PTAs" (Dkt. #21 ¶ 11). The Indictment thus alleges a naked price-fixing conspiracy among buyers in the labor market to fix the pay rates of the PTs and PTAs. As **[*16]** such, the Indictment describes a price-fixing conspiracy that is *per se* unlawful. *See* *Socony-Vacuum, 310 U.S. at 222* ("[T]he Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike."). In other words, to summarize, the scope of anticompetitive conduct that constitutes price fixing is broad—it covers agreements among buyers in the labor market. And the *per se* rule applies to naked price-fixing agreements categorically. Accordingly, the Indictment sufficiently alleges a price-fixing conspiracy that warrants the *per se* rule.

D. Fixing the Price of Labor, or Wage Fixing, is a Form of Price Fixing and Thus Illegal *Per Se*.

Defendants do not dispute that price-fixing agreements are *per se* illegal; they do, however, challenge how the Government labeled the offense and whether the charged conduct constitutes a *per se* offense (Dkt. #36 at p. 8). But, contrary to Defendants' argument, whether the Indictment refers to the "pay rates" of the PTs and PTAs as "prices" or "wages" does not affect the outcome. *See* L. Sullivan, Handbook of the Law of Antitrust, s 74, at 198 (1977) ("The antitrust laws concern substance, not form, in the preservation of competition."). The antitrust **[*17]** laws fully apply to the labor markets, and price-fixing agreements among buyers—like therapist staffing companies—are prohibited by the Sherman Act. *See* *Anderson, 272 U.S. at 361-65*. At bottom, the alleged agreement between Defendants and co-conspirators had the purpose and effect of fixing the pay rates of the PTs and PTAs—the price of labor. When the price of labor is lowered, or wages are suppressed, fewer people take jobs, which "always or almost always tend[s] to restrict competition and decrease output." *See* *Bus. Elecs. Corp., 485 U.S. at 723*. This type of agreement is plainly anticompetitive and has no purpose except stifling competition. *See* *All Care Nursing Serv., Inc, 135 F.3d at 748* ("The key to per se treatment is whether the conduct is of the kind that can only be anticompetitive."). Indeed, "[b]uyers' cartels engaged in price fixing have been held to be illegal under the Sherman Act even though their goal is to lower the price of the input." *Int'l Outsourcing Servs, LLC v. Blistex, Inc., 420 F. Supp. 2d. 860, 864 (N.D. Ill. 2006)*.

Additionally, contrary to Defendants' argument, that the Indictment lacks allegations that Defendants "made any agreement to fix prices paid by consumers" does not mean the Indictment fails to state a price-fixing agreement (*see* Dkt. #36 at p. 13). The Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or sellers." *Mandeville, 334 U.S. at 236*. Rather, **[*18]** the statute protects "all who are made victims of the forbidden practices by whomever they may be perpetrated," and those protections extend to sellers of goods and services—such as the PTs and PTAs—to the same extent they do buyers, consumers, or competitors. *Id.* Besides, "[j]ust as ***antitrust law*** seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services." *Roman v. Cessna Aircraft Co., 55 F.3d 542, 544 (10th Cir. 1995)* (quoting II Phillip Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 377c (rev. ed. 1995)). As *Anderson* makes clear, employees are no less entitled to the protection of the Sherman Act than are consumers. *See 272 U.S. at 364-65*.

Justice Kavanaugh's recent concurrence in *National Collegiate Athletic Ass'n v. Alston* provides further support for the conclusion that fixing the price of labor, or wage fixing, is a form of price fixing. *141 S. Ct. 2141, 210 L. Ed. 2d 314 (2021)*. In *Alston*, the Supreme Court addressed wage fixing by the NCAA—namely the NCAA's cap on education-related compensation that student-athletes are eligible to receive. *Id. at 2147*. In his concurrence, Justice Kavanaugh unequivocally asserts: "Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because **[*19]** it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work." *Id. at 2167-68* (Kavanaugh, J., concurring) (citations omitted). Thus, in Justice Kavanaugh's mind, wage fixing is price fixing—price fixing of labor. *See id.*

While Defendants correctly state that *Alston* does not classify wage fixing as a *per se* violation,[2] Justice Kavanaugh's concurrence is significant because he characterizes wage fixing as price fixing. *See id.* And, "[i]t has long been settled that an agreement to fix prices is unlawful *per se*." *Catalano, 446 U.S. at 647*. Thus, outside the extraordinary context at issue in *Alston*, naked horizontal agreements to fix the price of labor, like the agreement here, are ordinarily *per se* illegal.

E. Other Courts Have Recognized that Wage-Fixing Conspiracies Are *Per Se* Unlawful as Price-Fixing Agreements.

Other courts have also recognized that wage-fixing conspiracies—or horizontal agreements among buyers in the labor market—are illegal *per se* like other price-fixing agreements. *See Todd, 275 F.3d at 198* ("If the plaintiff in this case could allege that defendants actually formed an agreement to fix [] salaries, [the] *per se* rule would likely apply."); *Law v. NCAA, 134 F.3d 1010, 1017 (10th Cir. 1998)* (finding that NCAA rule **[*20]** limiting salary of basketball coaches would ordinarily be a *per se* violation of *§ 1 of the Sherman Act*); *In re Animation Workers Antitrust Litig., 123 F. Supp. 3d 1175, 1179-84 (N.D. Cal. 2015)* ("[T]he Court concludes that [p]laintiff[-employees] have alleged sufficient facts to support a plausible *per se* claim that [d]efendant[-employers] allegedly conspired to suppress the compensation of the putative class."); *Cason-Merenda v. Detroit Med. Ctr., 862 F. Supp. 2d 603, 624-25 (E.D. Mich. 2012)* (noting plaintiffs and defendants agreed that wage fixing "like an analogous horizontal price-fixing conspiracy" should be characterized as a *per se* violation); *Fleischman v. Albany Med. Ctr., 728 F. Supp. 2d. 130, 157 (N.D.N.Y. 2010)* ("Generally, price-fixing [or in this case wage-fixing] agreements are considered a per se violation of the Sherman Act.") (alterations in original) (internal quotations and citations omitted); *Doe v. Ariz. Hosp. & Healthcare Ass'n, No. CV07-1292, 2009 U.S. Dist. LEXIS 42871, 2009 WL 1423378, at *3-4 (D. Ariz. Mar. 19, 2009)* (finding complaint that alleged defendant-hospitals conspired to keep temporary nursing wages below free market level should survive motion to dismiss because agreement was a *per se* illegal price-fixing agreement);

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[2] In *Alston*, the Supreme Court affirmed a judgment that evaluated the NCAA's limit on education-related compensation under the rule of reason. *Id at 10-11* (majority opinion). However, for many years, the Supreme Court has declined to condemn the NCAA's restraints as illegal *per se* because the "horizontal restraints on competition are essential if the product is to be available at all." *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. In these situations—where collaboration is essential among certain actors for there to be a product at all—the rule of reason applies regardless of the nature of the restraint at issue. *See id. at 103*. Accordingly, contrary to Defendants' argument, that the Supreme Court evaluated the NCAA's wage-fixing under the rule of reason does not justify the rule of reason in this case.

Cordova v. Bache & Co., 321 F. Supp. 600, 606 (S.D.NY. 1970) ("There can be little doubt about the fact that if a group of employers, as the complaint here alleges, were allowed . . . to agree together to reduce the commissions paid to their respective employees, they would have the same power to restrain competition as is inherent in a price-fixing agreement.").

Though Defendants **[*21]** take issue with the fact that all the cases that have labeled wage fixing as a *per se* violation are civil cases, (*see* Dkt. #47 at p. 5), the distinction is irrelevant. Just because this is the first time the Government has prosecuted for this type of offense does not mean that the conduct at issue has not been illegal until now. Rather, as these cases indicate, price-fixing agreements—even among buyers in the labor market—have been *per se* illegal for years.

F. There is Sufficient Judicial Experience with Price Fixing to Justify a *Per Se* Designation.

Defendants misapprehend the role of judicial experience in applying a *per se* designation to certain conduct. Defendants contend that agreements are deemed unlawful *per se* "only after courts have had considerable experience with the type of restraint at issue" (Dkt. #36 at p. 10) (quoting *Leegin, 551 U.S. at 886*). As a result, because neither the Supreme Court nor any Court of Appeals has ever determined whether a purported wage-fixing agreement is *per se* unlawful under *§ 1 of the Sherman Act*, Defendants argue there is insufficient judicial experience with wage fixing to justify a *per se* designation (Dkt. #36 a p. 9). Defendants are mistaken.

Judicial experience informs the decision **[*22]** to recognize a "*new per se* rule." *See* *Maricopa Cnty., 457 U.S. at 350 n.19* (emphasis in original). Price-fixing agreements, as horizontal restraints, have long been held to merit a *per se* designation. *Socony-Vacuum, 310 U.S. at 218*. Thus, courts "have [] considerable experience with the *type of restraint* at issue"—price-fixing agreements. See *Leegin, 551 U.S. at 886* (emphasis added). As courts have recognized, price-fixing agreements come in many forms. *See supra* pp. 8-10. And though no appellate court has ever specifically found that a price-fixing agreement among employers in the labor market is *per se* illegal does not mean the Court is recognizing a new *per se* rule. *See* *United States v. Andreas, 216 F.3d 645, 667 (7th Cir. 2000)* ("Yet the fact that the lysine producers' scheme did not fit precisely the characterization of a prototypical *per se* practice does not remove it from *per se* treatment."). Rather, a restraint that is "tantamount to" *per se* unlawful conduct "falls squarely within the tradition *per se* rule." *Catalano, 446 U.S. at 648*. Similarly, here, an agreement to fix the price of labor is "tantamount" to an agreement to fix prices, and "thus falls squarely within the traditional *per se* rule against price fixing." *See id.* Besides, the Supreme Court has explicitly rejected arguments like Defendants': "[T]he argument that the *per se* rule must **[*23]** be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules . . . ." *Maricopa Cnty., 457 U.S. at 351*.

Moreover, Defendants further argue that "[t]he need for further judicial experience and analysis is also evident" in light of the possibility that wage-fixing could "benefit[] consumers downstream through lower prices" and "encourage, rather than discourage, competitors" (Dkt. #36 at p. 11). In other words, *per se* designation is not appropriate because Defendants' conduct cannot be said to "lack any redeeming virtue" (Dkt. #36 at p. 11) (internal citations omitted). But the Supreme Court has also rejected similar arguments.

For example, in *Catalano*, the Supreme Court explicitly rejected similar procompetitive justifications that the court of appeals had relied upon—namely that the anticompetitive behavior at issue might actually decrease prices for consumers and increase competition by removing a barrier to market entry. *Id. at 649-50*. The Court stated that "[w]hile it may be that the elimination of a practice of giving variable discounts" may ultimately lead to a decrease in the invoice price, "[i]t is more realistic to view an agreement to eliminate credit sales **[*24]** as extinguishing one form of competition among the sellers." *Id. at 649*. Similarly, here, though an agreement to fix the price of labor could benefit consumers, "that is surely not necessarily to be anticipated" and that will not prevent it from being declared unlawful *per se. See id.* Undeniably, "Supreme Court jurisprudence is clear: where the per se rule applies, it is of no consequence that an agreement could potentially bring net economic benefits to some part of the market . . . ." *Kemp & Assocs., Inc. 907 F.3d at 1277*.

Further, in *Catalano*, the Supreme Court rejected the justification that an agreement to eliminate the practice of giving credit could actually enhance competition by removing a barrier to entry for other sellers. *446 U.S. at 649*. The Court reasoned, "it would seem to follow that the more successful an agreement is in raising the price level [or curtailing production], the safer it is from antitrust attack. Nothing could be more inconsistent with our cases." *Id.* Again, similarly, Defendants' argument that an agreement to fix the price of labor may "encourage, rather than discourage, competitors" misses the mark (*see* Dkt. #36 at p. 11). Time and time again, the Supreme Court has reiterated, "when a particular concerted activity entails **[*25]** an obvious risk of anticompetitive impact with no apparent potentially redeeming value, the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful *per se*." *Catalano, 446 U.S. at 649*.

G. Count One of the Indictment Sufficiently Charges a Conspiracy to Fix Price.

Since the Court has found that the allegations in the Indictment constitute a *per se* offense, the Court must next review the Indictment to determine whether it is legally sufficient on its face. To prove a *per se* violation of *15 U.S.C. § 1*, the Government must prove that (1) the defendant knowingly formed, joined, or participated in a contract, combination, or conspiracy; (2) its purpose was to fix, raise, maintain, or stabilize prices; and (3) the activities subject to the conspiracy occurred in the flow of interstate commerce or substantially affected interstate commerce. *15 U.S.C. § 1*; *Socony-Vacuum., 310 U.S. at 219-20, 223*; *United States v. Cargo Serv. Stations, Inc., 657 F.2d 676, 679, 681 (5th Cir. 1981)*.

Count One tracks the elements of a *per se* violation of *15 U.S.C. § 1*. It alleges that Defendants knowingly formed, joined, or participated in a conspiracy, that the conspiracy was meant to suppress competition by agreeing to fix prices,[3] and that the business activities occurred within the flow of, and substantially affected, interstate **[*26]** trade and commerce.[4] The Indictment therefore is legally sufficient on its face. It contains the "essential elements of the offense charged, [] the elements are described with particularity, without any uncertainty or ambiguity, and [] the charge is specific enough to protect Defendants against a subsequent prosecution for the same offense." *United States v. Lavergne, 805 F.2d 517, 521 (5th Cir. 1986)*.

Thus, Count One of the Indictment sufficiently alleges facts constituting a *per se* violation of the Sherman Act. Because the Court has found that the Indictment properly alleges a *per se* violation of the Sherman Act, the Court now turns to Defendants' next argument as to why the Court should dismiss Count One.

II. Constitutional Issues

Defendants argue that application of the *per se* rule is unconstitutional because it violates the *Fifth* and *Sixth Amendments of the U.S. Constitution* (Dkt. #36 at p. 15). Specifically, first, Defendants argue the Indictment violates the *Fifth Amendment* because it "violates the rule of lenity and fails to give fair warning of the prohibited conduct" (Dkt. #36 at pp. 15-16). Second, Defendants argue the Indictment violates the *Sixth Amendment* because it "improperly promotes a presumption of intent, vitiating the requirement of proof of state of mind in the criminal context" (Dkt. #36 at p. 16). The Court will address **[*27]** each argument in turn.

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[3] ". . . Jindal, Rodgers, and co-conspirators knowingly entered into and engaged in a conspiracy to suppress competition by agreeing to fix prices by lowering the pay rates to PTs and PTAs" (Dkt. #21 at pp. 3-4).

[4] "During the Relevant Period, the business activities of Jindal, Rodgers, and their co-conspirators that are the subject of the conspiracy charged in this Count were within the flow of, and substantially affected, interstate trade and commerce. For example, during the Relevant Period: (a) Insurance funds, including federal Medicare funds, traveled from banks or companies located in states outside of Texas through a home health agency to Company A in Texas, and from Company A to its PTs and PTAs to pay them for providing care to patients; (b) To provide care in patients homes and assisted living facilities, PTs and PTAs used equipment and vehicles purchased in interstate commerce; and (c) The conspiracy was intended to lower rates paid to PTs and PTAs, which would lessen their purchases in interstate trade and commerce" (Dkt. #21 at p. 6).

A. Defendants' *Fifth Amendment* Challenges Fail.

The *Fifth Amendment* provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property without due process of law . . . ." *U.S. CONST. amend. V*. As embodied by the "fair warning requirement," due process requires that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Lanier, 520 U.S. 259, 265, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997)* (internal quotations omitted).

The Supreme Court has identified "three related manifestations of the fair warning requirement." *Id. at 266*. "First, the vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* (internal quotations omitted). Second, the rule of lenity "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Id.* (citations omitted). And third, "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior **[*28]** judicial decision has fairly disclosed to be within its scope." *Id.* (citations omitted). To satisfy each of these requirements, a criminal statute, "standing alone or as construed" must "ma[k]e it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id. at 267*.

Defendants do not contend that the Sherman Act itself is unconstitutionally vague; rather, they argue that the Indictment violates the second and third manifestations of the fair warning requirement (Dkt. 47 at pp. 10-11). According to Defendants, because no court has found that purported wage-fixing agreements constitute criminal conduct and neither the Supreme Court nor any Court of Appeals has held wage fixing to be *per se* unlawful, then Defendants "could not possibly have had fair warning that the conduct alleged in the Indictment may be criminal" (Dkt. #36 at p. 18). Further, Defendants argue that because there is "a grievous uncertainty as to whether the Supreme Court condemns wage fixing as a *per se* antitrust violation," the rule of lenity mandates dismissal (Dkt. #47 at p. 11). In response, the Government argues "[t]his is not even close" because "the Supreme Court has long recognized that wage fixing is price **[*29]** fixing" (Dkt. #46 at p. 15 (citing *Anderson, 272 U.S. at 361-63*; *Superior Ct., 493 U.S. at 423, 427, 432, 436 n.19*)). While the issue is not as clear-cut as the Government suggests, Defendants' constitutional arguments fail.

i. The Defendants Received Fair Notice That Their Conduct Was Illegal.

The Indictment charges Defendants with price fixing. For more than 100 years, courts have repeatedly held price fixing as *per se* illegal under the Sherman Act. *Socony-Vacuum., 310 U.S. at 218*. Thus, Defendants could not have had any reasonable doubt that any price-fixing agreement was *per se* illegal. Defendants do not dispute this conclusion and instead insist that the "novel construction of the statute to construe '*wage fixing*' as *per se* unlawful . . . fails to give fair warning of the prohibited conduct" (Dkt. #36 at p. 15) (emphasis added). But this argument relies on the same semantical arguments this Court already rejected. *See supra* Part I.

Regardless of whether the Indictment characterizes Defendants' conduct as wage fixing or price fixing, the Sherman Act, in conjunction with the decades of case law, made it "reasonably clear" that Defendants' conduct was unlawful. *See Lanier, 520 U.S. at 267*. Indeed, most criminal statutes "deal with untold and unforeseen variations in factual situations," so "no more than a reasonable degree of certainty **[*30]** can be demanded." *Boyce Motor Lines v. United States, 342 U.S. 337, 340, 72 S. Ct. 329, 96 L. Ed. 367 (1950)*. Belaboring the point discussed in Part I, the Supreme Court has long recognized that price-fixing agreements come in many forms. *See Catalano, 446 U.S. at 647-50*; *see also supra* Part I pp. 8-10. And the Supreme Court has long recognized that *§ 1* categorically prohibits *per se* unlawful restraints across all markets and industries—including restraints on the buyer side and in the labor market. *See Mandeville, 334 U.S. at 235-36*; *Anderson, 272 U.S. at 361-63*; *see also supra* Part I pp. 9-11. Thus, decades of precedent gave Defendants more than sufficient notice that agreements among competitors to fix the price of labor are *per se* illegal. Moreover, the numerous district court decisions holding that agreements to fix the compensation of employees are *per se* unlawful reinforce this conclusion. *See supra* Part I. p. 14. At a minimum, these decisions foreclose Defendants' argument because it cannot be said that "no[] [] prior judicial decision has fairly disclosed [Defendants' conduct] to be within [the] scope [of the Sherman Act]." *See* *Lanier, 520 U.S. at 266*.

Moreover, the holding today is not a "novel" construction of the Sherman Act—it comports with previous broad interpretations of the Act and is a logical application of precedent. Similarly, that "no court has found that purported wage-fixing agreements **[*31]** constitute criminal conduct under the Sherman Act" does not mean that Defendants' did not have fair notice. *See* *United States v. Kinzler, 55 F.3d 70, 74 (2d Cir.1995)* ("The claimed novelty of this prosecution does not help [defendant's fair notice argument], for it is immaterial that there is no litigated fact pattern precisely on point.") (internal quotations omitted). Rather, the lack of criminal judicial decisions only indicates Defendants' unlucky status as the first two individuals that the Government has prosecuted for this type of conduct before.

But, "[t]o find unfair notice whenever a court specified new types of acts to which a criminal statute applied would stifle courts' ability to interpret and fairly apply criminal statutes." *United States v. Kay, 513 F.3d 432, 444-45*. Rather, "as *Lanier* points out, lack of prior court interpretations 'fundamentally similar' to the case in question does not create unfair notice." *Id. at 444*. Instead, "so long as the prior decisions gave reasonable warning" that the conduct was unlawful, then fair notice was satisfied. *See id.* And, here, decades of judicial interpretations gave Defendants more than "reasonably clear" notice that their conduct was unlawful. *See* *Lanier, 520 U.S. at 267*.

Even where the Supreme Court has considered certain conduct "not price fixing as such," it has affirmed **[*32]** the district court's application of the *per se* rule. *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 681, 692-699, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. Thus, even accepting Defendants' argument that their conduct was not literally price fixing, Defendants were still on notice that their conduct was "perilously close" to a line that subjected them to criminal prosecution. *See* *Boyce, 342 U.S. at 341*; *Id.* ("Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."). Thus, Defendants received fair notice that their conduct was illegal.

ii. The Rule of Lenity Does Not Apply.

Defendants also argue that the rule of lenity requires dismissal of Count One because there remains a "grievous uncertainty as to whether the Supreme Court condemns wage fixing as a *per se* antitrust violation" since "it has never evaluated it as such" (Dkt. #47 at p. 11). The Government responds by arguing that the rule of lenity is inapplicable here because "[t]here is no grievous ambiguity or uncertainty in this case" (Dkt. #46 at p. 15).

The rule of lenity is a principle of statutory construction that "applies primarily to the interpretation of criminal statutes." *Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 16, 131 S. Ct. 1325, 179 L. Ed. 2d 379 (2011)*. It dictates that courts resolve ambiguities in criminal statutes in favor **[*33]** of defendants. *See* *Crandon v. United States, 494 U.S. 152, 168, 110 S. Ct. 997, 108 L. Ed. 2d 132 (1990)*. But "[c]ourts do not resort to the rule of lenity every time a difficult issue of statutory interpretation arises." *United States v. Bittner, 469 F. Supp. 3d. 709, 723 (E.D. Tex. 2020)* (citation and internal quotation marks omitted). "[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Barber v. Thomas, 560 U.S. 474, 488, 130 S. Ct. 2499, 177 L. Ed. 2d 1 (2010)* (citation and internal quotation marks omitted).

Here, the rule of lenity has no application. As discussed, the rule of lenity applies only if a court can make "no more than a guess as to what Congress intended." *Ladner v. United States, 358 U.S. 169, 178, 79 S. Ct. 209, 3 L. Ed. 2d 199 (1958)*. Here, the Court can do much better than "guess." *See id.* Indeed, the Supreme Court has recognized that "Congress intended to strike as broadly as it could in *§ 1 of the Sherman Act* . . . ." *Goldfarb, 421 U.S. at 787*. And price-fixing agreements—in many forms—have long been held to be *per se* violations of the Act. *See* *Catalano, 446 U.S. at 647-50*; *see also supra* Part I pp. 8-10. The Supreme Court has also long held that the Sherman Act applies equally to all industries and markets—including to agreements made by buyers in the labor market. *See*

Mandeville, 334 U.S. at 235-36; *Anderson, 272 U.S. at 361-63*; *see also* supra Part I pp. 9-11. Thus, these cases leave no room for application of the rule of **[*34]** lenity. Put bluntly, "the rule of lenity cannot be used to create ambiguity when the meaning of a law, even if not readily apparent, is, upon inquiry, reasonably clear." *United States v. Nippon Paper Industries Co., 109 F.3d 1,8 (1st Cir. 1997)*. Though Defendants disagree with this Court's interpretation of the Sherman Act, that does not mean there is a "grievous ambiguity." *See* *Barber, 560 U.S. at 488*. Rather, decades of precedent make it clear that agreements to fix the price of labor—like all other price-fixing agreements—are *per se* illegal. Thus, the rule of lenity does not apply.

B. Defendants' *Sixth Amendment* Challenge Also Fails.

The *Sixth Amendment* provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." *U.S. CONST. amend. VI*. Defendants argue that the Indictment's *per se* designation violates the *Sixth Amendment* because it "improperly suggest[s] that intent could be presumed without further evidence" (Dkt. #36 at p. 20). According to Defendants, such a presumption would unconstitutionally take from the jury the determination of intent—thus depriving Defendants of their right to trial by jury (Dkt. #36 at p. 20). The basis of Defendants' argument stems from *United States v. U.S. Gypsum Co.*, where the Supreme Court held "that a defendant's state of mind or intent is an element of a criminal antitrust **[*35]** offense" which "cannot be taken by the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices." *438 U.S. at 435*. But Defendants' cursory *Sixth Amendment* argument also fails.

Decades ago, the Fifth Circuit rejected essentially the same argument that Defendants now make. *United States v. Cargo Serv. Stations, Inc., 657 F.2d 676, 681-84 (5th Cir. 1981)*. Defendants fail to acknowledge, much less distinguish, this precedent. In *Cargo Service*, defendants were charged with a conspiracy to fix prices and subsequently found guilty after a jury trial. *Id. at 678*. On appeal, relying on *Gypsum*, defendants argued that they were denied due process of law because the district court's jury instruction "improperly allowed the jury to convict absent a finding of intent" *Id. at 684*. The Fifth Circuit rejected this argument: "Neither a conclusive nor a permissive presumption is at issue here" because "a finding of intent to fix prices [equates to] an intent to unreasonably restrain trade." *Id. at 683 n.7*. Thus, "a finding that [defendants] intended to fix prices supplies the criminal intent necessary for a conviction of a criminal antitrust offense." *Id. at 684*. Further, the Fifth Circuit found the Defendants' reliance on *Gypsum* was misplaced—*Gypsum* was "easily distinguishable" because it involved the mere **[*36]** exchange of price information, not price fixing itself, and thus was a rule of reason case. *Id. at 683*. This Court thus finds that *Cargo Service* forecloses Defendants' argument.[5] Accordingly, application of the *per se* rule does not violate the *Sixth Amendment*.

Since the Court has addressed both Defendants' arguments pertaining to Count One, the Court will now turn to Rodgers' separate argument.

ANALYSIS: RODGERS' MOTION

In addition to adopting Jindal's arguments for Count One, Rodgers moves to dismiss the entire Indictment against him on another ground (Dkt. #45). Specifically, Rodgers argues the Indictment should be dismissed because the Government's prosecution breaches an oral non-prosecution agreement between Rodgers and the Government (Dkt. #45). In response, the Government denies the existence of an oral non-prosecution agreement (Dkt. #48). In fact, the Government contends that the only agreements between Rodgers and the Government were two no-direct use agreements ("NDU's"), commonly referred to as "proffer letters" (Dkt. #48 at p.3).

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[5] Moreover, every other circuit to address this issue has agreed. *United States v. Giordano, 261 F.3d 1134, 1143-44 (11th Cir. 2001)*; *United States v. Fischbach & Moore, Inc., 750 F.2d 1183, 1195-96 (3d. Cir. 1984)*; *United States v. Koppers Co., 652 F.2d 290, 293-95 (2d Cir. 1981)*; *United States v. Brighton Bldg. & Maint. Co., 598 F.2d 1101, 1106 (7th Cir. 1979)*; *United States v. Mfrs.' Ass'n, 462 F.2d 49, 52 (9th Cir. 1972)*.

I. Rodgers' Background

Details of the events between Rodgers, his attorney, and the Government are helpful for context regarding the alleged non-prosecution agreement. Based **[*37]** on a declaration from Brian Poe ("Poe"), Rodgers' attorney, and a declaration from Ryan Danks ("Danks"), Acting Chief of the Washington Criminal I Section of the Antitrust Division, the Court summarizes the following background information (Dkt. #45-8; Dkt. #48-1).

On November 26, 2019, DOJ Trial Attorney Katie Stella ("Stella") contacted Poe and the two spoke on the phone following a brief email exchange (Dkt. #45-8 ¶ 2). During the phone call, Stella stated that the Government considered Rodgers to be a "subject" of a criminal investigation and wanted to interview Rodgers in connection with an antitrust investigation. (Dkt. #45-8 ¶ 2). According to Poe's declaration, Stella also stated that "she did not anticipate Rodgers being charged if he continued to cooperate with the government's investigation" (Dkt. #45-8 ¶ 2). Danks' declaration does not mention this phone call.

On December 12, 2019, Rodgers and Poe met with the Government in Fort Worth for an interview or "proffer" (Dkt. #45-8 ¶ 4). A written NDU was executed before the interview on the same day, setting out the terms of the interview (Dkt. #48-1 ¶ 6; Dkt. #48, Exhibit 2). Poe's declaration does not mention the written NDU. **[*38]** Following Rodgers' proffer, Poe and the Government communicated several times via phone and email (Dkt. #45-8 ¶ 6). On May 22, 2020, Poe received a phone call from Stella concerning Rodgers (Dkt. #45-8 ¶ 7). During the call, Poe claims that Stella confirmed that Rodgers was still considered a "subject" of the criminal investigation and stated again that Rodgers would not be charged criminally if he continued to cooperate with the Government's investigation (Dkt. #45-8 ¶ 7). Again, Danks' declaration contains no mention of this call.

On or about December 9, 2020, Poe states he received a phone call from DOJ Antitrust Trial Attorney Megan Lewis ("Lewis") regarding Rodgers (Dkt. #45-8 ¶ 9). The purpose of the call was to inform Poe that a Grand Jury had indicted Jindal and that the Government anticipated Rodgers would need to testify at trial (Dkt. #45-8 ¶ 9; Dkt. #45-1 ¶ 7). Poe claims that while he had been previously assured by Stella that Rodgers would not be charged if he continued to cooperate, he took the opportunity to confirm this with Lewis since she was Stella's supervisor (Dkt. #45-8 ¶ 9). According to Poe's declaration, "Lewis unequivocally stated that Rodgers would not be **[*39]** charged if he continued to cooperate with the [G]overnment" (Dkt. #45-8 ¶ 9). Danks admits the Government contacted Poe on that day, but his declaration contains no further details of the substance of the conversation (Dkt. #48-1 ¶ 7). He does state, however, that the Government attorney with whom Poe spoke was not Lewis, nor was the attorney a supervisor of another attorney who worked on the investigation (Dkt. #48-1 ¶ 7).

On January 27, 2021, Rodgers and Poe attended a virtual proffer with the Government (Dkt. #45-8 ¶ 11). As with the first proffer, another NDU was executed setting out terms of the interview (Dkt. #48-1 ¶ 9; Dkt. #48, Exhibit 3). Again, Poe's declaration contains no mention of the written agreement that was executed that day. Subsequently, on a March 1, 2021 phone call, the Government notified Poe that it was recommending prosecution for Rodgers because, in the Government's view, Rodgers had not been truthful during the proffer on January 27, 2021 (Dkt. #45-8 ¶ 12; Dkt. #48-1 ¶ 10). Rodgers was indicted on April 15, 2021 (Dkt. #45-8 ¶ 14).

II. Non-Prosecution Agreement Legal Standard

"Non[-]prosecution agreements, like plea bargains, are contractual in nature, and are **[*40]** therefore interpreted in accordance with general principles of contract law." *United States v. Castaneda, 162 F.3d 832, 835 (5th Cir. 1998)*. Applying contract law, Rodgers "bears the burden of proving that there was a mutual manifestation of assent—either verbally, or through conduct—to the agreement's essential terms." *United States v. Jimenez, 256 F.3d 330, 347 (5th Cir. 2001)*.

If Rodgers proves that there was a non-prosecution agreement and "lives up to his end of the bargain, the government is bound to perform its promises." *Castaneda, 162 F.3d at 835-36*. If Rodgers "'material breaches' his commitments under the agreement, however, the government can be released from its reciprocal obligations." *Id. at*

836. To be relieved of its obligations, the Government must "prove to the court by a preponderance of the evidence that (1) the defendant breached the agreement, and (2) the breach is sufficiently material to warrant rescission." *Id.*

III. Analysis

Armed with a better understanding of the communication between Rodgers' counsel, Poe, and the Government, the Court turns back to Rodgers' argument. Rodgers claims there was an oral non-prosecution agreement that was "reached on or about December 9, 2020" "that Rodgers would not be charged if [he] continued to cooperate, which included testifying at trial" (Dkt. #50 at p. 6). Rodgers further contends **[*41]** that the Government has not proved that Rodgers breached the terms of his non-prosecution agreement (Dkt. #45 at p. 9). Accordingly, Rodgers argues the Government cannot rescind the agreement (Dkt. #45 at p. 9). The Government counters by arguing that no oral agreement was ever reached (Dkt. #48 at p. 10). The Government also argues that two written NDUs "conclusively establish that Rodgers did not have a non-prosecution agreement" "[b]ecause parol evidence is inadmissible to prove the meaning of the unambiguous NDUs" (Dkt. #48 at p. 10). Further, while the Government has not come forward with any evidence proving Rodgers violated any alleged oral agreement, it argues that "[i]f necessary" it "could readily show a material violation of any non-prosecution agreement" (Dkt. #48 at p. 13).

Applying basic contract principles to the alleged agreements in this case, in order to dismiss the Indictment, the Court must 1) find that the parol evidence rule does not bar the enforcement of the alleged oral non-prosecution agreement; 2) an oral non-prosecution agreement was in fact reached; 3) Rodgers performed his part of the agreement; and 4) the Government has breached the agreement.[6] *See* *Jimenez, 256 F.3d at 347 n.23* (noting **[*42]** that before considering whether any alleged agreement was breached, it must first be determined whether an agreement ever existed). Thus, the Court will first consider the effect of the written NDUs as part of its inquiry into whether an oral non-prosecution agreement was ever reached.

A. The Two Written NDUs Do Not Bar Enforcement of Any Alleged Oral Agreement.

As previously stated, the Government argues that two written NDUs between the Government and Rodgers trigger the parol evidence rule and thus "conclusively establish that Rodgers did not have a non-prosecution agreement" (Dkt. #48 at p. 10). According to the Government, because the NDUs contemplate Rodgers' potential prosecution and contain merger clauses, they "foreclose any contention that there was a non-prosecution agreement at the time of their signing" (Dkt. #48 at p. 10). In his motion to dismiss the Indictment, Rodgers does not mention the written NDUs. In his reply, however, Rodgers concedes that the written NDUs exist, but cites no law on the parol evidence rule and instead just repeatedly asserts that the Government "misconstrue[s] the language of these agreements" (Dkt. #50 at p. 5).

In construing a written contract, **[*43]** the primary concern of the court is to ascertain the true intentions of the parties as expressed in the writing itself. *J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 229 (Tex. 2003)*. Parties may not rely on extrinsic evidence to create an ambiguity or give the contract a different meaning from that which its language imports. *First Bank v. Brumitt, 519 S.W.3d 95, 110 (Tex. 2017)*. "If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law." *Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983)*. Likewise, "when a contract is unambiguous, [courts] generally will not look beyond the four corners of the document." *United States v. Long, 722 F.3d 257, 262 (5th Cir. 2013)* (internal quotations omitted). Further, when there is valid integrated agreement with respect to a particular subject matter, the parol evidence rule "precludes the enforcement of inconsistent prior or contemporaneous agreements." *Jack H. Brown & Co. v. Toys "R" Us, Inc., 906 F.2d 169, 173*

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[6] The parties did not address choice of law questions. The Court, however, is bound by *Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)* to apply the contract law of the State of Texas, where was the agreement was allegedly executed and where it would be performed. *United States v. McBride, 571 F. Supp. 596, 604 n.3 (S.D. Tex. 1983)*, *aff'd*, *915 F.2d 1569 (5th Cir. 1990)*

(5th Cir. 1990). However, the parol evidence rule "does not preclude enforcement of prior or contemporaneous agreements which are collateral to an integrated agreement and which are not inconsistent with and do not vary or contradict the express or implied terms or obligations thereof." Hubacek v. Ennis State Bank, 159 Tex. 166, 317 S.W.2d 30, 32 (Tex. 1958).

As a starting point, only the second NDU—executed on January 22, 2021—would trigger the parol evidence **[*44]** rule and thus bar enforcement of the alleged oral non-prosecution agreement. The first NDU was executed on December 12, 2019, (Dkt. #48, Exhibit 2), and Rodgers claims the oral agreement was not reached until about one year later—on or about December 9, 2020 (Dkt. #50 at p. 6). Yet, the parol evidence rule only bars enforcement of prior or contemporaneous agreements; it does not apply to agreements made *subsequent* to the written agreement. Brumitt, 519 S.W.3d at 111. Thus, only the second written NDU, executed on January 22, 2021, could trigger the parol evidence rule since the oral agreement was allegedly formed before the second written NDU was signed.

Moreover, the second NDU is the type of agreement that triggers the parol evidence rule. It is a written agreement that is "integrated." Indeed, it contains an integration or "merger" clause. *See* People's Cap. & Leasing Corp. v. McClung, No. 4:18-CV-00877, 2020 U.S. Dist. LEXIS 138839, 2020 WL 4464503, at *8 (E.D. Tex. Aug. 4, 2020) ("A merger clause is a provision in a contract to the effect that the written terms may not be varied by prior or oral agreements because all such agreements have been merged into the written document.") (internal quotations omitted). But, as well, by its own terms, it is integrated only as to the parties' agreements relating to the subject matter it addresses—not **[*45]** as to all prior or contemporaneous agreements between the parties related to other matters. *See* West v. Quintanilla, 573 S.W.3d 237, 244 (Tex. 2019) ("Although it is complete and final as to its subject matter, it does not purport to address or supersede agreements related to other matters."). In this sense, the NDU is only partially integrated. The language in the NDU makes this clear. For example, it states:

> It is understood that this agreement is limited to statements made during the interview on January 27, 2021, and does not apply to any oral, written, or recorded statements made by you at any other time. This letter and the attached Addendum constitute the entire understanding between the United States and you *in connection with this interview*.

(Dkt. #48, Exhibit 3) (emphasis added). Accordingly, though the NDU unambiguously states that it "constitute[s] the entire understanding between the United States and [Rodgers,]" it does so only in connection with the terms of the January 22, 2021, proffer meeting (*See* Dkt. #48, Exhibit 3). Thus, even though the NDU contains an integration clause, it does not foreclose the possibility that Rodgers and the Government reached another separate, unrelated agreement.

This is significant because **[*46]** under the parol evidence rule, the written, integrated NDU only "precludes enforcement of any prior or contemporaneous agreement that addresses the same subject matter and is inconsistent with [the NDUs'] terms." Id. at 244-45. Stated differently, the parol evidence rule does not preclude enforcement of a prior agreement that is "collateral to and not inconsistent" with the NDU. Id. at 245. Therefore, to determine if the parol evidence rule bars enforcement of the oral agreement, the Court must determine whether the alleged oral agreement was "collateral" to the NDU and whether it was "not inconsistent" with it. *See id.*

Here, the Court finds that any alleged oral non-prosecution agreement was "collateral" to the second NDU. To be collateral, the agreement must be one the parties might naturally make separately and would not be ordinarily be expected to be embodied in or integrated with the written agreement and not so clearly connected with the principal transaction as to be part and parcel of it. Boy Scouts of Am. v. Responsive Terminal Sys., Inc., 790 S.W.2d 738, 745 (Tex. App.—Dallas 1990, writ withdrawn). Here, the NDU and the oral agreement addressed different subject matters. An NDU is generally "an agreement between an [individual] and the government in a criminal case that sets forth the terms under which the **[*47]** [individual] will provide information to the government during an interview, commonly referred to as a 'proffer session.'" United States v. Lopez, 219 F.3d 343, 345 n.1 (4th Cir. 2000). On the other hand, a non-prosecution agreement is exactly what it sounds like—it is an agreement that states the Government will agree not to prosecute an individual if certain conditions are met (Dkt. #48-1 ¶3). Thus, the NDU agreement addressed the terms of the proffer session, while the alleged oral agreement would have addressed the terms of any protection from prosecution. Even in the Government's own words, "[n]on-prosecution agreements differ markedly from NDUs" (Dkt. #48 at p. 4). Consequently, because the oral non-prosecution agreement was collateral to the written NDU, the Court must resolve whether the oral non-prosecution agreement was inconsistent with the terms of the NDU. *See* *Quintanilla, 573 S.W.3d at 244-45*. If the oral non-prosecution agreement was "not inconsistent" with the NDU, then the parol evidence rule will not preclude enforcement of the oral agreement. *Id.*

The Court turns to the language of the NDU to determine if it is consistent with the alleged oral agreement that Rodgers would not be prosecuted if he continued to cooperate. In relevant part, the agreement states: **[*48]**

> 3. The United States agrees that no statement made by you during the interview will be used directly against you in any legal proceeding, except that your statements may be offered in any such proceeding to impeach your testimony or to rebut evidence offered on your behalf. In addition, the United States may use any statements made in the interview in a prosecution of you for making a false statement or declaration (*18 U.S.C. §§ 1001*, *1623*), obstruction of justice (*18 U.S.C. § 1503, et seq.*), or perjury (*18 U.S.C. § 1621*).
> 4. The United States is free to use any information directly or indirectly derived from the interview to pursue its investigation and in any subsequent prosecution of you or others.

(Dkt. #48, Exhibit 3). The language, particularly in paragraph four, broadly contemplates future prosecution of Rodgers. At first glance, this broad language appears to be inconsistent with the Government's oral promise not to prosecute Rodgers. But, after a closer examination of the language, the Court reaches a different conclusion. Instead, the Court finds that the collateral oral agreement at issue is "not inconsistent" with the written NDU—even though the NDU contemplates future prosecution of Rodgers. Indeed, in *Quintanilla*, the Texas Supreme Court explored **[*49]** what "inconsistent" means in this context and found that when the oral agreement contradicts or varies the parties' obligations under the written agreement, the oral agreement is an inconsistent collateral agreement. *Id. at 247*.

Here, the alleged oral agreement does not vary the parties' obligations under the written NDU. For one thing, the NDU does not specifically state that Rodgers is subject to a future prosecution; it simply states the Government can use the information from the interview in any subsequent prosecution (Dkt. #48, Exhibit 3). Further, the alleged oral agreement was not simply an agreement to not prosecute Rodgers—it was conditioned on his continued cooperation. Thus, just like the NDU contemplates future prosecution of Rodgers, so, too, does the alleged oral agreement—if Rodgers fails to continue to cooperate. As such, the oral agreement does not alter fundamental terms of the NDU.

Consequently, because the alleged oral non-prosecution agreement is "collateral to and not inconsistent" with the second NDU, the parol evidence rule does not preclude enforcement of it. *See* *id. at 245*. Accordingly, since the parol evidence rule is not applicable, the Court now turns to whether Rodgers has **[*50]** proved that there was a legally enforceable oral non-prosecution agreement.

B. No Legally Enforceable Oral Non-Prosecution Agreement Was Reached.

A defendant claiming to have a non-prosecution agreement bears the burden of "prov[ing] that such an agreement existed." *Jimenez, 256 F.3d at 347*. "Non-prosecution agreements . . . are contractual in nature, and are therefore interpreted in accordance with general principles of contract law." *Castaneda, 162 F.3d at 835*. Any "ambiguities" in a non-prosecution agreement "must be construed against the government." *McBride, 571 F. Supp. at 605*. Because a non-prosecution agreement is governed by contract law standards, whether the parties reached an agreement is question of fact. *Westlake Petrochemicals, L.L.C. v. United Polychem, Inc., 688 F.3d 232, 238-39 (5th Cir. 2012)*. However, whether an agreement has all the essential terms to be an enforceable agreement is a question of law. *Coe v. Chesapeake Expl., L.L.C., 695 F.3d 311, 320 (5th Cir. 2012)*. In other words, Rodgers' contention has both a factual dimension—namely, whether Rodgers and the Government agreed that the Government would not prosecute him if he cooperated—and a legal dimension—whether there was a meeting of minds on the agreement's essential terms.

Rodgers claims the oral agreement "that Rodgers would not be charged if Rodgers continued to cooperate, which included testifying at trial" was reached "on or about December **[*51]** 9, 2020" (Dkt. #50 at p. 6). In other words, Rodgers argues that the basis for the oral agreement was Poe's phone call with Lewis. Further, Rodgers asserts that the Government's failure to deny the occurrence of the oral conversation and the Government's failure to deny that an agreement was reached "is further proof to corroborate counsel's declaration" (Dkt. #50 at p. 6). Indeed, the Court does find that the absence of any explicit denial of an oral agreement in Danks' declaration is telling. But the Court also notes that Rodgers bears the burden of proving an agreement existed, and he faces some difficult challenges.

For example, contrary to Poe's declaration, Danks declares that Lewis was *not* the attorney on the phone call on December 9, 2021, and the attorney on the phone call was *not* a supervisor of another attorney who worked on the investigation (Dkt. #48-1 ¶ 7). These statements both directly contradict Poe's statements. While the name of the Government attorney who made the alleged agreement might seem like a minor detail, it does cast doubt on Poe's "unequivocal[]" recollection of the events. *See* *United States v. Casares, No. 2:14-653, 2019 U.S. Dist. LEXIS 44324, 2019 WL 1243617, at *4 (S.D. Tex. Mar. 18, 2019)* (singling out Defendant's failure to **[*52]** "specify with whom he entered into this alleged agreement" in holding no oral non-prosecution agreement existed). Further, while Poe asserts an oral agreement was made, Danks declares that "[t]he Division's general practice is that both NDUs and NPAs are written" (Dkt. #48-1 ¶ 3). Moreover, while Poe claims an oral non-prosecution was reached around December 9, 2020, Rodgers entered into a second written NDU with the Government after this that contained no mention of the oral agreement. The execution of the written NDU not only reinforces the Government's claim that agreements like this are in writing, but it also indicates that the course of dealing between the parties was to put important agreements in writing.

Even more telling, the Court finds it odd that Poe's declaration does not mention that two written NDUs were executed. And, finally, looking at Poe's declaration, the Court finds it noteworthy that when Poe was notified that the Government was now recommending prosecution, he never asserted that the change violated any alleged agreement. *See* *United States v. Sattar, No. 02-CR-395, 2003 U.S. Dist. LEXIS 19770, 2003 WL 22510398, *3 (S.D.N.Y Nov. 5, 2003)* (noting that if a non-prosecution agreement had been reached then Poe's response upon learning of the indictment "should have been an **[*53]** anguished howl of protest over the breach of the agreement.") (internal quotations omitted).

Nonetheless, even fully crediting Poe's declaration and assuming *arguendo* that Rodgers has demonstrated the factual aspect of the alleged agreement, the Court finds that no agreement was reached as a matter of law. *See* *Coe, 695 F.3d at 320* ("Whether an agreement fails for indefiniteness is a question of law."). Indeed, a contract is "legally binding only if its terms are sufficiently definite to enable a court to understand the parties' obligations." *Liberto v. D.F. Stauffer Biscuit Co., 441 F.3d 318, 323 (5th Cir. 2006)* (internal quotations omitted). Stated differently, "when an agreement leaves material matters open for future adjustment and agreement that never occur, it is not binding upon the parties and merely constitutes an agreement to agree." *Coe, 695 F.3d at 320*. To determine whether essential terms were sufficiently settled to find a contract, "[c]ourts look not only at any relevant written agreements but also at the relationship of the parties, [and] their course of dealings . . . ." *APS Cap. Corp. v. Mesa Air Grp., Inc., 580 F.3d 265, 272-73 (5th Cir. 2009)*.

Here, no legally enforceable agreement was reached because there was no "meeting of the minds" on all essential terms. Even accepting Rodgers' Poe's declaration as the truth—"that Rodgers would not be charged **[*54]** if Rodgers continued to cooperate, which included testifying at trial"—the agreement nevertheless fails to contain essential terms. *See* *id. at 272* ("[A]n agreement is not enforceable unless it resolves all essential terms and leaves no material matters open for future negotiation."). Indeed, not every "meeting of the minds" is a contract. The minds may not have met on essential terms. When the parties leave an essential term open for future negotiation, there is no binding contract. *T.O. Stanley Boot Co. v. Bank of El Paso, 847 S.W.2d 218, 221 (Tex. 1992)*. Here, the alleged agreement contains no mention of essential terms like "what level of cooperation would be required of [Rodgers] in order for h[im] to satisfy the purported [non-prosecution] agreement [and] who would determine whether [Rodgers] had fulfilled [his] part of the [] agreement." *See* *United States v. Lua, 990 F. Supp. 704, 711 (N.D. Iowa 1998)*; *see also* *Commonwealth v. Stewart, 66 Va. Cir. 135, 2004 WL 3455442, at *17 (Va. Cir. Ct. 2004)* (finding an absence of sufficient detail to prove a meeting of the minds). Absent such essential terms, there could be no meeting of the minds. That Rodgers now argues that he has lived up to his end of the agreement—by cooperating—and the Government disagrees illustrates how these details were material terms to the agreement. Undeniably, these details could change the outcome of the case. *See* *United States v. Aleman, 286 F.3d 86, 92 (2d. Cir. 2002)* ("A critical **[*55]** factual element of the alleged agreement will be who determines [Defendant]'s truthfulness and willingness to testify-the government, the court, or some other party.").

Further, examining the written NDUs, the relationship of the parties, their course of dealings, and other evidence only confirms there was no meeting of the minds as to the essential terms of the non-prosecution agreement. *See* *Mesa, 580 F.3d 272-73*. Indeed, when the agreement is oral, the court "must consider the possibility that immunity discussions . . . never progressed to a meeting of the minds and formation of an enforceable bargain." *Aleman, 286 F.3d at 89*. That a final oral agreement was never reached is bolstered by the existence of two written NDUs. These objectively show the course of dealing between the parties—when the parties agreed to final and essential terms of a contract, they did so in writing. By contrast, the only evidence that Rodgers offers to show that an oral agreement was reached is subjective evidence—Poe's declaration. But even Poe's declaration supports the conclusion that no final agreement was ever reached. Indeed, Poe's repeated conversations with the Government indicate that there was a possibility a deal could be made in the future, **[*56]** not that a final agreement already existed as to all essential terms. *See* *Lua, 990 F. Supp at 711*. For example, Poe acknowledges that he asked the Government about Rodgers' status several times. However, if there had been a prior meeting of the minds on all essential terms, then Poe's inquiries would have been unnecessary. Thus, his repeated inquiries highlight that even he might have been unsure that there was a final agreement on the table.

In short, the Court finds that Rodgers has failed to prove that essential terms of the agreement were sufficiently settled and definite. Indeed, the lack of detail regarding the terms of the alleged agreement highlight that the parties never reached a final agreement. And a court may not create an agreement where none exists. *See* *Lamajak, Inc. v. Frazin, 230 S.W.3d 786, 793 (Tex. App.—Dallas 2007, no pet.)*. A defendant must establish something "more than an unfounded and unilateral belief" that the government made a claimed promise in exchange for his cooperation. *United States v. Williams, 198 F.3d 988, 992 (7th Cir. 1999)*. Rodgers has not done so. Accordingly, because the Court concludes that there was no meeting of the minds as to the essential terms, the Court finds no non-prosecution agreement exists for the Court to enforce. Therefore, the Court denies Rodgers' motion to dismiss on this ground.

[*57] CONCLUSION

It is therefore **ORDERED** that Defendant Neeraj Jindal's Motion to Dismiss Count One of the First Superseding Indictment (Dkt. #36) and Defendant John Rodgers' Motion to Dismiss the Superseding Indictment (Dkt. #45) are hereby **DENIED**.

IT IS SO ORDERED.

SIGNED this 29th day of November, 2021.

/s/ Amos L. Mazzant

AMOS L. MAZZANT

UNITED STATES DISTRICT JUDGE

End of Document

Coronavirus Reporter v. Apple Inc.

United States District Court for the Northern District of California

November 30, 2021, Decided; November 30, 2021, Filed

Case No. 21-cv-05567-EMC

Reporter

2021 U.S. Dist. LEXIS 249564 *; 2021 WL 5936910

CORONAVIRUS REPORTER, et al., Plaintiffs, v. APPLE INC., et al., Defendants.

Subsequent History: Reconsideration denied by *Coronavirus Reporter v. Apple Inc., 2022 U.S. Dist. LEXIS 19200 (N.D. Cal., Feb. 2, 2022)*

Prior History: *Primary Prods. LLC v. Apple, Inc., 2021 U.S. Dist. LEXIS 152827, 2021 WL 3610507 (D. Me., Aug. 13, 2021)*

Core Terms

markets, developers, smartphone, relevant market, antitrust, allegations, motion to dismiss, antitrust claim, aftermarket, consumers, single-brand, products, foremarket, two-sided, downstream, platform, marketplace, software, users, stamps, enhanced, transactions, suppression, userbase, brand, enterprise, onboarding, internet, preliminary injunction, cross-elasticity

Counsel: [*1] For Coronavirus Reporter, Calid Inc, Plaintiffs: Keith Mathews, Esq., LEAD ATTORNEY, AWP Legal, Manchester, NH; Keith Matthews, LEAD ATTORNEY, Manchester, NH; Daniel de Zouza Clasen, Glendale, CA.

For Apple Inc., Defendant: Mark A. Perry, LEAD ATTORNEY, GIBSON, DUNN & CRUTCHER LLP, Washington, DC; Rachel S. Brass, LEAD ATTORNEY, Gibson Dunn & Crutcher LLP, San Francisco, CA.

Judges: EDWARD M. CHEN, United States District Judge.

Opinion by: EDWARD M. CHEN

Opinion

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS, AND DENYING PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION, TO STRIKE, AND TO APPEND CLAIM

Docket Nos. 20, 45, 51, 52, 74

I. INTRODUCTION

Plaintiffs bring this action for antitrust and RICO violations, and breach of contract and fraud against Apple, Inc. ("Apple") to challenge Apple's allegedly monopolist operation of its "App Store" through "curation" and "censor[ship]" of smartphone apps. Docket No. 41 ("FAC") ¶ 1-2. Plaintiffs seek to vindicate the right of "the end users of Apple's iPhone" to "enjoy unrestricted use of their smartphones" to run "innovative applications, written by third party developers." *Id.* ¶ 5.

Now pending is Apple's motion to dismiss all of Plaintiffs' claims against Apple. Docket No. 45. Additionally, **[*2]** Plaintiffs two motions for preliminary injunction, Docket Nos. 20, 52, motion to strike Apple's motion to dismiss, Docket No. 51, and request to append a claim to its FAC, Docket No. 52, are also pending. Finally, Apple's motion to quash Plaintiffs' subpoena request, Docket No. 74, is pending. For the reasons explained below, the Court **GRANTS** Apple's motion to dismiss all of Plaintiffs' claims against Apple, and **DENIES AS MOOT** each of Plaintiffs' pending motions and Apple's motion to quash.

II. BACKGROUND

A. Summary of Allegations

Plaintiffs bring this antitrust and breach of contract action against Apple, Inc. ("Apple") to challenge Apple's allegedly monopolist operation of its "App Store" through "curation" and "censor[ship]" of smartphone apps. Docket No. 41 ("FAC") ¶ 1-2. Plaintiffs seek to vindicate the right of "the end users of Apple's iPhone" to "enjoy unrestricted use of their smartphones" to run "innovative applications, written by third party developers." *Id.* ¶ 5.

1. Apple's App Approval Process

Apple launched the iPhone and its proprietary iOS ecosystem in 2007. *See Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *17 (N.D. Cal. Sept. 10, 2021)*. Apple introduced the App Store the following year. *2021 U.S. Dist. LEXIS 172303, [WL] at *19*. App developers wishing to distribute apps on the App Store **[*3]** must enter into two agreements with Apple: the Developer Agreement and the Developer Program License Agreement ("DPLA"). Developers must also abide by the App Store Review Guidelines (the "Guidelines").[1] The Developer Agreement governs the relationship between a developer and Apple, *see* Docket No. 42 ("Brass Decl."), Exh. 1 ("Developer Agreement"), while the DPLA governs the distribution of apps created using Apple's proprietary tools and software, *see id.*, Exh. 2 ("DPLA"). By signing the DPLA, developers "understand and agree" that Apple may reject apps in its "sole discretion." *Id.* § 6.9(b). The Guidelines set out the standards Apple applies when exercising that discretion to review and approve apps for distribution on the App Store, a process known as "App Review." *See generally id.*, Exh. 3 ("Guidelines").

2. Plaintiffs' Apps

Plaintiffs allege they are developers of "a diverse group" of apps: Coronavirus Reporter, Bitcoin Lottery, CALID, WebCaller, and Caller-ID. FAC ¶¶ 8, 27-30. Two of these apps, Coronavirus Reporter and Bitcoin Lottery, were never approved for distribution on the App Store. *Id.* ¶¶ 29, 53.

Coronavirus Reporter sought to collect "bioinformatics data" from users **[*4]** about COVID-19 symptoms that it would then share with "other users and [unidentified] epidemiology researchers." FAC ¶¶ 48, 52. The Coronavirus Reporter team allegedly included Dr. Robert Roberts, a former cardiologist for NASA. *Id.* ¶ 47. The Coronavirus Reporter app was developed in February 2020, and, if approved, "this startup COVID app" would allegedly have been "first-to-market." *Id.* The Coronavirus Reporter app was rejected by Apple on March 6, 2020, under Apple's policy requiring that any apps related to COVID-19 be submitted by a recognized health entity such as a government organization or medical institution. *Id.* ¶¶ 54, 56, 69, 94, 96, 98; *see also* Guidelines § 5.1.1(ix) ("Apps that provide services in highly-regulated fields (such as banking and financial services, healthcare, and air travel) or that require sensitive user information should be submitted by a legal entity that provides the services, and not by an individual developer"). Apple allegedly denied Coronavirus Reporter's appeal from rejection on March 26, 2020,

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[1] The agreements and Guidelines are "central" to Plaintiffs' claims, FAC ¶ 273, and are incorporated by reference in the FAC. *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)*; *see also* FAC ¶¶ 19, 24, 56, 74, 113-14, 135, 145, 165, 186, 195-206, 245, 254-55, 258-59, 269-71.

which Plaintiffs alleged was concurrent with "Apples internal discussions with its own partners" in order to "further cement Apple's own monopolistic trust **[*5]** and medi[c]al endeavors." FAC ¶ 56.

Similarly, Apple allegedly rejected Plaintiff Primary Productions' Bitcoin Lottery, a "blockchain app" developed by Plaintiff Primary Productions, under its alleged policy "generally block[ing] blockchain apps." FAC ¶¶ 85-86.

Plaintiffs' other apps (CALID, Caller-ID, and WebCaller) allegedly were approved for distribution on Apple's App Store. FAC ¶¶ 97, 103. CALID, "a cross-platform scheduling platform with an initial focus on telehealth," *id.* ¶ 94, was approved after the developer addressed several violations of Apple's Guidelines, including Apple's requirement that developers use Apple's payment system for in-app purchases. *Id.* ¶¶ 95, 97. Although Plaintiffs state that they later "abandoned" the app, *id.* ¶ 97, they allege "CALID was subject to ranking suppression," *id.* ¶ 28. Through "ranking suppression," Plaintiff allege that Apple rendered the app "invisible on App Store searches" by end users. *Id.* Plaintiffs similarly allege that Apple "suppressed" Caller-ID and WebCaller because it competed with Apple's own Facetime app and because Apple retaliated against Plaintiff Isaacs after he "informed Apple he held a patent on web caller ID, and that **[*6]** [Apple's] crony, Whitepages . . . violated his patent." *Id.* ¶¶ 104-07, 305. Plaintiffs concede, however, that Isaac's patent was invalidated. *Id.* ¶ 305.

3. Plaintiffs' Antitrust Claim Theory

The core of Plaintiffs antitrust claims are challenges to Apple's alleged exercise of market power in reviewing proposed apps and to Apple's unilateral authority to approve or deny which apps are allowed on the App Store. Plaintiffs challenge Apple's unilateral control over the ability of developers to access and provide apps to iOS users, including Apple's alleged practice of suppressing the visibility of apps which compete with Apple's own apps or apps of Apple's "cronies." FAC ¶ 21-23, 127, 199.

Plaintiffs' FAC articulates at least fifteen different relevant markets to its antitrust claims against Apple:

(1) a "Smartphone Enhanced National Internet Access Devices" market;
(2) a "smartphone market";
(3) a "single-product iOS Smartphone Enhanced Internet Access Device" market;
(4) "[t]he iOS market";
(5) the "market for smartphone enhanced commerce and information flow (devices and apps) transacted via the national internet backbone";
(6) the "institutional app market";

(7) the "iOS institutional app market"; **[*7]**
(8) the "iOS notary stamps" market;
(9) the "iOS onboarding software" market;
(10) the market for access rights to the iOS userbase;
(11) the "national smartphone app distribution market";
(12) the "iOS App market";
(13) the "US iOS Device App market";
(14) the "market of COVID startups"; and
(15) "the App Market."

FAC ¶¶ 8 n.1, 11, 12, 17-18, 81, 121, 135-37, 142, 165-66, 168, 233, 235. Plaintiffs' Opposition brief attempts to clarify that certain of the alleged markets are synonyms for other alleged markets, and that, to simplify for purposes of the instant motion, Plaintiffs are focused on "two relevant foremarkets" (apparently the "US smartphone market" and the "US iOS smartphone market" which "is an alternative single-produce market to the US smartphone market") and "five downstream markets":

(1) the institutional app market (i.e. wholesale app competition);

(2) the iOS institutional app market (iPhone app single-product wholesale marketplace);

(3) iOS notary stamps market (permission tokens to launch iOS apps);

(4) iOS onboarding software ('Mac Finder' capability disabled on all nonenterprise iOS devices); and

(5) access rights to the iOS userbase").

Docket No. 55 ("Opp.") at 7 (citing FAC **[*8]** ¶¶ 8 n.1, 16, 18). Plaintiffs allege that its market definitions cover and "equally apply to free apps - a major component of the ecosystem" of iOS app purchases. FAC ¶ 16.

Plaintiffs' antitrust theory allegedly "flow[s] logically" from the key fact that "the only marketplace, the only seller of apps to end-users, is Apple itself" and thus Apple monopolizes an "institutional smartphone application software marketplace" in which Apple "purchase[s]" apps from developers—by approving or rejecting them through the App Review process—and then resells them to consumers on its own terms. *Id.* ¶¶ 9-11, 19.

Plaintiffs allege that "Apple's App Store retails approximately 80% of the apps in the US consumer-facing market for smartphone apps," but that the relevant market for its antitrust claims is the "national institutional app market" where Apple "is a monopsony buyer of developers' apps." *Id.* ¶ 121. Plaintiffs allege that "Apple has complete control of pricing and contractual terms in [the national institutional app market]" and, accordingly, "they can reject apps simply because the app competes with Apple's own competitor app, or its cronies." *Id.* ¶ 127. Plaintiffs allege that Apple monopolizes **[*9]** three additional downstream markets, (a) iOS notary stamps market (permission tokens to launch iOS apps), (b) iOS onboarding software, and (c) access rights to the iOS userbase, through Apple's unilateral control of access to those markets. FAC ¶¶ 135-41.

4. Class Allegations

Plaintiffs propose to represent various classes pursuant to "*Fed R. Civ. P. 23(b)(1)*, *(2)*, and *(3)*," including for "All U.S. iOS developers of any app that was excluded through disallowance and/or ranking suppression on the App Store," and "Any iOS developer who paid a $99 annual subscription fee[] to Apple for access to the iOS userbase and/or 'app notarization.'" FAC ¶¶ 148-51. Plaintiffs allege that the $99 annual fee is required for app developers to access the "App Store Connect developer portal" to develop and test apps on Apple's software, and to submit apps to for Apple to consider for inclusion on the App Store. *Id.* ¶ 135.

5. Causes of Action

Plaintiffs allege eleven causes of action against Apple:

(1) Violation of *§ 2 of the Sherman Act* for "interstate restriction of smartphone enhanced internet userbase access services, iOS notary stamp and iOS onboarding software markets." FAC ¶¶ 160-172.

(2) Violation of *§ 2 of the Sherman Act* for "denial of essential facility **[*10]** in the institutional app markets" for Apple's "exclusionary behavior that denies essential facilities" that are necessary to compete in the smartphone market, such as denying "notary stamps." *Id.* ¶¶ 180-88.

(3) Violation of *§ 1 of the Sherman Act* because the "DPLA [is an] unreasonable restraint of trade" by "limiting competition in the critically important US institutional app marketplace." *Id.* ¶¶ 195-206.

(4) Violation of *§ 2 of the Sherman Act* for "ranking suppression as restraint of interstate trade." *Id.* ¶¶ 207-212.

(5) Violation of *§ 1 of the Sherman Act* for "tying the App Store, Notary Stamps and Software Onboarding to the iOS device market." *Id.* ¶¶ 213-217. Plaintiffs allege that "Apple is able to unlawfully condition access to iOS device to the use of a second product—App Store app marketplace." *Id.* ¶ 217.

(6) Violation of *§ 2 of the Sherman Act* for "$99 fee illegality." FAC ¶¶ 231-234. Plaintiffs allege "Apple unlawfully maintains is monopoly powers in the aforementioned markets" by "issuing an illegal demand of money from 20 million aspiring developers" of $99 each year "if they wish to access the iOS userbase or get their software notarized on an iOS device." *Id.* ¶ 235.

(7) "*Cameron* Antitrust Class Action Opt Out:" Plaintiffs CALID **[*11]** and Jeffrey Isaacs "assert claims for non-zero price apps as specified in the already docketed complaint *Cameron v. Apple*." *Id.* ¶¶ 241-43. Plaintiffs allege the *Cameron* case, No. 19-cv-3074-YGR (N.D. Cal.) is a "developer class-action antitrust suit" where the "class is restricted to app developers who sold apps for non-zero prices." *Id.* ¶ 36. Plaintiffs allege that certain Plaintiffs in this case are *Cameron* class action opt-outs, and state the *Cameron* causes of action in this suit through "reference to the *Cameron* complaint." *Id.* ¶ 132. Plaintiffs allege that Judge Gonzalez Rogers deemed this litigation not subject to consolidation with *Cameron. Id.* ¶ 243.

(8) Breach of Contract for Apple's pretextual refusal to approve the Coronavirus Reporter app for distribution on the App Store in violation of the DPLA and Developer Agreement. *Id.* ¶¶ 244-260.
(9) Breach of the Covenant of Good Faith and Fair Dealing for Apple's refusal to approve the Coronavirus Reporter app. FAC ¶¶ 261-66.

(10) Violation of the *Racketeer Influenced Corrupt Organization Act*, *18 U.S.C. § 1962(c)* because "Apple and its cronies formed an enterprise meant to exploit the work of developers by screening their ideas for purported compliance **[*12]** with DPLA, meanwhile lifting and appropriating their ideas for their own competing apps[.]" *Id.* ¶ 269.

(11) Fraud for improper rejections of and ranking suppression of disfavored apps. *Id.* ¶¶ 309-23.

Plaintiffs initially alleged a twelfth claim against the Federal Trade Commission ("FTC") under the *Administrative Procedure Act*, FAC ¶¶ 324-25, but voluntarily dismissed and withdrew that claim on November 23, 201, *see* Docket No. 83.

Plaintiffs seek damages of an estimated $200 billion and a permanent injunction restraining Apple from "denying developers access to the smartphone enhance Internet userbase." FAC at 106-07.

B. Procedural Background

On January 19, 2021, Plaintiff Coronavirus Reporter filed the first iteration of this lawsuit in the District of New Hampshire. *Coronavirus Reporter v. Apple, Inc.* ("DNH Docket."), No. 21-cv-47, Docket No. 1 (D.N.H.). Coronavirus Reporter twice amended its complaint in response to then-pending motions to dismiss, and then voluntarily dismissed the case when the court ordered it transferred to this jurisdiction. DNH Docket Nos. 17, 19, 26-27, 32-33, 39-40.

On May 17, 2021, Plaintiff Primary Productions—represented by the same counsel—filed a separate, **[*13]** nearly identical lawsuit in the District of Maine. *Primary Prods. LLC v. Apple Inc.* ("D. Me. Docket."), No. 21-cv-137, Docket No, 1 (D. Me.). There, Primary Productions amended its complaint in response to Apple's motion to dismiss. D. Me. Docket Nos. 17, 21. That case was then transferred to this Court, and Apple moved to dismiss the action. *See Primary Prods. LLC v. Apple Inc.*, No. 3:21-cv-6841-EMC, Docket Nos. 27 & 32 (N.D. Cal.). Thereafter, Plaintiff Primary Productions voluntarily dismissed that action. *Primary Prods.*, No. 3:21-cv-6841-EMC, Docket. 36.

Plaintiffs Coronavirus Reporter and CALID filed this putative class action on July 20, 2021, raising substantially similar claims to the prior two actions. Docket. 1. They then moved for a preliminary injunction. Docket No. 20. Apple moved to dismiss the complaint, and Plaintiffs again amended their complaint in response. Docket No. 41. The FAC—a putative class action was brought on behalf of Coronavirus Reporter, CALID, Primary Productions LLC, Jeffrey Isaacs, and two different classes of app developers affected by Apple's practices—is thus the seventh complaint filed by one or more of these related plaintiffs, all making similar **[*14]** allegations and claims.

Apple moves to dismiss the FAC. Docket No. 45 ("Motion to Dismiss"). After amending their complaint, Plaintiffs did not withdraw their motion for preliminary injunction, Docket No. 20, which remains pending. Instead, Plaintiff's filed a *second* motion for preliminary injunction, which is also pending. Docket No. 52. In that motion, Plaintiffs also request "appending" another claim to their FAC, under the California Unfair Competition Law (although Plaintiffs did not seek leave to amend their complaint as required under *Fed. R. Civ. P. 15(a)(2)*). *Id.*

Finally, in response to Apple's motion to dismiss the FAC, Plaintiffs filed a "motion to strike" Apple's motion to dismiss (although Plaintiffs did not cite any legal authority authorizing them to move to strike Apple's motion to dismiss). Docket No. 51 ("MTS"). *Cf.* 5C Wright & Miller, Fed. Prac. & Proc. Civ. § 1380 (3d ed.) ("*Rule 12(f)* motions [to strike] only may be directed towards pleadings as defined by *Rule 7(a)*; thus motions, affidavits, briefs, and other documents outside of the pleadings are not subject to *Rule 12(f)*.").

III. LEGAL STANDARD

A. Failure to State a Claim (*Rule 12(b)(6)*)

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the **[*15]** pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. A complaint that fails to meet this standard may be dismissed pursuant to *Rule 12(b)(6)*. *See* *Fed. R. Civ. P. 12(b)(6)*. To overcome a *Rule 12(b)(6)* motion to dismiss after the Supreme Court's decisions in *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* and *Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, a plaintiff's "factual allegations [in the complaint] 'must . . . suggest that the claim has at least a plausible chance of success.'" *Levitt v. Yelp! Inc., 765 F.3d 1123, 1135 (9th Cir. 2014)*. The court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)*. But "allegations in a complaint . . . may not simply recite the elements of a cause of action [and] must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Levitt, 765 F.3d at 1135* (quoting *Eclectic Props. E., LLC v. Marcus & Millichap Co., 751 F.3d 990, 996 (9th Cir. 2014)*). "A claim has facial plausibility when the Plaintiff pleads factual content that allows the court to draw the reasonable inference that the Defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly, 550 U.S. at 556*).

IV. ANALYSIS

A. Antitrust Claims (Counts 1-7)

Apple argues that all seven of Plaintiffs' antitrust claims **[*16]** should be dismissed because Plaintiffs fail to allege facts sufficient to meet two threshold conditions to proceed on any antitrust theory: (1) Plaintiffs fail to allege a plausible relevant market for their claims, and (2) Plaintiffs fail to allege antitrust injury.

As explained below, the Court dismisses all of the antitrust claims for Plaintiffs' failure to satisfy these threshold conditions. As such, the Court cannot and does not address whether Plaintiffs have sufficiently plead facts to state substantive antitrust claims.

1. Relevant Market for Antitrust Claims

"A threshold step in any antitrust case is to accurately define the relevant market, which refers to 'the area of effective competition.'" *Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 992 (9th Cir. 2020)* (citation omitted); *see also* *Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir. 1997)* ("The relevant market is the field in which meaningful competition is said to exist." (citing *United States v. Continental Can Co., 378 U.S. 441, 449, 84 S. Ct. 1738, 12 L. Ed. 2d 953 (1964)*)). Market definition is an essential predicate to the entire case, for "[w]ithout a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition.'" *Ohio v. American Express Co., 138 S. Ct. 2274, 2285, 201 L. Ed. 2d 678 (2018)*.

Typically, the relevant market is the "arena within which significant substitution in consumption or production occurs." *Id.* (citation omitted). But courts should **[*17]** "combine different products or services into 'a single market' when "that combination reflects commercial realities." *Id.* (citing *Brown Shoe Co. v. United States, 370 U.S. 294,* 336-337, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962) (pointing out that "the definition of the relevant market" must "'correspond to the commercial realities' of the industry")). "The principle most fundamental to product market definition is 'cross-elasticity of demand' for certain products or services." Kaplan v. Burroughs Corp., 611 F.2d 286, 291-92 (9th Cir. 1979). "Commodities which are 'reasonably interchangeable' for the same or similar uses normally should be included in the same product market for antitrust purposes." *Id.* "This interchangeability is largely gauged by the purchase of competing products for similar uses considering the price, characteristics and adaptability of the competing commodities." United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 380-81, 76 S. Ct. 994, 100 L. Ed. 1264 (1956). "In defining the relevant market, the court must look beyond the particular commodity produced by an alleged monopolist because the relevant product market for determining monopoly power, or the threat of monopoly control, depends upon the availability of alternative commodities for buyers." Kaplan, 611 F.3d at 292 (citing Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F.2d 1296, 1301 (9th Cir. 1978)). A plaintiff cannot ignore economic reality and "arbitrarily choose the product market relevant to its claims"; rather, the plaintiff must "justify any proposed **[*18]** market by defining it with reference to the rule of reasonable interchangeability and cross-elasticity of demand." Buccaneer Energy (USA) v. Gunnison Energy Corp., 846 F.3d 1297, 1313 (10th Cir. 2017) (internal quotation marks and citation omitted).

Where a complaint fails to adequately allege a relevant market underlying its antitrust claims, those claims must be dismissed. Pistacchio v. Apple Inc., 2021 U.S. Dist. LEXIS 47071, 2021 WL 949422, at *2 (N.D. Cal. Mar. 11, 2021).

a. Unclear Market Definitions

First, Apple correctly observes that the FAC lacks clarity as to the relevant product markets for Plaintiffs' antitrust claims. The FAC articulates and references at least fifteen different markets and does not always define the boundaries of or differences between those markets. *See e.g.*, FAC ¶¶ 8 n.1, 11, 12, 17-18, 81, 121, 135-37, 142, 165-66, 168, 233, 235; Motion to Dismiss at 7-9. For example, Plaintiffs mention the "the App Market" twice in the complaint but do not define it. FAC ¶¶ 109, 183. It is not clear whether this is the same as, distinct from or overlapping with the "national market of apps for smartphone enhanced internet access devices," *id.* ¶ 121; "the US consumer-facing market for smartphone apps," *id.*; or the undefined "app submarkets" referenced elsewhere, *id.* ¶¶ 168, 235. Plaintiffs suggest at one point that these "app markets . . . are downstream **[*19]** from the smartphone enhanced device market." *Id.* ¶ 183. But this articulation would seem to contradict Plaintiffs' allegations that hardware and software are "bundle[d]" together in a single "Smartphone Enhanced Internet Information and Commerce Access Device" market, *id.* ¶¶ 15-16, which itself is an apparent sub-market of the "market for smartphone enhanced commerce and information flow (devices and apps) transacted via the national internet backbone," *id.* ¶ 234. The FAC does not define these terms. And, depending on the boundaries of the alleged markets, they do not seem to correspond with the products subject to the alleged antitrust conduct. For instance, it is not clear why the Coronavirus Reporter is an app or program that can only be used on Apple smartphones and not on other smartphone enhanced Internet access devices, or any other device that has access to the internet. Why can the app not be used on laptops and desktops?

Plaintiffs attempt to bring clarity to the FAC through its briefing by seeking to narrow the relevant markets upon which it relies, and abandoning many markets alleged in the FAC. However, it is not permissible for Plaintiffs to amend their complaint through **[*20]** motion practice. Tietsworth v. Sears, 720 F. Supp. 2d 1123, 1145 (N.D. Cal. 2010). But even if the Court were to credit Plaintiffs' attempt at clarifying the scope of the FAC through briefing, Plaintiffs' newly proposed relevant markets still rely on inconsistent explanations regarding the relevant product markets.

Plaintiffs now argue that the principal markets on which their antitrust claims are two foremarkets - "US Smartphones" or "an alternative single brand foremarket" of "US iOS Smartphones" - and *four* downstream markets, "which by definition, Apple has 100% control over: the iOS institutional App Market, the iOS notary stamp market, the iOS application loader market and the iOS userbase market." MTS ¶¶ 11-12. But then, in Plaintiffs' Opposition to Apple's Motion to Dismiss, they contend that, notwithstanding the various references to other markets throughout the complaint, their antitrust claims are predicated on two foremarkets and *five* downstream markets.

Docket No. 45 ("Opposition") at 7. More notably, the term "foremarket" does not appear in Plaintiffs' FAC; it is an entirely new concept unanchored to the FAC.

Even if the Court were to proceed from Plaintiffs' narrowest formulation of the relevant markets for its claims - the two foremarkets **[*21]** and four downstream markets to which Plaintiffs refer in their Motion to Strike, MTS ¶¶ 11-12 - this attempt at creating a narrower framework for the product market analysis fails to provide sufficient clarity to pass muster. Does the "market for smartphone enhanced commerce and information flow (devices and apps) transacted via the national internet backbone," FAC ¶ 234, correspond to Plaintiffs' now asserted "US smartphones" foremarket or to one of Plaintiffs' single-brand downstream markets? What is included in the market for U.S. smartphones? All brands? What about devices such as tablets? Do the included products have to be Internet-enabled? What if they access the Internet only through a Wi-Fi connection? And where do Plaintiffs' allegations about Apple's monopoly over "the iOS market," *id.* ¶ 124 fit into its proposed framework of two foremarkets and four downstream markets? How do the newly asserted markets relate to Plaintiffs' allege antitrust injury in the "market of COVID startups"? *Id.* ¶ 81.

In summary, the FAC does not provide sufficient clarity for the Court to assess the threshold question of whether there is a relevant market for Plaintiffs antitrust claims. One cannot **[*22]** discern what is included and what is not, and thus analysis of cross-elasticity of demand is not possible. Nor do the newly asserted markets appear to correspond to the markets and allegations pleaded in the FAC.

The Court may dismiss Plaintiffs' antitrust claims based on these findings alone. *Sumotext Corp. v. Zoove, Inc., No. 16-CV-01370-BLF, 2016 U.S. Dist. LEXIS 152927, 2016 WL 6524409, at *3 (N.D. Cal. Nov. 3, 2016)* ("The Court also finds the allegations of the relevant market to be unclear, and it disagrees with Sumotext that the relevant market need not be alleged at the pleading stage."); *Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1044 & n.3 (9th Cir. 2008)* (a plaintiff alleging a claim under either *Section 1* or *Section 2 of the Sherman Act* must allege the existence of a relevant market and that the defendant has power within that market); *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1064 (9th Cir. 2001)* (affirming dismissal based on contradictory market definitions).

b. Plausibility of Alleged Product Markets

In light of the foregoing analysis that Plaintiffs' alleged product markets lack clarity, the Court need not analyze the plausibility of any of the product markets which Plaintiffs allege. Nonetheless, the Court will assume *arguendo* Plaintiffs' attempt to narrow the relevant markets to two foremarkets and four downstream markets are defined with sufficient clarity, MTS ¶¶ 11-12, and thus analyzes the plausibility of those six markets (while ignoring other markets **[*23]** that Plaintiffs alleged in the FAC and now seem to abandon). The Court finds that these alleged markets do not satisfy *Rule 12(b)(6)*'s plausibility standard.

Plaintiffs' Motion to Strike proposes the following six markets to underlie Plaintiff's antitrust claims:

> (1) Foremarket 1: "US Smartphones." MTS ¶ 11; FAC ¶ 15 ("Smartphone Enhanced Internet Information and Commerce Access Device Marketplace"); *id.* ("A smartphone is an ecosystem of hardware AND software. . . The iPhone exists within the marketplace for smartphones."); *id.* ¶ 16 ("The marketplace here is the smartphone internet access device."); *id.* ¶ 121 ("There is a relevant national market of apps for smartphone enhance internet access devices, which are critical to the flow of information and commerce.").
>
> (2) Foremarket 2: "an alternative single brand foremarket" of "US iOS Smartphones." MTS ¶ 12; FAC ¶ 18 ("Lastly, we define the single-product marketplace for iOS devices, a subset (80%) of the US smartphone internet access device marketplace."); *id.* ¶ 124 ("the iOS smartphone internet access device market is a relevant market under Sherman.").
>
> (3) Downstream Market 1: "iOS institutional App Market." MTS ¶ 12; FAC ¶ 18 ("iOS Device Application **[*24]** Institutional Marketplace. . . Distributors buy apps, like film studios buy movie rights. . . Largely Theoretical Marketplace: Apple does not recognize it as a legitimate market in their DPLA agreement. Nonetheless, Apple monopsony "buys" millions of apps at a price of zero."). Plaintiffs allege that "by definition, Apple controls

nearly 100% of the iOS institutional App marketplace . . . and hence no competing institutional app buyers." FAC ¶ 126.

(4) Downstream Market 2: "iOS notary stamp market." MTS ¶ 12. Plaintiffs allege that "Apple must issue a 'notarization' or digital encryption signature, in order for an app to launch . . . Apple is the sole producer of these notarizations stamps." FAC ¶ 135.

(5) Downstream Market 3: "iOS application loader market." MTS ¶ 12. Plaintiffs allege that "like the iOS app notarization stamp, the iOS app onboarding software is a critical component to access the critical infrastructure that is the national iOS 'network effect.'" FAC ¶ 136.

(6) Downstream Market 4: "iOS userbase market." MTS ¶ 12. Plaintiffs allege that there is a market "for access rights to the smartphone enhanced internet userbase" and "Apple. . . charges developers $99 for these **[*25]** (partial, selectively limited) access rights." FAC ¶ 140.

There are several problems under *Rule 12(b)(6)* with the relevant markets which Plaintiffs propose.

First, Plaintiffs do not plead facts sufficient to justify their proposed relevant markets. Recall that the "principle most fundamental to product market definition is 'cross-elasticity of demand' for certain products or services." *Kaplan, 611 F.2d at 291-92*. The FAC lacks any discussion of cross-elasticity of demand for certain products or services (a point Plaintiffs concede, Opp. at 7). Moreover, five of the six markets that Plaintiffs allege are single-brand markets in which Plaintiffs have drawn the definitional lines to such that the *only market participant* is inherently and necessarily Apple, MTS ¶¶ 11-12, however, Plaintiffs have not alleged facts required to justify defining these markets as *single-brand* markets.

"Single-brand markets are, at a minimum, extremely rare" and courts have rejected such market definitions "[e]ven where brand loyalty is intense." *Apple, Inc. v. Psystar Corp., 586 F. Supp. 2d 1190, 1198 (N.D. Cal. 2008)* (internal quotation marks and citation omitted). *But see id.* "It is an understatement to say that single-brand markets are disfavored. From nearly the inception of modern ***antitrust law***, the Supreme Court has **[*26]** expressed skepticism of single-brand markets[.]" *In re Am. Express Anti-Steering Rules Antitrust Litig., 361 F. Supp. 3d 324, 343 (E.D.N.Y. 2019)*; Herbert J. Hovenkamp, *Markets in IP & Antitrust*, *100 Geo. L.J. 2133, 2137 (2012)* ("[A]ntitrust law has found that a single firm's brand constitutes a relevant market in only a few situations."). To be sure, "[a]ntitrust markets consisting of just a single brand, however, are not per se prohibited. . . . In theory, it may be possible that, in rare and unforeseen circumstances, a relevant market may consist of only one brand of a product." *Apple, Inc. v. Psystar Corp. at 1198*. On the other hand, as the court in *Epic v. Apple* recently reiterated, "[a] single brand is *never* a relevant market when the underlying product is fungible." *Epic Games, Inc. v. Apple Inc., No. 4:20-CV-05640-YGR, 559 F. Supp. 3d 898, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *87 (N.D. Cal. Sept. 10, 2021)* (citation omitted, emphasis in the original).

Despite the foregoing, "in some instances one brand of a product can constitute a separate market." *Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* ("*Eastman Kodak*"). Determining whether a single-brand market is proper requires "a factual inquiry into the 'commercial realities' faced by consumers." *Id.* (quoting, *Grinnell Corp., 384 U.S. at 572*). In *Eastman Kodak*, the Supreme Court considered whether summary judgment was appropriate for Kodak on *Sections 1* and *2* claims where the plaintiffs had argued that Kodak possessed monopoly power in the *aftermarket* of sales of parts and repair services, despite not **[*27]** having such power in the foremarket of equipment sales. *504 U.S. at 466-471*. In affirming the Ninth Circuit's reversal of summary judgment, the Supreme Court identified two factors that supported the aftermarket framework: the existence of significant (i) "information" costs and (ii) "switching costs." *Id. at 473*.

Since then, the Ninth Circuit in *Newcal Industries Inc. v. Ikon Office Solution* outlined four factors that could indicate whether an alleged market is a properly defined single-brand aftermarket under *Eastman Kodak* at the motion to dismiss stage. *See 513 F.3d 1038, 1049-50 (9th Cir. 2008)*. The first indicator of an aftermarket is that the market is "wholly derivative from and dependent on the primary market." *Id. at 1049*. The second indicator is that the "illegal restraints of trade and illegal monopolization relate only to the aftermarket, not to the initial market." *Id. at 1050*. The third indicator is that the defendant's market power "flows from its relationship with its consumers" and the defendant did "not achieve market power in the aftermarket through contractual provisions that it obtains in the initial market." *Id.* The fourth indicator is that "[c]ompetition in the initial market. . . does not necessarily suffice to discipline anticompetitive practices in the aftermarket." **[*28]** *Id.*

"[T]o establish a single-brand aftermarket under *Kodak* and *Newcal*, the restriction in the aftermarket must not have been sufficiently disclosed to consumers in advance to enable them to bind themselves to the restriction knowingly and voluntarily." *Datel Holdings Ltd. v. Microsoft Corp., 712 F. Supp. 2d 974, 987 (N.D. Cal. 2010)*. Indeed, "[m]arket imperfections" may "prevent consumers from discovering" that purchasing a product in the initial market could restrict their freedom to shop in the aftermarket. *Newcal, 513 F.3d at 1048*. In other words, a plaintiff must show evidence "to rebut the economic presumption that [defendant's] consumers make a knowing choice to restrict their aftermarket options when they decide in the initial (competitive) market to" purchase in the foremarket. *Newcal, 513 F.3d at 1050*.

As to Plaintiffs' attempt to allege a single-brand market, Plaintiffs provide no response to Apple's argument that they fail to allege facts going to the four factors as required by *Newcal* to survive a motion to dismiss to justify their proposed *single brand aftermarkets*. *513 F.3d at 1049-50*. Plaintiffs *cannot* satisfy *Newcal* based on the facts they have alleged. Plaintiffs suggest that the four *single-brand* downstream markets (or aftermarkets) flow from the ***single-brand foremarket*** of iOS smartphones. *See* FAC ¶¶ 125 ("the iOS Institutional **[*29]** App marketplace is downstream. . . from the single-product iOS device market."), 135 ("The citizens of our country have invested around a trillion dollars in the iOS network effect. . . the market for iOS app notarization stamps is a relevant antitrust market"), 136 ("Like the iOS app notarization stamp, the iOS app onboarding software is a critical component to access the critical infrastructure that is the national iOS network effect."); MTS ¶ 12 ("Four downstream markets are alleged, which by definition, Apple has 100% control over."). Yet, Plaintiffs do not cite a single antitrust case that has *ever* recognized a ***single-brand foremarket***, and their attempt to define a single-brand foremarket market around "iOS smartphones" without any explanation for why that market should be so limited and without any reference to competitor products or substitutes runs afoul of the principle that "[a] single brand is *never* a relevant market when the underlying product is fungible." *Epic, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *87*.

Moreover, Plaintiffs do not attempt to plead facts to satisfy *Newcal's* four factors to justify their proposed single brand aftermarkets. *Newcal* requires Plaintiffs to show (1) the aftermarket is wholly derivative from the **[*30]** primary market, (2) the illegal restraints of trade relate only to the aftermarket, (3) the defendant did not achieve market power in the aftermarket through contractual provisions that it obtains in the initial market, and (4) competition in the initial market does not suffice to discipline anticompetitive practices in the aftermarket. *513 F.3d at 1048-50*. Importantly, the *Newcal* factors require Plaintiffs to articulate the relationship between a *non-brand limited foremarket* and *the single-brand aftermarkets*. But, here, Plaintiffs do not plead any facts demonstrating the relationship between the non-brand limited foremarket of US Smartphones and the four single-brand aftermarkets. Thus, Plaintiffs fail to allege facts as required by *Newcal* to sustain their single-brand markets.

On a broader level, Plaintiffs fail to plead facts sufficient to justify any of the six alleged relevant markets under the standard rules for *any* market, let alone do they plead the specific facts required to justify its *five* single-brand markets as required by *Newcal* at the motion to dismiss stage. *See* *Buccaneer Energy, 846 F.3d at 1313* (A plaintiff cannot ignore economic reality and "arbitrarily choose the product market relevant to its claims;" rather, the plaintiff must "justify **[*31]** any proposed market by defining it with reference to the rule of reasonable interchangeability and cross-elasticity of demand."). The asserted markets are not secondary markets derived from consumers who are unknowingly captured and held prisoner through a primary market. Instead, according to Plaintiffs' theory, the asserted markets appear to stand on their own, and, for the reasons stated above, lack plausibility.

Plaintiffs do not dispute Apple's arguments about lack of interchangeability analysis. They argue that their failure to provide analysis of cross-elasticity of demand in the FAC "is not fatal to Plaintiffs' claims" because each of the submarkets alleged are well-defined in themselves, and their boundaries can be refined through discovery. Opp. at 7-8 (citing *Brown Shoe Co. v. U.S., 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*). This is incorrect. "Authorities far too numerous to cite or discuss in detail have established" that "[t]he principle most fundamental to product market definition is 'cross-elasticity of demand.'" *Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979)*. "[W]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand," therefore, "the relevant market is legally insufficient." **[*32]** *City of N.Y. v. Grp. Health Inc., 649 F.3d 151, 155 (2d Cir. 2011)*.

But even if Plaintiffs' alleged Foremarket 1 of "US Smartphones" could be sustained, none of Plaintiffs' antitrust claims about Apple's actions are shown to impact that market. Plaintiffs must define "the relevant market, which refers to 'the area of effective competition.'" *Qualcomm., 969 F.3d at 992*. Plaintiffs fail to define that area of effective competition in which they compete. They are not smartphone manufacturers. Nor do they provide any other basis for the Court to find that the market of US Smartphones is the "area of effective competition" for Plaintiffs' claims. *See e.g., Pistacchio v. Apple Inc., No. 4:20-CV-07034-YGR, 2021 U.S. Dist. LEXIS 47071, 2021 WL 949422, at *2 (N.D. Cal. Mar. 11, 2021)* ("[T]he relevant market definition contains sparse supporting allegations. First, as noted, Pistacchio is required, and has not included appropriate allegations demonstrating that there are *not* appropriate economic substitutes for Apple Arcade on the iOS platform. . . . The complaint offers no specific allegations supporting the sole focus of the market definition on cloud gaming alternatives as opposed to the broader video game market generally, including those individually sold both in the Apple App Store or by competitors on computer or console platforms, nor does the complaint contain allegations supporting the narrowing **[*33]** of a market to consideration of a subscription based payment model.").

Second, the four downstream single-brand markets on which Plaintiffs' antitrust claims rely run afoul of a fundamental principle for antitrust market definition: they are not markets for products or services. *See e.g., Newcal, 513 F.3d at 1045* ("First and foremost, the relevant market must be a *product* market. The consumers do not define the boundaries of the market; the products or producers do.") (Emphasis in original); *Kaplan, 611 F.2d at 292* ("In arriving at an adequate market definition, price differential between competing products and services is a relevant factor to consider[.]"). For example, Plaintiffs alleged iOS Institutional App Market is defined as a market in which Apple "buy[s]" apps from developers by approving or rejecting them for distribution on the App Store. But Plaintiffs themselves admit this "market" is "largely theoretical," "hypothetical," and untethered to the licensing arrangement on which the App Store is actually predicated. *Id.* ¶¶ 18, 19, 121. Plaintiffs acknowledge that Apple's app review process is not one in which Apple buys the apps of developers, but, rather the "DPLA and App Store employ language that a free app is 'For Sale' **[*34]** or 'Available' through the App Store after gaining 'approval' by Apple for 'adherence to iOS standards.'" *Id.* ¶ 19. The DPLA confirms this arrangement, explaining that "Applications that meet Apple's Documentation and Program Requirements may be submitted for consideration by Apple for distribution via the App Store" and if "selected by Apple, Your Applications will be digitally signed by Apple and distributed[.]" DPLA § Purpose. The DPLA does not include any provisions indicating that Apple pays developers or "buys" apps through the app review process. Rather than buying apps, as discussed in greater detail below, Apple enables the distribution of apps to end users through the app review process.

Similarly, there is no basis supporting Plaintiffs' notion that the proposed downstream markets of "iOS notary stamps," "iOS application loaders," and "iOS userbase" are markets for *products*. Rather, as Plaintiffs acknowledge, each of these three markets refer to component parts a developer may access and use when a developer's app is approved for distribution on the App Store. *See* FAC ¶¶ 135-40. These three markets are neither *markets* nor do they describe *products* but integrated features **[*35]** of Apple's app approval process. Plaintiffs' articulation of these markets is contrived and does not reflect the reality of an actually-existing product market. Indeed, the Court in *Epic* rejected the alleged "foremarket for Apple's own operating system" on Apple mobile devices as "'artificial,'" "entirely litigation driven, misconceived, and bear[ing] little relationship to the reality of the marketplace" because the Court determined that the operating system was an integrated feature of the mobile devices, and that it was "illogical to argue that there is a market for something that is not licensed or sold to anyone." *Epic, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *29*. The *Epic* Court summarized that there were "fundamental factual flaws with Epic Games' market structure" because "[w]ithout a product, there is no market for the non-product, and the requisite analysis cannot occur." *2021 U.S. Dist. LEXIS 172303, [WL] at *86*; *see also id.* ("Thus, where there is no product or market for smartphone operating systems, there are no derivative markets."). The *Epic* Court also rejected the proposed "payment solutions aftermarket" for "the independent reason that [the "In App Purchases" feature set out in Apple's DPLA] is not a product for which there is a market." *Id.* The same analysis applies **[*36]** here: in the absence of information demonstrating that Plaintiffs' downstream markets describe *actually existing products* that are sold or licensed, Plaintiffs' aftermarkets are "without a product, there is no market for the non-product, and the requisite analysis cannot occur." *Id.*

Third, the markets Plaintiffs allege fail to grapple with their own admission and economic reality that the "iOS App market is two-sided." FAC ¶ 12; *accord id.* ¶¶ 11, 17, 18, 123, 125. The Court in *Epic* addressed the nature of the Apple's iOS App marketplace, and Plaintiffs do not dispute its analysis or conclusion that as a two-sided market the iOS App marketplace is a market not for products but for *transactions*:

> As a threshold issue, the Court considers whether the App Store provides two-sided transaction services or as Epic Games argues "distribution services." The Supreme Court has seemingly resolved the question: two-sided transaction platforms sell transactions. In two-sided markets, a seller "offers different products or services to two different groups who both depend on the platform to intermediate between them." *Amex, 138 S. Ct. at 2280*. Here, try as it might, Epic Games cannot avoid the obvious. Plaintiff only sells to iOS **[*37]** users through the App Store on Apple's platform. No other channel exists for the transaction to characterize the market as one involving "distribution services." . . .Accordingly, the Court finds that the relevant App Store product is transactions[.]

*Epic, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *83*. As such, Apple's iOS App two-sided app market is "best understood as supplying only one product—transactions—which is jointly consumed" by developers and consumers on opposing sides of the platform. *Amex, 138 S. Ct. at 2286 n.8*. Therefore, the relevant market must be some category of "transactions" between developers and consumers. *Epic, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *83-86*; *accord* *Amex, 138 S. Ct. at 2287* ("[W]e will analyze the two-sided market for credit-card transactions as a whole to determine whether the plaintiffs have shown that Amex's antisteering provisions have anticompetitive effects."). As the court in *US Airways v. Sabre Holdings Corp., 938 F.3d 43, 57 (2d Cir. 2019)*, explained, "A transaction platform is a two-sided platform where the business "cannot make a sale to one side of the platform without simultaneously making a sale to the other. . . As a result, "[e]valuating both sides of a two-sided transaction platform is . . . necessary to accurately assess competition."

Despite conceding the fact that the iOS App market is a two-sided market of transactions, Plaintiffs four proposed **[*38]** downstream single-brand markets each cut up the app marketplace into admittedly "hypothetical" and "theoretical," FAC ¶¶ 18-19, one-sided markets, with no reference to the *transaction between* developers and consumers that is the actual product on the platform. Instead, it posits Apple as the monopsony buyer of the apps. *See* FAC ¶ 121 ("The other side of this market is the national institutional app market . . Apple is a monopsony buyer of developers' apps, in the institutional app market, because they are sole distributor on the retail side."). Specifically, Plaintiffs advance a *theory* that Apple is an "institutional buyer" of apps and that it "sells" notary stamps, onboarding software and userbase access to developers. But this theoretical framework does not align with the economic reality that Plaintiffs concede: that the iOS App market is a two-sided market of transactions between developers and consumers. Developers are engaged in a *transaction* with consumers, not selling to Apple.

As the court in *Epic* explained, although Apple may be involved in facilitating an exchange through its operation of the App Store platform, ultimately "users and developers consume App Store transactions." **[*39]** *2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *83*. Plaintiffs' failure to allege relevant markets that encompass or even address the two-sided nature of the iOS App market renders their market definitions insufficient as a matter of law. *Amex, 138 S. Ct. at 2287* ("[C]ompetition cannot be accurately assessed by looking at only one side of the platform in isolation."); *Sabre Holdings Corp., 938 F.3d at 57* ("In other words: In cases involving two-sided transaction platforms, the relevant market must, as a matter of law, include both sides of the platform."); *Epic, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *86* ("Epic Games' aftermarket approach to market definition is inconsistent with its recognition that the App Store constitutes a two-sided transaction platform which it fails to properly analyze."). Plaintiffs offer no argument on this point.

In summary, missing from Plaintiffs' market definitions is the identification of *any* well-pleaded allegations that support the boundaries they seek to defined. Plaintiffs fail to plead facts sufficient to adequately define any of their markets (making any kind of analysis on interchangeability and cross-elasticity of demand impossible), fail to rationalize and defend the five single-brand markets; do not define markets for actual products; and ignore the two-sided nature of the iOS app market. "A threshold **[*40]** step in any antitrust case is to accurately define the relevant market." *Qualcomm Inc., 969 F.3d at 992*. Because Plaintiffs have failed to "rigorously address[]" market definition, their complaint warrants dismissal. *City of Oakland v. Oakland Raiders, 445 F. Supp. 3d 587, 600 (N.D. Cal. 2020)*.

2. Antitrust Injury

Apple also argues that Plaintiffs fail to plead antitrust injury.

To plausibly state antitrust claims in this market for transactions of apps (which cannot plausibly be limited to iOS apps based on the allegations in the FAC, as discussed above), Plaintiffs must allege injury to "competition in the market as a whole"—such as marketwide reduction in output or increase in prices—"not merely injury to itself as a competitor" in the market. *Gorlick Distrib. Ctrs., LLC v. Car Sound Exhaust Sys., Inc., 723 F.3d 1019, 1024-25 (9th Cir. 2013)*. This alleged harm also must be "'attributable to an anticompetitive aspect of the practice under scrutiny'"; "harm that could have occurred under the normal circumstances of free competition" does not suffice. *In re NFL's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1150 (9th Cir. 2019)* (quoting *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*).

Apple argues that Plaintiffs' theory of injury is that *their* apps were rejected from the App Store or subjected to alleged ranking suppression. Motion to Dismiss at 6; FAC ¶¶ 28-30, 53, 87. Yet, Apple contends, Plaintiffs make no allegation that Apple's conduct excluded Apple competitors, suppressed output of the market, increased **[*41]** app prices, or otherwise harmed competition *in the market* beyond Plaintiffs' conclusory allegations of "damage to an entire market," FAC ¶ 81, or unadorned references to "restricted output, quality, and innovation." *Id.* ¶¶ 115, 191. "[A] formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555*.

Additionally, Apple argues that Plaintiffs ignore the nature of the App Store platform such that for every app that is allegedly "suppressed" in search rankings, another app's visibility is lifted. Motion to Dismiss at 6. The effect of "suppression" in search rankings affects the relative positions among products in the market; but there is no showing of harm to competition across the market. Effects on *Plaintiffs'* apps alone, which may raise equitable issues as *between* app developers, do not establish *antitrust* injury. As the Court noted in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*, "[t]he antitrust laws . . . were enacted for the protection of competition not competitors." (Quotation marks omitted).

Finally, Apple argues that Plaintiffs cannot merely declare that every app rejection injures competition by decreasing output and constricting consumer choice, because "if that were the rule, the *Sherman Act* would inhibit competition **[*42]** by requiring all platforms to increase the number of available apps—no matter if they contained malware, were offensive, sought to scam users, or were inferior copycats that could confuse consumers." Docket No. 64 ("Reply") at 8. Relying on the *Epic*'s analysis, Apple contends that consumers instead "should be able to choose between the type of ecosystems and ***antitrust law*** should not artificially eliminate them." *Epic, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *29*. The App Store's curation—which differentiates it from other platforms—helps "maintain[] a healthy ecosystem that ultimately benefits" users and developers. *2021 U.S. Dist. LEXIS 172303, [WL] at *75*. Thus, Apple concludes, Plaintiffs offer no plausible theory that Apple's policies reduce the net quality of transactions in a relevant market, their allegations amount only to individual harm. *See Gorlick, 723 F.3d at 1025*.

Plaintiffs respond by arguing that they plead "harm to competitors" or "harm to the market" throughout the FAC, and that it is enough that Plaintiffs plead the harm generally at the motion to dismiss stage. Opp. at 11-12 (citing FAC ¶¶ 53, 81, 173, 174, 179, 200). Additionally, Plaintiffs point to a Congressional Subcommittee report which they contend provides the requisite detail to sustain their allegations of marketwide harm. **[*43]** Opp. at 12.

The Court disagrees. The allegations of injury contained in the FAC are either confined to specific harms experienced by Plaintiffs or a small group of competitors, rather than harm to the market. None of the allegations in the FAC allege harm generally to the market of transactions for apps across a relevant market.

Plaintiffs' allege various types of antitrust injury, all of which are insufficient:

- "Apple's refusal to sell notarization stamps or onboarding software . . . is intended to harm competition app developers, like Plaintiffs and Class Members." FAC ¶ 173.
- "The artificial monopoly created by notarization stamps and software onboarding results in damages to nearly twenty million proposed class members of approximately one thousand dollars each. . . When the stamps aren't issued, further damages accrue from lost app revenues. . . In China, 'open' app stores are ten times the size of Apple's App Store in China." FAC ¶ 174.

- "Much damage is done to the overall competition within the institutional app markets, as a result of Apple's anticompetitive practices in userbase access, notarization and onboarding. But the damages extend beyond those markets, into the overall **[*44]** US economy, and even public health response, in the case of Coronavirus Reporter." FAC ¶ 179
- "Apple's conduct and unlawful contractual restrains harm a market that forms a substantial part of the domestic economy, the smartphone enhanced internet device app market." FAC ¶ 200.

The assertions at FAC ¶¶ 173, 179 and 200 amount to conclusory and "threadbare recitals" of the elements of antitrust injury that are insufficient to state a claim. *Iqbal, 556 U.S. at 663*; *see also, e.g., NorthBay Healthcare Grp., Inc. v. Kaiser Found. Health Plan, Inc., 305 F. Supp. 3d 1065, 1074 (N.D. Cal. 2018)* (dismissing antitrust claims because "there are no non-conclusory allegations that [Defendant's] actions restrained trade in the relevant market or injured overall competition" and the allegations "lack factual enhancement and are conclusory."); *Eastman v. Quest Diagnostics Inc., 108 F. Supp. 3d 827, 835 (N.D. Cal. 2015)* (same); *Feitelson v. Google Inc., 80 F. Supp. 3d 1019, 1029 (N.D. Cal. 2015)* (same). Additionally, as discussed above, these allegations relate to harms in hypothetical, non-existent single-brand markets - not in a relevant, actually-existing, two-sided, brand-differentiated market for app transactions.

Although the allegation at FAC ¶ 174 provides some factual basis for Plaintiffs' theory of injury—asserting that Apple's App Review process necessarily injures competition by excluding a number of developers from launching apps on Apple's App Store—this allegation **[*45]** on its own is not sufficient to plead to antitrust injury for two reasons. First, Plaintiffs ignore the App Store serves a two-sided transaction market. As *Epic* held, in a two-sided transaction market, there must be consideration of the "effects on both sides of the market." *2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *102*. Plaintiffs' theory of antitrust injury alleges injury on only one side of the transaction - developers - but fails to grapple with the second side of the transaction market, consumers. Indeed, that apps which comply with Apple's generally applicable "Guidelines" regarding security, functionality and reliability are approved over those that do not is consistent with "normal circumstances of free competition" and may well serve the best interests of consumers. *In re NFL's Sunday Ticket Antitrust Litig., 933 F.3d at 1150*. It is not enough that conduct "has the effect of reducing consumers' choices or increasing prices to consumers." *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1202 (9th Cir. 2012)*). That is because these effects may arise for procompetitive reasons, such as increased interbrand competition. *See Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 891-93, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. As the court held in *Epic*, Apple's "centralized app distribution and the 'walled garden' approach differentiates Apple from Google." *2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *102*. "That distinction ultimately increases consumer choice by allowing users who value open distribution **[*46]** to purchase Android devices, while those who value security and the protection of a 'walled garden' to purchase iOS devices." Although the conclusion in *Epic* is not necessarily controlling here, Plaintiffs alleged theory of antitrust injury fails to give *any* consideration of the consumer-side of the two-sided transaction market. Failure to allege injury that harmed overall competition in the relevant market—here, a two-sided market of transactions—undermines Plaintiffs' theory of antitrust injury. *See NorthBay Healthcare, 305 F. Supp. 3d at 1074*.

Second, even if it is assumed that Apple exercised monopsonist market power in the apps transaction market, its decisions as to which apps are allowed to sell through the App Store is not an act that in itself causes harm the antitrust laws were designed to protect. Plaintiffs failed to make any allegation the Apple benefits from its rejection of apps or from suppression of apps in the search function. There is no showing that Apple is reaping the fruits of anti-competitive conduct. The deficiency of Plaintiffs' claim in asserting an antitrust injury is demonstrated by the following analogy. Query: if the only newspaper in town decides which advertisements may properly be posted or which **[*47]** advertisements to accept, does a rejected advertiser suffer an anti-trust injury? No. That is not the kind of injury antitrust laws are intended to protect. As noted above, ***antitrust law*** protections competition, not competitors. In contrast, if the newspaper attempted to squelch competition by telling advertisers if they dare advertise in an up-and-coming competing newspaper or radio station, they will be barred from its newspaper, that could suffice to show antitrust injury. *See e.g., Lorain J. Co. v. United States, 342 U.S. 143, 150-51, 152, 72 S. Ct. 181, 96 L. Ed. 162 (1951)* ("The publisher's attempt to regain its monopoly of interstate commerce by forcing advertisers to boycott a competing radio station violated *§ 2" of the Sherman Act*). Plaintiffs do not allege facts any such antitrust injury in the FAC.

To be sure, Plaintiffs allege that:

> "Apple rejected Coronavirus Reporter on March 6, 2020, knowing apps from large institutions and strategic partners were in the pipeline but not yet ready. Apple specifically strategized to prevent the Coronavirus Reporter app, and *all* COVID startup firms, from setting a precedent or amassing a user base, which could jeopardize its own pipeline and/or the first-mover advantage of desirable institutional partners of a monopolistic trust." FAC ¶ 53.

If **[*48]** Apple were to reject or suppress Plaintiffs' apps to diminish competition for Apple's own apps or apps of other developers with whom Apple is conspiring, that might be deemed to inflict antitrust injury. But the FAC and ¶ 53 fail to plausibly allege such conduct with any specificity.

Finally, Plaintiffs' argument that by incorporating by reference a "House Subcommittee report" regarding Apple's business practices into the FAC they have sufficiently plead antitrust injury is unavailing. Opp. at 12. Although the FAC makes reference to the report and states that the report is incorporated by reference, FAC ¶¶ 37-45, Plaintiffs do not connect the findings in the report to their theory and allegations of antitrust injury to the entire market in this case. At most, Plaintiffs allege that aspects of Apple's business practices described in the report "directly harmed Plaintiffs and class members," FAC ¶¶ 40-41, but go no further in elaborating how the practices alleged in this case inflicted antitrust injury in the two-sided market relevant here.

Thus, in addition to Plaintiffs failing to define a relevant market for their antitrust claims, Plaintiffs fail to sufficiently plead antitrust injury **[*49]** in the FAC even if the Court were to assume a relevant market had been defined. This failure provides a second and independent basis for the Court to dismiss Plaintiffs' antitrust claims (Claims 1-7). Because Plaintiffs have failed to make the threshold showings of a plausible a relevant market and alleging antitrust injury, the Court need not analyze whether they have alleged facts sufficient to satisfy the substantive elements of Plaintiffs' particular antitrust claims. *See e.g., Amex, 138 S. Ct. at 2285* (Market definition is an essential predicate to the entire case, for "[w]ithout a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition.'").

B. Contract Claims (Claims 8 and 9)

Plaintiffs bring two breach of contract claims: (1) breach of contract for Apple's pretextual refusal to approve the Coronavirus Reporter app for distribution on the App Store in violation of the DPLA and Developer Agreement, FAC ¶¶ 244-260 (Claim 8), and (2) breach of the covenant of good faith and fair dealing for Apple's refusal to approve the Coronavirus Reporter app, *id.* ¶¶ 261-66 (Claim 9). Plaintiffs fail to state claims for breach of contract and, accordingly, these **[*50]** claims are dismissed.

To state a breach of contract claim under California law, DPLA § 14.10, a plaintiff must plead: (1) a contract; (2) plaintiff's performance or excuse for nonperformance; (3) breach; and (4) damages. *Hamilton v. Greenwich Invs. XXVI, LLC, 195 Cal. App. 4th 1602, 126 Cal. Rptr. 3d 174, 183 (Cal. Ct. App. 2011)*. Plaintiffs fail to "identify the specific provision of the contract" at issue, much less allege facts establishing breach. *Donohue v. Apple, Inc., 871 F. Supp. 2d 913, 930 (N.D. Cal. 2012)*.

Plaintiffs allege that Apple breached the 'promise[]" in its "Developer Agreement as amended in March 2020 . . . that entities with 'deeply rooted medical credentials' were permitted to publish COVID apps on the App Store." FAC

¶¶ 245, 254. But nothing in the Developer Agreement (or any other contract) contained such a promise, much less *obligated* Apple to distribute any particular app through the App Store, even those submitted by institutions. *See* Donohue, 871 F. Supp. 2d at 931 (rejecting argument that a user guide contained contractual promises because it "includes no 'promises' which plaintiff could have 'accepted'"). Plaintiffs do not identify any contractual provision that they allege was breached.

Instead, Apple points out that the contract governing app distribution is the DPLA. The DPLA expressly states that approval decisions are in Apple's "sole discretion." DPLA § 3.2(g) ("Applications **[*51]** for iOS Products. . . **may be distributed only if selected by Apple (in its sole discretion)** for distribution via the App Store. . . as contemplated in this Agreement.") (Emphasis added). Plaintiffs agreed to this arrangement in exchange for use to Apple's propriety software, tools, and services. *See* DPLA § 1.1 (developers must "accept and agree to the terms" of the DPLA to "use the Apple Software or Services"). Thus, Plaintiffs fail to state a claim for breach of contract (Claim 8) because they fail to allege a breach.

Similarly, Plaintiffs' claim for breach of the covenant of good faith and fair dealing (Claim 9) fails because it re-hashes Plaintiffs' breach allegations (*compare* FAC ¶¶ 254, 260, *with id.* ¶¶ 263, 26). Plaintiffs do not allege that Apple frustrated any specific contractual term. *See* Soundgarden, 2020 U.S. Dist. LEXIS 64545, 2020 WL 1815855, at *17. Thus, it is dismissed for the same reasons. *See* Soundgarden v. UMG Recordings, Inc., 2020 U.S. Dist. LEXIS 64545, 2020 WL 1815855, at *17 (C.D. Cal. Apr. 6, 2020) ("no additional claim is actually stated" where allegations "do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief"). Moreover, the "implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create **[*52]** obligations not contemplated by the contract." Donohue, 871 F. Supp. 2d at 932 (quotation marks omitted). The express conferral of "sole discretion" upon Apple under the DPLA cannot be contradicted by the implied covenant. *See* Rockridge Tr. v. Wells Fargo, N.A., 985 F. Supp. 2d 1110, 1156 (N.D. Cal. 2013) ("An implied covenant of good faith and fair dealing cannot contradict the express terms of a contract.").

C. RICO and Fraud Claims (Claims 10 and 11)

To plead a civil RICO claim under § 1962(c), Plaintiffs must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's business or property." Living Designs, Inc. v. E.I. Dupont de Nemours & Co., 431 F.3d 353, 361 (9th Cir. 2005) (quotation marks omitted).

Plaintiffs allege that Apple, unnamed "individuals within Apple," "Apple's App Review team," "PR firms, law firms, and rival developer cronies," FAC ¶¶ 269, 270, 273, formed a RICO enterprise and "engaged in a distinct pattern of predicate acts over a multi-year timespan," *id.* ¶ 274, including "wire fraud and mail fraud by assigning junior App Review members to issue false, pretextual reasons for rejection to small developers," *id.* ¶ 275, and "lifting and appropriating their ideas into their own competing apps, and suppressing the original creators' work by blocking app store distribution," **[*53]** *id.* ¶ 269.

Plaintiffs' RICO claim sounds in fraud and must be pled with particularity under Rule 9(b). Odom v. Microsoft Corp., 486 F.3d 541, 553 (9th Cir. 2007) (en banc). The FAC therefore "must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false." Depot, Inc. v. Caring for Montanans, Inc., 915 F.3d 643, 668 (9th Cir. 2019) (quotation marks omitted). Plaintiffs' allegations do not meet Rule 9(b)'s standard.

Plaintiffs rely on vague, conclusory allusions to Apple's alleged practice of "assigning junior App Review members to issue false, pretextual reasons for rejection to small developers." FAC ¶ 275; *see also, e.g., id.* ¶¶ 42, 87, 104, 257. These general allegations do not identify the specific who, what, when, where, and how. Plaintiffs' attempts to describe discrete instances of fraud are no more detailed. For example, Plaintiffs point to a communication from Apple stating that Coronavirus Reporter was rejected because it contained "data that has not been vetted for accuracy by a reputable source" and was not associated with a "recognized institution." *Id.* ¶ 278. There is no plausible allegation that this was false, *id.* ¶ 277, only, at most, that Apple's requirements were poorly considered, *id.* ¶¶ 277-78. The **[*54]** decision was consistent with Apple's Guidelines. *See* Guidelines § 5.1.1(ix). Similarly, Plaintiffs suggest that Apple rejected Bitcoin Lottery because its "primary purpose" was to "encourage users to watch ads or perform marketing-oriented tasks," which was "not appropriate for the App Store." *Id.* ¶ 280. But here too, Plaintiffs do not dispute that the rejection was made pursuant to Apple's Guidelines. *See* Guidelines § 3.2.2(vi) ("Apps should allow a user to get what they've paid for without performing additional tasks. . . Apps should not require users to rate the app, review the app, watch videos, download other apps. . . or take other similar actions in order to access functionality, content, use the app, or receive monetary or other compensation, including but not limited to gift cards and codes."). Thus, Plaintiffs' RICO claim fails to sufficiently allege fraudulent behavior with particularity as required under *Rule 9(b)* and should be dismissed. *Rule 9(b)* also applies to Plaintiffs' derivative fraud claim (Count 11), and thus that claim fails for the same reason.

Additionally, Plaintiffs' RICO claim fails for another reason. Plaintiffs must allege an enterprise that is *separate* from the "person **[*55]** employed by or associated with" that enterprise who engaged in the unlawful RICO conduct. *18 U.S.C. § 1962(c)*; *see also Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1396 (9th Cir. 1986)*. In other words, "[i]f [a corporation] is the enterprise, it cannot also be the RICO defendant." *Rae v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984)*. Plaintiffs' allegations make clear that the alleged enterprise *is* Apple itself. According to the FAC, it consists of "Apple," *id.* ¶ 269, "Apple's App Review team," and "senior Apple management," *id.* ¶ 270. Where, as here, the "enterprise consist[s] only of [the corporation] and its employees, the pleading . . . fail[s] for lack of distinctiveness." *Living Designs, Inc., 431 F.3d at 361*.

Finally, Plaintiffs' assertions that the alleged enterprise consisted of Apple's "crony app developers," "law firms," and "PR firms" who allegedly "divert profits," "spread Apple's gospel," or obfuscate "Apple's anticompetitive agenda," FAC ¶¶ 271-72, fails because none of these groups are alleged to have participated in an alleged enterprise involving the predicate acts of wire and mail fraud. The allegations are also conclusory.

Thus, the Court dismisses Plaintiffs' RICO and fraud claims (Claims 10 and 11).

D. Leave to Amend

Based on the foregoing analysis, the Court dismisses all eleven of Plaintiffs' claims against Apple in the FAC. Accordingly, **[*56]** because all of the claims against Apple are dismissed, so too are Plaintiffs' class allegations stemming from those claims.

The Court addresses whether Plaintiffs should be given leave to amend any or all of their claims. While *Fed. R. Civ. P. 15(a)* states that leave to amend "shall be freely given when justice so requires," nonetheless "[a] district court acts within its discretion to deny leave to amend when amendment would be futile[.]" *Chappel v. Lab'y Corp. of Am., 232 F.3d 719, 725-26 (9th Cir. 2000)*.

Although Plaintiffs are correct to note that this will be the first ruling under *rule 12(b)(6)* concerning Plaintiffs' complaint, Apple is also correct in observing that between the various iterations of this case being filed across jurisdictions and by different configurations of Plaintiffs - all challenging the same conduct by Apple and all by the same counsel - this is Plaintiff's *seventh* amended complaint on these claims. *See supra* Procedural Background. Plaintiffs have had the benefit of responding to Apple's fully briefed motions to dismiss in this case and previous cases, and, yet, in this seventh complaint they still fail to state any claims. Accordingly, the Court finds that it would be futile to grant leave to Plaintiffs to bring an *eighth* amended complaint, and thus dismisses **[*57]** the claims with prejudice.

E. Other Issues

1. Plaintiffs' Motions for Preliminary Injunction and to Strike

Because the Plaintiffs' claims against Apple are dismissed with prejudice, Plaintiffs pending motions for preliminary injunction are denied as moot. Docket Nos. 20, 52.

The Court denies Plaintiffs' motion to strike Apple's motion to dismiss, Docket No. 51. There is no basis for a party to strike a motion. *See* 5C Wright & Miller, Fed. Prac. & Proc. Civ. § 1380 (3d ed.) ("*Rule 12(f)* motions [to strike] only may be directed towards pleadings as defined by *Rule 7(a)*; thus motions, affidavits, briefs, and other documents outside of the pleadings are not subject to *Rule 12(f)*.").

2. Plaintiffs' Motion to Append Claim

Plaintiffs' second motion for preliminary injunction additionally asserts that Plaintiffs are authorized to append an "addendum [] two-pages in length that succinctly raises" a new claim (Claim 12) under California' Unfair Competition Law, and proceeds to assume that "the operative complaint" is now "the FAC + UCL Addendum." Docket No. 51 at 3. The Court need not consider Plaintiffs' procedurally improper attempt to amend their complaint. This addendum is a nullity because Plaintiffs did not notice a motion **[*58]** for such relief, much less complied with the Court's procedures for doing so. *See Hocking v. City of Roseville, 2007 U.S. Dist. LEXIS 81540, 2007 WL 3240300, at *5 (E.D. Cal. Nov. 2, 2007)* ("Because this request was not submitted by properly noticed motion, it is not presently before the court and the court therefore declines to address it at this time."); *see also N.D. Cal. L.R. 7-1* & *10* (explaining the rules for moving for leave to amend a complaint). The Court denies the request to append a claim to the FAC on this procedural grounds.

Even if the Court were to consider Plaintiffs' request on the merits, it would deny the motion. Plaintiffs' proposed UCL claim draws from an article published in Politico describing Apple's lobbying efforts in state legislature, which Plaintiff's characterize as allegedly "expos[ing] a quid pro quo to rescind Apple's $25 million donation to an historically black college (HBCU) in Georgia, alleged to be the most disgraceful scandal in Apple's forty-year history." Docket No. 53 ("UCL Claim") ¶ 3. Plaintiffs claim that this allegation presents additional predicate acts for their RICO claim (Count 10), that the RICO enterprise should be amended to include the lobbyists and law firms mentioned in the article, and that they bring a UCL claim under the "unfair" prong derived from **[*59]** the RICO claim. *Id.* ¶ 5. Notably, the Politico article they reference was published on August 20, 2021, which was 17 days *before* Plaintiffs filed their FAC. There was no superseding development warranting the amendment. Moreover, this conduct has nothing to do with Plaintiffs. Plaintiffs do not include allegations about how they were injured by the actions described in the article, and, thus, it is not apparent that the Plaintiffs have standing to pursue this claim. *Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* ("[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'").

Furthermore, the attempted amendment is problematic because Apple's *First Amendment*-protected lobbying activity cannot form the basis for antitrust liability, RICO and UCL liability under the *Noerr-Pennington* doctrine. *See Kottle v. Nw. Kidney Centers, 146 F.3d 1056, 1059 (9th Cir. 1998)* ("This circuit has clarified that the *Noerr-Pennington* doctrine is not merely a narrow interpretation of the *Sherman Act* in order to avoid a statutory clash with *First Amendment* values . . . rather, the doctrine is a direct application of the *Petition Clause*, and we have used it to set aside antitrust actions premised on state law, as well as those based on federal law."); *Sosa v. DIRECTV, Inc., 437 F.3d 923, 929 (9th Cir. 2006)* (extending *Noerr-Pennington* to RICO); *Multimedia Patent Tr. v. LG Elecs., Inc., 2013 U.S. Dist. LEXIS 156686, 2013 WL 12073800, at *3 (S.D. Cal. Aug. 1, 2013)* (same **[*60]** for UCL). Plaintiffs' asserted allegations appear meritless and it would likely be futile for them to attempt to cure this deficiency.

Thus, on procedural grounds and on the merits, the Court denies Plaintiffs' attempt to add another claim to their complaint under the UCL. Docket No. 52.

3. Plaintiffs' Notices for Discovery and Apple's Motion to Quash

On October 25, 2021, Plaintiffs filed a notice informing the Court of recently submitted petitions for cert. requesting that the U.S. Supreme Court "invoke original jurisdiction and assign a special master to ensure" that proceedings involving antitrust claims against Apple, including this case, "are not contaminated by Gibson Dunn's [counsel for Apple] political retaliation against Dr. Isaacs," a party to this case. Docket No. 65. The information Plaintiffs bring to the Court's attention in the notice is not relevant this case and the Court takes no action on the notice.

Plaintiffs appear to refer to a case in which Isaacs alleged a RICO claim against Gibson, Dunn & Crutcher LLP but not any individual lawyers. Plaintiffs do not allege that any attorneys are Apple's attorneys of record in this case. That case was dismissed—with fees awarded **[*61]** to the defendants—and all appeals are exhausted. *See Isaacs* *v. USC Keck Sch. of Med., 853 F. App'x 114, 117-18 (9th Cir. 2021)*; *Isaacs v. USC Keck Sch. of Med.*, No. 19-8000 DSF, Dkt. 112 (C.D. Cal. May 15, 2020).

Apple's counsel filed a declaration stating, "We are aware of no reasonable basis for Plaintiffs' assertion that counsel for Apple in this case (or, for that matter, any attorney of Gibson, Dunn & Crutcher LLP) would be a witness in this litigation. To the extent that Plaintiffs have asserted that Gibson, Dunn & Crutcher LLP as an entity may be a witness, we are aware of no reasonable basis for that statement either. Nor are we aware of any reasonable basis for Plaintiffs' assertion that counsel for Apple have a conflict of interest or are subject to disqualification for any reason. Gibson Dunn has been retained by Apple to represent the company in this litigation, and we will continue to do so." Docket No. 63 ¶¶ 2-3.

Plaintiffs also filed notices pursuant to *California Code of Civil Procedure § 1987* purporting to require Apple executives and Lina Khan, Chair of the Federal Trade Commission, to appear for live examination at the hearing on November 4, 2021. Docket Nos. 66-68. Those state civil procedure notices have no effect in federal court and were improper. *See* *Castillo-Antonio v. Hernandez, 2019 U.S. Dist. LEXIS 108962, 2019 WL 2716289, at *3 (N.D. Cal. June 28, 2019)*. Plaintiffs did not seek nor obtain leave to present live testimony at the upcoming November 4 motions **[*62]** hearing, and in any event, no live testimony is needed. *See* *N.D. Cal. L.R. 7-6* ("No oral testimony will be received in connection with any motion, unless otherwise ordered by the assigned Judge."). Furthermore, the hearing has passed - any issues that were raised by the notices are now moot.

Finally, Apple moved to quash Plaintiffs' subpoena requests. Docket No. 74. However, now that the Court has dismissed all of Plaintiffs' claims against Apple with prejudice, there is no basis for Plaintiffs' subpoena requests. Thus, Apple's motion to quash is also denied as moot.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Apple's motion to dismiss all of Plaintiffs' claims against Apple. Docket No. 45. The Court **DENIES AS MOOT** Plaintiffs' pending motions for preliminary injunction, to strike and to append claim, as well as Apple's motion to quash. Docket Nos. 20, 51, 52, 74.

This order disposes of Docket Nos. 20, 45, 51, 52, and 74. The Clerk is instructed to enter Judgment and close the case.

IT IS SO ORDERED.

Dated: November 30, 2021

/s/ Edward M. Chen

EDWARD M. CHEN

United States District Judge

JUDGMENT

On November 30, 2021, the Court issued its Order Granting Defendant's Motion to Dismiss, and Denying Plaintiffs' **[*63]** Motions for Preliminary Injunction, to Strike, and to Append Claim. Pursuant to *Federal Rule of Civil Procedure 58*, the Court hereby **ENTERS** judgment in favor of Defendant. The Clerk of Court shall close the file in this matter.

IT IS SO ORDERED.

Dated: November 30, 2021

/s/ Edward M. Chen

EDWARD M. CHEN

United States District Judge

In re Broiler Chicken Antitrust Litig.

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

November 30, 2021, Decided; November 30, 2021, Filed

No. 16 C 8637

Reporter
2021 U.S. Dist. LEXIS 228367 *; 2021 WL 5578878

IN RE BROILER CHICKEN ANTITRUST LITIGATION

Subsequent History: Substituted opinion at *In re Broiler Chicken Antitrust Litig., 2021 U.S. Dist. LEXIS 229895 (N.D. Ill., Dec. 1, 2021)*

Prior History: *In re Broiler Chicken Antitrust Litig., 2017 U.S. Dist. LEXIS 73219 (N.D. Ill., Apr. 21, 2017)*

Core Terms

cases, appointed counsel, fee award, incentive award, settlement, expenses, declining, named plaintiff, auction, antitrust, bid, sophisticated, entities, class action, settlement fund, market rate, one-third, class member, courts

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For Daniel M. Percy, Gloria J. Lathen, Jonas Dimas, Frank Coe, Lester Patterson, Dorothy Monahan, Pamela Tierney, Linda Cheslow, Natalie Wilbur, Plaintiffs: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Daniel J. Kurowski, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Chicago, IL; Jeannie Y Evans, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Chicago, IL; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For John Gross and Company, Inc., Plaintiff: Naveed Abaie, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steven Alan Hart, LEAD **[*5]** ATTORNEY, Hart McLaughlin & Eldridge, LLC, Chicago, IL; Alexander Dewitt Kullar, PRO HAC VICE, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Allan Howard Steyer, PRO HAC VICE, Steyer, Lowenthal, Boodrookas Alvarez & Smith LLP, San Francisco, CA; Bobby Pouya, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Clifford Harris Pearson, PRO HAC VICE, Pearson, Simon & Warshaw LLP, Sherman Oaks, CA; D. Scott Macrae, PRO HAC VICE, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Devon Paul Allard, PRO HAC VICE, The Miller Law Firm, P.C., Rochester, MI; Douglas A Millen, Freed Kanner London & Millen, LLC, Bannockburn, IL; Eric Jeffrey Mont, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Jill M. Manning, PRO HAC VICE, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Franisco, CA; Kevin B Love, PRO HAC VICE, Criden & Love, P.A., South Miami, FL; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Matthew Pearson, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, **[*6]** CA; Michael Jerry Freed, Freed Kanner London & Millen, LLC, Bannockburn, IL; Michael E. Moskovitz, Freed Kanner London &Millen LLC, Bannockburn, IL; Neil J Swartzberg, PRO HAC VICE, Pearson Simon & Warshaw, LLP, San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; Rick A. Decker, PRO HAC VICE, The Miller Law Firm, P.C., Rochester, MI; Robert J. Wozniak, Freed Kanner London & Millen, LLC, Bannockburn, IL; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Simeon Andrew Morbey, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Stephen M Owen, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Steven A Kanner, Freed Kanner London & Millen, LLC, Bannockburn, IL; Veronica W Glaze, Pearson, Simon & Warshaw LLP, Sherman Oaks, CA.

For Fargo Stopping Center LLC, Plaintiff: Adam J. Trott, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Adam John Zapala, LEAD ATTORNEY, Cotchett, Pitre & Mccarthy, Burlingame, CA; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Daniel E Gustafson, LEAD ATTORNEY, Gustafson Gluek PLLC, Minneapolis, **[*7]** MN; Daniel C Hedlund, LEAD ATTORNEY, Gustafson Gluek PLLC, Minneapolis, MN; Joyce Chang, LEAD ATTORNEY, PRO HAC VICE, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Mark Francis Ram, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Tamarah P Prevost, LEAD ATTORNEY, Cotchett Pitre and McCarthy, LLP, Burlingame, CA; Brian Douglas Penny , Penny, PRO HAC VICE, Goldman Scarlato & Penny, Conshohocken, PA; Brittany N. Resch, Gustafson Gluek PLLC, Minneapolis, MN; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Dianne M Nast, NastLaw LLC, Philadelphia, PA; Joseph M. Alioto , Jr., Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Joshua J. Rissman, Gustafson Gluek PLLC, Minneapolis, MN; Kenneth A. Wexler, Wexler Wallace LLP, Chicago, IL; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Melinda J. Morales, Wexler Wallace LLP, Chicago, IL; Michelle J. Looby, Gustafson Gluek PLLC, Minneapolis, MN; Michelle Perkovic, Wexler Wallace Llp, Chicago, IL; Richard Michael Hagstrom, Hellmuth & Johnson, PLLC, Edina, MN; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens **[*8]** Berman Sobol Shapiro LLP, Berkeley, CA.

For Sargent's, Plaintiff: Adam J. Trott, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Adam John Zapala, LEAD ATTORNEY, Cotchett, Pitre & Mccarthy, Burlingame, CA; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Daniel E Gustafson, LEAD ATTORNEY, Gustafson Gluek PLLC, Minneapolis, MN; Daniel C Hedlund, LEAD ATTORNEY, Gustafson Gluek PLLC, Minneapolis, MN; Joyce Chang, LEAD ATTORNEY, PRO HAC VICE, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Mark Francis Ram, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Tamarah P Prevost, LEAD ATTORNEY, Cotchett Pitre and McCarthy, LLP, Burlingame, CA; Brittany N. Resch, Gustafson Gluek PLLC, Minneapolis, MN; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Dianne M Nast, NastLaw LLC, Philadelphia, PA; Joseph M. Alioto , Jr., Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Joshua J. Rissman, Gustafson Gluek PLLC, Minneapolis, MN; Kenneth A. Wexler, Wexler Wallace LLP, Chicago, IL; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Michelle J. Looby, Gustafson Gluek PLLC, Minneapolis, **[*9]** MN; Richard Michael Hagstrom, Hellmuth & Johnson, PLLC, Edina, MN; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Dorothy Monohan, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Bodega Brew Pub, Inc., Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Timothy D Battin, LEAD ATTORNEY, PRO HAC VICE, Straus & Boies, LLP, Fairfax, VA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Christopher Le, PRO HAC VICE, Straus & Boies, LLP, Fairfax, VA; Daniel Zemans, Law Offices of Daniel Zemans, LLC, Chicago, IL; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Nathan Cihlar, PRO HAC VICE, Straus & Boies, LLP, Fairfax, **[*10]** VA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Christopher G Glover, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Carl V. Malmstrom, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Fred T Isquith, Wolf Haldenstein Adler Freeman & Herz Llp, New York, NY; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Christopher Vallaro, Abraham Drucker, Ilana Harwayne-Gidansky, Sabrina Majernik, Christopher Nelson, Amy Veaner, Plaintiffs: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Carl V. Malmstrom, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Fred T Isquith, **[*11]** Wolf Haldenstein Adler Freeman & Herz Llp, New York, NY; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Barters International LLC, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Lisa M. Sriken, LEAD ATTORNEY, PRO HAC VICE, Bernstein Liebhard LLP, New York, NY; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Steven Alan Hart, Hart McLaughlin & Eldridge, LLC, Chicago, IL.

For William E. Stack, Margo Stack, Plaintiffs: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio **[*12]** Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Terry Rose Saunders, The Saunders Law Firm, Chicago, IL.

For Cedar Farms Co., Inc., Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Thomas Cusack Cronin, Cronin & Co., Ltd., Chicago, IL; Steven Alan Hart, Hart McLaughlin & Eldridge, LLC, Chicago, IL.

For Ferraro Foods, Inc., Ferraro Foods of North Carolina, LLC, Plaintiffs: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO **[*13]** HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Jessica Noel Servais, PRO HAC VICE, Heins Mills & Olson, P.l.c., Minneapolis, MN; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Vincent J Esades, Heins Mills & Olson, P.L.C., Minneapolis, MN; Steven Alan Hart, Hart McLaughlin & Eldridge, LLC, Chicago, IL.

For Joe Christiana Food Distributors, Inc., Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana **[*14]** Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Steven Alan Hart, Hart McLaughlin & Eldridge, LLC, Chicago, IL.

For Sullott Corporation, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Kevin S Landau, PRO HAC VICE, Taus Cebulash & Landau LLP, New York, NY; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Cheryl Brenchley, Matthew Hayward, Wayne Deshotel, Carmen Ocasio, Vern Gardner, Jonathan Glover, Plaintiffs: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol **[*15]** Shapiro LLP, Berkeley, CA.

For Tracy Newman, Plaintiff: Alison Deich, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC, DC; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Greenwood Village, CO; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Benjamin D. Brown, PRO HAC VICE, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Brent W. Johnson, Cohen Milstein Sellers & Toll PLLC, Washington, D.C., DC; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Daniel H. Silverman, Cohen Milstein Sellers & Toll, PLLC, Chicago, IL; Kit A. Pierson, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Ray Wieters, Jason Liebich, Debra Piette, Steve Mizera, Joshua Madsen, Michael Perry, Kirk Evans, Catherine Senkle, Andrew Evans, James Flasch, Plaintiffs: **[*16]** Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Daniel J. Kurowski, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Chicago, IL; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Marilyn Stangeland, Plaintiff: Alison Deich, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC, DC; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Greenwood Village, CO; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Benjamin D. Brown, PRO HAC VICE, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Brent W. Johnson, Cohen Milstein Sellers & Toll PLLC, Washington, D.C., DC; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, **[*17]** CA; Daniel H. Silverman, Cohen Milstein Sellers & Toll, PLLC, Chicago, IL; Kit A. Pierson, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Vern Peter Gardner, Plaintiff: Alison Deich, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC, DC; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Greenwood Village, CO; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Benjamin D. Brown, PRO HAC VICE, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Brent W. Johnson, Cohen Milstein Sellers & Toll PLLC, Washington, D.C., DC; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Daniel H. Silverman, Cohen Milstein Sellers & Toll, PLLC, Chicago, IL; Kit A. Pierson, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Matthew Dickinson Heaphy, PRO HAC VICE, **[*18]** Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For David Weidner, Plaintiff: Alison Deich, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC, DC; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Greenwood Village, CO; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Benjamin D. Brown, PRO HAC VICE, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Brent W. Johnson, Cohen Milstein Sellers & Toll PLLC, Washington, D.C., DC; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Daniel H. Silverman, Cohen Milstein Sellers & Toll, PLLC, Chicago, IL; Kit A. Pierson, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, **[*19]** Berkeley, CA.

For Alison Pauk, Plaintiff: Alison Deich, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC, DC; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Greenwood Village, CO; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Benjamin D. Brown, PRO HAC VICE, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Brent W. Johnson, Cohen Milstein Sellers & Toll PLLC, Washington, D.C., DC; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Daniel H. Silverman, Cohen Milstein Sellers & Toll, PLLC, Chicago, IL; Kit A. Pierson, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Jennifer Wallace, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol **[*20]** Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; J Gerard Stranch , IV, PRO HAC VICE, Branstetter, Stranch & Jennings, PLLC, Nashville, TN; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Christopher Gilbert, Plaintiff: Alison Deich, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC, DC; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Benjamin D. Brown, PRO HAC VICE, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Brent W. Johnson, Cohen Milstein Sellers & Toll PLLC, Washington, D.C., DC; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Christopher J. Cormier, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Greenwood Village, CO; Daniel H. Silverman, Cohen Milstein Sellers & Toll, PLLC, Chicago, IL; Kit A. Pierson, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Matthew **[*21]** Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Leslie Weidner, Plaintiff: Alison Deich, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC, DC; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Greenwood Village, CO; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Benjamin D. Brown, PRO HAC VICE, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Brent W. Johnson, Cohen Milstein Sellers & Toll PLLC, Washington, D.C., DC; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Daniel H. Silverman, Cohen Milstein Sellers & Toll, PLLC, Chicago, IL; Kit A. Pierson, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, **[*22]** Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Alpine Special Treatment Center, Inc., Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Robert J Gralewski , Jr., PRO HAC VICE, Kirby McInerney LLP, San Diego, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Indirect Purchaser Plaintiffs, Plaintiff: Adam John Zapala, LEAD ATTORNEY, Cotchett, Pitre & Mccarthy, Burlingame, CA.

For Piggly Wiggly Alabama Distributing Co., Inc., Plaintiff: Eric Richard Lifvendahl, LEAD ATTORNEY, Lowis & Gellen LLP, Chicago, IL; Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Matthew Powers McCahill, LEAD ATTORNEY, Kaplan Fox & Kilsheimer LLP, New York, NY; Matthew P. Mccahill, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer Llp, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY; Solomon B Cera, **[*23]** LEAD ATTORNEY, Cera LLP, San Francisco, CA; Charles Andrew Dirksen, PRO HAC VICE, Cera LLP, Boston, MA; Richard Lyle Coffman, The Coffman Law Firm, Beaumont, TX.

For Affiliated Foods, Inc.'s Plaintiffs, Plaintiff: Charles Andrew Dirksen, LEAD ATTORNEY, Cera LLP, Boston, MA; Eric Richard Lifvendahl, LEAD ATTORNEY, Lowis & Gellen LLP, Chicago, IL; Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Rick A. Decker, LEAD

ATTORNEY, PRO HAC VICE, The Miller Law Firm, P.C., Rochester, MI; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY; Solomon B Cera, LEAD ATTORNEY, Cera LLP, San Francisco, CA.

Plaintiffs in 1:16-cv-08637, Plaintiff, Pro se.

For Alex Lee, Inc., Big Y Foods, Inc., Woodman's Food Market, Inc., Plaintiffs: Charles Andrew Dirksen, LEAD ATTORNEY, Cera LLP, Boston, MA; Eric Richard Lifvendahl, LEAD ATTORNEY, Lowis & Gellen LLP, Chicago, IL; Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Matthew Powers McCahill, LEAD ATTORNEY, Kaplan Fox & Kilsheimer LLP, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY; Solomon **[*24]** B Cera, LEAD ATTORNEY, Cera LLP, San Francisco, CA; Evan Patrick Boyle, Williams Montgomery & John, Chicago, IL.

For Merchants Distributors, LLC, Associated Grocers of New England, Inc., Fareway Stores, Inc., Plaintiffs: Charles Andrew Dirksen, LEAD ATTORNEY, Cera LLP, Boston, MA; Eric Richard Lifvendahl, LEAD ATTORNEY, Lowis & Gellen LLP, Chicago, IL; Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Matthew Powers McCahill, LEAD ATTORNEY, Kaplan Fox & Kilsheimer LLP, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY; Solomon B Cera, LEAD ATTORNEY, Cera LLP, San Francisco, CA.

For Sysco Corporation, Plaintiff: Erica Michelle Spevack, PRO HAC VICE, Boies Schiller Flexner LLP, Washington, DC; Jonathan M. Shaw, PRO HAC VICE, Boies, Schiller & Flexner Llp, Washington, DC.

For US Foods, Inc., Plaintiff: Scott Gant, LEAD ATTORNEY, PRO HAC VICE, Boies Schiller Flexner LLP, Washington, DC; Daryl M. Schumacher, Kopecky Schumacher Rosenburg PC, Chicago, IL; Erica Michelle Spevack, PRO HAC VICE, Boies Schiller Flexner LLP, Washington, DC; Jonathan M. Shaw, PRO HAC VICE, Boies, Schiller & Flexner Llp, Washington, **[*25]** DC; Kyle N Smith, PRO HAC VICE, Boies Schiller Flexner LLP, Washington, DC.

For Piggly Wiggly Alabama Distributing Co., Inc., Plaintiff: Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY.

For End-User Consumer Plaintiffs, Plaintiff: Breanna LE Van Engelen, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Jason A. Zweig, Hagens Berman Sobol Shapiro Llp, Chicago, IL; Rio Shaye Pierce, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, WA.

For Action Meat Distributors, Inc., W. Lee Flowers & Co., Inc., Howard Samuels as Trustee in Bankruptcy for Central Grocers, Inc., et al., Plaintiffs: Eric Richard Lifvendahl, Lowis & Gellen LLP, Chicago, IL.

For Jetro Holdings. LLC, Plaintiff: Mark A. Singer, LEAD ATTORNEY, PRO HAC VICE, Boies Schiller Flexner LLP, Albany, NY; Philip J. Iovieno, LEAD ATTORNEY, Boies Schiller Flexner, Albany, NY; Anne M. Nardacci, Boies Schiller Flexner, Albany, NY; Nicholas A Gravante , Jr, Boies, Schiller and Flexner LLP, New York, NY; Ryan Thomas McAllister, PRO HAC VICE, Boies **[*26]** Schiller Flexner LLP, Albany, NY; Terence H. Campbell, Cotsirilos, Tighe, Streicker, Poulos, & Campbell, Ltd., Chicago, IL.

For The Kroger Co., Plaintiff: Brandon S Floch, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL; Douglas H Patton, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL; Samuel J. Randall, Kenny Nachwalter, P.a., Miami, FL; William J Blechman, Kenny Nachwalter, P.A., Miami, FL.

For Hy-Vee, Inc., Albertsons Companies, Inc., Plaintiffs: Brandon S Floch, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL; Douglas H Patton, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL; Samuel J. Randall, Kenny Nachwalter, P.a., Miami, FL; William J Blechman, Kenny, Nachwalter, Seymour, Arnold, Miami, FL.

For Associated Grocers of the South, Inc., Plaintiff: David P Germaine, LEAD ATTORNEY, Sperling & Slater, P.C., Chicago, IL; John Paul Bjork, LEAD ATTORNEY, Sperling & Slater, P.C., Chicago, IL; Joseph Michael Vanek, LEAD ATTORNEY, Sperling & Slater, P.C., Chicago, IL; Martin Amaro, Sperling & Slater, P.C., Chicago, IL; Ryan Thomas Holt, Sherrard Roe Voigt & Harbison, Plc, Nashville, TN.

For Meijer, Inc., Meijer Distribution, Inc., OSI Restaurant Partners, LLC, Publix Super Markets, Inc., Supervalu **[*27]** Inc., Wakefern Food Corporation, Plaintiffs: David P Germaine, LEAD ATTORNEY, Sperling & Slater, P.C., Chicago, IL; Joseph Michael Vanek, LEAD ATTORNEY, Sperling & Slater, P.C., Chicago, IL; Martin Amaro, Sperling & Slater, P.C., Chicago, IL.

For Ahold Delhaize USA, Inc., Plaintiff: Ryan Patrick Phair, LEAD ATTORNEY, Hunton Andrews Kurth, Washington, DC; Carter C. Simpson, PRO HAC VICE, Hunton Andrews Kurth LLP, Washington, DC; Craig Young Lee, Hunton Andrews Kurth, LLP, Washington, DC; Emily K Bolles, PRO HAC VICE, Hunton Andrews Kurth LLP, Washington, DC; John S Martin, PRO HAC VICE, Hunton Andrews Kurth, Richmond, VA; Julie B. Porter, Salvatore Prescott & Porter PLLC, Evanston, IL.

For BJ's Wholesale Club Inc., Maximum Quality Foods, Inc., Darden Restaurants, Inc., Sherwood Food Distributors, LLC, Plaintiffs: Philip J. Iovieno, LEAD ATTORNEY, Boies Schiller Flexner, Albany, NY; Anne M. Nardacci, Boies Schiller Flexner, Albany, NY; Mark A. Singer, Boies Schiller Flexner LLP, Albany, NY; Nicholas A Gravante , Jr, Boies, Schiller and Flexner LLP, New York, NY; Ryan Thomas McAllister, PRO HAC VICE, Boies Schiller Flexner LLP, Albany, NY; Terence H. Campbell, Cotsirilos, Tighe, Streicker, **[*28]** Poulos, & Campbell, Ltd., Chicago, IL.

For Associated Wholesale Grocers, Inc., on behalf of itself and as assignee of Affiliated Foods Midwest Cooperative, Inc.'s claims, Plaintiff: Amy D. Fitts, LEAD ATTORNEY, Polsinelli PC, Kansas City, MO; Daniel D. Owen, LEAD ATTORNEY, PRO HAC VICE, Polsinelli, Kansas City, MO; Guillermo Gabriel Zorogastua, LEAD ATTORNEY, PRO HAC VICE, Kansas City, MO; Rodney L. Lewis, Polsinelli PC, Chicago, IL.

For United Supermarkets, LLC, Krispy Krunchy Foods, LLC, Cheney Bros., Inc., Plaintiffs: Amanda R Jesteadt, LEAD ATTORNEY, Carlton Fields, P.A., West Palm Beach, FL; David Bedford Esau, LEAD ATTORNEY, Carlton Fields, P.A., West Palm Beach, FL; Sarah Cortvriend, LEAD ATTORNEY, Carlton Fields Jorden Burt, P.a., West Palm Beach, FL; Kristin Alexandra Gore, Carlton Fields, P.A., West Palm Beach, FL; Martin Vincent Sinclair, Sperling & Slater, PC, Chicago, IL.

For Commercial and Institutional Indirect Purchaser Plaintiffs, Plaintiff: James David Harper, LEAD ATTORNEY, PRO HAC VICE, Harper Little, PLLC, Oxford, MS; Scott Patton Tift, LEAD ATTORNEY, PRO HAC VICE, Barrett Johnston Martin & Garrison, LLC, Nashville, TN; Gabrielle Sliwka, PRO HAC VICE, Gustafson Gluek **[*29]** PLLC, Minneapolis, MN; Kara Anne Elgersma, Wexler Wallace LLP, Chicago, IL; Michelle Perkovic, Wexler Wallace Llp, Chicago, IL.

Plaintiffs in 1:16-cv-08637, Plaintiff, Pro se.

For Quirch Foods, LLC, f/k/a Quirch Foods Co., Christopher Clay Olson, Plaintiff: Andrew Szot, Miller Law LLC, Chicago, IL; Marvin Alan Miller, Miller Law LLC, Chicago, IL; Matthew E Van Tine, Miller Law LLC, Chicago, IL.

For Hooters of America, LLC, Plaintiff: Amanda R Jesteadt, LEAD ATTORNEY, Carlton Fields, P.A., West Palm Beach, FL; Sarah Cortvriend, LEAD ATTORNEY, Carlton Fields Jorden Burt, P.a., West Palm Beach, FL.

For Hooters of America, LLC, Checkers Drive-In Restaurants, Inc., Plaintiffs: Kristin Alexandra Gore, Carlton Fields, P.A., West Palm Beach, FL.

For Brookshire Grocery Company, Plaintiff: For Schnuck Markets, Inc., Plaintiff: Evan Patrick Boyle, Williams Montgomery & John, Chicago, IL.

For Direct Purchaser Plaintiffs, Plaintiff: Allan Howard Steyer, PRO HAC VICE, Steyer, Lowenthal, Boodrookas Alvarez & Smith LLP, San Francisco, CA; D. Scott Macrae, PRO HAC VICE, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Jill M. Manning, PRO HAC VICE, Steyer Lowenthal Boodrookas Alvarez & **[*30]** Smith LLP, San Franisco, CA.

For Unified Grocers, Inc., Associated Grocers of Florida, Inc., Plaintiffs: Martin Amaro, Sperling & Slater, P.C., Chicago, IL; David P Germaine, Sperling & Slater, P.C., Chicago, IL.

For Giant Eagle, Inc., Plaintiff: Bernard D Marcus, PRO HAC VICE, Marcus & Shapira, L.L.P., Pittsburgh, PA; Erin Gibson Allen, PRO HAC VICE, Marcus & Shapira LLP, Pittsburgh, PA; Moira E. Cain-Mannix, PRO HAC VICE, Marcus & Shapira LLP, Pittsburgh, PA.

For Bi-Lo Holdings, LLC, Plaintiff: Philip J. Iovieno, Boies Schiller Flexner, Albany, NY; Theodore Beloyeannis Bell, Ahern & Associates P.C., Chicago, IL.

For Walmart, Inc., Plaintiff: Neal S Manne, LEAD ATTORNEY, Susman Godfrey, LLP, Houston, TX; Shawn J. Rabin, LEAD ATTORNEY, Susman Godfrey L.L.P., New York, NY.

For Conagra Brands, Inc., Pinnacle Foods, Inc., Kraft Heinz Foods Company, Nestle USA, Inc., Nestle Purina Petcare Company, Plaintiffs: David C. Eddy, LEAD ATTORNEY, ***Antitrust Law*** Group, LLC, Columbia, SC; Dennis John Lynch, ***Antitrust Law*** Group, Llc, Columbia, SC; Rachael Cecelia Brennan Blackburn, A & G Law LLC, Chicago, IL; Robert M. Andalman, A & G Law LLC, Chicago, IL.

For Services Group of America, Inc., Plaintiff: **[*31]** Dominic Emil Draye, PRO HAC VICE, Greenberg Traurig, LLP, Phoenix, AZ; Erik Weber, Greenberg Traurig, LLP, Austin, TX; Gregory J. Casas, PRO HAC VICE, Greenberg Traurig, LLP, Austin, TX; John F. Gibbons, Greenberg Traurig, LLP., Chicago, IL; Thomas E. Dutton, Greenberg Traurig, LLP, Chicago, IL.

For WalMart, Inc., WAL-MART STORES EAST, LP, Wal-Mart Stores Arkansas, LLC, Wal-Mart Stores Texas, LLC, Wal-Mart Louisiana, LLC, Sam's West, Inc., Sam's East, Inc., Plaintiffs: Neal S Manne, Susman Godfrey, LLP, Houston, TX; Shawn J. Rabin, Susman Godfrey L.L.P., New York, NY.

For Restaurants of America, Inc., LTP Management Group, Inc., Gibson, Greco & Wood, Ltd., Hooters Management Corporation, Anaheim Wings, LLC d/b/a Hooters of Anaheim, Gaslamp Wings, LLC previously d/b/a Hooters of San Diego, Plaintiffs: Lauren Giudice, Carlton Fields, Orlando, FL.

For Mission Valley Wings, LLC d/b/a Hooters of Mission Valley, Oceanside Wings, LLC previously d/b/a Hooters of Oceanside, Costa Mesa Wings, LLC d/b/a Hooters of Costa Mesa, Rancho Bernardo Wings, LLC d/b/a Hooters of San Marcos, Ontario Wings, LLC d/b/a Hooters of Ontario, Hollywood Wings, LLC d/b/a Hooters of Hollywood, South Gate Wings, LLC **[*32]** d/b/a Hooters of South Gate, Wings Over Long Beach, LLC d/b/a Hooters of Long Beach, Bonita Plaza Wings, LLC d/b/a Hooters of Plaza Bonita, Downtown Wings, LLC previously d/b/a Hooters of Downtown LA, Plaintiffs: Amanda R Jesteadt, LEAD ATTORNEY, Carlton Fields, P.A., West Palm Beach, FL; David Bedford Esau, LEAD ATTORNEY, Carlton Fields, P.A., West Palm Beach, FL; Sarah Cortvriend, LEAD ATTORNEY, Carlton Fields Jorden Burt, P.a., West Palm Beach, FL; Lauren Giudice, Carlton Fields, Orlando, FL; Kristin Alexandra Gore, Carlton Fields, P.A., West Palm Beach, FL.

For Commonwealth of Puerto Rico, Plaintiff: Elena N Liveris, Law Offices of Michael M. Mulder, Evanston, IL; Michael M. Mulder, Law Offices of Michael M. Mulder, Evanston, IL.

For PJ Food Service, Inc., Plaintiff: Philip J. Iovieno, LEAD ATTORNEY, Boies Schiller Flexner, Albany, NY; Scott R. Wilson, LEAD ATTORNEY, PRO HAC VICE, Boies Schiller Flexner LLP, New York, NY; Anne M. Nardacci, Boies Schiller Flexner, Albany, NY; Mark A. Singer, Boies Schiller Flexner LLP, Albany, NY; Nicholas A Gravante , Jr, Boies, Schiller and Flexner LLP, New York, NY; Ryan Thomas McAllister, Boies Schiller Flexner LLP, Albany, NY.

For Koch Foods, **[*33]** Inc., JCG Foods of Alabama, LLC, JCG Foods of Georgia, LLC, Koch Meats Co., Inc., Defendants: Stephen Novack, LEAD ATTORNEY, Novack and Macey LLP, Chicago, IL; Brian E. Cohen, Novack and Macey LLP, Chicago, IL; Christopher S. Moore, Novack and Macey, LLP, Chicago, IL; Elizabeth Carlson Wolicki, Novack and Macey, LLP, Chicago, IL; Julie Ann Johnston-Ahlen, Novack and Macey, LLP, Chicago, IL; Marie Velinda Lim, Novack and Macey LLP, Chicago, IL; Stephen J. Siegel, Novack and Macey LLP, Chicago, IL.

For Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Breeders, Inc., Tyson Poultry, Inc., Defendants: John M. Tanski, LEAD ATTORNEY, Axinn, Veltrop & Harkrider LLP-HTFD, Hartford, CT; Nicholas Gaglio, LEAD ATTORNEY, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, New York, NY; Rachel J Adcox, LEAD ATTORNEY, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, Washington, DC; Daniel K. Oakes, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, Washington, DC; Jarod G. Taylor, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, Hartford, CT; Jordan Matthew Tank, Lipe Lyons Murphy Nahrstadt & Pontikis, Chicago, IL; Kenina J Lee, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, Washington, DC; Michael J O'Mara, PRO HAC VICE, **[*34]** Axinn, Veltrop & Harkrider LLP, Washington, DC.

For Pilgrim's Pride Corporation, Defendant: Brian Liegel, Weil Gotshal & Manges Llp, Miami, FL; Carrie C. Mahan, PRO HAC VICE, Weil, Gotshal & Manges LLP, Washington, DC; Cecile L. Farmer, PRO HAC VICE, Weil, Gotshal & Manges LLP, Washington, DC; Christopher J. Abbott, PRO HAC VICE, Weil, Gotshal & Manges LLP, Washington, DC; Clayton E. Bailey, PRO HAC VICE, Bailey Brauer PLLC, Dallas, TX; Eric A. Rivas, PRO HAC VICE, Weil, Gotshal & Manges LLP, Redwood Shores, CA; Jessica L. Falk, PRO HAC VICE, Weil, Gotshal & Manges LLP, New York, NY; Jonathan S. Goldsmith, PRO HAC VICE, Weil, Gotshal & Manges LLP, Washington, DC; Kevin J Arquit, Kasowitz Benson Torres LLP, New York, NY; Lorell Guerrero, PRO HAC VICE, Weil Gotshal & Manges, Miami, FL; Michael Lee McCluggage, Eimer Stahl LLP, Chicago, IL; Rachel A. Farnsworth, PRO HAC VICE, Weil, Gotshal & Manges LLP, Princeton, NJ; Robert A Dahnke, PRO HAC VICE, Weil, Gotshal & Manges LLP, Washington DC, DC.

For Perdue Farms, Inc., Defendant: Andrew Thomas Hernacki, LEAD ATTORNEY, PRO HAC VICE, Venable LLP, Washington, DC; Deborah Leah Bessner, LEAD ATTORNEY, PRO HAC VICE, Venable LLP, New York, NY; James **[*35]** Douglas Baldridge, LEAD ATTORNEY, Venable LLP, Washington, DC; Robert Paul Davis, LEAD ATTORNEY, PRO HAC VICE, Venable LLP, Washington, DC, DC; Zakariya Koorosh Varshovi, LEAD ATTORNEY, PRO HAC VICE, Venable LLP, Washington, DC; Benjamin P. Argyle, PRO HAC VICE, Venable LLP, New York, NY; Danielle R Foley, PRO HAC VICE, Venable LLP, Washington, DC; Kirstin Beth Ives, Falkenberg Ives LLP, Chicago, IL; Leonard L. Gordon, PRO HAC VICE, Venable LLP, New York, NY; Lisa Jose Fales, PRO HAC VICE, Venable LLP, Washington, DC; Mary M Gardner, PRO HAC VICE, Venable LLP, Washington, DC.

For Sanderson Farms, Inc., Sanderson Farms, Inc. (Foods Division), Sanderson Farms, Inc. (Production Division), Sanderson Farms, Inc. (Processing Division), Defendants: Christa Cynthia Cottrell, LEAD ATTORNEY, Kirkland & Ellis LLP, Chicago, IL; Daniel E. Laytin, LEAD ATTORNEY, Kirkland & Ellis LLP, Chicago, IL; Stacy L Pepper, LEAD ATTORNEY, Kirkland & Ellis LLP, Chicago, IL; Jessica Jean Giulitto, Kirkland And Ellis Llp, Chicago, IL; Joseph Benjamin Tyson , III, Kirkland & Ellis Llp, Chicago, IL; Martin L. Roth, Kirkland & Ellis LLP, Chicago, IL.

For Wayne Farms, LLC, Defendant: Peter Duffy Doyle, LEAD ATTORNEY, **[*36]** Proskaver Rose, New York, NY; Christopher E Ondeck, PRO HAC VICE, Proskauer Rose LLP, Washington, DC; Marc Eric Rosenthal, Proskauer Rose LLP, Chicago, IL; Rucha A Desai, PRO HAC VICE, Proskauer Rose LLP, Boston, MA; Stephen R Chuk, PRO HAC VICE, Proskauer Rose LLP, Washington, DC.

For Mountainaire Farms, Inc., Mountainaire Farms, LLC, Mountainaire Farms of Delaware, Inc., Defendants: John W. Treece, LEAD ATTORNEY, Chicago, IL; Adam Lee Hopkins, PRO HAC VICE, Rose Law Firm, Fayetteville, AR; Amanda K. Wofford, PRO HAC VICE, Rose Law Firm, Little Rock, AR; Bourgon Burnelle Reynolds, PRO HAC VICE, Rose Law Firm, P.A., Little Rock, AR.

For Peco Foods, Inc., Defendant: Boris Bershteyn, LEAD ATTORNEY, PRO HAC VICE, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Patrick Joseph Fitzgerald, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Chicago, IL; Gail E. Lee, Skadden, Arps, Slate, Meagher & Flom, Chicago, IL; Lara A Flath, Skadden Arps Slate Meagher & Flom, LLP CH, Chicago, IL.

For Foster Farms, LLC, Defendant: Carmine R. Zarlenga, LEAD ATTORNEY, Mayer Brown LLP, Washington, DC; Stephen M. Medlock, LEAD ATTORNEY, PRO HAC VICE, Mayer Brown LLP, Washington, DC; Oral Pottinger, **[*37]** PRO HAC VICE, Mayer Brown LLP, Washington, DC; William Stallings, PRO HAC VICE, Mayer Brown LLP, Washington, DC.

For House of Raeford Farms, Inc., Defendant: Gregory Gene Wrobel, LEAD ATTORNEY, Vedder Price P.C., Chicago, IL; Henry W. Jones , Junio, PRO HAC VICE, Jordan Price, Raleigh, NC.

For Simmons Foods, Inc., Defendant: Lynn Hagman Murray, LEAD ATTORNEY, Shook, Hardy & Bacon LLP, Chicago, IL; Peter Francis O'Neill, LEAD ATTORNEY, Shook, Hardy & Bacon Llp, Chicago, IL; John R Elrod, Conner & Winters, LLP, Fayetteville, AK; Laurie A. Novion, Shook, Hardy & Bacon, Kansas City, MO; Vicki D Bronson, PRO HAC VICE, Conner & Winters, Fayetteville, AR.

For Fieldale Farms Corporation, Defendant: Alex Brown, PRO HAC VICE, Alston & Bird LLP, Atlanta, GA; Anthony Thomas Greene, PRO HAC VICE, Alston & Bird LLP, Atlanta, GA; Brendan J. Healey, Baron Jarris Healey, Chicago, IL; Brian Parker Miller, PRO HAC VICE, Alston & Bird LLP, Atlanta, GA; James Butler Cash , Jr., PRO

HAC VICE, Alston & Bird LLP, Atlanta, GA; Max Paul Marks, PRO HAC VICE, Alston & Bird LLP, Atlanta, GA; Roger Brent Hatcher , Jr., PRO HAC VICE, Smith, Gilliam, Williams & Miles, P.A., Gainesville, GA; valarie cecile williams, **[*38]** PRO HAC VICE, Alston & Bird LLP, Atlanta, GA.

For George's Inc., George's Farms, Inc., Defendants: William L. Greene, LEAD ATTORNEY, PRO HAC VICE, Stinson LLP, Minneapolis, MN; Gary V Weeks, PRO HAC VICE, The Law Group of Northwest Arkansas LLP, Fayetteville, AR; Jaclyn Niccole Warr, Stinson LLP, St. Louis, MO; John Conroy Martin, Sugar Felsenthal Grais and Helsinger LLP, Chicago, IL; K.C. Dupps Tucker, PRO HAC VICE, The Law Group of Northwest Arkansas LLP, Fayetteville, AR; Kevin Parker Kitchen, PRO HAC VICE, Stinson LLP, Minneapolis, MN; Kristy Elizabeth Boehler, PRO HAC VICE, The Law Group of Northwest Arkansas LLP, Fayetteville, AR; Peter Joseph Schwingler, PRO HAC VICE, Stinson LLP, Minneapolis, MN; Zachary H Hemenway, PRO HAC VICE, Stinson Leonard Street, Kansas City, MO.

For O.K. Foods, Inc., O.K. Farms, Inc., O.K. Industries, Inc., Defendants: Anna Forman, LEAD ATTORNEY, PRO HAC VICE, Kutak Rock LLP, Omaha, NE; John P. Passarelli, LEAD ATTORNEY, PRO HAC VICE, Kutak Rock LLP, Omaha, NE; Robin Stewart, LEAD ATTORNEY, PRO HAC VICE; J.R. Carroll, PRO HAC VICE, Kutak Rock, LLP, Fayetteville, AR; James M. Sulentic, PRO HAC VICE, Kuak Rock LLP, Omaha, NE; Jeffrey Michael Fletcher, PRO **[*39]** HAC VICE, Kutak Rock, LLP, Fayetteville, AR; Kimberly Michelle Hare, Kutak Rock Llp, Chicago, IL; Stephen Michael Dacus, PRO HAC VICE, Kutak Rock LLP, Fayetteville, AR.

For Mar-Jac Poultry, Inc., Mar-Jac Poultry MS, LLC, Mar-Jac Poultry AL, LLC, Mar-Jac AL/MS, Inc., Mar-Jac Holdings, LLC, Defendants: Edward C. Konieczny, LEAD ATTORNEY, Edward C. Konieczny LLC, Atlanta, GA; David C Newman, PRO HAC VICE, Smith, Gambrell & Russell, Atlanta, GA; James L. Thompson, Lynch Thompson, LLP, Chicago, IL; Pennington Philip John, PRO HAC VICE, Smith, Gambrell & Russell, LLP, Washington, DC; Wm. Parker Sanders, PRO HAC VICE, Smith Gambrell & Russell LLP, Atlanta, GA.

For Harrison Poultry, Inc., Defendant: Kaitlin Ann Carreno, LEAD ATTORNEY, PRO HAC VICE, Eversheds Sutherland, Atlanta, GA; Patricia Anne Gorham, LEAD ATTORNEY, PRO HAC VICE, Eversheds Sutherland (US) LLP, Atlanta, GA; Clay H. Phillips, SmithAmundsen LLC (Chgo), Chicago, IL; James Robert McGibbon, PRO HAC VICE, Eversheds Sutherland (US) LLP, Atlanta, GA; Peter M. Szeremeta, PRO HAC VICE, Eversheds Sutherland (US) LLP, Atlanta, GA; Ronald David Balfour, Smithamundsen Llc, Chicago, IL.

For Agri Stats, Inc., Defendant: Jacob D Koering, Miller, **[*40]** Canfield, Paddock and Stone, P.L.C., Chicago, IL; Jeffrey Mark Drake, Miller, Canfield, Paddock and Stone, Chicago, IL; Jennifer A. Fleury, PRO HAC VICE, Hogan Lovells US LLP, Houston, TX; Justin Wade Bernick, PRO HAC VICE, Hogan Lovells US LLP, Washington, DC; Liam Edward Phibbs, PRO HAC VICE, Hogan Lovells US LLP, Washington, DC; William L Monts , III, Hogan Lovells US LLP, Washington, DC.

For Norman W. Fries, Inc., d/b/a Claxton Poultry Farms, Inc., Defendant: James Franklin Herbison, LEAD ATTORNEY, Winston & Strawn LLP, Chicago, IL; Charles C. Murphy , Jr., PRO HAC VICE, Vaughan & Murphy, Atlanta, GA; Michael P Mayer, Winston & Strawn LLP, Chicago, IL.

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For Foster Poultry Farms, Defendant: Carmine R. Zarlenga, Mayer Brown LLP, Washington, DC.

For Simmons Prepared Foods, Inc., Defendant: Lynn Hagman Murray, Shook, Hardy & Bacon LLP, Chicago, IL; Peter Francis O'Neill, Shook, Hardy & Bacon Llp, Chicago, IL; Vicki D Bronson, PRO HAC VICE, Conner & Winters, Fayetteville, AR.

For Amick Farms, LLC, Defendant: Steven Howard Gistenson, LEAD ATTORNEY, Dykema Gossett PLLc, Chicago, IL; Cody D. Rockey, Dykema Gossett PLLC, Ann Arbor, MI; Dante Andreas Stella, Dykema Gossett Pllc, Detroit, MI; Howard Bruce Iwrey, Dykema Gossett Pllc, Bloomfield Hills, MI.

For Case Foods, Inc., Case Farms, LLC, Case Farms Processing, Inc., Defendants: Joseph D Carney, LEAD ATTORNEY, PRO HAC VICE, Joseph D. Carney & Associates, LLC, Avon, OH; Daniel Martin Feeney, Miller Shakman Levine & Feldman LLP, Chicago, IL; Deborah A Klar, PRO HAC VICE, D. Klar Law, Bel Air, CA; Thomas M. Staunton, Miller, Shakman Levine & Feldman LLP, Chicago, IL.

For Mar-Jac **[*42]** Holdings, Inc., Defendant: Edward C. Konieczny, LEAD ATTORNEY, Edward C. Konieczny LLC, Atlanta, GA; James L. Thompson, Lynch Thompson, LLP, Chicago, IL.

For R.W. Zant Co., Respondent: Joshua Erik Bidzinski, LEAD ATTORNEY, Swanson, Martin & Bell, Llp, Chicago, IL; Shera D. Wiegler, LEAD ATTORNEY, Swanson, Martin & Bell, LLP, Chicago, IL.

For Gerber's Poultry, Inc., Movant: Charles B. Leuin, Benesch, Friedlander, Coplan & Aronoff LLP, Chicago, IL.

For Shamrock Foods Company, United Food Service, Inc., Movants: Ilana Drescher, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod, Miami, FL; Jerry R Goldsmith, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod, Miami, FL; Joshua Goldberg, Carpenter Lipps & Leland LLP, Chicago, IL; Lori P Lustrin, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod, Miami, FL; Robert W Turken, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod, Miami, FL; Scott N Wagner, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod, Miami, FL; Steven Christopher Moeller, Carpenter Lipps & Leland LLP, Chicago, IL.

For Porky Products, Inc., Movant: Ariel Welker Schepers, Barack Ferrazzano Kirschbaum & Nagelberg LLP, Chicago, IL; Edward Francis Malone, Barack Ferrazzano Kirschbaum **[*43]** & Nagelberg LLP, Chicago, IL; JORDAN DEREK WEINREICH, PRO HAC VICE, Sherman Wells Sylvester & Stamelman LLP, Florham Park, NJ.

For Quirch Foods, LLC, f/k/a Quirch Foods Co., Movant: Carlos Juan Canino, LEAD ATTORNEY, PRO HAC VICE, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, FL; Abigail Grieco Corbett, PRO HAC VICE, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, FL; Jay Brian Shapiro, PRO HAC VICE, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, FL; Samuel Olds Patmore, PRO HAC VICE, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, FL.

For United States of America, Intervenor: Michael Thomas Koenig, LEAD ATTORNEY, U.S. Department of Justice, Washington, DC; Carolyn M Sweeney, United States Department of Justice, Antitrust Division, Washington, DC; Heather Diefenbach Call, U.S. Department of Justice, Washington, DC; Paul John Torzilli, United States Department of Justice, Antitrust Division, Washington, DC.

Judges: Honorable Thomas M. Durkin, United States District Judge.

Opinion by: Thomas M. Durkin

Opinion

MEMORANDUM OPINION AND ORDER

In this lawsuit alleging a price-fixing conspiracy in the chicken industry against more than 20 defendants, **[*44]** the Court appointed interim counsel to represent a putative class of direct-purchaser plaintiffs (the "DPPs" and their "Appointed Counsel"). *See* R. 144.[1] The Court approved settlements Appointed Counsel negotiated with six defendant corporate families, totaling $170,261,600.00, while the case continues to proceed against the remaining defendants.[2] Appointed Counsel have now moved for: an interim fee award; reimbursement of litigation expenses;

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[1] The Court appointed Lockridge Grindal Nauen P.L.L.P. and Pearson, Simon & Warshaw, LLP as Interim Co-Lead Counsel, and Hart, McLaughlin & Eldridge, LLC as Interim Liaison Counsel.

and incentive awards to the five named class representatives. R. 4550. That motion is granted in accordance with this order.

Background

Without the benefit of a prior government investigation to guide them, Appointed Counsel filed the first complaint in this case in September 2016. Since then, the Court has appointed counsel for two additional classes and more than 100 entities have opted out of the classes to file their own direct actions. The more than 20 defendants are represented by some of the most prominent law firms in the country.

Appointed Counsel successfully defended the case against a significant motion to dismiss. They have shepherded the case through extensive discovery, as is recounted in the declaration supporting their motion, *see* ***[*45]*** R. 4552, and is reflected in the more than 5,000 docket entries that make up the case, including 16 scheduling orders. Appointed Counsel have briefed numerous motions, including a motion for class certification that is currently pending.

Appointed Counsel have been assisted by 20 other firms. Appointed Counsel and the assisting firms have submitted their hours for the Court's review on a quarterly basis. Their collective lodestar is 100,608.25 hours representing $50,928.159.75 in fees. *See* R. 4552 ¶ 24.

Appointed Counsel seek a fee award of one-third of the settlement total of $170,261,600.00, or $56,753,866.00. They also seek payment of $4.5 million of the $5,104,566.48 in litigation expenses they have incurred. And they seek a $25,000 incentive award for each of the five named plaintiffs.[3]

Analysis

It is customary for class counsel in large and complex cases to seek an interim fee award. *See*, *e.g.*, *Kleen Prod. LLC v. Int'l Paper Co., 2017 U.S. Dist. LEXIS 183015, 2017 WL 5247928, at *4 (N.D. Ill. Oct. 17, 2017)*; *see also* *In re Endotronics, Inc., 1989 U.S. Dist. LEXIS 1141, 1989 WL 6746, at *1 (D. Minn. Jan. 30, 1989)* ("Untoward delay could discourage [class counsel] from engaging in matters such as these. The Court, therefore, must have discretion to award interim fees and costs."). The "starting point" for determining such an award is the "market rate" for such services. *In re Synthroid Mktg. Litig., 264 F.3d 712, 719 (7th Cir. 2001)*; *see also* *Silverman v. Motorola Sols., Inc., 739 F.3d 956, 957 (7th Cir. 2013)* ("[A]ttorneys' **[*46]** fees in class actions should approximate the market rate that prevails between willing buyers and willing sellers of legal services."); *Williams v. Rohm & Haas Pension Plan, 658 F.3d 629, 635 (7th Cir. 2011)* ("[T]he district court must try to assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys."). Estimation of the market rate "is inherently conjectural," *In re Trans Union Corp. Priv. Litig., 629 F.3d 741, 744 (7th Cir. 2011)*, because "there is no market in class cases." Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, *89 Fordham L. Rev. 1151, 1155 (2021)*. But the Seventh Circuit has explained that the goal of approximating the market rate can be "informed by a number of factors, including: (1) the actual agreements between the parties as well as fee agreements reached by sophisticated entities in the market for legal services; (2) the risk of non-payment at the outset of the case; (3) the caliber of Class Counsel's performance; and [4] information from other cases, including fees awarded in comparable cases." *Hale v. State Farm Mut. Auto. Ins. Co., 2018 U.S. Dist. LEXIS 210368, 2018 WL 6606079, at *8 (S.D. Ill. Dec. 16, 2018)* (citing *Synthroid, 264 F.3d at 719*)).

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[2] This Court granted final approval to settlements with: Fieldale Farms Corporation on November 16, 2018, R. 1414; Amick Farms LLC on October 26, 2020, R. 3934; George's Inc., George's Farms, Inc. and Peco Foods, Inc. on October 27, 2020, R. 3944; and Pilgrim's Pride Corp., Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Breeders, Inc., and Tyson Poultry, Inc. on June 29, 2021, R. 4789.

[3] The named plaintiffs are: Maplevale Farms, Inc.; John Gross and Company, Inc.; Ferraro Foods, Inc. and Ferraro Foods of North Carolina, LLC; Joe Christiana Food Distributors, Inc.; and Cedar Farms Co., Inc. *See* R. 4552 ¶ 36.

A. Actual Agreements

Appointed Counsel in this case do not have a fee agreement with the named plaintiffs other than that they would take a percentage of any award. *See* R. 5048-1 ¶ 11, Fitzpatrick Decl. ("According to [Appointed Counsel], the representative class members **[*47]** signed retainer agreements that did not specify a fee percentage; they specified only that any fees would be awarded by the Court.").[4] However, 2,808 claims have been filed by potential class member entities in the class, the majority of whom are sophisticated business entities. *See id.*, Fitzpatrick Decl. ("In light of the sophistication of the class members, all of whom are businesses and some of whom are quite large, the conclusion that can be drawn from their decision not to object is that they favor the flat fee proposed by DPPs—not a sliding-scale fee."). None of them have objected to the fee award request. Courts have found that the lack of opposition by sophisticated business entities is evidence that the award is reasonable. *See* Silverman, 739 F.3d at 959 (holding that for large, sophisticated investors, it would be "worth a complaint to the district judge if the lawyers' cut seems too high. Yet none of the institutional investors has protested."); *In re Dairy Farmers of Am., Inc., 80 F. Supp. 3d 838, 847 (N.D. Ill. 2015)* (observing, in finding that the requested one-third fee award was reasonable, that "the plaintiffs here are sizable, sophisticated entities capable of reviewing (and objecting to) the proposed fee arrangement"),

No other actual agreements have been presented **[*48]** to the Court. There is, however, case law describing court-ordered auctions in which potential class counsel bid for appointment. *See* *In re Cap. One Tel. Consumer Prot. Act Litig., 80 F. Supp. 3d 781, 800 (N.D. Ill. 2015)* (collecting cases, including *In re Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190 (N.D. Ill. 1996)*). The courts in *In re Amino Acid* and the other cases collected by *In re Capital One* sought fee award structure bids from attorneys hoping to represent the classes in those cases. The courts in those cases chose counsel who submitted declining fee scale award structures. (In other words, counsel proposed that their fee percentage decrease as the settlement amount increased.) These cases are relatively outdated, none being less than 20 years old. *See* R. 5048-1 ¶ 8, Fitzpatrick Decl. (court "experimentation with auctions has all but ceased"). But the Court is also aware that counsel for the End-User Plaintiff Class in this case bid a declining fee scale in other cases within the last ten years. *See* R. 5182 (citing *In re Lithium Ion Batteries Antitrust Litig.*, Case No. 13-MD-2420-YGR (N.D. Cal), Dkt. 2630-2; *In re Optical Disk Drive Prods. Antitrust Litig.*, Case No. 10-MD-2134-VRW (N.D. Cal) Dkt. 2900, reported in *In re Optical Disk Drive Antitrust Litig., 959 F.3d 922, 934 (9th Cir. 2020)*).

The Court does not put much stock in these examples. First, no other attorneys bid to be appointed counsel for **[*49]** the DPPs in this case. Without competition, a bid auction was not feasible. And without competition, no attorney would offer to take a case under a declining fee scale award structure.

Furthermore, the Seventh Circuit has explained that declining fee scale award structures do not reflect market realities and impose a perverse incentive "ensuring that at some point attorneys' opportunity cost will exceed the benefits of pushing for a larger recovery, even though extra work could benefit the client." Synthroid, 264 F.3d at 721; *see also* Silverman, 739 F.3d at 957 ("[S]olvent litigants do not select their own lawyers by holding auctions, because auctions do not work well unless a standard unit of quality can be defined and its delivery verified. There is no 'standard quantity' of legal services, and verification is difficult if not impossible."). "Subsequent cases within the Seventh Circuit have similarly recognized that the auction concept is flawed[.]" R. 5050-1 at 17 n.15, Klonoff Decl. Of course, when confronted with a court ordered competitive auction that permits declining scale bids, some attorneys will likely make such a bid in order to win the auction. But for the reasons expressed by the Seventh

[4] Appointed Counsel submitted a declaration from Brian Fitzpatrick, who is a professor at Vanderbilt University Law School and has studied and written about class action litigation. *See* R. 5048-1. In addition to requesting further briefing from Appointed Counsel, the Court invited briefs from counsel for the other two putative classes in the case. The Commercial and Institutional Indirect Purchaser Class submitted a declaration by Robert Klonoff, who is a professor at Lewis & Clark Law School, and who has also studied and written about class action litigation. *See* R. 5050-1. The Court found both declarations very helpful and has relied on them in preparing this opinion and order.

Circuit, the Court questions whether **[*50]** it is appropriate to permit declining scale bids in an auction. Thus, cases with auctions that permitted such bids carry little weight in the Court's consideration here.

B. Risk of Non-Payment & Caliber of Class Counsel's Performance

A declining scale fee award structure might be appropriate in cases in which settlement is a more likely outcome and in which the "marginal costs" of increasing the settlement recovery amount are low. *See* Silverman, 739 F.3d at 959. As Professor Fitzpatrick surmised, this "may explain the use of [declining scale fee award structures] in the two [Telephone Consumer Protection Act] cases" the Court asked the parties to address. *See* R. 5048-1 at 17 n.6, Fitzpatrick Decl.

The Court ordered the parties to address the use of declining sliding scale fee award structures in Gehrich v. Chase Bank USA, N.A., 316 F.R.D. 215, 236 (N.D. Ill. 2016), and In re Cap. One Tel. Consumer Prot. Act Litig., 80 F. Supp. 3d 781, 805 (N.D. Ill. 2015). *See* R. 4915. Unlike those cases in which "settlement was likely," Gehrich, 316 F.R.D. at 230, settlement in a complex antitrust case like this is far from a foregone conclusion. *See* R. 505-1 ¶ 37, Klonoff Decl. ("In terms of risk and complexity, TCPA cases are the polar opposite of the present case, a complicated multi-party antitrust conspiracy case.").[5] Appointed Counsel invested massive resources of time and money when no other counsel expressed interest, with little **[*51]** assurance of success. *See* Silverman, 739 F.3d at 958 ("When this suit got under way, no other law firm was willing to serve as lead counsel. Lack of competition not only implies a higher fee but also suggests that most members of the securities bar saw this litigation as too risky for their practices."). As noted, no government investigation preceded the complaint in this case for Appointed Counsel to piggy-back. And Plaintiffs have been opposed by many defendants, including a number of very large and well-funded corporations, which have retained some of the most prominent and sophisticated law firms in the United States. The Court's 92-page decision denying the motions to dismiss was a relatively close call. Discovery proceeded while the motions to dismiss were briefed and decided, so Appointed Counsel was immediately incurring costs of time and money without any assurance of an award. Furthermore, issues raised in the motions to dismiss show that success on class certification and summary judgment, let alone trial, is no guarantee.

Appointed Counsel have devoted thousands of hours to this case. Their performance to date has been exemplary. The road to some of the settlements was eventually smoothed by later **[*52]** criminal indictments. But Appointed Counsel's work appears to have prompted the government investigations that led to those indictments, rather than the reverse. A substantial award is warranted here as a proper incentive for high quality counsel to take on complex cases, requiring a massive investment of time and money, with such a high risk of non-payment.

C. Fee Awards in Comparable Cases

The Seventh Circuit has recognized that academic studies of attorney fees awards in common fund class settlement cases reveal a declining percentage with the size of the settlement. *See* Silverman, 739 F.3d at 959. But as Professor Fitzpatrick noted, "these findings are based on fee awards from other Circuits . . . that are not even trying to capture how clients pay lawyers in the market like the Seventh Circuit does." R. 5048-1 at 20 n.7, Fitzpatrick Decl. These decisions are infected by default rules recommending smaller attorney fee award percentages for "megafunds." *See*, *e.g.*, Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 123 (2d Cir. 2005) (affirming a 6.5 percent fee award from a common fund over $3 billion, reasoning that "the sheer size of the instant fund makes a smaller percentage appropriate"); Dial Corp. v. News Corp., 317 F.R.D. 426 (S.D.N.Y. 2016) ("[I]n class actions where the recovered settlement fund runs into the multi-millions, **[*53]** courts typically decrease the percentage of the fees amount as the size of the fund increases."). The Seventh Circuit has expressly rejected a megafund rule because it is a perverse incentive. *See* Synthroid, 264 F.3d at 718 (reversing district court's fee

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[5] Moreover, research by both Professors Fitzpatrick and Klonoff shows that the use of declining sliding scale fee awards in the Seventh Circuit is rare. *See* R. 5048-1 at 13 n.5, Fitzpatrick Decl.; R. 5050-1 at 26-31, Klonoff Decl.

award in part because it imposed a lower fee percentage because the settlement fund was more than $100 million, holding that "[m]arkets would not tolerate that effect"). Clients generally want to incentivize their counsel to pursue every last settlement dollar, and a declining percentage award operates to the contrary. Thus, to the extent that courts in other circuits have awarded percentages smaller than what Appointed Counsel seek here, the Court finds those awards relatively unpersuasive.

Most persuasive are the large number of antitrust cases in this circuit that have awarded one-third of the common fund as attorney's fees. *See* R. 5050-1 at 45-46 (table citing cases), Klonoff Decl. The fact that fee awards in antitrust cases in this circuit are almost always one-third is a strong indication that this should be considered the "market rate." *See* R. 5048-1 ¶ 14, Fitzpatrick Decl. (in "a series of antitrust class actions . . . . recover[ing] more than $2 billion **[*54]** . . . . *not a single class member ever objected* to the fee request in any of these cases" showing that "sophisticated corporations are happy to play flat fees of 33.33% and they are happy to do so even in the largest cases."). There is simply little to no precedent recommending anything other than an award of 33 percent. With the only real evidence of the "market rate" being one-third, that is what the Court will award.

D. Expenses

Appointed Counsel seek $4.5 million out of $5,104,566.48 in expenses. Appointed Counsel "informed the class" that they would not seek to recover the full amount of their expenses at this time. *See* R. 4551 at 2 n.7. The request for $4.5 million in expenses is granted.

Expenses, however, should be deducted from the common fund before the fee award percentage is applied. The "ratio that is relevant to assessing the reasonableness of the attorneys' fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received." *Redman v. RadioShack, 768 F.3d 622, 630 (7th Cir. 2014)*. Out-of-pocket costs, although paid through the settlement fund, are not benefits to the class and thus not part of "what the class members received." *Id.*; *see also* *In re Wells Fargo Sec. Litig., 157 F.R.D. 467, 471 (N.D. Cal. 1994)* ("If an attorney risks losing some portion **[*55]** of his fee award for each additional dollar in expenses he incurs, the attorney is sure to minimize expenses."). Therefore, Appointed Counsel will be paid fees of one-third of the settlement fund minus $4.5 million in expenses.

E. Named Plaintiff Incentive Awards

"Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998)*. "To determine if an incentive award is warranted, a district court evaluates the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc., 897 F.3d 825, 834 (7th Cir. 2018)* (citing *Cook, 142 F.3d at 1016*). Incentive awards based on a percentage of the settlement fund "are disfavored, if not altogether forbidden." *See* William B. Rubenstein, 5 Newberg on Class Actions § 17:16 (5th ed. 2018); *see also* *In Re EpiPen Mktg., Sales Pracs. & Antitrust Litig., 2018 U.S. Dist. LEXIS 195455, 2021 WL 5369798, at *7 (D. Kan. Nov. 17, 2021)*.

The declarations submitted in support of incentive awards give no indication of the number of hours the named plaintiffs have spent on the case. Appointed Counsel relies on *Cook v. Niedert* in which the Seventh Circuit affirmed an incentive award of $25,000 per **[*56]** named plaintiff. *See* R. 4551 at 21 (citing *142 F.3d at 1016*). But in *Cook* the named plaintiff was an individual who "reasonably feared workplace retaliation" by "filing the suit." *Id. at 1016*. No such risk is present here, and the named plaintiffs are business entities, not individual people. Presumably, businesses serving as named plaintiffs for the DPP class believe that the chance of collecting from this lawsuit was worth the cost of participating in it. Litigation is convenient for no one. But business entities are in a much better position to devote time to a lawsuit and delegate the burdens among their officers and employees than a person who must bear the entire burden individually.

"Empirical evidence shows that incentive awards are now paid in most class suits and average between $10-$15,000 per class representative." *See* William B. Rubenstein, 5 Newberg on Class Actions § 17:1 (5th ed. 2018). Appointed Counsel cite one antitrust case from this district which awarded $15,000 to named plaintiffs from a $90 million settlement. *See In re Potash Antitrust Litig.*, No. 1:08-cv-06910 (ECF No. 589) (N.D. Ill. June 12, 2013). Without specific hour totals indicating a higher award is appropriate, and without evidence **[*57]** that the role of class representative imposed anything other than a professional (as opposed to a personal) burden, the Court will not ignore what appears to be a customary maximum of a $15,000 incentive award.

Conclusion

Therefore, Appointed Counsel's motion [4550] is granted as follows: (1) expenses are awarded in the amount of $4.5 million; (2) incentive awards in the amount of $15,000 are awarded to each of the five class representatives; and (3) fees are awarded in the amount of $55,228,866.70, which is one third of the settlement fund after deducting the expenses and incentive awards.

ENTERED:

/s/ Thomas M. Durkin

Honorable Thomas M. Durkin

United States District Judge

Dated: November 30, 2021

Prevent DEV GmbH v. Adient PLC

United States District Court for the Eastern District of Michigan, Southern Division

November 30, 2021, Decided; November 30, 2021, Filed

Case No. 20-cv-13137

Reporter

2021 U.S. Dist. LEXIS 229553 *; 2021 WL 5585917

PREVENT DEV GMBH, Plaintiff, v. ADIENT PLC, ET AL., Defendant.

Prior History: *Prevent USA Corp. v. Volkswagen, AG, 2020 U.S. Dist. LEXIS 43638 (E.D. Mich., Mar. 13, 2020)*

Core Terms

suppliers, seat, alleges, forum non conveniens, domestic, boycott, courts, lawsuit, motion to dismiss, antitrust, contracts, commerce, covers, termination, affiliates, automotive, witnesses, subsidiaries, defendants', grounds, anti trust law, manufactured, litigating, delivery, adequate alternative, antitrust claim, convenient, documents, effects, reasons

Counsel: **[*1]** For Prevent Dev GMBH, Plaintiff: Brianna S. Hills, Duane L. Loft, Boies Schiller Flexner LLP, New York, NY; Matthew S. Tripolitsiotis, Boies Schiller Flexner LLP, Armonk, NY; Mischa M Boardman, Mark J. Zausmer, Zausmer, P.C., Farmington Hills, MI.

For Adient PLC, Defendant: Arthur Thomas O'Reilly, Kurt Johnson, Louis P. Gabel, Jones Day, Detroit, MI; Michelle K. Fischer, Jones Day (Cleveland), Cleveland, OH.

For Lear Corporation, Defendant: Andrew Marovitz, Britt M. Miller, Daniel Fenske, Mayer Brown LLP, Chicago, IL; Howard B. Iwrey, Dykema Gossett, Bloomfield Hills, MI; Michelle K. Fischer, Jones Day (Cleveland), Cleveland, OH.

For Volkswagen, AG, Ralf Brandstatter, Defendants: Laura Kabler Oswell, Sullivan & Cromwell LLP, Palo Alto, CA; Leonid Traps, Sharon Leigh Nelles, Steven L. Holley, Suhana Han, Sullivan & Cromwell LLP, New York, NY; Todd A. Holleman, Miller, Canfield, (Detroit), Detroit, MI.

Judges: GERSHWIN A. DRAIN, UNITED STATES DISTRICT JUDGE.

Opinion by: GERSHWIN A. DRAIN

Opinion

U.S. DISTRICT COURT JUDGE

GERSHWIN A. DRAIN

OPINION AND ORDER GRANTING ADIENT AND LEAR'S MOTION TO DISMISS (ECF NO. 21) AND GRANTING VOLKSWAGEN AND BRANDSTÄTTER'S MOTION TO DISMISS (ECF NO. 35)

I. Introduction

Plaintiff Prevent DEV **[*2]** GmbH ("Prevent") filed this antitrust action against Defendants Adient PLC ("Adient"); Lear Corporation ("Lear"); Volkswagen, AG ("Volkswagen"); and Ralf Brandstätter ("Brandstätter") for an alleged boycott. ECF No. 1. Specifically, Prevent alleges Defendants have unlawfully conspired to exclude it from the automotive seat cover market in violation of the Sherman Act and the Michigan Antitrust Reform Act. *Id.* Plaintiff also brings claims for tortious interference and civil conspiracy. *Id.* Prevent thus seeks damages and injunctive relief under *Sections 15* and *16 of the Clayton Act*, *15 U.S.C. §§ 15*, *26*.

Presently before the Court are Adient and Lear's Motion to Dismiss, filed on January 25, 2021, and Volkswagen and Brandstätter's Motion to Dismiss, filed on March 10, 2021. ECF Nos. 21, 35. The matters are fully briefed, and a hearing was held on September 21, 2021. On November 9, 2021, Volkswagen and Brandstätter filed a notice informing the court of a decision by the United States Court of Appeals for the Sixth Circuit Court in a related case, *Prevent USA Corp. v. Volkswagen AG, No. 21-1379, 17 F.4th 653, 2021 U.S. App. LEXIS 33234, 2021 WL 5176952 (6th Cir. Nov. 8, 2021)*, and Prevent filed a response the next day. ECF Nos. 48, 49. For the following reasons, the Court **GRANTS** Adient and Lear's Motion to Dismiss [#21] and **GRANTS** Volkswagen and Brandstätter's **[*3]** Motion to Dismiss [#35].

II. Background

A. Factual Background

The automotive seating market consists of a three-tiered supply chain. ECF No. 1, PageID.17. Specifically, it consists of Tier 3 suppliers, which sell raw or nearly raw materials like metal, plastic, textiles, and leather; Tier 2 suppliers, which make component parts; and Tier 1 suppliers, which incorporate the Tier 2 components into complete seats that they then sell to large carmakers, or Original Equipment Manufacturers ("OEMs"). *Id.* at PageID.16-19.

Prevent "is a corporation organized and existing under the laws of Germany with its principal place of business in Wolfsburg, Germany." *Id.* at PageID.13. "Plaintiff's business includes operating as a 'Tier 2' supplier of seat covers, typically supplying seat covers to the Tier 1 suppliers." *Id.* at PageID.4.

Defendant Adient "is a corporation organized and existing under the laws of Ireland, with its principal place of business in Plymouth, Michigan," while Defendant Lear "is a corporation organized and existing under the laws of Delaware with its principal place of business in Southfield, Michigan." *Id.* at PageID.13-14. Defendants Adient and Lear are "Tier 1" suppliers, which **[*4]** "supply full automotive seats directly to carmakers like Volkswagen, General Motors, and Daimler." *Id.* Adient and Lear also operate as Tier 2 suppliers, *id.* at PageID.25-26, and thus compete against Prevent in the automotive seat covers market.

Defendant Volkswagen is "a corporation organized and existing under the laws of Germany with its principal place of business in Wolfsburg, Germany." *Id.* at PageID.15. Volkswagen is an OEM and "the largest manufacturer of passenger vehicles in the world by sales volume." *Id.* Defendant Brandstätter is domiciled in or near Wolfsburg, Germany. *Id.* He has been the Chief Executive Officer of Volkswagen since June 2020 and was the Chief Operating Officer from August 2018 until then. *Id.*

Plaintiff alleges that, in 2016, Prevent Group, with which Plaintiff is associated, became embroiled in a global dispute with Defendant Volkswagen over a supply stoppage. *Id.* at PageID.29. "In response, Volkswagen launched 'Project 1,' a highly organized campaign to 'demolish' Plaintiff and the Prevent Group and to exclude them systematically from the market." *Id.* at PageID.4. Allegedly, led by Brandstätter, *id.* at PageID.30-31, Volkswagen approached all four major Tier **[*5]** 1 automotive seat suppliers with an agreement to boycott Prevent from their business across all OEMs in exchange for guaranteed future contracts with Volkswagen, *id.* at PageID.34-35. Only

Adient and Lear, which allegedly controlled 56% and 22% of the global automotive seat market in 2017 respectively, *id.* at PageID.24-25, agreed to engage in the scheme.[1] *Id.* at 35.

Plaintiff contends Volkswagen proposed this agreement despite it being "against Volkswagen's rational economic interest" since Prevent "was the cheapest, most efficient competitor." *Id.* at PageID.34. And, in 2018, Adient and Lear "abruptly" cut ties with Prevent and stopped sending Requests for Quotes ("RFQ") for potential new business. *Id.* at PageID.37.

Prevent alleges it learned about the boycott because in 2017, it "received an anonymous letter and internal Volkswagen documents[] . . . from a person claiming to have first-hand information about Volkswagen's Project 1 strategy to destroy Plaintiff and the Prevent Group." *Id.* at PageID.6. Representatives of the Prevent Group subsequently notified German authorities and the Volkswagen Board. *Id.* at PageID.6-7.

Additionally, a member of the Project 1 team provided *Business Insider* ***[*6]*** information and over fifty hours of audio recordings of more than thirty Project 1 meetings from 2017 to 2018. *Id.* at PageID.6. *Business Insider* began reporting on Project 1 in July 2020, including "the Project 1 group discussing how to redirect Plaintiff's business to Adient." *Id.* at PageID.7. After an internal investigation, Volkswagen identified the source as a manager named Christian Minkley. *Id.* He has since died in "unusual" circumstances, but he left notes indicating his manager directed him to record the Project 1 meetings. *Id.* at PageID.7-8.

Plaintiff also claims its allegations are based on "information from other suppliers[] and other sources with direct evidence of these facts." *Id.* at PageID.8.

B. Procedural Background

Since 2016, the Prevent Group, Volkswagen, and their affiliates have been engaged in extensive litigation related to Project 1 in German courts. ECF No. 21-3, PageID.779. These disputes are ongoing, ECF No. 21, PadeID.147, and discussed in further detail *infra* at III.A.4. Then, in November 2019, two Prevent Group affiliates brought the Project 1 dispute to this district. *See Prevent USA Corp. et al. v. Volkswagen AG*, 19-cv-13400-BAF-EAS. This case was ultimately **[*7]** dismissed on *forum non conveniens* grounds, *Prevent USA Corp. v. Volkswagen AG, No. 19-CV-13400, 2021 U.S. Dist. LEXIS 53216, 2021 WL 1087661, at *17 (E.D. Mich. Mar. 22, 2021)*, which the United States Court of Appeals for the Sixth Circuit affirmed, *Prevent USA, 2021 U.S. App. LEXIS 33234, 2021 WL 5176952, at *7*. As with the litigation in Germany, this lawsuit is discussed in greater detail at III.A.4 *infra*.

Prevent filed the instant action on November 30, 2020. Prevent is suing all four Defendants for an unlawful agreement in restraint of trade in violation of the *Sherman Act § 1* (Claim 1) and Michigan ***Antitrust Law***, *M.C.L. § 445.772* (Claim 4), as well as for civil conspiracy (Claim 8). Additionally, Prevent is bringing claims against Adient and Lear for monopsonization or attempted monopsonization in violation of the *Sherman Act § 2* (Claims 2 and 3) and Michigan ***Antitrust Law***, *M.C.L. § 445.773* (Claims 5 and 6). Finally, Prevent is bringing a tortious interference claim against Volkswagen and Brandstätter (Claim 7).

Adient and Lear filed a joint Motion to Dismiss on January 25, 2021. ECF No. 21. They aver (1) Prevent's claims under the *Sherman Act* are barred by the *Foreign Trade Antitrust Improvements Act of 1992 ("FTAIA")*, (2) the case is not properly in this district under the doctrine of *forum non conveniens*, (3) Prevent fails to state a *Sherman Act § 1* claim, (4) Prevent fails to state a *Sherman Act § 2* claim, (5) Prevent does not establish antitrust injury, and (6) the **[*8]** derivative state law claims should also be dismissed. Prevent filed a response on March 1, 2021, ECF No. 24, and Adient and Lear timely replied, ECF No. 37.

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[1] The Court acknowledges Defendants Adient and Lear dispute the characterizations of their market share in 2017. Nevertheless, the Court declines to resolve this dispute because the market share did not ultimately play a role in the Court's analysis.

On March 10, 2021, Volkswagen and Brandstätter also filed a joint Motion to Dismiss. In it, they argue (1) the case is not properly in this district under the doctrine of *forum non conveniens*, (2) Prevent fails to plead personal jurisdiction as to either Defendant, (3) Prevent fails to state a *Sherman Act § 1* claim, and (4) the derivative state law claims should also be dismissed. Prevent filed its response on March 31, 2021, ECF No. 40, and Volkswagen and Brandstätter timely replied, ECF No. 41.

III. LAW & ANALYSIS

A. The Court Will Dismiss Prevent's Claims on the Basis of *Forum Non Conveniens*

As stated above, the defendants move for dismissal on several grounds; however, Defendants' *forum non conveniens* arguments are persuasive and dispositive as to all Defendants. For the following reasons, the Court concludes the case should be handled in Germany.

Under the doctrine of *forum non conveniens*, "a district court may decline to exercise its jurisdiction" if it would be more convenient to resolve the claims in another forum. *Hefferan v. Ethicon Endo-Surgery, Inc., 828 F.3d 488, 492 (6th Cir. 2016)*.

> When courts apply *forum* ***[*9]*** *non conveniens*, there are three considerations: (1) whether an adequate alternative forum is available; (2) whether a balance of private and public interests suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court; and (3) the amount of deference to give the plaintiff's choice of forum.

Jones v. IPX Int'l Equatorial Guinea, S.A., 920 F.3d 1085, 1090 (6th Cir. 2019). *Forum non conveniens* analysis is fact dependent. *Williams v. Green Bay & W.R. Co., 326 U.S. 549, 557, 66 S. Ct. 284, 90 L. Ed. 311 (1946)*. Moreover, it "does not turn on any one factor." *Wong v. PartyGaming Ltd., 589 F.3d 821, 831 (6th Cir. 2009)* (citing *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)*). "There is no requirement in *Piper* that the burden be 'oppressive,' though an oppressive burden would be sufficient." *Gering v. Fraunhofer-Gesellschaft e.V., No. 05-73458, 2009 U.S. Dist. LEXIS 81812, 2009 WL 2922847, at *3 (E.D. Mich. Sept. 9, 2009)* (quoting *Stewart v. Dow Chemical, 865 F.2d 103, 106 (6th Cir.1989)*).

1. The Doctrine of *Forum Non Conveniens* is applicable to Antitrust Cases

As a threshold matter, the Court briefly addresses Plaintiff's contention "that cases under the U.S. antitrust laws can *never* be dismissed in favor of a foreign court on grounds of *forum non conveniens*." ECF No. 24, PageID.707 (citing *Indus. Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 890 (5th Cir. 1982)*, *vacated on other grounds*, *460 U.S. 1007, 103 S. Ct. 1244, 75 L. Ed. 2d 475 (1983)*; *Laker Airways Ltd. v. Pan Am. World Airways, 568 F. Supp. 811, 818 (D.D.C. 1983)*).

When the instant motion was briefed and argued, the United States Court of Appeals for the Sixth Circuit had not yet addressed this issue. However, since then—while deciding the related case *Prevent USA*—the Sixth Circuit rejected Plaintiff's position and held "nothing in [the special venue provision **[*10]** of the *Clayton Act*] indicates that the district court may not dismiss a case for refiling in a foreign country." *2021 U.S. App. LEXIS 33234, 2021 WL 5176952, at *6*. The Sixth Circuit thus upheld the district court's dismissal of the plaintiff's *Sherman Act* and state law claims on *forum non conveniens* grounds. *2021 U.S. App. LEXIS 33234, [WL] at *7*. Accordingly, the Court will proceed with the *forum non conveniens* analysis.

2. Germany is an Adequate Alternative Forum

There exists an adequate alternative forum when "the defendant is 'amenable to process' in the foreign jurisdiction." *Wong, 589 F.3d at 830* (quoting *Piper Aircraft Co., 454 U.S. at 255 n. 22*). The "alternative forum is inadequate if 'the remedy provided by [it] is so clearly inadequate or unsatisfactory that it is no remedy at all." *Id. at 831* (quoting *Piper Aircraft Co., 454 U.S. at 254*). There is no remedy at all when, "for example, the jurisdiction 'does not permit litigation of the subject matter of the dispute.'" *Hefferan, 828 F.3d at 494-95* (quoting *Piper Aircraft Co., 454 U.S. at 255 n. 22*). The remedy in the alternative forum does not need to be the same as would be provided by an American court. *Id. at 495* ("Law that is simply less favorable to the plaintiff in the alternative forum is not so extraordinary as to render that forum inadequate."). In particular, a forum is not "inadequate simply because of the likelihood of lesser damages." *Id.*; *see also* *Prevent USA, 2021 U.S. App. LEXIS 33234, 2021 WL 5176952, at *3* ("But the reality that the foreign venue makes it more **[*11]** difficult to establish the claim or that the foreign law is less generous to prevailing plaintiffs does not establish unavailability.").

Germany is an adequate alternative forum in which to litigate this dispute. First, Germany is available as an alternative forum. Defendant Volkswagen is a German corporation, and Defendant Brandstätter is a German resident, so both are amenable to process in that jurisdiction. Moreover, Defendants "Adient and Lear both have substantial operations in Germany and are willing to accept service there." ECF No. 21, PageID.157 (citing ECF Nos. 21-3, 21-4).

Prevent has expressed concerns that "consent to service does not mean that a German court will accept jurisdiction or otherwise agree to adjudicate the case." ECF No. 24, PageID.708. Prevent does not indicate why a German court would not accept jurisdiction over the case—especially given the ongoing litigation in Germany between the Prevent Group and Volkswagen over Project 1. Instead, Prevent relies on *Associação Brasileira de Medicina de Grupo v. Stryker Corp., 891 F.3d 615 (6th Cir. 2018)* to say that a defendant's willingness to accept service is irrelevant. ECF No. 24, PageID.708 (citing *Stryker, 891 F.3d at 621*). Prevent overstates the *Stryker* holding. In that record, there was no evidence the defendant had any connection **[*12]** to Brazil or that Brazilian courts permitted litigation over the subject matter at issue. *Stryker, 891 F.3d at 622*. Thus, the Sixth Circuit held the defendant's single statement in a brief that it consented to jurisdiction in Brazil was insufficient to show Brazil was an available and adequate forum.

That is the opposite of the situation in the present case. Prevent itself alleged that Adient and Lear have close and "significant" business relationships with Volkswagen, a German company, ECF No. 1, PageID.26-27, and that they engaged in this boycott to deepen those relationships. Given, Adient and Lear's regular contact with German commerce, there is evidence before the Court that Adient and Lear have connections with Germany sufficient to form the basis of jurisdiction.

Additionally, there is sufficient evidence that Germany permits litigation over the subject matter at issue. The Prevent Group has already brought claims in German courts based on Project 1, generally, and the termination of agreements to supply seat backrests, in particular. ECF No. 21, PageID.157 (citing ECF Nos. 21-3, 21-3-15). Moreover, a plaintiff asserting claims assigned to it by Prevent (and six other members of the Prevent Group) recently **[*13]** brought a case in Germany alleging antitrust claims against Volkswagen that include the abrupt termination of Prevent's seat cover contracts in March 2018. ECF No. 35-11, PageID.1609, PageID.1632-35, PageID.1669.

> [T]he fact that Prevent Group companies have filed several lawsuits against VWAG and its subsidiaries in German courts for unfair competition and antitrust violations arising from their alleged execution of Project 1 is powerful evidence that plaintiffs themselves recognize Germany as an available and adequate forum for the litigation of such disputes.

*Prevent USA, 2021 U.S. Dist. LEXIS 53216, 2021 WL 1087661, at *9* (citing *Faber-Plast GmbH v. Kleinert, 997 F. Supp. 846, 847 (E.D. Mich. 1998)*). To quell any lingering concerns, the Court will condition the *forum non* *conveniens* dismissal on Adient and Lear's consent to suit and acceptance of process in Germany. *See Stryker, 891 F.3d at 621* (citing *Dowling v. Richardson-Merrell, Inc., 727 F.2d 608, 611, 616 (6th Cir. 1984)*.[2]

Second, German courts would be able to provide an adequate remedy. Plaintiff's claims can be brought in Germany. Germany has antitrust laws which cover the exercise of monopoly/monopsony power and boycott. ECF No. 21, PageID.157 (citing ECF No. 21-5); *see also* ECF No. 35-11 (translation of antitrust lawsuit based on Project 1 filed by assignee of Plaintiff and six other Prevent Group companies against Volkswagen and other defendants). **[*14]**

Prevent contends that Germany is inadequate because "German ***antitrust law*** would apply 'only with respect to the effects of the Defendants' conduct on the German market, but not with respect to the effects of that conduct on the U.S. and other markets.'" ECF No. 24, PageID.709 (quoting ECF No. 25). However, in *Prevent USA*, the Sixth Circuit concluded a German-based antitrust lawsuit would likely reach more conduct and injuries than an American-based one. *Prevent USA, 2021 U.S. App. LEXIS 33234, 2021 WL 5176952, at *3*. In Germany, Prevent may also bring antitrust claims under European law and could thus include in its cause of action anticompetitive effects across the European Union. *Id.* In contrast, a *Sherman Act* claim cannot reach foreign conduct that produces only anticompetitive harm abroad. *Id.*

Indeed, the Court notes it is not at all clear Prevent has alleged domestic harm sufficient to bring a *Sherman Act* claim. The Complaint does not allege Volkswagen, Adient, or Lear ever bought, or refused to buy, seat covers from Prevent for import into the United States. Instead, Plaintiff alleges that from 2015 to 2017, Prevent sold seat covers to Adient for the Volkswagen Passat. ECF No. 1, PageID.28. Plaintiff also alleges Volkswagen assembles the Passat in Tennessee. *Id.* Notably, **[*15]** Plaintiff does not allege Adient exclusively used its seat covers in manufacturing seats for the Passat, Volkswagen exclusively used Adient's seats in assembling the Passat, or the Passat is exclusively manufactured in Tennessee. The Court is thus left to make these assumptions and infer that, at least between 2015 and 2017, Prevent's seat covers entered the United States. Prevent asks too much—especially because Adient and Lear raised this point in their Motion to Dismiss, *see* ECF No. 21, PageID.152, and Prevent did not address it. This cause of action consists of a German company initiating the boycott of another German company and goods that are not alleged to have been imported into the United States, a German court should have jurisdiction over the conduct at issue.

Equally unavailing is Prevent's argument that Germany is inadequate because "its courts are not empowered to award treble damages, compel meaningful party discovery, or compel any third-party discovery at all." ECF No. 24, PageID.709. Again, a forum is not "inadequate simply because of the likelihood of lesser damages." *Hefferan, 828 F.3d at 495*. As to the procedural differences between Germany's legal system and the American one, various courts, **[*16]** including the Sixth Circuit, have found that the German legal system is adequate. *See, e.g., id.* ("The differences in Germany's legal system do not reveal an alternative forum that provides a remedy 'so clearly inadequate or unsatisfactory' that it is 'no remedy at all.'") (quoting *Piper Aircraft, 454 U.S. at 254*); *Prevent USA, 2021 U.S. App. LEXIS 33234, 2021 WL 5176952, at *3* (holing Germany was an adequate forum to hear Prevent Group plaintiffs' antitrust case). Moreover, Plaintiff's assignee and other Prevent Group affiliates have already availed themselves of the German courts based on the same underlying conduct. *See Faber-Plast, 997 F. Supp. at 847* (finding Germany to be an adequate alternative forum in part because "the parties have engaged, and indeed continue to engage, in litigation in Germany, and a substantial part of the events giving rise to the instant suit occurred in Germany").

Accordingly, for the foregoing reasons, the Court concludes the Germany is an adequate alternative forum this lawsuit.

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[2] *See also Solari v. Goodyear Tire & Rubber Co., 654 F. App'x 763, 766 (6th Cir. 2016)* ("Goodyear U.S. has repeatedly agreed to submit to French jurisdiction for the claims asserted in Plaintiffs' amended complaint. So unless Plaintiffs can show that France would decline jurisdiction or otherwise provides a "clearly unsatisfactory" remedy, Goodyear U.S. has shown an adequate alternative forum.")

3. The Balance of Public and Private Interests Favor Transfer

"If an adequate alternative forum is available, then courts examine whether the plaintiff's choice of forum is unnecessarily burdensome. *Zions First Nat. Bank v. Moto Diesel Mexicana, S.A. de C.V., 629 F.3d 520, 523 (6th Cir. 2010)*. To guide that analysis, courts look to the private and public interests that the Supreme Court listed **[*17]** in *Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)*." *Jones, 920 F.3d at 1092*.

i. Private Interests

> In *Gulf Oil*, the Supreme Court announced a non-exhaustive list of private interests to consider, including, "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive."

Jones, 920 F.3d at 1092 (quoting *Gulf Oil Corp., 330 U.S. at 508*). The Sixth Circuit has also considered whether "documents and witnesses will likely require translation to English." *Solari, 654 F. App'x at 768*; *see also* *Prevent USA, 2021 U.S. App. LEXIS 33234, 2021 WL 5176952, at *4*.

Here, the private interests strongly favor litigation in Germany. Prevent alleges Defendant Volkswagen, a German company, developed the idea for Project 1 and approached Defendants Adient and Lear with the boycott scheme to "demolish[] [Prevent] as a supplier of seat covers." ECF No. 1, PageID.5. It further alleges Defendant Brandstätter, a German resident, oversaw the planning and execution of Project 1 and gave detailed updates to Volkswagen's Board, including Chairman Herbert Diess, whom the Complaint specifically names. *Id.* at PageID.30. Diess and the other Board members will **[*18]** be key witnesses in the litigation. Despite their importance to the case, they would be outside of this Court's subpoena power.[3] *See* *Gering, 2009 U.S. Dist. LEXIS 81812, 2009 WL 2922847, at *4* (finding private interests favored dismissing the case to Germany because "[t]his Court does not have the authority to compel foreign witnesses to appear and testify in the Eastern District of Michigan, and the overwhelming majority (if not all) of the potential witnesses in this case are foreign witnesses").

Additionally, many of the exhibits submitted by all parties have been translated from German into English. *See, e.g.*, ECF No. 1-3. And most of the factual allegations in the Complaint are based on internal Project 1 documents that were originally written in German. *Id.* at PageID.30 n. 5 ("Quotes of written Volkswagen materials throughout the Complaint are unofficial translations from German."). It stands to reason that much of the evidence in this case will continue to be in German, which supports dismissing the case for litigation in Germany. *See* *Gering, 2009 U.S. Dist. LEXIS 81812, 2009 WL 2922847, at *4* ("The fact that a jury in the Eastern District of Michigan will be comprised of English-speaking persons (presumably similarly lacking knowledge of the German language) likewise strongly **[*19]** disfavors trying this case in the Eastern District of Michigan.").

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[3] Prevent argues that Adient and Lear, as domestic defendants, "bear the burden of identifying specific witnesses who would be unwilling to testify in this forum and establishing their relevance to the case." ECF No. 24, PageID.710-11 (citing *Hefferan, 828 F.3d at 498-99*). Prevent is correct that the *Hefferan* court held that the availability of compulsory process "receives less weight when it has not been alleged or shown that any witness would be unwilling to testify." *Id. at 499* (internal quotation marks omitted). Nevertheless, despite this lack of specificity, the Sixth Circuit affirmed the district court's dismissal of the Hefferans' case because "[r]elative ease of access to sources of proof and the availability of compulsory process for proceedings abroad support dismissal." Similarly, Adient and Lear's failure to specifically allege that certain foreign witnesses will not testify in the United States is not fatal to their *forum non conveniens* argument.

Prevent alleges "[e]mployees of Adient and Lear regularly met with C-suite level executives from Volkswagen in Michigan and discussed Project 1 initiatives and measures. ECF No. 1, PageID.35. Then, at the hearing, Prevent named specific employees it averred would be key witnesses and are domiciled in Michigan. Similarly, in its response to Volkswagen and Brandstätter's notice regarding *Prevent USA*, Prevent again argued the evidence of, and key witnesses to, the alleged conspiracy between Volkswagen and Adient and Lear is in Michigan. ECF No. 49, PageID.2878-79.

While some Adient and Lear employees may be key witnesses and may be based in Michigan, the Court concludes access to sources of proof would still be relatively easier in Germany. Adient and Lear have consented to litigating this matter in Germany and have agreed to make available in Germany any documents or personnel under their control in Michigan. ECF No. 21, PageID.159 n. 13 (citing ECF Nos. 21-4, 21-5). Furthermore, Brandstätter, who allegedly oversaw Project 1, participated in calls with Adient and Lear from Germany, so even those meetings have a German nexus. Additionally, **[*20]** the Volkswagen executives who met with Adient and Lear employees in Michigan are already available in Germany. While some of the evidence in this case may be in Michigan, "the bulk of the documents and records constituting necessary proof in the litigation are located in" Germany, *Barak v. Zeff, 289 F. App'x 907, 912 (6th Cir. 2008)*, and that which is not can be brought there. Accordingly, the Court finds the private interests favor litigating this case in Germany.

ii. Public Interests

> Looking again to *Gulf Oil*, the public interests we consider include the administrative difficulties of litigation in congested centers instead of the suit's place of origin, the burden of jury duty on citizens of communities with no relation to the case, the importance of trying the case in view and reach of others that may be affected, the local interest in having localized controversies decided at home, and the appropriateness of having trial at home with the law that governs the case.

Jones, 920 F.3d at 1093 (citing *Gulf Oil Corp., 330 U.S. at 508-09*). "To evaluate [the public interest] factors, the court must consider the locus of the alleged culpable conduct, often a disputed issue, and the connection of that conduct to the plaintiff's chosen forum." *Van Cauwenberghe v. Biard, 486 U.S. 517, 528, 108 S. Ct. 1945, 100 L. Ed. 2d 517 (1988)*.

Here, the public interest factors also favor litigation in Germany. **[*21]** The suit's place of origin is Germany. Plaintiff alleges Project 1 was developed in Germany. ECF No. 1, PageID.5. Plaintiff further alleges that as part of Project 1, Volkswagen "hatched" a conspiracy for a group boycott, in which it convinced Adient and Lear to participate. *Id.*; *see also id.* at PageID.32-33 (describing internal Volkswagen documents that allegedly detail the boycott plan). Yet, Prevent now asserts this is a Michigan-based conspiracy because the Complaint alleges Adient and Lear employees met with Volkswagen employees in Michigan. ECF No. 49, PageID.2878-79. However, that some of the actions related to the alleged conspiracy occurred in Michigan does not change the fact that the "locus of the alleged culpable conduct," *Biard, 486 U.S. at 528*, is Germany, where Project 1 and this boycott were formulated and managed.

That the cause of action is German in nature is evidenced by the fact that Plaintiff's assignee is currently litigating the termination of these contracts in Germany. *See* ECF No. 35-11. Additionally, as discussed *infra* at III.A.4, there are already several related cases in Germany between Prevent Group affiliates and Volkswagen arising from the 2016 supply stoppage and Project **[*22]** 1 schemes. "The importance of trying the case in view and reach of others that may be affected, [and] the local interest in having localized controversies decided at home" weigh in favor of litigating this dispute in Germany among its brethren. Judicial economy favors removing the case to Germany as well.[4]

Furthermore, it appears the presence of foreign defendants in this case has already caused some administrative difficulties: Volkswagen and Brandstätter were not served with the Summons and Complaint until late February 2021, almost three months after the complaint was filed. *See* ECF Nos. 39, 43. And, as discussed *supra* at III.A.3.i, it appears much of the evidence is in German and/or Germany.

Prevent asserts "Germany has an interest only in its own market, not the worldwide market alleged in the Complaint. By contrast, a 'defendant's home forum always has a strong interest in providing a forum for redress of injuries.'" ECF No. 24, PageID.710 (quoting *Shi v. New Mighty U.S. Tr., 918 F.3d 944, 952, 440 U.S. App. D.C. 105 (D.C. Cir. 2019)*) (internal citations omitted). While the Court generally agrees with this principle, it is ultimately unhelpful in this case as Germany is the home forum for half the Defendants. Moreover, as discussed *supra* at III.A.2., a German **[*23]** court's interest would extend to anticompetitive conduct throughout the European Union. *Prevent USA, 2021 U.S. App. LEXIS 33234, 2021 WL 5176952, at *3*. In contrast, a Sherman Act claim brought in the United States can only address domestic effects. *Id.*

The Court acknowledges citizens of Michigan have some relation to this case to the extent meetings regarding the alleged boycott occurred in Michigan. Nevertheless, the boycott itself was an agreement initiated by a German company (Volkswagen) to boycott another German company (Prevent), and that the goods subject to the boycott (seat covers) are not alleged to have ever been imported into the United States. A handful of meetings in Michigan is not a sufficient connection to outweigh the foreign nature of the suit. Accordingly, the public interests also favor litigating this case in Germany.

4. Deference to Plaintiff's Choice

Generally, courts "apply a strong presumption in favor of a plaintiff's selected forum." *Zions First, 629 F.3d at 523-24*. It is also usually "reasonable for [a] district court to assume that the choice [of a defendant's home forum] was convenient. *District Boling v. Prospect Funding Holdings, LLC, 771 F. App'x 562, 571 (6th Cir. 2019)*. However, a "foreign plaintiff's forum choice is usually accorded less deference" than an American plaintiff's because it is "much less reasonable" to assume the forum is **[*24]** convenient. *Hefferan, 828 F.3d at 493* (quoting *Piper Aircraft Co., 454 U.S. at 256*). This is especially true "as evidence of forum shopping mounts." *Stryker, 891 F.3d at 619*. Courts consider whether a foreign plaintiff's "decision to file suit in the United States was motived by a legitimate reason such as convenience or the ability to obtain jurisdiction over the defendants rather than tactical advantage." *Id. at 494*.

Here, the Court finds Prevent's choice of forum is entitled to little deference. Prevent is a foreign plaintiff and therefore entitled to less deference. *Hefferan, 828 F.3d at 493*. Prevent counters that Adient and Lear are headquartered in this District and cannot seriously claim inconvenience. *See, e.g.*, ECF No. 49, PageID.2877. However, courts have dismissed on *forum non conveniens* grounds when cases involved both domestic and foreign defendants. *See, e.g., Ranza v. Nike, Inc., 793 F.3d 1059 (9th Cir. 2015)* (affirming dismissal of workplace discrimination claims brought by American plaintiff living abroad against foreign corporation and its domestic parent company); *Kryvicky v. Scandinavian Airlines Sys., 807 F.2d 514 (6th Cir. 1986)* (affirming dismissal of wrongful death claims brought by American plaintiff against foreign airline and domestic airline manufacturer).

[4] The Court acknowledges Prevent's assertion that Adient and Lear are not named in any of the German lawsuits and thus the actions cannot be called "parallel." ECF No. 40, PageID.2399. Nevertheless, Prevent assigned claims arising from the March 2018 termination of its seat cover supply agreements to an entity established to bring such claims on behalf of the Prevent Group. *See* ECF No. 35-11, PageID.1669. While Adient and Lear are not named in that litigation, the complaint refers to the third parties that replaced them as Volkswagen's suppliers. *Id.* at PageID.1609. It is clear these lawsuits are related, if not "parallel."

Despite Adient and Lear's connection to Michigan, the Court concludes the Prevent Group's litigation history evidences foreign shopping. **[*25]** As discussed *supra* at III.A.3.ii n.4, the Court acknowledges Prevent, Adient, and Lear, have not been named parties in the any of the prior lawsuits in Germany. However, Prevent is wrong in arguing "[c]ourts will only infer forum shopping when the *same* plaintiff has brought parallel claims in a foreign court and is seeking to re-litigate an unfavorable result in the foreign court." ECF No. 24, PageID.705 (emphasis in original). For example, in *Prevent USA, 2021 U.S. Dist. LEXIS 53216, 2021 WL 1087661*, the district court (Friedman, J.) dismissed on *forum non conveniens* grounds despite neither of the two plaintiffs, one of which was an American company, being named in the earlier foreign litigation.

Moreover, Prevent is so closely affiliated with the other Prevent Group companies that it is disingenuous for Plaintiff to try to separate the instant action from its predecessors. In fact, the Complaint is rife with references to the broader Prevent Group and its dispute with Volkswagen. A few examples are below.

> In 2016, a global dispute arose between Volkswagen and companies affiliated with Plaintiff known as the "Prevent Group." . . . In response, Volkswagen launched "Project 1," a highly organized campaign to "demolish" Plaintiff and the Prevent **[*26]** Group and to exclude them systematically from the market.

ECF No. 1, PageID.4.

> Project 1 had several dimensions, including interfering with acquisitions by Prevent Group companies that might threaten Volkswagen's market power, hiring private investigators to spy on Prevent Group executives to gain insight into the Prevent Group's acquisition strategy and business, and manufacturing negative press about the Prevent Group. These aspects of Project 1 are the subject of separate proceedings both in this District and in certain European courts.

Id. at PageID.5.

> At one point, Adient was the single largest customer of both Plaintiff and across the entire automotive business of the wider Prevent Group. At the same time, Prevent Group companies would purchase some components from Adient in markets in which Adient was acting as a Tier 3 supplier, including certain fabrics. In addition, the Prevent Group also provided major product development and pre-serial production services to several of Adient's operations. The relationship between Plaintiff and Adient was highly successful.

Id. at PageID.27

> As Plaintiff grew, it achieved more bargaining power to insist upon competitive prices and terms, directly **[*27]** threatening Volkswagen's strategy of keeping its suppliers small and weak and thereby allowing Volkswagen to force anticompetitive prices and terms on those suppliers. Entities within the Prevent Group began acquiring smaller, weak suppliers. This posed a direct threat to Volkswagen's market power strategy.

Id. at PageID.29.

> Volkswagen estimated that the replacement of Prevent Group companies, including Plaintiff, would cost it roughly 200 million euros. . . . The replacement of all Prevent Group companies, including Plaintiff, as suppliers to Volkswagen was approved at the highest levels of the company.

Id. at PageID.32-33.

> By foreclosing Plaintiff from capturing these returns, Defendants caused loss to Plaintiff's industry goodwill and market reputation, and substantially decreased the overall market valuation of the Prevent Group.

Id. at PageID.41

The instant lawsuit is the latest iteration in a long series of lawsuits in which Prevent Group companies have alleged, both in this District and German courts, that Volkswagen and its subsidiaries are trying to drive them out of business. Judge Friedman extensively detailed this litigation history in *Prevent USA, 2021 U.S. Dist. LEXIS 53216, 2021 WL 1087661*. Because Defendants submitted **[*28]** the same declaration in support of their motions to dismiss, the Court includes Judge Friedman's summary below.

This litigation history is explained in the declaration of Dr. Detlef Hass, ECF 33, submitted in support of defendants' motion. Dr. Hass catalogues the lawsuits that have been litigated in German courts between Prevent Group companies and Volkswagen since 2016. The first two were brought by VWAG and some of its subsidiaries against the Prevent Group companies Car Trim GmbH ("Car Trim") and ES Automobilguss GmbH ("Automobilguss") in August 2016 when these suppliers froze all deliveries to Volkswagen. In each case, the Braunschweig Regional Court found the suppliers' delivery freezes to be unjustified, granted Volkswagen's motions for preliminary injunctions, and ordered the suppliers to resume delivery of parts for specified periods of time. *See* Hass Decl. ¶¶ 3, 4; Hass Decl. Exs. 1, 2.

A third lawsuit arose in 2018. In March of that year, Volkswagen informed Automobilguss that it was terminating its supplier contract with that company. Automobilguss then sued VWAG in the Regional Court of Leipzig and sought an injunction requiring Volkswagen to continue purchasing gear components. **[*29]** *See* Hass Decl. ¶ 6; Hass Decl. Ex. 3. The court granted partial relief, but the appellate court, the Higher Regional Court of Dresden, reversed. Hass Decl. ¶¶ 7-9; Hass Decl. Ex. 4[.] The appellate court concluded that Volkswagen had good cause to terminate its relationship with [Automobliguss] "in reaction to the illegal threat of the [latter]" to stop supplying gear components. PageID.1022. The court also rejected plaintiff's antitrust argument that VWAG had abused its market power, finding that "[t]he Plaintiff did not demonstrate by *prima facie* evidence that the Defendant is a market-dominating company." PageID.1017.

Prevent Group's legal action against Volkswagen continued in another German court in 2018 when Prevent TWB GmbH & Co KG ("TWB") sued VWAG and two other VW subsidiaries in an effort to require them to continue purchasing its car seat components. *See* Hass Decl. ¶ 10; Hass Decl. Ex. 5. Defendants had given notice in March 2018 that they were cancelling their supply agreements with TWB effective March 2019. The Regional Court of Dortmund noted plaintiff's belief that "the cancellation is simply retribution for the dispute that has been publicized in the media between [VWAG] **[*30]** and two affiliated companies of Plaintiff's parent company, CarTrim GmbH and ES Automobilguss GmbH, dating from 2016." Hass Decl. Ex. 5 (PageID.1073). The court denied the injunction. PageID.1069. In affirming, the Duesseldorf Higher Regional Court found plaintiff's request for an injunction to be "unfounded" because, among other reasons, plaintiff conceded that it had already found more than ten new customers." Hass Decl. Ex. 6 (PageID.1136, 1141).

The dispute over VWAG's cancellation of Prevent Group's parts contracts continued in another German court, the Regional Court of Hanover, where TWB sued Skoda Auto a.s., a VWAG subsidiary, in 2018. Hass Decl. ¶ 12. That court, like the Regional Court of Dortmund (and for essentially the same reasons), denied plaintiff's request for an injunction to compel defendant to continue buying car seat components after defendant canceled its contract in early 2018. Hass Decl. Ex. 7. Plaintiff appealed this decision to the First Antitrust Division of the Celle Higher Regional Court[] but withdrew the appeal after that court indicated that it intended to dismiss the appeal because it "clearly has no chance of succeeding." Hass Decl. ¶ 13, Hass Decl. **[*31]** Ex. 8 (PageID.1247).

Another in this continuing series of disputes between VWAG and Prevent Group is a lawsuit brought by VWAG against Neue Halberg-Guss GmbH ("NHG"), a supplier of engine blocks and other components, in the Regional Court of Braunschweig in 2018. Hass Decl. ¶ 19, 20; Hass Decl. Exs. 12, 13. In that case, VWAG obtained an order permitting it to attach NHG's assets in the amount of 42 million Euros. The basis for the claim was that NHG, upon being acquired by the Prevent Group, massively increased the prices it demanded VWAG pay as a condition of continued delivery. Hass Decl. Exs. 13 (PageID.1633-35). VWAG paid the demanded prices, which the court characterized as "usurious," in order to avoid production shutdowns at its engine plant. PageID.1650, 1654. In affirming, the appellate court agreed that NHG's significant price increases were usurious and that NHG's threatened "delivery stop caused an economic predicament for [VWAG], which at the time was dependent on deliveries from [NHG] because alternatives were—undisputedly—not available in a timely manner." Hass Decl. Ex. 14 (PageID.1735).

The most recent [German] battle between VWAG and Prevent Group took shape in December **[*32]** 2019, when a company named Andromeda Dispute & Litigation GmbH ("Andromeda") sued VWAG, Audi AG, Porsche AG, Skoda Auto a.s., SEAT S.A., SITECH Sitztechnik GmbH, Volkswagen Automatic Transmission

Co. Ltd. No. 125, and Volkswagen R GmbH in the Regional Court of Frankfurt. Hass Decl. ¶ 22, Hass Decl. Ex. 15. Plaintiff indicated that it was suing by assignment on behalf of several Prevent Group companies whose contracts with the VW companies had been terminated in March 2018. Hass Decl. Ex. 15 (PageID.1788). In this lawsuit, plaintiff asserts claims "on the basis of contractual and criminal law, and in particular ***antitrust law***" for these unlawful terminations. *Id.* VWAG, plaintiff alleges, "had strategically prepared for this separation for years." PageID.1789. Plaintiff points to a Project 1 presentation in April 2017 for VWAG's board where the company's "separation costs" were tallied. *Id.* VWAG allegedly intended that "[a]ll suppliers should see what happens when they do not strictly follow the unwritten laws of [VWAG]; for, in 2016, individual companies of the 'Prevent Group' had dared to suspend delivery." *Id.* VWAG allegedly intended "to 'eliminate' all of the companies of the 'Prevent **[*33]** Group.'" PageID.1790. According to the complaint, VWAG believed that "the strategy of the 'Prevent Group' that had been pursued for years - the acquisition and recovery of small and mid-sized automotive supply companies - had to be halted." *Id.* VWAG allegedly

> created a "List of problematic suppliers," which recorded, among other things, financial assessments for each supplier, the dependence of the supplier on [VWAG] in percentage of revenue, a "depth evaluation" for each supplier, the plans of Volkswagen for handling the supplier, and, in the column "Status," all information regarding a change of control. On the other hand, a concept was needed for the replacement of the companies that supplied [VWAG] and its corporation [sic].
>
> . . .
>
> Now, with great urgency, replacement suppliers needed to be found for all parts delivered by companies of the "Prevent Group" and - this was planned for "February 2018" - in one fell swoop, all contracts of all companies of the corporation of Defendant No. 1) with companies of the "Prevent Group" were annulled, terminated properly or without notice, and this action was accompanied by a great media presence in order to demonstrate to all suppliers the consequences **[*34]** of "insubordinate behavior."

PageID.1790, 1792. As evidence, plaintiff references a Project 1 presentation in April 2017 to VWAG's board. PageID.1792.

The complaint goes on to allege:

> The conduct of the Defendants was and is illegal in many respects. In March 2018, there were as few "grounds for termination" for a termination or ending of the contracts without notice or even with notice before the expiry of the fixed term as there were in June 2016.
>
> . . .
>
> The concerted action of March 20, 2018, was not only the contractually based but also antitrust-based and moreover illegal infringement of an established and practiced commercial business as well as a malicious, immoral injury to seven Cedents, because, as they have declared, Defendant No. 1) and the remaining affiliates did not pursue any justified economic goals but rather the targeted public injury of the "Prevent Group." Defendant No. 1) lied to the Cedents - as well as to the courts - regarding its actual plans; it was only gradually - some of it very recently - that the duplicitous double-dealing was uncovered.

PageID.1792-93. Further,

> [i]n order to conceal the negative influences on the assets, the stock market price and the share **[*35]** value of Volkswagen AG, the responsible persons involved temporarily named their project "Project-1," more precisely, in the years 2016 and 2017. It is not known what further or other code names the destruction campaign had. In any case, a presentation for the board meeting of the VW Group dated April 25, 2017 (Annex K1) contained a recommendation for action, calling for a complete "modulation" of the "companies of the Prevent Group" (including ES Guss and Car Trim) and for all objectives to be fully implemented by February 2018....Furthermore, the presentation refers to the Group's board meetings dated August 16, 2016 and August 23, 2016, at which the Board of Management of the Group had already decided on the "modulation" - the destruction of all suppliers of the "Prevent Group" and the structure of alternative suppliers.

PageID.1814-15. The complaint also alleges the specific goals of Project 1:

> In any case, on August 16, 2016, the Board of Management of the [Volkswagen] Group decided to "modulate", i.e. boycott the supplier companies of the Hastor family of entrepreneurs, which were no longer wanted for further business. The Board of Management of the Group determined that

> (1) a fully **[*36]** secured 2-supplier strategy was to be set up to ensure that all VW plants would be supplied with automotive parts without using the companies of the Hastor/Prevent Group;
> (2) any participation by the Hastor family of entrepreneurs in a supply company in the past, present and future should be examined and prevented;
> (3) the legal department should be closely involved in all activities relating to the companies of this family of entrepreneurs;
> (4) close internal monitoring of developments is necessary and that the Board of Management of the Group should report on developments at least weekly (i.e. again on August 23, 2016).
>
> In view of these determinations, it was clear that the Board of Management of the Group did not think of admitting their own mistakes or even of responding to justified demands from VW Group suppliers. It was also clear that the VW Group would use all means made available by the Board of Management to "clean up" all supply chains and supply companies of Hastor managers or Hastor holdings as soon as this appeared necessary for any reason or was deemed necessary as a preventive measure.

PageID.1815.

The complaint further alleges that Project 1, which the complaint also referred **[*37]** to as "the destruction campaign," included an effort by the VW Group

> to use its organizational and structural possibilities in the value-added pyramid for the approximately 11 million vehicles it produces annually to *deny the assignors access to new supply contracts for the brands of the VW Group*. In addition, the Hastor family and their companies willing to invest were *denied access to the supplier market in all markets in which the VW Group was able to exert influence on the award of supplier contracts*, namely in South America, *North America*, Europe[,] and Asia. This included blocking the acquisition of shareholdings in other companies, although the VW group could not have any equity interest of its own in investing Group funds for this purpose.

PageID.1818 (original emphasis omitted; emphasis added). Project 1 also allegedly sought to block Prevent Group companies from acquiring other suppliers:

> [T]he VW Group has also made every possible effort to exploit its organizational and structuring possibilities in the value-added pyramid for the supply chain controlled by its worldwide in order to prevent companies in which the Hastor family could have had a direct or indirect holding from **[*38]** being taken over.
>
> . . .
>
> VW AG, as a listed company, has at no time publicly reported to the capital market that it has been engaged in a campaign of destruction against the companies of the Hastor family of entrepreneurs since at least 2015 and is planning for this dispute both the loss of all deliveries to these companies (and consequently also possible disruptions to assembly at their plants) and costs and claims for damages in the hundreds of millions.

PageID.1844-45.

The complaint asserts antitrust claims, arguing at length that plaintiff had stated a claim under both German and European ***antitrust law***. PageID.1848 et seq. Plaintiff alleges that VWAG and the named subsidiaries have monopsony power due to their "dominant position with regard to the vendor parts manufactured by the Prevent companies." PageID.1850. Plaintiff asserts that defendant could be held liable under German ***antitrust law*** for "any market conduct which has objectively disadvantageous effects on competition for the party concerned." *Id.* Within its discussion of defendants' antitrust violations, plaintiff alleges:

> In this context, reference should also be made once again to the strategy of the defendant's group management **[*39]** board to try by all means to prevent the takeover of suppliers by companies of the Prevent Group. All this must be taken into account in the necessary balancing of the interests of the companies concerned. The interest of the defendant is clearly directed towards permanently excluding all companies of the Prevent Group as suppliers for all defendants, because it fears that these companies will build up countervailing power and that it will no longer be able to unilaterally enforce its interests in the

> drafting of contracts, in particular its general terms and conditions of purchase, and in the execution of contracts, as it has done in the past.

PageID.1854. Plaintiff further alleges:

> In the present case, as has been explained, it must be assumed that the defendant has a monopoly-like position in the demand for subcontracted parts, which is manifested in the specific form of the supply contracts. Ultimately, the first objective of the defendant regarding 1. [sic] was not only to consolidate its position of power as a buyer of motor vehicle parts, but to expand it and to make it clear to all other suppliers what consequences they would have to expect if they did not comply with the defendant's **[*40]** requirements.

PageID.1857. The complaint asserts a slew of claims under German law, including antitrust, fraud, unjust enrichment, and interference with an "established ... business operation." PageID.1870. Plaintiff expands on the latter point, citing authority for the proposition that such interference includes "[t]he prevention of planned commercial activities of an already active company ..., such as its extension or expansion, if the 'internal connection' to an existing company is present." PageID.1871.

*2021 U.S. Dist. LEXIS 53216, [WL] at *12-16*.

After this extensive litigation history, in November 2019, two plaintiffs affiliated with the Prevent Group sued Volkswagen and Volkswagen Group of America, Inc. in this District for actions related to Project 1. *See Prevent USA Corp. et al. v. Volkswagen AG*, 19-cv-13400-BAF-EAS. Specifically, the plaintiffs argued that the defendants conspired to block Prevent Group affiliates from acquiring other automobile parts suppliers "with the purpose and effect of suppressing competition, maintaining Volkswagen's market power over suppliers, and in the process causing massive losses to [the Prevent Group]." *Prevent USA, 2021 U.S. Dist. LEXIS 53216, 2021 WL 1087661, at *2*.

One of the plaintiffs in that case, Prevent USA, is a subsidiary of **[*41]** the Prevent Group, organized and existing under the laws of Pennsylvania, and registered to do business in Michigan. The other, Eastern Horizon, is a Dutch company with its principal place of business in the Netherlands. One of the defendants in that case, Volkswagen Group of America, is a New Jersey corporation whose principal place of business is in Virginia. The other is the same Volkswagen entity named in the instant case. Volkswagen and Volkswagen Group of America successfully moved to dismiss the lawsuit based on *forum non conveniens*.

The court (Friedman, J.) found Germany was an adequate forum for the litigation because both defendants were amenable to process there, Germany's legal system was competent to handle a broad array of disputes, and Prevent Group companies were already litigating several unfair competition and antitrust lawsuits against Volkswagen and its subsidiaries based on the Project 1 conduct. *2021 U.S. App. LEXIS 33234, [WL] at *8-9*. The court found the balance of interests favored litigation in Germany because the case had little connection to Michigan, Project 1 was devised and administered in Germany, and the majority of the evidence was in Germany. *2021 U.S. App. LEXIS 33234, [WL] at *9-11*. Finally, the court gave the plaintiffs' choice **[*42]** of forum little deference because they had little connection to the United States and "Prevent Group companies have brought a number of lawsuits against Volkswagen in Germany, the obviously more convenient and appropriate forum for resolution of their disputes against this German car maker." *2021 U.S. App. LEXIS 33234, [WL] at *11*; *see also* *2021 U.S. App. LEXIS 33234, [WL] at *12-16* (describing Prevent Group's litigation history against Volkswagen in Germany). The United States Court of Appeals for the Sixth Circuit affirmed. *Prevent USA, 2021 U.S. App. LEXIS 33234, 2021 WL 5176952*, at *.; *see also* *2021 U.S. App. LEXIS 33234, [WL] at *5* ("The convenience of handling this lawsuit in Michigan is not obvious, even from Prevent USA's perspective. Keep in mind that the Prevent Group brought five different actions in Germany before bringing this American lawsuit.").

The parties dispute whether the Prevent Group is "winning" the litigation in Germany, but the Court need not decide a plaintiff's potential motive for forum shopping—be it to relitigate issues or the opportunity for higher damages. Given that the bulk of the evidence in this case will be in German or Germany, it is "much less reasonable" to assume Prevent chose this forum for convenience rather than tactical advantage.

For the foregoing reasons, the Court will dismiss the cause of action as to all defendants **[*43]** on *forum non conveniens* grounds.

B. Prevent's Antitrust Claims are Barred by the FTAIA

Additionally, the Court finds that Prevent's antitrust claims are barred by the FTAIA. All Defendants argue that Prevent's antitrust claims are barred by the FTAIA. ECF No. 21, PageID.152-155; ECF No. 35, PageID.1015. The Court also finds these arguments persuasive.

"The FTAIA seeks to make clear to American exporters . . . that the *Sherman Act* does not prevent them from entering into businesses arrangements ... however anticompetitive, as long as those arrangements adversely affect only foreign markets." *F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 161, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)*. To determine whether anticompetitive conduct is subject to *Sherman Act* liability, a court must first determine whether "that conduct falls within the FTAIA's general rule excluding the *Sherman Act*'s application," *i.e.*, does the "conduct involv[e] trade or commerce . . . with foreign nations. *Id. at 158*. Then, a court must determine

> whether the conduct nonetheless falls within a domestic-injury exception to the general rule, an exception that applies (and makes the *Sherman Act* nonetheless applicable) where the conduct (1) has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce, and (2) "such effect gives rise to a [*Sherman Act*] claim." **[*44]**

Id. at 159 (quoting *15 U.S.C. §§ 6a(1)(A)*, *(2)*).

As a threshold matter, Prevent avers the FTAIA only applies when the Complaint alleges wholly foreign transactions, and it thus cannot apply here where the unlawful agreement was reached in Michigan with companies headquartered in Michigan. ECF No. 24, PageID.702-03. In support of its position, Plaintiff contends Defendants' FTAIA arguments disregard *Empagran*'s holding that "the FTAIA's general rule applies where the anticompetitive conduct at issue is foreign." *542 U.S. at 163*.

However, Prevent misconstrues that particular holding in *Empagran*. The Supreme Court was determining whether the FTAIA only applies to export commerce or whether it reaches other types of conduct. *See* *542 U.S. at 163*. After analyzing the legislative history, the *Empagran* Court found "that wholly foreign transactions as well as export transactions are covered by the amendment, but that import transactions are not." *Id.* The Supreme Court went on to hold that when anticompetitive conduct had independent adverse domestic and foreign effects, a domestic purchaser could bring a *Sherman Act* claim for the domestic injury, but foreign purchaser could not bring a claim based on the foreign harm. *Id. at 159*. *Empagran* is thus inapposite and Prevent has not advanced any authority for this **[*45]** argument.

The other cases Prevent cites are similarly unhelpful to Prevent's argument and instead demonstrate the contrapositive. *TI Inv. Servs., LLC v. Microsoft Corp.* holds the FTAIA does not apply to a United States defendant selling services to United States consumers within the United States but would apply to that same defendant selling services to Indian customers. *23 F. Supp. 3d 451, 468 (D.N.J. 2014)*. Similarly, *Lotes Co. v. Hon Hai Precision Indus. Co.* holds "[u]nlike claims involving purely domestic conduct, the FTAIA bars claims based on foreign conduct from proceeding unless the foreign conduct has a cognizable effect on the United States." *753 F.3d 395, 406 (2d Cir. 2014)*. The purpose of the FTAIA is not to exclude wholly foreign conduct as Prevent argued, it is to exclude "conduct that causes only foreign injury." *Empagran, 542 U.S. at 158*.

Prevent's reliance on *In re Auto. Parts Antitrust Litig. (Bearings), No. 12-MD-02311, 2014 U.S. Dist. LEXIS 119372, 2014 WL 4209588, at *6 (E.D. Mich. Aug. 26, 2014)* is similarly misplaced. *See* ECF No. 24, PageID.703 ("[W]here at least some conduct is alleged to have occurred in the United States, the FTAIA thus does not apply."). As the next sentence in that opinion makes clear, the *Bearings* court held that the FTAIA arguments only applied to the foreign parent company because the domestic subsidiary was "specifically alleged to manufacture and sell bearings within the United **[*46]** States." *Bearings, 2014 U.S. Dist. LEXIS 119372, 2014 WL 4209588, at *6*. As discussed *supra* at III.A.2, Prevent did not make any similar allegations in its own Complaint—it does not allege that its seat covers were ever imported into the United States.

Here, the alleged boycott agreement was between two companies headquartered in Michigan and a company headquartered in Germany and concerned another company headquartered in Germany, so it necessarily "involves trade or commerce with foreign nations" and falls within the FTAIA's general rule. Thus, the Court must determine whether the alleged boycott falls into the FTAIA exception.

Non-import foreign commerce is subject to *Sherman Act* liability "where the conduct (1) has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce, and (2) 'such effect gives rise to a [*Sherman Act*] claim.'" *Empagran, 542 U.S. at 159* (quoting *15 U.S.C. §§ 6a(1)(A)*, *(2)*). The Court of Appeals for the Sixth Circuit has not yet analyzed the FTAIA exception, and there is a circuit split as to how "direct" the effect on United States commerce must be. *Compare* *United States v. LSL Biotechnologies, 379 F.3d 672, 680 (9th Cir. 2004)* (defining "direct" as "an immediate consequence of the defendant's activity"), *with* *Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 857 (7th Cir. 2012)* (en banc) (defining "direct" as "a reasonably proximate causal nexus"). To be "substantial" the conduct must have more than a "spillover **[*47]** effect on the domestic commerce." *Eurim-Pharm GmbH v. Pfizer Inc., 593 F. Supp. 1102, 1106-07 (S.D.N.Y. 1984)*. The second prong of the FTAIA exception requires "that the domestic effect must proximately cause the plaintiff's injury." *Lotes Co., 753 F.3d at 414* (collecting cases).

In *Lotes*, the plaintiff argued the defendants had attempted to gain monopoly power over the entire USB connector industry by refusing to offer licenses to adopters of their technology. *Id. at 401*. It further alleged this exclusionary conduct increased prices for devices using USB connectors in the United States. *Id. at 402*. The defendants contended the plaintiff's *Sherman Act* claims were barred by the FTAIA. The United States Court of Appeals for the Second Circuit held it did not need to determine "whether the defendants' foreign anticompetitive conduct has a 'direct, substantial, and reasonably foreseeable effect' on U.S. domestic or import commerce" because "even assuming that Lotes has plausibly alleged a domestic effect, that effect did not 'give [ ] rise to' Lotes's claims." *Id. at 413* (alteration in original). Specifically, the court found

> those higher prices did not cause Lotes's injury of being excluded from the market for USB 3.0 connectors—that injury flowed directly from the defendant's exclusionary foreign conduct. Lotes's complaint thus **[*48]** seeks redress for precisely the type of "independently caused foreign injury" that *Empagran* held falls outside of Congress's intent. *Empagran, 542 U.S. at 173, 124 S.Ct. 2359*.
>
> Indeed, to the extent there is any causal connection between Lotes's injury and an effect on U.S. commerce, the direction of causation runs the wrong way. Lotes alleges that the defendants' patent hold-up has excluded Lotes from the market, which reduces competition and raises prices, which are then passed on to U.S. consumers. Lotes's injury thus *precedes* any domestic effect in the causal chain. And "[a]n effect never precedes its cause." *Am. Home Prods. Corp. v. Liberty Mut. Ins. Co., 748 F.2d 760, 765 (2d Cir.1984)*.

Id. at 414.

Here, Prevent suffers from the same problem. It alleges Defendants collaborated to exclude it from the global automotive seat cover market and that this exclusion "raised the price and reduced the output of seat covers" which "affected vehicles sold in the United States." ECF No. 1 at PageID.39. But this causal chain goes the wrong way: Prevent's injury precedes any domestic effect Defendants' actions may have had on United States markets. "Accordingly, even assuming that the defendants' anticompetitive conduct caused a 'direct, substantial, and reasonably foreseeable effect' in the United States, any such effect did not **[*49]** 'give[ ] rise to'" Prevent's claim. *Id. at 415* (alteration in original). Because Prevent has not satisfied both prongs of the FTAIA exception, the Court concludes the *Sherman Act* claims (Claims 1-3) are barred. This would also serve to bar Prevent's state law antitrust claims (Claims 4-6). *In re Auto. Parts Antitrust Litig., 2017 U.S. Dist. LEXIS 221151, 2017 WL 7689654, at *7 (E.D. Mich. May 5, 2017)*.

IV. CONCLUSION

For the foregoing reasons, the Court concludes this matter will be dismissed on *forum non conveniens* grounds. The Court further concludes Prevent's Sherman Act and attendant state law claims are barred by the FTAIA.

Accordingly,

IT IS ORDERED Defendants Adient and Lear's Motion to Dismiss [#21] is **GRANTED**. This dismissal is conditioned on the following:

1. Adient and Lear's consent to suit and acceptance of process in Germany in a civil action arising out of the alleged boycott;
2. Adient and Lear's agreement to make available any documents or witnesses within its control that are necessary for fair adjudication of said action in Germany; and
3. Adient and Lear's consent to pay any judgment rendered against it in Germany in the aforementioned action.

IT IS FURTHER ORDERED Defendants Volkswagen and Brandstätter's Motion to Dismiss [#35] is **GRANTED**.

IT IS SO ORDERED.

/s/ Gershwin A. Drain

GERSHWIN A. DRAIN

UNITED **[*50]** STATES DISTRICT JUDGE

Dated: November 30, 2021

Veritext Corp. v. Bonin

United States District Court for the Eastern District of Louisiana

November 30, 2021, Decided; December 1, 2021, Filed

CIVIL ACTION NO. 16-13903; 17-9877 REF: ALL CASES SECTION "B"(2)

Reporter

2021 U.S. Dist. LEXIS 229661 *; 2021 WL 5630915

VERITEXT CORP., ET AL. VERSUS PAUL A. BONIN, ET AL.

Subsequent History: Reconsideration denied by *Veritext Corp. v. Bonin, 2022 U.S. Dist. LEXIS 95319 (E.D. La., May 27, 2022)*

Prior History: *Veritext Corp. v. Bonin, 259 F. Supp. 3d 484, 2017 U.S. Dist. LEXIS 54336, 2017 WL 1317609 (E.D. La., Apr. 10, 2017)*

Core Terms

immunity, parte, plaintiffs', subject matter jurisdiction, entity, motion to dismiss, state action, court reporting

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For Vincent P. Borrello, Jr., individually and in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters, Milton Donegan, Jr., individually and in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters, Suzette Magee, individually and in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters, Kimya M. Holmes, in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters, John H. Anderssen, May F. Dunn, Elizabeth C. Methvin, individually and in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters, Laura Putnam, in their official capacity as a Member of the Louisiana **[*2]** Board of Examiners of Certified Court Reporters, John J. Lee, Jr., in his official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters, Defendants (2:16-cv-13903-ILRL-JCW): John Elliott Baker, LEAD ATTORNEY, John Elliott Baker, Attorney at Law, Covington, LA; Brandon William Keay, David A. Marcello, James M. Garner, Joshua Simon Force, Sher, Garner, Cahill, Richter, Klein & Hilbert, LLC, New Orleans, LA; Stephanie Eileen Holden, Blank Rome, LLP (Houston), Houston, TX.

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For Vincent P. Borrello, Jr., 17-9877, Milton Donegan, Jr., 17-9877, Suzette Magee, 17-9877, Kimya M. Holmes, 17-9877, John H. Andressen, 17-9877, May F. Dunn, 17-9877, Elizabeth C. Methvin, 17-9877, Laura Putnam, 17-9877, John J. Lee, Jr., 17-9877, Consol Defendants (2:16-cv-13903-ILRL-JCW): John Elliott Baker, LEAD ATTORNEY, John Elliott Baker, Attorney at Law, Covington, LA; Brandon William Keay, David A. Marcello, James M. Garner, Joshua Simon **[*3]** Force, Sher, Garner, Cahill, Richter, Klein & Hilbert, LLC, New Orleans, LA.

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For Louisiana Court Reporters Association, Defendant (2:17-cv-09877-ILRL-JCW): Larry M. Roedel, LEAD ATTORNEY, David C. Fleshman, David Barnwell Phelps, Roedel, Parsons, Koch, Blache, Balhoff & McCollister (B.R.), Baton Rouge, LA.

For Vincent P. Borrello, Jr., Milton Donegan, Jr., Suzette Magee, Kimya M. Holmes, John H. Andressen, May F. Dunn, Elizabeth C. Methvin, Laura Putnam, John J. Lee, Jr., Defendants (2:17-cv-09877-ILRL-JCW): John Elliott Baker, LEAD ATTORNEY, John Elliott Baker, Attorney at Law, Covington, LA; Brandon William Keay, David A. Marcello, James M. Garner, Joshua Simon Force, Sher, Garner, Cahill, Richter, Klein & Hilbert, LLC, New Orleans, LA.

Judges: Ivan L.R. Lemelle, SENIOR UNITED STATES DISTRICT JUDGE.

Opinion by: Ivan L.R. Lemelle

Opinion

ORDER AND REASONS

Before the Court is defendants' motion to dismiss pursuant to *Rule 12(b)(1) of the Federal Rules of Civil Procedure* (Rec. Docs. 247), plaintiffs' response in opposition (Rec. Doc. 250), and defendants' reply in further support of motion **[*4]** to dismiss (Rec. Doc. 253).

For the reasons discussed below,

IT IS ORDERED that defendants' motion to dismiss (Rec. Doc. 247) is **DENIED**.

I. FACTS AND PROCEDURAL HISTORY

On February 25, 2019, this Court consolidated plaintiff Esquire Deposition Solutions, LLC ("Esquire") and plaintiff Veritext Corp.'s actions against defendants John J. Lee, Jr.,[1] Vincent P. Borrello, Jr., Milton Donegan, Jr., Suzette Magee, Kimya M. Holmes, John H. Anderssen, May F. Dunn, Elizabeth C. Methvin, and Laura Putnam. *See* Rec. Doc. 91. Veritext and Esquire are both Delaware corporations providing court-reporting services to clients across the United States, including in Louisiana. Rec. Docs. 1 at 5, 117 at 5. Both companies also consume court reporting services in Louisiana. *Id.* Plaintiffs provide negotiated rates and discounts for court reporting services to frequent customers who agree to utilize plaintiffs' services for all or some of their court reporting needs. Rec. Doc. 117 at 8.

Defendants are current and former members of the Louisiana Board of Examiners of Certified Shorthand Reporters ("Board"), which is a regulatory body created "for the purpose of encouraging proficiency in the practice of shorthand **[*5]** reporting as a profession, promoting efficiency in court and general reporting, and . . . establishing a standard of competency for those persons engaged in it." *LA. STAT. ANN. § 37:2551(A)* (2021). The Board is authorized to enforce *Louisiana Code of Civil Procedure Article 1434*, the provision under scrutiny in this matter, which prohibits

> a person who has a contractual relationship with a party litigant to provide shorthand reporting or other court reporting services . . . [or] a person employed part or full time under contract or otherwise by a person who has a contractual relationship with a party litigant to provide shorthand reporting or other court reporting services.

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[1] On January 11, 2019, the Court granted plaintiffs' motion to substitute John J. Lee, Jr., in his official capacity as a member of the Louisiana Board of Examiners of Certified Shorthand Reporters, for Paul A. Bonin. Rec. Doc. 89.

La. Code Civ. Proc. Ann. art. 1434(A)(2) (2021); *see also* Rec. Doc. 117 at 6, 17.

In 2012, the Board began enforcing *Article 1434* against all court reporters who entered into volume-based discount contracts with party litigants. *Id.* at 13. Plaintiffs consequently brought Constitutional claims under the dormant *Commerce Clause* and the *Fourteenth Amendment*, as well as a claim under *Section 1 of the Sherman Act, 15 U.S.C. § 1*. Rec. Docs. 1, 4. The Court dismissed plaintiffs' constitutional challenges, and subsequently dismissed the *Sherman Act* claim on reconsideration. *Veritext Corp. v. Bonin, 259 F. Supp. 3d 484 (E.D. La. 2017)*, *on reconsideration*, *2017 U.S. Dist. LEXIS 121488, 2017 WL 3279464 (E.D. La. Aug. 2, 2017)*. On appeal, the Fifth Circuit confirmed the dismissal of Veritext's Constitutional claims but reversed the dismissal of its *Sherman Act* claim **[*6]** because it found that "Veritext pled facts sufficient to support a finding that the Board's conduct does indeed restrain trade." *Veritext Corp. v. Bonin, 901 F.3d 287, 292 (5th Cir. 2018)*. Additionally, the Court held that the Board members were not entitled to *Parker* immunity because the active supervision requirement of that doctrine was "not met." *Id.; see also Parker v. Brown, 317 U.S. 341, 351, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*.

Plaintiffs then filed a motion for partial summary judgment on the affirmative defenses of unclean hands, *in pari delicto*, indemnification, contribution, and allocation of fault. Rec. Docs. 229, 231, 234. The Court granted summary judgment for the affirmative defenses of unclean hands and allocation of fault and dismissed as moot the affirmative defenses of *in pari delicto*, indemnification, and contribution. Rec. Docs. 237, 238. Defendants next filed a motion for reconsideration of plaintiffs' motion for summary judgment.[2] Rec. Docs. 240, 242, 246. Shortly after their motion for reconsideration, defendants filed this instant motion to dismiss for lack of subject matter jurisdiction. Rec. Docs. 247, 250, 253.

II. LAW AND ANALYSIS

A. Motion to Dismiss Standard

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a party to move for dismissal of a complaint for lack of subject matter jurisdiction. *Fed. R. Civ. P. 12(b)(1)*. The court's "subject matter jurisdiction" **[*7]** defines its power to hear cases under statutory or constitutional authority. *See Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)*. "Sovereign immunity implicates subject matter jurisdiction." *Chapa v. U.S. Dep't of Just., 339 F.3d 388, 389 (5th Cir. 2003)*. "Because sovereign immunity deprives the court of jurisdiction, the claims barred by sovereign immunity can be dismissed only under *Rule 12(b)(1)* and not with prejudice." *Warnock v. Pecos Cty., Tex., 88 F.3d 341, 343 (5th Cir. 1996)*.

A party may raise an objection that the federal court lacks subject matter jurisdiction at any stage of litigation. *Arbaugh v. Y&H Corp., 546 U.S. 500, 506, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)*. But even without a challenge from any party, courts have an independent obligation to determine whether subject matter jurisdiction exists. *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)*. When the court lacks subject matter jurisdiction, the court does not have the authority to hear and determine a particular matter and must dismiss the case. *See Kontrick v. Ryan, 540 U.S. 443, 455, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004)* (quoting *Fed. R. Civ. P. 12(h)(3)*).

B. *Eleventh Amendment* Immunity Differs from State Action Immunity[3]

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[2] This Court denied defendants' motion for reconsideration on October 22, 2021. Rec. Doc. 262.

[3] State action immunity is also known as *Parker* immunity. *See Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*.

The *Eleventh Amendment* bars a private citizen from suing a state in federal court, unless the state consents to suit, Congress has abrogated the state's sovereign immunity, or the *Ex parte Young* exception applies. *209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)*; *Freedom from Religion Found. v. Abbott, 955 F.3d 417, 424 (5th Cir. 2020)*. This protection from suit "extends to any state agency or entity deemed an alter ego or arm of the state." *Perez v. Region 20 Educ. Serv. Ctr., 307 F.3d 318, 326 (5th Cir. 2002)*. A court considers many factors in determining whether a state agency is an "arm of the state," including: **[*8]**

> (1) whether the state, through statutes or case law, views the entity as an arm of the state; (2) the source of the entity's funding; (3) whether the entity is concerned with local or statewide problems; (4) the entity's degree of authority independent from the state; (5) whether the entity can sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.

Earles v. State Bd. of Certified Pub. Accts. of La., 139 F.3d 1033, 1037 (5th Cir. 1998).

In contrast, state action immunity derives from "statutory construction, legislative intent, and judicial deference to federalism," not the *Eleventh Amendment*. *Rodgers v. La. Bd. of Nursing, 665 F. App'x 326, 329 (5th Cir. 2016)* (citing *Cmty. Commmc'ns Co. v. City of Boulder, Colo., 455 U.S. 40, 53, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982)*). It was first recognized in *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. *See* *id. at 1040*. There, the court held that both state agencies and private individuals are exempt from activities that might otherwise violate federal ***antitrust law***. *Id.* But the state cannot automatically invoke this immunity. *Id. at 1040-41*. Generally, two criteria must be satisfied: (1) "the challenged restraint must be one clearly articulated and affirmatively expressed as state policy to displace competition with state regulation" and (2) "the anticompetitive conduct must be actively supervised by the state itself." *La. Real Est. Appraisers Bd. v. U.S. Fed. Trade Comm'n, 976 F.3d 597, 603 (5th Cir. 2020)*.

Accordingly, *Eleventh Amendment* immunity and state action immunity are two distinct protections that defendants may raise when sued. *See* ***[*9]*** *Earles, 139 F.3d at 1036-44* (distinguishing between *Eleventh Amendment* Immunity and state action immunity when ruling). In the instant motion, defendants assert they are entitled to *Eleventh Amendment* immunity. Rec. Doc. 247-1 at 2. But plaintiffs contend that the Fifth Circuit already ruled defendants are not immune from plaintiffs' claims. Rec. Doc. 250 at 2. Plaintiffs misunderstand that the Fifth Circuit only ruled on defendants' pursuit of state action immunity, not *Eleventh Amendment* immunity. *See* *Veritext Corp. v. Bonin, et al., 901 F.3d 287, 292 (5th Cir. 2018)*. In this prior proceeding, the Court ruled that plaintiffs were not entitled to *Parker* immunity because the active supervision requirement, prong two of the aforementioned test, was not met. *Id. at 292*. Because the Fifth Circuit only ruled on whether defendants were entitled to state action immunity, and this doctrine is distinct from *Eleventh Amendment* immunity, defendants are not barred from moving to dismiss on these new grounds.

C. *Ex parte Young* Exception

Although the prior Fifth Circuit decision does not bar defendants from moving to dismiss based on *Eleventh Amendment* immunity, defendants are not necessarily entitled to that protection. The aforementioned exceptions to *Eleventh Amendment* immunity must be inapplicable. Defendants posit that none are relevant, and emphasize in particular that plaintiffs' injunctive relief claims **[*10]** do not fall within the *Ex parte Young* exception. Rec. Doc. 247-1 at 14. Under *Ex parte Young*, "a litigant may sue a state official in his official capacity if the suit seeks prospective relief to redress an ongoing violation of federal law." *Williams on behalf of J.E. v. Reeves, 954 F.3d 729, 736 (5th Cir. 2020)*. For this exception to apply, "three criteria must be satisfied: (1) A plaintiff must name individual state officials as defendants in their official capacities; (2) the plaintiff must allege an ongoing violation of federal law; and (3) the relief sought must be properly characterized as prospective." *Green Valley Special Util. Dist. v. City of Schertz, Tex., 969 F.3d 460, 471 (5th Cir. 2020)* (citing *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002)*) (other citations omitted).

Here, plaintiffs satisfy each criterion of the *Ex Parte Young* exception. First, plaintiffs name defendants in their official capacity. *See* Rec. Doc. 247-1 at 1. Second, plaintiffs claim an ongoing violation of federal law. They assert that the Board members' enforcement of *Louisiana Code of Civil Procedure Article 1434* violates the *Sherman Act*, *15 U.S.C. § 1*. *See* Rec. Doc. 117 at 21-22. The Fifth Circuit even affirmed that "Veritext has alleged facts sufficient to make out a prima facie *Sherman Act* claim." *Veritext Corp., 901 F.3d at 292*.

Defendants emphasize that the *Ex parte Young* exception cannot apply because the Fifth Circuit deemed *Article 1434* constitutional. *See* Rec. Doc. 247-1 at 14-16. They maintain that the *Ex parte Young* ***[*11]*** exception only bars suit "when the plaintiff seeks to restrain enforcement" of an "unconstitutional" state law. Rec. Doc. 247-1 at 14. But the exception is not limited to when a state law may violate the Federal Constitution. If a plaintiff alleges a state law violates a federal statute, then the *Ex parte Young* exception still applies. *See* *Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)* ("[T]he rule permitting suits alleging conduct contrary to the supreme authority of the United States has survived.") (internal quotation marks omitted); *see also* *Air Evac EMS, Inc. v. Tex. Dep't Ins., Div. of Workers Comp., 851 F.3d 507, 520 (5th Cir. 2017)* (applying the *Ex parte Young* exception when the plaintiff alleged a violation of the *Americans with Disabilities Act (ADA)*). Thus, even though the Fifth Circuit determined plaintiffs' constitutional claims lacked merit, its affirmation of plaintiffs' *Sherman Act* claim confirms plaintiffs right to seek relief for an ongoing violation of that Act.[4]

Lastly, plaintiffs seek injunctive relief, and thus, satisfy the third criterion of the *Ex parte Young* exception. *See* Rec. Doc. 117 at 21-22; *see also* *Verizon, 535 U.S. at 645* (including injunctive relief as a form of prospective relief under the *Ex parte Young* exception). Defendants claim plaintiffs' requested relief "would be impossible to enforce." Rec. Doc. 247-1 at 22. A court, nevertheless, only **[*12]** conducts a "straightforward inquiry" in determining whether *Eleventh Amendment* immunity applies. *Verizon, 535 U.S. at 645*. After determining the requested relief is prospective, the Court need not consider "the scope of any eventual relief." *Air Evac EMS, 851 F.3d at 520*.

Upon satisfying the criteria for the *Ex parte Young* exception, plaintiffs may sue defendants in their official capacity for prospective relief and defendants are not entitled to *Eleventh Amendment* immunity.

New Orleans, Louisiana this 30th day of November, 2021

/s/ Ivan L.R. Lemelle

SENIOR UNITED STATES DISTRICT JUDGE

End of Document

[4] Defendants rely on *Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997)*, to argue that plaintiffs' claims against state officials are the functional equivalent of a claim against the state, and thus, not privy to the *Ex parte Young* exception. Rec. Doc. 247-1 at 18-20. But the Fifth Circuit has "never before applied the holding of *Coeur d'Alene* in a context outside of the unique land rights challenge in that case." *Williams, 954 F.3d at 739*.

In re Broiler Chicken Antitrust Litig.

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

December 1, 2021, Decided; December 1, 2021, Filed

No. 16 C 8637

Reporter
2021 U.S. Dist. LEXIS 229895 *; 2021 WL 5709250

IN RE BROILER CHICKEN ANTITRUST LITIGATION

Prior History: *In re Broiler Chicken Antitrust Litig., 2021 U.S. Dist. LEXIS 228367 (N.D. Ill., Nov. 30, 2021)*

Core Terms

cases, appointed counsel, fee award, incentive award, settlement, expenses, declining, named plaintiff, auction, antitrust, bid, sophisticated, entities, class action, settlement fund, market rate, one-third, class member, courts

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For Christopher G Glover, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Carl V. Malmstrom, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Fred T Isquith, Wolf Haldenstein Adler Freeman & Herz Llp, New York, NY; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Christopher Vallaro, Abraham Drucker, Ilana Harwayne-Gidansky, Sabrina Majernik, Christopher Nelson, Amy Veaner, Plaintiffs: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Carl V. Malmstrom, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Fred T Isquith, Wolf Haldenstein Adler Freeman & Herz Llp, New York, NY; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens **[*9]** Berman Sobol Shapiro LLP, Berkeley, CA.

For Barters International LLC, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Lisa M. Sriken, LEAD ATTORNEY, PRO HAC VICE, Bernstein Liebhard LLP, New York, NY; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Steven Alan Hart, Hart McLaughlin & Eldridge, LLC, Chicago, IL.

For William E. Stack, Margo Stack, Plaintiffs: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Terry Rose Saunders, The Saunders Law Firm, Chicago, IL.

For **[*10]** Cedar Farms Co., Inc., Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Thomas Cusack Cronin, Cronin & Co., Ltd., Chicago, IL; Steven Alan Hart, Hart McLaughlin & Eldridge, LLC, Chicago, IL.

For Ferraro Foods, Inc., Ferraro Foods of North Carolina, LLC, Plaintiffs: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Jessica Noel Servais, PRO HAC VICE, Heins Mills & Olson, P.l.c., Minneapolis, MN; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE; Shana Scarlett, PRO **[*11]** HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Vincent J Esades, Heins Mills & Olson, P.L.C., Minneapolis, MN; Steven Alan Hart, Hart McLaughlin & Eldridge, LLC, Chicago, IL.

For Joe Christiana Food Distributors, Inc., Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Matthew Dickinson Heaphy, Sarah Jane Van

Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Steven Alan Hart, Hart McLaughlin & Eldridge, LLC, Chicago, IL.

For Sullott Corporation, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Kevin S Landau, PRO HAC VICE, Taus Cebulash & Landau LLP, New York, NY; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO **[*12]** HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Cheryl Brenchley, Matthew Hayward, Wayne Deshotel, Carmen Ocasio, Vern Gardner, Jonathan Glover, Plaintiffs: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Tracy Newman, Marilyn Stangeland, Vern Peter Gardner, David Weidner, Alison Pauk, Leslie Weidner, Plaintiffs: Alison Deich, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC, DC; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Greenwood Village, CO; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Benjamin D. Brown, PRO HAC VICE, Kit A. Pierson, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Brent W. Johnson, **[*13]** Cohen Milstein Sellers & Toll PLLC, Washington, D.C., DC; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Daniel H. Silverman, Cohen Milstein Sellers & Toll, PLLC, Chicago, IL; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Ray Wieters, Jason Liebich, Debra Piette, Steve Mizera, Joshua Madsen, Michael Perry, Kirk Evans, Catherine Senkle, Andrew Evans, James Flasch, Plaintiffs: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Daniel J. Kurowski, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Chicago, IL; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Jennifer Wallace, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steve W. Berman, LEAD ATTORNEY, Hagens **[*14]** Berman Sobol Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; J Gerard Stranch, IV, PRO HAC VICE, Branstetter, Stranch & Jennings, PLLC, Nashville, TN; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Christopher Gilbert, Plaintiff: Alison Deich, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC, DC; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Benjamin D. Brown, PRO HAC VICE, Kit A. Pierson, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Brent W. Johnson, Cohen Milstein Sellers & Toll PLLC, Washington, D.C., DC; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Christopher J. Cormier, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Greenwood Village, CO; Daniel H. Silverman, Cohen Milstein Sellers & Toll, PLLC, Chicago, IL; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, **[*15]** CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Alpine Special Treatment Center, Inc., Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San

Francisco, CA; Robert J Gralewski, Jr., PRO HAC VICE, Kirby McInerney LLP, San Diego, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Indirect Purchaser Plaintiffs, Plaintiff: Adam John Zapala, LEAD ATTORNEY, Cotchett, Pitre & Mccarthy, Burlingame, CA.

For Piggly Wiggly Alabama Distributing Co., Inc., Plaintiff: Eric Richard Lifvendahl, LEAD ATTORNEY, Lowis & Gellen LLP, Chicago, IL; Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Matthew Powers McCahill, LEAD ATTORNEY, Kaplan Fox & Kilsheimer LLP, New York, NY; Matthew P. Mccahill, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer Llp, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY; Solomon B Cera, LEAD ATTORNEY, Cera LLP, **[*16]** San Francisco, CA; Charles Andrew Dirksen, PRO HAC VICE, Cera LLP, Boston, MA; Richard Lyle Coffman, The Coffman Law Firm, Beaumont, TX.

For Affiliated Foods, Inc.'s Plaintiffs, Plaintiff: Charles Andrew Dirksen, LEAD ATTORNEY, Cera LLP, Boston, MA; Eric Richard Lifvendahl, LEAD ATTORNEY, Lowis & Gellen LLP, Chicago, IL; Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Rick A. Decker, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, P.C., Rochester, MI; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY; Solomon B Cera, LEAD ATTORNEY, Cera LLP, San Francisco, CA.

Plaintiffs in 1:16-cv-08637, Plaintiff, Pro se.

For Alex Lee, Inc., Big Y Foods, Inc., Woodman's Food Market, Inc., Plaintiffs: Charles Andrew Dirksen, LEAD ATTORNEY, Cera LLP, Boston, MA; Eric Richard Lifvendahl, LEAD ATTORNEY, Lowis & Gellen LLP, Chicago, IL; Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Matthew Powers McCahill, LEAD ATTORNEY, Kaplan Fox & Kilsheimer LLP, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY; Solomon B Cera, LEAD ATTORNEY, **[*17]** Cera LLP, San Francisco, CA; Evan Patrick Boyle, Williams Montgomery & John, Chicago, IL.

For Merchants Distributors, LLC, Associated Grocers of New England, Inc., Fareway Stores, Inc., Plaintiffs: Charles Andrew Dirksen, LEAD ATTORNEY, Cera LLP, Boston, MA; Eric Richard Lifvendahl, LEAD ATTORNEY, Lowis & Gellen LLP, Chicago, IL; Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Matthew Powers McCahill, LEAD ATTORNEY, Kaplan Fox & Kilsheimer LLP, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY; Solomon B Cera, LEAD ATTORNEY, Cera LLP, San Francisco, CA.

For Sysco Corporation, Plaintiff: Erica Michelle Spevack, PRO HAC VICE, Boies Schiller Flexner LLP, Washington, DC; Jonathan M. Shaw, PRO HAC VICE, Boies, Schiller & Flexner Llp, Washington, DC.

For US Foods, Inc., Plaintiff: Scott Gant, LEAD ATTORNEY, PRO HAC VICE, Erica Michelle Spevack, Kyle N Smith, PRO HAC VICE, Boies Schiller Flexner LLP, Washington, DC; Daryl M. Schumacher, Kopecky Schumacher Rosenburg PC, Chicago, IL; Jonathan M. Shaw, PRO HAC VICE, Boies, Schiller & Flexner Llp, Washington, DC.

For End-User Consumer Plaintiffs, Plaintiff: **[*18]** Breanna LE Van Engelen, PRO HAC VICE, Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Jason A. Zweig, Hagens Berman Sobol Shapiro Llp, Chicago, IL; Rio Shaye Pierce, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Action Meat Distributors, Inc., W. Lee Flowers & Co., Inc., Howard Samuels as Trustee in Bankruptcy for Central Grocers, Inc., et al., Plaintiffs: Eric Richard Lifvendahl, Lowis & Gellen LLP, Chicago, IL.

For Jetro Holdings. LLC, Plaintiff: Mark A. Singer, LEAD ATTORNEY, PRO HAC VICE, Ryan Thomas McAllister, PRO HAC VICE, Boies Schiller Flexner LLP, Albany, NY; Philip J. Iovieno, LEAD ATTORNEY, Anne M. Nardacci, Boies Schiller Flexner, Albany, NY; Nicholas A Gravante, Jr, Boies, Schiller and Flexner LLP, New York, NY; Terence H. Campbell, Cotsirilos, Tighe, Streicker, Poulos, & Campbell, Ltd., Chicago, IL.

For The Kroger Co., Albertsons Companies, Inc., Plaintiffs: Brandon S Floch, Douglas H Patton, PRO HAC VICE, William J Blechman, Kenny Nachwalter, P.A., Miami, FL; Samuel J. Randall, Kenny Nachwalter, P.a., Miami, FL.

For Hy-Vee, Inc., Plaintiff: Brandon S Floch, Douglas H Patton, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL; Samuel J. Randall, Kenny Nachwalter, **[*19]** P.a., Miami, FL; William J Blechman, Kenny, Nachwalter, Seymour, Arnold,, Critchlow & Spector, P.A., Miami, FL.

For Associated Grocers of the South, Inc., Plaintiff: David P Germaine, John Paul Bjork, Joseph Michael Vanek, LEAD ATTORNEYS, Martin Amaro, Sperling & Slater, P.C., Chicago, IL; Ryan Thomas Holt, Sherrard Roe Voigt & Harbison, Plc, Nashville, TN.

For Meijer, Inc., Meijer Distribution, Inc., OSI Restaurant Partners, LLC, Publix Super Markets, Inc., Supervalu Inc., Wakefern Food Corporation, Plaintiffs: David P Germaine, Joseph Michael Vanek, LEAD ATTORNEYS, Martin Amaro, Sperling & Slater, P.C., Chicago, IL.

For Ahold Delhaize USA, Inc., Plaintiff: Ryan Patrick Phair, LEAD ATTORNEY, Hunton Andrews Kurth, Washington, DC; Carter C. Simpson, Emily K Bolles, PRO HAC VICE, Hunton Andrews Kurth LLP, Washington, DC; Craig Young Lee, Hunton Andrews Kurth, LLP, Washington, DC; John S Martin, PRO HAC VICE, Hunton Andrews Kurth, Richmond, VA; Julie B. Porter, Salvatore Prescott & Porter PLLC, Evanston, IL.

For BJ's Wholesale Club Inc., Maximum Quality Foods, Inc., Darden Restaurants, Inc., Sherwood Food Distributors, LLC, Plaintiffs: Philip J. Iovieno, LEAD ATTORNEY, Anne M. Nardacci, Boies **[*20]** Schiller Flexner, Albany, NY; Ryan Thomas McAllister, PRO HAC VICE, Mark A. Singer, Boies Schiller Flexner LLP, Albany, NY; Nicholas A Gravante, Jr, Boies, Schiller and Flexner LLP, New York, NY; Terence H. Campbell, Cotsirilos, Tighe, Streicker, Poulos, & Campbell, Ltd., Chicago, IL.

For Associated Wholesale Grocers, Inc.,, on behalf of itself and as assignee of Affiliated Foods Midwest Cooperative, Inc.'s claims, Plaintiff: Amy D. Fitts, LEAD ATTORNEY, Polsinelli PC, Kansas City, MO; Daniel D. Owen, LEAD ATTORNEY, PRO HAC VICE, Polsinelli, Kansas City, MO; Guillermo Gabriel Zorogastua, LEAD ATTORNEY, PRO HAC VICE, Kansas City, MO; Rodney L. Lewis, Polsinelli PC, Chicago, IL.

For United Supermarkets, LLC, Krispy Krunchy Foods, LLC, Cheney Bros., Inc., Plaintiffs: Amanda R Jesteadt, David Bedford Esau, LEAD ATTORNEYS, Kristin Alexandra Gore, Carlton Fields, P.A., West Palm Beach, FL; Sarah Cortvriend, LEAD ATTORNEY, Carlton Fields Jorden Burt, P.a., West Palm Beach, FL; Martin Vincent Sinclair, Sperling & Slater, PC, Chicago, IL.

For Commercial and Institutional Indirect Purchaser Plaintiffs, Plaintiff: Christopher Clay Olson, 1:16-, LEAD ATTORNEY, PRO HAC VICE, Harper Little PLLC, Charleston, **[*21]** SC; James David Harper, LEAD ATTORNEY, PRO HAC VICE, Harper Little, PLLC, Oxford, MS; Scott Patton Tift, LEAD ATTORNEY, PRO HAC VICE, Barrett Johnston Martin & Garrison, LLC, Nashville, TN; Gabrielle Sliwka, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN; Kara Anne Elgersma, Wexler Wallace LLP, Chicago, IL; Michelle Perkovic, Wexler Wallace Llp, Chicago, IL.

For Quirch Foods, LLC, f/k/a Quirch Foods Co., Plaintiff: Andrew Szot, Marvin Alan Miller, Matthew E Van Tine, Miller Law LLC, Chicago, IL.

For Hooters of America, LLC, Plaintiff: Amanda R Jesteadt, LEAD ATTORNEY, Kristin Alexandra Gore, Carlton Fields, P.A., West Palm Beach, FL; Sarah Cortvriend, LEAD ATTORNEY, Carlton Fields Jorden Burt, P.a., West Palm Beach, FL.

For Schnuck Markets, Inc., Plaintiff: Evan Patrick Boyle, Williams Montgomery & John, Chicago, IL.

For Checkers Drive-In Restaurants, Inc., Plaintiff: Kristin Alexandra Gore, Carlton Fields, P.A., West Palm Beach, FL.

For Direct Purchaser Plaintiffs, Plaintiff: Allan Howard Steyer, PRO HAC VICE, Steyer, Lowenthal, Boodrookas Alvarez & Smith LLP, San Francisco, CA; D. Scott Macrae, PRO HAC VICE, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Jill **[*22]** M. Manning, PRO HAC VICE, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Franisco, CA.

For Unified Grocers, Inc., Associated Grocers of Florida, Inc., Plaintiffs: Martin Amaro, David P Germaine, Sperling & Slater, P.C., Chicago, IL.

For Giant Eagle, Inc., Plaintiff: Bernard D Marcus, PRO HAC VICE, Marcus & Shapira, L.L.P., Pittsburgh, PA; Erin Gibson Allen, Moira E. Cain-Mannix, PRO HAC VICE, Marcus & Shapira LLP, Pittsburgh, PA.

For Bi-Lo Holdings, LLC, Plaintiff: Philip J. Iovieno, Boies Schiller Flexner, Albany, NY; Theodore Beloyeannis Bell, Ahern & Associates P.C., Chicago, IL.

For Walmart, Inc., Plaintiff: Neal S Manne, LEAD ATTORNEY, Susman Godfrey, LLP, Houston, TX; Shawn J. Rabin, LEAD ATTORNEY, Susman Godfrey L.L.P., New York, NY.

For Conagra Brands, Inc., Pinnacle Foods, Inc., Kraft Heinz Foods Company, Nestle USA, Inc., Nestle Purina Petcare Company, Plaintiffs: David C. Eddy, LEAD ATTORNEY, ***Antitrust Law*** Group, LLC, Columbia, SC; Dennis John Lynch, ***Antitrust Law*** Group, Llc, Columbia, SC; Rachael Cecelia Brennan Blackburn, Robert M. Andalman, A & G Law LLC, Chicago, IL.

For Services Group of America, Inc., Plaintiff: Dominic Emil Draye, PRO HAC VICE, Greenberg Traurig, **[*23]** LLP, Phoenix, AZ; Gregory J. Casas, PRO HAC VICE, Erik Weber, Greenberg Traurig, LLP, Austin, TX; John F. Gibbons, Greenberg Traurig, LLP., Chicago, IL; Thomas E. Dutton, Greenberg Traurig, LLP, Chicago, IL.

For WalMart, Inc., WAL-MART STORES EAST, LP, Wal-Mart Stores Arkansas, LLC, Wal-Mart Stores Texas, LLC, Wal-Mart Louisiana, LLC, Sam's West, Inc., Sam's East, Inc., Plaintiffs: Neal S Manne, LEAD ATTORNEY, Susman Godfrey, LLP, Houston, TX; Shawn J. Rabin, Susman Godfrey L.L.P., New York, NY.

For Restaurants of America, Inc., LTP Management Group, Inc., Gibson, Greco & Wood, Ltd., Hooters Management Corporation, Anaheim Wings, LLC d/b/a Hooters of Anaheim, Gaslamp Wings, LLC previously d/b/a Hooters of San Diego, Plaintiffs: Lauren Giudice, Carlton Fields, Orlando, FL.

For Mission Valley Wings, LLC d/b/a Hooters of Mission Valley, Oceanside Wings, LLC previously d/b/a Hooters of Oceanside, Costa Mesa Wings, LLC d/b/a Hooters of Costa Mesa, Rancho Bernardo Wings, LLC d/b/a Hooters of San Marcos, Ontario Wings, LLC d/b/a Hooters of Ontario, Hollywood Wings, LLC d/b/a Hooters of Hollywood, South Gate Wings, LLC d/b/a Hooters of South Gate, Wings Over Long Beach, LLC d/b/a Hooters of Long **[*24]** Beach, Bonita Plaza Wings, LLC d/b/a Hooters of Plaza Bonita, Downtown Wings, LLC previously d/b/a Hooters of Downtown LA, Plaintiffs: Amanda R Jesteadt, David Bedford Esau, LEAD ATTORNEYS, Kristin Alexandra Gore, Carlton Fields, P.A., West Palm Beach, FL; Sarah Cortvriend, LEAD ATTORNEY, Carlton Fields Jorden Burt, P.a., West Palm Beach, FL; Lauren Giudice, Carlton Fields, Orlando, FL.

For Commonwealth of Puerto Rico, Plaintiff: Elena N Liveris, Michael M. Mulder, Law Offices of Michael M. Mulder, Evanston, IL.

For PJ Food Service, Inc., Plaintiff: Philip J. Iovieno, LEAD ATTORNEY, Anne M. Nardacci, Boies Schiller Flexner, Albany, NY; Scott R. Wilson, LEAD ATTORNEY, PRO HAC VICE, Boies Schiller Flexner LLP, New York, NY; Mark A. Singer, Ryan Thomas McAllister, Boies Schiller Flexner LLP, Albany, NY; Nicholas A Gravante, Jr, Boies, Schiller and Flexner LLP, New York, NY.

For Koch Foods, Inc., JCG Foods of Alabama, LLC, JCG Foods of Georgia, LLC, Koch Meats Co., Inc., Defendants: Stephen Novack, LEAD ATTORNEY, Brian E. Cohen, Marie Velinda Lim, Stephen J. Siegel, Novack and Macey LLP, Chicago, IL; Christopher S. Moore, Elizabeth Carlson Wolicki, Julie Ann Johnston-Ahlen, Novack and Macey, **[*25]** LLP, Chicago, IL.

For Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Breeders, Inc., Tyson Poultry, Inc., Defendants: John M. Tanski, LEAD ATTORNEY, Axinn, Veltrop & Harkrider LLP-HTFD, Hartford, CT; Nicholas Gaglio, LEAD ATTORNEY, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, New York, NY; Rachel J Adcox, LEAD ATTORNEY, PRO HAC VICE, Daniel K. Oakes, Kenina J Lee, Michael J O'Mara, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, Washington, DC; Jarod G. Taylor, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, Hartford, CT; Jordan Matthew Tank, Lipe Lyons Murphy Nahrstadt & Pontikis, Chicago, IL.

For Pilgrim's Pride Corporation, Defendant: Brian Liegel, Weil Gotshal & Manges Llp, Miami, FL; Carrie C. Mahan, Cecile L. Farmer, Christopher J. Abbott, Jonathan S. Goldsmith, PRO HAC VICE, Weil, Gotshal & Manges LLP, Washington, DC; Clayton E. Bailey, PRO HAC VICE, Bailey Brauer PLLC, Dallas, TX; Eric A. Rivas, PRO HAC VICE, Weil, Gotshal & Manges LLP, Redwood Shores, CA; Jessica L. Falk, PRO HAC VICE, Weil, Gotshal &

Manges LLP, New York, NY; Kevin J Arquit, Kasowitz Benson Torres LLP, New York, NY; Lorell Guerrero, PRO HAC VICE, Weil Gotshal & Manges, Miami, FL; Michael Lee McCluggage, Eimer Stahl **[*26]** LLP, Chicago, IL; Rachel A. Farnsworth, PRO HAC VICE, Weil, Gotshal & Manges LLP, Princeton, NJ; Robert A Dahnke, PRO HAC VICE, Weil, Gotshal & Manges LLP, Washington DC, DC.

For Perdue Farms, Inc., Defendant: Andrew Thomas Hernacki, Zakariya Koorosh Varshovi, LEAD ATTORNEYS, PRO HAC VICE, James Douglas Baldridge, LEAD ATTORNEY, Danielle R Foley, Lisa Jose Fales, Mary M Gardner, PRO HAC VICE, Venable LLP, Washington, DC; Deborah Leah Bessner, LEAD ATTORNEY, PRO HAC VICE, Benjamin P. Argyle, Leonard L. Gordon, PRO HAC VICE, Venable LLP, New York, NY; Robert Paul Davis, LEAD ATTORNEY, PRO HAC VICE, Venable LLP, Washington, DC, DC; Kirstin Beth Ives, Falkenberg Ives LLP, Chicago, IL.

For Sanderson Farms, Inc., Sanderson Farms, Inc. (Foods Division), Sanderson Farms, Inc. (Production Division), Sanderson Farms, Inc. (Processing Division), Defendants: Christa Cynthia Cottrell, Daniel E. Laytin, Stacy L Pepper, LEAD ATTORNEYS, Martin L. Roth, Kirkland & Ellis LLP, Chicago, IL; Jessica Jean Giulitto, Kirkland And Ellis Llp, Chicago, IL; Joseph Benjamin Tyson, III, Kirkland & Ellis Llp, Chicago, IL.

For Wayne Farms, LLC, Defendant: Peter Duffy Doyle, LEAD ATTORNEY, Proskaver Rose, New York, NY; **[*27]** Christopher E Ondeck, Stephen R Chuk, PRO HAC VICE, Proskauer Rose LLP, Washington, DC; Marc Eric Rosenthal, Proskauer Rose LLP, Chicago, IL; Rucha A Desai, PRO HAC VICE, Proskauer Rose LLP, Boston, MA.

For Mountainaire Farms, Inc., Mountainaire Farms, LLC, Mountainaire Farms of Delaware, Inc., Defendants: John W. Treece, LEAD ATTORNEY, Chicago, IL; Adam Lee Hopkins, PRO HAC VICE, Rose Law Firm, Fayetteville, AR; Amanda K. Wofford, PRO HAC VICE, Rose Law Firm, Little Rock, AR; Bourgon Burnelle Reynolds, PRO HAC VICE, Rose Law Firm, P.A., Little Rock, AR.

For Peco Foods, Inc., Defendant: Boris Bershteyn, LEAD ATTORNEY, PRO HAC VICE, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Patrick Joseph Fitzgerald, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Chicago, IL; Gail E. Lee, Skadden, Arps, Slate, Meagher & Flom, Chicago, IL; Lara A Flath, Skadden Arps Slate Meagher & Flom, LLP CH, Chicago, IL.

For Foster Farms, LLC, Defendant: Carmine R. Zarlenga, LEAD ATTORNEY, Stephen M. Medlock, LEAD ATTORNEY, PRO HAC VICE, Oral Pottinger, William Stallings, PRO HAC VICE, Mayer Brown LLP, Washington, DC.

For House of Raeford Farms, Inc., Defendant: Gregory Gene Wrobel, LEAD ATTORNEY, **[*28]** Vedder Price P.C., Chicago, IL; Henry W. Jones, Junio, PRO HAC VICE, Jordan Price, Raleigh, NC.

For Simmons Foods, Inc., Defendant: Lynn Hagman Murray, LEAD ATTORNEY, Shook, Hardy & Bacon LLP, Chicago, IL; Peter Francis O'Neill, LEAD ATTORNEY, Shook, Hardy & Bacon Llp, Chicago, IL; John R Elrod, Conner & Winters, LLP, Fayetteville, AK; Laurie A. Novion, Shook, Hardy & Bacon, Kansas City, MO; Vicki D Bronson, PRO HAC VICE, Conner & Winters, Fayetteville, AR.

For Fieldale Farms Corporation, Defendant: Alex Brown, Anthony Thomas Greene, Brian Parker Miller, James Butler Cash, Jr., Max Paul Marks, valarie cecile williams, PRO HAC VICE, Alston & Bird LLP, Atlanta, GA; Brendan J. Healey, Baron Jarris Healey, Chicago, IL; Roger Brent Hatcher, Jr., PRO HAC VICE, Smith, Gilliam, Williams & Miles, P.A., Gainesville, GA.

For George's Inc., George's Farms, Inc., Defendants: William L. Greene, LEAD ATTORNEY, PRO HAC VICE, Kevin Parker Kitchen, Peter Joseph Schwingler, PRO HAC VICE, Stinson LLP, Minneapolis, MN; Gary V Weeks, K.C. Dupps Tucker, Kristy Elizabeth Boehler, PRO HAC VICE, The Law Group of Northwest Arkansas LLP, Fayetteville, AR; Jaclyn Niccole Warr, Stinson LLP, St. Louis, MO; John Conroy **[*29]** Martin, Sugar Felsenthal Grais and Helsinger LLP, Chicago, IL; Zachary H Hemenway, PRO HAC VICE, Kansas City, MO.

For O.K. Foods, Inc., O.K. Farms, Inc., O.K. Industries, Inc., Defendants: Anna Forman, John P. Passarelli, LEAD ATTORNEYS, PRO HAC VICE, Kutak Rock LLP, Omaha, NE; Robin Stewart, LEAD ATTORNEY, PRO HAC VICE, (816) 960-0090, Trial bar Status: Pro Hac Vice →; J.R. Carroll, Jeffrey Michael Fletcher, PRO HAC VICE, Kutak

Rock, LLP, Fayetteville, AR; James M. Sulentic, PRO HAC VICE, Kuak Rock LLP, Omaha, NE; Kimberly Michelle Hare, Kutak Rock Llp, Chicago, IL; Stephen Michael Dacus, PRO HAC VICE, Kutak Rock LLP, Fayetteville, AR.

For Mar-Jac Poultry, Inc., Mar-Jac Poultry MS, LLC, Mar-Jac Poultry AL, LLC, Mar-Jac AL/MS, Inc., Mar-Jac Holdings, LLC, Defendants: Edward C. Konieczny, LEAD ATTORNEY, Edward C. Konieczny LLC, Atlanta, GA; David C Newman, PRO HAC VICE, Smith, Gambrell & Russell, Atlanta, GA; James L. Thompson, Lynch Thompson, LLP, Chicago, IL; Pennington Philip John, PRO HAC VICE, Smith, Gambrell & Russell, LLP, Washington, DC; Wm. Parker Sanders, PRO HAC VICE, Smith Gambrell & Russell LLP, Atlanta, GA.

For Harrison Poultry, Inc., Defendant: Kaitlin Ann Carreno, LEAD **[*30]** ATTORNEY, PRO HAC VICE, Eversheds Sutherland, Atlanta, GA; Patricia Anne Gorham, LEAD ATTORNEY, PRO HAC VICE, James Robert McGibbon, Peter M. Szeremeta, PRO HAC VICE, Eversheds Sutherland (US) LLP, Atlanta, GA; Clay H. Phillips, SmithAmundsen LLC (Chgo), Chicago, IL; Ronald David Balfour, Smithamundsen Llc, Chicago, IL.

For Agri Stats, Inc., Defendant: Jacob D Koering, Miller, Canfield, Paddock and Stone, P.L.C., Chicago, IL; Jeffrey Mark Drake, Miller, Canfield, Paddock and Stone, Chicago, IL; Jennifer A. Fleury, PRO HAC VICE, Hogan Lovells US LLP, Houston, TX; Justin Wade Bernick, Liam Edward Phibbs, PRO HAC VICE, William L Monts, III, Hogan Lovells US LLP, Washington, DC.

For Norman W. Fries, Inc., d/b/a Claxton Poultry Farms, Inc., Defendant: James Franklin Herbison, LEAD ATTORNEY, Michael P Mayer, Winston & Strawn LLP, Chicago, IL; Charles C. Murphy, Jr., PRO HAC VICE, Vaughan & Murphy, Atlanta, GA.

For Mar-Jac Poultry, LLC, Defendant: Edward C. Konieczny, LEAD ATTORNEY, Edward C. Konieczny LLC, Atlanta, GA; David C Newman, PRO HAC VICE, Smith, Gambrell & Russell, Atlanta, GA; Pennington Philip John, PRO HAC VICE, Smith, Gambrell & Russell, LLP, Washington, DC; Wm. Parker Sanders, **[*31]** PRO HAC VICE, Smith Gambrell & Russell LLP, Atlanta, GA.

For Perdue Foods LLC, Defendant: Deborah Leah Bessner, LEAD ATTORNEY, PRO HAC VICE, Benjamin P. Argyle, PRO HAC VICE, Venable LLP, New York, NY; James Douglas Baldridge, LEAD ATTORNEY, Mary M Gardner, Zakariya Koorosh Varshovi, PRO HAC VICE, Venable LLP, Washington, DC; Kirstin Beth Ives, Falkenberg Ives LLP, Chicago, IL.

For Foster Poultry Farms, Defendant: Carmine R. Zarlenga, Mayer Brown LLP, Washington, DC.

For Simmons Prepared Foods, Inc., Defendant: Lynn Hagman Murray, Shook, Hardy & Bacon LLP, Chicago, IL; Peter Francis O'Neill, Shook, Hardy & Bacon Llp, Chicago, IL; Vicki D Bronson, PRO HAC VICE, Conner & Winters, Fayetteville, AR.

For Amick Farms, LLC, Defendant: Steven Howard Gistenson, LEAD ATTORNEY, Dykema Gossett PLLc, Chicago, IL; Cody D. Rockey, Dykema Gossett PLLC, Ann Arbor, MI; Dante Andreas Stella, Dykema Gossett Pllc, Detroit, MI; Howard Bruce Iwrey, Dykema Gossett Pllc, Bloomfield Hills, MI.

For Case Foods, Inc., Case Farms, LLC, Case Farms Processing, Inc., Defendants: Joseph D Carney, LEAD ATTORNEY, PRO HAC VICE, Joseph D. Carney & Associates, LLC, Avon, OH; Daniel Martin Feeney, Miller Shakman Levine & Feldman **[*32]** LLP, Chicago, IL; Deborah A Klar, PRO HAC VICE, D. Klar Law, Bel Air, CA; Thomas M. Staunton, Miller, Shakman Levine & Feldman LLP, Chicago, IL.

For Mar-Jac Holdings, Inc., Defendant: Edward C. Konieczny, LEAD ATTORNEY, Edward C. Konieczny LLC, Atlanta, GA; James L. Thompson, Lynch Thompson, LLP, Chicago, IL.

For R.W. Zant Co., Respondent: Joshua Erik Bidzinski, LEAD ATTORNEY, Swanson, Martin & Bell, Llp, Chicago, IL; Shera D. Wiegler, LEAD ATTORNEY, Swanson, Martin & Bell, LLP, Chicago, IL.

For R.W. Zant Co., Respondent: Joshua Erik Bidzinski, Shera D. Wiegler, LEAD ATTORNEYS, Swanson, Martin & Bell, Llp, Chicago, IL.

For Service List: David C. Eddy, LEAD ATTORNEY, ***Antitrust Law*** Group, LLC, Columbia, SC; Matthew P. Mccahill, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer Llp, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY; Maura R. Grossman, PRO HAC VICE, Maura

Grossman Law, Buffalo, NY; Patrick John Ahern, Ahern and Associates, P.C., Chicago, IL; Rachael Cecelia Brennan Blackburn, Robert M. Andalman, A & G Law LLC, Chicago, IL.

For Gerber's Poultry, Inc., Movant: Charles B. Leuin, Benesch, Friedlander, Coplan & Aronoff LLP, Chicago, IL. **[*33]**

For Shamrock Foods Company, United Food Service, Inc., Movants: Ilana Drescher, Jerry R Goldsmith, Lori P Lustrin, Robert W Turken, Scott N Wagner, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod, Miami, FL; Joshua Goldberg, Steven Christopher Moeller, Carpenter Lipps & Leland LLP, Chicago, IL.

For Porky Products, Inc., Movant: Ariel Welker Schepers, Edward Francis Malone, Barack Ferrazzano Kirschbaum & Nagelberg LLP, Chicago, IL; JORDAN DEREK WEINREICH, PRO HAC VICE, Sherman Wells Sylvester & Stamelman LLP, Florham Park, NJ.

For Quirch Foods, LLC, f/k/a Quirch Foods Co., Movant: Carlos Juan Canino, LEAD ATTORNEY, PRO HAC VICE, Abigail Grieco Corbett, Jay Brian Shapiro, Samuel Olds Patmore, PRO HAC VICE, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, FL.

For United States of America, Intervenor: Michael Thomas Koenig, LEAD ATTORNEY, U.S. Department of Justice, Antitrust Division, Washington, DC; Carolyn M Sweeney, Paul John Torzilli, United States Department of Justice, Antitrust Division, Washington, DC; Heather Diefenbach Call, U.S. Department of Justice, Antitrust Division, Washington Criminal II Section, Washington, DC; Heather Diefenbach Call, U.S. Department **[*34]** of Justice, Antitrust Division, Washington Criminal II Section.

Judges: Thomas M. Durkin, United States District Judge.

Opinion by: Thomas M. Durkin

Opinion

MEMORANDUM OPINION AND ORDER[1]

In this lawsuit alleging a price-fixing conspiracy in the chicken industry against more than 20 defendants, the Court appointed interim counsel to represent a putative class of direct-purchaser plaintiffs (the "DPPs" and their "Appointed Counsel"). *See* R. 144.[2] The Court approved settlements Appointed Counsel negotiated with six defendant corporate families, totaling $169,601,600.00, while the case continues to proceed against the remaining defendants.[3] Appointed Counsel have now moved for: an interim fee award; reimbursement of litigation expenses; and incentive awards to the five named class representatives. R. 4550. That motion is granted in accordance with this order.

Background

[1] This opinion and order, originally entered on November 30, 2021, has been amended to correct typographical errors in the total settlement fund amount and the attorney fee award amount. This amendment is entered nunc pro tunc to November 30, 2021.

[2] The Court appointed Lockridge Grindal Nauen P.L.L.P. and Pearson, Simon & Warshaw, LLP as Interim Co-Lead Counsel, and Hart, McLaughlin & Eldridge, LLC as Interim Liaison Counsel.

[3] This Court granted final approval to settlements with: Fieldale Farms Corporation on November 16, 2018, R. 1414; Amick Farms LLC on October 26, 2020, R. 3934; George's Inc., George's Farms, Inc. and Peco Foods, Inc. on October 27, 2020, R. 3944; and Pilgrim's Pride Corp., Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Breeders, Inc., and Tyson Poultry, Inc. on June 29, 2021, R. 4789.

Without the benefit of a prior government investigation to guide them, Appointed Counsel filed the first complaint in this case in September 2016. Since then, the Court has appointed counsel for two additional classes and more than 100 entities have opted out of the classes to file their own direct actions. The more than 20 defendants are represented by some **[*35]** of the most prominent law firms in the country.

Appointed Counsel successfully defended the case against a significant motion to dismiss. They have shepherded the case through extensive discovery, as is recounted in the declaration supporting their motion, *see* R. 4552, and is reflected in the more than 5,000 docket entries that make up the case, including 16 scheduling orders. Appointed Counsel have briefed numerous motions, including a motion for class certification that is currently pending.

Appointed Counsel have been assisted by 20 other firms. Appointed Counsel and the assisting firms have submitted their hours for the Court's review on a quarterly basis. Their collective lodestar is 100,608.25 hours representing $50,928.159.75 in fees. *See* R. 4552 ¶ 24.

Appointed Counsel seek a fee award of one-third of the settlement total of $169,601,600.00, or $56,533,866.70. They also seek payment of $4.5 million of the $5,104,566.48 in litigation expenses they have incurred. And they seek a $25,000 incentive award for each of the five named plaintiffs.[4]

Analysis

It is customary for class counsel in large and complex cases to seek an interim fee award. *See, e.g., Kleen Prod. LLC v. Int'l Paper Co., 2017 U.S. Dist. LEXIS 183015, 2017 WL 5247928, at *4 (N.D. Ill. Oct. 17, 2017)*; *see also In re Endotronics, Inc., 1989 U.S. Dist. LEXIS 1141, 1989 WL 6746, at *1 (D. Minn. Jan. 30, 1989)* ("Untoward delay **[*36]** could discourage [class counsel] from engaging in matters such as these. The Court, therefore, must have discretion to award interim fees and costs."). The "starting point" for determining such an award is the "market rate" for such services. *In re Synthroid Mktg. Litig., 264 F.3d 712, 719 (7th Cir. 2001)*; *see also Silverman v. Motorola Sols., Inc., 739 F.3d 956, 957 (7th Cir. 2013)* ("[A]ttorneys' fees in class actions should approximate the market rate that prevails between willing buyers and willing sellers of legal services."); *Williams v. Rohm & Haas Pension Plan, 658 F.3d 629, 635 (7th Cir. 2011)* ("[T]he district court must try to assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys."). Estimation of the market rate "is inherently conjectural," *In re Trans Union Corp. Priv. Litig., 629 F.3d 741, 744 (7th Cir. 2011)*, because "there is no market in class cases." Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, *89 Fordham L. Rev. 1151, 1155 (2021)*. But the Seventh Circuit has explained that the goal of approximating the market rate can be "informed by a number of factors, including: (1) the actual agreements between the parties as well as fee agreements reached by sophisticated entities in the market for legal services; (2) the risk of non-payment at the outset of the case; (3) the caliber of Class Counsel's performance; and [4] information from other cases, including fees awarded in comparable cases." *Hale v. State Farm Mut. Auto. Ins. Co., 2018 U.S. Dist. LEXIS 210368, 2018 WL 6606079, at *8 (S.D. Ill. Dec. 13, 2018)* (citing *Synthroid, 264 F.3d at 719* **[*37]**)).

A. Actual Agreements

Appointed Counsel in this case do not have a fee agreement with the named plaintiffs other than that they would take a percentage of any award. *See* R. 5048-1 ¶ 11, Fitzpatrick Decl. ("According to [Appointed Counsel], the representative class members signed retainer agreements that did not specify a fee percentage; they specified only that any fees would be awarded by the Court.").[5] However, 2,808 claims have been filed by potential class member

[4] The named plaintiffs are: Maplevale Farms, Inc.; John Gross and Company, Inc.; Ferraro Foods, Inc. and Ferraro Foods of North Carolina, LLC; Joe Christiana Food Distributors, Inc.; and Cedar Farms Co., Inc. *See* R. 4552 ¶ 36.

[5] Appointed Counsel submitted a declaration from Brian Fitzpatrick, who is a professor at Vanderbilt University Law School and has studied and written about class action litigation. *See* R. 5048-1. In addition to requesting further briefing from Appointed

entities in the class, the majority of whom are sophisticated business entities. *See id.*, Fitzpatrick Decl. ("In light of the sophistication of the class members, all of whom are businesses and some of whom are quite large, the conclusion that can be drawn from their decision not to object is that they favor the flat fee proposed by DPPs—not a sliding-scale fee."). None of them have objected to the fee award request. Courts have found that the lack of opposition by sophisticated business entities is evidence that the award is reasonable. *See* *Silverman, 739 F.3d at 959* (holding that for large, sophisticated investors, it would be "worth a complaint to the district judge if the lawyers' cut seems too high. Yet none of the institutional investors has **[*38]** protested."); *In re Dairy Farmers of Am., Inc., 80 F. Supp. 3d 838, 847 (N.D. Ill. 2015)* (observing, in finding that the requested one-third fee award was reasonable, that "the plaintiffs here are sizable, sophisticated entities capable of reviewing (and objecting to) the proposed fee arrangement"),

No other actual agreements have been presented to the Court. There is, however, case law describing court-ordered auctions in which potential class counsel bid for appointment. *See* *In re Cap. One Tel. Consumer Prot. Act Litig., 80 F. Supp. 3d 781, 800 (N.D. Ill. 2015)* (collecting cases, including *In re Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190 (N.D. Ill. 1996)*). The courts in *In re Amino Acid* and the other cases collected by *In re Capital One* sought fee award structure bids from attorneys hoping to represent the classes in those cases. The courts in those cases chose counsel who submitted declining fee scale award structures. (In other words, counsel proposed that their fee percentage decrease as the settlement amount increased.) These cases are relatively outdated, none being less than 20 years old. *See* R. 5048-1 ¶ 8, Fitzpatrick Decl. (court "experimentation with auctions has all but ceased"). But the Court is also aware that counsel for the End-User Plaintiff Class in this case bid a declining fee scale in other cases within the last ten years. *See* R. 5182 (citing *In re Lithium Ion Batteries Antitrust* ***[*39]*** *Litig.*, Case No. 13-MD-2420-YGR (N.D. Cal), Dkt. 2630-2; *In re Optical Disk Drive Prods. Antitrust Litig.*, Case No. 10-MD-2134-VRW (N.D. Cal) Dkt. 2900, reported in *In re Optical Disk Drive Antitrust Litig., 959 F.3d 922, 934 (9th Cir. 2020)*).

The Court does not put much stock in these examples. First, no other attorneys bid to be appointed counsel for the DPPs in this case. Without competition, a bid auction was not feasible. And without competition, no attorney would offer to take a case under a declining fee scale award structure.

Furthermore, the Seventh Circuit has explained that declining fee scale award structures do not reflect market realities and impose a perverse incentive "ensuring that at some point attorneys' opportunity cost will exceed the benefits of pushing for a larger recovery, even though extra work could benefit the client." *Synthroid, 264 F.3d at 721*; *see also* *Silverman, 739 F.3d at 957* ("[S]olvent litigants do not select their own lawyers by holding auctions, because auctions do not work well unless a standard unit of quality can be defined and its delivery verified. There is no 'standard quantity' of legal services, and verification is difficult if not impossible."). "Subsequent cases within the Seventh Circuit have similarly recognized that the auction concept is flawed[.]" R. 5050-1 **[*40]** at 17 n.15, Klonoff Decl. Of course, when confronted with a court ordered competitive auction that permits declining scale bids, some attorneys will likely make such a bid in order to win the auction. But for the reasons expressed by the Seventh Circuit, the Court questions whether it is appropriate to permit declining scale bids in an auction. Thus, cases with auctions that permitted such bids carry little weight in the Court's consideration here.

B. Risk of Non-Payment & Caliber of Class Counsel's Performance

A declining scale fee award structure might be appropriate in cases in which settlement is a more likely outcome and in which the "marginal costs" of increasing the settlement recovery amount are low. *See* *Silverman, 739 F.3d at 959*. As Professor Fitzpatrick surmised, this "may explain the use of [declining scale fee award structures] in the two [*Telephone Consumer Protection Act*] cases" the Court asked the parties to address. *See* R. 5048-1 at 17 n.6, Fitzpatrick Decl.

Counsel, the Court invited briefs from counsel for the other two putative classes in the case. The Commercial and Institutional Indirect Purchaser Class submitted a declaration by Robert Klonoff, who is a professor at Lewis & Clark Law School, and who has also studied and written about class action litigation. *See* R. 5050-1. The Court found both declarations very helpful and has relied on them in preparing this opinion and order.

The Court ordered the parties to address the use of declining sliding scale fee award structures in *Gehrich v. Chase Bank USA, N.A., 316 F.R.D. 215, 236 (N.D. Ill. 2016)*, and *In re Cap. One Tel. Consumer Prot. Act Litig., 80 F. Supp. 3d 781, 805 (N.D. Ill. 2015)*. *See* R. 4915. Unlike those cases in which "settlement was likely," *Gehrich, 316 F.R.D. at 230*, settlement in a complex antitrust case like this is far from a foregone conclusion. *See* R. 505-1 **[*41]** ¶ 37, Klonoff Decl. ("In terms of risk and complexity, TCPA cases are the polar opposite of the present case, a complicated multi-party antitrust conspiracy case.").[6] Appointed Counsel invested massive resources of time and money when no other counsel expressed interest, with little assurance of success. *See* *Silverman, 739 F.3d at 958* ("When this suit got under way, no other law firm was willing to serve as lead counsel. Lack of competition not only implies a higher fee but also suggests that most members of the securities bar saw this litigation as too risky for their practices."). As noted, no government investigation preceded the complaint in this case for Appointed Counsel to piggy-back. And Plaintiffs have been opposed by many defendants, including a number of very large and well-funded corporations, which have retained some of the most prominent and sophisticated law firms in the United States. The Court's 92-page decision denying the motions to dismiss was a relatively close call. Discovery proceeded while the motions to dismiss were briefed and decided, so Appointed Counsel was immediately incurring costs of time and money without any assurance of an award. Furthermore, issues raised in the motions to **[*42]** dismiss show that success on class certification and summary judgment, let alone trial, is no guarantee.

Appointed Counsel have devoted thousands of hours to this case. Their performance to date has been exemplary. The road to some of the settlements was eventually smoothed by later criminal indictments. But Appointed Counsel's work appears to have prompted the government investigations that led to those indictments, rather than the reverse. A substantial award is warranted here as a proper incentive for high quality counsel to take on complex cases, requiring a massive investment of time and money, with such a high risk of non-payment.

C. Fee Awards in Comparable Cases

The Seventh Circuit has recognized that academic studies of attorney fees awards in common fund class settlement cases reveal a declining percentage with the size of the settlement. *See* *Silverman, 739 F.3d at 959*. But as Professor Fitzpatrick noted, "these findings are based on fee awards from other Circuits . . . that are not even trying to capture how clients pay lawyers in the market like the Seventh Circuit does." R. 5048-1 at 20 n.7, Fitzpatrick Decl. These decisions are infected by default rules recommending smaller attorney fee award **[*43]** percentages for "megafunds." *See, e.g.,* *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 123 (2d Cir. 2005)* (affirming a 6.5 percent fee award from a common fund over $3 billion, reasoning that "the sheer size of the instant fund makes a smaller percentage appropriate"); *Dial Corp. v. News Corp., 317 F.R.D. 426 (S.D.N.Y. 2016)* ("[I]n class actions where the recovered settlement fund runs into the multi-millions, courts typically decrease the percentage of the fees amount as the size of the fund increases."). The Seventh Circuit has expressly rejected a megafund rule because it is a perverse incentive. *See* *Synthroid, 264 F.3d at 718* (reversing district court's fee award in part because it imposed a lower fee percentage because the settlement fund was more than $100 million, holding that "[m]arkets would not tolerate that effect"). Clients generally want to incentivize their counsel to pursue every last settlement dollar, and a declining percentage award operates to the contrary. Thus, to the extent that courts in other circuits have awarded percentages smaller than what Appointed Counsel seek here, the Court finds those awards relatively unpersuasive.

Most persuasive are the large number of antitrust cases in this circuit that have awarded one-third of the common fund as attorney's fees. *See* R. 5050-1 at 45-46 (table citing cases), **[*44]** Klonoff Decl. The fact that fee awards in antitrust cases in this circuit are almost always one-third is a strong indication that this should be considered the "market rate." *See* R. 5048-1 ¶ 14, Fitzpatrick Decl. (in "a series of antitrust class actions . . . . recover[ing] more than $2 billion . . . . *not a single class member ever objected* to the fee request in any of these cases" showing that "sophisticated corporations are happy to play flat fees of 33.33% and they are happy to do so even in the largest

[6] Moreover, research by both Professors Fitzpatrick and Klonoff shows that the use of declining sliding scale fee awards in the Seventh Circuit is rare. *See* R. 5048-1 at 13 n.5, Fitzpatrick Decl.; R. 5050-1 at 26-31, Klonoff Decl.

cases."). There is simply little to no precedent recommending anything other than an award of 33 percent. With the only real evidence of the "market rate" being one-third, that is what the Court will award.

D. Expenses

Appointed Counsel seek $4.5 million out of $5,104,566.48 in expenses. Appointed Counsel "informed the class" that they would not seek to recover the full amount of their expenses at this time. *See* R. 4551 at 2 n.7. The request for $4.5 million in expenses is granted.

Expenses, however, should be deducted from the common fund before the fee award percentage is applied. The "ratio that is relevant to assessing the reasonableness of the attorneys' fee that the parties agreed **[*45]** to is the ratio of (1) the fee to (2) the fee plus what the class members received." *Redman v. RadioShack, 768 F.3d 622, 630 (7th Cir. 2014)*. Out-of-pocket costs, although paid through the settlement fund, are not benefits to the class and thus not part of "what the class members received." *Id.; see also In re Wells Fargo Sec. Litig., 157 F.R.D. 467, 471 (N.D. Cal. 1994)* ("If an attorney risks losing some portion of his fee award for each additional dollar in expenses he incurs, the attorney is sure to minimize expenses."). Therefore, Appointed Counsel will be paid fees of one-third of the settlement fund minus $4.5 million in expenses.

E. Named Plaintiff Incentive Awards

"Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998)*. "To determine if an incentive award is warranted, a district court evaluates the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc., 897 F.3d 825, 834 (7th Cir. 2018)* (citing *Cook, 142 F.3d at 1016*). Incentive awards based on a percentage of the settlement fund "are disfavored, if not altogether forbidden." *See* William B. Rubenstein, 5 Newberg **[*46]** on Class Actions § 17:16 (5th ed. 2018); *see also In Re EpiPen Mktg., Sales Pracs. & Antitrust Litig., 2021 U.S. Dist. LEXIS 224272, 2021 WL 5369798, at *7 (D. Kan. Nov. 17, 2021)*.

The declarations submitted in support of incentive awards give no indication of the number of hours the named plaintiffs have spent on the case. Appointed Counsel relies on *Cook v. Niedert* in which the Seventh Circuit affirmed an incentive award of $25,000 per named plaintiff. *See* R. 4551 at 21 (citing *142 F.3d at 1016*). But in *Cook* the named plaintiff was an individual who "reasonably feared workplace retaliation" by "filing the suit." *Id. at 1016*. No such risk is present here, and the named plaintiffs are business entities, not individual people. Presumably, businesses serving as named plaintiffs for the DPP class believe that the chance of collecting from this lawsuit was worth the cost of participating in it. Litigation is convenient for no one. But business entities are in a much better position to devote time to a lawsuit and delegate the burdens among their officers and employees than a person who must bear the entire burden individually.

"Empirical evidence shows that incentive awards are now paid in most class suits and average between $10-$15,000 per class representative." *See* William B. Rubenstein, 5 Newberg on Class Actions § 17:1 (5th ed. 2018). Appointed Counsel cite **[*47]** one antitrust case from this district which awarded $15,000 to named plaintiffs from a $90 million settlement. *See In re Potash Antitrust Litig.*, No. 1:08-cv-06910 (ECF No. 589) (N.D. Ill. June 12, 2013). Without specific hour totals indicating a higher award is appropriate, and without evidence that the role of class representative imposed anything other than a professional (as opposed to a personal) burden, the Court will not ignore what appears to be a customary maximum of a $15,000 incentive award.

Conclusion

Therefore, Appointed Counsel's motion [4550] is granted as follows: (1) expenses are awarded in the amount of $4.5 million; (2) incentive awards in the amount of $15,000 are awarded to each of the five class representatives; and (3) fees are awarded in the amount of $55,008,866.67, which is one third of the settlement fund after deducting the expenses and incentive awards.

ENTERED:

/s/ Thomas M. Durkin

Honorable Thomas M. Durkin

United States District Judge

Dated: December 1, 2021 nunc pro tunc to November 30, 2021

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City of Oakland v. Oakland Raiders

United States Court of Appeals for the Ninth Circuit

June 14, 2021, Argued and Submitted, San Francisco, California; December 2, 2021, Filed

No. 20-16075

Reporter

20 F.4th 441 *; 2021 U.S. App. LEXIS 35621 **

CITY OF OAKLAND, Plaintiff-Appellant, v. OAKLAND RAIDERS, a California Limited Partnership; ARIZONA CARDINALS FOOTBALL CLUB, LLC; ATLANTA FALCONS FOOTBALL CLUB LLC; BALTIMORE RAVENS, LP; BUFFALO BILLS, LLC; PANTHERS FOOTBALL, LLC; CHICAGO BEARS FOOTBALL CLUB, INC.; CINCINNATI BENGALS, INC.; CLEVELAND BROWNS FOOTBALL COMPANY, LLC; DALLAS COWBOYS FOOTBALL CLUB, LTD.; PDB SPORTS LTD.; DETROIT LIONS, INC.; GREEN BAY PACKERS, INC.; HOUSTON NFL HOLDINGS, LP; INDIANAPOLIS COLTS, INC.; JACKSONVILLE JAGUARS LLC; KANSAS CITY CHIEFS FOOTBALL CLUB, INC.; CHARGERS FOOTBALL COMPANY LLC; THE RAMS FOOTBALL COMPANY, LLC; MIAMI DOLPHINS, LTD.; MINNESOTA VIKINGS FOOTBALL LLC; NEW YORK FOOTBALL GIANTS, INC.; NEW YORK JETS, LLC; PHILADELPHIA EAGLES LLC; PITTSBURGH STEELERS LLC; FORTY NINERS FOOTBALL COMPANY LLC; FOOTBALL NORTHWEST LLC; BUCCANEERS TEAM LLC; TENNESSEE FOOTBALL, INC.; PRO-FOOTBALL, INC.; NATIONAL FOOTBALL LEAGUE; NEW ENGLAND PATRIOTS LLC; NEW ORLEANS LOUISIANA SAINTS, LLC, Defendants-Appellees.

Subsequent History: US Supreme Court certiorari denied by *Oakland, Ca v. Oakland Raiders, 2022 U.S. LEXIS 3909 (U.S., Oct. 3, 2022)*

Prior History: [1]** Appeal from the United States District Court for the Northern District of California. D.C. No. 3:18-cv-07444-JCS. Joseph C. Spero, Magistrate Judge, Presiding.

City of Oakland v. Oakland Raiders, 445 F. Supp. 3d 587, 2020 U.S. Dist. LEXIS 76589, 2020 WL 2079256 (N.D. Cal., Apr. 30, 2020)

Core Terms

team, antitrust, group boycott, speculative, alleges, host, price-fixing, prices, relocation, franchises, Defendants', hypothetical, stadium, consumer, horizontal, output, alleged injury, supracompetitive, league, anti trust law, district court, traceability, attractive, contends, boycott, causal chain, damages, competitive market, anticompetitive, factors

LexisNexis® Headnotes

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

HN1[] **Horizontal Refusals to Deal, Boycotts**

A group boycott occurs when multiple producers refuse to sell goods or services to a particular consumer.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

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

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

HN2[] **Remedies, Damages**

To plead a Sherman Act claim, a private plaintiff must show that it is a proper party to pursue the claim—a requirement known as antitrust standing. Although buyers who pay collusive overcharges (direct purchasers) ordinarily have antitrust standing to challenge a horizontal price-fixing scheme, buyers who are priced out the market—and hence do not purchase the product or pay the overcharge—ordinarily do not. A nonpurchaser's injury is less direct than the injuries of actual purchasers and highly speculative.

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

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

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

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN3[] **Standards of Review, De Novo Review**

Dismissal for failure to state a claim is reviewed de novo. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Antitrust standing is a question of law reviewed de novo.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN4[] **Standing, Injury in Fact**

To establish constitutional standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN5[] **Clayton Act, Claims**

Section 1 of the Sherman Act prohibits unreasonable restraints of trade. Actions for damages, like this one, are authorized by § 4 of the Clayton Act. Despite the apparent breadth of the phrase any person, the U.S. Supreme Court has held that Congress did not intend to afford a remedy to everyone injured by an antitrust violation simply on a showing of causation. Instead, the plaintiff must have antitrust standing.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN6[] **Standing, Requirements**

Courts have identified certain factors for determining whether a plaintiff who has borne an injury has antitrust standing: (1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages. These five factors are illustrative rather than exhaustive.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN7[] **Standing, Requirements**

To conclude that there is antitrust standing, a court need not find in favor of the plaintiff on each factor. Instead, we balance the factors,, recognizing that antitrust standing involves a case-by-case analysis. Most cases will find some factors tending in favor of standing (to a greater or lesser degree), and some against (also in varying degrees), and a court may find standing if the balance of factors so instructs. Nevertheless, the first factor—antitrust injury—is mandatory.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN8[] **Standing, Requirements**

Courts have identified four requirements for antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Evidence > Burdens of Proof > Allocation

HN9[] **Standing, Requirements**

The antitrust injury requirement is satisfied where the plaintiff shows that it stands to suffer, not gain, from the defendant's unlawful conduct.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN10[] **Standing, Requirements**

Under the third requirement for antitrust injury, it is not enough that the plaintiff's claimed injury flows from the unlawful conduct. An antitrust injury must flow from that which makes defendants' acts unlawful.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

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

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN11[] **Anticompetitive & Predatory Practices, Predatory Pricing**

The plaintiff's injury must be of the type the antitrust laws were intended to prevent. The U.S. Supreme Court has made clear that injuries which result from increased competition or lower (but non-predatory) prices are not encompassed by the antitrust laws. Thus, if the injury flows from aspects of a defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal.

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

HN12[] **Per Se Rule & Rule of Reason, Sherman Act**

The goal of the Sherman Act is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN13[] **Standing, Requirements**

The second factor in the antitrust standing inquiry looks to whether the plaintiff's alleged injury was the direct result of the defendant's allegedly anticompetitive conduct. This factor focuses on the chain of causation between the plaintiff's injury and the alleged restraint of trade. The harm may not be derivative and indirect or secondary, consequential, or remote.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN14[] **Standing, Requirements**

Nonpurchasers who are priced out of the market, however, present a special problem, due to the speculative nature of the harm. Courts require a reasonable level of certainty before they will confer antitrust standing on such consumers.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN15[] Standing, Requirements

Under Montreal Trading a regular course of dealing exception makes sense only if that course of dealing occurred in a competitive market.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN16[] Remedies, Damages

The speculative measure of harm factor in the antitrust standing inquiry considers whether the plaintiff's damages are only speculative.

Summary:

SUMMARY[**]

Antitrust

The panel affirmed the district court's dismissal, for failure to state a claim, of an antitrust action brought by the City of Oakland against the National Football League and its member teams.

The City alleged that defendants created artificial scarcity in their product of NFL teams, and then used that scarcity to demand supra-competitive prices from host cities. The City alleged that when it could not pay those prices, defendants punished it by allowing the Raiders to move to Las Vegas.

The panel held that the City had Article III standing because it plausibly alleged that, but for defendants' conduct, it would have retained the Raiders, and thus made the required showing that its injury was likely caused by defendants.

Affirming the district court's dismissal, the panel held that defendants' conduct did not amount to an unreasonable restraint of trade in violation of § 1 of the Sherman Act. The panel held that the City failed sufficiently to allege a group boycott, which occurs when multiple producers refuse to sell goods or services to **[**2]** a particular customer. Here, the City alleged only that a single producer, the Raiders, refused to deal with it. The panel held that the City also failed sufficiently to allege statutory standing on a theory that defendants' conduct constituted an unlawful horizontal price-fixing scheme. The panel held that a finding of antitrust standing requires a balancing of the nature of the plaintiff's alleged injury, the directness of the injury, the speculative measure of the harm, the risk of duplicative recovery, and the complexity in apportioning damages. The panel reasoned that here, the City was priced out of the market and therefore was a nonpurchaser. In addition, the City's damages were highly speculative and would be exceedingly difficult to calculate.

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

Concurring, Judge Bumatay wrote that he would hold that the price-fixing claim was too speculative to satisfy the threshold of constitutional standing. He wrote that the City did not show that its injury was fairly traceable to defendants' challenged conduct, but rather relied on speculation upon speculation to connect its injury of the Raiders leaving for Las Vegas to the NFL's entry rule. Judge Bumatay thus concurred in the court's **[**3]** judgment and joined Parts I, II, and III.B of the majority opinion.

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Makan Delrahim Assistant Attorney General; Michael F. Murray, Deputy Assistant Attorney General; Daniel E. Haar and Jeffrey D. Negrette, Attorneys; Antitrust Division, United States Department of Justice, Washington, D.C.; for Amicus Curiae United States **[**4]** of America.

Judges: Before: A. Wallace Tashima and Patrick J. Bumatay, Circuit Judges, and Douglas L. Rayes,[*] District Judge. Opinion by Judge A. Wallace Tashima; Concurrence by Judge Bumatay.

Opinion by: A. Wallace Tashima

Opinion

[*447] TASHIMA, Circuit Judge:

[*448] Plaintiff City of Oakland (the "City") alleges that the National Football League ("NFL") and its thirty-two member teams (collectively, "Defendants") have "created artificial scarcity in their product (NFL teams), and then used that scarcity . . . to demand supra-competitive prices from host cities." First Am. Compl. ("FAC" or "complaint") FAC ¶ 1.[1] It further alleges that, "[w]hen Oakland could not pay those prices, Defendants punished the city: they voted to allow the Raiders to move to Las Vegas, which left Oakland without an NFL team and caused significant losses to Oakland." FAC ¶ 2. The City contends that Defendants' conduct amounts to an unreasonable restraint of trade in violation of *§ 1 of the Sherman Act, 15 U.S.C. § 1*, on two independent bases: First, because it constitutes an unlawful group boycott, and second, because it constitutes an unlawful horizontal price-fixing scheme. The district court dismissed the City's Sherman Act claim for failure to state a claim upon which relief **[**5]** may be granted. *See* *City of Oakland v. Oakland Raiders, 445 F. Supp. 3d 587, 606 (N.D. Cal. 2020)*; *Fed. R. Civ. P. 12(b)(6)*. We affirm.

We agree with the district court that the City has failed to allege a group boycott. ***HN1***[] A group boycott occurs when *multiple* producers refuse to sell goods or services to a particular consumer. Although the City alleges

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[*] The Honorable Douglas L. Rayes, United States District Judge for the District of Arizona, sitting by designation.

[1] The NFL is "an association of 'separately owned professional football teams.'" *In re Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1144 (9th Cir. 2019)* (quoting *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 187, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*).

collective action (*i.e.*, that the other NFL teams supported the Raiders' boycott), it has not alleged a *group* boycott. The City has alleged only that a single producer—the Raiders—refused to deal with the City.

The City's horizontal price fixing theory fails as well. ***HN2***[] To plead a *Sherman Act* claim, a private plaintiff must show that it is a proper party to pursue the claim—a requirement known as antitrust standing. Although buyers who pay collusive overcharges (direct purchasers) ordinarily have antitrust standing to challenge a horizontal price-fixing scheme, buyers, like the City, who are priced out the market—and hence do **[*449]** not purchase the product or pay the overcharge—ordinarily do not. A nonpurchaser's injury is less direct than the injuries of actual purchasers and highly speculative: we cannot know whether, in the absence of Defendants' restrictions on output, the nonpurchaser would have made a purchase and, if so, under what terms. In addition, **[**6]** the City's damages are highly speculative and would be exceedingly difficult to calculate. We therefore agree with the district court that the City has failed to allege antitrust standing on its horizontal price fixing theory of liability.

I.[2]

In 1995, the Oakland Raiders professional football team signed an agreement to play in the Oakland-Alameda County Coliseum ("Coliseum"). FAC ¶ 102. Under the terms of the agreement, the Raiders leased the Coliseum for a period of sixteen years, with an annual rent of $50,000; the City offered the Raiders a $31.9 million relocation and operating loan; the City committed up to $10 million toward the construction of a new training facility; the City offered up to $85 million toward stadium modernization efforts; and the Raiders agreed to a $1 surcharge on ticket sales, with the proceeds to benefit Oakland public schools and other public services. FAC ¶ 102. The Raiders extended the lease in 2009 and again in 2014. FAC ¶¶ 107, 112.

In the years that followed, the City negotiated with the Raiders in an unsuccessful attempt to keep the team in Oakland. In 2014, the City proposed donating land to the Raiders for a new stadium. FAC ¶ 113. **[**7]** In 2015, the City proposed a $500 million renovation of the Coliseum, to which the City would have contributed significantly. FAC ¶ 113. In 2016, the City supported a proposal to build a new $1.3 billion stadium in Oakland, financed by $350 million in public funds, $400 million from an investment group led by former NFL players Ronnie Lott and Rodney Peete, and $500 million from the Raiders. FAC ¶ 121. The City alleges that the Raiders and the NFL engaged in these negotiations in bad faith. According to the complaint, "[t]he Raiders, the NFL, and ultimately, the vast majority of NFL Clubs, were just stringing Oakland along as part of their collusive scheme to relocate the Raiders." FAC ¶ 23.

In 2017, the Raiders filed an application with the NFL to relocate the team to Las Vegas. FAC ¶ 124. The NFL teams voted thirty-one to one to approve the relocation. FAC ¶ 132. The complaint alleges that the move benefitted the Raiders and the other NFL teams alike. The Raiders moved to a new, $1.9 billion stadium in Las Vegas, financed by $750 million in public funds, FAC ¶¶ 5, 149, and the team's enterprise value more than doubled to $3 billion, FAC ¶¶ 5, 63. The other teams, meanwhile, divided **[**8]** a $378 million relocation fee paid by the Raiders, FAC ¶ 66, and, due to revenue sharing among NFL teams, stand to share in "new television rights in a new geographic territory, new merchandising, new intellectual property and game receipts from an ultra-luxury $1.9 billion stadium," FAC ¶¶ 4, 66.

In 2018, the City commenced this action against the NFL, the Raiders, and the other thirty-one NFL teams, alleging an antitrust violation under *§ 1 of the Sherman Act, 15 U.S.C. § 1*, as well as breach **[*450]** of contract and unjust enrichment claims under California law. FAC ¶¶ 218-42. The complaint seeks declaratory and monetary relief, including treble damages under *§ 4 of the Clayton Act, 15 U.S.C. § 15(a)*.

[2] Because the district court dismissed the City's Sherman Act claim under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, we recite the facts as they appear in the City's complaint. *See* *Padilla v. Yoo, 678 F.3d 748, 751 n.1 (9th Cir. 2012)* ("We emphasize that this factual background is based only on the *allegations* of the plaintiffs' complaint. Whether the plaintiffs' allegations are in fact true has not been decided in this litigation, and nothing we say in this opinion should be understood otherwise.").

With respect to the *Sherman Act* claim, which is the focus of this appeal, the complaint alleges that

> [t]he relevant market in this action is the market for hosting NFL teams. The consumers in this market are all Host Cities offering, and all cities and communities that are willing to offer (*i.e.*, potential Host Cities), home stadia and other support to major league professional football teams in the geographic United States. The product in this market is the NFL team, as a hosted entity.

FAC ¶ 189. The City alleges that this market is anticompetitive because the **[**9]** NFL limits both the number of teams and the freedom of teams to relocate: NFL rules permit neither league expansion nor team relocation without the approval of three-fourths of the NFL's teams. FAC ¶ 66. The complaint further alleges that these policies and practices artificially restrict the number of teams, driving up the prices demanded of and paid by host cities. As incumbent and aspiring host cities compete with one another, they are forced to pay supracompetitive prices to retain or acquire teams, usually in the form of publicly financed stadia. The complaint alleges that in a competitive market—with more teams and fewer restrictions on relocation—teams would instead compete for host cities, driving down prices: "Because all viable locations would have a team, team owners would not be able to make threats about leaving their current Host Cities. In fact, the tables would take a dramatic turn: teams actually would compete for financially viable locations." FAC ¶ 47 (quoting R. Fort, *Market Power in Pro Sports: Problems and Solutions*, 13-14, *in The Economics of Sports* (W. Kern ed., 2000)). The complaint maintains that, "[i]n a competitive market, demanding a new stadium would be **[**10]** a risky move for any team owner: the Host City could reject the demand and seek out a new team willing to play in the existing stadium." FAC ¶ 145.

The City's contention that, in a competitive market, the Raiders would have stayed in Oakland rests on three premises. First, the City alleges that there would be more NFL teams in a competitive market. According to the complaint, Defendants "artificially restrict the supply of its product (NFL teams) even though consumer demand in the market could support greater output (more teams)." FAC ¶ 9. "[F]ocusing on factors of wealth and population," the City contends that "the current NFL could support as many as 42 teams in the United States." FAC ¶ 43. Second, the City asserts that Oakland is a highly attractive market:

> A recent economic analysis conducted by Dr. Daniel Rascher, Professor and Director of Academic Programs for the Sport Management Program at the University of San Francisco, commissioned by Oakland focused on which U.S. cities, currently without an NFL team, best reflect the demographic and financial conditions of existing Host Cities and are the best prospects for new NFL franchises. The winner? ***Oakland***. Focusing on total population, **[**11]** real income, percentage of NFL "super fans," and existing stadia support, Oakland was the highest rated city for NFL expansion.

FAC ¶ 138. Third, the City alleges that "without the NFL's cartel structure and rigid control over output (league expansion), the Raiders would have had virtually no relocation 'extortion' threat to exercise." FAC ¶ 92.

[*451] The City contends that Defendants' conduct violates the *Sherman Act* on horizontal price-fixing and group boycott theories. First, the City contends that Defendants have engaged in a group boycott, also known in ***antitrust law*** as a concerted refusal to deal. The complaint alleges that "[t]he decision to remove a team from a Host City, combined with the decision to deny that same City a new expansion franchise, constitutes a collective refusal to deal with, or a group boycott of, the City." FAC ¶ 140. Second, the City contends that Defendants, as a cartel, have engaged in a classic horizontal price-fixing scheme. FAC ¶ 146. By "constrain[ing] the supply of NFL teams," the NFL "is driving up the price of hosting an NFL team far beyond the marginal costs of operating an NFL team and far beyond the price that would be found in a competitive marketplace." FAC **[**12]** ¶¶ 145-46.

The complaint asserts that the City lost the Raiders for two reasons. First, the City alleges that it was priced out of the market: "Because it could not pay Defendants' supra-competitive prices, Oakland lost the Raiders and any chance to host an NFL team." FAC ¶ 51. Second, because Defendants believed moving the Raiders to Las Vegas was in their economic interest, they refused to negotiate with the City in good faith.

The complaint alleges that Defendants' conduct—and the loss of the Raiders—has injured the City in several ways: lost investment value arising from the tens of millions of dollars the City borrowed to improve the Coliseum and build a training facility, FAC ¶¶ 201-03; lost income, including the $1 ticket surcharge dedicated to public education and the rental monies the Raiders paid for use of the Coliseum, FAC ¶¶ 204-05; lost tax revenues from ticket sales, concessions, stadium parking, player compensation, and merchandising associated with Raiders games, FAC ¶¶ 206-10; and devaluation of the Coliseum property, which the City and Alameda County jointly own, FAC ¶¶ 211-17.

The district court dismissed the City's Sherman Act claim with prejudice under *Rule 12(b)(6)* and declined **[**13]** to exercise supplemental jurisdiction over the state-law claims. The court concluded that the City's alleged injuries were too speculative to confer antitrust standing because the City "had not plausibly alleged that, but for the limited number of teams, Oakland would still have an NFL team." *City of Oakland, 445 F. Supp. 3d at 601*. The court also rejected the City's group boycott theory on the ground that the City had "not alleged that any NFL team besides the Raiders has refused to deal with Oakland, or that the NFL has prohibited any team from dealing with Oakland." *Id. at 605-06*. Following the entry of judgment, the City timely appealed.

II.

HN3[] "Dismissal for failure to state a claim is reviewed *de novo*." *Barrett v. Belleque, 544 F.3d 1060, 1061 (9th Cir. 2008)* (per curiam). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Antitrust standing is a question of law reviewed de novo." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1054 (9th Cir. 1999)*.

[*452] III.

A. Article III Standing

We begin by addressing Defendants' argument that the City lacks Article **[**14]** III standing.[3] ***HN4***[] To establish constitutional standing, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203, 210 L. Ed. 2d 568 (2021)* (citing *Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*).

Defendants focus on the second requirement, contending that the City's "purported injury cannot 'fairly . . . be traced' to the NFL's rules requiring existing teams to approve league expansion," because the City relies on "a long and speculative chain of causation." Specifically, Defendants emphasize that the City does not "allege that any team sought to play in the NFL and was denied admission," "that if there were an additional team, it would have played in Las Vegas thereby foreclosing the Raiders' move there," "that if there were additional teams and one of them might have played in Las Vegas, the Raiders would have stayed in Oakland rather than move to another city with a more attractive stadium or better economics," or "that it made any effort to attract an existing franchise or new expansion team to replace the Raiders in Oakland since learning in 2016 of the Raiders' **[**15]** plans to leave."

We agree with Defendants that the City relies on a somewhat speculative chain of causation. As we explain in Part III.C, *infra*, this fact plays a significant role in our analysis of the City's *statutory* standing. To establish constitutional standing, however, the City need not establish to a certainty that, but for Defendants' challenged conduct, it would have retained the Raiders or acquired another team. It need only plausibly allege that, but for that conduct, there is

[3] Although Defendants did not challenge the City's constitutional standing in the district court, the issue "may be raised at any time, even for the first time on appeal." *DBSI/TRI IV Ltd. P'ship v. United States, 465 F.3d 1031, 1038 (9th Cir. 2006)*.

a "substantial probability" that it would have done so. *See Warth v. Seldin, 422 U.S. 490, 504, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*; *Nat'l Fam. Farm Coal. v. U.S. Env't Prot. Agency, 966 F.3d 893, 908 (9th Cir. 2020)*; *Legal Aid Soc'y of Alameda Cnty. v. Brennan, 608 F.2d 1319, 1334-35 (9th Cir. 1979)*. That standard is satisfied here. The City credibly alleges that Oakland is a prime location for an NFL team, that there would be more NFL teams in a market driven by consumer demand, and that—in a competitive market—teams like the Raiders would not be able to use a threat of relocation to demand supracompetitive concessions from host cities. Specifically, Oakland is an incumbent host city. FAC ¶ 1. The City further alleges that in the absence of Defendants' challenged actions (*i.e.*, in a competitive market), there would be more teams in the NFL FAC ¶¶ 1, 9, 39, 43-44, 67, 69, 197, 199; that in the absence of Defendants' challenged actions, **[**16]** Defendants would not be able to threaten relocation, FAC ¶¶ 16, 145, or demand supracompetitive prices from host cities, FAC ¶¶ 5, 10, 14, 47, 49, 57, 149, 198; that Oakland was willing and able to pay competitive prices to retain the Raiders, FAC ¶¶ 4, 65, 121-22, 128-31; that Oakland is a highly desirable host city for an NFL team, FAC ¶¶ 5, 26. 127,138; that NFL relocation policies favor a team's home territory over relocation, FAC ¶¶ 21, 89-90, 167; that the Raiders were financially successful in Oakland, received significant **[*453]** financial support from the City, and had one of the most loyal fan bases in the NFL, FAC ¶ 22; that Oakland lost the Raiders solely because it was unable to pay supracompetitive prices, FAC ¶¶ 51, 133, 150-51; and that, in a competitive market, the Raiders would have stayed in Oakland or Oakland would have landed another team, FAC ¶¶ 16, 92.

These allegations are sufficiently plausible to allege that there is a "substantial probability" that the Raiders would have stayed in Oakland if not for Defendants' challenged conduct. This is not a case in which the plaintiff's theory of standing is either "counterintuitive" or premised on "a 'highly attenuated chain **[**17]** of possibilities.'" *California v. Texas, 141 S. Ct. 2104, 2119, 210 L. Ed. 2d 230 (2021)* (quoting *Clapper v. Amnesty Int'l USA, 568 U.S. 398, 410, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)*).[4]

B. Group Boycott[5]

As stated above, the complaint alleges a violation of the *Sherman Act* on two alternative theories—horizontal price fixing and group boycott. The district court rejected the group boycott theory on the ground that the City "has not alleged that any NFL team besides the Raiders has refused to deal with Oakland, or that the NFL has prohibited any team from dealing with Oakland or set any 'agreed terms' that Oakland must meet to attract a new or different team." *City of Oakland, 445 F. Supp. 3d at 605-06*. The City contends that the complaint adequately states a claim on a group boycott theory because it alleges that "it is the NFL owners *acting collectively* (not individual teams) who

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[4] Defendants' reliance on *City of Rohnert Park v. Harris, 601 F.2d 1040 (9th Cir. 1979)*, is misplaced. There, the city's assertion that a regional shopping center would have been developed in the city absent the defendants' challenged conduct was "entirely speculative." *Id. at 1045*. That is not the case here.

[5] "The classic 'group boycott' is a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level"—something that is not alleged here. *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advert. Ass'n, 672 F.2d 1280, 1284 (7th Cir. 1982)* (quoting *Smith v. Pro Football, Inc., 593 F.2d 1173, 1178, 193 U.S. App. D.C. 19 (D.C. Cir. 1978)*); *see also* Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* ¶¶ 2003i, 2200a (4th and 5th eds. 2013-2020) ("Areeda & Hovenkamp"). "The term group boycott," however, "is in reality a very broad label for divergent types of concerted activity," *Phil Tolkan Datsun, 672 F.2d at 1285* (quoting *Mackey v. Nat'l Football League, 543 F.2d 606, 619 (8th Cir. 1976)*, *overruled on other grounds as stated in Eller v. Nat'l Football League Players Ass'n, 731 F.3d 752, 755 (8th Cir. 2013)*), and the Supreme Court has recognized group boycotts aimed directly at consumers, *e.g., St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 544, 98 S. Ct. 2923, 57 L. Ed. 2d 932* ("[T]he *Sherman Act* makes it an offense for [businessmen] to agree among themselves to stop selling to particular customers." (alteration in original) (quoting *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 214, 71 S. Ct. 259, 95 L. Ed. 219 (1951)*, *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*)). For purposes of our analysis, therefore, we assume that a concerted refusal to deal with a consumer or consumers states a cognizable "group boycott" claim under *§ 1 of the Sherman Act*.

decide whether and where a particular team may relocate and . . . Defendants made a '*collective* decision to move the Raiders to Las Vegas.'" We disagree.

Collective action in support of an individual boycott is not the same as a group boycott. The City's allegations, taken as true, show only that *the Raiders* boycotted the City and that the other Defendants supported **[**18]** the Raiders' boycott. **[*454]** The other teams did not "boycott" the City. The FAC does not allege that they, or any of them, refused to "sell" to the City.

The group boycott cases upon which the City relies involve circumstances in which *multiple* producers refused to sell their goods or services to consumers. In *FTC v. Superior Court Trial Lawyers Ass'n., 493 U.S. 411, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990)*, the Supreme Court recognized a viable group boycott claim where "*a group of lawyers* agreed not to represent indigent criminal defendants in the District of Columbia Superior Court until the District of Columbia government increased the lawyers' compensation." *Id. at 422-23* (emphasis added). The Supreme Court explained that these lawyers, as a group, had engaged in "a concerted refusal to serve an important customer in the market for legal services." *Id. at 423*. And in *St. Paul Fire & Marine Insurance Co., 438 U.S. at 543-45*, the Court recognized a group boycott claim where *three medical malpractice insurers* refused to offer coverage to the policyholders of a fourth insurer in order to force the policyholders into agreeing to coverage by the fourth insurer on the fourth insurer's terms. As these cases reflect, a group boycott occurs when "*two or more competitors* . . . refuse to do business with one firm." *Group boycott*, Black's Law Dictionary (11th ed. 2019) **[**19]** (emphasis added); *see* *Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1568 (11th Cir. 1991)* ("[T]he distinguishing feature of such cases is a plurality of refusals to deal by different parties."); *Constr. Aggregate Transp., Inc. v. Fla. Rock Indus., Inc., 710 F.2d 752, 773 (11th Cir. 1983)* ("[I]t is important to remember that a concerted refusal to deal essentially is an agreement among two or more parties that each will engage in an individual refusal to deal with a particular customer or customers. In the case before us, however, we have only one business entity refusing to deal with the plaintiff . . . . That [a second business entity] may have instigated [the first entity's] refusal to deal does not create the plurality of 'refusals' necessary for the arrangement to be called a group boycott."). Here, the other NFL teams simply supported the Raiders' refusal to deal with the City, but did not themselves refuse to do business with the City. The City, therefore, although it has alleged an individual boycott, has not alleged a group boycott.[6]

The City alternatively contends that it has alleged a group boycott because the other teams supported the Raiders' relocation threat by agreeing among themselves that they would neither relocate to Oakland nor allow an expansion team to locate there if the City refused to accede to the Raiders' demands **[**20]** for a new stadium. FAC ¶ 140. A law review article upon which the City relies describes this group boycott theory as follows:

> [G]iven the artificial scarcity of teams and the difficulty of new entry, threats to relocate are more than the action of an individual economic entity; rather, every threat to relocate is also an implicit threat of a concerted boycott. A group boycott exists when individual economic actors agree to refrain from dealing with another entity in order to gain some competitive advantage, in this case the advantage of favorable subsidies to build or renovate new stadiums. . . . Translation: If Houston does not pay the price demanded by the Oilers, no other NFL team will deal with the city.

[*455] David Haddock, Tonga Jacobi & Matthew Sag, *League Structure & Stadium Rent-Seeking—the Role of Antitrust Revisited*, *65 Fla. L. Rev. 1, 50-51 (2013)*. This may be a viable theory of group boycott (a question we need not reach), but it fails here because the City has not proffered any specific allegations to suggest that such an agreement in fact existed in this case. As the district court explained, "[c]ertain commentators' view that 'a threat by an individual team to relocate *may* comprise an *implicit* threat of **[**21]** concerted boycott' does not, without more, show that such a boycott in fact occurred." *City of Oakland, 445 F. Supp. 3d at 606*. The City's allegation is therefore too speculative to cross the plausibility threshold.

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[6] We do not decide whether the collective action of which the City complains could be actionable under *§ 1 of the Sherman Act* on any other theory. We hold only that the conduct of which the City complains does not allege a group boycott.

C. Horizontal Price Fixing: Antitrust Standing

Because the City's group boycott theory fails to state a claim, the viability of the City's Sherman Act claim turns on its horizontal price-fixing theory. As set forth below, we hold that the City's price-fixing theory fails as well, for lack of antitrust standing.[7]

HN5[] *Section 1 of the Sherman Act* prohibits unreasonable restraints of trade. *In re NFL's Sunday Ticket Antitrust Litig., 933 F.3d at 1149*.[8] Actions for damages, like this one, are authorized by *§ 4 of the Clayton Act*.[9] "Despite the apparent breadth of the phrase 'any person,' the Supreme Court has held that Congress did not intend to afford a remedy to everyone injured by an antitrust violation simply on a showing of causation." *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987 (9th Cir. 2000)*. Instead, the plaintiff must have "antitrust standing." *Id.*

HN6[] We have "identified certain factors for determining whether a plaintiff **[**22]** who has borne an injury has antitrust standing":

> (1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall;
> (2) the directness of the injury;
> (3) the speculative measure of the harm;
>
> (4) the risk of duplicative recovery; and
>
> (5) the complexity in apportioning damages.

Am. Ad Mgmt., 190 F.3d at 1054.[10]

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[7] Because we affirm the dismissal of the City's group boycott theory on other grounds, we need not address whether our analysis of antitrust standing with respect to the City's price-fixing theory applies as well to the City's group boycott theory.

[8] The City does not contend that the challenged practices are per se unlawful.

[9] *Section 4(a)* provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a).

[10] These five factors are illustrative rather than exhaustive. In *R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 146 (9th Cir. 1989)* (en banc), for example, we articulated five different factors that, although largely overlapping with those identified in *American Ad Management*, included two factors that we did not specifically mention in *American Ad Management*: "[t]he specific intent of the alleged conspirators" and "[t]he existence of other, more appropriate plaintiffs." We nevertheless rely on the *American Ad Management* factors to frame our analysis. Among other virtues, they adhere closely to the factors identified by Areeda and Hovenkamp in their influential treatise on ***antitrust law***:

> Unlike the United States government, which is authorized to sue anyone who violates the antitrust laws, a private antitrust plaintiff must show "standing" to sue. In addition to proving everything that would entitle the government to relief, the private plaintiff must also show (1) that the acts violating the antitrust laws caused—or, in an equity case, threatened to cause—it injury-in-fact to its "business or property;" (2) that this injury is not too remote or duplicative of the recovery of a more directly injured person; (3) that such injury is "antitrust injury," which is defined as the kind of injury that the antitrust laws were intended to prevent and "flows from that which makes defendants' acts unlawful"; and, in a damage case, (4) that the damages claimed or awarded measure such **[**23]** injury in a reasonably quantifiable way.

Areeda & Hovenkamp ¶ 335 (footnotes omitted). Although *American Ad Management* did not mention the requirement that a plaintiff show injury to its "business or property," that is indisputably an additional requirement for antitrust standing under *§ 4 of*

HN7[] "To conclude that there is antitrust standing, a court need not find in **[*456]** favor of the plaintiff on each factor." Id. at 1055. "Instead, we balance the factors," *id.*, recognizing that "[a]ntitrust standing involves a case-by-case analysis," Amarel v. Connell, 102 F.3d 1494, 1507 (9th Cir. 1996) (as amended). "Most cases will find some factors tending in favor of standing (to a greater or lesser degree), and some against (also in varying degrees), and a court may find standing if the balance of factors so instructs." L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 791 F.2d 1356, 1363 (9th Cir. 1986). Nevertheless, the first factor—antitrust injury—is mandatory. *See* Am. Ad Mgmt., 190 F.3d at 1055 ("[T]he Supreme Court has noted that '[a] showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4.'" (second alteration in original) (quoting Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110 n.5, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986))); *see also* Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1102 (9th Cir. 1999) ("To have standing to bring an antitrust case, a plaintiff must demonstrate that the harm the plaintiff has suffered or might suffer from the practice is an 'antitrust injury,' that is, an 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" (quoting Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))). Applying these principles here, we conclude that, although the City has alleged antitrust **[**24]** injury, it has not alleged antitrust standing generally.

1. Antitrust Injury

HN8[] We have identified "four requirements for antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." Am. Ad Mgmt., 190 F.3d at 1055.

The City has adequately alleged the first requirement—unlawful conduct. The City alleges that Defendants, operating as a cartel, have restricted the number of NFL teams and demanded supracompetitive prices from host cities. These allegations are sufficient. *See, e.g.,* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107-08, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) ("Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit."); Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995) ("If the plaintiff puts forth evidence of restricted output and supracompetitive prices, that is direct proof of . . . injury to competition . . . .").

The City has adequately alleged the second requirement—injury—as well. HN9[] This requirement is satisfied where the **[*457]** plaintiff shows that it "stands to suffer, not gain," from the defendant's unlawful conduct. Am. Ad Mgmt., 190 F.3d at 1056. That is the case here. The City plausibly alleges that, but for Defendants restrictions on output, the Raiders would **[**25]** have stayed in Oakland, or another NFL team would have located there. The City alleges, moreover, that the loss of the Raiders has caused the City economic loss, including reduced tax revenues.

HN10[] Under the third requirement, "[i]t is not enough that the plaintiff's claimed injury flows from the unlawful conduct. An antitrust injury must 'flow[ ] from that which makes defendants' acts unlawful.'" *Id.* (second alteration in original). The complaint again satisfies this requirement here. The City's alleged injuries stem from the loss of the Raiders, and the City plausibly alleges that the Raiders left Oakland because of Defendants' allegedly unlawful restriction on output. The City also credibly asserts that, in a world with more teams, there might have already been a team in Las Vegas, blocking the Raiders' move there, and that, in a competitive market with more teams, the Raiders would not have had the leverage to demand supracompetitive concessions from the City. The City's alleged injuries, therefore, flow from that which allegedly makes Defendants' conduct unlawful: limiting output below levels dictated by consumer demand.

HN11[] "Finally, the plaintiff's injury must be 'of the type the antitrust **[**26]** laws were intended to prevent.'" Id. at 1057. "The Supreme Court has made clear that injuries which result from *increased* competition or lower (but non-predatory) prices are not encompassed by the antitrust laws." *Id.* Thus, "[i]f the injury flows from aspects of a defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's

the Clayton Act. *See* 15 U.S.C. § 15(a); Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 260-61, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972).

conduct is illegal." *Theme Promotions, Inc. v. News Am. Mktg. FSI, 546 F.3d 991, 1003 (9th Cir. 2008)*. Here, Defendants argue that the complaint fails this test because the City lost the Raiders "through the process of competition . . . . Loss of the Raiders to a city that made a better offer is not injury arising from a *reduction* in competition."

Defendants' argument stands ***antitrust law*** on its head. "[T]he principal objective of antitrust policy is to maximize *consumer* welfare by encouraging *firms* to behave competitively," Areeda & Hovenkamp ¶ 100, not, as Defendants suggest, to maximize producers' welfare by increasing competition among consumers. ***HN12***[] As the Supreme Court recently reminded us, "[t]he goal [of the *Sherman Act*] is to distinguish between restraints with anticompetitive effect that are harmful *to the consumer* and restraints stimulating competition that are in *the consumer's* best interest." *NCAA v. Alston, 141 S. Ct. at 2151* (first **[**27]** alteration in original) (emphasis added) (quoting *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284, 201 L. Ed. 2d 678 (2018)*). Thus, the fact that the City lost the Raiders as a result of enhanced competition among *consumers* does not negate the City's antitrust injury.

On the contrary, the proper focus is on whether the City's injuries flow from a decrease in competition among *producers*. They do. The City alleges that it was injured because Defendants reduced output and increased prices. These are precisely the kinds of harms to competition that the antitrust laws were intended to prevent. *See Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1034 (9th Cir. 2001)* ("Antitrust injury 'means injury from higher prices or lower output, the principal vices proscribed by the antitrust laws.'" **[*458]** (quoting *Nelson v. Monroe Reg'l Med. Ctr., 925 F.2d 1555, 1564 (7th Cir. 1991)*)). Thus, the City has alleged antitrust injury.

2. The Directness of the Injury

HN13[] The second factor in the antitrust standing inquiry "looks to whether [the plaintiff's] alleged injury was the direct result of [the defendant's] allegedly anticompetitive conduct." *Am. Ad Mgmt., 190 F.3d at 1058*. This factor focuses on "the chain of causation between [the plaintiff's] injury and the alleged restraint" of trade. *Id.* "The harm may not be 'derivative and indirect' or 'secondary, consequential, or remote.'" *Theme Promotions, 546 F.3d at 1004* (first quoting *Amarel, 102 F.3d at 1511*, and then quoting *Kolling v. Dow Jones & Co., 137 Cal. App. 3d 709, 187 Cal. Rptr. 797, 808 (Ct. App. 1982)*).

This factor cuts against the **[**28]** City's antitrust standing. In a horizontal price-fixing scheme like the one the City alleges here, members of a cartel "collude on price and output in an effort to maximize their profits." Areeda & Hovenkamp ¶ 391b1. Producers restrict output and raise prices, and consumers—direct purchasers from the cartel—pay an overcharge (a supracompetitive price) to purchase the producers' goods or services. These direct purchasers plainly have "standing to recover any collusive overcharges." *Id.* Their injuries are direct and certain. The same cannot be said, however, of consumers, like the City, that "were priced out of the market." *Id.* As Areeda & Hovenkamp explain:

> The difficulty lies in identifying those who are injured by the deadweight welfare loss. Anyone could claim that he or she would have purchased at the competitive price but was priced out of the market as a result of the anticompetitive pricing. Thus, courts are likely to find that the claims of those who refused to purchase at the cartel price are *speculative*.

Id.

The Tenth Circuit confronted this situation in *Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864 (10th Cir. 1981)*. There, the plaintiff alleged that the defendants unlawfully limited potash production to drive up prices. *Id. at 865*. The plaintiff **[**29]** brought an antitrust action against the producers, arguing that as a result of the defendants' actions it was unable to buy potash that it could have resold at a profit. *Id. at 867*. The Tenth Circuit held that the plaintiff lacked antitrust standing. *Id. at 868*. First, the court noted that "[a] price fixing conspiracy is certainly 'aimed' at those who purchase the product at the inflated price; their injury is more direct and more proximately caused than those who are unable to purchase due to product scarcity." *Id.* Second, the plaintiff's injury was too speculative:

> [W]hen, as here, the nonpurchaser has no prior course of dealing with any defendant, we will remain unsure about many things, including: whether the purchase would have been made from one of the conspirators or from one of their competitors; what quantity would have been purchased; what price would have been paid; and at what price resale would have occurred. In the instant case we would also be uncertain whether the potash producers would have inquired about the identity of [the plaintiff's] customers before making the sale; whether, if asked, [the plaintiff] could have truthfully replied that part of the purchase was allocated to customers **[**30]** outside North Korea; whether [the plaintiff] would have had the funds needed to make the purchase; and whether an alleged shortage of railroad cars would have aborted the transaction.

[*459] *Id. at 868*.[11]

The same concerns exist here too. First, the City's injuries are less direct than those of actual purchasers, such as the cities of Las Vegas and Los Angeles, each of which recently acquired NFL teams, presumably by agreeing to supracompetitive prices. Indeed, the existence of these more direct victims is an additional factor counseling against the City's standing. *See* *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc., 241 F.3d 696, 701 (9th Cir. 2001)*; *R.C. Dick Geothermal Corp., 890 F.2d at 146*; *Montreal Trading, 661 F.2d at 868*.[12]

Second, the City's contention that, in the absence of Defendants' challenged practices, it would have retained the Raiders (or acquired another team) is too speculative to establish antitrust standing. As the district court explained:

> The Court . . . previously held that Oakland had not plausibly alleged that, but for the limited number of teams, Oakland would still have an NFL team. The Court identified the following "incomplete list of issues that might be relevant" but were not addressed in Oakland's original complaint:
>
> > (1) whether there are additional potential owners willing to establish new teams if the NFL allowed them to **[**31]** do so; (2) whether such potential owners would have based a team in Las Vegas before the Raiders decided to relocate there; (3) whether the Raiders would still have left Oakland for another city if the NFL allowed additional teams; (4) if the Raiders might still have left, whether an additional team would have been established in Oakland to replace the Raiders; or (5) whether Oakland has made any effort to attract an existing team other than the Raiders or to establish a new expansion team to replace the Raiders.
>
> Oakland's first amended complaint alleges none of those things. Instead, it repeats an allegation from the original complaint that entrepreneur and basketball-team-owner Mark Cuban believes Oakland is a better site for the Raiders than Las Vegas, and adds an allegation that an economic analysis commissioned by Oakland determined that, of U.S. cities without NFL teams, Oakland "best reflect[s] the demographic and financial conditions of existing Host Cities" and has "the best prospects for new NFL franchises." But Oakland still has not plausibly alleged what the playing field would look like if the NFL allowed more than thirty-two teams. In that hypothetical world, what would **[**32]** prevent Las Vegas from offering a more attractive deal, as in fact occurred? Would another team have already existed in Las Vegas? Would the Raiders have gone elsewhere if Las Vegas already had a team? If the Raiders left, would a different team play in Oakland? The first amended complaint answers none of those questions.

City of Oakland, 445 F. Supp. 3d at 601 (second alteration in original) (citations omitted).

We agree. The City has not alleged—and there is no way of knowing—what would have occurred in a more competitive marketplace. Would new teams have joined the NFL? Would they have found Oakland attractive? Would the Raiders have left Oakland in any event? Would the **[*460]** Raiders have stayed in the Bay Area, but not in Oakland? What price would the City have paid to retain the Raiders or acquire another team? Would the City

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[11] The Tenth Circuit did not adopt a bright-line rule precluding nonpurchasers who have been priced out of a market from establishing antitrust standing. *See* *Montreal Trading, 661 F.2d at 868*. We agree.

[12] The City's injuries would also be less direct than those of NFL expansion teams denied entry into the league.

have been willing and able to pay a competitive price? There are too many speculative links in the chain of causation between Defendants' alleged restrictions on output and the City's alleged injuries. *Cf.* Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 540, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) ("In this case, the chain of causation between the Union's injury and the alleged restraint in the market for construction subcontracts contains several somewhat vaguely defined links.").

The City complains **[**33]** that it should not be required "to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct." (Quoting United States v. Microsoft Corp., 253 F.3d 34, 79, 346 U.S. App. D.C. 330 (D.C. Cir. 2001).)[13] Nonpurchasers who are priced out of the market, however, present a special problem, due to the speculative nature of the harm. ***HN14***[] We require a reasonable level of certainty before we will confer antitrust standing on such consumers. *See* Montreal Trading, 661 F.2d at 868; Areeda & Hovenkamp ¶ 391b1.

The City alternatively contends that it has standing under *Montreal Trading* because it can show "a regular course of dealing with the conspirators." *661 F.2d at 868*. The City's past dealings with the Raiders, however, do not establish a *regular* course of dealing. ***HN15***[] And, under *Montreal Trading*, a "regular course of dealing" exception makes sense only if that course of dealing occurred in a competitive market. But that is not what the FAC alleges. The City alleges that its course of dealing with the Raiders occurred in an anticompetitive market, which does not resolve the many uncertain links in the chain of causation. Thus, even assuming that *Montreal Trading* is the law of the Circuit, an issue we need not decide, the City would still lack standing.

In sum, this factor—the directness of the injury—supports the conclusion that the City has not alleged antitrust **[**34]** standing.

3. The Speculative Measure of Harm

HN16[] So too does the third factor, which considers whether the City's "damages are only speculative." *Am. Ad Mgmt., 190 F.3d at 1059*. For the reasons just discussed, we do not know whether the City would have retained an NFL team, whether that team would have been the Raiders or another team, where that team would have played, or what price the City would have paid for the privilege of having an NFL team. Because we do not know whether the City would have retained the Raiders, we cannot know whether it would have avoided the harm it alleges.

Furthermore, even if the City could demonstrate that it would have retained the Raiders (or acquired another team), its damages—"lost investment value," "tax revenues associated with Raiders games," and "devaluation of the Coliseum property"—would be exceedingly difficult to calculate. *Cf.* *id. at 1060* ("[W]e do not find the calculation of damages in this case to be exceedingly complicated."); Areeda & **[*461]** Hovenkamp ¶ 335c5 ("Once it becomes clear—especially early in the litigation—that damage measurements will be unduly speculative, the courts generally dismiss the damage suit."). In this respect too, this case is far afield from the conventional horizontal **[**35]** price-fixing case in which an actual purchaser seeks to recover collusive overcharges.

In sum, like the second factor, the third factor supports that the City has not adequately alleged antitrust standing.

4. Remaining Factors

The remaining factors do not undermine the City's claim of antitrust standing. This case does not appear to present a risk of duplicative recoveries. Nor does it appear that this case would require an apportionment of damages. Nevertheless, in light of the indirectness of the City's injuries, the existence of more direct victims, the speculative

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[13] In *Microsoft, 253 F.3d 34*, the plaintiffs were required to prove that Microsoft's anticompetitive practices (*i.e.*, foreclosing Netscape's and Java's distribution channels) caused Microsoft to maintain its monopoly power in the operating system market. In that context, and relying on Areeda & Hovenkamp, the D.C. Circuit reasoned that courts could infer causation from the fact that a defendant has engaged in anticompetitive conduct that reasonably appears capable of making a significant contribution to maintaining monopoly power. *Id. at 79*. The court did not address the question presented here.

measure of harm, and the difficulty in calculating damages, we are persuaded that the City lacks antitrust standing to pursue its horizontal price-fixing theory. As the district court observed, the circumstances presented here "render[] this case particularly unsuitable as a novel expansion of antitrust liability to non-purchaser plaintiffs." *City of Oakland, 445 F. Supp. 3d at 603*.

IV.

We hold that the district court properly dismissed the City's Sherman Act claim for failure to state a claim upon which relief may be granted. The City's group boycott theory fails to state a claim because the City has not alleged that more than one team refused to deal with the **[**36]** City. The City's horizontal price-fixing theory fails because the City has not adequately alleged antitrust standing. Although the City has alleged antitrust injury, it has not alleged with sufficient certainty that it would have purchased the product (*i.e.*, that the Raiders would have stayed in Oakland), and under what terms, in a hypothetical competitive market.

The judgment of the district court, therefore, is **AFFIRMED**.

Concur by: BUMATAY

Concur

BUMATAY, Circuit Judge, concurring:

The City of Oakland brings two theories of antitrust liability against the NFL, the Raiders, and the NFL's other 31 teams. We've called one theory the "group boycott" claim and the other a "price-fixing" claim. As the majority correctly holds, both theories come up short. In their view, Oakland gets to suit up and take the field of Article III standing but can't run the claims into the endzone of antitrust liability. Upon further review, however, I think, the majority fumbles the standing analysis on the price-fixing claim. I would hold that this claim is too speculative to satisfy the threshold of constitutional standing and so must be benched even before kickoff. On the group boycott claim, I fully agree with the majority **[**37]** that Oakland stays on the field but ultimately fails to score on the merits. In short, we should have dismissed Oakland's price-fixing claim on Article III standing grounds and denied the group boycott claim on legal sufficiency grounds. I thus concur in the court's judgment and join Parts I, II and III.B of the majority opinion.

I.

Rigorous enforcement of the Article III standing requirements ensures that federal courts stay in their lanes. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016). By disclaiming jurisdiction to resolve certain disputes, we confine ourselves to "a proper[] judicial role." *Id.* (simplified). To meet **[*462]** Article III standing, a party must establish (1) an injury in fact; (2) traceability; and (3) redressability. *Id.* And meeting standing on one claim doesn't mean standing on other claims. *See DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352-53, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006)*. Thus, courts must look to see if a party has standing for each claim brought—regardless of standing on another claim. *Id.* The party seeking access to federal court bears the burden of showing standing. *Spokeo*, 578 U.S. at 338.

Here, Oakland asserts two independent theories of antitrust liability under *§ 1 of the Sherman Act, 15 U.S.C. § 1*.

First, the "price-fixing" claim. Oakland alleges that the NFL has created a horizontal price-fixing scheme with its entry requirements for new teams. An NFL **[**38]** rule dictates that 3/4 of NFL owners must vote to approve a new football team's entry into the league. Such a rule, says Oakland, inflates the price of hosting teams for cities by artificially restricting the supply of teams.

Second, we have the "group boycott" claim. Oakland contends that the NFL and its teams have started an anticompetitive boycott against the City by collectively refusing to deal with it. In the City's view, the NFL's franchises are punishing Oakland for declining to pay the high costs and benefits to keep the Raiders in the Bay Area.

Oakland fails to meet its burden of establishing Article III standing for the price-fixing claim, while the group boycott claim fails on the merits.

A.

Oakland's price-fixing claim drops the ball on the second element—traceability. A party satisfies this element by showing that its injury "is fairly traceable to the challenged conduct of the defendant." *Spokeo*, 578 U.S. at 338. Traceability requires "a causal connection between the injury and the conduct complained of." *Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. So with traceability, we ask: "Is the line of causation between the illegal conduct and injury too attenuated?" *Allen v. Wright, 468 U.S. 737, 752, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)*.

Our court has held that "a causal chain does not fail simply because it has several links, **[**39]** provided those links are not hypothetical or tenuous." *Nw. Requirements Utils. v. FERC, 798 F.3d 796, 806 (9th Cir. 2015)* (simplified). Traceability then can't "rely on conjecture about the behavior of other parties." *Ecological Rts. Found. v. Pac. Lumber Co., 230 F.3d 1141, 1152 (9th Cir. 2000)*. And when a standing theory "rests on a highly attenuated chain of possibilities," "far stronger evidence" is required to establish traceability. *California v. Texas, 141 S. Ct. 2104, 2119, 210 L. Ed. 2d 230 (2021)* (simplified).

Oakland's price-fixing claim relies on speculation upon speculation to connect its injury to the NFL's entry rule. Basically, Oakland tries to connect its injury—the Raiders leaving for Las Vegas—to the NFL's 3/4 approval rule for new franchises. Specifically, Oakland argues that the entry rule allows NFL teams to demand excessive payments from host cities, causing the Raiders to move to Las Vegas and costing Oakland an NFL home team. As a result, Oakland argues it would not have been injured under more lenient rules for entry into the NFL. Essentially, Oakland's causal chain looks like this:

[*463]

But Oakland relies on speculation every step of the way. Start with Step One. Under Oakland's theory, in a pro-competitive hypothetical world, the NFL would replace its current 3/4 approval rule with a more competitive approach, which would allow for easier admission. We aren't told what **[**40]** this new rule might be or how it might meet the threshold of improved competition. Instead, we must imagine a hypothetical rule that would somehow accomplish what Oakland seeks.

Step Two—engage in more speculation about hypothetical teams. To get to the next step in the chain of traceability, we need to speculate that this new rule would entice new football franchises to apply to the NFL. Here, it's unclear how potential football franchises would react to this hypothetical new rule. Oakland assumes that more franchises would apply, given a more lenient admission rule. But there is no evidence that these imaginary franchises would have a significant incentive to apply under, say, a 1/2 owner approval rule rather than the existing 3/4 rule. As the NFL accurately notes, Oakland cannot point to a single instance of a team being denied entry into the NFL under the existing rule. And under either regime, a potential franchise would have to convince a significant portion of NFL owners that its admission would not hurt the sport or the quality of competition. In fact, the only evidence Oakland can muster on this point is a 2004 estimate that the NFL could support up to 42 teams in the United **[**41]** States. But such evidence comes well short **[*464]** of showing that more franchises would be likely to apply simply because the NFL could hypothetically support more of them. Article III requires "far stronger evidence" here. *California v. Texas, 141 S. Ct. at 2119*.

Step Three—consider a hypothetical world where the NFL admits new teams from the crop of applicants. The problem at this step is that the composition of sports leagues is inherently difficult to predict. Sports leagues can't have an infinite number of teams. For example, a sports league has to weigh increasing the number of teams in its roster against other factors such as scheduling constraints, the quality of competition, and existing contracts and commitments with players. *See* Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application*, ¶ 2214(b) (5th ed. 2021) ("Areeda & Hovenkamp") ("[A] sports league requires limits on the number of teams in order that scheduling and ranking can be coordinated."). Oakland would have us overlook these realities and speculate that the NFL would admit more teams if it had a more permissive entry rule and received more applications.

Step Four—calculate the probabilities that a new imaginary NFL **[**42]** team would play in Las Vegas. Only if another NFL team played at Allegiant Stadium would the Raiders be blocked from leaving Oakland—the precise injury alleged here. But as Oakland acknowledges, it can't provide any evidence that Las Vegas would have hosted an NFL team prior to the Raiders under supposedly pro-competitive rules. As a result, Oakland again asks this court to make another speculative leap—this time that a hypothetical franchise admitted under hypothetical rules would have chosen Las Vegas as its home. But we generally do not "endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper v. Amnesty Int'l, USA, 568 U.S. 398, 414, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)*; *see also* *Ecological Rts. Found., 230 F.3d at 1152* ("The issue in the causation inquiry is whether the alleged injury can be traced to the defendant's challenged conduct, rather than to that of some other actor not before the court.").

Finally, Step Five—assume there would be enough new franchises admitted by the NFL to prevent other host cities from attracting the Raiders away from Oakland. At this final step, we must speculate whether another city would have still attracted the Raiders with a more appealing stadium or better economics. Oakland does put forward evidence from an economic expert **[**43]** stating that Oakland is an attractive location for an NFL franchise. But ultimately, Oakland asks us to conjecture about how hypothetical franchises would have weighed hypothetical proposals from hypothetical host cities. So Oakland's expert can't save the speculative house of cards from tumbling down.

In sum, Oakland's price-fixing theory requires us to make layers of speculative judgments to connect the allegedly unlawful conduct (the NFL's entry rule) to the alleged injury (the Raiders' decision to leave Oakland). But Article III standing requires more than an elaborate string of speculations. It requires the alleged injury to be fairly traceable to the unlawful conduct. *Spokeo*, 578 U.S. at 338. Oakland's loss of the Raiders is too remote and too conjectural to be traceable to the NFL's entry process. I would hold that Oakland failed to establish Article III standing on its price-fixing claim.

The majority looks past these speculations by determining that Oakland has shown a "substantial probability" of standing. Maj. Op. 16. The majority argues **[*465]** that, despite a "somewhat speculative chain of causation," there is a substantial probability that the Raiders would have stayed in Oakland but for the NFL's entry rule. Maj. Op. 15. **[**44]** But our court has made clear that causation cannot "be too speculative, or rely on conjecture about the behavior of other parties." *Ecological Rts. Found., 230 F.3d at 1152*. That is precisely what Oakland's price-fixing claim does. It speculates about events at every step of the causal chain—relying on inferences about what unknown, independent parties would do under hypothetical circumstances. As a result, I would dismiss Oakland's price-fixing claim for failure to establish Article III standing.[1]

B.

Oakland, however, does establish Article III standing for its group boycott claim. Oakland satisfies the standing requirements for the group boycott claim because it directly connects the unlawful conduct to the alleged injury.

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[1] In reaching the merits of the price-fixing claim, the majority imports a Tenth Circuit case into our court—*Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864 (10th Cir. 1981)*. In *Montreal Trading*, the Tenth Circuit denied antitrust standing to non-purchasers on the theory that their injuries were too uncertain. *Id. at 868*. I question, however, whether *Montreal Trading* is relevant here. *Montreal Trading* explained that nonpurchasers should be denied standing to sue "when they lack a past course of dealing with the conspirators." *Id.* But Oakland, the Raiders, and the NFL have a long course of dealing, making the applicability of the *Montreal Trading* rule suspect. Moreover, the majority applies *Montreal Trading* without claiming to adopt it as a "bright-line rule" for our circuit. Maj. Op. 29 n.11. But doing so just further complicates an already complicated area of law. The majority should have punted on this issue.

Unlike the price-fixing claim, the premise of the group boycott claim is that the NFL franchises themselves colluded to keep Oakland from hosting an NFL team. The football teams sought to punish Oakland, the theory goes, after the City refused to make new payments or improvements to its stadium to keep the Raiders. Thus, the injury of a lack of an NFL franchise is closely tied to the alleged unlawful conduct of group boycotting. In other words, there is a direct handoff from the anticompetitive action to the alleged injury. **[**45]** As a result, Oakland establishes Article III standing on its group boycott claim.

Looking at the merits, I agree with the majority that Oakland fails to demonstrate an antitrust violation on this claim. In short, Oakland can only show that the Raiders refused to deal with the City—not that the other franchises joined the Oakland boycott. Moreover, since Oakland failed to plead a *Sherman Act* violation, I do not reach whether Oakland has sufficiently shown antitrust standing. Antitrust standing is distinct from Article III standing. *See* *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535 n.31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. Unlike Article III standing, courts have discretion to skip antitrust standing and go right to the merits. *See* Areeda & Hovenkamp, ¶ 335f ("When a court concludes that no violation has occurred, it has no occasion to consider [antitrust] standing."). So there's no need to address Oakland's antitrust standing on this claim, but that doesn't mean the City has it. *See* Maj. Op. 21 n.7.

II.

So, after further review, we must affirm the district court's dismissal of Oakland's suit. While Oakland doesn't need to provide indisputable evidence of traceability to win access to federal courts, the City can't rely on a Hail Mary of speculation to satisfy standing. In my view, we should **[*466]** have blown the whistle on jurisdiction rather than **[**46]** letting that claim play out on the merits.

Romoff v. GM LLC

United States District Court for the Southern District of California

December 2, 2021, Decided; December 2, 2021, Filed

Case No.: 21-cv-00938-WQH-BGS

Reporter

574 F. Supp. 3d 782 *; 2021 U.S. Dist. LEXIS 231369 **; 2021 WL 5741455

ROBERT ROMOFF and JOE SICILIANO, individually, and on behalf of all others similarly situated, Plaintiffs, v. GENERAL MOTORS LLC, Defendant.

Subsequent History: Affirmed by *Romoff v. Gen. Motors LLC, 2023 U.S. App. LEXIS 2343, 2023 WL 1097258 (9th Cir. Cal., Jan. 30, 2023)*

Core Terms

Destination, consumers, alleges, motion to dismiss, unfair, omission, misleading, disclosure, deceptive, disclose, shipping, prong, unjust enrichment, average consumer, misrepresentation, manufacturers, dealer, label, actual cost, fraudulent, prohibits, stickers, violates

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Judges: Hon. William Q. Hayes, United States District Judge.

Opinion by: William Q. Hayes

Opinion

[*784] ORDER

HAYES, Judge:

The matter before the Court is the Motion to Dismiss Plaintiffs' Class Action Complaint filed by Defendant General Motors LLC. (ECF No. 12).

I. PROCEDURAL BACKGROUND

On May 17, 2021, Plaintiffs Robert Romoff and Joe Siciliano filed a Class Action Complaint against Defendant General Motors LLC ("GM"). (ECF No. 1). The Complaint alleges that GM violated California and New Jersey law by including a "Destination Charge" in the listed sticker price of its vehicles that did not reflect the actual cost to GM of delivering the vehicles to dealerships and by failing to disclose that the charge included profit. (*See id.*).

[*785] On August 2, 2021, GM filed a Motion to Dismiss Plaintiffs' Class Action Complaint **[**2]** for failure to state a claim under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. (ECF No. 12). On August 24, 2021, Plaintiffs filed an Opposition to the Motion to Dismiss. (ECF No. 13). On August 31, 2021, Defendant filed a Reply. (ECF No. 14).

II. ALLEGATIONS IN THE COMPLAINT

Defendant GM "designs, engineers, manufactures and sells vehicles." (ECF No. 1 ¶ 24). The "Monroney" price stickers on vehicles sold by GM "break out [a] Destination Charge separate and apart from the base MSRP and include it as an add-on." (*Id.* ¶ 27). This disclosure is mandated by the Federal Automobile Information Disclosure Act, which requires manufacturers to list "the amount charged to the dealer for the transportation of the car to the place of delivery." (*Id.* ¶ 32). "A vehicle's destination fee is generally understood in the automotive industry to reflect the manufacturer's average cost of delivering one of its vehicles to a dealership." (*Id.* ¶ 2). "Line items are intended to inform consumers of the reason they are being charged" and "[c]onsumers do not generally expect line-item costs to include hidden profit." (*Id.* ¶ 32).

"Despite its name, the 'Destination Charge' has little to do with getting the vehicle to its intended destination" and instead **[**3]** is used as a "vessel for profit." (*Id.* ¶¶ 27-28). "[T]he increase in GM's Destination Charge over the past decade has not and is not correlated with the actual increase in costs of shipping." (*Id.* ¶ 30). "[O]ther automakers['] 'destination fees' have not increased at the same pace during this ten-year period." (*Id.* ¶ 30). "[O]ther major industry participants routinely disclose that their 'destination fees' are largely comprised of profit." (*Id.* ¶ 32). GM "never discloses that the Destination Charge far exceeds the actual costs it pays to transport its vehicles to dealers." (*Id.* ¶ 35). By labelling the charge a "Destination Charge," GM "misleads reasonable consumers into believing its 'Destination Charge' reflects the actual cost of shipping its vehicles to their 'destination,' not the cost of shipping its vehicles *plus* profit." (*Id.* ¶ 26).

Plaintiffs Robert Romoff and Joe Siciliano are citizens of California and New Jersey, respectively, who purchased new GM vehicles. Prior to purchasing the vehicles, Plaintiffs viewed the vehicles' price stickers. Romoff's vehicle included a Destination Charge of $1,195 and Siciliano's vehicle included a Destination Charge of $995. Plaintiffs "reasonably **[**4]** believed that the . . . Destination Charge represented GM's cost to deliver" the vehicles "and further understood that the Destination Charge was a pass-through cost that [they were] required to pay and unable to negotiate." (*Id.* ¶¶ 14, 20). GM "failed to disclose that it had included profit in the Destination Charge." (*Id.* ¶¶ 15, 21). Plaintiffs were damaged by GM's "material misrepresentations and omissions" because they "overpaid" for their vehicles by paying the full Destination Charge. (*Id.* ¶¶ 17, 23). Had they known the truth, Plaintiffs "would not have purchased or leased the [ ] [v]ehicles, or would have paid significantly less for them." (*Id.* ¶¶ 61, 77).

Plaintiffs seek to represent the following classes:

> All consumers who, during the applicable statute of limitations, purchased or leased a Class Vehicle in the state of California and paid a Destination Charge (the "California Class"). All consumers who, during the applicable statute of limitations, purchased or leased a Class Vehicle in the state of New Jersey **[*786]** and paid a Destination Charge (the "New Jersey Class").

(*Id.* ¶ 44).

Plaintiffs brings the following individual and class claims against GM: (1) violation of California's **[**5]** Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code §§ 17200, et seq.*; (2) violation of *California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, et seq.*; (3) violation of the New Jersey Consumer Fraud Act ("NJCFA"), *N.J. Stat. Ann. § 56:8-1*; and (4) unjust enrichment (on behalf of both classes). Plaintiffs seeks declaratory and injunctive relief, restitution, disgorgement, damages, pre-judgment interest, and attorneys' fees and costs.

III. CONTENTIONS

GM contends that its conduct was not deceptive because the amount and existence of the Destination Charge and total vehicle price was fully disclosed prior to purchase. GM contends that Plaintiffs' statutory claims should be dismissed because: (1) GM had no duty to disclose any additional information about the charge; (2) whether profit is included in a charge is not a material fact to a reasonable or average consumer; and (3) Plaintiffs have not satisfied the CLRA, UCL, and NJCFA's standing requirements. GM contends that the UCL claim should be dismissed due to the lack of predicate unlawful acts. GM contends that Plaintiffs' equitable claims should be dismissed because Plaintiffs have an adequate remedy at law.

Plaintiffs contend that a disclosed fee can be deceptive to a reasonable or average consumer when it is misrepresented as a pass-through cost. Plaintiffs **[**6]** contend that whether a reasonable consumer would be deceived is a question that is not appropriate for resolution at this stage of the litigation. Plaintiffs contend that GM's alleged violation of the CLRA is an adequate basis for their UCL claim. Plaintiffs contend that GM has a duty to disclose the existence of profit in the Destination Charge. Plaintiffs contend that GM's misrepresentations and omissions are material. Plaintiffs contend that the Complaint adequately alleges reliance, causation, and economic injury. Plaintiffs contend that the Complaint alleges fact sufficient to support their claims for equitable relief and that they can plead in the alternative at this stage in the litigation.

IV. LEGAL STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits dismissal for "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. In order to state a claim for relief, a pleading "must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. Dismissal under *Rule 12(b)(6)* "is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1041 (9th Cir. 2010)* (quoting *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*).

"To survive a motion to dismiss, a complaint must contain sufficient **[**7]** factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation **[*787]** of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (second alteration in original) (quoting *Fed. R. Civ. P. 8(a)*).

Additionally, claims sounding in fraud must comply with the heightened pleading requirements of *Federal Rule of Civil Procedure 9(b)*, which requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*. "To comply with *Rule 9(b)*, allegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Bly—Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)*. *Rule 9(b)* "requires more specificity including an account of the time, place, and specific content of the false representations as well as the identities **[**8]** of the parties to the misrepresentations." *Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)*.

V. DISCUSSION

California's Consumers Legal Remedies Act prohibits "unfair methods of competition and unfair or deceptive acts or practices." *Cal. Civ. Code § 1770*. Among the twenty-four activities deemed unlawful by the CLRA, two are alleged in this case: "[r]epresenting that goods or services have . . . characteristics . . . that they do not have" and "[a]dvertising goods or services with intent not to sell them as advertised." *Id. § 1770(a)(5)*, *(9)*.

California's Unfair Competition Law prohibits "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. "Because Business & Professions Code § 17200 is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent." Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999). A practice is "unlawful" if it violates other laws, including the CLRA. Kasky v. Nike, Inc., 27 Cal. 4th 939, 949, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002). A practice is "fraudulent" if "members of the public are likely to be deceived." Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1169 (9th Cir. 2012). The "unfair" prong of the UCL prohibits "practice[s] [that] may be deemed unfair even if not specifically proscribed by some other law." Cel-Tech Commc'ns, 20 Cal. 4th at 180.

New Jersey's Consumer Fraud Act prohibits:

> [t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, **[**9]** misrepresentation, or the knowing concealment, suppression, or omission of any material fact with the intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise . . ., or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby.

N.J. Stat. Ann. § 56:8-2. The NJCFA thus sets forth three general categories of unlawful acts: "(1) affirmative acts; (2) knowing omissions; and (3) regulatory violations." Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 245, 872 A.2d 783 (2005).

Plaintiffs allege that by calling the charge a "Destination Charge," GM affirmatively "misleads reasonable consumers into believing its 'Destination Charge' reflects the actual cost of shipping its vehicles to their 'destination,' not the cost of shipping its vehicles *plus* profit." **[*788]** (ECF No. 1 ¶ 26). The CLRA and the fraudulent prong of the UCL proscribe conduct that is "likely to deceive" a "reasonable consumer." *Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008)*. "[T]he reasonable consumer standard requires a probability 'that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.'" *Ebner v. Fresh, Inc., 838 F.3d 958, 965 (9th Cir. 2016)*. The NJCFA imposes a similar "average **[**10]** consumer" standard in determining whether conduct is unlawful. *See* Cox v. Sears Roebuck & Co., 138 N.J. 2, 17, 647 A.2d 454 (1994) ("The capacity to mislead is the prime ingredient of all types of consumer fraud."); Smajlaj v. Campbell Soup Co., 782 F. Supp. 2d 84, 98 (D.N.J. 2011) ("To constitute consumer fraud the business practice in question must be misleading and stand outside the norm of reasonable business practice in that it will victimize the average consumer."). "'[W]hether a practice is deceptive will usually be a question of fact not appropriate for decision on demurrer' or motions to dismiss." Moore v. Mars Petcare US, Inc., 966 F.3d 1007, 1017 (9th Cir. 2020). However, "if common sense would not lead anyone to be misled, then the claim may be disposed of at a motion to dismiss stage." Id. at 1018; *see also* Hassler v. Sovereign Bank, 644 F. Supp. 2d 509, 516 (D.N.J. 2009) ("[C]ourts have dismissed [NJCFA] complaints for failure to state a claim where plaintiffs have failed to allege that the defendant engaged in conduct that could be considered misleading within the meaning of the Act.").

The Complaint alleges that the price stickers on vehicles sold by GM "break out [a] Destination Charge separate and apart from the base MSRP and include it as an add-on." (ECF No. 1 ¶ 27). The Complaint alleges that this disclosure is mandated by the Federal Automobile Information Disclosure Act ("AIDA"), which requires manufacturers to list "the amount **[**11]** charged to the dealer for the transportation of the car to the place of delivery." (*Id.* ¶ 32). The Complaint alleges that "[a] vehicle's destination fee is generally understood in the automotive industry to reflect the manufacturer's average cost of delivering one of its vehicles to a dealership." (*Id.* ¶ 2). The Complaint alleges that "[l]ine items are intended to inform consumers of the reason they are being charged" and "[c]onsumers do not generally expect line-item costs to include hidden profit." (*Id.* ¶ 32). The Complaint alleges that GM's "'Destination Charge' has little to do with getting the vehicle to its intended destination" and instead is used as a "vessel for profit." (*Id.* ¶¶ 27-28). The Complaint alleges that by labelling the charge a

"Destination Charge," GM "misleads reasonable consumers into believing its 'Destination Charge' reflects the actual cost of shipping its vehicles to their 'destination,' not the cost of shipping its vehicles *plus* profit." (*Id.* ¶ 26).

The word "charge"—as used in the Complaint—is defined as "the price demanded for something." Charge, Merriam Webster, https://www.merriam-webster.com/dictionary/charge (last accessed Nov. 17, 2021); *see also* *Moore, 966 F.3d at 1018* **[**12]** (discussing the dictionary definition of a term in analyzing whether a label was misleading to a reasonable consumer under California statutes); *Hassler, 644 F. Supp. 2d at 516* (discussing dictionary definition in analysis of NJCFA claim). Reasonable or average consumers would not be surprised to learn that the price of goods often includes profit for the seller. The term "Destination Charge" does not reasonably imply an absence of profit. *See* *Becerra v. Dr Pepper/Seven Up, Inc., 945 F.3d 1225, 1230 (9th Cir. 2019)* (rejecting an argument that a term in a label was misleading "[j]ust because some consumers **[*789]** may unreasonably interpret the term differently").

As alleged in the Complaint, the amount and existence of the Destination Charge and the total listed sticker price of GM's vehicles were fully disclosed. Plaintiffs received the vehicles they were promised at the prices they agreed upon. GM's alleged disclosure of the Destination Charge complied with the AIDA requirement that manufacturers divulge "the amount charged, if any, to such dealer for the transportation of such automobile to the location at which it is delivered to such dealer." *15 U.S.C. § 1232(f)(3)*. The statutory language contained in the AIDA—requiring disclosure of "the amount charged" to the dealer—no more suggests the absence of profit than the term "Destination Charge" itself. In summary, the allegations concerning the context of the vehicles' sales do not alter the common-sense understanding that a charge can include profit. *See Ebner, 838 F.3d at 966* (affirming dismissal of UCL and CLRA claims because "[a]part from the **[**13]** accurate [ ] label, there are no other words, pictures, or diagrams adorning the packaging . . . from which *any* inference could be drawn or on which *any* reasonable belief could be based"). The Court concludes that the Complaint fails to allege facts to support an inference that Defendant made any affirmative misrepresentation.

In addition to alleging that the term "Destination Charge" is an affirmative misrepresentation, Plaintiffs also plead an omission theory of liability—that GM had a duty to disclose the existence of profit in the Destination Charge and failed to do so. To be actionable under the CLRA, UCL, or NJCFA, the omitted fact must be material. *See* *Hodsdon v. Mars, Inc., 891 F.3d 857, 863 (9th Cir. 2018)* (requiring the plaintiff to allege that an omission is material to plead a claim under California consumer protection laws); *N.J. Stat. Ann. § 56:8-2* (prohibiting the "act, use or employment by any person of any . . . knowing concealment, suppression, or omission of any *material* fact . . . ." (emphasis added)). A fact is material if a reasonable person would attach importance to its existence in determining his or her course of action. *See* *Friedman v. AARP, Inc., 855 F.3d 1047, 1055 (9th Cir. 2017)*; *Peters v. U.S. Dep't of Housing & Urban Dev., No. Civ. 04:06057-RBK, 2006 U.S. Dist. LEXIS 4727, 2006 WL 278916, at *5 (D.N.J. Feb. 1, 2006)*.

The Court has concluded that a reasonable or average consumer would not expect the Destination Charge to exclude **[**14]** profit. As a result, additional disclosure of the fact that the charge includes profit would not affect a reasonable or average consumer's understanding of the composition of the Destination Charge. GM's omission of additional information regarding the Destination Charge is not material.

The unlawful prong of the UCL "borrows violations of other laws and treats them as unlawful practices that the [UCL] makes independently actionable." *Alvarez v. Chevron Corp., 656 F.3d 925, 933 n.8 (9th Cir. 2011)*. The Complaint alleges that GM's conduct was unlawful under the UCL because GM's conduct violated the CLRA and California's False Advertising Law, *Cal. Bus. & Prof. Code § 17500, et seq.* The reasonable consumer standard applies to both of these borrowed statutes. *See Williams, 552 F.3d at 938*. Plaintiffs' unlawful-prong UCL claim fails because the Complaint does not adequately plead a violation of any predicate law.

The "unfair" prong of the UCL prohibits "practice[s] [that] may be deemed unfair even if not specifically proscribed by some other law." *Cel-Tech Commc'ns, 20 Cal. 4th at 180*.

> Under the UCL's unfairness prong, courts consider either: (1) whether the **[*790]** challenged conduct is tethered to any underlying constitutional, statutory or regulatory provision, or that it threatens an incipient

> violation of an ***antitrust law***, or violates the policy or spirit **[**15]** of an ***antitrust law***; (2) whether the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers; or (3) whether the practice's impact on the victim outweighs the reasons, justifications and motives of the alleged wrongdoer.

Doe v. CVS Pharm, Inc., 982 F.3d 1204, 1214-15 (9th Cir. 2020). The factual basis for Plaintiffs' unfair-prong UCL claim is the same as for Plaintiffs' other claims. Because the Complaint fails to allege facts to support an inference that GM's conduct is deceptive or violates any statutory provision, this Court joins numerous other district courts in holding that the unfair-prong claim must also be rejected. *See* *Sue Shin v. Campbell Soup Co., No. CV 17-1082-DMG (JCx), 2017 U.S. Dist. LEXIS 136121, 2017 WL 3534991, at *8 (C.D. Cal. Aug. 9, 2017)* ("Here, Shin's UCL unfair prong claim overlaps entirely with her claim under the fraudulent prong. Accordingly, for the same reasons the Court granted Campbell's motion to dismiss as to the FAL, CLRA, and UCL fraudulent-prong claims, the Court [grants] Campbell's motion to dismiss Shin's unfair-prong UCL claim."); *Hadley v. Kellogg Sales Co. 243 F. Supp. 3d 1074, 1105 (N.D. Cal. 2017)* (collecting cases). The Court concludes that the Motion to Dismiss is granted as to Plaintiff's CLRA, UCL, and NJCFA claims.

In California, "[w]hen a plaintiff alleges unjust enrichment, a court may construe the cause of action as a quasi-contract claim seeking restitution. **[**16]** *Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753, 762 (9th Cir. 2015)* (internal citations and quotations omitted). "To allege unjust enrichment as an independent cause of action, a plaintiff must show that the defendant received and unjustly retained a benefit at the plaintiff's expense." *ESG Capital Partners, LP v. Stratos, 828 F.3d 1023, 1038 (9th Cir. 2016)*. The test is the same under New Jersey law—"a plaintiff must show both that [the] defendant received a benefit and that retention of that benefit without payment would be unjust." *VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554, 641 A.2d 519 (1994)*.

GM's conduct cannot be considered "unjust" because the Complaint fails to adequately allege facts to support an inference that GM's conduct is deceptive. *See Ebner, 838 F.3d at 968* ("Because we have concluded that the FAC fails to state a claim under any of these [California] statutes, the unjust enrichment cause of action has been mooted."); *Maniscalco v. Brother Intern. Corp. (USA), 627 F. Supp. 2d 494, 505 (D.N.J. 2009)* ("Plaintiffs' unjust enrichment claims . . . are identical to their claims under the CFA . . . . Therefore, BIC's argument based solely on Plaintiffs' purportedly failed CFA allegations, has no merit."). The Court concludes that the Motion to Dismiss is granted as to Plaintiffs' unjust enrichment claims.

VI. CONCLUSION

IT IS HEREBY ORDERED that the Motion to Dismiss Plaintiffs' Class Action Complaint filed by Defendant (ECF No. 12) is granted. The Class Action Complaint **[**17]** (ECF No. 1) is dismissed without prejudice. No later than thirty (30) days from the date of this Order, Plaintiffs Robert Romoff and Joe Siciliano may file any motion for leave to amend pursuant to *Civil Local Rules 7.1* and *15.1(c)*. If no motion is filed, the case will be closed.

Dated: December 2, 2021

/s/ William Q. Hayes

Hon. William Q. Hayes

United States District Court

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Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.

United States Court of Appeals for the Ninth Circuit

August 31, 2021, Argued and Submitted, Seattle, Washington; December 6, 2021, Filed

No. 20-15837, No. 20-15940

Reporter

20 F.4th 466 *; 2021 U.S. App. LEXIS 35876 **; 111 Fed. R. Serv. 3d (Callaghan) 926

OPTRONIC TECHNOLOGIES, INC., DBA Orion Telescopes & Binoculars, Plaintiff-Appellee, v. NINGBO SUNNY ELECTRONIC CO., LTD., Defendant-Appellant, and SUNNY OPTICS, INC.; MEADE INSTRUMENTS CORP.; DOES, 1-25, Defendants.OPTRONIC TECHNOLOGIES, INC., DBA Orion Telescopes & Binoculars, Plaintiff-Appellant, v. NINGBO SUNNY ELECTRONIC CO., LTD.; SUNNY OPTICS, INC.; MEADE INSTRUMENTS CORP.; DOES, 1-25, Defendants-Appellees.

Prior History: [1]** Appeals from the United States District Court for the Northern District of California. D.C. No. 5:16-cv-06370-EJD. Edward J. Davila, District Judge, Presiding.

Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., 2020 U.S. Dist. LEXIS 59298, 2020 WL 1667435 (N.D. Cal., Apr. 3, 2020)
Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., 2020 U.S. Dist. LEXIS 62795, 2020 WL 1812257 (N.D. Cal., Apr. 9, 2020)

Disposition: VACATED in part only with regard to the valuation of the settlement set-off, which is REMANDED for further proceedings consistent with this opinion. AFFIRMED with regard to all other issues. We AWARD costs on appeal to Orion.

Core Terms

telescope, district court, manufacturing, damages, conspiracy, monopolize, competitor, antitrust, prices, email, acquisition, acquire, jury's verdict, conspired, bid, Entities, buy, relevant market, monopoly power, market share, overcharges, percent, terms, injunction, calculate, injunctive relief, specific intent, anti trust law, anticompetitive, parties

LexisNexis® Headnotes

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

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

Appellate courts review evidentiary rulings for abuse of discretion and will reverse only if incorrect evidentiary rulings were prejudicial.

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

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN2[] **Standards of Review, De Novo Review**

A jury verdict will be upheld if supported by substantial evidence. Appellate courts may not weigh the evidence but simply ask whether the plaintiff has presented sufficient evidence to support the jury's conclusion. Any underlying legal analysis or statutory interpretation is reviewed de novo. But findings of fact will be reversed only when the evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict.

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

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

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

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

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

HN3[] **Standards of Review, Abuse of Discretion**

Appellate courts review de novo a district court's denial of a renewed motion for judgment as a matter of law. Appellate courts review for abuse of discretion a district court's rulings on motions to alter or amend a judgment, motions for a permanent injunction, and motions for a new trial.

Civil Procedure > ... > Discovery > Methods of Discovery > Expert Witness Discovery

Evidence > ... > Testimony > Examination > Direct Examinations

HN4[] **Methods of Discovery, Expert Witness Discovery**

Although the advisory notes to Fed. R. Civ. P. 26(a)(2)(B) permit counsel to assist experts in preparing reports, an expert report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

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

Evidence > Inferences & Presumptions > Inferences

HN5[] **Standards of Review, Abuse of Discretion**

A district court abuses its discretion if it misapplies the law or makes a finding that is illogical, implausible, or without support in inferences which can be drawn from the record.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Trials > Jury Trials > Jury Instructions

HN6[] Judges, Discretionary Powers

A district court has substantial latitude in formulating jury instructions.

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

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

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

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

HN7[] Conspiracy to Monopolize, Elements

By its terms, Section 1 of the Sherman Act bans every contract, combination, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. 15 U.S.C.S. § 1. The elements of a Section 1 claim are: (1) a contract, combination, or conspiracy; (2) that unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce. To establish a conspiracy, the available evidence must tend to exclude the possibility that the alleged conspirators acted independently. Horizontal price fixing and market allocation are per se Section 1 violations.

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

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

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

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

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

HN8[] Actual Monopolization, Claims

Section 2 of the Sherman Act makes it illegal to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce. 15 U.S.C.S. § 2. While section 1 of the Sherman Act targets concerted anticompetitive conduct, section 2 of the Sherman Act targets independent anticompetitive conduct. Monopoly power itself is not unlawful—instead, it must be accompanied by an element of anticompetitive conduct to trigger section 2 of the Sherman Act liability.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN9[] Sherman Act, Claims

Attempted monopolization under section 2 of the Sherman Act, 15 U.S.C.S. § 2, requires: (1) specific intent to monopolize a relevant market; (2) predatory or anticompetitive conduct; and (3) a dangerous probability of success. Conspiracy to monopolize requires: (1) an agreement or understanding between alleged conspirators; (2) a specific intent to monopolize; and (3) overt acts in furtherance of the alleged conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN10[] Sherman Act, Claims

To define a market under section 2 of the Sherman Act, 15 U.S.C.S. § 2, the district court must determine: (1) the field in which the plaintiff was engaged in geographic and distributional terms, and (2) the product, or product line, that competes in that field. The relevant market is defined as the commodities reasonably interchangeable by consumers for the same purpose. Appellate courts review relevant market definitions as fact findings reversible only if the evidence compels a conclusion contrary to the jury's verdict.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

HN11[] Sherman Act, Claims

Courts use the specific intent element to limit the reach of an attempt claim to conduct threatening monopolization under section 2 of the Sherman Act, 15 U.S.C.S. § 2. A plaintiff may establish specific intent to monopolize through either direct evidence of unlawful design or circumstantial evidence principally of illegal conduct. This inference may be drawn from conduct with an unreasonable restraint of trade in violation of section 1 of the Sherman Act, 15 U.S.C.S. § 1.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

Antitrust & Trade Law > Sherman Act > Claims

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

HN12[] Actual Monopolization, Claims

Monopoly power is the ability to control prices or exclude competition in the relevant market. It can be proven by direct or circumstantial evidence. The latter approach requires plaintiffs to (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run. A market share of 65% or more usually establishes a prima facie case of monopoly power in Section 2 of the Sherman Act, 15 U.S.C.S. § 2, contexts. But the minimum showing of market share required in an attempt case is a lower quantum than the minimum showing required in an actual monopolization case. A market share as low as 44% is sufficient to support a finding that a party was dangerously close to monopoly power where barriers to entry were high and competitors could not expand their short-run output.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Antitrust & Trade Law > Clayton Act > Scope

HN13[] **Clayton Act, Claims**

Section 7 of the Clayton Act prohibits mergers that tend substantially to lessen competition or create a monopoly. 15 U.S.C.S. § 18. To establish a prima facie section 7 case, a plaintiff must (1) propose the proper relevant market and (2) show that the effect of the merger in that market is likely to be anticompetitive. A new trial may be granted where there is no evidence on the amount of damages attributable only to the antitrust violation. But a district court's denial of a motion for a new trial is reversible only if the record contains no evidence in support of the verdict. Once a plaintiff establishes the fact of antitrust injury, appellate courts must uphold the jury's finding as to the amount of damages unless that finding is grossly excessive or monstrous, clearly not supported by the evidence, or only based on speculative guesswork.

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

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

HN14[] **Standards of Review, Abuse of Discretion**

Appellate courts review for abuse of discretion a grant of a permanent injunction and any decision underlying the imposition of the injunction is reviewed by the standard that is appropriate to that determination.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

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

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN15[] **Clayton Act, Claims**

Section 16 of the Clayton Act authorizes injunctive relief against any threatened loss or damage by a violation of the antitrust laws. 15 U.S.C.S. § 26. Such relief must be based on a clear indication of a significant causal connection between the conduct enjoined or mandated and the violation found directed toward the remedial goal intended. But a district court may order an injunction beyond a simple proscription against the precise conduct previously pursued. The reviewing court only asks if the relief is a reasonable method of eliminating the consequences of the illegal conduct. If the jury finds that monopolization or attempted monopolization has occurred, the available injunctive relief is broad, including to terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

HN16[] **Remedies, Injunctions**

A district court can order conduct to avoid a recurrence of the antitrust violation and to eliminate its consequences.

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN17[] **Remedies, Injunctions**

In antitrust cases involving injunctive relief, district courts have broad discretion to fit the decree to the special needs of the individual case.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN18[] **Remedies, Damages**

A plaintiff need not prove that the antitrust violation was the only cause of its injury in order to recover damages; proof that the violation was a material cause is sufficient.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

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

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN19[] **Remedies, Damages**

Where an antitrust plaintiff suffers continuing antitrust injuries from anticompetitive changes to market structure that arose from a proven antitrust violation, the violation may be a material cause of that injury, and so recovery of damages is permitted, even after the last proven date of the violative conduct. If a defendant has conspired to violate the antitrust laws and thereby harmed a market's competitive structure, it remains liable for the continuing injuries suffered by plaintiffs from the structural harm to competition that its unlawful scheme brought about. It is no defense to argue that the conspiracy has ended, where the conspiracy achieved its anticompetitive objective.

Civil Procedure > ... > Discovery > Methods of Discovery > Expert Witness Discovery

Civil Procedure > Pretrial Matters > Conferences > Scheduling Conferences

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

Civil Procedure > Pretrial Matters > Conferences > Pretrial Orders

HN20[] **Methods of Discovery, Expert Witness Discovery**

Fed. R. Civ. P. 26 states that a party must disclose to the other parties the identity of any expert witness it may use at trial. Fed. R. Civ. P. 26(a)(2)(A). If a scheduling order is issued, experts must be disclosed at the times and in the sequence that the court orders. Fed. R. Civ. P. 26(a)(2)(D).

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN21[] **Standing, Requirements**

A party must have antitrust standing, consisting of the (1) injury of the type the antitrust laws were intended to prevent that also (2) flows from that which makes defendants' acts unlawful. And monetary recovery will not be permitted for injuries independently caused by something other than the antitrust violation.

Summary:

SUMMARY[**]

Antitrust

The panel affirmed in part and vacated in part the district court's judgment, after a jury trial, in favor of Optronic Technologies, Inc., also known as Orion Telescopes & Binoculars, in Orion's lawsuit alleging that Ningbo Sunny Electronic Co. Ltd. and Sunny Optics, Inc., violated federal ***antitrust law*** and California laws.

Orion alleged that Sunny conspired with Suzhou Synta Optical Technology Co. Ltd. and other "Synta Entities" to fix prices and allocate the telescope market.

The panel held that the district court properly admitted the expert report and testimony of Drs. Jose Sasian and J. Douglas Zona, Orion's telescope manufacturing expert and damages expert, and properly excluded the testimony of Jeffrey Redman, a rebuttal expert for Sunny.

The panel held that the district court did not abuse **[**2]** its discretion by giving the jury a mid-trial curative instruction limiting the scope of the testimony of Dr. Celeste Saravia, a rebuttal expert on damages.

The panel held that Orion presented sufficient evidence to support the jury's verdict in Orion's favor on its Sherman Act § 1 claims. First, sufficient evidence supported the jury's verdict that Sunny conspired with horizontal competitor Synta to ensure that Sunny acquired Meade Instruments Corp., another telescope manufacturer, to protect their market share and guarantee that competitor Jinghua Optics & Electronics would not buy Meade. Second, sufficient evidence supported the jury's alternative findings that Sunny conspired with a competitor to fix prices or credit terms

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

in violation of § 1. Third, sufficient evidence supported the jury's verdict that Sunny agreed with Synta, a horizontal competitor, either not to compete with one another in the market, or to divide customers or potential customers between them.

The panel held that the evidence supported the jury's verdict for Orion on its Sherman Act § 2 claims of attempted monopolization and conspiracy to monopolize the global telescope manufacturing market. The panel concluded that the jury's verdict imposing **[**3]** § 2 liability did not depend on an improper joint monopoly theory. The panel held that Orion sufficiently defined the relevant market through expert testimony by Dr. Zona. In addition, sufficient evidence supported the jury's findings that Sunny expressed a specific intent to gain monopoly power and was dangerously close to attaining monopoly power.

The panel affirmed the jury's verdict for Orion on its Clayton Act § 7 claim, based on the jury's finding of a reasonable likelihood that Sunny's acquisition of Meade would substantially reduce competition in the telescope manufacturing market or create a monopoly. The panel held that Sunny was not entitled to a new trial on the issue of § 7 liability because Orion presented evidence of antitrust injury, and the jury's finding as to damages was neither grossly excessive unsupported, nor the result of guesswork.

The panel held that the district court did not abuse its discretion in imposing injunctive relief against Sunny under Clayton Act § 16.

The panel held that Orion offered substantial evidence in support of the district court's finding that the conspiracy between Sunny and Synta continued post 2016, and Sunny was not entitled to judgment as a matter of law on the issue **[**4]** of whether Orion was entitled to post-September 2016 damages.

Vacating in part, the panel held that the district court abused its discretion by excluding under Fed. R. Civ. P. 26 and 37 the declaration that Dr. Saravia gave in support of Sunny's motion to alter or amend the judgment with regard to the valuation of a settlement set-off. The panel remanded for further proceedings.

On Orion's cross-appeal, the panel affirmed the district court's grant of summary judgment for Sunny on the issue of whether Sunny caused Orion's failure to acquire Meade.

Counsel: Karin Bohmholdt (argued) and Hannah B. Shanks-Parkin, Greenberg Traurig LLP, Los Angeles, California, for Defendant-Appellant.

J. Noah Hagey (argued), Matthew Borden, Jeffrey M. Theodore, Ronald J. Fisher, and Athul K. Acharya, BraunHagey & Borden LLP, San Francisco, California, for Plaintiff-Appellee.

Judges: Before: A. Wallace Tashima and Ronald M. Gould, Circuit Judges, and Jed S. Rakoff,* District Judge. Opinion by Judge Gould.

Opinion by: Ronald M. Gould

Opinion

[*473] GOULD, Circuit Judge:

Optronic Technologies, Inc., also known as Orion Telescopes & Binoculars ("Orion"), filed a lawsuit alleging that Ningbo Sunny Electronic Co., Ltd. and Sunny Optics, Inc., collectively "Sunny," violated federal **[**5]** ***antitrust law*** and California laws. The case went to trial and the jury gave its verdict for Orion, awarding it $16.8 million in damages. Sunny appealed this verdict and several district court rulings. We have jurisdiction under 28 U.S.C. §

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

1291, and we affirm the jury's verdict. In so holding, we comment on the legal analysis a district court may use to resolve pre-and-post-trial motions in similar cases, and the evidence necessary to support a jury verdict in antitrust cases.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties

Orion is an American telescope company that designs and markets telescopes but does not make them. Sunny is a Chinese telescope manufacturer owned by Peter Ni, and James Chiu controls Sunny's manufacturing activities. Orion alleged that Sunny violated federal ***antitrust law*** and related California laws by unlawfully conspiring with Suzhou Synta Optical Technology Co. Ltd. ("Suzhou Synta"), Synta Technology Corp. ("Synta Tech"), and Celestron Acquisition LLC ("Celestron"), collectively **[*474]** the "Synta Entities." Sunny and Suzhou Synta are two of the biggest manufacturers of telescopes sold in the United States. The relationship between Suzhou Synta and Synta Tech is disputed, but David **[**6]** Shen is the principal of both companies, collectively "Synta." Celestron is a Suzhou Synta subsidiary and the largest telescope distributor in the United States. Celestron made its own telescopes but stopped after being acquired by Synta. Joe Lupica was Celestron's CEO and CFO but resigned to work on Sunny's 2013 acquisition of Meade Instruments Corp. ("Meade"), another telescope manufacturer. Sunny hired Lupica as Meade's CEO.

B. The Telescope Manufacturing Market

During the relevant time period, the key telescope distributors were Celestron, Meade, and Orion, whereas the main telescope manufacturers were Sunny, Synta, and Meade. Because most telescope manufacturers are private, market share data is not readily available. But public customs data show that, since 2012, Sunny and Synta have together accounted for up to 80 percent of telescopes imported into the United States. In 1991, the Federal Trade Commission ("FTC") blocked a proposed joint venture between Celestron and Meade. The FTC decided that this joint venture would "be a virtual monopolist in the manufacture and sale of [certain telescopes]." Meade had tried to acquire Celestron's assets in 2002, but the FTC prevented this **[**7]** deal "to maintain competition." In 2005, Synta bought all of Celestron's assets, including its intellectual property, and moved Celestron's telescope manufacturing to Synta's factory in China.

C. The Meade Deal

Meade made itself available for purchase in early 2013. Orion offered $4.5 million, but Meade chose to proceed with a different $4.5 million offer from Jinghua Optics & Electronics ("JOC") and announced the proposed merger in May 2013. Sunny intervened by submitting an unsolicited $5.87 million bid for Meade. Meade terminated the JOC merger and accepted Sunny's offer. Sunny created a holding company called Sunny Optics, to facilitate its acquisition of Meade. Orion claims Celestron and Synta colluded with Sunny to help it acquire Meade. The parties agree that a company called Sky Rainbow—which Orion insists is jointly owned by Peter Ni, the principal of Sunny, and David Shen, the principal of Synta—financed Sunny's acquisition of Meade. Sunny also admits it reached out to Celestron—now owned by Synta—to request that Celestron pay for already-purchased telescopes faster than it was obliged to do.

D. The Hayneedle Deal

In 2014, Hayneedle, an e-commerce company, decided to sell certain **[**8]** website addresses—including telescopes.com, on which Celestron relied heavily—known as the "Haystack Assets." Orion submitted the highest bid and signed a letter of intent with Hayneedle in May 2014. The Synta Entities sent an email advising Orion that the Synta Entities were cutting off Orion's line of credit. This email stated that "if Orion really buys Hayneedle, this will be the beginning of hazard [sic], we could not trust Orion's credit any more." The Synta Entities forwarded this email to Sunny and asked Sunny to also withdraw Orion's line of credit. Sunny sent Orion an almost identical email. Not surprisingly, Orion's deal with Hayneedle fell through. Orion claims it was unable to acquire the Hayneedle Assets after Synta and Sunny cut off its lines of credit.

E. Procedural History

In September 2016, Orion entered into Settlement and Supply Agreements with **[*475]** the Synta Entities to resolve antitrust claims related to Sunny's acquisition of Meade. Orion then sent a demand letter to Sunny, after which Sunny stopped selling telescopes to Orion. Orion filed this lawsuit on November 1, 2016. The operative complaint set out four claims against Sunny and two of its subsidiaries: (1) price-fixing **[**9]** and collusion by competitors in violation of *Sherman Act § 1*; (2) attempted monopolization and conspiracy to monopolize in violation of *Sherman Act § 2* and *Clayton Act § 7*; (3) violation of the California Unfair Competition Law ("UCL"); and (4) collusion to restrain trade in violation of California's Cartwright Act. Orion also sought compensatory and punitive damages, disgorgement, divesture, injunctive relief, and restitution from Sunny.

Both parties moved for summary judgment. The district court denied Orion's motion for summary judgment, but granted in part and denied in part Sunny's motion for summary judgment. Orion's summary judgment motion alleged that Sunny had violated *Sherman Act § 1* by conspiring with the Synta Entities to acquire Meade. Sunny argued that Orion lacked standing on this claim because Orion would not have acquired Meade regardless of misconduct by Sunny or its subsidiaries. The district court granted Sunny partial summary judgment on the issue of standing, holding "that Orion would not have acquired Meade in the absence of [Sunny's] alleged misconduct; JOC would have." But the district court found that Orion may still have been harmed by Sunny's acquisition of Meade because it concentrated the telescope market "more **[**10]** than five times the amount presumed to enhance market power." The district court found a genuine issue of material fact as to whether Sunny and Synta had entered into an agreement that harmed competition. Sunny also obtained summary judgment on Orion's below-cost pricing and refusal to deal claims.

Before trial, Orion timely designated two expert witnesses, Jose Sasian, PhD., and J. Douglas Zona, PhD. Sunny did not timely disclose any expert witnesses, but later disclosed fraud examiner Jeffrey Redman and economist Celeste Saravia, Ph.D. as rebuttal experts. The parties cross-filed motions to exclude the other's experts. The district court denied Sunny's motion but granted Orion's motion to exclude Mr. Redman's testimony. It partially granted Orion's motion to exclude Dr. Saravia.

A six-week jury trial was held. Dr. Saravia testified at trial, and Orion objected that she was impermissibly offering affirmative damages testimony. The district court sustained this objection and instructed the jury that it was "not to consider [Dr. Saravia's] testimony as to any amount of damages nor her opinion as to damages." After Orion rested, Sunny moved for judgment as a matter of law pursuant to *Federal Rule of Civil Procedure 50(a)* **[**11]** . The district court denied this motion.

The jury reached a verdict on November 26, 2019. It found Sunny liable on all claims tried before it and awarded a total of $16.8 million in damages. Sunny and Meade filed for bankruptcy on December 4, 2019, and litigation was stayed as to them. The district court entered a partial judgment for Orion and against Sunny on December 5, 2019. This partial judgment encompassed the *Sherman Act §§ 1* and *2*, *Clayton Act § 7*, *California UCL*, and *California Cartwright Act* claims, collectively the "Damages Claims." The district court then trebled the damages that were listed in the jury's verdict, under the *Clayton Act § 4*, *15 U.S.C. § 15*, and awarded Orion $50.4 million on the Damages Claims.

Sunny renewed its motion for judgment as a matter of law under **[*476]** *Federal Rule of Civil Procedure 50(b)* and moved for a new trial under *Federal Rule of Civil Procedure 59(a)*. The district court denied these motions. Sunny also moved to alter or amend the judgment under *Federal Rule of Civil Procedure 59(e)* to offset the value of the Settlement and Supply Agreements. The district court deducted $3.1 million from Orion's award, but did not offset any profits Orion derived from the Supply Agreement. In its view, Sunny had the burden of proof on this issue and the evidence that it offered to this end—a declaration by Dr. Saravia—was inadmissible as untimely **[**12]** under *Federal Rules of Civil Procedure 26* and *37*.

Orion moved for equitable relief and judgment on its UCL claim. The district court granted this motion, but reduced the scope of Orion's proposed injunction by ordering Sunny to: (1) supply Meade and Orion at non-discriminatory terms for five years; and (2) not communicate with Synta to the extent that such communication violated federal ***antitrust law***.

On April 10, 2020, the United States Bankruptcy Court for the Central District of California permitted the district court to enter a final judgment against Defendants Sunny Optics and Meade, which the district court did five days later. Sunny timely appealed.

II. STANDARDS OF REVIEW

HN1[] We review evidentiary rulings for abuse of discretion and will reverse only if incorrect evidentiary rulings were prejudicial. *Velazquez v. City of Long Beach, 793 F.3d 1010, 1017 (9th Cir. 2015)*.

HN2[] A jury verdict will be upheld if supported by substantial evidence. *Castro v. County of Los Angeles, 833 F.3d 1060, 1066 (9th Cir. 2016)*. "[W]e may not weigh the evidence but simply ask whether the plaintiff has presented sufficient evidence to support the jury's conclusion." *Id.* Any underlying legal analysis or statutory interpretation is reviewed *de novo*. *Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 814 (9th Cir. 2003)*. But findings of fact will be reversed only when the evidence "permits only one reasonable conclusion, and that conclusion is contrary **[**13]** to the jury's verdict." *Castro, 833 F.3d at 1066*.

HN3[] We review *de novo* a district court's denial of a renewed motion for judgment as a matter of law. *Id.* We review for abuse of discretion a district court's rulings on motions to alter or amend a judgment, *Idaho Potato Comm'n v. G & T Terminal Packaging, Inc., 425 F.3d 708, 718 (9th Cir. 2005)*, motions for a permanent injunction, *Bank of Am. v. City & County of San Francisco, 309 F.3d 551, 557 (9th Cir. 2002)*, and motions for a new trial, *City Sols., Inc. v. Clear Channel Commc'ns, 365 F.3d 835, 843 (9th Cir. 2004)*.

III. SUNNY'S APPEAL

A.

Sunny seeks reversal on the basis that the district court made three erroneous evidentiary rulings as to experts. We disagree.

Sunny first challenges the district court's admission of the testimony of Dr. Sasian, Orion's telescope manufacturing expert. Dr. Sasian's testimony that Sunny and Synta could make the same telescopes supports an inference that Sunny and Synta are horizontal competitors. This inference is relevant because Orion alleged that Sunny and Synta conspired to fix prices and allocate the telescope market, which are *per se* antitrust violations when engaged in by horizontal competitors. *See* *Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)*; **[*477]** *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 986 (9th Cir. 2000)*.

Sunny argues that Dr. Sasian's testimony was "junk-science untethered to the facts of the case" because he only visited Celestron's factory for two hours roughly thirty-six years ago and relied on publicly available data from Orion's website. But Dr. Sasian's report **[**14]** and testimony explained how he used the product specifications of telescopes made by Sunny and Synta to determine that they could make each other's products. That these data were publicly available on Orion's website does not make Dr. Sasian's report untethered to the facts of this case.

Sunny also contends that Dr. Sasian's admission that 60% of his report was written by counsel gives grounds for reversal. ***HN4***[] Although the advisory notes to *Federal Rule of Civil Procedure 26(a)(2)(B)* permit counsel to assist experts in preparing reports, "the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness." The district court properly admitted Dr. Sasian's report because the parts written by counsel consisted of background information qualified by statements such as "I am informed that . . . ." Dr. Sasian also testified that he signed his report after reviewing and editing it and determining that it accurately reflected his analysis and opinion with regard to the case.

Sunny further contends that Dr. Sasian was not qualified as an expert because he has made only "a couple of hobby telescopes." **[**15]** But the district court reasonably found that Dr. Sasian is qualified to testify as to whether it is technically feasible for Sunny and Synta to manufacture certain telescopes made by the other company. Dr. Sasian holds a Ph.D. in optical sciences, serves as an astronomy and optical sciences professor, has published research regarding the design, fabrication, and testing of various optical devices including telescopes, and previously worked at AT&T Bell Laboratories, where he personally oversaw the design and fabrication of lens systems.

We conclude that the district court properly admitted Dr. Sasian's expert report and testimony. *See United States v. Hinkson, 585 F.3d 1247, 1263 (9th Cir. 2009)* (*en banc*) (holding that***HN5***[] a district court abuses its discretion if it misapplies the law or makes a finding that is illogical, implausible, or without support in inferences which can be drawn from the record).

Sunny also disputes the district court's admission of the testimony of Dr. Zona, Orion's damages expert. Sunny maintains that Dr. Zona's testimony was insufficiently tied to the facts of the case because he relied on theoretical economic models instead of "actual data" and did not calculate the actual overcharges Sunny inflicted on Orion.

Dr. Zona **[**16]** used two methods—direct and structural—to calculate damages. For the direct method, Dr. Zona's elasticity, margin, and pass-through calculations were based on data from the telescope manufacturing market, but he explained that the overcharges inflicted on Orion are not directly observable. Dr. Zona estimated these overcharges by looking to the number of alleged co-conspirators and considering the market shares of manufacturers in the relevant market. One method measured cartel overcharges from other conspiracies with similar market compositions, though Dr. Zona noted that his estimates could be conservative because the telescope market had so few buyers, which would likely magnify the overcharges. Dr. Zona separately looked to the structural theory of Cournot Equilibrium, an economic **[*478]** model where competitors simultaneously choose levels of output to maximize their profits. He adjusted this analysis to reflect the relevant market structure, of which two colluders—Sunny and Synta—controlled more than 70% of the market, based on data taken directly from this case. This Cournot Equilibrium model corroborated the results that Dr. Zona derived from his analysis of cartels operating in markets **[**17]** with compositions similar to the telescope market. Dr. Zona separately calculated damages through the structural method to check his direct method calculations. Dr. Zona's expert report and testimony were sufficiently tied to the facts of this case such that the district court properly admitted this evidence. *See Velazquez, 793 F.3d at 1017*; *Hinkson, 585 F.3d at 1263*.

The final pretrial evidentiary ruling that Sunny contests is the district court's exclusion of the testimony of Mr. Redman, one of Sunny's rebuttal experts. On appeal, Sunny argues that, although Mr. Redman is not an accountant or economist, he is qualified in these areas based on experience alone, and he should have been admitted because courts "routinely allow non-economists" to rebut expert economists such as Dr. Zona.

Sunny's arguments are unavailing. Mr. Redman admitted that he did not grasp the meaning of the term "pass through" as used by Dr. Zona. He also conceded that he was unfamiliar with the private cartel data that Dr. Zona used to estimate Orion's overcharges. In addition, Mr. Redman had no experience with antitrust damages and had never calculated elasticity or overcharges in antitrust contexts. Mr. Redman stated that the structural model used by Dr. Zona **[**18]** is "out of [his] area of expertise," and his arguments for how to calculate an overcharge violated antitrust economic principles. As the district court found, "Mr. Redman does not appear to understand the methods and models that Dr. Zona used." We hold that the district court properly excluded testimony of Mr. Redman as to Dr. Zona. *See* *Hinkson, 585 F.3d at 1263*. There was no abuse of discretion in this ruling.

B.

Sunny challenges the district court's mid-trial curative instruction limiting the scope of Dr. Saravia's expert witness testimony, contending that this ruling was an abuse of discretion.

At trial, Dr. Saravia, who was only a rebuttal expert, testified regarding her sensitivity analysis of Dr. Zona's damages calculations, in which she adjusted the parameters—*i.e.*, inputs—he used in his damages model by replacing them with alternative inputs that she deemed "more consistent with facts in the case." Dr. Saravia testified that, after her adjustments, Dr. Zona's "estimate of damages . . . goes way down," as shown by a slide titled "Making Reasonable Adjustments Dramatically Lowers Dr. Zona's Damages." Orion objected that Dr. Saravia had exceeded the bounds of rebuttal testimony by giving affirmative damages **[**19]** testimony.

The parties agreed that the district court had properly prohibited Dr. Saravia from presenting alternative damages estimates or models as part of her rebuttal testimony. The district court gave a curative instruction, in which it advised the jury that it was striking Dr. Saravia's testimony to the extent that she had presented a lower measure of damages than the one calculated by Dr. Zona. In issuing this curative instruction, the district court further explained to the jury that Dr. Saravia's criticisms of the methods used by Dr. Zona, as shown by her sensitivity analysis, were properly before the jury and **[*479]** could be considered, but that she was not permitted to provide an alternative estimate of her own. The district court did not, as Sunny claims, tell the jury to ignore Dr. Saravia's testimony altogether. Indeed, Sunny's counsel continued his direct examination of Dr. Saravia after the district court's curative instruction and clarified that she was only testifying as to her sensitivity analysis and not to an alternative measure of damages. We therefore conclude that the district court did not abuse its discretion in giving its curative instruction on Dr. Saravia's damages **[**20]** testimony. *See United States v. Rodriguez, 971 F.3d 1005, 1016 (9th Cir. 2020)* (stating that ***HN6***[] "[t]he district court has substantial latitude in formulating jury instructions" (cleaned up)).

C.

Sunny seeks reversal on the basis that Orion presented insufficient evidence to support three parts of the jury's verdict in Orion's favor on its *Sherman Act § 1* ("*Section 1*") claims. We reject these contentions.

HN7[] By its terms, *Section 1* bans every "contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 1*. The elements of a *Section 1* claim are: (1) a contract, combination, or conspiracy; (2) "that unreasonably restrained trade under either a *per se* rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce." *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001)*. To establish a conspiracy, the available evidence must tend "'to exclude the possibility' that the alleged conspirators acted independently." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Horizontal price fixing and market allocation are *per se* *Section 1* violations. *See* *Palmer, 498 U.S. at 49*; *Knevelbaard Dairies, 232 F.3d at 986*.

Sunny first contends that substantial evidence does not support the jury's verdict that Sunny conspired with horizontal competitor Synta to ensure that Sunny acquired Meade to protect their market share and guarantee that competitor JOC would not buy Meade. **[**21]** If proven, that would be a *per se* *Section 1* violation. *See* *Helix Milling Co. v. Terminal Flour Mills Co., 523 F.2d 1317, 1322 (9th Cir. 1975)*.

At trial Orion offered evidence from which the jury could conclude that Peter Ni, David Shen, and other Synta executives discussed, before Sunny submitted its bid for Meade, arranging a transaction in which Sunny would acquire Meade. An email between Ni, Shen, and other Synta executives states that Sunny bought Meade "to prevent JOC to buy Meade," and Synta executives agreed that Celestron—which was owned by Synta—and Synta would "provide[] the financial support to Sunny" for its purchase of Meade. Orion also presented evidence that

Synta did in fact provide such financial support. Specifically, Celestron made $7.2 million in "prepayments" to Sunny for unshipped telescopes, and gave Sunny $10 million in interest-free loans to fund Meade's operations, Indeed, Orion offered evidence that Sunny's purchase of Meade was financed by funds provided by Sky Rainbow, an entity jointly owned by Ni and Shen. Orion further pointed out that Celestron and Synta received interests in Meade equivalent to the funds they provided for Sunny's acquisition of Meade, which signaled that Sunny rewarded Celestron and Synta for this financial support. The jury **[**22]** also viewed evidence that Celestron executives ran Sunny's acquisition of Meade. In 2013, Celestron's CEO resigned to consult Sunny on the Meade deal then became the CEO of **[*480]** Meade. Sunny also instructed the lawyers who represented it in the Meade deal to take advice from Shen.

Orion also offered evidence from which the jury could infer that Sunny's acquisition of Meade was part of a larger scheme in which Sunny and Synta aimed to jointly control the telescope market notwithstanding that federal regulators had already prohibited such a combination. After former Celestron CEO Joe Lupica became the CEO of Meade, he sent an email indicating that the owners of Sunny and Synta—Peter Ni and David Shen—had a "vision of how the four companies are to cooperate for the benefit of the entire group of companies." Lupica later sent another email stating that "[i]f we take advantage of the strong relationships among Sunny, Synta, Celestron and Meade (under Peter's ownership), we can quickly turn the company around and the four companies can dominate the telescope industry." To this end, Lupica insisted that "we need to have one senior management team managing Meade and Celestron." And the evidence **[**23]** was such that the jury could infer that Lupica was aware that the FTC had blocked two prior attempts to merge Celestron and Meade because the combined entity would be "a virtual monopolist in the manufacture and sale of [certain telescopes]."

We thus hold that substantial evidence supports the jury's verdict that Sunny and Synta conspired to acquire Meade to protect their market share and stop a competitor from buying Meade. *See* *Castro, 833 F.3d at 1066*.

Sunny also challenges the jury's alternative findings that Sunny conspired with a competitor to fix prices or credit terms in violation of *Section 1*. But the jury could infer from the evidence that Synta controls an entity called Good Advance, and that Sunny and Synta conspired to fix the prices that they charged Orion and Synta's subsidiary Celestron using Good Advance. Orion offered evidence that Good Advance uses the name "Taiwan Synta," and Sunny admits that Joyce Huang, Good Advance's only employee, works for Synta Tech. Also, the evidence showed that Huang worked for Synta owner David Shen, who gave direction to Good Advance, and Good Advance has the same business address as Synta and Sky Rainbow, the entity that transferred the funds that Sunny used to purchase **[**24]** Meade.

Orion also offered specific price-fixing evidence at trial. Synta asked Sunny: "Is Sunny's AZ GOTO mount the same as that Suzhou used? If so, please re-check your price. Suzhou's 2013 list price of AZ GOTO mount [and] steel tripod was US $140." Sunny sent an email to Huang stating that it was "considering . . . adopting different product prices to protect Celestron." Huang, who worked for Synta's David Shen, told Sunny to raise the prices it charged Orion to match the prices that Synta was charging Orion. Sunny agreed. Price lists showed that Sunny charged Orion fifty percent more than it charged Synta subsidiary, Celestron, for identical items. Substantial evidence therefore supports the jury's verdict that Sunny and Synta committed a *per se* *Section 1* violation by conspiring to fix the prices that they charged Synta's subsidiary Celestron and Orion. *See* *Castro, 833 F.3d at 1066*; *Knevelbaard Dairies, 232 F.3d at 986*.

With regard to fixing credit terms, which is a form of price fixing and a *per se* *Section 1* violation, *Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980)*, the jury could infer from the evidence adduced at trial that Sunny and Synta engaged in such behavior in retaliation for Orion's Hayneedle deal. Orion offered the highest bid to Hayneedle for the Haystack Assets, **[*481]** including the telescopes.com **[**25]** website address on which Synta's subsidiary Celestron relied, and Orion then signed a letter of intent with Hayneedle. The Synta Entities then sent an email terminating Orion's line of credit. The Synta Entities forwarded this email to Sunny and asked Sunny to withdraw Orion's line of credit. Sunny sent Orion a credit termination email nearly identical to the one sent by the Synta Entities. These emails both stated that Sunny and Synta were revoking Orion's credit because Orion was buying the Haystack Assets. These emails also stated that Sunny and Synta would no longer allow Orion to receive telescope shipments in advance of payment. Because substantial evidence supports the jury's verdict that Sunny and Synta fixed credit terms in violation of Section 1, we affirm this finding. *See* Castro, 833 F.3d at 1066; Catalano, 446 U.S. at 648.

Sunny argues that there was not substantial evidence to support the jury's verdict that Sunny agreed with Synta, a horizontal competitor, either not to compete with one another in the market, or to divide customers or potential customers between them. Such conduct constitutes illegal market allocation, which is a *per se* Section 1 violation. *See* Palmer, 498 U.S. at 49. We disagree.

The documentary evidence and expert testimony that Orion presented **[**26]** during trial—particularly Dr. Sasian's testimony regarding overlapping production capabilities—showed that Sunny had the technical capability to manufacture the same telescopes as Synta, but chose not to. Two internal emails mentioned "consider[ing] how to avoid conflict with Celestron's products," and "divid[ing] the products and sell[ing] them to different markets to reduce conflicts." Other emails between Sunny and Synta indicate that they had agreed to divide customers. For instance, in a December 2013 email, Synta's Shen told Sunny that:

> Bidding with Costco between May and June (compete with Celestron for the price). This is a very important issue. This need Director Ni to communicate face-to-face with DAVE when he goes to the United States. Don't bid. If you let the thing go by doing this, how would you deal with everything in the future? All products are produced by Sunny. Following a conflict, Celestron would not trust Sunny any longer.

This is quintessential evidence of a market allocation conspiracy. We accordingly conclude that substantial evidence supports the jury's verdict that Sunny engaged in *per se* illegal market allocation with Synta. *See* Castro, 833 F.3d at 1066; Palmer, 498 U.S. at 49.

D.

Sunny also seeks reversal **[**27]** on the basis that the evidence does not support the jury's verdict for Orion on its Sherman Act § 2 ("Section 2") claims. We disagree. ***HN8***[] Section 2 makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . ." 15 U.S.C. § 2. While Section 1 "targets concerted anticompetitive conduct, [Section 2] targets independent anticompetitive conduct." Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 989-90 (9th Cir. 2020). Monopoly power itself is not unlawful—instead, it must be "accompanied by an element of anticompetitive conduct" to trigger Section 2 liability. Id. at 990.

The jury found Sunny liable for attempted monopolization and conspiracy to monopolize under Section 2. ***HN9***[] Attempted monopolization requires: "(1) specific intent to monopolize a relevant market; (2) predatory or anticompetitive **[*482]** conduct; and (3) a dangerous probability of success." Catlin v. Wash. Energy Co., 791 F.2d 1343, 1348 (9th Cir. 1986). Conspiracy to monopolize requires: "(1) an agreement or understanding between [alleged conspirators]; (2) a specific intent to monopolize; and (3) overt acts in furtherance of the alleged conspiracy." Howard Hess Dental Lab'ys Inc. v. Dentsply Int'l, Inc., 516 F. Supp. 2d 324, 341 (D. Del. 2007), *aff'd*, 602 F.3d 237 (3d Cir. 2010).

We first reject Sunny's argument that Orion improperly pursued a "joint monopoly theory" at trial. The district court's jury instruction on conspiracy to monopolize required Orion to show that **[**28]** "[Sunny or its subsidiaries] specifically intended that *one of the parties* to the agreement would obtain or maintain monopoly power in the telescope and accessory manufacturing market." It is true that this jury instruction does not specify which entity—Sunny or Synta—the parties to the agreement intended would achieve or maintain monopoly power, but Sunny agreed to the jury instructions in advance and did not object to this lack of clarity. Moreover, there is substantial evidence that Sunny was dangerously close to acquiring monopoly power, and the jury could have found that the parties intended for Sunny to have a monopoly over the telescope manufacturing market. We therefore conclude that the jury's verdict imposing Section 2 liability does not depend on a joint monopoly theory.

Sunny's contentions that Orion could not prevail under *Section 2* for failure to define the relevant market are similarly unavailing. ***HN10***[] To define a market, the district court must determine: (1) "the field in which the plaintiff was engaged . . . in geographic and distributional terms," and (2) "the product (or product line) that competes in that field." *JBL Enters., Inc. v. Jhirmack Enters., Inc., 698 F.2d 1011, 1016 (9th Cir. 1983)*. The relevant market is defined as the "commodities reasonably interchangeable **[**29]** by consumers for the same purpose." *Id.* We review relevant market definitions as fact findings reversible only if the evidence compels a conclusion contrary to the jury's verdict. *Id.*

Orion established the relevant market through expert testimony by Dr. Zona. Sunny claims this was insufficient because Dr. Zona did not analyze the cross-elasticity of demand between the product and substitutes, conduct a SSNIP [1] analysis, independently analyze whether manufacturers can produce both high-and-low-end telescopes, explain why the market included accessories, or evaluate substitutes to the telescope manufacturing market.

These contentions are without merit. Sunny acknowledges that there is no requirement to use any specific methodology in defining the relevant market. Dr. Zona testified that there was no need to perform a SSNIP analysis because the global telescope and telescope accessory manufacturing **[*483]** market is so broad—geographically unbounded and encompassing all products potentially substituted for or sold with telescopes—that the key question is whether a new manufacturer, such as an automaker, could enter the telescope market quickly enough to offset a SSNIP imposed by a hypothetical **[**30]** monopolist. As such, Dr. Zona determined reasonably that he could forgo a SSNIP analysis in favor of his barriers to entry analysis. Dr. Sasian testified that Sunny and Synta had the technical capacity to make high-and-low-end telescopes, so Dr. Zona did not need to independently determine that as part of his antitrust economic analysis. Dr. Zona further testified that his market definition included telescope accessories because buyers purchase them with telescopes and they are often shipped together to save money. *See JBL Enters., 698 F.2d at 1016* (explaining that the relevant product may also include "a 'cluster' or 'product line' of one manufacturer [if it] is reasonably interchangeable for that of another by the [distributor] that is making the purchase"). Dr. Zona finally testified that there is no real substitute for telescope manufacturing. No basis for reversal on market definition therefore exists here. *See United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*.

Regarding the sufficiency of the evidence, Sunny takes the position that "no evidence" supports the jury's finding that Sunny expressed a specific intent to gain monopoly power. We disagree.

HN11[] Courts use the specific intent element to limit "the reach of an attempt claim to conduct threatening monopolization." **[**31]** *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1027 (9th Cir. 1981)*. A plaintiff may establish specific intent to monopolize through either direct evidence of "unlawful design" or circumstantial evidence "principally of illegal conduct." *Id.* This "inference may be drawn from conduct . . . with an unreasonable restraint of trade in violation of *section 1 of the Sherman Act*." *Id. at 1028*.

As explained above, substantial direct evidence of unlawful design supports the jury's *Section 1* finding that Sunny had a specific intent to seize control of the telescope and accessory manufacturing market by acquiring Meade. The email in which Sunny stated that it purchased Meade "to prevent JOC to buy Meade," for instance, establishes that Sunny's specific intent was to prevent JOC, the third-largest competitor in the telescope and accessory manufacturing market, from becoming a stronger competitor. In addition, and as explained above, the evidence supports the jury's conclusion that Sunny unlawfully conspired with Synta to prevent JOC, a new, smaller

[1] SSNIP is a common methodology for defining a relevant antitrust market. To perform a SSNIP analysis, an economist proposes a narrow geographic and product market definition and then iteratively expands that definition until a hypothetical monopolist in the proposed market would be able to profitably make a small but significant non-transitory increase in price ("SSNIP"). At each step, if consumers would respond to a SSNIP by making purchases outside the proposed market definition, thereby rendering the SSNIP unprofitable, then the proposed market definition is too narrow. At the next step, the economist expands the proposed geographic or product market definition to include the substituted products or area. This process is repeated until a SSNIP in the proposed market is predicted to be profitable for the hypothetical monopolist. *See St. Alphonsus Med. Ctr. - Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 784 (9th Cir. 2015)*.

competitor, from buying Meade. Orion also presented evidence that Sunny told the FTC Shen was not involved in its Meade acquisition, when, at the very least, Sky Rainbow, which Shen partially owned, funded Sunny's acquisition of Meade. This *Section 1* violation also **[**32]** supports a finding of specific intent to monopolize. *See William Inglis & Sons Baking Co., 668 F.2d at 1028*.

Sunny attempts to pre-empt this analysis by suggesting that Synta would have no motive to help Sunny acquire monopoly power because that would give Sunny the power to dictate prices and market economies over Synta. We are not persuaded. Because Synta is a horizontal competitor of Sunny, Synta would benefit from Sunny's ability to raise prices because Synta could raise its own prices in turn. *See Matsushita Elec. Indus. Co., 475 U.S. at 583* ("[C]ompetitors . . . stand to gain from any conspiracy to raise the market price."). And the jury could have inferred that Synta agreed to help **[*484]** Sunny acquire Meade because it expected to receive favorable wholesale pricing for Celestron-branded products and to engage in the market allocation scheme addressed in Orion's *Section 1* claims. Orion also offered evidence that Celestron was aware that its conduct was, or could be perceived as anticompetitive. Celestron provided $7.2 million in "prepayments" to Sunny for unshipped telescopes to support Sunny's acquisition of Meade, and Celestron admitted that it would need to revert to its usual course of dealing with Sunny to avoid unwanted suspicion. We therefore hold that substantial evidence supports **[**33]** the jury's verdict that Sunny demonstrated the specific intent to monopolize necessary for *Section 2* liability. *See id.*; *Castro, 833 F.3d at 1066*; *William Inglis, 668 F.2d at 1027*.

Sunny finally suggests that the evidence Orion offered at trial did not establish that Sunny was dangerously close to attaining monopoly power. This contention is unavailing and does not warrant reversal.

HN12[] Monopoly power is the ability to "control prices" or "exclude competition" in the relevant market. *Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202, 1206 (9th Cir. 1997)*. It can be proven by direct or circumstantial evidence. *Id. at 1202*. The latter approach requires plaintiffs to "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run." *Id.* A market share of sixty-five percent or more usually establishes a prima facie case of monopoly power in *Section 2* contexts. *Id. at 1206* (citation omitted). But "the minimum showing of market share required in an attempt case is a lower quantum than the minimum showing required in an actual monopolization case." *Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1438 (9th Cir. 1995)*. We have held that a market share as low as forty-four percent is sufficient to support a finding that a party was dangerously **[**34]** close to monopoly power where barriers to entry were high and competitors could not expand their short-run output. *Id.*

The evidence Orion presented at trial, including Dr. Zona's expert testimony, established that Sunny's market share was around fifty percent and reached its peak of sixty-three percent in 2013. Sunny's citations to its 2017 market share of about thirty-three-and-a-half percent, are inapposite because, by 2018, Sunny's market share was just over forty-nine percent, above the forty-four percent mark that we have recognized to be sufficient to establish a dangerous proximity to market power. *See id.* Dr. Zona testified that there are high barriers to entry in the telescope manufacturing market, and that this market is highly concentrated. Orion also presented evidence that there had been no new entrants into the telescope manufacturing market for ten years, corroborating Dr. Zona's conclusion that there are high barriers to entry in the telescope manufacturing market. After Sunny bought Meade, Sunny became the largest telescope manufacturer in the world. Sunny's forty-nine percent market share could have risen more if it had gotten Meade's telescope manufacturing plant **[**35]** up to speed. Substantial evidence therefore supports the jury's finding that Sunny was dangerously close to monopoly power such that it could be held liable under *Section 2*. *See Castro, 833 F.3d at 1066*; *Rebel Oil, 51 F.3d at 1438*.

None of Sunny's attacks successfully undermines the jury's verdict finding that Sunny unlawfully conspired to monopolize the global telescope manufacturing market in violation of *Section 2 of the Sherman Act*. **[*485]** Accordingly, the *Section 2* verdict stands.

E.

Orion prevailed on its *Clayton Act § 7* ("*Section 7*") claim because the jury found a reasonable likelihood that Sunny's acquisition of Meade would substantially reduce competition in the telescope manufacturing market or create a monopoly. Sunny seeks a new trial on the basis that Orion did not prove damages from this violation of *Section 7*. Once more, we disagree.

HN13[] *Section 7* prohibits mergers that tend "substantially to lessen competition" or "create a monopoly." *15 U.S.C. § 18*. "To establish a prima facie [*Section 7*] case, [a plaintiff] must (1) propose the proper relevant market and (2) show that the effect of the merger in that market is likely to be anticompetitive." *Fed. Trade Comm'n v. Penn State Hershey Med. Ctr., 838 F.3d 327, 337-38 (3d Cir. 2016)*. A new trial may be granted where there is "no evidence on the amount of damages attributable only to the antitrust violation." *Farley Transp. Co. v. Santa Fe Trail Transp. Co., 786 F.2d 1342, 1351 (9th Cir. 1985)*. But "[t]he district court's denial of the motion for a new trial **[**36]** is reversible only if the record contains no evidence in support of the verdict." *Id. at 1347*. Once a plaintiff establishes "the fact of antitrust injury," we must uphold the jury's finding as to the amount of damages unless that finding is "'grossly excessive or monstrous,' clearly not supported by the evidence, or 'only based on speculative guesswork.'" *Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1287 (9th Cir. 1984)* (citation omitted).

Orion presented evidence of antitrust injury on its *Section 7* claim during trial. The theory that Orion set out to the jury was that Sunny's acquisition of Meade reduced the number of major telescope manufacturers from three to two. This manufacturer consolidation further concentrated the already highly concentrated telescope manufacturing market by causing its Herfindahl-Hirschman Index ("HHI")—a widely accepted measure of market concentration—to increase by over 1,000 points, or five times the amount that is presumptively anticompetitive. *See St. Alphonsus Med. Ctr., 778 F.3d at 788*. By acquiring Meade, Sunny gained increased control over telescope manufacturing, which enabled Sunny and its competitors to charge supracompetitive prices for telescopes. This was a major factor in the overcharges that Orion experienced in its business dealings with Sunny, Synta, and Meade. **[**37]** Sunny tries to counter this analysis by arguing that Orion's expert Dr. Zona testified that the overcharges Orion had to pay did not result from Sunny's acquisition of Meade. But this mischaracterizes Dr. Zona's testimony. Dr. Zona only confirmed that his damages calculation excluded damages Orion sustained from its failure to acquire Meade. He did not state that Orion was undamaged by supracompetitive prices arising from the merger. Because Orion presented evidence of antitrust injury, and because the jury's finding as to damages was neither grossly excessive, unsupported, nor the result of guesswork, Sunny is not entitled to a new trial on the issue of *Section 7* liability. *See Handgards, 743 F.2d at 1287*.

F.

The district court entered injunctive relief against Sunny under *Clayton Act § 16 ("Section 16")*, *15 U.S.C. § 26*, and the UCL. Sunny claims this injunction is overbroad. ***HN14***[] We review for abuse of discretion a grant of a permanent injunction and any decision "underlying the imposition of the injunction is reviewed by the standard **[*486]** that is appropriate to that determination." *Bank of Am., 309 F.3d at 557*.

Sunny suggests the district court's injunction does not flow from conduct that violated the antitrust laws, implying that whether the banned conduct violates ***antitrust law*** is a legal issue **[**38]** underlying the grant of injunctive relief and subject to *de novo* review. That suggestion is incorrect.

HN15[] *Section 16* authorizes injunctive relief against any "threatened loss or damage by a violation of the antitrust laws." *15 U.S.C. § 26*. Such relief must be based on a "clear indication of a significant causal connection between the conduct enjoined or mandated and the violation found directed toward the remedial goal intended." *United States v. Microsoft Corp., 253 F.3d 34, 105, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (quotation marks omitted). But a district court may order an injunction "beyond a simple proscription against the precise conduct previously pursued." *Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 698, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. The reviewing court only asks if "the relief [is] a reasonable method of eliminating the consequences of the illegal conduct." *Id.* If the jury finds that monopolization or attempted monopolization has occurred, the available injunctive relief is broad, including to "terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future." Microsoft, 253 F.3d at 103; *accord* Ford Motor Co. v. United States, 405 U.S. 562, 573, 92 S. Ct. 1142, 31 L. Ed. 2d 492 (1972) (holding that antitrust relief must restore competition).

There was no error. Sunny's decision to forgo profits by refusing to supply Meade was proof of its intent to restrain competition. **[**39]** And the telescope manufacturing market would become overconcentrated if Sunny eliminated Meade as a competitor. The district court validly ordered Sunny to supply Meade on non-discriminatory terms. This injunction will help ensure that Sunny does not engage in practices "likely to result in monopolization in the future." Microsoft, 253 F.3d at 103.

Sunny similarly claims that the district court improperly granted relief on Orion's refusal-to-deal claim, which was dismissed on summary judgment, when it ordered Sunny to supply Orion on non-discriminatory terms. **HN16**[] But the district court can order conduct to "avoid a recurrence of the [antitrust] violation and to eliminate its consequences. Prof'l Eng'rs, 435 U.S. at 698. As explained above, the jury properly found that Orion had been forced to pay inflated prices as a result of the market power exerted by Sunny and Synta following the unlawful Meade acquisition. The district court thus properly fashioned a "reasonable method of remedying the harm to [Orion] caused by [Sunny's] attempted monopolization and ensuring that [Sunny's] violations of ***antitrust law*** do not recur" with regard to Orion by ordering Sunny to supply Orion on non-discriminatory terms.

Sunny, citing *Kodak*, argues that the district **[**40]** court's order to supply Orion and Meade on non-discriminatory terms is inappropriate because it will result in a windfall for Orion and so may create an oligopoly. *See* 125 F.3d at 1224-26. But in *Kodak*, the defendant challenged various requirements of an injunction insofar as they required nondiscriminatory sales of parts to non-party competitors, and we affirmed that "[i]njunctive relief covering nonpart[ies] . . . is proper" to prevent future Sherman Act violations. Id. at 1226. Sunny is now making the opposite argument: that injunctive relief requiring an antitrust defendant to deal on a nondiscriminatory basis is only appropriate if it applies to the defendant's interactions with **[*487]** all market participants. Kodak imposes no such requirement. The district court acted within its discretion in finding that, under the facts of this case, extending injunctive relief only to Orion and Meade would enhance, not stifle, competition. *See* Ford, 405 U.S. at 573 (explaining that, **HN17**[] in antitrust cases involving injunctive relief, district courts have broad discretion to "fit the decree to the special needs of the individual case" (quotation marks omitted)). We decline to conclude that the district court abused its discretion in fashioning injunctive relief **[**41]** it deemed appropriate to prevent a recurrence of the antitrust violations, or to remand this case based on the scope of the injunction. *See* Prof'l Eng'rs, 435 U.S. at 698; Ford, 405 U.S. at 573; Microsoft, 253 F.3d at 103.

G.

In connection with the antitrust claims at issue here, Orion and Synta entered into the Settlement and Supply Agreements in 2016, and Synta also agreed to supply Orion on most favored customer terms. Sunny also stopped supplying Orion in 2016. Sunny challenges the district court's finding that its conspiracy with Synta could have continued past 2016 and seeks judgment as a matter of law on the issue of whether Orion is entitled to post-September 2016 damages.

The parties disagree on who bore the burden of proof on this issue. Regardless, Orion offered substantial evidence that the conspiracy between Sunny and Synta continued past 2016 because Synta kept overcharging Orion instead of giving Orion the most favored customer rate, leading Orion to pay more for telescopes than it had before its agreements with Synta. This evidence also showed that Sunny stopped supplying Orion. These acts to raise Orion's costs are suggestive of a continued conspiracy.

But even if the conspiracy between Sunny and Synta to eliminate Meade as an independent competitor **[**42]** ended in 2016, when Orion and Synta signed the Settlement and Supply Agreements, Orion could still recover post-2016 damages because it continued to suffer economic harm from the harm to competition caused by the illegal concerted activity. See L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 791 F.2d 1356, 1366 (9th Cir. 1986) (**HN18**[] "[A] plaintiff need not prove that the antitrust violation was the only cause of its injury in order to recover damages[;] proof that the violation was a material cause is sufficient."). The purpose of Sunny and Synta's conspiracy was to prevent JOC from acquiring Meade and to eliminate Meade as an independent competitor in the market for telescope and telescope accessories manufacturing. This conspiracy achieved its objective: a highly concentrated market with fewer competitors and higher costs for telescope brands not yet controlled by the co-conspirators. Orion's antitrust post-2016 injuries arose directly from the change in market structure that resulted from the conspiracy's successful elimination of Meade as an independent competitor. When Sunny decided to stop supplying Orion, Synta exploited its market power to charge Orion higher prices. Orion nonetheless continued buying approximately seventy-five percent of its telescopes from Synta **[**43]** because it lacked viable alternate suppliers in the highly concentrated market. This is consistent with Dr. Zona's testimony; he explained that structural changes to the telescope manufacturing market brought about by the conspiracy continued to impose costs on Orion after 2016, and he was able to estimate those costs.

[*488] ***HN19***[] Therefore, where an antitrust plaintiff suffers continuing antitrust injuries from anticompetitive changes to market structure that arose from a proven antitrust violation, we hold that the violation may be a material cause of that injury, and so recovery of damages is permitted, even after the last proven date of the violative conduct. This rule accords with the common-sense principle that "if you break it, you buy it." If a defendant has conspired to violate the antitrust laws and thereby harmed a market's competitive structure, it remains liable for the continuing injuries suffered by plaintiffs from the structural harm to competition that its unlawful scheme brought about. It is no defense to argue that the conspiracy has ended, where the conspiracy achieved its anticompetitive objective. As a result, Orion could prevail by showing that an overt pre-2016 conspiracy **[**44]** had residual market effects that resulted in post-2016 damages.

The district court properly found that Sunny was not entitled to judgment as a matter of law on post-2016 damages. The jury could have found that Sunny and Synta continued conspiring after 2016 or that Orion's post-2016 damages were a residual effect of a pre-2016 conspiracy between Sunny and Synta. *See* *Castro, 833 F.3d at 1066*. Either would suffice to affirm.

H.

Sunny contends the district court improperly excluded a declaration by Dr. Saravia in ruling on its post-trial motion to alter or amend the judgment. In the district court's view, this declaration fell within the scope of *Federal Rule of Evidence 702*, and was inadmissible as untimely under *Federal Rules of Civil Procedure 26* and *37*.

HN20[] But *Rule 26* states that "a party must disclose to the other parties the identity of any [expert] witness it may use at trial . . . ." *FED. R. CIV. P. 26(a)(2)(A)*. If a scheduling order is issued, experts must be disclosed "at the times and in the sequence that the court orders." *FED. R. CIV. P. 26(a)(2)(D)*. Here, the district court entered a pre-trial scheduling order that set a May 31, 2019 deadline for disclosure of rebuttal experts. Sunny timely disclosed Mr. Redman and Dr. Saravia as rebuttal experts. And there is no evidence that Sunny did not attach written reports to these disclosures. **[**45]** *FED. R. CIV. P. 26(a)(2)(B)*. Indeed, Orion's motion to exclude Dr. Saravia's testimony takes issue with her written report. As such, the district court could not apply the rule that "[i]f a party fails to provide information or identify a witness as required by *Rule 26(a)*[,] the party is not allowed to use that information or witness to supply evidence on a motion" with regard to Dr. Saravia. *FED. R. CIV. P. 37(c)(1)*.

We hold that the district court abused its discretion by excluding under *Federal Rules of Civil Procedure 26* and *37* the declaration that Dr. Saravia gave in support of Sunny's motion to alter or amend the judgment. *See Yokoyama v. Midland Nat'l. Life Ins. Co., 594 F.3d 1087, 1091 (9th Cir. 2010)*. We express no opinion on whether Dr. Saravia's declaration is admissible under *Federal Rule of Evidence 702* because the district court should address that issue in the first instance. *See* *Singleton v. Wulff, 428 U.S. 106, 120-21, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976)*. We remand for further proceedings consistent with this opinion.

IV. ORION'S CROSS-APPEAL

Orion cross-appeals the district court's entry of summary judgment for Sunny on the issue of whether Sunny caused Orion's failure to acquire Meade. ***HN21***[] But Orion must have antitrust standing, consisting of the "(1) injury of the type the **[*489]** antitrust laws were intended to prevent that also (2) flows from that which makes defendants' acts unlawful." *In re Online DVD-Rental Antitrust Litig., 779 F.3d 914, 922 (9th Cir. 2015)* (cleaned up). And monetary recovery "will not be permitted for **[**46]** injuries . . . independently caused by something other than the antitrust violation." *Nat'l Football League, 791 F.2d at 1366*.

The relevant facts are that, in February 2013, Orion offered $4.5 million to acquire Meade. Meade chose a different higher offer from JOC. In April 2013, JOC reduced its offer from $5 million to $4.5 million, so Meade re-opened the bidding process. In May 2013, Meade reached out to Orion and stated that it no longer had an exclusive merger agreement with JOC. But Orion declined to submit another offer to buy Meade at that time. JOC later offered $4.5 million to purchase Meade, and Meade accepted. The merger between JOC and Meade was announced on May 17, 2013. Sunny later made an unsolicited $5.87 million bid to acquire Meade, so Meade abandoned its second deal with JOC to accept Sunny's offer.

Orion claims that a reasonable jury could have found in its favor because: (1) JOC's second bid for $4.5 million was the same amount as Orion's bid; (2) JOC had backed out of buying Meade once; and (3) Orion had more to gain from purchasing Meade than JOC did and so it might have increased its bid to ensure that it acquired Meade. These arguments are unavailing because they do not properly account for the timing **[**47]** of bids. Most importantly, when Orion was informed that Meade's deal with its prior high bidder was off, Orion declined to even submit a bid to buy Meade. Orion's decision not to submit a new offer to Meade creates a strong presumption that Orion would not have acquired Meade even if Sunny had not outbid JOC for Meade. Orion offered no evidence Meade would have accepted a higher bid from Orion after announcing its $4.5 million deal with JOC, or that Meade would have terminated this deal for reasons other than Sunny's bid. There was no genuine dispute of material fact on whether Sunny prevented Orion from buying Meade. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

VACATED in part only with regard to the valuation of the settlement set-off, which is REMANDED for further proceedings consistent with this opinion. AFFIRMED with regard to all other issues. We AWARD costs on appeal to Orion.

Ass'n for Accessible Meds. v. Bonta

United States District Court for the Eastern District of California

December 8, 2021, Decided; December 9, 2021, Filed

No. 2:20-cv-01708-TLN-DB

Reporter
562 F. Supp. 3d 973 *; 2021 U.S. Dist. LEXIS 236387 **; 2021 WL 5853431

ASSOCIATION FOR ACCESSIBLE MEDICINES, Plaintiff, v. ROB BONTA, in his official capacity as Attorney General of the State of California, Defendant.

Subsequent History: Modified by, Injunction granted at, in part, Injunction denied by, in part *Ass'n for Accessible Meds. v. Bonta, 2022 U.S. Dist. LEXIS 27533 (E.D. Cal., Feb. 14, 2022)*

Core Terms

Fuel, generic, injunction, settlement, regulates, dormant, merits, preliminary injunction, settlement agreement, declaration, patent, ripeness, sales, public interest, pharmaceutical, litigating, violates, asserts, argues, irreparable harm, economic injury, manufacturers, brand-name, parties, likelihood of success, civil penalty, extraterritoriality, contends, succeed, interstate commerce

Counsel: **[**1]** For Association for Accessible Medicines, Plaintiff: Matthew D. Rowen, LEAD ATTORNEY, Kirkland & Ellis LLP, Washington, DC; Jay P. Lefkowitz, PHV, PRO HAC VICE, Kirkland & Ellis LLP, New York, NY.

For Xavier Becerra, in his official capacity as Attorney General of the State of California, Defendant: David Samuel Houska, LEAD ATTORNEY, California Attorney General, Public Rights Division, San Francisco, CA; Jacqueline Palma Malafa, LEAD ATTORNEY, California Department of Justice, Los Angeles, CA; Karli A Eisenberg, LEAD ATTORNEY, California Office of Attorney General, Sacramento, CA; Nicole D. Ries Fox, Office of The Attorney General, San Diego, CA.

For American Antitrust Institute, Consumer Reports, Inc., Public Citizen, Inc., Amicuss: Eric B. Fastiff, LEAD ATTORNEY, Lieff Cabraser Heimann and Bernstein, San Francisco, CA.

Judges: Troy L. Nunley, United States District Judge.

Opinion by: Troy L. Nunley

Opinion

[*977] ORDER

This matter is before the Court on Plaintiff Association for Accessible Medicine's ("Plaintiff") Motion for Preliminary Injunction ("PI") requesting the Court enjoin the enforcement of Assembly Bill 824 ("AB 824"). (ECF No. 15.) Defendant Rob Bonta, in his official capacity as Attorney General of the State **[**2]** of California ("Defendant" or the

"State"), has filed an opposition.[1] (ECF No. 20.) Plaintiff has filed a reply. (ECF No. 26.) For the reasons set forth below, Plaintiff's motion is GRANTED.

I. Factual and Procedural Background [2]

AB 824, signed into law by California Governor Gavin Newsom on October 7, **[*978]** 2019, creates a presumption that "reverse payment" settlement agreements regarding patent infringement claims between brand-name and generic pharmaceutical companies are anti-competitive and unlawful.

Reverse payment settlement agreements arise primarily — if not exclusively — in the context of pharmaceutical drug regulations and suits brought under the statutory provisions of the Drug Price Competition and Patent Term Restoration Act of 1984, commonly referred to as the *Hatch-Waxman Act*. Under the *Hatch-Waxman Act*, once a brand-name company has submitted a new prescription drug to the U.S. Food and Drug Administration ("FDA") and gained approval to market it, a manufacturer of a generic drug with the same active ingredients that is biologically equivalent to the approved brand-name drug can gain approval to market the generic through an abbreviated FDA process. The New Drug Application ("NDA") process is long, comprehensive, and expensive, whereas the Abbreviated New Drug Application **[**3]** ("ANDA") process to which generic drugs are subject is substantially less expensive and requires far less testing.

In order to gain approval through the FDA, the generic company must file an ANDA. As part of this application, the generic company must assure the FDA that its drug will not infringe on any patents owned by the brand-name company. One way to do so is for the generic company to certify that any listed, relevant patent is invalid or will not be infringed by the manufacture, use, or sale of the generic drug. This is called Paragraph IV certification. Because filing under Paragraph IV indicates there are current patents the generic company asserts are invalid or uninfringed by its product, the Paragraph IV certification is *per se* a patent infringement and thus the brand-name company can and often does bring suit against the generic drug manufacturer.

Settlements of the resulting lawsuits sometimes include reverse payments in which the plaintiff, the brand-name company, pays the defendant, the infringing generic company, a sum of money for the promise that the generic company will keep its drug off the market for an agreed-upon length of time.

AB 824 targets these types of settlements. **[**4]** According to the State, AB 824 closes this loophole in the *Hatch-Waxman Act* and ensures a brand-name company cannot continue to enforce an otherwise weak patent against generic companies through these reverse payment settlement agreements. AB 824 imposes a presumption that a settlement agreement involving a brand-name company compensating the generic company for keeping its drug off the market is anticompetitive under California ***antitrust law***. It also levies a civil penalty against any individual who assists in the violation of the section of three times the value received by the individual due to the violation or $20 million, whichever is greater.

Plaintiff, a nonprofit, voluntary association comprised of the leading manufacturers and distributors of generic and biosimilar medicines, manufacturers and distributors of bulk active pharmaceutical ingredients, and suppliers of other goods and services to the generic and biosimilar pharmaceutical industry, previously filed suit in an attempt to invalidate AB 824. (ECF No. 1, No. 2:19-cv-02281-TLN-DB.) In the related case, Plaintiff also filed a motion for preliminary injunction (ECF No. 10, No. 2:19-cv-02281-TLN-DB), which the Court denied (ECF No. 29, **[**5]** No. 2:19-cv-02281-TLN-DB). The Court found, primarily due to the nature of Plaintiff's pre-enforcement attack on AB

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[1] Pursuant to *Federal Rule of Civil Procedure ("Rule") 25(d)*, "[t]he officer's successor is automatically substituted as a party" when a public officer "ceases to hold office while the action is pending." *Fed. R. Civ. P. 25(d)*. Accordingly, Rob Bonta is automatically substituted as a party for Xavier Becerra, the former Attorney General of the State of California. The Clerk of the Court is directed to update the docket as necessary.

[2] The following factual background is taken mostly verbatim from the Court's December 31, 2019 Order denying Plaintiff's motion for preliminary injunction in the related case. (*See* ECF No. 29, No. 2:19-cv-02281-TLN-DB.)

824, Plaintiff failed to establish a likelihood **[*979]** of success on the merits or raise serious questions going to the merits. (*Id.*) The Court concluded that absent a constitutional violation, Plaintiff failed to establish an irreparable harm that was both likely and imminent. (*Id.*) Plaintiff subsequently filed an interlocutory appeal of the Court's decision to the Ninth Circuit. (ECF No. 31, No. 2:19-cv-02281-TLN-DB.) The Ninth Circuit heard oral arguments on the matter and ultimately vacated this Court's order and remanded with instructions to dismiss without prejudice, finding Plaintiff failed to demonstrate its members had an Article III injury in fact and concluding Plaintiff lacked associational standing to bring claims on its members' behalf. (*See* ECF Nos. 46-47, No. 2:19-cv-02281-TLN-DB.) The Court subsequently dismissed the suit without prejudice pursuant to the Ninth Circuit's memorandum and mandate. (ECF Nos. 48-49, No. 2:19-cv-02281-TLN-DB.)

On August 25, 2020, Plaintiff filed the instant Complaint alleging near-identical causes of action to its prior suit, once again in an **[**6]** attempt to invalidate AB 824: (1) Declaratory/Injunctive Relief — *Commerce Clause* — Extraterritoriality; (2) Declaratory/Injunctive Relief — Preemption; (3) Declaratory/Injunctive Relief — *Excessive Fines Clause*; and (4) Declaratory/Injunctive Relief — Due Process — Burden-Shifting. (ECF No. 1 at 21-33.) On September 14, 2020, Plaintiff filed the instant motion for preliminary injunction. (ECF No. 15.) On October 15, 2020, the State filed an opposition (ECF No. 20), and on October 22, 2020, Plaintiff filed a reply (ECF No. 26).

II. Standard of Law

Injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC, Inc., 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)* (citing *Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997)* (per curiam)). "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981)*; *see also* *Costa Mesa City Emps. Ass'n v. City of Costa Mesa, 209 Cal. App. 4th 298, 305, 146 Cal. Rptr. 3d 677 (2012)* ("The purpose of such an order is to preserve the status quo until a final determination following a trial."); *GoTo.com, Inc. v. Walt Disney, Co., 202 F.3d 1199, 1210 (9th Cir. 2000)* ("The status quo ante litem refers not simply to any situation before the filing of a lawsuit, but instead to the last uncontested status which preceded the pending controversy.").

"A plaintiff seeking a preliminary injunction must establish [1] that he **[**7]** is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter, 555 U.S. at 20*. A plaintiff must "make a showing on all four prongs" of the *Winter* test to obtain a preliminary injunction. *Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011)*. In evaluating a plaintiff's motion for preliminary injunction, a district court may weigh the plaintiff's showings on the *Winter* elements using a sliding-scale approach. *Id.* A stronger showing on the balance of the hardships may support issuing a preliminary injunction even where the plaintiff shows that there are "serious questions on the merits . . . so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* Simply put, plaintiffs must **[*980]** demonstrate, "that [if] serious questions going to the merits were raised [then] the balance of hardships [must] tip[ ] sharply" in [p]laintiffs' favor in order to succeed in a request for preliminary injunction. *Id. at 1134-35*.

III. Analysis [3]

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[3] The State requests the Court take judicial notice of Exhibits A through E, Assembly Committee on Health AB 824 Bill Analysis (March 26, 2019), Assembly Floor Analysis of AB 824 (September 4, 2019), Letters of Support for AB 824, Table 8: Total All Payers State Estimates by State of Residence (1991-2004) — Drugs and Other Non-durable Products (Millions of Dollars), Health expenditures by state of residence: Summary tables, and *Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions*, FTC Staff Study (Jan. 2010), respectively. (ECF No. 20-1.) Plaintiff has not filed an opposition to this request. The Court

Plaintiff argues in the instant motion for preliminary **[**8]** injunction that it is likely to succeed on the merits of its claims, its members will suffer irreparable harm absent an injunction, the balance of equities and the public interest weigh in favor of an injunction, and it is likely to succeed on the merits. (*See* ECF No. 15-1.) The Court will first address the State's evidentiary objections, then the jurisdictional prerequisite of standing, and finally evaluate each of Plaintiff's arguments, starting with the dormant *Commerce Clause* claim.

A. The State's Objections to Plaintiff's Evidence

The State filed objections to Plaintiff's declarations submitted with the instant motion. (ECF No. 24-1.) With respect to Exhibit E, the State contends the following portion of paragraph four is inadmissible on the grounds of lack of personal knowledge, in violation of *Federal Rule of Evidence 602*: "[B]ecause of [the company's] concern about the enforcement of AB 824 as it would apply to such a settlement in light of AB 824's provision deeming exclusive licenses to be things of value, [the company] decided to pull out of the settlement negotiation and instead continue litigating the case." (*Id.* at 3-4, 6.) The Court finds that Exhibit E contains the sworn statements of the company's general counsel, **[**9]** who states that he is "knowledgeable about [the company's] recent and pending patent-infringement litigation." (ECF No. 17-3 at 1-2.) Exhibit E also contains information about the company filing suit against a generic drug company after it filed an ANDA with a Paragraph IV certification challenging one of the company's patents. (*Id.*) The Court sees no reason — and the State has not provided an adequate reason — not to take declarant's statement as truth. The language of the declaration does not indicate "speculation without foundation in personal knowledge," a basis upon which courts have stricken declarations. *See* *Green v. City & County of San Francisco, No. 17-cv-00607-TSH, 2021 U.S. Dist. LEXIS 161990, 2021 WL 3810243 (N.D. Cal. Aug. 21, 2021)*. Further, the declaration states facts that would be admissible evidence. Accordingly, the State's objection with respect to Exhibit E is overruled.

The Court need not address objections to evidence upon which it did not rely in the instant motion and therefore declines to consider the State's remaining objections.

B. Standing

As previously noted, the Ninth Circuit held that Plaintiff lacked associational **[*981]** standing to bring claims on its members' behalf and remanded to this Court to dismiss without prejudice. (*See* ECF Nos. 46-47, **[**10]** No. 2:19-cv-02281-TLN-DB.) Specifically, the Ninth Circuit found none of the declarations submitted from Plaintiff's members alleged an intention to engage in a "pay for delay" settlement agreement "of the sort prohibited by AB 824" and therefore Plaintiff did not establish standing "based on a threat of imminent or certainly impending prosecution." (ECF No. 47 at 5; No. 2:19-cv-02281-TLN-DB (internal quotation marks and citation omitted).) The Ninth Circuit also found Plaintiff's members "have not established that they have incurred economic injury due to complying with AB 824, i.e., by foregoing pay for delay settlement agreements or litigating patent-infringement suits to judgment." (*Id.*) As the previously-referenced declarations stated the members would only be *likely* to litigate every pending lawsuit to judgment or *likely* to keep their products off-market until the relevant patents expire, the court found Plaintiff alleged "only possible future injury and d[id] not establish a substantial risk of harm." (*Id.* at 6 (internal quotation marks and citation omitted).)

Plaintiff argues in the instant motion that "[a]ny questions of standing or ripeness are now answered" because declarations **[**11]** filed with its motion state that a number of its members have suffered "concrete economic harm." (ECF No. 15-1 at 8.) In opposition, the State contends Plaintiff has not met its burden to demonstrate Article III standing because it does not demonstrate injury-in-fact and traceability. (ECF No. 20 at 12.)

To establish Article III standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo,*

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previously took judicial notice of these exact documents in the prior suit (ECF No. 29 at 5-6, No. 2:19-cv-02281-TLN-DB) and for the same reasons now GRANTS the State's request for judicial notice.

The Court has also reviewed and considered the amici curiae brief submitted by the American Antitrust Institute, Consumer Reports, Inc., and Public Citizen, Inc. in support of AB 824's implementation and enforcement. (*See* ECF Nos. 19-2, 22.)

Inc. v. Robins, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016). "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977).

With respect to injury-in-fact, the State argues "it is not clear whether the potential settlements that [Plaintiff] describes in its declarations even come within the ambit of AB 824" as "one declaration makes no mention of an agreement to forego anything . . . such as sales or research," "other declarations use generic **[**12]** descriptors such as '[Most Favored Nations]' and 'industry-standard accelerator provision' to describe key settlement provisions," and some of the terms in the declarations "may be subject to exceptions to AB 824." (*Id.* at 12-13.) Additionally, the State asserts Plaintiff cannot establish standing based on "fears of hypothetical future harm," such as an altered course of patent settlement negotiations or how the State will enforce AB 824. (*Id.* at 13-14.) However, Plaintiff specifies that Exhibit E, the declaration of one of its members, avers that "the member recently decided, in light of AB 824's provision deeming exclusive licenses to be things of value (and at considerable cost in terms of legal fees), to pull out of a tentative settlement agreement under which the defendant would have received consideration and would have been allowed to bring its generic product onto the market prior to the expiration of the patent, but not immediately." (ECF No. 26 at 5 (internal quotation marks omitted) (citing ECF No. 15-6 **[*982]** ¶¶ 4-5).) The declaration further states that "because of [the company's] concern about the enforcement of AB 824 as it would apply to such a settlement in light of AB 824's **[**13]** provision deeming exclusive licenses to be things of value, [the company] decided to pull out of the settlement negotiation and instead continue litigating the case." (ECF No. 17-3 at 3.) The declaration also notes the company "has thus chosen to continue litigating a patent-infringement lawsuit at considerable cost in terms of legal fees that it would not be incurring had the settlement proposal . . . been finalized." (*Id.*) This declaration avers that the company "intend[ed] to enter into a settlement agreement of the sort prohibited by AB 824" and establishes economic injury in the form of "foregoing pay for delay settlements" — the previous deficiencies identified by the Ninth Circuit. It is therefore sufficient to prove injury-in-fact.

With respect to traceability, the Court finds that the injury-in-fact complained of in Exhibit E is directly traceable to AB 824 taking effect at the start of 2020. With respect to redressability, Plaintiff seeks an injunction to stop enforcement of AB 824. (*See* ECF Nos. 1, 15-1.) Accordingly, the Court finds Plaintiff has sufficiently alleged the elements of associational standing to bring the instant motion for preliminary injunction.

C. Likelihood **[**14]** of Success on the Merits

Plaintiff argues AB 824: violates the dormant Commerce Clause by directly regulating out-of-state-conduct; is preempted by federal patent law, the delicate balance between the competing interests of patent protections and ***antitrust law*** struck by the Supreme Court in FTC v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013), and the Biologics Price Competition and Innovation Act ("BPCIA"); violates the constitutional prohibition on excessive fines under the Eighth Amendment; and violates due process in that it creates a burden-shift with no meaningful opportunity to rebut the presumption applied. (*See* ECF No. 15-1.) Because the Court finds that Plaintiff is likely to succeed on the merits of its dormant Commerce Clause claim, it will address that claim only and decline to consider the rest of Plaintiff's arguments challenging the legality of AB 824. Plaintiff argues its dormant Commerce Clause claim is ripe and likely to succeed on the merits. (ECF No. 15-1 at 13-16.) The Court will consider each of Plaintiff's arguments in turn.

i. Ripeness

Plaintiff contends the issue is ripe for adjudication because (1) the State admitted in oral argument before the Ninth Circuit that it intends to enforce the statute with respect to agreements made out-of-state and (2) Plaintiff's members **[**15]** have suffered economic injury in the form of declining or losing favorable settlement offers and spending huge sums litigating cases they otherwise would have settled. (ECF No. 15-1 at 13-14.) With respect to prudential ripeness, Plaintiff asserts its claim is now ripe because its members have already suffered economic injury. (*Id.* at 14.)

In opposition, the State contends the claim is constitutionally unripe because: Plaintiff has not shown any of its members has a plan to violate the law or has executed the type of agreement prohibited by AB 824 as its declarations fail to "indicate whether California sales would be included in the alleged potential settlements"; statements made by the State during oral argument before the Ninth Circuit do not constitute a threat of prosecution; and Plaintiff does not show past prosecution or enforcement of the law. (ECF No. 20 at 16.) The State characterizes the claim as a pre-enforcement, as-applied claim that is prudentially unripe because it is not yet **[*983]** factually developed and requires the Court to speculate about hypothetical cases as to how AB 824 may be enforced. (*Id.* at 16-17.)

The constitutional test for ripeness consists of three parts: (1) **[**16]** a concrete plan to violate the law; (2) a communicated threat of prosecution; and (3) a history of past prosecution or enforcement of the challenged law. *See, e.g.*, *Clark v. City of Seattle, 899 F.3d 802 (9th Cir. 2018)*. However, Plaintiff is correct that the Court need not rely on this test when "tangible economic injury is alleged," as "the gravamen of the suit is economic injury rather than threatened prosecution." *See* *Nat'l Audubon Society, Inc. v. Davis, 307 F.3d 835, 855 (9th Cir. 2002)*. Courts then apply the test for Article III standing, *id. at 855-56*, as articulated above. As previously noted, the Court finds Plaintiff adequately establishes constitutional standing.

Prudential ripeness is a doctrine that encompasses three principles: "the general prohibition on a litigant's raising another person's legal right[;] the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches[;] and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)* (internal quotation marks and citation omitted). The Ninth Circuit has articulated that prudential ripeness involves evaluation of "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1141 (9th Cir. 2000)* (internal quotation marks and citation **[**17]** omitted) (finding plaintiffs' claims "unfit for judicial resolution" because they were "devoid of any specific factual context" and the record was "remarkably thin and sketchy, consisting only of a few conclusory affidavits"). Here, as previously noted, Exhibit E avers that one of Plaintiff's member companies decided to pull out of a settlement negotiation for a pay-for-delay settlement agreement and chose instead to continue litigating a patent-infringement lawsuit at significant cost due to concerns about enforcement of AB 824. (ECF No. 17-3 at 3.) Accordingly, the Court finds the claim is prudentially ripe, as there is a sufficient factual development for judicial resolution.

ii. Likelihood of Success

Plaintiff argues AB 824 — because it is not limited to settlement agreements entered into in California or between California entities — directly regulates out-of-state commerce and is therefore a per se violation of the dormant *Commerce Clause*. (ECF No. 15-1 at 14-16 (citing *Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 55 S. Ct. 497, 79 L. Ed. 1032 (1935)*; *Sam Francis Found. v. Christies, Inc. (Sam Francis), 784 F.3d 1320 (9th Cir. 2015)*).) In opposition, the State contends Plaintiff's dormant *Commerce Clause* claim rests solely on an extraterritoriality theory and "the Supreme Court has rarely held that statutes violate the extraterritoriality doctrine."[4] (ECF No. 20 at 17 **[**18]** (quoting **[*984]** *Rocky Mt. Farmers Union v. Corey, 730 F.3d 1070, 1101 (9th Cir. 2013)*). The State

[4] The Court agrees with the State that Plaintiff alleges that AB 824 unlawfully regulates extraterritorial activity — especially in light of the fact that the Ninth Circuit has identified the case law Plaintiff cites as pertaining to extraterritoriality arguments and that Plaintiff does not argue any other theory in its briefing. (ECF No. 15-1 at 14-16 (citing *Healy v. Beer Inst., 491 U.S. 324, 332, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989)*; *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth. (Brown-Forman), 476 U.S. 573, 579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986)*); *see also* ECF Nos. 15-1, 26); *Rocky Mt. Farmers Union, 730 F.3d at 1101* (citing *Healy, 491 U.S. at 336*; *Brown-Forman, 476 U.S. at 579*). Accordingly, this Court will only address the argument regarding extraterritoriality.

maintains AB 824 does not regulate conduct occurring wholly outside California, as an agreement "to engage in unlawful sales in California [that] may be made outside the state does not put those decisions out of the state's reach." (*Id.* at 18-19.)

The *Commerce Clause* provides that "Congress shall have power . . . [t]o regulate Commerce . . . among the several States." *U.S. Const., art. I, § 8, cl. 3*. "This affirmative grant of power does not explicitly control the several states, but it 'has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.'" *Rocky Mt. Farmers Union, 730 F.3d at 1087* (quoting *Oregon Waste Sys. v. Department of Envtl. Quality, 511 U.S. 93, 98, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994)*; *Wyoming v. Oklahoma, 502 U.S. 437, 454, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992)*). The "negative" or "dormant" *Commerce Clause* "prohibits discrimination against interstate commerce and bars state regulations that unduly burden interstate commerce." *Id.; Sam Francis, 784 F.3d at 1323* (internal citation omitted). The Supreme Court has articulated a two-tiered approach to evaluate state economic regulation under the *Commerce Clause*: "[1] When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Court has] generally struck down the statute without **[**19]** further inquiry. [2] When, however, a statute only has indirect effects on interstate commerce and regulates evenhandedly, [the Court has] examined whether the [s]tate's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris, 729 F.3d 937, 948 (9th Cir. 2013)* (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578-79, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986)*).

With respect to direct regulation of interstate commerce occurring wholly outside of a state's borders, also known the extraterritoriality doctrine, the dormant *Commerce Clause* provides that "any 'statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority.'" *Rocky Mt. Farmers Union, 730 F.3d at 1101* (quoting *Healy v. Beer Inst., 491 U.S. 324, 336, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989)*). The critical inquiry "is whether the practical effect of the regulation is to control conduct beyond the boundary of the state." *Id.* (quoting *Healy, 491 U.S. at 336*; *Brown-Forman, 476 U.S. at 579*). To determine practical effect, the Ninth Circuit considers the direct consequences of the statute as well as "how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id.* (quoting *Healy, 491 U.S. at 336*). "[T]he Supreme Court has rarely held that statutes violate the extraterritoriality doctrine." *Id.*

[20]** Nevertheless, the Ninth Circuit in *Sam Francis* recently found California's Resale Royalty Act's clause regulating sales outside the state of California facially violative of the dormant *Commerce Clause*. *784 F.3d at 1322*. The language of the clause at issue required the payment of royalties to the artist after a sale of fine art whenever the seller resided in California or the sale took place in California. *Id.* The court noted the statute violates the dormant *Commerce Clause* **[*985]** because it "facially regulates a commercial transaction that 'takes place wholly outside of the State's borders.'" *Id. at 1323-24* (citing *Healy, 491 U.S. at 336*; *Valley Bank of Nev. v. Plus Sys., Inc., 914 F.2d 1186, 1189-90 (9th Cir. 1990)* ("Direct regulation occurs when a state law directly affects transactions that take place . . . entirely outside of the state's borders. Such a statute is invalid per se . . . .")). The court provided the following example: "if a California resident has a part-time apartment in New York, buys a sculpture in New York from a North Dakota artist to furnish her apartment, and later sells the sculpture to a friend in New York, the Act requires the payment of a royalty to the North Dakota artist — even if the sculpture, the artist, and the buyer never traveled to, or had any connection with, California." *Id.*

Conversely, in *Rocky Mountain*, the Ninth Circuit held California's Low Carbon Fuel Standard ("Fuel Standard"), *Cal. Code Regs., tit. 17, §§ 95480-90* (2011), did not violate the dormant *Commerce Clause*'s prohibition on extraterritorial regulation. *730 F.3d at 1078*. The California Air Resources Board ("CARB") implemented the Fuel Standard to lower greenhouse gas ("GHG") emissions in transportation fuel *consumed in California* by reducing the quantity of GHGs emitted in the production of fuel. *Id. at 1079-80* (emphasis added). To comply with the Fuel Standard, "a fuel blender must keep the average carbon intensity of its total volume of fuel below the Fuel Standard's annual limit" and "fuels generate credits or deficits, depending on whether their carbon intensity is higher or lower than the annual cap." *Id. at 1080*. The Fuel Standard uses a "lifecycle analysis" to account for emissions associated with all aspects of the fuel production process and CARB assigns a cumulative carbon intensity value to an individual fuel lifecycle, known as a "pathway." *Id. at 1080-81*.

The Ninth Circuit concluded the Fuel Standard regulates only the California market, as it stated:

> [The Fuel Standard] says nothing at all about ethanol produced, sold, and used outside California, it does **[**21]** not require other jurisdictions to adopt reciprocal standards before their ethanol can be sold in California, it makes no effort to ensure the price of ethanol is lower in California than in other states, and *it imposes no civil or criminal penalties on non-compliant transactions completed wholly out of state*.

Id. at 1101-03 (emphasis added). The court noted California does not control the transportation, farming practices, and land use factors that could encourage producers to adopt less carbon-intensive policies "simply because it factors them into the lifecycle analysis." *Id. at 1103*. The court also highlighted that the "credits and caps [in the Fuel Standard] apply only to the portfolios of fuel blenders in California and the producers who contract with them." *Id.* The court concluded that "California properly based its regulation on the harmful properties of fuel" and "[i]t does not control the production or sale of ethanol wholly outside of California." *Id. at 1104*.

Here, with respect to settlement agreements, the language of AB 824 provides that:

> [A]n agreement resolving or settling, on a final or interim basis, a patent infringement claim, in connection with the sale of a pharmaceutical product, shall be presumed **[**22]** to have anticompetitive effects and shall be a violation of this section if both of the following apply: (A) A nonreference drug filer[5] receives anything **[*986]** of value from another company asserting patent infringement, including, but not limited to, an exclusive license or a promise that the brand company will not launch an authorized generic version of its brand drug. (B) The nonreference drug filer agrees to limit or forego research, development, manufacturing, marketing, or sales of the nonreference drug filer's product for any period of time.

Cal. Health & Safety Code § 134002(a)(1). With respect to rebutting this presumption, the law provides that:

> Parties to an agreement are not in violation of paragraph (1) if they can demonstrate by a preponderance of the evidence that either of the following are met: (A) The value received by the nonreference drug filer . . . is a fair and reasonable compensation solely for other goods or services that the nonreference drug filer has promised to provide. (B) The agreement has directly generated procompetitive benefits and the procompetitive benefits of the agreement outweigh the anticompetitive effects of the agreement.

Id. § 134002(a)(3). The law also contains a civil penalties provision, as follows:

> Each person **[**23]** that violates or assists in the violation of this section shall forfeit and pay to the State of California a civil penalty sufficient to deter violations of this section, as follows: (i) If the person who violated this section received any value due to that violation, an amount up to three times the value received by the party that is reasonably attributable to the violation of this section, or twenty million dollars ($20,000,000), whichever is greater. (ii) If the violator has not received anything of value as described in clause (i), an amount up to three times the value given to other parties to the agreement reasonably attributable to the violation of this section, or twenty million dollars ($20,000,000), whichever is greater. (iii) For the purposes of this subdivision, "reasonably attributable to this violation" shall be determined by California's share of the market for the brand drug at issue in the agreement.

Id. § 134002(e)(1)(A).

The State contends that "AB 824 seeks to prevent or reduce anticompetitive pharmaceutical sales in California, and, thus, applies to agreements to engage in that conduct," not "conduct occurring wholly outside California." (ECF

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[5] The statute defines a "nonreference drug filer" as "[a]n ANDA filer" or "[a] biosimilar biological product application filer." *Cal. Health & Safety Code § 134000(g)*.

No. 20 at 18-19.) The State asserts "if **[**24]** manufacturers want to avoid application of AB 824 to agreements they enter into, they can do so simply by omitting California sales from those covered by the agreement." (*Id.* at 19.) However, a review of the relevant sections of the statute reveals no such limitation to only California sales, unlike the Fuel Standard's express limitation to fuels consumed in California in *Rocky Mountain*. *730 F.3d at 1079-80*. The Court therefore finds persuasive Plaintiff's hypothetical: "If two parties settle a patent suit in Delaware on terms that AB 824 deems unlawful, the settling parties (and every person who merely assists) would be liable for severe penalties under California law."[6] **[*987]** (ECF No. 15-1 at 16 (citing *Cal. Health & Safety Code §§ 134002(a)*, *(e)*).) The Court finds this hypothetical similar to the hypothetical articulated by the Ninth Circuit in *Sam Francis*. *784 F.3d at 1323-24*. As it is written, AB 824 may reach the kind of settlement agreements proposed by Plaintiff — an agreement in which none of the parties, the agreement, or the pharmaceutical sales have any connection with California.

The Court further finds issues with AB 824's civil penalties provision. One of the factors that weighed against the Ninth Circuit finding an unconstitutional, extraterritorial regulation of **[**25]** commerce in *Rocky Mountain* was that the Fuel Standard did not impose civil or criminal penalties on non-compliant transactions completed wholly out of state. *730 F.3d at 1101-03*. That is not the case here. The State characterizes the civil penalties provision in AB 824, which could conceivably impose a $20 million fine (or more) on a person who received any value for a violation of this section, as "simply alter[ing] the . . . penalties to conduct that was already illegal under California law." (ECF No. 20 at 18.) The Court finds this argument disingenuous, as AB 824 could be used to levy substantially significant civil penalties on parties that do not have any connection with California. As it is written, the civil penalties provision could hypothetically reach a corporate officer of a Delaware company entering into a settlement agreement with another Delaware company regarding pharmaceutical sales in only Delaware. In light of this provision, the Court cannot reasonably find that AB 824 regulates only the California market.

Based on the foregoing, the Court finds Plaintiff is likely to succeed in showing that AB 824 violates the dormant *Commerce Clause*. As such, the Court need not and does not address Plaintiff's alternative claims **[**26]** challenging the legality of AB 824.

D. Immediate and Irreparable Injury

Plaintiff argues "[o]nly an injunction barring enforcement of the statute can prevent its members from suffering further irreparable harm, as "AB 824 has already caused multiple . . . members to lose favorable settlement offers and the value associated with them, and has thus caused these members to spend huge sums of money litigating patent cases they otherwise would have settled." (ECF No. 15-1 at 24.) Plaintiff asserts this economic injury constitutes irreparable injury due to the State's *Eleventh Amendment* immunity. (*Id.*) Plaintiff also maintains its members suffer irreparable injury by subjecting them to a law that violates their constitutional rights. (*Id.*)

In opposition, the State argues that since AB 824 went into effect, Plaintiff's members have settled more than 40 patent infringement cases and "there has not been a statistically significant decrease in the number of ANDAs submitted in 2020." (ECF No. 20 at 27.) The State also notes Plaintiff's argument of irreparable injury due to subjecting its members to an unconstitutional law is meritless because Plaintiff has not demonstrated a likelihood of success on the merits. (**[**27]** *Id.*)

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[6] The State contends that "if manufacturers want to avoid application of AB 824 to agreements they enter into, they can do so simply by omitting California sales from those covered by the agreement," impliedly arguing that the provisions of AB 824 will not be enforced against parties entering into settlement agreements covering pharmaceutical sales outside of California. (ECF No. 20 at 19.) The State continually emphasizes in its opposition that AB 824 "does not regulate conduct occurring wholly outside California," "sets the terms of doing business in California," and "governs the prices for which goods are sold in California." (*Id.* at 18-19.) The Court ultimately does not find this argument persuasive as AB 824 on its face does not include such a limitation to California sales. 2019 Cal. Legis. Serv. 531; *see also* ***Smallwood v. Allied Van Lines, Inc., 660 F.3d 1115, 1121 (9th Cir. 2011)*** (For purposes of statutory interpretation, "[u]nder the 'plain meaning' rule, '[w]here the language [of a statute] is plain and admits of no more than one meaning[,] the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion." (citing *Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 878 (9th Cir. 2001)* (en banc)). The Court therefore cannot read "California sales" into the statute where it was not written by the State Legislature.

The Court agrees with Plaintiff. The Ninth Circuit has concluded that although monetary harm does not constitute irreparable harm, monetary injury can be **[*988]** irreparable when *Eleventh Amendment* sovereign immunity prevents a plaintiff from recovering damages in federal court. *Cal. Pharmacists Ass'n v. Maxwell-Jolly, 563 F.3d 847, 852 (9th Cir. 2009)*, *vacated on other grounds by* *Douglas v. Indep. Living Ctr. of S. Cal., Inc., 565 U.S. 606, 132 S. Ct. 1204, 182 L. Ed. 2d 101 (2012)*. The monetary injury stems from Plaintiff's members foregoing cost-saving settlement agreements likely deemed unlawful by AB 824 and instead litigating these cases to judgment. Accordingly, the Court is persuaded that Plaintiff's members will be unable to recover monetary damages against the State even if Plaintiff is successful on the merits of its case.

Further, "[I]f the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is 'proper.'" *Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 136 S. Ct. 2292, 2307, 195 L. Ed. 2d 665 (2016)* (citing *Citizens United v. FEC, 558 U.S. 310, 333, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)*); *see also* *Puente Arizona v. Arpaio, 76 F. Supp. 3d 833, 860 (D. Ariz. 2015)*, *vacated in part on other grounds by* *Puente Arizona v. Arpaio, 821 F.3d 1098 (9th Cir. 2016)*. As noted previously, Plaintiff has established a likelihood of success on the merits of its dormant *Commerce Clause* claim.

Based on the foregoing, the Court finds that Plaintiff has sufficiently shown a likelihood of irreparable harm in the absence of a preliminary injunction.

E. Balance of Equities and Public Interest

Having found a likelihood of **[**28]** success as to Plaintiff's dormant *Commerce Clause* claim and a likelihood of irreparable harm absent an injunction, Plaintiff must demonstrate the balance of equities tip in its favor. *See* *Alliance, 632 F.3d at 1134-35*. A court balancing the equities will look to possible harm that could befall either party. *See CytoSport, Inc. v. Vital Pharms., Inc., 617 F. Supp. 2d 1051, 1081 (E.D. Cal. 2009)*, *aff'd*, *348 F. App'x 288 (9th Cir. 2009)*. Additionally, "[t]he public interest analysis for the issuance of a preliminary injunction requires [the Court] to consider whether there exists [s]ome critical public interest that would be injured by the grant of preliminary relief." *Credit Bureau Connection, Inc. v. Pardini, 726 F. Supp. 2d 1107, 1123 (E.D. Cal. Jul. 12, 2010)* (citing *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly, 572 F.3d 644, 659 (9th Cir. 2009)*).

As noted previously, Plaintiff argues that absent an injunction, its members will suffer economic injury and continue to be subjected to an unconstitutional law. (ECF No. 15-1 at 24.) Plaintiff also asserts that for every day that AB 824 is in effect, the flow of generic and biosimilar medicines into the market slows, resulting in lost savings from such medicines. (*Id.*) Plaintiff maintains AB 824 "has already led to delays in the availability of generic medicines, and it has already driven generic manufacturers to withdraw Paragraph IV ANDAs." (*Id.*)

In opposition, the State asserts that "any time a State is enjoined by a court from effectuating statutes enacted by representatives **[**29]** of its people, it suffers a form of irreparable injury." (ECF No. 20 at 28 (citing *Maryland v. King, 567 U.S. 1301, 133 S. Ct. 1, 183 L. Ed. 2d 667 (2012)*).) The State contends that if AB 824 is enjoined, "California will have one less tool at its disposal to combat collusive agreements, and consequently, Californians will be denied affordable drugs and experience increasing insurance premiums." (*Id.*) The State also asserts that it has an interest in ensuring pharmaceuticals are affordable, and AB 824 "is designed to curb the high costs of prescription drugs that affect not **[*989]** only healthcare patients, but also payors such as employers and the Medicare and Medicaid programs." (*Id.*)

In light of the irreparable harm to Plaintiff articulated above, the Court finds Plaintiff's arguments with respect to the balance of equities and the public interest persuasive as well. Relative to Plaintiff's injury, the Court agrees with Plaintiff's contention that the harm to the State is relatively *de minimis*, as the State "will still be able to bring enforcement actions under federal ***antitrust law***." (ECF No. 15-1 at 25.) The Court also notes that the State can amend AB 824 to ensure that it is compliant with the U.S. Constitution. Finally, the public interest favors a permanent **[**30]** injunction because Plaintiff has established a likelihood of success on its dormant *Commerce Clause* claim. *See* *Puente Arizona, 76 F. Supp. 3d at 861*.

Based on the foregoing, the Court finds the balance of equities and the public interest element tips sharply in Plaintiff's favor such that an injunction would be proper even if there were only serious questions going to the merits.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiff's Motion for Preliminary Injunction to enjoin enforcement of AB 824. (ECF No. 15.)

IT IS SO ORDERED.

DATE: December 8, 2021

/s/ Troy L. Nunley

Troy L. Nunley

United States District Judge

Cisco Sys. v. Dexon Computer, Inc.

United States District Court for the Northern District of California

December 9, 2021, Decided; December 9, 2021, Filed

Case No. 20-cv-04926-CRB

Reporter
2021 U.S. Dist. LEXIS 236322 *; 2021 WL 5848080

CISCO SYSTEMS, INC., et al., Plaintiffs, v. DEXON COMPUTER, INC., et al., Defendants.

Prior History: *Cisco Sys. v. Dexon Computer, Inc., 2021 U.S. Dist. LEXIS 96082, 2021 WL 2015942 (N.D. Cal., May 20, 2021)*

Core Terms

customers, alleges, counterclaims, products, software, networking, misrepresentation, antitrust, markets, competitors, purchasers, fails, secondary market, reseller, pleaded, secondary-market, misleading, license, package, genuine, consumers, switches, declaratory judgment, counterfeit, violates, harmed, maintenance services, motion to dismiss, leave to amend, channels

LexisNexis® Headnotes

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

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

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

Fed. R. Civ. P. 12(b)(6) allows a defendant to move to dismiss a cause of action which fails to state a claim upon which relief can be granted. To survive a *Rule 12(b)(6)* motion, a complaint must plead enough facts to state a claim to relief that is plausible on its face. A claim is plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. When evaluating a *Rule 12(b)(6)* motion, the court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party. But conclusory allegations amounting only to formulaic recitation of the elements are not entitled to an assumption of truth. Courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on *Rule 12(b)(6)* motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Mistake

HN2[] **Heightened Pleading Requirements, Fraud Claims**

A party alleging fraud must state with particularity the circumstances constituting fraud. *Fed. R. Civ. P. 9(b)*. Particularity requires the who, what, when, where, and how of the misconduct charged, including what is false or misleading about a statement, and why it is false. Allegations must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.

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

Patent Law > Remedies > Declaratory Judgments

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > Burdens of Proof

HN3[] **Discretionary Jurisdiction, Factors**

Courts may adjudicate only actual cases or controversies. *U.S. Const. art. III, § 2, cl. 1*. When presented with a claim for a declaratory judgment, therefore, federal courts must take care to ensure the presence of an actual case or controversy. Absent a true case or controversy, a complaint solely for declaratory relief under *28 U.S.C.S. § 2201* will fail for lack of jurisdiction under *Fed. R. Civ. P. 12(b)(1)*. To satisfy the actual controversy requirement in a trademark case, the plaintiff must show real and reasonable apprehension that it would be liable for infringement if it continued marketing its product.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

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

When dismissal is appropriate, courts shall freely give leave to amend the complaint when justice so requires. *Fed. R. Civ. P. 15(a)(2)*. In the Ninth Circuit, district courts may deny leave to amend due to undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Defenses

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN5[] **Tying Arrangements, Defenses**

To pass a motion to dismiss, a plaintiff must allege an actual adverse effect on competition caused by the tying arrangement.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

HN6[] Attempts to Monopolize, Elements

The mere fact of having monopoly power is not unlawful unless it is accompanied by an element of anticompetitive conduct.

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

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

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

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

HN7[] State Regulation, Claims

The Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200*, broadly prohibits unfair competition, defined as any unlawful, unfair or fraudulent business act or practice. The unlawful prong requires an underlying violation of law.

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

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

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

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

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

HN8[] State Regulation, Claims

To plead a claim under the Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200*, fraudulent prong, a plaintiff must show that members of the public are likely to be deceived by the challenged practice. Likelihood of deception is assessed under a reasonable consumer standard. A plaintiff must also demonstrate actual reliance, which may be inferred from the misrepresentation of a material fact.

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

HN9[] Heightened Pleading Requirements, Fraud Claims

Particularity under *Fed. R. Civ. P. 9(b)* requires the who, what, when, where, and how of the misconduct charged, including what is false or misleading about a statement, and why it is false.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Grounds for Relief

Governments > Legislation > Statutory Remedies & Rights

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

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

HN10[] State Declaratory Judgments, Grounds for Relief

N.Y. General Business Law § 369-b does not provide a private right of action. A party cannot bring a declaratory judgment claim based on a statute for which there is no private right of action.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Elements of False Advertising

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Standing

Trademark Law > ... > Particular Subject Matter > Geographic Terms > Terms Ineligible for Protection

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Scope

HN11[] False Advertising, Lanham Act

Section 43(a) of the Lanham Act, 15 U.S.C.S. § 1125(a)(1)(B), forbids the use of false or misleading descriptions in commercial advertising. Although the Ninth Circuit has not yet decided the issue, the better reasoned district court authority is that, where a Lanham Act claim is predicated on the theory that the defendant engaged in a knowing and intentional misrepresentation, then Fed. R. Civ. P. 9(b) is applicable.

Torts > ... > Contracts > Intentional Interference > Elements

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

Torts > Intentional Torts > Defamation > Libel

HN12[] Intentional Interference, Elements

Intentional interference with contractual relations requires pleading the existence of a valid then-existing contract between plaintiff and a third party. Intentional interference with prospective economic advantage requires pleading an existing economic relationship with a probability of future economic benefit and that the defendant's interference was wrongful by some legal measure other than the fact of interference itself. Similarly, trade libel requires a plaintiff to identify the particular purchasers who have refrained from dealing with him, and specify the transactions of which he claims to have been deprived.

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Judges: CHARLES R. BREYER, United States District Judge.

Opinion by: CHARLES R. BREYER

Opinion

ORDER GRANTING MOTION TO DISMISS COUNTERCLAIMS

Plaintiffs Cisco Systems, Inc. and Cisco Technology, Inc. (collectively "Cisco") sued Defendant Dexon Computer, Inc. ("Dexon") for trademark infringement, trademark counterfeiting, false designation of origin, unfair business practices under California law, and unjust enrichment. In its amended answer, Dexon filed eleven counterclaims against Cisco: antitrust violations of the Sherman Act and the California Cartwright Act; violations of the California Unfair Competition Law and the Lanham Act; declaratory judgments as to the parties' rights; and tortious interference with business and trade libel. Cisco moves to dismiss all counterclaims. The Court GRANTS the motion with leave to amend.

I. BACKGROUND

A. Facts Alleged

Cisco Systems, Inc. is a Delaware corporation with its principal place of business in San Jose, California. Am. Answer & Countercl. (dkt. 50) ¶ 11. Cisco **[*5]** Technology, Inc. is a California corporation with its principal place of business in San Jose, California. Id. ¶ 12. Cisco manufactures and sells products and services in "routing and switching" as well as "home networking, IP telephony, optical networking, security, storage area networking, and wireless technology." Id. ¶ 14.

Dexon is a Minnesota corporation with its principal place of business in Bloomington, Minnesota. See id. ¶ 10. Dexon sells "affordable network equipment" to hospitals, emergency service providers, public service organizations, and other small to medium-sized businesses. Id. ¶ 6. Dexon is a "value added reseller" ("VAR") or "independent secondary-market reseller": it purchases and resells new or refurbished equipment by such companies as Cisco, Hewlett Packard, Dell, and Juniper Networks. Id. ¶¶ 52, 95.

1. Alleged Monopoly in Three Markets

Dexon alleges that Cisco has a monopoly in three putative markets: the market for Ethernet switches; the market for routers (collectively, "equipment markets"); and the market for maintenance of its own equipment.

First, Dexon alleges that Cisco has more than a 60% market share of the U.S. and global markets for Ethernet switches. **[*6]** Id. ¶ 26. Ethernet switches are "devices that control data flow within a network to enable network components to communicate efficiently." Id. ¶ 22.

Second, Dexon alleges that Cisco has more than a 60% market share in the U.S. and global markets for routers. Id. ¶ 30. Routers "allow for communication between networks." Id. ¶ 27. Although some Ethernet switches incorporate routing technologies, customers do not substitute Ethernet switches for routers. Id. ¶¶ 27, 28.

In the equipment markets, some of Cisco's competitors are "Hewlett Packard, Dell, and Juniper Networks." Id. ¶ 95. A new firm may struggle to enter these markets because of the high cost of developing the software and hardware and building a sales network. Id. ¶ 31. Also, customers have "long purchase cycles" before they replace or upgrade their network components. Id. ¶ 32.

Third, Cisco has a 90% share of the U.S. and global "After-Market for Maintenance Services" on its own equipment. Id. ¶ 20. Cisco sells the SmartNet package, a maintenance service that may be purchased in one to five year periods. Id. ¶¶ 2, 3. SmartNet provides "onsite visits from certified engineers, software updates, technical assistance center [ ] access, **[*7]** online resources, and hardware replacement services." Id. ¶ 16. Although third parties provide some of these maintenance services for Cisco equipment, only SmartNet provides "important software bug fixes, patches, and updates." Id. ¶¶ 18, 17, 20.

Cisco does not require any purchasers of its equipment to purchase SmartNet. Id. And "customers can and do purchase Cisco networking equipment without maintenance services." Id. ¶ 21. Further, those who choose to purchase SmartNet need not do so at the same time they purchase Cisco equipment, or from the same seller. See id. ¶¶ 36, 38. Nonetheless, Dexon alleges that customers who have purchased Cisco products are "effectively compelled" to purchase SmartNet. Id. ¶ 18.

2. Cisco's Conduct Toward Consumers

Cisco has an "Authorized Channel Network" under which it sells equipment to entities that are "Authorized Resellers." Id. ¶ 97. Cisco exerts strict control over how, and at what prices, its "Authorized" partners buy and sell Cisco equipment. Id. Dexon, however, is a vendor in the secondary market and often has cheaper prices. Id. ¶ 95. Dexon alleges that Cisco's margins are "far higher" for sales made through channels with higher resale prices." **[*8]** Id. ¶ 45. Dexon alleges that the cheaper prices on the secondary market "run counter to Cisco's profit motives," so Cisco takes steps to suppress it. Id. ¶ 59.

Cisco informs purchasers of secondary-market equipment that the software embedded in the equipment is "not transferable," so their equipment will require a new software license. Id. ¶ 103. After informing these purchasers that their software licenses are invalid, Cisco "extort[s]" license fees from them. Id. ¶ 106. Cisco also informs them that their equipment is "used," "stolen," or "counterfeit." Id. ¶ 110. Cisco defines "used" to mean "previously owned equipment that is now owned by a party other than the original customer," including both "opened and unopened equipment." Id. ¶ 111 (emphasis added). Cisco knows that this definition is misleading and contrary to customers' understanding of the term. Id. ¶¶ 112-13. Finally, Cisco refuses to warranty equipment sold on the secondary market on the stated basis that it cannot determine whether the products are genuine or counterfeit. Id. ¶ 114.

Cisco also allegedly coerces secondary-market equipment purchasers who have purchased SmartNet packages into purchasing more equipment. Id. **[*9]** ¶ 44. Dexon alleges that Cisco "has suddenly claimed at some point after customers purchased a SmartNet service package that the SmartNet service packages were no longer valid in the absence of a new purchase of a [Cisco router and/or Ethernet switch]." Id. ¶ 40. Cisco has sometimes "force[d]" a customer to pay a "re-certification fee" to reinstate a SmartNet package "associated with previously purchased networking products." Id. Customers have "little choice" but to give in because they have already purchased equipment and SmartNet. Id.

Dexon provides two examples of Cisco's conduct toward secondary-market equipment purchasers. First, an unidentified hospital that had long purchased Cisco products from Dexon was contemplating another order from Dexon. Id. ¶ 42. Cisco "threatened [the hospital] that if it did not cancel the order" from Dexon, Cisco would "not honor the contemplated new SmartNet service package" and "cancel immediately all SmartNet service packages . . . in place for the entire hospital system and clinics." Id. The hospital backed out of the deal with Dexon. Id. Second, in the middle of an unidentified 911-service center's five-year SmartNet package, Cisco told the center **[*10]** that it had to purchase new routers and Ethernet switches "if it wanted to receive the service it was due under its SmartNet service package." Id. ¶ 43. Because the center could not afford it, Dexon, at its own expense, purchased a new SmartNet package for the center's equipment. Id.

Cisco's tactics "force customers to only be able to access both networking equipment and service through the most expensive avenues." Id. ¶ 53. It is "practically difficult" for these customers to defect to a competitor of Cisco's. Id. ¶ 55. Further, "customers are not free to make a product choice on the merits but rather need to account for the likely reaction of Cisco" and "what treatment it will face if it draws Cisco's disapproval." Id. ¶ 57. Cisco's competitors in the equipment markets therefore "have less revenue than they should." Id.

3. Cisco's Conduct Toward Dexon

Cisco "spends substantial money and effort to attack secondary market participants such as Dexon and to chill reseller and end user participation in the secondary market." Id. ¶ 119. It employs a team of "Brand Protection" employees who intervene with resellers and end users to disrupt sales on the secondary market. Id. ¶ 120(b).

Cisco **[*11]** also "tortiously and erroneously insinuat[es] to resellers and end users that secondary market participants in general are engaging in illegal activity." Id. ¶ 120(c).

In 2015, Cisco deactivated Dexon's access to the online service database used to arrange maintenance for Cisco products. Id. ¶¶ 50, 49. Cisco later reinstated Dexon. Id. But in 2018, Cisco deactivated Dexon's access and refused to reinstate it. Id. ¶ 51. As a result, at least two customers purchased equipment from a Cisco competitor. Id. On another occasion, Cisco allegedly threatened a larger VAR not to do business with Dexon, and when the VAR representative refused to comply, "he was assigned to a different region and account." Id. ¶ 52. Dexon believes that other VARs were "successfully coerced . . . to limit or withdraw their business from Dexon." Id. Cisco has "falsely advis[ed] Dexon's actual and prospective customers" that "Dexon does not sell genuine Cisco product; Dexon does not sell new Cisco product; Dexon 'repackages' used Cisco product as 'new'; Dexon opens new Cisco product and substitutes parts or software" and made other similar statements. Id. ¶ 121.

Dexon has lost customers "due to [Cisco's] anticompetitive **[*12]** and coercive tactics." Id. ¶ 58. And it suffered "losses that directly stem from Cisco's anticompetitive conduct" when it was "forced to provide new equipment under duress from Cisco." Id. Dexon has also sustained "losses to its goodwill and reputation in the marketplace." Id. ¶ 60. Because of its market position, Cisco is "immune" to "customer dissatisfaction" and instead actively "portray[s] Dexon as an unworthy sales partner [that] is the cause of the customers' problems." Id.[1]

B. Procedural History

On July 22, 2020, Cisco sued Dexon for trademark infringement, trademark counterfeiting, false designation of origin, unfair business practices under California law, and unjust enrichment. See Am. Compl. (dkt. 32). The Court denied Dexon's motion to dismiss Cisco's amended complaint for lack of personal jurisdiction. See Amended Order (dkt. 40). After Dexon filed an amended answer and eleven counterclaims, Cisco moved to dismiss them. See Mot. to Dismiss (dkt. 72).

II. LEGAL STANDARD

HN1[] *Rule 12(b)(6) of the Federal Rules of Civil Procedure* allows a defendant to move to dismiss a cause of action which fails to state a claim upon which relief can be granted. To survive a *Rule 12(b)(6)* motion, a complaint must plead "enough facts to state a claim to **[*13]** relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. When evaluating a *Rule 12(b)(6)* motion, the court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)*. But conclusory allegations amounting only to "formulaic recitation of the elements" are not entitled to an assumption of truth. See *Iqbal, 556 U.S. at 681* (quoting *Twombly, 550 U.S. at 555*). "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on *Rule 12(b)(6)* motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)*.

HN2[] A party alleging fraud "must state with particularity the circumstances constituting fraud." *Fed. R. Civ. P. 9(b)*. Particularity requires "the who, what, when, where, and how of the misconduct charged, including what is false or misleading about a statement, and why it is false." *Benavidez v. Cty. of San Diego, 993 F.3d 1134, 1145 (9th Cir. 2021)* (quoting United States v. United Healthcare Ins. Co., *848 F.3d 1161, 1180 (9th Cir. 2016)*). Allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute **[*14]** the

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[1] Dexon includes more factual allegations in its opposition brief, but these are not properly before the court on this motion. See, e.g., MTD Opp. (dkt. 81) at 26-27, 30.

fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." United Healthcare, 848 F.3d at 1180 (citation and quotation omitted).

HN3[] Courts may adjudicate only actual cases or controversies. U.S. Const. art. III, § 2, cl. 1. "When presented with a claim for a declaratory judgment, therefore, federal courts must take care to ensure the presence of an actual case or controversy." Rhoades v. Avon Prods., Inc., 504 F.3d 1151, 1157 (9th Cir. 2007) (citing Pub. Serv. Comm'n v. Wycoff, Co., 344 U.S. 237, 244, 73 S. Ct. 236, 97 L. Ed. 291 (1952)). "Absent a true case or controversy, a complaint solely for declaratory relief under 28 U.S.C. § 2201 will fail for lack of jurisdiction under Rule 12(b)(1)." Id. (citation omitted). To satisfy the actual controversy requirement in a trademark case, the plaintiff must show "real and reasonable apprehension" that it would be liable for infringement if it continued marketing its product. Monster Cable Prods., Inc. v. Euroflex S.R.L., 642 F. Supp. 2d 1001, 1010 (N.D. Cal. 2009) (quoting Chesebrough-Pond's, Inc. v. Faberge, Inc., 666 F.2d 393, 396 (9th Cir. 1982)).

HN4[] When dismissal is appropriate, courts "shall freely" give leave to amend the complaint "when justice so requires." Fed. R. Civ. P. 15(a)(2). In the Ninth Circuit, district courts may deny leave to amend due to "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment." Leadsinger, Inc. v. BMG Music Pub., 512 F.3d 522, 532 (9th Cir. 2008) (quoting Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)).

III. [*15] DISCUSSION

The Court dismisses all of Dexon's counterclaims for failure to state a claim.

A. Antitrust Claims

1. Tying Claims (Counterclaims 1 and 4)

Dexon alleges that Cisco violated Section 1 of the Sherman Act and the California Cartwright Act because competition was harmed when customers who purchased SmartNet (maintenance service) were forced to purchase a "tied" product (equipment). See Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 462, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992). HN5[] To pass a motion to dismiss, a plaintiff "must allege an actual adverse effect on competition caused by the tying arrangement." Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1200 (9th Cir. 2012) (quotation and citation omitted).

These counterclaims fail because Dexon does not allege that the supposed tie had any adverse effect on competition. Dexon alleges that Cisco's competitors are impacted because "customers are not free to make a product choice on the merits but rather need to account for the likely reaction of Cisco." Countercl. ¶ 57; see id. ¶ 65 ("A substantial amount of commerce has been affected in the [equipment] Markets."); id. ¶ 67 (same). But the alleged facts do not support these conclusory assertions. The hospital that cancelled its order from Dexon simply bought Cisco products elsewhere, leaving competitors such as Hewlett Packard, Dell, and Juniper Networks **[*16]** unaffected. See id. ¶ 42. Dexon nowhere alleges that these competitors lost a sale when Cisco asked the 911 service center to purchase more Cisco equipment. And no lost sale is plausible because, at that time, the 911 center was not interested in "mak[ing] a product choice on the merits." It wanted no further equipment from any manufacturer. See id. ¶ 43.

More broadly, the supposed tie makes no logical sense. SmartNet exists to maintain Cisco products. The maintenance service (the supposed tying product) is only desirable to consumers as an add-on to the underlying equipment (the supposed tied product). Because a consumer buys SmartNet for equipment she already has, Cisco cannot exploit control over the SmartNet market to force people to buy the underlying equipment. It's true that, if

Cisco improperly withheld SmartNet service from its customers, Cisco may have breached its contract. But that is not an antitrust violation, nor would the claim be Dexon's.[2]

Because Dexon fails to plead a tying claim under the *Sherman Act*, its *Cartwright Act* claim fails. See *Cnty. Of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)* (noting that the "analysis under California's ***antitrust law*** mirrors the analysis under federal law").

2. Monopolization Claims (Counterclaims [*17] 2 and 3)

The Court also dismisses Dexon's counterclaims that Cisco unlawfully monopolized the equipment markets in violation of *Section 2 of the Sherman Act* (or that it attempted to do so). ***HN6***[] The mere fact of having monopoly power is not unlawful "unless it is accompanied by an element of anticompetitive conduct." See *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. Dexon alleges that Cisco engaged in the following exclusionary conduct to maintain its monopoly power: coercing purchases in the equipment markets; bullying its customers to purchase through more expensive channels; pressuring a VAR not to deal with Dexon; hurting Dexon by discontinuing its access to Cisco's service database; reversing a prior course of conduct toward Dexon; and engaging in similar tactics. Countercl. ¶ 71(a)-(f).

Dexon fails to plead that any of this alleged conduct, either singly or in the aggregate, was anticompetitive. As explained above, Dexon fails to allege that Cisco's coercion or "bullying" of its consumers harmed Cisco's competitors in the equipment markets. Nor does Dexon allege that competition was harmed when Cisco pressured another VAR not to deal with Dexon, discontinued Dexon's access to Cisco's database, or reversed its prior course of conduct toward Dexon. Cisco's conduct apparently led **[*18]** some customers to purchase Cisco equipment from suppliers other than Dexon. Countercl. ¶ 42. But this had no effect on Cisco's competitors. In at least one case, Cisco's conduct apparently helped its competitors: shutting off Dexon's access to the service database led frustrated consumers to purchase products made by other manufacturers. See id. ¶ 51. Dexon does not allege that Cisco's conduct made it more difficult for Dexon (or any other distributor) to distribute the products made by Cisco's competitors. And such an allegation would be a difficult one to make. Cf. *Omega Env't, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1163 (9th Cir. 1997)* (restrictions on distribution channels rarely pose an antitrust problem because they rarely foreclose competitors' access to consumers).

Further, Dexon's theory for why Cisco took action against Dexon makes little economic sense. See *Adaptive Power Sols., LLC v. Hughes Missile Sys. Co., 141 F.3d 947, 952 (9th Cir. 1998)* ("Antitrust claims must make economic sense." (citing *Eastman Kodak, 504 U.S. at 468*)). A firm is unlikely to prefer distribution channels with higher resale prices. Dexon alleges that Cisco gets a higher margin out of more expensive distributors, but it pleads no specific facts in support of this assertion. Id. ¶¶ 45, 59. Without more, it is implausible.

Because Dexon has not pleaded that Cisco's alleged conduct harmed **[*19]** competition, its claims under *Section 2 of the Sherman Act* fail.

3. Antitrust Injury

The antitrust claims also fail because Dexon has not pleaded antitrust injury. Although Dexon alleges that it was harmed by Cisco's conduct, it has not pleaded this harm was caused by anticompetitive conduct. Thus, while the conduct may have violated consumers' contracts with Cisco, or it may have been unwarranted or arbitrary, any injury to Dexon was not "of the type the antitrust laws were intended to prevent and that flows from that which

[2] It is at least theoretically possible for a firm to harm competitors by locking customers into a costly long-term service plan and then requiring purchases in a tied equipment market that customers en masse (for some set of reasons) cannot refuse. But no court that has yet found such an arrangement, and the conditions necessary are far away from the facts alleged here.

makes defendants' acts unlawful." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*.

For the above reasons, counterclaims 1 through 4 are dismissed with leave to amend. See *Leadsinger, 512 F.3d at 532*.

B. Other Claims

1. Unfair Competition Law (Counterclaim 5)

Dexon also alleges a claim under the California Unfair Competition Law ("UCL"), founded on the putative antitrust violations, as well as the following conduct: misrepresentations about the software license that users need to operate the equipment; misleading classification of secondary-market Cisco equipment as "used" or "counterfeit"; wrongful denial of warranties to secondary-market equipment; and tortious efforts to interfere with Dexon's business. Countercl. ¶¶ 92-130. These allegations fail because Dexon **[*20]** fails to allege its own reliance on any purported misrepresentation and/or because they are insufficiently pleaded under *Federal Rule of Civil Procedure 9(b)*.

HN7[] The UCL broadly prohibits "unfair competition," defined as "any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*; *Friedman v. AARP, Inc., 855 F.3d 1047, 1051 (9th Cir. 2017)*. The "unlawful" prong requires an underlying violation of law. See *Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1168 (9th Cir. 2012)*. Dexon has not plausibly alleged a violation of the antitrust laws, so it does not allege a UCL violation on that basis. See *Jones v. Micron Tech. Inc., 400 F. Supp. 3d 897, 923 (N.D. Cal. 2019)*.

Nor has Dexon pleaded a violation of the "unfair" prong. Dexon fails to sufficiently allege that any of Cisco's conduct "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 544 (Cal. 1999)*; see *Cisco Sys. Inc. v. Link US, LLC, 2019 U.S. Dist. LEXIS 212028, 2019 WL 6682838 (N.D. Cal. Dec. 6, 2019)* (applying this test in the context of a reseller).

HN8[] To plead a claim under the UCL's fraudulent prong, a "plaintiff must show that members of the public are likely to be deceived by the [challenged] practice." *Friedman, 855 F.3d at 1055*. "[L]ikelihood of deception is assessed under a 'reasonable consumer standard.'" Id. A plaintiff must also demonstrate "actual reliance," which may be "inferred from the misrepresentation **[*21]** of a material fact." Id.

a. Reliance by Third Parties

The UCL claim fails because Dexon did not plead its own reliance on the misrepresentation or facts sufficient to infer that reliance.

Courts are split as to whether reliance by third parties is sufficient to plead UCL fraud claims. See *Equinox Hotel Mgmt., Inc. v. Equinox Holdings, Inc., 2018 U.S. Dist. LEXIS 16914, 2018 WL 659105, at *13-14 (N.D. Cal. Feb. 1, 2018)* (discussing the split). But the majority view is that the plaintiff must plead his own reliance. See, e.g., id.; *L.A. Taxi Coop., Inc. v. Uber Techs., Inc., 114 F. Supp. 3d 852, 866 (N.D. Cal. 2015)*. On this view, the UCL does not confer statutory standing on a plaintiff when only third parties (and not the plaintiff itself) relied on the misrepresentation.

The Court is persuaded by the majority approach and concludes that Dexon must allege facts sufficient to infer its own reliance on the misrepresentations. While it is plausible that Dexon is indirectly harmed by its customers' reliance on the misrepresentation, the mere existence of harm does not mean that this harm is cognizable under the UCL. That's especially true given that restitution is the only monetary remedy for UCL claims, which is a poor fit for the thrust of Dexon's counterclaim as alleged. See *Cal. Bus. & Prof. Code § 17203*; *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 131 Cal. Rptr. 2d 29, 63 P.3d 937, 947 (Cal. 2003)* (restitution under the UCL must "restore the status quo by returning to the plaintiff funds in which he or she has an ownership **[*22]** interest"). Dexon has failed to allege facts plausibly suggesting that the harm derived from its own reliance.[3]

b. Other Grounds

The Court notes several additional flaws with Dexon's UCL claim. First, Dexon fails to allege that Cisco made any misrepresentation about the software license that users need to operate the equipment. See *Link US, 2019 U.S. Dist. LEXIS 212028, 2019 WL 6682838, at *7-8* (rejecting this argument). Dexon alleges that Cisco informs customers that "although its hardware can be freely resold, the 'embedded Cisco software that runs on the hardware' is 'not transferable,' and purchasers of secondary market Cisco equipment 'must acquire a new license from Cisco before the software can be used.'" Countercl. ¶ 102. Dexon contends that this statement is false because it violates the first sale doctrine. But that doctrine applies to purchased software, not to purchased software licenses. Dexon alleges no plausible facts suggesting that initial owners of Cisco equipment own (rather than merely license) the embedded software. Cisco makes no misrepresentation when it informs secondary-market equipment purchasers that they need a software license. See *Link US, 2019 U.S. Dist. LEXIS 212028, 2019 WL 6682838, at *7-8* (citing *Vernor v. Autodesk, Inc., 621 F.3d 1102, 1107 (9th Cir. 2010)*).

Dexon's claim of wrongful denial of warranties to secondary-market equipment **[*23]** also fails. The Court can discern no misrepresentations here. Countercl. ¶¶ 114-19. Dexon criticizes Cisco's policy of refusing to warranty secondary-market equipment, asserts that Cisco's tools to detect counterfeits are lacking, and alleges that Cisco fails to properly police its manufacturers and process serial numbers. Id. ¶¶ 116-18. Dexon has alleged not fraud, but frustration.

The allegations also fail because Dexon does not "state with particularity the circumstances constituting fraud." *Fed. R. Civ. P. 9(b)*; see *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)* (applying *Rule 9(b)* to UCL fraud claims). ***HN9***[] Particularity requires "the who, what, when, where, and how of the misconduct charged, including what is false or misleading about a statement, and why it is false." *Benavidez, 993 F.3d at 1145* (quotation and citation omitted). Dexon does not state who at Cisco classified genuine products as "used" or "counterfeit," or when, and to whom. See Countercl. ¶ 110. And although it provides at least some further details in its opposition, see Opp. at 25, its pleading does not allege the "who, when, or where" of Cisco's allegedly misleading definition of the word "used." See id. ¶ 111-13. Dexon fails to allege the "who, when, or where" to back up its conclusory claim that Cisco's Technical **[*24]** Assistance Center "intentionally modif[ies] or change[s] product serial numbers" in order to sell SmartNet. Id. ¶ 118. Nor does it allege "who, when, where, or what" as to Cisco's alleged "tortious[] and erroneous[] insinuati[ons] to resellers and end users" that actors such as Dexon are engaging in illegal activity. See id. ¶ 120(d). It also does not allege "when or where" Cisco told Dexon's actual and prospective customers that "Dexon does not sell genuine [or new] product," or who made this claim, or to whom. Id. ¶ 121. Although Dexon alleges that Cisco made this threat to a hospital system, that hospital is unidentified and insufficient specific facts are pleaded. Id. ¶ 42.

For these reasons, Dexon has failed to state a claim under the UCL.

2. Declaratory Judgment (Counterclaims 6 and 7)

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[3] In *Cisco Sys. Inc. v. Link US, LLC, 2019 U.S. Dist. LEXIS 212028, 2019 WL 6682838 (N.D. Cal. Dec. 6, 2019)*, this Court held that a counterclaim plaintiff stated a UCL fraud claim based on Cisco's misleadingly broad definition of "used" equipment. Cf. id. ¶¶ 111-13 (making a similar allegation). The Court permitted the claim to proceed, explaining that reliance need not be pleaded specifically, and apparently assuming that reliance by third parties could be cognizable. However, the Court did not consider this question. The Court does so today and adopts the majority approach.

Dexon seeks a declaratory judgment that "the sale of genuine Cisco product which Cisco has unilaterally deemed to be 'unauthorized' or 'unapproved' because sold outside of Cisco's authorized channels, sold to a secondary market reseller such as Dexon, or ineligible for warranty services as a result thereof, do not violate the *Lanham Act*." Countercl. ¶ 132.

This sentence is difficult to parse, but Dexon appears **[*25]** to want a declaration that its sale of genuine Cisco products does not violate the *Lanham Act*. But Cisco does not contend that the sale of genuine Cisco products violates the *Lanham Act*. Dexon does not allege that Cisco has sued Dexon or anyone else on this theory. In this suit, Cisco has sued Dexon on the theory that it does not sell genuine products. See Amended Compl. (dkt. 32). The Court lacks subject matter jurisdiction to issue a declaratory judgment as Dexon's proposed contention because Dexon has no "real and reasonable apprehension" of liability under the *Lanham Act* for selling genuine products. See MTD at 22 (citing Monster Cable Prods., Inc. v. Euroflex S.R.L., 642 F. Supp. 2d 1001, 1010 (N.D. Cal. 2009)). The Court dismisses with leave to amend.

The Court also dismisses Dexon's claim for a declaratory judgment that, in limiting its warranty to products sold by Authorized Sellers, Cisco violates *N.Y. General Business Law § 369-b*. ***HN10***[] *Section 369-b* does not provide a private right of action. *Cisco Sys., Inc. v. Beccela's Etc., LLC, 403 F. Supp. 3d 813, 826 (N.D. Cal. 2019)* (citing *Worldhomecenter.com, Inc. v. KWC America, Inc., 2011 U.S. Dist. LEXIS 104496, 2011 WL 4352390, at *8 (S.D.N.Y. Sept. 15, 2011)*). A party cannot bring a declaratory judgment claim based on a statute for which there is no private right of action. *N. Cty. Commc'ns Corp. v. Cal. Catalog & Tech., 594 F.3d 1149, 1162 (9th Cir. 2010)*.

3. ***Lanham Act*** (Counterclaim 8)

Dexon also alleges that Cisco violated the *Lanham Act* because it made "misleading representations of fact regarding the software embedded in Cisco hardware sold on the secondary market" and "misleading representations of fact regarding **[*26]** whether products in the secondary market are 'used.'" Countercl. ¶ 144-45.

HN11[] *Section 43(a)* of the *Lanham Act* forbids the use of false or misleading descriptions in commercial advertising. See *15 U.S.C. § 1125(a)(1)(B)*; see *Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997)* (stating the five required elements). Although the Ninth Circuit has not yet decided the issue, "the better reasoned [district court] authority is that, where a *Lanham Act* claim is predicated on the theory that the defendant engaged in a knowing and intentional misrepresentation, then *Rule 9(b)* is applicable." *Clorox Co. v. Reckitt Benckiser Grp. PLC, 398 F. Supp. 3d 623, 634 (N.D. Cal. 2019)* (quoting *23andMe, Inc. v. Ancestry.com DNA, LLC, 356 F. Supp. 3d 889, 908 (N.D. Cal. 2018)*).

The *Lanham Act* claim fails for two reasons discussed in the previous section. First, Cisco's statement that secondary-market equipment purchasers require a software license is not a misrepresentation. Second, Dexon has not pleaded with particularity the "who, what, or when" regarding Cisco's allegedly misleading definition of "used," who was misled, and how specifically the misrepresentation caused Dexon harm. See *Kearns, 567 F.3d at 1126*.

4. Intentional Interference and Trade Libel (Counterclaims 9, 10, and 11)

Dexon also insufficiently pleads its intentional interference with contractual relations, intentional interference with prospective economic advantage, and trade libel claims, all of which are subject to *Rule 9(b)*. These claims are based on the general **[*27]** allegations that Cisco "made false and misleading statements about Dexon and the products it sells to these customers in order to disrupt the contractual relationship and to cause these customers to purchase product from Cisco authorized resellers." Countercl. ¶ 152; see also id. ¶¶ 159(a)-(c), 165 (similar).

All three claims require specificity not present here. ***HN12***[] Intentional interference with contractual relations requires pleading the existence of a valid then-existing contract between plaintiff and a third party. *Quelimane Co. v. Stewart Title Guar. Co., 19 Cal. 4th 26, 77 Cal. Rptr. 2d 709, 960 P.2d 513, 530 (Cal. 1998)*. Intentional interference with prospective economic advantage requires pleading an existing "economic relationship . . . with a probability of future economic benefit" and that the defendant's interference "was wrongful by some legal measure other than the fact of interference itself." *Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376, 45 Cal. Rptr. 2d 436, 902 P.2d 740, 748, 751 (Cal. 1995)*. Similarly, trade libel requires a plaintiff to "identify the particular purchasers who have refrained from dealing with him, and specify the transactions of which he claims to have been deprived." *Muddy Waters. LLC v. Superior Ct., 62 Cal. App. 5th 905, 925, 277 Cal. Rptr. 3d 204 (2021)*.

The Court dismisses these three counterclaims with leave to amend. Especially in light of *Rule 9(b)*, Dexon's allegations are far too unspecific. See *AccuImage Diagnostics Corp v. Terarecon, Inc., 260 F. Supp. 2d 941, 956-57 (N.D. Cal. 2003)* (dismissing these clahns where plaintiff pleaded only **[*28]** "conclusory allegations").

IV. CONCLUSION

For the foregoing reasons, the Court dismisses Dexon's eleven counterclaims with leave to amend. Dexon may file an amended answer and counterclaims within 30 days of the date of this order.

IT IS SO ORDERED.

Dated: December 9, 2021

/s/ Charles R. Breyer

CHARLES R. BREYER

United States District Judge

End of Document

REX-Real Estate Exch., Inc. v. Brown

United States District Court for the District of Oregon

December 9, 2021, Decided; December 9, 2021, Filed

No. 3:20-cv-02075-HZ

Reporter

2021 U.S. Dist. LEXIS 235892 *; 2021 WL 5855660

REX — Real Estate Exchange, Inc., Plaintiff, v. KATE BROWN, in her individual and official capacity as the Governor of Oregon; STEVE STRODE, in his individual and official capacity as the Commissioner of the Oregon Real Estate Agency; OREGON REAL ESTATE AGENCY; OREGON REAL ESTATE BOARD; MARIE DUE, DEBRA GISRIEL, SUSAN GLEN, JOSE GONZALEZ, DAVID E. HAMILTON, KIM HEDDINGER, LAWNAE HUNTER, PATRICIA IHNAT, and ALEX D. MACLEAN III, in their official capacities as members of the Oregon Real Estate Board, Defendants.

Subsequent History: Appeal dismissed by *Real Estate Exch., Inc. v. Brown, 2022 U.S. App. LEXIS 19342 (9th Cir. Or., May 26, 2022)*

Core Terms

immunity, rebates, state-action, anti-rebate, supervision, policies, articulated, customers, restrain, state policy, anti-competitive, alleges, Sherman Act, antitrust, buyers, rights, real estate licensee, regulation, broker, member of the board, real estate license, state agency, state law, recommendations, conspiracy, license, motion to dismiss, official capacity, active market, appointed

LexisNexis® Headnotes

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

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

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

A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* tests the sufficiency of the claims. When evaluating the sufficiency of a complaint's factual allegations, the court must accept all material facts alleged in the complaint as true and construe them in the light most favorable to the non-moving party. A motion to dismiss under *Rule 12(b)(6)* will be granted if a plaintiff alleges the grounds of his entitlement to relief with nothing more than labels and conclusions, and a formulaic recitation of the elements of a cause of action. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true, even if doubtful in fact.

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

Evidence > Inferences & Presumptions > Inferences

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

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

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A plaintiff must plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. In other words, a complaint must state a plausible claim for relief and contain well-pleaded facts that permit the court to infer more than the mere possibility of misconduct.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

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

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

HN3[] **Sherman Act, Claims**

Section 1 of the Sherman Act makes unlawful every contract, combination, or conspiracy, in restraint of trade or commerce among the several States. *15 U.S.C.S. § 1*. The Act serves to promote robust competition and suppress business combinations that restrain competition. But the Sherman Act gives no hint that it was intended to restrain state action. States may have an interest in regulating occupations, conferring exclusive rights to dominate a particular market to certain entities, or otherwise limiting competition to achieve public objectives. Thus, a State acting in its sovereign capacity is generally immune from federal antitrust laws. But state-action immunity is the exception rather than the rule. When a State delegates control over a market to a non-state actor, the actor generally cannot assert state-action immunity.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

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

HN4[] **Sherman Act, Defenses**

Courts use three approaches to analyzing state-action immunity from federal antitrust laws. First, true state action, such as that of a state legislature or state supreme court, is ipso facto immune from antitrust liability. Second, municipalities and executive state agencies are entitled to state-action immunity if they act pursuant to a clearly articulated and affirmatively expressed state policy to replace competition. Third, private parties and state agencies that are controlled by participants in the markets they regulate only receive immunity if their anticompetitive acts are (1) taken pursuant to a clearly articulated state policy and (2) supervised by the state.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN5[] **Scope, Exemptions**

State executive branches are entitled to state-action immunity from antitrust suits.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN6[] **Sherman Act, Claims**

Non-state actors who engage in anti-competitive conduct pursuant to state authorization do not receive ipso facto immunity from liability under the Sherman Act. Nevertheless, such persons or entities may be immune if they satisfy a two-part test: (1) the anti-competitive conduct was pursuant to a clearly articulated and affirmatively expressed state policy to replace competition with regulation; and (2) the conduct is actively supervised by the State itself. Municipalities acting pursuant to clearly articulated and affirmatively expressed state policies are protected by state-action immunity without needing to show they are actively supervised by the state. State agencies may receive the same immunity as municipalities without active state supervision because, as public bodies, state agencies are unlikely to be involved in private arrangements to limit competition. Once it is clear that state authorization exists, there is no need to require the State to supervise actively the execution of what is a properly delegated function. So long as a state agency meets the requirements set forth in Hess and is acting pursuant to a clearly articulated state policy, it is immune from liability under the Sherman Act.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN7[] **Exemptions & Immunities, Parker State Action Doctrine**

When a state agency is composed of or controlled by actors who participate in the same market they regulate, any anti-competitive agency actions must be actively supervised by the State. But the supervision requirement extends to state agencies controlled by active market participants, who possess singularly strong private interests because they pose the very risk of self-dealing.

Governments > State & Territorial Governments > Employees & Officials

HN8[] **State & Territorial Governments, Employees & Officials**

When the state executive or executive agencies act within their lawful authority, their acts are those of the sovereign.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

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

HN9[] **Sherman Act, Claims**

Clear articulation does not require a legislature to expressly state an anticompetitive intent. The clear-articulation test for State immunity from liability under the *Sherman Act, 15 U.S.C.S. § 1*, is met if the anticompetitive effect was the foreseeable result of what the State authorized.

Real Property Law > Brokers > Discipline, Licensing & Regulation

HN10[] **Brokers, Discipline, Licensing & Regulation**

Oregon law specifically prohibits a real estate licensee from providing any part or share of the licensee's compensation to a person who is the buyer or seller of the real property that is the subject of the transaction. *Or. Rev. Stat. § 696.290(1)(a)*.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN11[] **Sherman Act, Claims**

To state a claim for violation of *Section 1* of the Sherman Act, *15 U.S.C.S. § 1*, a plaintiff must plead facts that show (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the person or entities intended to harm or restrain trade or commerce among the several states, or with foreign nations; (3) which actually injures competition. A conspiracy as defined by *Section 1* of the Sherman Act requires an agreement that joins together independent centers of decisionmaking. The agreement need not be between two or more separate legal entities. But the Sherman Act requires an agreement to restrain trade made between separate economic actors pursuing separate economic interests.

Civil Rights Law > ... > Section 1983 Actions > Elements > Protected Rights

HN12[] **Elements, Protected Rights**

To state a claim under *42 U.S.C.S. § 1983*, a plaintiff must both (1) allege the deprivation of a right secured by the federal Constitution or statutory law, and (2) allege that the deprivation was committed by a person acting under color of state law. Legislative acts that do not impinge on fundamental rights or employ suspect classifications are presumed valid, and this presumption is overcome only by a clear showing of arbitrariness and irrationality.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN13[] **Judicial Review, Standards of Review**

Under rational basis review, a law or policy must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for treating the plaintiff differently. Even if a state statute or policy produces unequal or unfair results, it does not necessarily fail rational basis review. A state law may be constitutional even if it is unwise, improvident, or out of harmony with a particular school of thought, as long as it bears some a relationship to some legitimate end.

Governments > Police Powers

HN14[] **Governments, Police Powers**

Regulation of certain trades or professions is a legitimate objective of state governments. It is properly within the state's police power to regulate and license professions.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN15[] **Judicial Review, Standards of Review**

That a statute may be over-inclusive by its enforcement does not, under rational basis review, render it unconstitutional.

Constitutional Law > State Constitutional Operation

HN16[] **Constitutional Law, State Constitutional Operation**

There is no private right of action for damages under the Oregon Constitution.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Governments > State & Territorial Governments > Claims By & Against

Torts > Public Entity Liability > Immunities > Sovereign Immunity

Constitutional Law > State Sovereign Immunity > Abrogation of Immunity

HN17[] **State Sovereign Immunity, State Immunity**

Federal courts have long recognized an exception to *Eleventh Amendment* sovereign immunity when state officials are sued in their official capacities for prospective relief on federal law claims. But the exception does not apply when a suit against state officials is brought under state law. Thus, the *Eleventh Amendment* bars plaintiffs from bringing state law claims for both prospective and retrospective relief against state officials in their official capacities.

Constitutional Law > State Sovereign Immunity > Abrogation of Immunity

Governments > State & Territorial Governments > Claims By & Against

HN18[] **State Sovereign Immunity, Abrogation of Immunity**

Pennhurst does not preclude state law claims against sate government officers in their individual capacities.

Counsel: [*1] For Plaintiff: Herbert G. Grey, Beaverton, OR; Michael C. Toth, REX - Real Estate Exchange, Inc., Austin, TX; Austin R. Nimocks, Christopher L. Peele, Cory R. Liu, Ashcroft Sutton Reyes LLC, Austin, TX,.

For Defendants: David B. Markowitz, Harry B. Wilson, Stanton R. Gallegos, Markowitz Herbold PC, Portland, OR.

Judges: MARCO A. HERNÁNDEZ, United States District Judge.

Opinion by: MARCO A. HERNÁNDEZ

Opinion

OPINION & ORDER

HERNÁNDEZ, District Judge:

Plaintiff REX — Real Estate Exchange, Inc. ("REX") brings this action for antitrust violation under *Section 1 of the Sherman Act*, violation of the *Fourteenth Amendment* *Equal Protection and Due Process Clauses*, and violation of rights secured by *Article I, section 20 of the Oregon Constitution* against Defendants Kate Brown in her individual and official capacity as Governor of Oregon, Steve Strode in his individual and official capacity as Oregon Real Estate Commissioner, the Oregon Real Estate Agency, the Oregon Real Estate Board ("Board"), and each individual member of the Board in their official capacities. Currently before the Court is Defendants' Motion to Dismiss Plaintiff's Complaint. For reasons stated below, the Court grants Defendants' Motion.

BACKGROUND

Plaintiff REX is a real estate technology company that connects real estate buyers and sellers online. Compl. ¶ 4, ECF **[*2]** 1. Unlike most traditional brick-and-mortar real estate companies, REX offers rebates to customers on commissions it receives. *Id.* at ¶ 5. Under its Buyer Rebate Program, when one of its customers purchases a home, REX refunds half of its buyer's agent commission to the customer at closing. *Id.* at 6. REX contends that its Buyer Rebate Program reduces the price of the average home in Oregon by $5,000 to $10,000 with no impact on the seller's revenue. *Id.*

Defendant Oregon Real Estate Agency ("Agency") is an official agency of the State of Oregon. Compl. ¶ 18. The Agency has the power to "[m]ake and enforce rules as necessary to administer and enforce the provisions of . . . any law with the administration and enforcement of which the agency is charged. Or. Rev. Stat. ("O.R.S") *§ 696.385(3)*. The agency operates under the supervision and control of the Oregon Real Estate Commissioner

("Commissioner"), who is appointed by the Governor subject to confirmation by the Oregon Senate. *O.R.S. 696.375(2)*. By statute, the Commissioner must have been a real estate broker in Oregon "actively engaged in business as such" for five years prior to the date of appointment. *Id.* The Commissioner "holds office at the pleasure of the **[*3]** governor." *Id.*

Defendant Oregon Real Estate Board exists within the Agency and is made of up nine members appointed by the Governor to hold office for four years and serve at the pleasure of the Governor. *O.R.S. 696.405(1)*. Seven members must have held real estate licenses and have been actively engaged in the real estate profession in Oregon for five years prior to their appointments. *Id.* The other two Board members cannot be real estate licensees or have had any prior connection to the Agency. *Id.* The Board is authorized to inquire into the needs of real estate licensees, advise the Governor as to how the Agency may best serve the state and the licensees, and make recommendations and suggestions of policy to the Agency regarding the regulation of licensees and the real estate business in Oregon. *O.R.S. 696.425(1)*.

REX received a real estate brokerage license and began doing business in Oregon in January 2019. In March 2019, the Agency sent an "Education Letter of Advice" ("Letter") notifying REX that its Buyer Rebate Program violates an Oregon state law that prohibits sharing real estate commissions with any person who does not have a real estate license. *Id.* at ¶ 59; *see O.R.S. 696.290* ("[A] real estate licensee may not offer, **[*4]** promise, allow, give, pay or rebate, directly or indirectly, any part or share of the licensee's compensation arising from or accruing from any real estate transaction . . . to any person who is not a real estate licensee[.]"). The Letter informed REX that offering rebates to its customers is grounds for discipline under Oregon law, but that the Agency would not take action against REX's license at that time. Compl. Ex. 1, ECF 1-1. Since receiving the letter, REX has not rebated any portion of its commissions to customers. Compl. ¶ 63. REX contends that it has forgone transactions in Oregon and its revenue growth has been slower compared to other markets because it cannot offer rebates to customers. *Id.*

REX asserts that the Agency's anti-rebate policies bar new entrants to the brokerage market and protect incumbent brokers who benefit from artificially high commissions. *Id.* at 62. REX alleges that the Agency's policies restrict competition and "injure buyers and sellers of property throughout Oregon" by depriving them of price discounts, including cash rebates. *Id.* at 67. According to REX, "Defendants' promulgation, adoption, maintenance, and enforcement of the anti-rebate policies **[*5]** arises from and result in agreements, combinations, and conspiracies that restrain competition . . . in violation *Section 1 of the Sherman Act, 15 U.S.C. § 1*." *Id.* at 72. REX also claims that Oregon's anti-rebate policies violate its and its customers' due process rights and equal protection rights. *Id.* at ¶¶ 82-109. Finally, REX claims that by enforcing the anti-rebate policies, Defendants violate the rights of REX and its customers under the *Privileges and Immunities Clause of the Oregon Constitution Article I, section 20*. *Id.* at ¶¶ 112-124.

Plaintiff seeks damages and an injunction prohibiting Defendants from enforcing Oregon's anti-rebate policies. Defendants move to dismiss all claims.

STANDARDS

II. *Rule 12(b)(6)*

HN1[] A motion to dismiss under *Rule 12(b)(6)* tests the sufficiency of the claims. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. When evaluating the sufficiency of a complaint's factual allegations, the court must accept all material facts alleged in the complaint as true and construe them in the light most favorable to the non-moving party. *Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1140 (9th Cir. 2012)*. A motion to dismiss under *Rule 12(b)(6)* will be granted if a plaintiff alleges the "grounds" of his "entitlement to relief" with nothing "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action[.]" *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "Factual allegations must be enough to raise a right to relief above the speculative level **[*6]** on the assumption that all the allegations in the complaint are true (even if doubtful in fact)[.]" *Id.* (citations and footnote omitted).

HN2[] To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (internal quotation marks omitted). A plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In other words, a complaint must state a plausible claim for relief and contain "well-pleaded facts" that "permit the court to infer more than the mere possibility of misconduct[.]" *Id. at 679*.

DISCUSSION

I. Claims Under the Sherman Act, *15 U.S.C. § 1*

Plaintiff claims that Oregon's Governor, Real Estate Commissioner, Real Estate Agency, Real Estate Board, and each of the Board's members acted pursuant to a "continuing agreement among Defendants and co-conspirators to require home sellers to pay the buyer broker an inflated amount," and Defendants' established, maintain, and implement Oregon's anti-rebate policies in furtherance of a contract, combination, or conspiracy to unreasonably restrain trade and commerce in violation **[*7]** of *Section 1 of the Sherman Act*. Compl. ¶¶ 74-76. Defendants argue that (1) Plaintiff's Sherman Act claim is barred by state-action immunity; and (2) Plaintiff fails to allege facts that make the Sherman Act claim plausible on its face. The Court addresses Defendants' arguments in turn.

A. State-Action Immunity

HN3[] *Section 1 of the Sherman Act* makes unlawful "every contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States." *Parker v. Brown, 317 U.S. 341, 350, 63 S. Ct. 307, 87 L. Ed. 315 (1943)* (quoting *15 U.S.C. § 1*). The Act serves to promote robust competition and suppress "business combinations" that restrain competition. *Id. at 351*. But the Sherman Act "gives no hint that it was intended to restrain state action." *Id.* States may have an interest in regulating occupations, conferring exclusive rights to dominate a particular market to certain entities, or otherwise limiting competition to achieve public objectives. *N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 503, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015)*. Thus, a State acting in its sovereign capacity is generally immune from federal antitrust laws. *Deak-Perera Haw., Inc. v. Dep't of Transp. 745 F.2d 1281, 1282 (9th Cir. 1984)*; *see* *Dental Exam'rs, 574 U.S. at 503* ("If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal ***antitrust law*** would impose an impermissible burden on the State's power to regulate."). **[*8]**

But "[s]tate-action immunity is the exception rather than the rule." *Chamber of Com. of the U.S.A. v. City of Seattle, 890 F.3d 769, 781 (9th Cir. 2018)*. When a State delegates control over a market to a non-state actor, the actor generally cannot assert state-action immunity. *See id.* ("Closer analysis is required when the activity at issue is not directly that of the State itself, but rather is carried out by other pursuant to state authorization.") (internal quotations and citations omitted).

HN4[] Courts use three approaches to analyzing state-action immunity. First, true state action, such as that of a state legislature or state supreme court, is *ipso facto* immune from antitrust liability. *Hoover v. Ronwin, 466 U.S. 558, 567-68, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984)*. Second, municipalities and executive state agencies are entitled to state-action immunity if they act pursuant to a "clearly articulated and affirmatively expressed state policy" to replace competition. *Id. at 568-69*; *see* *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 45, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*. Third, private parties and state agencies that are controlled by participants in the markets they regulate only receive immunity if their anticompetitive acts are (1) taken pursuant to a clearly articulated state policy and (2) supervised by the state. *Dental Exam'rs, 574 U.S. at 506*.

1. *Oregon Governor*

Defendants assert that Governor Brown is *ipso facto* immune from antitrust liability under *Parker*. Plaintiff, **[*9]** on the other hand, claims that the *ipso facto* immunity afforded to state legislatures and supreme courts does not extend to governors. *See Hoover, 466 U.S. at 568 n.17* ("This case does not present the issue whether the Governor of a State stands in the same position as the state legislature and state supreme court for purposes of the state-action doctrine."). But while the issue was not before the Court in *Hoover*, the Ninth Circuit has held that ***HN5***[] state executive branches are entitled to state-action immunity from antitrust suits. *See Deak-Perera, 745 F.2d at 1283*, *cert. denied*, *470 U.S. 1053, 105 S. Ct. 1756, 84 L. Ed. 2d 820 (1985)* ("We see no reason why a state executive branch, when operating within its constitutional and statutory authority, should be deemed any less sovereign than a state legislature, or less entitled to deference under principles of federalism."). As the head of the executive branch of Oregon, any actions taken by the Governor are acts of the sovereign. Thus, Governor Brown is entitled to state-action immunity.

2. *Oregon Real Estate Agency and Real Estate Commissioner*

HN6[] Non-state actors who engage in anti-competitive conduct pursuant to state authorization do not receive *ipso facto* immunity from liability under the Sherman Act. Nevertheless, such persons or entities may be immune if they satisfy **[*10]** a two-part test: (1) the anti-competitive conduct was pursuant to "a clearly articulated and affirmatively expressed state policy to replace competition with regulation"; and (2) the conduct is "actively supervised by the State itself." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*; *see Dental Exam'rs, 574 U.S. at 506*.

The supervision requirement ensures that immunity is conferred only to non-state actors who "in the judgment of the State, actually further state regulatory policies." *Patrick v. Burget, 486 U.S. 94, 101, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988)*. In *Town of Hallie*, the Supreme Court held that municipalities acting pursuant to clearly articulated and affirmatively expressed state policies are protected by state-action immunity without needing to show they are actively supervised by the state. *471 U.S. at 47*. The Ninth Circuit has since held that state agencies may receive the same immunity as municipalities without active state supervision because, as public bodies, state agencies are unlikely to be involved in private arrangements to limit competition. *Hass v. Oregon State Bar, 883 F.2d 1453, 1460 (9th Cir. 1989)*. "Once it is clear that state authorization exists, there is no need to require the State to supervise actively the . . . execution of what is a properly delegated function." *Hass 883 F.2d at 1460* (citing *Town of Hallie, 471 U.S. at 47*). In *Hass*, the Ninth Circuit determined that the Oregon State Bar was a state agency because the Oregon legislature **[*11]** had "expressly designated the Bar as the instrumentality through which the legislature will implement its policies[.]" *Id. at 1461*. The Court held that the Bar need not satisfy the active supervision requirement to be entitled to state-action immunity*. Id.* So long as a state agency meets the requirements set forth in *Hass* and is acting pursuant to a clearly articulated state policy, it is immune from liability under the Sherman Act.

Plaintiff argues that the Agency and the Commissioner cannot receive state-action immunity without active state supervision because the Agency is "wholly controlled by a market participant." Compl. ¶ 60. ***HN7***[] When a state agency is composed of or controlled by actors who participate in the same market they regulate, any anti-competitive agency actions must be "actively supervised" by the State. *Midcal, 445 U.S. at 105*. The *Midcal* supervision rule stems from the concern that "where a private party is engaging in anticompetitive activity, there is a real danger he is acting to further his own interests, rather than the governmental interests of the State." *Dental Exam'rs, 574 U.S. at 507* (internal quotations and citation omitted). *Midcal* involved private businesses that restrained competition pursuant to state policy. *445 U.S. at 99-101*. But the supervision requirement **[*12]** extends to "[s]tate agencies controlled by active market participants, who possess singularly strong private interests" because they "pose the very risk of self-dealing Midcal's supervision requirement was created to address. *Id. at 114*.

Plaintiff asserts that the Commissioner is an active market participant because he "must hold an active real estate broker license to qualify for the position." Compl. ¶ 60. In its response brief, Plaintiff acknowledges that Commissioner Strode deactivated his license.[1] Pl. Resp. 17, ECF 38. But Plaintiff argues that the Commissioner's "deep ties to the real-estate lobby" give him "the same economic incentives to restrain competition as current active market participants." *Id.* at 17-18. Plaintiff relies on *Dental Exam'rs*, in which a majority of the North Carolina Dental Board's members were engaged in the active practice of dentistry—the profession they regulated. 574 U.S. at 511. In that case, the Supreme Court held that because the board was almost entirely composed of active market participants, it could only be entitled to state-action immunity if it was actively supervised by the State. *Id.*

In contrast, Commissioner Strode does not have an active real estate license and **[*13]** thus cannot engage in an active real estate practice while he is the head of the Agency. Even if the Commissioner has an economic incentive to restrain competition because of a future intent to participate in the market, this case is distinguishable from *Dental Exam'rs*. In *Dental Exam'rs*, the board members were elected by other licensed dentists and were not removable by any public official. *Id. at 499-500*. Here, the Commissioner is appointed by the Governor with Senate confirmation and can be removed by the Governor at will. In that respect, the Agency is more like a prototypical state agency—a fact that is not diminished by the requirement that the Commissioner have formerly been an active market participant. As such, the Agency and the Commissioner need not satisfy the "active supervision" requirement. So long as they acted pursuant to a clearly articulated state policy, they are be entitled to state-action immunity. *See* *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 810 F.2d 869, 876 (9th Cir. 1987)* (**HN8**[] "When the state executive or executive agencies act within their lawful authority, their acts are those of the sovereign.").

Plaintiff also claims that the Agency did not act pursuant to a clearly articulated state policy because *O.R.S. 696.290(1)(a)* does not clearly express a policy banning rebates **[*14]** to its customers. Plaintiff argues that because other states allow rebates in the face of similar statutory language, *O.R.S. 696.290(1)(a)* cannot be a "clearly" articulated ban on rebates. Pl. Resp. 9-15, ECF 38.[2]

HN9[] Clear articulation does not require a legislature to expressly state an anticompetitive intent. *Chamber of Com. of the U.S.A., 890 F.3d at 782* (citing *FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 226, 133 S. Ct. 1003, 185 L. Ed. 2d 43 (2013)*. "The clear-articulation test is met if the anticompetitive effect was the foreseeable result of what the State authorized." *Id.* (internal quotations and citations omitted); *see* *City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 372, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)* ("We have rejected the contention that this requirement can be met only if the delegating statute explicitly permits the displacement of competition.").

Here, the Oregon legislature, in creating the Agency, expressly empowered the Agency to enforce rules and regulations related to the business of real estate sales. The Agency's authority to regulate real estate sales derives from *O.R.S. 696.385(3)*, which states that the "Real Estate Agency shall have the power to . . . [m]ake and enforce rules as necessary to administer and enforce the provisions of . . . any law with the administration or enforcement of which the agency is charged." In enacting an authorizing statute, the Oregon legislature clearly articulated a policy empowering **[*15]** the Agency to suppress competition in Oregon as necessary to enforce Oregon law. *See* *Hass, 883 F.2d at 1458* (holding that statutory scheme that "clearly evinces a legislative policy to supplant free market competition with regulation in the field" satisfies the clear articulation test). Thus, the Agency, and the Commissioner as its head, are authorized to enforce the provisions of *O.R.S. 696.290(1)(a)*, which by its terms,

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[1] *O.R.S. 696.375(2)* requires the Commissioner to have previously held a real estate license and to have been active in the real estate business prior to appointment. The statute does not require the Commissioner to have an active real estate license while holding office. Plaintiff acknowledges its error after Defendants provided evidence that Commissioner Strode deactivated his real estate license upon being appointed Commissioner.

[2] The Court notes that the majority of state statutes cited by Plaintiff do not explicitly use the word "rebate" as *O.R.S. 696.290(1)(a)* does. Whether, within a particular context, the term "rebate" may be interpreted differently is not before the Court. The Court finds that the Agency's interpretation is consistent with the plain meaning of the statute.

states that a real estate licensee "may not . . . *rebate* . . . any part or share of the licensee's compensation . . . to any person who is not a real estate licensee[.]" (emphasis added).[3] Suppressing activity by real estate licensees that does not comply with the plain language of O.R.S. 696.290(1)(a) is a "foreseeable result" of what the legislature authorized.

The Court finds that in sending the Letter to REX, the Agency acted in a manner that was within its authority as delegated by the Oregon legislature and that was pursuant to a clearly articulated state policy. *See id.* ("Our task, therefore, is to determine whether the restraints in question are a reasonable and foreseeable exercise of delegated powers within the scope of an agency's authority.") (quoting Hybud Equip. Corp. v. City of Akron, 742 F.2d 949, 960 (6th Cir. 1984)). Under *Hallie*, the Commissioner and the Agency are entitled to **[*16]** state-action immunity from antitrust liability.

3. *The Oregon Real Estate Board and Board Members*

Plaintiff argues that because the majority of Board members hold active real estate licenses and are active market participants, they must meet both of Midcal's requirements. Defendants, on the other hand, argue that the Board and its members are immune from suit because they lack any authority to adopt, establish, or enforce state policy. The Board exists within the Agency and serves to "make recommendations and suggestions of policy." O.R.S. 696.425(1). Defendants note that the Board did not sign the Letter to REX or engage in its drafting. Def. Reply 14, ECF 40. Plaintiff alleges that the Board's anti-competitive act was to give "advice, recommendations, and/or assistance to the Agency concerning Oregon's anti-rebate law and . . . on enforcement activities, including the threatening letter sent to REX." Compl. ¶61. Even if Plaintiff can make credible allegations that the Board engaged in contract, combination, or conspiracy to restrain competition, the Board is entitled to state-action immunity under Midcal.

First, like the Agency, any recommendations made by the Board to prohibit rebates to customers were made pursuant **[*17]** to a clearly articulated state policy. The Board's role is to make policy recommendations and suggestions to the Agency. And if the Board recommended that the Agency notify REX that providing rebates to customers violates state law, then the Board engaged in a reasonable interpretation of O.R.S. 696.290(1).

Second, the Board is actively supervised by the Agency as an arm of the State. The Board lacks the authority to take any enforcement action and can only act through suggestions and recommendations to the Agency and the Governor. Indeed, the Board was created as a subsidiary of the Agency itself. *See* O.R.S. 696.405(1) ("The Real Estate Board is established within the Real Estate Agency."). Thus, by definition actions of the Board are supervised by the State. Under Midcal, the Board is entitled to state-action immunity.

In summary, any alleged anti-competitive actions by the Governor, the Commissioner, the Agency, and the Board were taken to enforce an anti-rebate law enacted by the state legislature. All such actions are those of the State itself, and thus fall squarely within the protection from antitrust liability justified by the reasoning in Parker.[4]

B. Plausible Claim under the Sherman Act

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[3] Under O.R.S. 696.290(1)(a), "any person who is not a real estate licensee" includes individuals exempt from license requirements under O.R.S. § 696.030. Such persons include "[a] nonlicensed individual transferring or acquiring an interest in real estate owned or to be owned by the nonlicensed individual." O.R.S. § 696.030(17). Thus, **HN10**[] Oregon law specifically prohibits a real estate licensee from providing "any part or share of the licensee's compensation" to a person who is the buyer or seller of the real property that is the subject of the transaction. O.R.S. 696.290(1)(a).

[4] The Court declines to opine on the wisdom of Oregon's anti-rebate policy. "The Court did not suggest in Parker, nor has it suggested since, that a state action is exempt from antitrust liability only if the sovereign acted wisely[.] The only requirement is that the action be that of the State acting as a sovereign." Hoover, 466 U.S. at 574 (internal quotations and citation omitted).

Even if Defendants were not entitled to state-action **[*18]** immunity, Plaintiff has failed to allege facts that make its antitrust claim plausible on its face. ***HN11***[] To state a claim for violation of *Section 1 of the Sherman Act*, a plaintiff must plead facts that show "(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the person or entities intended to harm or restrain trade or commerce among the several states, or with foreign nations; (3) which actually injures competition." *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)*. A conspiracy as defined by *Section 1 of the Sherman Act* requires "an agreement that joins together independent centers of decisionmaking." *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 196, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* (internal quotations and citation omitted). The agreement need not be between two or more separate legal entities. But the Sherman Act requires an agreement to restrain trade made between "separate economic actors pursuing separate economic interests." *Id. at 195*.

Defendants are all members of the executive branch of the Oregon state government. The Governor appoints and may remove the Commissioner and each of the nine members of the Board. The Commissioner and all of the Board members serve at the pleasure of the Governor. The Board is authorized by state statute to advise both the Agency and the Governor on policy regarding **[*19]** the real estate industry in Oregon. Thus, with respect to the Sherman Act, Defendants are members of the same entity. And with the respect to the alleged anti-competitive action taken, they are not separate decisionmakers. Plaintiff alleges no facts supporting an inference that Governor Brown, the Agency, or the Board function as separate economic actors to restrain competition. As such, even if Defendants were not entitled to state-action immunity, Plaintiff's claim that Defendants engaged in a contract, combination, or conspiracy to restrain competition would fail.

II. Claims under *42 U.S.C. § 1983*

Plaintiff brings three claims against Defendants under *42 U.S.C. § 1983* for violation of constitutional rights. First, Plaintiff claims Defendants violated its due process rights under the *Fourteenth Amendment* because *O.R.S. 696.290*, the law on which Oregon's anti-rebate policies are based, lacks "any rational relationship to a legitimate public purpose." Compl. ¶ 88. Second, Plaintiff claims that Defendants' enforcement of the anti-rebate policies violates the *Fourteenth Amendment Equal Protection Clause* by treating individuals and businesses that offer rebates differently than those that do not. P. Resp. 23. Third, Plaintiff brings an equal protection claim on behalf of its customers who do not have real **[*20]** estate licenses because they are prohibited from receiving rebates, whereas home buyers who happen to possess real estate licenses are not.[5] Compl. ¶ 104.

HN12[] "To state a claim under *§ 1983*, a plaintiff must both (1) allege the deprivation of a right secured by the federal Constitution or statutory law, and (2) allege that the deprivation was committed by a person acting under color of state law." *Anderson v. Warner, 451 F.3d 1063, 1067 (9th Cir. 2006)*. Legislative acts that do not impinge on fundamental rights or employ suspect classifications are presumed valid, and this presumption is overcome only by a "clear showing of arbitrariness and irrationality." *Kawaoka v. City of Arroyo Grande, 17 F.3d 1227 (9th Cir. 1994)*. Because there is no fundamental right to give or receive rebates in real estate transactions, government prohibition of rebates is presumptively valid under the *Due Process Clause* if it is rationally related to a legitimate government interest. And because Plaintiff does not allege discrimination based on a suspect classification, the anti-rebate policy will survive an equal protection challenge "if there is a rational relationship between the disparity of treatment and some legitimate government purpose." *United States v. Ayala-Bello, 995 F.3d 710 (9th Cir. 2021)* (quoting *Heller v. Doe, 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)*). Thus, the fate of all three constitutional claims hinge on whether there is a rational basis **[*21]** for Oregon's anti-rebate policy.

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[5] Defendants do not challenge whether Plaintiff has third-party standing to assert claims on behalf of its customers. The Court does not address this issue in detail but notes that federal courts commonly recognize an exception to the rule against third-party standing when commercial businesses assert the rights of their customers. *See* *Craig v. Boren, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976)* ("[V]endors and those in like positions have been uniformly permitted to resist the efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function.").

HN13[] Under rational basis review, a law or policy must be upheld if there is "any reasonably conceivable state of facts that could provide a rational basis" for treating the plaintiff differently. *Jones v. Solis, 121 F. App'x 228, 230 (9th Cir. 1995)* (*quoting* *FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)*). Even if a state statute or policy produces unequal or unfair results, it does not necessarily fail rational basis review. *United States v. Padilla-Diaz, 862 F.3d 856, 862 (9th Cir. 2017)*. A state law may be constitutional even if it is "unwise, improvident, or out of harmony with a particular school of thought," as long as it bears some a relationship to some legitimate end. *Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psych., 228 F.3d 1043, 1051 (9th Cir. 2000)* (quoting *Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563 (1955)*).

Plaintiff presents many compelling arguments that Oregon's anti-rebate law hurts consumers and artificially increases home prices. But Plaintiff alleges no facts to rebut the presumption that *O.R.S. 696.290* has a rational relationship to a legitimate government purpose. **HN14**[] Regulation of certain trades or professions is a legitimate objective of state governments. *See* *id. at 1054* ("It is properly within the state's police power to regulate and license professions."). Oregon's statutory scheme authorizes Defendants to regulate the business of real estate sales and the professional activity of realtors. Defendants state a legitimate purpose in preventing individuals **[*22]** without real estate licenses from receiving compensation for work that can only be performed by licensed realtors under the state scheme.

Plaintiff makes the conclusory allegation that Oregon's anti-rebate "policies unconstitutionally infringe on the rights of consumers and their brokers to decide how to transact." Compl. ¶ 64. But regulating the interaction between sales professionals and consumers falls squarely within the governing power of the State and provides a rational basis for Defendants' enforcement action here. In addition, Defendants' application of *O.R.S. 696.290* to Plaintiff may be constitutional even if it prohibits more activity than is necessary to achieve its goal. *See* *Mendoza v. Garrett, 358 F. Supp. 3d 1145, 1175 (D. Or. 2018)* (**HN15**[] "[T]hat the statute may be overinclusive by its enforcement . . . does not, under rational basis review, render it unconstitutional."). Because Plaintiff does not allege facts showing that Oregon's statute prohibiting compensation to unlicensed individuals lacks a rational basis, it fails to state a claim for violation of the *Fourteenth Amendment Due Process and Equal Protection Clauses*.

III. Claims under the *Oregon Constitution, Article 1, Section 20*

Plaintiff brings claims under the *Privileges and Immunities Clause of Article 1, section 20 of the Oregon Constitution*.[6] Plaintiff alleges that Oregon's anti-rebate policies "violate Plaintiff's privileges by prohibiting Plaintiff from **[*23]** participating in the real estate market merely because it provides rebates to non-real estate licensees[.]" Compl. ¶ 114. Plaintiff also brings a claim on behalf of its customers, alleging that Oregon's anti-rebate policies "limit the privilege of receiving a rebate to real estate licensees and excludes non-licensees from receiving rebates[.]" Compl. ¶ 120.

As a preliminary matter, the Court notes that **HN16**[] there is no private right of action for damages under the Oregon Constitution. *See* *Hunter v. City of Eugene, 309 Ore. 298, 303, 787 P.2d 881, 883 (1990)* ("Oregon's Bill of Rights provides no textual or historic basis for implying a right to damages for constitutional violations."). Thus, neither of Plaintiff's claims under the Oregon Constitution provide a mechanism to recover damages from Defendants in their individual capacities.

Next, Defendants argue that the *Eleventh Amendment* bars suits brought in federal court under state law against state officials. **HN17**[] Federal courts have long recognized an exception to *Eleventh Amendment* sovereign immunity when state officials are sued in their official capacities for prospective relief on federal law claims. *Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)*. But the *Ex Parte Young* exception does not apply

[6] "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." *OR. CONST., art I, § 20*.

when a suit against state officials is brought under state law. *Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)*. Thus, the *Eleventh Amendment* bars plaintiffs from bringing state law claims **[*24]** for both prospective and retrospective relief against state officials in their official capacities. *Pena v. Gardner, 976 F.2d 469, 473 (9th Cir. 1992)* (citing *Pennhurst, 465 U.S. at 106*). Consequently, Plaintiff's claims under the Oregon Constitution against Governor Brown, Commissioner Strode, and members of the Board in their official capacities are barred by the *Eleventh Amendment*.

HN18[] Plaintiff correctly asserts that *Pennhurst* does not preclude it from bringing state law claims against Defendants in their individual capacities. *See* *id. at 472* ("[The *Eleventh Amendment*] will not, however, bar claims against state officials in their *personal* capacities.") (emphasis in original). Though Plaintiff may bring damages claims against individual defendants, Oregon law provides no mechanism to recover damages under the Oregon Constitution. *See* *Hunter, 309 Ore. at 303, 787 P.2d at 883*. Thus, Plaintiff's state constitutional claims must be dismissed.

In its extensive Complaint, Plaintiff makes compelling arguments that excessive fixed broker commissions harm consumers and the housing market itself. Plaintiff notes that the U.S. Department of Justice has begun to take action against the anti-competitive activity of traditional real estate brokers and that many states allow commission rebates to home buyers. Plaintiff points out that Oregon is one of the few remaining **[*25]** states that prohibit such rebates. But neither the merits of traditional real estate brokers' compensation scheme nor the prudence of Oregon's anti-rebate policies are before Court. The Court's role here is to decide whether Plaintiff states a plausible claim that the anti-rebate policies violates *Section 1 of the Sherman Act*, the *Fourteenth Amendment Due Process and Equal Protection Clauses, or the Oregon Constitution*. In that regard, Plaintiff does not meet its burden.

CONCLUSION

Construing all alleged facts in Plaintiff's Complaint as true, the Court finds that Plaintiff fails to adequately state claims on which relief may be granted. The Court grants Defendants' Motion to Dismiss [22].

IT IS SO ORDERED.

DATED: December 9, 2021.

/s/ Marco A. Hernández

MARCO A. HERNÁNDEZ

United States District Judge

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Netafim Irrigation, Inc. v. Jain Irrigation, Inc.

United States District Court for the Eastern District of California

December 14, 2021, Decided; December 14, 2021, Filed

CASE NO. 1:21-cv-00540-AWI-EPG

Reporter
562 F. Supp. 3d 1073 *; 2021 U.S. Dist. LEXIS 239108 **; 2021 WL 5909391

NETAFIM IRRIGATION, INC., Plaintiff, v. JAIN IRRIGATION, INC., JAIN DISTRIBUTION HOLDINGS, INC., IRRIGATION DESIGN & CONSTRUCTION, LLC, and AGRI-VALLEY IRRIGATION, LLC, Defendants.

Subsequent History: Later proceeding at *Netafim Irrigation. Inc. v. Jain Irrigation, Inc., 2022 U.S. Dist. LEXIS 18472 (E.D. Cal., Feb. 1, 2022)*

Dismissed by, Without prejudice, in part, Motion denied by, in part *Netafim Irrigation, Inc. v. Jain Irrigation, Inc., 2022 U.S. Dist. LEXIS 126239, 2022 WL 2791201 (E.D. Cal., July 15, 2022)*

Dismissed by *Netafim Irrigation, Inc. v. Jain Irrigation, Inc., 2022 U.S. Dist. LEXIS 230587 (E.D. Cal., Dec. 21, 2022)*

Core Terms

allegations, micro-irrigation, geographic, firms, growers, Defendants', Irrigation, markets, manufacturers, acquisition, antitrust, design services, relevant market, consumers, warranty, tubing, market power, customers, products, merger, sales, market share, zip code, recycled, deceive, anti trust law, conclusory, motion to dismiss, local market, storefronts

Counsel: **[**1]** For Netafim Irrigation, Inc., Plaintiff: Kenneth Reinker, PHV, LEAD ATTORNEY, PRO HAC VICE, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC; Gregg William Kettles, Wendy Y. Wang, Best Best & Krieger LLP, Los Angeles, CA; Kendall H. MacVey, Best Best & Krieger LLP, Riverside, CA.

For Jain Irrigation, Inc., Jain Distribution Holdings, Inc., Irrigation Design & Construction, LLC, Agri-Valley Irrigation, LLC, Defendants: Dylan Ballard, LEAD ATTORNEY, Sheppard, Mullin, Richter & Hampton LLP, San Francisco, CA.

Judges: Anthony W. Ishii, SENIOR UNITED STATES DISTRICT JUDGE.

Opinion by: Anthony W. Ishii

Opinion

[*1077] ORDER ON DEFENDANTS' MOTION TO DISMISS

(Doc. No. 15)

Plaintiff Netafim Irrigation, Inc., alleges that Defendants Jain Irrigation, Inc., Jain Distribution Holdings, Inc., Irrigation Design & Construction, LLC, and Agri-Valley Irrigation, LLC, engaged in anticompetitive market behavior when the Jain entities acquired majority shares of the latter two companies. Netafim also alleges that all four

Defendants are liable for false advertising that caused it damage. Defendants now move to dismiss each of Netafim's claims. For the reasons that follow, the Court will grant that motion in part and deny it in part.

BACKGROUND [2]**

Netafim's case is centered on the micro-irrigation industry in Central California. Doc. No. 1 ("Compl."), ¶ 1.[1] Micro-irrigation is a comparatively cost-effective and sustainable form of irrigation that delivers water and nutrients directly to the root systems of crops. Id., ¶ 15. The micro-irrigation industry consists of three levels: (1) manufacturers that produce equipment for micro-irrigation systems; (2) local design firms that work with growers to customize, install, and maintain micro-irrigation systems; and (3) growers that purchase and use micro-irrigation **[*1078]** systems on their farms. Id., ¶ 16. Manufacturers depend on local design firms to sell products to growers, as the local design firms are able to design micro-irrigation systems that meets the needs of particular growers' fields and then install and maintain those systems. Id., ¶ 17. As part of these relationships, manufacturers invest time and money to ensure the local design firms are knowledgeable about the manufacturers' product lines and prices—this often involves manufacturers' provision to local design firms of non-public pricing and individualized quotes for projects. Id., ¶ 19. These relationships notwithstanding, **[**3]** local design firms have historically worked with multiple manufacturers in order to offer growers the most suitable products at the best prices. Id., ¶ 18. Likewise, local design firms also compete to win growers' business based on the price, quality, and array of equipment they can offer. Id.

Netafim manufactures micro-irrigation equipment and is based in Fresno, California. Id., ¶¶ 1, 3. Jain Irrigation is also based in Fresno and serves as Netafim's largest competitor in micro-irrigation equipment manufacturing. Id., ¶¶ 1, 4. Irrigation Design and Agri-Valley are micro-irrigation design firms based in Patterson, California, and Fresno, respectively. Id., ¶¶ 6-7.

In 2016, Netafim had approximately $65 million in sales in Central California, which included around $9 million in sales through Irrigation Design and Agri-Valley. Id., ¶¶ 20, 23-28. Jain, on the other hand, had approximately $25 million in Central Valley sales in 2016. Id., ¶ 21. Meanwhile, Irrigation Design and Agri-Valley had combined revenues of $113 million in 2016. Id., ¶ 22. At that time, Irrigation Design and Agri-Valley were the two largest micro-irrigation design firms in Central California. Id.

In 2017, Jain **[**4]** Distribution—a Fresno-based sister company of Jain Irrigation—acquired an 80% interest in both Irrigation Design and Agri-Valley. Id., ¶¶ 5-7, 29.[2] After the acquisition, Netafim terminated its relationships with Irrigation Design and Agri-Valley. Id., ¶ 31. Given the control that Irrigation Design and Agri-Valley had over access to growers in local markets in Central California, once these relationships were terminated, Netafim was unable to match its pre-acquisition sales figures by using other design firms. Id., ¶¶ 35-36. In turn, Netafim's equipment sales declined in 2017 and were still depressed through 2020. Id., ¶¶ 36-38.

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[1] While others will be cited and discussed in greater detail below, the following factual allegations drawn from the complaint provide relevant context for resolving Defendants' motion. The Court construes these factual allegations as true. See *Mollett v. Netflix, Inc., 795 F.3d 1062, 1065 (9th Cir. 2015)*.

[2] While the complaint explains that Jain Distribution is the holding company for Irrigation Design and Agri-Valley—and that both Jain Distribution and Jain Irrigation are wholly owned subsidiaries of Jain Irrigation Limited, "an Indian multi-national conglomerate" that has not itself been sued in this action—Netafim's allegations describing the acquisition singly identify Jain Irrigation as the active Jain participant. Compl., ¶¶ 1, 4-5, 29-38. Nonetheless, the parties' briefing on Defendants' motion does not recognize a distinction between the separate Jain entities. Thus, for purposes of this order, the Court will adopt that practice as well.

Netafim filed its complaint on March 29, 2021.[3] Therein, it alleges that Jain's acquisition of Irrigation Design and Agri-Valley reduced competition in the sale of micro-irrigation **[*1079]** equipment in local markets across Central California. Id., ¶ 1. On this theory, Netafim raises causes of action under the *Sherman Antitrust Act, 15 U.S.C. § 1*, and the Clayton Antitrust Act, *15 U.S.C. § 18*. Compl., ¶¶ 79-85, 86-92. Netafim also brings a cause of action under the *Lanham Act*, *15 U.S.C. § 1125*, which is based on allegations that Defendants engaged in an adverse campaign of false advertisements following the acquisition. Compl., ¶¶ 93-102. Netafim **[**5]** seeks equitable relief and millions of dollars in damages for its claims. Id., ¶ 1, Prayer for Relief.

Defendants now move to dismiss the complaint in full under *Federal Rule of Civil Procedure 12(b)(6)*. Doc. No. 15. Netafim has filed its opposition, to which Defendants have replied. Doc. Nos. 17 & 18.

LEGAL STANDARD

Under *Federal Rule of Civil Procedure 12(b)(6)*, a cause of action may be dismissed where a plaintiff fails "to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. Dismissal under *Rule 12(b)(6)* may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. *Conservation Force v. Salazar, 646 F.3d 1240, 1242 (9th Cir. 2011)*; Johnson v. Riverside Healthcare Sys., *534 F.3d 1116, 1121-22 (9th Cir. 2008)*. To survive a *Rule 12(b)(6)* motion for failure to allege sufficient facts, a complaint must include a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. Compliance with this rule ensures that the defendant has "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*) (internal marks omitted). Under this standard, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*) (internal marks omitted). A claim has facial plausibility when the plaintiff pleads factual content **[**6]** that allows the court to draw the reasonable inference that the defendant is liable for the alleged misconduct. *Id. at 663*.

In reviewing a complaint under *Rule 12(b)(6)*, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Mollett, 795 F.3d at 1065*; Marceau v. Blackfeet Hous. Auth., *540 F.3d 916, 919 (9th Cir. 2008)*. But the court is "not 'required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.'" *Seven Arts Filmed Entm't, Ltd. v. Content Media Corp. PLC, 733 F.3d 1251, 1254 (9th Cir. 2013)* (quoted source omitted). Complaints that offer no more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Iqbal, 556 U.S. at 678*; *Johnson v. Fed. Home Loan Mortg. Corp., 793 F.3d 1005, 1008 (9th Cir. 2015)*. Rather, "for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009)* (quoting *Iqbal, 556 U.S. at 678*). If a motion to dismiss is granted, the court "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be **[*1080]** cured by the allegation of other facts." *Henry A. v Willden, 678 F.3d 991, 1005 (9th Cir. 2012)* (quoted source and internal marks omitted). **[**7]**

DISCUSSION

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[3] As acknowledged in the complaint and Defendants' unopposed request for judicial notice, the parties here have been involved in other adversarial litigation in federal and state court. Compl., ¶¶ 56-58; Doc. No. 15-2. See *Jain Irrigation, Inc. v. Netafim Irrigation, Inc., 386 F. Supp. 3d 1308 (E.D. Cal. 2019)*; Jain Irrigation, Inc. v. Netafim Irrigation, Inc., No. 37-2019-00035422-CU-AT-CTL (Cal. Super. Ct. filed July 8, 2019). Notwithstanding this notice, the Court's resolution of this motion is not affected by these separate proceedings.

In their motion, Defendants argue that all three of Netafim's claims should be dismissed. The Court will start with Defendants' challenges to the antitrust claims, and then turn to the parties' disputes regarding the false advertising claim.

A. Antitrust claims

Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*. *Section 7* of the Clayton Antitrust Act prohibits mergers and acquisitions "in any line of commerce" in which the effect "may be substantially to lessen competition, or to tend to create a monopoly." *15 U.S.C. § 18*.

Mirroring these provisions, Netafim uses its first two claims to allege that Jain's acquisition of Irrigation Design and Agri-Valley was an unreasonable restraint of trade (in violation of the *Sherman Act*) that substantially lessened competition in the markets for micro-irrigation equipment and micro-irrigation design services in local markets throughout Central California (in violation of the *Clayton Act*). Compl., ¶¶ 81, 88. Defendants now challenge both claims, considered together, on four threshold grounds.[4]

Defendants' first two challenges go to Netafim's pleading of an antitrust injury, which is itself a necessary **[**8]** predicate for possessing the unique antitrust standing that is required for claims under the Sherman and Clayton Acts. *Somers v. Apple, Inc., 729 F.3d 953, 963 (9th Cir. 2013)*; *Glen Holly Ent., Inc. v. Tektronix Inc., 352 F.3d 367, 371 (9th Cir. 2003)*. Broadly, antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Somers, 729 F.3d at 963* (quoted source omitted). With their dismissal motion, Defendants argue that Netafim has not sufficiently pleaded that their conduct caused any injury, much less one that antitrust laws are meant to deter.

Defendants' latter two challenges go to the sufficiency of Netafim's allegations defining a relevant market and Defendants' power within that defined market. Allegations of this kind are also generally required for both Sherman and Clayton Act claims. *Brown Shoe Co. v. United States, 370 U.S. 294, 324, 343, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*; *Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1044 (9th Cir. 2008)*.

[*1081] The Court will consider the market-related challenges first, as they necessarily color the discussion of the antitrust injury disputes. See *Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 992 (9th Cir. 2020)* ("[I]n assessing alleged antitrust injuries, courts must focus on anticompetitive effects 'in the market where competition is [allegedly] being restrained.' 'Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury.'" **[**9]** (quoted source omitted)).

1. Relevant market

"A threshold step in any antitrust case is to accurately define the relevant market, which refers to 'the area of effective competition.'" *Qualcomm Inc., 969 F.3d at 992* (quoted source omitted); see also *Rebel Oil Co. v. Atl.*

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[4] Defendants also assert that Netafim's Clayton Act claim against Irrigation Design and Agri-Valley must fail as the language of *Section 7* only applies to acquirers of assets, not sellers. Netafim does not respond to this assertion. Defendants are correct as to the language of the *Clayton Act* provision. *15 U.S.C. § 18* (stating in multiple contexts that "no person shall acquire"). But the Ninth Circuit has also recognized that sellers may be joined in a *Section 7* claim if the court requires jurisdiction over both the selling and acquiring entities to fashion equitable relief. *United States v. Coca-Cola Bottling Co. of L.A., 575 F.2d 222, 230-31 (9th Cir. 1978)* (discussing *Section 15 of the Clayton Act*, which is codified at *15 U.S.C. § 25*). For purposes of its *Section 7* claim, Netafim seeks both equitable relief and damages from all Defendants. Compl., Prayer for Relief. Recognizing the statutory language and the controlling precedent, the Court will dismiss that claim as to Irrigation Design and Agri-Valley with respect to damages. *Gerlinger v. Amazon.Com, Inc., 311 F. Supp. 2d 838, 852 (N.D. Cal. 2004)*; *Fricke-Parks Press, Inc. v. Fang, 149 F. Supp. 2d 1175, 1186 (N.D. Cal. 2001)*.

Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995) ("[A] 'market' is the group of sellers or producers who have the 'actual or potential ability to deprive each other of significant levels of business.'" (quoted source omitted)). Setting the relevant market boundaries is a critical first step as it enables the court to assess issues regarding market share, the defendant's ability to lessen or destroy competition, and the alleged antitrust injury. *Qualcomm Inc., 969 F.3d at 992*; *Rebel Oil Co., 51 F.3d at 1434*.

To define a relevant market, the plaintiff must identify both a product market and a geographic market. *Hicks v. PGA Tour, Inc., 897 F.3d 1109, 1120 (9th Cir. 2018)*. The product market "includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)* (quoted source omitted). In other words, based on the product market, the relevant market will "include 'the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business.'" *Newcal Indus., Inc., 513 F.3d at 1045* (quoted source omitted). In so far as it is defined geographically, the relevant market **[**10]** is the "area of effective competition . . . where buyers can turn for alternate sources of supply." *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1490 (9th Cir. 1991)* (quoted source and internal marks omitted).

Before turning to Netafim's allegations, the Court notes that relevant market determinations are typically fact-intensive, with actual "inquiry into the 'commercial realities' faced by consumers." *High Tech. Careers v. San Jose Mercury News, 996 F.2d 987, 990 (9th Cir. 1993)* (quoted source omitted). This often enables market-defining allegations to survive scrutiny under *Rule 12(b)(6)*. *Newcal Indus., Inc., 513 F.3d at 1045*. Nonetheless, a relevant market definition still must be plausible and without a fatal legal defect that is apparent from the face of the complaint. Id.

In the complaint, Netafim defines separate product markets for micro-irrigation equipment and micro-irrigation design services, and geographic markets as the local areas where micro-irrigation design services are demanded by growers and provided by design firms. Compl., ¶¶ 59-65.

In their motion, Defendants primarily take issue with how the product markets interact or fail to interact with the geographic markets. First, Defendants argue that Netafim has not actually alleged a geographic market that corresponds to the equipment product market. Second, regarding the design services product market, Defendants **[**11]** assert that Netafim's allegations are conclusory and improperly based on cherrypicked counties and zip codes that show a significant anticompetitive effect.

[*1082] The Court rejects the first argument. As noted above, to properly define a relevant market, a product market must be paired with a geographic market. *Hicks, 897 F.3d at 1120*. Yet, Netafim's broader allegations establish that its geographic markets definition of local areas where micro-irrigation design services are demanded and provided necessarily corresponds to the product markets for both those services and micro-irrigation equipment. Namely, according to the complaint, Jain's acquisition of the design firms disrupted competition in the micro-irrigation industry by reducing other manufacturers' access to growers. This theory of harm is itself predicated on Netafim's description of a three-tier micro-irrigation industry where design firms function as the necessary intermediary between manufacturers of micro-irrigation equipment and growers who purchase that equipment as part of their micro-irrigation systems. Compl., ¶¶ 16-19. In other words, Netafim's allegations explain that producers (manufacturers) and consumers (growers) of micro-irrigation equipment **[**12]** are mutually dependent on the services of micro-irrigation design firms. Through this lens, it is clear that the market for those design services overlap with the market for micro-irrigation equipment, as the latter is being sold through the former. This conclusion aligns with Netafim's product market allegations. Id., ¶¶ 59-60. It also allows for a reasonable inference (if one is even needed) that the relevant geographic markets for selling that equipment are the same geographic markets for selling those design services.

Defendants' second argument is aimed at the sufficiency of the relevant geographic market allegations. In general terms, the relevant geographic market is the "area of effective competition" where buyers could practicably turn for alternative sources of supply if a seller attempted to exercise market power by increasing price or decreasing quality. *Tanaka, 252 F.3d at 1063* (quoted source omitted).[5] A geographic market need not be alleged or proved with "scientific precision," nor must it be defined "by metes and bounds as a surveyor would lay off a plot of ground." *United States v. Conn. Nat'l Bank, 418 U.S. 656, 669, 94 S. Ct. 2788, 41 L. Ed. 2d 1016 (1974)*; *United States v. Pabst Brewing Co., 384 U.S. 546, 549, 86 S. Ct. 1665, 16 L. Ed. 2d 765 (1966)*. Rather, the complaint need only include sufficient information to present a relevant geographic market that is facially sustainable. **[**13]** *Newcal Indus., Inc., 513 F.3d at 1045*; see also *Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1336 (11th Cir. 2010)* ("[A]ntitrust plaintiffs still must present enough information in their complaint to plausibly suggest the contours of the relevant geographic and product markets.").

As noted above, Netafim defines the relevant geographic markets as the "local geographic markets where growers demand design services and where design firms provide design services." Compl., ¶ 61. Netafim alleges that these local geographic markets arise from growers' demand for local service. Id., ¶ 62. According to Netafim, "[e]very micro-irrigation system **[*1083]** must be tailored to the needs of a particular grower in a particular location for a particular field and crop," which in turn leads growers to seek design services from design firms with a "local office" and "expertise with local field and crop factors that influence the design of micro-irrigation systems." Id. In response to this demand, Netafim continues, design firms operate "locally" by maintaining "local stores to serve growers in these local markets." Id., ¶ 63. "Each store serves growers located near the store. Design firms have local employees and rely on local labor forces and local equipment to design and install systems in each area." Id. Netafim **[**14]** also explain that Defendants' own operations "illustrate that the relevant geographic markets are local." Id., ¶ 64. Netafim supports this allegation by listing fourteen storefronts that Irrigation Design and Agri-Valley maintain in certain counties and zip codes across Central California. Id., ¶¶ 24-25. Netafim alleges that this quantity of separate physical locations indicates that "design services are provided in local markets." Id., ¶ 64. Netafim adds that Irrigation Design and Agri-Valley's market dominance in those counties and zip codes—as exhibited by Netafim's sales figures through the design firms at these locations and its dramatic drop in sales following the acquisition—also "confirms that the [relevant] markets are local." Id., ¶¶ 64-65.

Much of Defendants' argument focuses on Netafim's enumeration of "cherrypicked" and "gerrymandered" counties and zip codes in the complaint.[6] Netafim responds that its pleading does not define the relevant geographic markets by county lines and zip code borders, and that these geographic markers were added to the complaint only to more clearly illustrate the control that Defendants had over access to growers in those local areas. This reading, **[**15]** however, conflicts with the following allegation: "The local geographic markets where Netafim alleges that [Irrigation Design and Agri-Valley] had a dominant share are listed in Tables 1 and 2, above, and include Merced, Solano, and Stanislaus Counties, and the zip codes of 93292, 93620, 93622, 93624, 93722, 95012, 95206, 95236, 95341, 95360, 95363, and 95620." Compl., ¶ 61. And to the extent Netafim has alleged that the relevant geographic markets are at least in part defined by the boundaries of particular counties and zip codes, it has not plausibly explained in the complaint why these lines are appropriately drawn. Rather, this case aligns with other instances where courts have rejected geographic market definitions based on political and administrative boundaries. Cf. *Concord Assocs., L.P. v. Ent. Props. Tr., 817 F.3d 46, 53-54 (2d Cir. 2016)* (rejecting a gambling-related market based primarily on four New York counties while excluding nearby gambling markets in Connecticut, Pennsylvania, and New Jersey); *Nicolosi Distrib., Inc. v. FinishMaster, Inc., No. 18-cv-03587-BLF, 2019 U.S. Dist. LEXIS 62079, 2019 WL 1560460, at *5 (N.D. Cal. Apr. 10, 2019)* (rejecting a geographic market based on county

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[5] This describes a monopoly market situation, where the seller holds market power. If market power is instead possessed by a buyer or group of buyers, the market situation is alternatively described as a monopsony. *United States v. Syufy Enters., 903 F.2d 659, 663 & n.4 (9th Cir. 1990)*. These similar yet unique forms of market power are generally treated as equivalent for purposes of ***antitrust law***. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 321-22, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)*. In the context of a monopsony, however, the relevant geographic market definition captures the area in which sellers are able to turn to other buyers as reasonably good substitutes. *Todd v. Exxon Corp., 275 F.3d 191, 201-02 (2d Cir. 2001)* (explaining generally how market definitions are affected by different market situations).

[6] Defendants ask the Court to take judicial notice of a map of Central California that identifies the twelve zip codes that are referenced in Netafim's allegations. Doc. No. 15-2. Although maps are frequently a subject of judicial notice, the Court resolves this portion of Defendants' motion without need for notice of this particular map.

lines where no plausible explanation for excluding other neighboring counties). Thus, in so far as Netafim has defined the relevant geographic markets based on certain counties and zip codes, its current **[**16]** allegations cannot stand.

Yet, the Court also recognizes that much of Netafim's geographic market pleading is based on something other than the enumerated counties and zip codes. This is the tack Netafim takes in opposition to Defendants' **[*1084]** motion when it urges the Court to instead focus on its allegations explaining that "the relevant geographic markets are the local areas around [the design firms'] retail stores." While this contention aligns with other allegations in the complaint, neither those allegations nor Netafim's opposition explain how to implement this separate definition without running into obvious problems. For instance, consider a hypothetical where two design firm storefronts are located within a mile of each other, one maintained by Irrigation Design and the other maintained by a non-defendant design firm. Under Netafim's proposal, each storefront gives rise to a unique geographic market consisting of the surrounding local area. Yet, nothing in the complaint (nor Netafim's argument here) suggests that growers in this area could not alternate between the two stores if one of the design firms increased its prices. Defendants present a similar hypothetical in their motion, **[**17]** with argument that design firms located a block apart would exist in different markets simply because they fell within different zip codes. Netafim responded with explanation that "two stores a block away from each other presumably would be in the same local market." This may have defeated Defendants' zip code theory, but with no other limiting principles in play, it also conflicts with Netafim's suggestion that each storefront gives rise to a geographic market.

At bottom, the Court can reasonably infer from the complaint that the defined "local geographic markets" are circumscribed areas in Central California that surround physical storefronts maintained by micro-irrigation design firms. This, according to Netafim's pleading, is where design services are sought and provided, and growers would not leave these areas for those design services (and ultimately micro-irrigation equipment) if subjected to a small price increase. Without reasonably concrete geographic terms, however, the complaint otherwise presents an open-ended approach to decipher the amorphous phrase "local geographic markets." To that end, the Court finds as telling how the allegations here stand in contrast to other **[**18]** cases that have involved properly alleged "local" geographic markets. For instance, in *Sentry Data Systems, Inc. v. CVS Health, 379 F. Supp. 3d 1320, 1329 (S.D. Fla. 2019)*, the plaintiff alleged local geographic markets based on twenty-two core-based statistical areas in which the defendant had a 30% or greater share of contract pharmacy locations. Similarly, *Sidibe v. Sutter Health, 667 F. App'x 641, 642-43 (9th Cir. 2016)*, involved allegations of local geographic markets for the sale of inpatient hospital services based on hospital service areas as defined in a publication produced by healthcare researchers. Likewise, in *Universal Hospital Services, Inc. v. Hill-Rom Holdings, Inc., No. SA-15-CA-32-FB, 2015 U.S. Dist. LEXIS 154154, 2015 WL 6994438, at *2 (W.D. Tex. Oct. 15, 2015)*, the plaintiff defined regional geographic sub-markets for time-sensitive medical equipment rentals as a circle with a ninety-mile radius centered on regional distribution centers owned and operated by the parties. And in *It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676, 681-82 (4th Cir. 2016)*, the court determined that the instant concert promotion dispute involved the local market of the Washington-Baltimore area. The market definition in each of these cases came with limiting principles of a kind that are not present here.[7]

[*1085] While the bar at this stage does not demand scientific precision or metes and bounds, some certainty is required to ensure the phrase "local geographic markets" provides enough notice to be able to proceed. See *Orchard Supply Hardware LLC v. Home Depot USA, Inc., 939 F. Supp. 2d 1002, 1010 (N.D. Cal. 2013)* ("Plaintiff's **[**19]** definition of the relevant geographic market—'various regional markets in California and Oregon where Orchard and other retail sellers of power tools compete against one another'—is vague and conclusory."). Because the complaint fails in this regard, the Court will dismiss the claims on this basis and provide Netafim with an opportunity to amend its pleading.

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[7] The same is true regarding Netafim's own case law authority. See *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 783-85 (9th Cir. 2015)* (relevant geographic market of the city of Nampa); *Movie 1 & 2 v. United Artists Commc'ns, Inc., 909 F.2d 1245, 1248 (9th Cir. 1990)* (relevant geographic market of the greater Santa Cruz area); United States v. Trib. Publ'g Co., No. CV 16-01822-AB (PJWx), 2016 WL 2989488, at *3-4 (C.D. Cal. Mar. 18, 2016) (relevant geographic market of Orange County and Riverside County).

2. Market power

Along with a relevant market definition, a plaintiff must plead that the defendant has power within that market. Newcal Indus., Inc., 513 F.3d at 1052; Rick-Mik Enters., Inc. v. Equilon Enters. LLC, 532 F.3d 963, 972 (9th Cir. 2008). Market power is the ability of a seller "to raise price and restrict output." Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 464, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992) (quoted sources and internal marks omitted); Rebel Oil Co., 51 F.3d at 1434; see also Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111, 1118 (10th Cir. 2008) ("In a monopsony, the buyers have market power to decrease market demand for a product and thereby lower prices."). Practically, "[m]arket power . . . is simply a way to assess whether the defendant's conduct has anticompetitive effects." Staley v. Gilead Scis., Inc., 446 F. Supp. 3d 578, 616 (N.D. Cal. 2020). Similar to the relevant market definition, ascertaining market power is fact-intensive and case-specific; thus, market power allegations often survive scrutiny under Rule 12(b)(6). Eastman Kodak Co., 504 U.S. at 466-67; Newcal Indus., Inc., 513 F.3d at 1052.

As to the nuts and bolts, market power can be proved through direct or circumstantial evidence, and market power allegations should generally track at least one **[**20]** of these routes. Rebel Oil Co., 51 F.3d at 1434. The first route requires direct proof of an injury to competition that a competitor with market power could inflict, such as evidence showing restricted output and supra-competitive prices. Id. In contrast, plaintiffs more commonly present a circumstantial case, which demands a relevant market definition and evidence showing that (1) the defendant owns a dominant share of that market and (2) there are significant barriers to entry and existing competitors lack the capacity to increase their output in the short run. Id.

A threshold problem emerges quickly. Namely, before even considering Netafim's market power allegations, the Court recognizes its inability to fully assess them in light of the insufficient allegations regarding the relevant geographic market. Id. ("Without a definition of the relevant market, it is impossible to determine market share."). Even so, there still exists value in sizing up the market power allegations at this stage so as to offer guidance moving forward.[8]

In the complaint, Netafim first describes the micro-irrigation equipment market in Central California as being worth approximately $225 million at the time of the acquisition. Compl., ¶ **[**21]** 66. Of this pie, Netafim estimates its own share to have been 37% and Jain's to have been 11%, with the **[*1086]** remainder left for small manufacturers who were also harmed by the acquisition. Id. Netafim acknowledges its inability to further pinpoint specific market shares within the "local geographic markets," but alleges that a similar breakdown is likely to apply at a local level. Id. Netafim then describes Irrigation Design and Agri-Valley as the two largest design firms in Central California. Id., ¶ 67. While noting the design firms' specific market shares vary across local markets depending on their physical locations and grower relationships, Netafim alleges that the pair "provide nearly all micro-irrigation design services in the regions surrounding their locations." Id. Netafim again points to the previously discussed enumeration of Irrigation Design and Agri-Valley storefronts, which include the percentages of Netafim's sales through the design firms at those locations in 2016 and 2017. Id., ¶¶ 24-25, 67.

Through these allegations, Netafim does not exactly confirm whether it intends to prove market power through direct or circumstantial evidence. Although its opposition brief focuses **[**22]** on the circumstantial angle, at this stage, Netafim might in fact still intend to try to do both. And some groundwork has been laid for each kind of effort. As for direct evidence, Netafim does not directly allege that the acquisition choked output, but it repeatedly references how the acquisition disrupted the channels for communication between manufacturers and growers. Id., ¶¶ 74-75. And while supra-competitive prices are not identified, the complaint expressly states (albeit in conclusory fashion) that the acquisition led to increased prices for micro-irrigation equipment and design services. Id., ¶¶ 77, 84, 91.

[8] To that end, if it chooses to amend its relevant market allegations, Netafim may also amend its market power allegations as it deems necessary.

As for circumstantial evidence, the Court first notes that some parts of the equation, such as barriers to entry, are missing from or only weakly implied in the general market power allegations. In contrast, Netafim's allegations regarding its sales through specific storefronts that were maintained by Irrigation Design and Agri-Valley lend some credence to the idea that the design firms owned strong market shares in certain locations. Id., ¶¶ 24-25, 67. On the other hand, the Court places some stock in Defendants' point that, based on figures in the complaint, Irrigation **[**23]** Design and Agri-Valley only accounted for about 14% of Netafim's overall sales in Central California in 2016, which raises some doubt regarding the design firms' market share. Id., ¶¶ 20, 27-28. The fact that Netafim has not alleged its own market share (or Jain's, for that matter) in the same local areas where the design firms maintained the aforementioned storefronts also adds uncertainty on this front.[9] Also noteworthy is Netafim's allegation of Jain's 11% market share in Central California. Id., ¶ 66. What makes a given market share dominant necessarily varies from case to case, but some figures will be too low regardless of the particular circumstances presented. Eleven precent almost assuredly fails to meet the bar. *Rebel Oil Co., 51 F.3d at 1438*. And yet, as Netafim emphasizes in its opposition, there remain reasonable counterarguments to Defendants' highlighting of these seemingly too-low figures. For one, these numbers relate to Defendants' pre-acquisition position, and Netafim's entire case is based on the changes in the parties' positions following the acquisition. Moreover, as to the 11% figure, Netafim's case does not appear to be premised on an isolated allegation of **[*1087]** Jain's share in the market for **[**24]** micro-irrigation equipment. Rather, Netafim seems to be alleging that Jain's position in that market *plus* its acquisition of Irrigation Design and Agri-Valley and their respective shares in the market for micro-irrigation design services constitutes sufficient power in an interconnected market based on the sale of micro-irrigation equipment to growers through micro-irrigation design firms. This matches the discussion above regarding the unified theory of harm on which Netafim rests its antitrust claims. Finally, in so far as Defendants contend Netafim's pleading is insufficient because it lacks precise market share figures, some caution is in order. See *ThermoLife Int'l LLC v. NeoGenis Labs Inc., No. CV-18-02980-PHX-DWL, 2021 U.S. Dist. LEXIS 72375, 2021 WL 1400818, at *9 (D. Ariz. Apr. 14, 2021)* (explaining that exact, percentage-based market share figures are not necessarily needed to pass muster under *Rule 12(b)(6)*); *Top Rank, Inc. v. Haymon, No. CV 15-4961-JFW (MRWx), 2015 U.S. Dist. LEXIS 164676, 2015 WL 9948936, at *8 (C.D. Cal. Oct. 16, 2015)* (same). To provide pinpoint accuracy, Netafim would essentially need access to financial information of Defendants that it cannot be expected to possess at this stage.

With this collective information now at the fore for the parties' consideration moving forward, the Court finds a comfortable stopping point and defers further judgment on the sufficiency of these allegations given that full resolution cannot be had with the **[**25]** insufficient relevant market definition.

3. Antitrust Injury

Next up are Defendants' antitrust injury challenges. An antitrust injury consists of (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent. *Somers, 729 F.3d at 963*. The Ninth Circuit has also imposed a fifth requirement that "the 'injured party be a participant in the same market as the alleged malefactors.'" *Glen Holly Ent., Inc., 352 F.3d at 371* (quoted source omitted). "In other words, the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market." Id. (quoted source omitted).

Broadly, Netafim alleges that Jain's acquisition of Irrigation Design and Agri-Valley was both an illegal vertical merger and an illegal horizontal merger, each of which produced increased prices and reduced quality across the micro-irrigation equipment and design services markets that has caused harm to Netafim, other manufacturers, and growers. Defendants argue that Netafim's injury allegations regarding increased prices or reduced quality are

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[9] For instance, if the design firms accounted for 100% of Netafim's sales in a specific area, but Netafim's sales only accounted for a small fraction of the total sales in that area, the design firms would not possess dominant market shares based on their business with Netafim alone.

insufficient. They also contend **[**26]** that, even if an injury has been sufficiently alleged, Netafim has failed to plausibly allege that that injury was caused by their conduct. The Court takes these arguments in reverse order.

a. Causation

To plead an antitrust claim, the plaintiff must "allege some credible injury caused by [the defendant's] unlawful conduct." *Am. Ad Mgmt., Inc., 190 F.3d at 1056*. For their first challenge, Defendants hone in on Netafim's allegation that, "[f]ollowing the announcement of the acquisition, Netafim could no longer work with [Irrigation Design and Agri-Valley] and terminated its relationships with them." Compl., ¶ 31. With this allegation, Defendants assert that Netafim conceded that the cause of its purported injuries, if any, was its own voluntary decision to refuse to do business with the design firms after their acquisition by Jain.

[*1088] The Court rejects this argument, at this stage, as it relies solely on isolating a particular allegation from its greater context within the complaint. Namely, in addition to the allegation above, Netafim explains that it ended the design firm relationships, in part, because Jain would make the design firms favor its own products over those manufactured by competitors including Netafim. Id., ¶ **[**27]** 32. Netafim supports this allegation by quoting from Jain's public announcement of the acquisition as being a "[m]ajor push to deploy [Jain's] leading Agriculture Technology portfolio" and means by which Jain would be able to "build direct relationships with growers" through the design firms. Id. Netafim also supports this allegation by explaining that the design firms did in fact favor Jain's products after the acquisition. Id., ¶ 33. As one example, Netafim describes being informed by a large cantaloupe grower that Irrigation Design had "flipped" the grower from Netafim to Jain. Id. It adds that other growers informed that Irrigation Design pressured them to switch their business to Jain too. Id. The other reason for ending the relationships, according to Netafim, was its inability to bid on projects through the design firms without providing Jain with access to its competitively sensitive pricing and product information. Id., ¶ 34. In theme, Netafim alleges elsewhere in the complaint that manufacturers' close working relationships with design firms includes provision of "non-public pricing and individualized quotes for projects." Id., ¶ 19.

When read together and in a light most **[**28]** favorable to Netafim, the Court does not find a fatal pleading deficiency. Although Defendants describe Netafim's additional reasoning as pretext for its decision to boycott the design firms, the Court cannot draw the same conclusion without betraying the legal standard for considering a *Rule 12(b)(6)* motion. The same can be said for Defendants' assertion that, since the acquisition, the design firms have repeatedly sought Netafim's business to no avail. Defendants' best authority for an analogous pleading failure featured allegations indicating that the plaintiff had "voluntarily withdrew from competition" in the relevant market by executing a contract with the defendant to sell virtually all the assets of its relevant division. *Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1235 (6th Cir. 1981)*. This may have constituted a failure to plead causation, but Netafim has made no comparable claim that it sought to entirely remove itself from the market for micro-irrigation equipment manufacturing. Finally, Defendants' citation to case law at the summary judgment stage is inapt here. See *United Indus., Inc. v. Eimco Process Equip. Co., 61 F.3d 445, 448-49 (5th Cir. 1995)*; *Argus Inc. v. Eastman Kodak Co., 801 F.2d 38, 43-45 (2d Cir. 1986)*. While a dispute on this issue may play out differently as this litigation progresses, the allegations at hand allow for a reasonable inference that Netafim's own action did not **[**29]** break the causal chain.

b. Injury

For their other argument, Defendants contend that Netafim has not pleaded a plausible antitrust injury. "A plaintiff may only pursue an antitrust action if it can show *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Am. Ad Mgmt., Inc., 190 F.3d at 1055* (quoted source and internal marks omitted); see also *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* ("Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them **[*1089]** only when they may produce anticompetitive effects."). "It is well established that the antitrust laws are only intended to preserve competition for the benefit of consumers." Id. "Consumer welfare is maximized when economic resources are allocated to their best use . . ., and when consumers are assured competitive price and quality." *Rebel Oil Co., 51 F.3d at 1433*. Thus, "the antitrust laws are only concerned with acts that harm 'allocative efficiency *and* raise[ ] the price of goods above their competitive level or diminish[ ] their quality.'" *Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1034 (9th Cir. 2001)* (quoting *Rebel Oil Co., 51 F.3d at 1433*).

Turning **[**30]** to the complaint, for both antitrust claims, Netafim alleges that "the acquisition increased prices and reduced quality in the relevant markets for micro-irrigation equipment and design services in Central California." Compl., ¶¶ 84, 91. Netafim explains that these effects are the result of Defendants' merger of a large equipment manufacturer and the area's two largest design firms. Id., ¶¶ 82-83, 89-90. Big picture, Defendants contend that Netafim's injury allegations are nothing more than conclusory, boilerplate assertions. The Court agrees with Defendants.

While Netafim does well to sketch outlines of a horizontal merger between the design firms and a vertical merger between those design firms and Jain, its allegations do not sufficiently describe how those mergers translated to harm. For one, other than the conclusory reference to increased prices and reduced quality, Netafim has not offered any factual allegations suggesting that consumers (i.e., growers) have actually suffered from these or any other harms as a result of the mergers. Or as Defendants correctly point out in their reply brief, "Netafim fails to allege a single instance in which, as a result of the merger, a single **[**31]** grower was prevented from purchasing a single piece of micro-irrigation equipment." In fact, the only substantive allegation involving a post-acquisition consumer describes a cantaloupe grower switching from Netafim to Jain, which if anything implies enhanced consumer welfare. Compl., ¶ 33. Netafim's references to reduced competition for the sale of micro-irrigation equipment and between design firms provide no help on this front, as reduced competition only triggers antitrust liability when consumers are harmed. *Rebel Oil Co., 51 F.3d at 1433*. Nor is harm to consumers demonstrated by Netafim's allegation that non-Jain manufacturers have had to invest significant resources to compete following the acquisition. Compl., ¶ 74. Not only does this allegation contradict a theory of reduced competition, it also describes an activity—jostling for market share—that is not proscribed by antitrust laws. *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 115-16, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*; see also *Pool Water Prods., 258 F.3d at 1036* ("Increased concentration may make anticompetitive activity more likely, but in and of itself it does not amount to antitrust injury."). To that end, Netafim also never explains how competing manufacturers, including itself, were injured by a harm that antitrust laws were intended to prevent. *Reveal Chat Holdco, LLC v. Facebook, Inc., 471 F. Supp. 3d 981, 997-98 (N.D. Cal. 2020)* (explaining that **[**32]** plaintiffs must sufficiently allege that they themselves have suffered antitrust injuries); see also *Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1102 (9th Cir. 1999)* (explaining that the plaintiffs stood to benefit from increased prices because they competed with, rather than consumed, the defendants' products).

In sum, Netafim's allegations identify harms that antitrust laws are intended to prevent, but do so in a manner that fails to connect these conclusory references to specific factual circumstances of this case. **[*1090]** Thus, the Court will grant Defendants' motion to dismiss on this ground as well.

B. False advertising claim

Defendants also seek dismissal of Netafim's claim for false advertising in violation of *§ 43(a)(1)(B) of the Lanham Act*. *15 U.S.C. § 1125(a)(1)(B)*. Under this statute, a plaintiff may bring an action "against persons who make false and deceptive statements in a commercial advertisement [or promotion] about their own or the plaintiff's product." *Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 835 (9th Cir. 2002)*. For claims of this kind, the plaintiff must plead (and ultimately prove) six elements: (1) the defendant made a false or misleading statement either about the plaintiff's or its own product; (2) the statement was made in a commercial advertisement or promotion; (3) the statement actually deceived or has the tendency to deceive a substantial **[**33]** segment of its audience; (4) the deception is material, in that it is likely to influence the purchasing decision; (5) the defendant caused its statement to enter interstate commerce; and (6) the plaintiff has been or is likely to be injured as a result of the statement, either by direct diversion of sales from itself to the defendant, or by a lessening of goodwill associated with the plaintiff's product. *§ 1125(a)(1)(B)*; *Jarrow Formulas, Inc., 304 F.3d at 835 n.4*.

For its *Lanham Act* claim, Netafim alleges that, following the acquisition, Defendants made numerous false or misleading statements about (1) the usefulness and safety of micro-irrigation equipment manufactured with additives, foaming agents, or recycled materials, and (2) Netafim's ability and willingness to fulfill warranty obligations. Id., ¶¶ 95-96. It further describes the statements—which are unpacked in greater detail below—as at least misleading, if not literally false, and asserts that they were made with intent to mislead potential customers as to the usefulness, reliability, and safety of Netafim's products. Id., ¶¶ 98, 100. As to their dissemination, Netafim alleges that the statements entered interstate commerce because they were posted online or spread to Netafim's customers **[**34]** by way of Defendants' salesforces. Id., ¶¶ 96, 101. And as to their effect, Netafim alleges that Defendants' statements both tended to deceive customers and actually influenced customers' purchasing decisions. Id., ¶¶ 99-100.

In the same fashion as Netafim's pleading, the Court will differentiate and separately consider the allegations regarding micro-irrigation equipment statements from those related to its warranty obligations.

a. Micro-irrigation equipment

Netafim identifies three distinct ways in which Defendants made false or misleading statements about micro-irrigation equipment.

Netafim first describes a report from an Agri-Valley salesperson that, soon after the acquisition, Jain trained Irrigation Design and Agri-Valley salespeople how to pitch against Netafim equipment and did so with a sales handbook that included magnified photos purporting to be damaged Netafim equipment. Compl., ¶ 40. Netafim alleges that it heard from this salesperson that Defendants "used these images to falsely represent to customers that Netafim's equipment is of inferior quality because it contains recycled materials." Id.

Netafim next alleges that, in June 2017, it learned from a San Joaquin Valley grower **[**35]** that Defendants' salespeople told him the following false statements: (1) "Netafim is primarily owned by venture capitalists and the investors have been concerned with their returns"; (2) "[o]ther than changing the names of some products, there have not been recent new product advancements, or improvements in efficiency **[*1091]** made by Netafim to stay competitive"; and (3) "[a]s a result, Netafim have been utilizing foam fillers and recycled materials to manufacture its new drip tape and hose in order to reduce its resin cost and maintain margins." Id., ¶ 41.

Finally, Netafim describes numerous false or misleading statements that appeared in two blog posts that were published in June 2017 and August 2020. Id., ¶¶ 43-46. As to the June 2017 post, which was published by Jain on its commercial website and then re-published by Agri-Valley on its own website, Netafim alleges that the following false assertions were made:

- "To save money some manufacturers are adding foams, fillers and other additives to resin used to make irrigation tubing."
- "Unfortunately consumers pay for these cost cutting measures without any explanation about the compromise in material."
- "Many [competing manufacturers] no **[**36]** longer follow engineering standards developed to help growers ensure they have reliably performing products for years to come."
- "You can see the material voids (holes), resulting in a product that weighs less, and most likely will not have the same performance, and may be more susceptible to environmental stress cracking when used in combination with other fillers or recycled materials."
- "From research, recycled plastics will not have the same performance and long-term life as virgin resin systems designed for irrigation tubing. For further reference and study please visit this Dow webinar or read this article about down-cycling."

• "ASABE 435 Standards . . . . Compromises such as wall thickness, recycled resins, and the addition of fillers, foams, or other additives, make tubing that cannot meet the standards for performance set out by the 435 standards."
• "There simply is not enough of a safety factor in operating pressure and long term operating and burst pressure performance as with tubing meeting the standard."

Id., ¶ 45.

In addition to the statements above, Netafim also alleges that the following false assertions were made in a video embedded in the June 2017 post:

• "100% virgin **[**37]** plastic, Jain tubing comes with a 10-year warranty and conforms to ASABE standards."
• "While some manufacturers add foam, fillers, and additives to reduce their material usage, Jain manufactures tubing with a thicker wall that meets 435 advanced weather-performance standards."

Id., ¶¶ 46-47. Specific to these assertions, Netafim alleges that "[i]t is false that Jain's micro-irrigation tubes are made of '100% virgin plastic,'" as "Jain's products include other materials," and "Jain admits as much in other postings on its own website." Id., ¶ 50. Netafim points to other statements made in Jain's blog posts that it contends contradict the 100% virgin plastic assertion. Id.

As to the August 2020 blog post, which Jain published on its website, Netafim alleges that Jain asserted the following:

"One of the major differences in the tubing is the quality of resin a manufacturer uses to make the tubing and emitter line . . . . A couple of questions to ask of your local distributor selling you the cheapest tubing possible: Were recycled resins used to make the tubing? Were foaming agents or fillers used to make this tubing?"

[*1092] Id., ¶ 43. This, Netafim alleges, falsely suggests that micro-irrigation **[**38]** tubing and emitter lines made with recycled resins, foaming agents, or other additives are low quality. Id., ¶ 44.

Regarding all of the above assertions, Netafim alleges that the following suggestions are false: (1) the purpose of additives is to increase profits or cut costs at the expense of quality, and (2) micro-irrigation tubing that uses recycled materials or additives does not meet ASABE 435 standards. Id., ¶¶ 48-49.

Against these allegations, Defendants raise a litany of arguments that particular statements or sets of statements fail to satisfy certain elements of a *Lanham Act* claim. As an initial matter, the Court finds little favor in this tactic in so far as it flattens the breadth of the pleaded claim by isolating individual statements. For instance, the Court agrees with Defendants' assertion that Netafim's allegations regarding the San Joaquin Valley grower conversation describe only statements made by a single salesperson to a single grower during a single sales conversation. And the Court agrees that, taken alone, these allegations do not sufficiently allege a *Lanham Act* claim. That is, in isolation, these allegations identify false or misleading statements, but not ones that were made in **[**39]** a commercial advertisement or promotion, entered interstate commerce, and deceived or influenced the broader purchasing public. But the Court also recognizes that Netafim has not pleaded these allegations for purposes of setting forth a distinct *Lanham Act* claim. Rather, it has done so to support its overarching claim that Defendants engaged in a "misinformation campaign" regarding Netafim's products and the usefulness and safety of micro-irrigation equipment manufactured with additives, foaming agents, or recycled materials. Compl., ¶¶ 2, 39. This in turn requires the Court to read Netafim's allegations supporting that overarching claim in their entirety to determine if a sufficient claim has been pleaded. *L.A. Taxi Coop., Inc. v. Uber Techs., Inc., 114 F. Supp. 3d 852, 862 & n.2 (N.D. Cal. 2015)*. And reading the allegations in that fashion, and in the light most favorable to Netafim, the Court finds the pleading to be sufficient.

As catalogued above, Netafim has identified specific false or misleading statements that Defendants made regarding their own micro-irrigation equipment and that of competing manufacturers. Although some of these statements did not refer directly to Netafim or include a side-by-side comparison between Defendants and their competitors, some direct comparisons **[**40]** were made and the collection as a whole reasonably indicates that such associations were implied when not expressed. See Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139, 1145 (9th Cir. 1997) (explaining that a statement may be actionable under the Lanham Act even without a direct comparison to a competitor, and that falsity may be shown through necessary implication). With its description of the alleged statements, Netafim also depicts statements made in the context of commercial advertising or promotions, given their dissemination to the relevant purchasing public through direct interactions or targeted blog posts. Newcal Indus., Inc., 513 F.3d at 1054. Likewise, Netafim connects those statements to customer deception by asserting that Defendants trained sales personnel to pitch against its equipment by making false representations as to its quality. While generic, this point is adequately bolstered by Netafim's description of the conversation with the San Joaquin Valley grower that involved the same kind of statements, as well as its allegation that growers informed of being pressured with similar sales pitches after the acquisition. See Lona's Lil Eats, LLC v. DoorDash, Inc., No. 20-CV-06703-TSH, 2021 U.S. Dist. LEXIS 8930, **[*1093]** 2021 WL 151978, at *8 (N.D. Cal. Jan. 18, 2021). This combination of allegations also provides substance for Netafim's otherwise-bald claim that it heard from customers that Defendants' statements tended to **[**41]** deceive and influence purchasing decisions. In a similar fashion, Netafim's conclusory interstate commerce allegation suffices when combined with its allegations describing blog posts. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 829 n.3 (9th Cir. 2011). Moreover, Netafim generally alleges that the industry for micro-irrigation products involves interstate shipments (Compl., ¶ 12), and its other allegations regarding the size and scope of that industry enable the Court to infer that the statements at least substantially affected interstate commerce. Thompson Tank & Mfg. Co. v. Thompson, 693 F.2d 991, 993 (9th Cir. 1982). Finally, even though Netafim's injury allegation is conclusory (Compl., ¶ 102), commercial injury is generally presumed when the plaintiff competes directly with the defendant and the defendant's statement has a tendency to mislead consumers. ThermoLife Int'l, LLC v. Gaspari Nutrition Inc., 648 F. App'x 609, 615-16 (9th Cir. 2016); TrafficSchool.com, Inc., 653 F.3d at 826-27, 829. The misleading factor is discussed above, and Netafim alleges throughout the complaint that it directly competes with Defendants to sell micro-irrigation equipment to growers. Compl., ¶¶ 1, 21.

In sum, the Court finds these allegations, when read in their entirety, present a sufficient claim. Although Defendants' motion promotes additional inquiry as to whether particular, isolated statements satisfy the elements of a Lanham Act claim, the Court declines to wade further **[**42]** into these disputes at this stage. For one, some turn on fact-intensive questions that are inapt for full resolution here. And, as explained above, Netafim's individual allegations can be actionable in support of a broader claim, even if they are not themselves actionable on their own. While Netafim's reliance on nonactionable statements may hamper its ability to survive future challenges in this case, resolution at those stages is distinct from the Court's task at hand.

b. Warranty obligations

Netafim's allegations regarding Defendants' false statement about its warranty obligations are briefer than its allegations regarding the micro-irrigation equipment statements. Namely, Netafim highlights another statement in the June 2017 blog post that, Netafim alleges, was made in reference to a then-pending change in its ownership and aimed at its ability and willingness to fulfill warranty obligations to clients. Compl., ¶¶ 51-52. According to the complaint, the statement in question reads as follows: "I would recommend asking, who is warrantying the product? Will this company be in its current form and have the ability and willingness to honor the warranty or will you be dealing with a new **[**43]** owner in a business that has significantly changed." Id., ¶ 52. Netafim alleges that this statement "falsely insinuated Netafim would not honor its warranties" when in fact "Netafim's ability and willingness to honor its product warranties was not then and is not now dependent on its ownership." Id., ¶¶ 52-53.

Defendants challenge these allegations on grounds that the statement constitutes puffery (as opposed to actionable false statements) and does not involve a direct comparison to Netafim. Defendants also point out that Netafim has not alleged that this particular statement deceived customers or harmed Netafim in any way. In opposition, Netafim does not particularize its defense of this statement, and instead seems to lump its defense of these allegations with all of those discussed above regarding micro-irrigation equipment.

[*1094] The Court declines to dismiss Netafim's claim on account of the lack of a direct comparison in this statement. Southland Sod Farms, 108 F.3d at 1145. Likewise, at this stage, the Court declines to conclusively determine that this statement is "extremely unlikely to induce consumer reliance," and thus nonactionable puffery. *Newcal Indus., Inc., 513 F.3d at 1053*. Otherwise, however, the Court finds Netafim's opposition to be unpersuasive. **[**44]** While Netafim provides factual allegations that illustrate how Defendants' false statements regarding micro-irrigation equipment tended to deceive customers as to that equipment, it has not included similar details regarding the warranty statement. Instead, for purposes of this statement, Netafim must rely solely on its boilerplate allegation that all of statements set forth in the complaint tended to deceive customers. Compl., ¶ 99. The Court cannot infer from this allegation alone that Defendants' allegedly false statement—which, at most, impliedly references Netafim's ability and willingness to fulfill warranty obligations—actually deceived or tended to deceive a substantial segment of the relevant purchasing public. The Court also finds the same defect with Netafim's pleading of the materiality or influence of any deception, as Netafim's allegations on that element make no mention of the Netafim's warranty obligations. Id., ¶ 100. And that lack of sufficiently alleged deception leaves Netafim unable to avail itself of a presumption of injury here. Without this, Netafim's generic allegation that all of Defendants' statements caused Netafim to be injured is not enough. Id., ¶ 102. **[**45]** For all of these insufficiencies, the Court will dismiss this portion of Netafim's Lanham Act claim and grant Netafim leave to amend.

ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. Defendants' motion to dismiss (Doc. No. 15) is GRANTED in part and DENIED in part;

    a. The first cause of action for violation of the *Sherman Act* is DISMISSED without prejudice;

    b. The second cause of action for violation of the *Clayton Act* is DISMISSED with prejudice to the extent it seeks damages against Defendants Irrigation Design and Agri-Valley;

    c. The second cause of action for violation of the *Clayton Act* is otherwise DISMISSED without prejudice;

    d. The third cause of action for violation of the *Lanham Act* is DISMISSED, without prejudice, to the extent the claim is based on the warranty statement; and

2. Netafim is GRANTED leave to file an amended complaint. If Netafim elects to file a first-amended complaint, it must do so within thirty days of service of this order.

IT IS SO ORDERED.

Dated: December 14, 2021

/s/ Anthony W. Ishii

SENIOR DISTRICT JUDGE

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In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.

United States District Court for the District of Kansas

December 15, 2021, Decided; December 15, 2021, Filed

MDL No: 2785; Case No. 17-md-2785-DDC-TJJ

Reporter
2021 U.S. Dist. LEXIS 239220 *; 2021 WL 5918912

IN RE: EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation. (This Document Applies to Consumer Class Cases)

Prior History: *In re EpiPen Mktg., 268 F. Supp. 3d 1356, 2017 U.S. Dist. LEXIS 121974, 2017 WL 3297989 (J.P.M.L., Aug. 3, 2017)*

Core Terms

generic, brand, class member, Decertify, Surreply, seal, antitrust, argues, damages, plaintiffs', consumers, updated, loyalists, class certification, overcharges, sustain an injury, class action, asserts, Reply, purchases, class representative, uninjured, but-for, leave to file, prices, named plaintiff, reimbursed, contends, switched, certification

Counsel: **[*1]** In Re: All Plaintiffs (for Lead/Liaison Counsel ONLY): Amanda Klevorn, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - New Orleans, New Orleans, LA; Korey Nelson, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - New Orleans, New Orleans, LA; Lynn Lincoln Sarko, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Warren T. Burns, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX.

In Re: Consumer Class Cases Plaintiffs (For Filings as to All Consumer Class Cases Plaintiffs): Alison Elizabeth Chase, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLP - Santa Barbara, Santa Barbara, CA; Amanda Klevorn, LEAD ATTORNEY, Burns Charest, LLP - New Orleans, New Orleans, LA; Arthur L. Shingler, III, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Brian O. O'Mara, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Daniel E. Gustafson, **[*2]** LEAD ATTORNEY, PRO HAC VICE, Gustafson Gluek, PLLC - South 6th Street, Minneapolis, MN; Daniel C. Hedlund, LEAD ATTORNEY, PRO HAC VICE, Gustafson Gluek, PLLC - South 6th Street, Minneapolis, MN; Devon Paul Allard, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Eric Fierro, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLP - Phoenix, Phoenix, AZ; Felicia Craick, LEAD ATTORNEY, Keller Rohrback, LLC - Seattle, Seattle, WA; Gregory M. Bentz, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Lynn Lincoln Sarko, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Mahde Youssef Abdallah, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Maxwell Goins, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan McDevitt, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Spencer Cox, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX; Stacy **[*3]** A. Burrows, LEAD ATTORNEY, Law Offices of George A. Barton, PC, Overland Park, KS; Stuart A. Davidson, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Tanya Korkhov, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLP - New York, New York, NY; Taylor Foye, LEAD ATTORNEY, Sharp Barton, LLP - Metcalf, Overland Park, KS; Warren T. Burns, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX; William L. Kalas, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI.

In Re: All Defendants (for Lead/Liaison Counsel ONLY): Philip A. Sechler, LEAD ATTORNEY, PRO HAC VICE, Robbins, Russell, Englert, Orseck, Untereiner & Sauber, LLP, Washington, DC.

For Rosetta Serrano -- Consumer Class -- (KS #16-2711) on behalf of themselves, Plaintiff: Amanda Klevorn, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - New Orleans, New Orleans, LA; Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Charles Jacob Gower, LEAD ATTORNEY, PRO HAC VICE, CAD Law, LC, Salina, KS; Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Greenwood Village, Greenwood Village, CO; Cristina R. Delise, LEAD **[*4]** ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Derek William Loeser, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Gretchen Freeman Cappio, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Korey Nelson, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - New Orleans, New Orleans, LA; Lydia Wright, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - New Orleans, New Orleans, LA; Lynn Lincoln Sarko, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, **[*5]** PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Spencer Cox, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX; Stephen J. Fearon, Jr., LEAD ATTORNEY, PRO HAC VICE, Squitieri & Fearon, LLP, New York, NY; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX; Warren T. Burns, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX.

For Shannon Clements -- Consumer Class -- (KS #16-2711) on behalf of themselves and all other similiarly situated, Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Derek **[*6]** William Loeser, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Gretchen Freeman Cappio, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Lynn Lincoln Sarko, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, **[*7]** Rochester, MI; Spencer Cox, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX; Stephen J. Fearon, Jr., LEAD ATTORNEY, PRO HAC VICE, Squitieri & Fearon, LLP, New York, NY; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC

VICE, The Lanier Law Firm, PC, Houston, TX; Warren T. Burns, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX.

For Annette Sutorik -- Consumer Class -- (KS #16-2711) on behalf of themselves and all other similiarly situated formerly known as Annette P. Wilcome Sutorik, Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Derek William Loeser, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Gretchen Freeman Cappio, LEAD ATTORNEY, **[*8]** PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Lynn Lincoln Sarko, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Spencer Cox, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX; Stephen J. Fearon, Jr., LEAD ATTORNEY, PRO HAC VICE, Squitieri & Fearon, LLP, New York, NY; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD **[*9]** ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX; Warren T. Burns, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX.

For Lesley Huston -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Charles T. Schimmel, LEAD ATTORNEY, Wright Schimmel, LLC, Overland Park, KS; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Isaac L. Diel, LEAD ATTORNEY, Sharp McQueen, PA - OP, Overland Park, KS; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, **[*10]** PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX; W. Greg Wright, LEAD ATTORNEY, Wright Schimmel LLC, Overland Park, KS.

For Chris Rippy -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan **[*11]** K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B.

Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Raymond C. Buchta, III -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, **[*12]** LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jason Scott Goldstein, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Lee Seltzer -- **[*13]** Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, **[*14]** The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Joy Shepard -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, **[*15]** Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Lorraine Wight -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier

Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, **[*16]** Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Teia Amell -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; **[*17]** Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Todd Beaulieu -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD **[*18]** ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Heather DeStefano -- **[*19]** Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, **[*20]** The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Laura Chapin -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Emily Hughes, LEAD ATTORNEY, PRO HAC VICE, Miller Law Firm, PC, Rochester, MI; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, **[*21]** PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Sonya North -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, **[*22]** CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Elizabeth Huelsman -- Consumer Class -- (KS #16-2711) formerly known as Liz Huelzman, Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller **[*23]** Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Nikitia Marshall -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, **[*24]** NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, **[*25]** CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Stacee Svites -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, **[*26]** LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Linda Wagner -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. **[*27]** Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Anastasia Johnston -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Emily Hughes, LEAD ATTORNEY, PRO HAC VICE, Miller Law Firm, PC, Rochester, MI; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, **[*28]** Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Elizabeth Williamson -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law **[*29]** Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Emily Hughes, LEAD ATTORNEY, PRO HAC VICE, Miller Law Firm, PC, Rochester, MI; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, **[*30]** PC, Houston, TX.

For Mark Kovarik -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, **[*31]** LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Suzanne Harwood, -- Consumer Class -- (KS #16-2711), Plaintiff Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma **[*32]** City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Donna Wemple -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO **[*33]** HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Jennifer Walton -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC **[*34]** VICE, Pritzker Levine, LLP, Emeryville, CA; Emily Hughes, LEAD ATTORNEY, PRO HAC VICE, Miller Law Firm, PC, Rochester, MI; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Meredith Krimmel -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New **[*35]** York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., **[*36]** San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Vishal Aggarwal -- Consumer Class -- (ILN #17-2189 / KS #17-2450) individually and on behalf of all other similarly situated, Plaintiff: Ben Barnow, LEAD ATTORNEY, PRO HAC VICE, Barnow and Associates, PC, Chicago, IL; Erich Paul Schork, LEAD ATTORNEY, PRO HAC VICE, Barnow and Associates, PC, Chicago, IL; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Rosemary Medellin Rivas, LEAD ATTORNEY, PRO HAC VICE, Levi & Korsinsky, LLP, San Francisco, CA; Timothy Gordon Blood, LEAD ATTORNEY, PRO HAC VICE, Blood Hurst & O'Reardon, LLP, San Diego, CA.

For Angie Nordstrum -- Consumer Class -- (NJ #17-2401 / KS #17-2451) Individually and on Behalf of All Others Similarly Situated, Plaintiff: Arthur L. Shingler, III, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Bradley Beall, LEAD ATTORNEY, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, **[*37]** FL; Brian O. O'Mara, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Brian D. Penny, LEAD ATTORNEY, PRO HAC VICE, Goldman Scarlato & Penny, PC, Conshohocken, PA; Damien J. Marshall, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner, LLP - NY, New York, NY; Donald A. Ecklund, LEAD ATTORNEY, PRO HAC VICE, Carella, Byrne, Cecchi, Olstein, Brody & Agnello, PC, Roseland, NJ; Duane L. Loft, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner, LLP - NY, New York, NY; Eugene Mikolajczyk, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; James E. Cecchi, LEAD ATTORNEY, PRO HAC VICE, Carella, Byrne, Cecchi, Olstein, Brody & Agnello, PC, Roseland, NJ; Jennifer Kan, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner, LLP - Armonk, Armonk, NY; Joseph Alm, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner, LLP - DC, Washington, DC; Lea Bays, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Matthew S. Tripolitsiotis, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner, LLP - **[*38]** Armonk, Armonk, NY; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Stuart A. Davidson, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL.

For Carly Bowersock -- Consumer Class -- (NJ #17-2401 / KS #17-2451) Individually and on Behalf of All Others Similarly Situated, Plaintiff: Arthur L. Shingler, III, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Bradley Beall, LEAD ATTORNEY, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Brian O. O'Mara, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Brian D. Penny, LEAD ATTORNEY, PRO HAC VICE, Goldman Scarlato & Penny, PC, Conshohocken, PA; Damien J. Marshall, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner, LLP - NY, New York, NY; Donald A. Ecklund, LEAD ATTORNEY, PRO HAC VICE, Carella, Byrne, Cecchi, Olstein, Brody & Agnello, PC, Roseland, NJ; Duane L. Loft, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner, LLP - NY, New York, NY; Eugene Mikolajczyk, LEAD ATTORNEY, **[*39]** PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; James E. Cecchi, LEAD ATTORNEY, PRO HAC VICE, Carella, Byrne, Cecchi, Olstein, Brody & Agnello, PC, Roseland, NJ; Jennifer Kan, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner, LLP - Armonk, Armonk, NY; Joseph Alm, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner, LLP - DC, Washington, DC; Lea Bays, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Matthew S. Tripolitsiotis, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner, LLP - Armonk, Armonk, NY; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Stuart A. Davidson, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL.

For Sanofi-Aventis US, LLC -- Sanofi -- (NJ #17-2763 / KS #17-2452), Plaintiff: Adam Scott Tolin, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - NJ, Princeton, NJ; Diane P. Sullivan, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, **[*40]** LLP - NJ, Princeton, NJ; Eric Shaun Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - New York, New York, NY; Eric Andrew Rivas, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP- CA, Redwood Shores, CA; Erin Marie James, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - New York, New York, NY; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jacob Benjamin Ebin, LEAD ATTORNEY, PRO HAC VICE, Mayer Brown LLP, New York, NY; John A. Stratford, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP- CA, Redwood Shores, CA; Joseph Adamson, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - New York, New York, NY; Lauren Jacobson, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - New York, New York, NY; Lisa Marie Madalone, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - New York, New York, NY; Luna Ngan Barrington, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - New York, New York, NY; Melissa Rutman, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP - New York, New York, NY; Nathaniel David White, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - Dallas, Dallas, TX; Paul J. Geller, LEAD ATTORNEY, **[*41]** PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Randi Singer, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP - New York, New York, NY; Robert William Taylor, PRO HAC VICE, Weil, Gotshal & Manges, LLP - New York, New York, NY; Sarah L. Segal, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - New York, New York, NY; Yehudah L. Buchweitz, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - New York, New York, NY.

For Kenneth Evans -- Consumer Class -- (ALS #17-336 / KS #17-2485) as an individual and as representative of the class, Plaintiff: Brian Murphy, LEAD ATTORNEY, PRO HAC VICE, Braswell Murphy, LLC, Mobile, AL; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; James Bringhurst Eubank, LEAD ATTORNEY, Beasley Allen Crow Methvin Portis & Miles, PC, Montgomery, AL; Kasie M. Braswell, LEAD ATTORNEY, PRO HAC VICE, Braswell Murphy, LLC, Mobile, AL; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; W. Daniel Miles, III, LEAD ATTORNEY, PRO HAC VICE, Beasley Allen Crow Methvin Portis & Miles, PC, **[*42]** Montgomery, AL.

For Local 282 Welfare Trust Fund -- Consumer Class -- (NJ #17-6110 / KS #17-2498) Individually and on Behalf of All Others Similarly Situated, Plaintiff: Arthur L. Shingler, III, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Bradley Beall, LEAD ATTORNEY, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Brian O. O'Mara, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Eugene Mikolajczyk, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; James E. Cecchi, LEAD ATTORNEY, PRO HAC VICE, Carella, Byrne, Cecchi, Olstein, Brody & Agnello, PC, Roseland, NJ; Lea Bays, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS.

For Donna Anne Dvorak -- Consumer Class -- (KS#17-2785), Plaintiff: Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, **[*43]** New York, NY; Lynn Lincoln Sarko, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Warren T. Burns, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX.

For Michael Gill -- Consumer Class -- (KS#17-2785), Plaintiff: Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Lynn Lincoln Sarko, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Warren T. Burns, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX.

For April Sumner -- Consumer Class -- (KS#17-2785), Plaintiff: Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Lynn Lincoln Sarko, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP -

Boca Raton, **[*44]** Boca Raton, FL; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Warren T. Burns, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX.

For Landon Ipson -- Consumer Class -- (KS#17-2785), Plaintiff: Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Lynn Lincoln Sarko, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Warren T. Burns, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX.

For Kenneth Steinhauser -- Consumer Class -- (KS #16-2711), Plaintiff: Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD **[*45]** ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Ryan C. Hudson, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Mylan N.V., Defendant: Adam K. Levin, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Benjamin Frederick Holt, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Brian C. Fries, LEAD ATTORNEY, Lathrop GPM, LLP - Kansas City, Kansas City, MO; Carolyn Anne DeLone, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Chad E. Blomberg, LEAD ATTORNEY, Lathrop Gage, LLP - Kansas City, Kansas City, MO; Charles A. Loughlin, LEAD ATTORNEY, Hogan Lovells US, LLP - DC555, Washington, DC; Christopher D. **[*46]** Edelman, LEAD ATTORNEY, PRO HAC VICE, U.S. Department of Justice, Civil Division, Washington, DC; Daniel Thomas Graham, LEAD ATTORNEY, PRO HAC VICE, Clark Hill, PLC - IL, Chicago, IL; David M. Foster, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; James Moloney, LEAD ATTORNEY, Lathrop Gage, LLP - Kansas City, Kansas City, MO; Jon Myer Talotta, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US LLP, Tysons, VA; Justin Bernick, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Katherine Booth Wellington, LEAD ATTORNEY, Hogan Lovells US, LLP - DC, Washington, DC; Kathryn M. Ali, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US LLP - DC, Washington, DC; Keith O'Doherty, LEAD ATTORNEY, Hogan Lovells US, LLP - DC, Washington, DC; Kimberly Rancour, LEAD ATTORNEY, Hogan Lovells US, LLP - DC555, Washington, DC; Michael David Gendall, LEAD ATTORNEY, Hogan Lovells US LLP, Washington, DC; Sue Lin, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Timothy Robert Herman, LEAD ATTORNEY, PRO HAC VICE, Clark Hill, PLC - IL, Chicago, IL; Yuri Fuchs, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC, Washington, DC.

For Mylan **[*47]** Specialty, LP a Delaware limited partnership, Defendant: Adam K. Levin, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Arnold B. Calmann, LEAD ATTORNEY, PRO HAC VICE, Saiber, LLC, Newark, NJ; Benjamin Frederick Holt, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Brian C. Fries, LEAD ATTORNEY, Lathrop GPM, LLP - Kansas City, Kansas City, MO; Carolyn Anne DeLone, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Chad E. Blomberg, LEAD ATTORNEY, Lathrop Gage, LLP - Kansas City, Kansas City, MO; Charles A. Loughlin, LEAD ATTORNEY, Hogan Lovells US, LLP - DC555, Washington, DC; Christopher D. Edelman, LEAD ATTORNEY, PRO HAC VICE, U.S. Department of Justice, Civil Division, Washington, DC; Daniel Thomas Graham, LEAD ATTORNEY, PRO HAC VICE, Clark Hill, PLC - IL, Chicago, IL; David M. Foster, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; David A. Perez, LEAD ATTORNEY, PRO HAC VICE, Perkins Coie, LLP - Seattle, Seattle, WA; James Moloney, LEAD ATTORNEY, Lathrop Gage, LLP - Kansas City, Kansas City, MO; Jeffrey S. Soos, LEAD ATTORNEY, PRO HAC VICE, Saiber, LLC, Newark, NJ; Jessica **[*48]** Arden Ettinger, LEAD ATTORNEY, PRO HAC VICE, Robbins, Russell, Englert, Orseck, Untereiner & Sauber, LLP, Washington, DC; John Goerlich, LEAD ATTORNEY, Robbins, Russell, Englert, Orseck, Untereiner &

Sauber, LLP, Washington, DC; Jon Myer Talotta, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US LLP, Tysons, VA; Justin Bernick, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Katherine Booth Wellington, LEAD ATTORNEY, Hogan Lovells US, LLP - DC, Washington, DC; Kathryn M. Ali, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US LLP - DC, Washington, DC; Kathryn Zecca, LEAD ATTORNEY, PRO HAC VICE, Robbins, Russell, Englert, Orseck, Untereiner & Sauber, LLP, Washington, DC; Keith O'Doherty, LEAD ATTORNEY, Hogan Lovells US, LLP - DC, Washington, DC; Kimberly Rancour, LEAD ATTORNEY, Hogan Lovells US, LLP - DC555, Washington, DC; Lee Turner Friedman, LEAD ATTORNEY, PRO HAC VICE, Robbins, Russell, Englert, Orseck, Untereiner & Sauber, LLP, Washington, DC; Michael David Gendall, LEAD ATTORNEY, Hogan Lovells US LLP, Washington, DC; Philip A. Sechler, LEAD ATTORNEY, PRO HAC VICE, Robbins, Russell, Englert, Orseck, Untereiner & Sauber, LLP, Washington, DC; Ralph C. Mayrell, **[*49]** LEAD ATTORNEY, PRO HAC VICE, Robbins, Russell, Englert, Orseck, Untereiner & Sauber, LLP, Washington, DC; Roy T. Englert, Jr., LEAD ATTORNEY, Robbins, Russell, Englert, Orseck, Untereiner & Sauber, LLP, Washington, DC; Sue Lin, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Susan E. Foster, LEAD ATTORNEY, PRO HAC VICE, Yarmuth Wilsdon Calfo, PLLC, Seattle, WA; Thomas L. Boeder, LEAD ATTORNEY, PRO HAC VICE, Perkins Coie, LLP - Seattle, Seattle, WA; Timothy Robert Herman, LEAD ATTORNEY, PRO HAC VICE, Clark Hill, PLC - IL, Chicago, IL; Yuri Fuchs, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC, Washington, DC.

For Mylan Pharmaceuticals, Inc., Defendant: Adam K. Levin, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Benjamin Frederick Holt, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Brian C. Fries, LEAD ATTORNEY, Lathrop GPM, LLP - Kansas City, Kansas City, MO; Carolyn Anne DeLone, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Chad E. Blomberg, LEAD ATTORNEY, Lathrop Gage, LLP - Kansas City, Kansas City, MO; Charles A. Loughlin, LEAD ATTORNEY, Hogan Lovells US, **[*50]** LLP - DC555, Washington, DC; Christopher D. Edelman, LEAD ATTORNEY, PRO HAC VICE, U.S. Department of Justice, Civil Division, Washington, DC; Daniel Thomas Graham, LEAD ATTORNEY, PRO HAC VICE, Clark Hill, PLC - IL, Chicago, IL; David M. Foster, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Jon Myer Talotta, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US LLP, Tysons, VA; Justin Bernick, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Katherine Booth Wellington, LEAD ATTORNEY, Hogan Lovells US, LLP - DC, Washington, DC; Kathryn M. Ali, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Keith O'Doherty, LEAD ATTORNEY, Hogan Lovells US, LLP - DC, Washington, DC; Kimberly Rancour, LEAD ATTORNEY, Hogan Lovells US, LLP - DC555, Washington, DC; Michael David Gendall, LEAD ATTORNEY, Hogan Lovells US LLP, Washington, DC; Sue Lin, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Timothy Robert Herman, LEAD ATTORNEY, PRO HAC VICE, Clark Hill, PLC - IL, Chicago, IL; Yuri Fuchs, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC, Washington, DC.

For Heather Bresch (KS #16-2711), Defendant: **[*51]** Adam K. Levin, LEAD ATTORNEY, Hogan Lovells US LLP - DC, Washington, DC; Benjamin Frederick Holt, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Brian C. Fries, LEAD ATTORNEY, Lathrop GPM, LLP - Kansas City, Kansas City, MO; Carolyn Anne DeLone, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Chad E. Blomberg, LEAD ATTORNEY, Lathrop Gage, LLP - Kansas City, Kansas City, MO; Christopher D. Edelman, LEAD ATTORNEY, PRO HAC VICE, U.S. Department of Justice, Civil Division, Washington, DC; David M. Foster, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Jon Myer Talotta, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US LLP, Tysons, VA; Justin Bernick, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Katherine Booth Wellington, LEAD ATTORNEY, Hogan Lovells US, LLP - DC, Washington, DC; Keith O'Doherty, LEAD ATTORNEY, Hogan Lovells US, LLP - DC, Washington, DC; Kimberly Rancour, LEAD ATTORNEY, Hogan Lovells US, LLP - DC555, Washington, DC; Michael David Gendall, LEAD ATTORNEY, Hogan Lovells US LLP, Washington, DC; Sue Lin, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, **[*52]** Washington, DC; Yuri Fuchs, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC, Washington, DC.

For King Pharmaceuticals, Inc., Defendant: Brendan Woodard, LEAD ATTORNEY, PRO HAC VICE, White & Case, LLP - NY, New York, NY; Dimitrios Drivas, LEAD ATTORNEY, PRO HAC VICE, White & Case LLP - NY, New

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For Meridian Medical Technologies, Inc., Defendant: Ada Wang, LEAD ATTORNEY, PRO HAC VICE, White & Case, LLP - NY, New York, NY; Brendan Woodard, LEAD ATTORNEY, PRO HAC VICE, White & Case, LLP - NY, New York, NY; Brigid Bone, LEAD ATTORNEY, PRO HAC VICE, White & Case, LLP - NY, New York, NY; Chenyuan Fu, LEAD ATTORNEY, PRO HAC VICE, White & Case, LLP - NY, New York, NY; David E. Delorenzi, LEAD **[*53]** ATTORNEY, PRO HAC VICE, Gibbons, PC, Newark, NJ; Devan Calleen Rittler-Patton, LEAD ATTORNEY, Shook, Hardy & Bacon LLP - KC/Grand, Kansas City, MO; Dimitrios Drivas, LEAD ATTORNEY, PRO HAC VICE, White & Case LLP - NY, New York, NY; Edward Thrasher, LEAD ATTORNEY, PRO HAC VICE, White & Case LLP - NY, New York, NY; Ivan Navedo, LEAD ATTORNEY, PRO HAC VICE, White & Case, LLP - NY, New York, NY; Joseph M. Rebein, LEAD ATTORNEY, Shook, Hardy & Bacon LLP - KC/Grand, Kansas City, MO; Kathryn Swisher, LEAD ATTORNEY, PRO HAC VICE, White & Case LLP - NY, New York, NY; Raj Gandesha, LEAD ATTORNEY, PRO HAC VICE, White & Case LLP - NY, New York, NY; Robert Milne, LEAD ATTORNEY, PRO HAC VICE, White & Case LLP - NY, New York, NY; Sean Murray, LEAD ATTORNEY, PRO HAC VICE, White & Case, LLP - NY, New York, NY; Sheryn George, LEAD ATTORNEY, PRO HAC VICE, White & Case LLP - NY, New York, NY; Silvia M. Medina, LEAD ATTORNEY, PRO HAC VICE, White & Case LLP - NY, New York, NY; Steven Rivera, LEAD ATTORNEY, PRO HAC VICE, White & Case, LLP - NY, New York, NY.

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Judges: Daniel D. Crabtree, United States District Judge.

Opinion by: Daniel D. Crabtree

Opinion

MEMORANDUM AND ORDER

In February 2020, the court certified a *Rule 23(b)(3)* class action brought by consumer and third-party payors of the EpiPen—an epinephrine auto-injector ("EAI") used to treat anaphylaxis—who allege state antitrust violations premised on a generic delay theory. Doc. 2018-1 at 126-28; *see also* Doc. 2169 at 42 (Pretrial Order ¶ 4.a.). Generally, the class plaintiffs allege that the Mylan Defendants[1]—who marketed and sold the EpiPen—violated certain state antitrust laws by entering an unlawful reverse payment settlement that delayed generic entry of a competing generic EAI and stifled competition in the EAI market. *See* Doc. 2169 at 15-17, 42, 44-45 (Pretrial Order ¶¶ 3.a.1.b., 4.a., 4.d.).

The Mylan Defendants now ask the court to decertify the state law antitrust class. *See* Doc. 2389 (Mylan Defendants' Motion to Decertify the State Antitrust Class With Respect to Plaintiffs' Generic **[*64]** Delay Claim). They argue that a recent Supreme Court decision requires the court to decertify the state antirust class because "[e]very class member must have Article III standing in order to recover individual damages." *TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208, 210 L. Ed. 2d 568 (2021)*. Here, the Mylan Defendants argue, some class members are brand loyalists—meaning they would have purchased EpiPen even if a generic was available on the EAI market. So, according to the Mylan Defendants, the brand loyalist class members have sustained no injuries from any generic delay (even if it occurred). As a consequence, the Mylan Defendants argue the court should decertify the state law antitrust class action because the class includes uninjured class members who lack standing.

The class plaintiffs filed an Opposition to the Motion to Decertify (Doc. 2404). The Mylan Defendants filed a Reply (Doc. 2424; *see also* Doc. 2423-1 (sealed version)). Then, the class plaintiffs filed a Motion for Leave to File a Surreply (Doc. 2437). And, the Mylan Defendants filed a Response, opposing the class plaintiffs' Motion for Leave to File a Surreply (Doc. 2447). The matter thus is fully briefed, and the court now is prepared to rule.[2]

For reasons explained below, the court grants **[*65]** in part the Mylan Defendants' Motion to Decertify the State Antitrust Class (Doc. 2389) and denies the motion in part. The court grants the motion in just two respects: (1) The court grants Mylan's motion to decertify the portion of the state law antitrust class action asserting claims under the laws of Nevada and North Carolina because no named plaintiff purchased an EpiPen in those two states after the alleged but-for generic entry date, and thus, no named plaintiff sustained injury under the antitrust laws of either

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[1] The Mylan Defendants include Mylan N.V., Mylan Specialty L.P., Mylan Pharmaceuticals Inc., and Heather Bresch. Doc. 2169 at 1. This Order refers to these four defendants collectively as "the Mylan Defendants" or "Mylan."

[2] The Mylan Defendants' motion asks the court to set the matter for oral argument "if the Court believes that would be helpful." Doc. 2389 at 2. Our local rule, *D. Kan. Rule 7.2*, gives the court discretion to "set any motion for oral argument or hearing at the request of a party or on its own initiative." The court finds here that the parties' extensive papers adequately argue the issues raised by the Mylan Defendants' Motion to Decertify. Oral argument isn't necessary or consistent with *Fed. R. Civ. P. 1*. So, the court declines to set oral argument on this motion.

state based on any generic delay; and (2) the court grants Mylan's unopposed request to dismiss plaintiff Anastasia Johnston's claims because she sustained no financial injury. The court denies Mylan's motion in all other respects.

Also, the court grants the class plaintiffs' Motion for Leave to File a Surreply (Doc. 2437). The court begins with the Surreply issue.

I. Class Plaintiffs' Motion for Leave to File a Surreply

The class plaintiffs ask the court for leave to file a Surreply. They assert that Mylan's Reply "raise[s] *four* new, unfounded issues that warrant a short response." Doc. 2437 at 2. Mylan opposes the request for leave to file a Surreply, arguing that (1) **[*66]** plaintiffs could have raised the Surreply's arguments earlier in the briefing, and (2) Mylan's Reply didn't raise new arguments improperly but, instead, simply responded to arguments presented by plaintiffs' Opposition to the Motion to Decertify.

Our court's local rules limit briefing on motions to the motion (with memorandum in support), a response, and a reply. *D. Kan. Rule 7.1(a)* & *(c)*. Surreplies typically are not allowed. *Taylor v. Sebelius, 350 F. Supp. 2d 888, 900 (D. Kan. 2004)*, *aff'd on other grounds*, *189 F. App'x 752 (10th Cir. 2006)*. Instead, surreplies are permitted only with leave of court and under "rare circumstances." *Humphries v. Williams Nat. Gas Co., No. 96-4196-SAC, 1998 U.S. Dist. LEXIS 21196, 1998 WL 982903, at *1 (D. Kan. Sept. 23, 1998)* (citations omitted). As an example, when a moving party raises new material for the first time in a reply, the court should give the nonmoving party an opportunity to respond to that new material (which includes both new evidence and new legal arguments) in a surreply. *Green v. New Mexico, 420 F.3d 1189, 1196 (10th Cir. 2005)*; *Doebele v. Sprint/United Mgmt. Co., 342 F.3d 1117, 1139 n.13 (10th Cir. 2003)*. The rules governing filing of surreplies "are not only fair and reasonable, but they assist the court in defining when briefed matters are finally submitted and in minimizing the battles over which side should have the last word." *Humphries, 1998 U.S. Dist. LEXIS 21196, 1998 WL 982903, at *1* (citation omitted).

Here, the court disagrees with plaintiffs that the Reply asserts four new arguments. Each argument responds directly to something that class plaintiffs **[*67]** assert in their Opposition. So, the arguments aren't necessarily "new." Yet, the court recognizes, the specific arguments don't surface in the briefing until Mylan's Reply. And, Mylan has submitted new factual material to support the arguments. *See* Doc. 2423-1 at 14, 21 (citing Ex. 2); *see also id.* at 30 (citing Exs. 3 & 4). On these facts, the court finds, this case presents the "rare circumstances" where a surreply is permitted. *Humphries, 1998 U.S. Dist. LEXIS 21196, 1998 WL 982903, at *1* (citation omitted). The questions raised by the pending motion confront difficult issues about a certified class scheduled to try its state law antitrust claims to a jury less than two months from now. The class plaintiffs' proposed Surreply helps the court to consider the important questions presented by Mylan's Motion to Decertify. So, exercising its discretion, the court grants plaintiffs' request for leave to file a Surreply (Doc. 2437). Also, the court grants Mylan's request to file a Response to plaintiffs' Surreply. Doc. 2447 at 2. As explained in this Order's last section (Part III), the court directs the parties to file both sealed and unsealed versions of class plaintiffs' proposed Surreply (Doc. 2438-1) and Mylan's proposed Response to the Surreply **[*68]** (Doc. 2446-1) as separate docket entries.

II. The Mylan Defendants' Motion to Decertify the State Antitrust Class

Next, the court addresses the merits of the Mylan Defendants' Motion to Decertify. The court begins with the legal standard governing decertification of a class action.

A. Legal Standard

Federal Rule of Civil Procedure 23(c)(1)(C) provides that an "order that grants or denies class certification may be altered or amended before final judgment." *Fed. R. Civ. P. 23(c)(1)(C)*; *see also* *DG ex rel. Stricklin v. Devaughn, 594 F.3d 1188, 1201 (10th Cir. 2010)* (explaining that district court "possesses the discretion under *Rule 23(c)(1)(C)* to amend its certification order to reflect its findings or decertify the class altogether prior to final judgment"). Citing this Rule, the Supreme Court has explained that a certification order "is inherently tentative" because even "after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." *Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* (citing *Fed. R. Civ. P. 23(c)(1)*).

When moving to decertify a class, "'defendant must logically provide some reason for the court to change its conclusion.'" *Blair v. TransAm Trucking, Inc., 309 F. Supp. 3d 977, 1014 (D. Kan. 2018)* (quoting *Schell v. OXY USA Inc., No. 07-1258-JTM, 2013 U.S. Dist. LEXIS 129569, 2013 WL 4857686, at *3 (D. Kan. Sept. 11, 2013)*). "'Yet, it remains the plaintiff's burden to prove that the requirements of *Rule 23* are met.'" *Id.* (quoting *Arkalon Grazing Ass'n v. Chesapeake Operating, Inc., No. 09-1394-CM, 2014 U.S. Dist. LEXIS 91589, 2014 WL 3089556, at *1 (D. Kan. July 7, 2014)*); *see also* *Sibley v. Sprint Nextel Corp., 315 F.R.D. 642, 651 (D. Kan. 2016)* ("When faced with a motion to decertify—that is, even after the Court has granted **[*69]** a motion for class certification—the party seeking certification continues to bear the burden of meeting the requirements of *Rule 23*." (citation omitted)). *Cf.* *Day v. Celadon Trucking Servs., Inc., 827 F.3d 817, 832 (8th Cir. 2016)* (requiring defendant to "provide good reason before the district court revisits the [class certification] issue").

The decision whether to certify a class action "belongs within the discretion of the trial court." *Tabor v. Hilti, Inc., 703 F.3d 1206, 1227 (10th Cir. 2013)* (citation and internal quotation marks omitted). But when exercising this discretion, district courts must conduct a "rigorous analysis" and decide whether the putative class satisfies all the requirements of *Federal Rule of Civil Procedure 23*. *Comcast Corp. v. Behrend, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)* (citation and internal quotation marks omitted); *see also* *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350-51, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*.

To certify a class action, *Rule 23(a)* requires (1) numerosity, (2) commonality, (3) typicality, and (4) adequate representation, plus one of the requirements established by *Rule 23(b)(1)*, *(b)(2)*, or *(b)(3)*. *Fed. R. Civ. P. 23(a)—(b)*. Here, the court certified the state law antitrust class action under *Rule 23(b)(3)*. Doc. 2018-1 at 126. *Rule 23(b)(3)* requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. The court applies this governing standard **[*70]** to Mylan's Motion to Decertify, below.

B. Analysis

As already recited, the Mylan Defendants move to decertify the state law antitrust class action. They argue that the Supreme Court's recent *TransUnion* decision requires that "[e]very class member must have Article III standing in order to recover individual damages[,]" *TransUnion, 141 S. Ct. at 2208*, but some class members in this antitrust class action are uninjured, and thus, lack standing to sue. In the alternative, Mylan argues that the court should decertify the state law antitrust generic delay claims for certain states that no longer have an adequate or typical class representative. The court addresses both arguments, in turn, below.

1. Motion to Decertify State Antitrust Class Action

Mylan's motion asserts that *TransUnion* requires the court to decertify the class because the certified state law antitrust class contains uninjured class members. Plaintiffs respond, arguing that the court's prior class certification Order doesn't conflict with the Supreme Court's *TransUnion* decision. Also, plaintiffs argue that the evidentiary record shows that Mylan is wrong that the class contains uninjured members. The court addresses these arguments about the facts and the law in the following subsections, **[*71]** a. and b. It starts with the governing law.

a. *TransUnion*'s Effect on the Class Certification Order

In February 2020, the court certified an antitrust class action consisting of "[a]ll persons and entities in the Antitrust States[3] who paid or provided reimbursement for some or all of the purchase price of Branded EpiPens at any time" in the class period "for the purpose of consumption, and not resale, by themselves, their family member(s), insureds, plan participants, employees, or beneficiaries." Doc. 2018-1 at 126. In its class certification Order, the court rejected Mylan's argument that plaintiffs had failed to satisfy *Rule 23(b)(3)*'s predominance requirement because—according to Mylan's argument—plaintiffs cannot prove that all class members sustained injury. *See id.* at 58-79. Instead, the court applied "the standard artic[ulated] by the Seventh Circuit" and approved by our court in two of Judge Lungstrum's opinions. *Id.* at 67; *see also id.* at 62-67 (discussing *Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 825 (7th Cir. 2012)*, *In re Urethane Antitrust Litig., No. 04-1616-JWL, 2013 U.S. Dist. LEXIS 69784, 2013 WL 2097346, at *2 (D. Kan. May 15, 2013)*, and *In re Syngenta AG MIR 162 Corn Litig., No. 14-md-2591-JWL, 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *4 (D. Kan. Sept. 26, 2016)*). This standard precludes class certification when the putative class "'contains a great many persons who have suffered no injury at the hands of the defendant.'" *Messner, 669 F.3d at 825*.

Based on the evidence presented at class certification—including expert opinion from plaintiffs' **[*72]** expert, Professor Meredith Rosenthal—the court concluded "plaintiffs have shown, at least at the class certification stage, that the percentages of uninjured class members are small enough that they don't preclude class certification." *Id.* at 75. Also, it concluded that "any questions about the absence of injury for some class members don't overwhelm the common issues and defeat predominance on class certification." *Id.* at 76. But, the court recognized that "'depending on the ultimate size of the class at issue here,' the factual record eventually may develop more fully and show that the number of uninjured class members is 'more significant' than it now appears." *Id.* at 75 (quoting *Messner, 669 F.3d at 826*). The court noted that it "'is free to revisit this issue' if that, in fact, occurs." *Id.* (quoting *Messner, 669 F.3d at 826*); *see also Fed. R. Civ. P. 23(c)(1)(C)* ("An order that grants or denies class certification may be altered or amended before final judgment."). So, at class certification, the court concluded that "the current record doesn't defeat the predominance requirement simply because the putative class definitions contain a percentage of uninjured class members." *Id.*

Also, the court declined to deny certification based on Mylan's argument that certifying a class with **[*73]** uninjured class members violates Article III's standing requirements. *Id.* at 76-77. Relying on existing Tenth Circuit precedent, the court found that "the Article III standing requirement does not demand that plaintiffs establish each putative class member has sustained injury." *Id.* at 77 (citing *Colo. Cross Disability Coal. v. Abercrombie & Fitch Co., 765 F.3d 1205, 1214 (10th Cir. 2014)*). Instead, the court concluded under existing Circuit precedent, plaintiff had satisfied the Article III standing requirement "by showing that each named plaintiff has sustained injury sufficient to confer standing." *Id.*

More than a year after the court issued its certification Order, the Supreme Court issued its opinion in *TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021)*. *TransUnion* addressed the question whether every class member in that case's class action had satisfied the requirement of demonstrating "Article III standing in order to *recover individual damages*" in the class action. *Id. at 2208* (emphasis added). *TransUnion* involved a class of 8,185 individuals asserting *Fair Credit Reporting Act* claims against a credit reporting agency because the class members' internal TransUnion credit reports contained misleading information. *Id. at 2200*. But, for only "1,853 of the class members, TransUnion provided misleading credit reports to third-party businesses." *Id.* And, for "the other 6,332 class members[,]" their credit reports "were *not* provided to third-party **[*74]** businesses during the relevant time period." *Id.* The Supreme Court thus held that "the 6,332 class members whose internal TransUnion credit files were not disseminated to third-party businesses did not suffer a concrete harm." *Id. at 2212*. As a consequence, those 6,332 class members lacked standing to assert *Fair Credit Reporting Act* claims against TransUnion. *Id. at 2214*.

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[3] At class certification, the Antitrust States included: Alabama, California, Florida, Hawaii, Illinois, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New York, North Carolina, Tennessee, and Utah. Doc. 2018-1 at 126 n.72. On summary judgment, however, the court dismissed the Tennessee antitrust claims without prejudice because no properly-named plaintiff resides in that state. Doc. 2381 at 163, 182. So, 16 Antitrust States currently remain part of the certified class action.

Mylan asserts that *TransUnion*'s holding requires the court to decertify the state antitrust class action. Mylan argues that the certified class contains brand loyalists—*i.e.*, consumers who loyally purchased branded EAIs and who wouldn't have switched to purchasing a generic EAI when one became available. Mylan argues that these class members thus sustained no injury—no concrete harm—from any generic delay. As a consequence, Mylan asserts, the brand loyalists who are class members lack standing to assert state antitrust claims against Mylan. Also, Mylan contends, it's impossible to identify these uninjured class members without conducting individualized inquiries of each class member to determine who was and was not a brand loyalist. This individual inquiry, Mylan argues, will "overwhelm questions common to the class." *Comcast Corp. v. Behrend, 569 U.S. 27, 34, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*. And, says Mylan, that individual inquiry defeats *Rule 23(b)(3)* **[*75]** 's predominance requirement, thus requiring the court to decertify the state antitrust class.

Mylan recognizes that *TransUnion* never discussed Article III standing in the context of certifying a class action. Indeed, Mylan concedes that "the Supreme Court passed on the issue of 'whether every class member must demonstrate standing *before* a court certifies a class.'" Doc. 2390 at 17 n.10 (quoting *TransUnion, 141 S. Ct. at 2208 n.4*). But, Mylan argues, *TransUnion* explicitly recites that plaintiffs "must maintain their personal interest in the dispute *at all stages of litigation*." *TransUnion, 141 S. Ct. at 2208* (emphasis added). And, it also recognizes that a "plaintiff must demonstrate standing 'with the manner and degree of evidence required at the successive stages of the litigation.'" *Id.* (quoting *Lujan v. Defs. of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*). Mylan argues that plaintiffs can't shoulder that burden here—where class certification already has occurred, and the court already has decided summary judgment. Mylan asserts that a trial won't change the fact that plaintiffs can't demonstrate that all class members have sustained damages. Thus, Mylan argues, not every class member in this case has "Article III standing[,]" and, under *TransUnion*, these class members can't "recover individual damages." *Id.* As a consequence, Mylan asserts, the **[*76]** court must decertify the class because there is no way to identify and remove from the class uninjured brand loyalists—which, according to Mylan, plaintiffs have conceded exist in the class—without conducting millions of individual inquiries.

Plaintiffs respond that they always have argued—and the data always has shown—that a low probability exists that the class includes brand loyalists who remained brand loyal throughout the entire class period. Also, plaintiffs provide updated opinions from Prof. Rosenthal based on her analysis of updated pharmacy records. According to plaintiffs, Prof. Rosenthal's updated analysis shows "that the probability that brand loyalists are in the Class is, at best, *de minimis*." Doc. 2404 at 18. But, plaintiffs argue, even if the class includes some brand loyalists, Prof. Rosenthal's updated analysis also shows that any purported brand loyalist nonetheless sustained injury in the form of paying overcharges for the EpiPen. Using updated data, Prof. Rosenthal finds that the EpiPen price fell in the real world after a generic EAI entered the market. She opines that this same EpiPen price decline would have occurred in the but-for world where a generic would **[*77]** have entered the market sooner. As a consequence, Prof. Rosenthal asserts, even brand loyalists have sustained damages from generic delay in the form of paying higher prices for EpiPens. Thus, plaintiffs argue, even if certain class members never would have purchased a generic EAI over a branded EpiPen, all class members—including any purported brand loyalists—sustained injury because they paid overcharges on their EpiPen purchases.

Based on this data, plaintiffs argue that *TransUnion* differs from this case.[4] *See* Doc. 2404 at 20 (asserting that "each and every member of this Class was injured through paying higher prices for brand and generic EpiPens"); *see also id.* at 21 (arguing that "Mylan speculates that so-called 'brand loyalists' exist and have not suffered an injury," but plaintiffs have shown "all class members were impacted as a result of the delayed entry of an independent generic alternative for EpiPen" (citation and internal quotations omitted)). Thus, plaintiffs assert, Mylan's reliance on *TransUnion* is misplaced because plaintiffs are capable of proving that all class members—

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[4] Plaintiffs assert four arguments why *TransUnion* doesn't require the court to decertify the class. Doc. 2404 at 20-22. Also, plaintiffs argue that accepting Mylan's argument that the court must decertify the state antitrust class because it contains some number of uninjured class members "would be a potential death knell to generic delay claims—and many other types of class actions." *Id.* at 22-23. Because the court finds that plaintiffs have shown they are capable of presenting classwide evidence of generic delay damages sustained by every class member, thus satisfying Article III standing, the court need not address plaintiffs' other arguments.

even brand loyalists, if they exist—sustained damage from paying overcharges for EpiPen that Mylan's generic delay **[*78]** caused.

Mylan argues that the court can't consider Prof. Rosenthal's updated damages theory, and, even if it considers it, Mylan asserts that it doesn't support class certification. The court addresses those arguments in subsection b. And, as explained below, the court finds that plaintiffs have come forward with a method—in the form of Prof. Rosenthal's expert opinion—of proving classwide injury with evidence that is common to the class.[5] Thus, plaintiffs have provided a way—at this stage of the litigation, anyway—to show that each member sustained concrete harm from Mylan's alleged conduct, thereby establishing that all class members have Article III standing. So, the court declines to decertify the class based on the Supreme Court's *TransUnion* decision.

But—at the same time—the court recognizes the effect that *TransUnion*'s standing requirement has on this case where—Mylan argues—some class members sustained no injury. Although plaintiffs have come forward with a method for proving classwide injury for all EpiPen purchasers—brand loyal or not—a factfinder may not agree that the evidence shows what plaintiffs argue it does. A jury may accept Prof. Rosenthal's opinions about classwide injury. But, a jury **[*79]** also might reject those opinions. And, if a jury concludes that plaintiffs haven't shown classwide injury, then *TransUnion* holds that those class members who haven't sustained injury lack standing to recover damages. To address this problem, the court predicts that it will require a specific jury finding addressing the brand loyalist argument. The parties must confer and propose appropriate jury instructions and verdict form addressing whether each class member has sustained damage from the generic delay. This approach would enable the factfinder to decide whether each class member has sustained injury, and thus has or doesn't have standing to recover antitrust damages.

a. Plaintiffs Have Shown a Method of Proving That All Class Members—Even Brand Loyalists—Sustained Damages.

As already discussed, even if some small number of brand loyalists exist in the class, plaintiffs assert that updated data shows these class members still sustained injury from generic delay in the form of overcharges paid for branded EpiPens. According to plaintiffs' expert, Prof. Meredith Rosenthal, she has received "updated IQVIA Xponent data" extending "through October 2020[,]" and her analysis of that updated data shows **[*80]** EpiPen prescriptions "fell precipitously with the entry of the Mylan authorized generic and Teva's generic." Doc. 2412-2 at 4 (Rosenthal Decl. ¶ 6). Prof. Rosenthal explains that this updated data allows one to "see the effect of actual competitive generic entry on EpiPen's price," and based on that data, she opines "with a high degree of certainty that the brand EpiPen price would have decreased after competitive generic entry had it occurred" in a but-for world with no without generic delay. *Id.* at 9-10 (Rosenthal Decl. ¶ 13 & Fig. 3); *see also id.* ("[W]ith the longer span of data from the period after independent generic competition for EpiPen (*i.e.*, the Teva launch), it is now possible to infer with a high degree of certainty that brand EpiPen prices would also have declined but-for the alleged generic delay."). This analysis, in turn, "supports" Prof. Rosenthal's "conclusion that there is a very low probability that any given Class member did not suffer a quantifiable overcharge in this matter" in the form of higher prices for branded EpiPens. *Id.* Mylan asserts five arguments why plaintiffs' updated data nonetheless fails to permit class certification to continue.

First, Mylan **[*81]** argues that the court can't even consider the theory of injury to brand loyalists in the form of EpiPen overcharges because it's untimely. Mylan asserts that the parties have litigated this case for four years and Mylan has argued since at least March 2019 that the class contains uninjured class members. But, Mylan argues, plaintiffs never asserted their argument that brand loyalists have sustained injury in the form of paying EpiPen

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[5] As plaintiffs note, the court already concluded, when deciding defendants' Motion to Dismiss the Consolidated Class Action Complaint, that plaintiffs had "alleged economic loss sufficient to discharge the standing requirement" by alleging that "Mylan's conduct caused them to pay inflated prices for the EpiPen, and—but for Mylan's unlawful conduct—they would have purchased other versions of the EpiPen (both branded and generic) at lower cost." Doc. 896 at 102-03 (citations omitted). But, the court also recognizes, this ruling addressed plaintiffs' state consumer protection act claims, not the antitrust claims. *See id.* at 99-104.

overcharges until they filed their Opposition to the Motion to Decertify in August 2021. Mylan argues that plaintiffs can't use untimely expert testimony to inject this new theory in the case at this late stage when they never included their overcharge damages theory in the Pretrial Order. Also, Mylan contends, allowing plaintiffs to proceed with this new damages theory will prejudice Mylan because it has had no opportunity to conduct discovery on this topic, depose witnesses or experts about the overcharge damages, assert *Daubert* challenges to Prof. Rosenthal's opinions on this theory, or brief the issue on the merits to the court. The court disagrees with Mylan's arguments.

Although plaintiffs didn't assert the overcharge damages theory until their Opposition **[*82]** to the Motion to Decertify, they have explained adequately why they couldn't have asserted it earlier—that is, they didn't have the data to support the theory until June 2021. Prof. Rosenthal explains that the data available to her "at the time of [her] merits report were retail sales (IQVIA) data through June 2018, and Mylan's EpiPen rebate data through November 2018." Doc. 2438-2 at 4 (Rosenthal Sur-Reply Decl. ¶ 3). She explains that this data showed "a decreasing EpiPen price trend[,]" but "it was not yet clear if this was a trend that would continue after an independent generic manufacturer entered the market[.]" *Id.* Because Prof. Rosenthal only had data that "ended prior to Teva's actual launch[,]" she asserts "it was not possible . . . to reach a conclusion about the impact of Teva's launch on EpiPen prices and quantities[,]" and thus, she "was unable at the time to calculate overcharges for brand loyal purchases." *Id.* But, when Mylan produced additional rebate data on June 9, 2021, *see* Doc. 2437-3 at 2, Prof. Rosenthal found this new data made it "possible to conclude that the retail price of brand EpiPen, both gross and net of rebates, decreased after independent generic entry **[*83]** in the actual world." Doc. 2438-2 at 4 (Rosenthal Sur-Reply Decl. ¶ 3). Thus, she explains, she is "able to demonstrate that Class members paid a higher price for brand EpiPen than they would have in the but-for scenario and calculate the associated damages for purchases of the brand using data subsequent to Teva's launch to compute an appropriate brand price yardstick." *Id.*

Mylan contends that Prof. Rosenthal could have performed this analysis earlier had plaintiffs asserted their overcharge damages theory earlier and requested the data sooner. But Mylan's argument doesn't challenge the fact that plaintiffs didn't receive Mylan's updated rebate data until June 2021. And, Mylan never explains why the court should fault plaintiffs for failing to assert a damages theory that Mylan hasn't produced data to support.[6]

Also, plaintiffs argue that Prof. Rosenthal's updated damages opinion is timely because the parties agreed that her updated damages opinion was due on October 1, 2021—a deadline that still was in the future when Mylan filed the Motion to Decertify and the parties briefed its issues. *See* Doc. 2415 at 2 (Scheduling Order No. 15 (Amended Trial Order)). Mylan responds that Prof. Rosenthal's **[*84]** updated damages opinion was intended merely to provide an updated damages number using pre-existing damages theories that plaintiffs already had disclosed. In contrast, Mylan argues, plaintiffs have asserted a new damages theory which, Mylan contends, is waived because plaintiffs never asserted it in the Pretrial Order. *See* *Wilson v. Muckala, 303 F.3d 1207, 1215 (10th Cir. 2002)* ("[T]he pretrial order is the controlling document for trial[,]" and any "claims, issues, defenses, or theories of damages not included in the pretrial order are waived[.]" (citation and internal quotation marks omitted)). But, our Circuit explicitly has recognized that "'while the pretrial order defines a lawsuit's boundaries in the trial court and on appeal, total inflexibility is undesirable.'" *103 Invs. I, L.P. v. Square D Co., 372 F.3d 1213, 1217 (10th Cir. 2004)* (quoting *Summers v. Mo. Pac. R.R. Sys., 132 F.3d 599, 604 (10th Cir. 1997)*); *see also id.* (holding that the trial court abused its discretion by refusing to consider an expert rebuttal report as untimely).

Here, plaintiffs adequately have justified the reason they couldn't assert their overcharge damages theory earlier: because plaintiffs' expert didn't yet have the data to support the theory. Under these facts, precluding plaintiffs from asserting their damages theory would amount to "total inflexibility" and that approach is "undesirable" **[*85]** here. *103 Invs., 372 F.3d at 1217* (citation and internal quotation marks omitted). Also, the court disagrees with Mylan's argument that permitting plaintiffs to proceed with the overcharge damages theory will prejudice Mylan. As plaintiffs highlight, Mylan has responded to Prof. Rosenthal's updated damages opinion by submitting a 16-page Declaration

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[6] Mylan also contends that its updated rebate data is only relevant to Prof. Rosenthal's opinions about net prices, not gross prices. But, as Prof. Rosenthal explains, she used two sets of data—the IQVIA Xponent data and the Mylan rebate data—to conduct the updated pricing analysis. Doc. 2438-2 at 4-5 & n.5 (Rosenthal Sur-Reply Decl. ¶¶ 3, 5 & Fig. 3).

from Mylan's own expert, John H. Johnson. Doc. 2423-2 (Johnson Decl.). Dr. Johnson uses the same two sets of data—the IQVIA Xponent data and the Mylan rebate data—and opines that the data refutes Prof. Rosenthal's opinion that brand loyalists have sustained injury in the form of paying overcharges for EpiPen. *Id.* at 3-4, 9-10 (Johnson Decl. ¶¶ 3-4, 10 & Fig. 2). Also, Mylan's Reply and its Response to the Sur-Reply devote more than 20 pages challenging the merits of Prof. Rosenthal's updated damages opinion.[7] *See* Doc. 2423-1 at 6-7, 14-15, 19-29; *see also* Doc. 2446-1 at 3-11. In this context, it is evident. Mylan has had ample opportunity to review Prof. Rosenthal's opinions since their disclosure, and it still has the capacity to challenge her opinions. Thus, the court finds Mylan isn't prejudiced here.

In sum, the court declines Mylan's invitation to exclude Prof. **[*86]** Rosenthal's updated damages opinions as untimely.

Second, Mylan argues that plaintiffs' updated damages opinion doesn't support class certification because plaintiffs never have identified any redressable injury for brand loyalists. *See* *California v. Texas, 141 S. Ct. 2104, 2115-16, 210 L. Ed. 2d 230 (2021)* (explaining that the redressability requirement "to satisfy Article III standing" requires that plaintiffs seek a judicial "remedy that will redress the individual plaintiffs' injuries"). Here, Mylan argues, Prof. Rosenthal previously testified that brand loyalists' damages are zero. *See* Doc. 1636-6 at 18 (Rosenthal Dep. 172:9-18). But, plaintiffs explain, Prof. Rosenthal gave this deposition testimony in February 2019—more than two years before she received Mylan's updated damages data supporting her overcharge damages opinion. For the same reasons already outlined, the court concludes that plaintiffs' failure to assert a redressable injury for brand loyalists before Mylan produced the updated damages data supporting Prof. Rosenthal's analysis shouldn't preclude them from asserting their overcharge damages theory based on newly provided data. With the updated damages data, plaintiffs have identified a redressable injury in the form of alleged EpiPen overcharges. **[*87]**

Also, the court concludes, *TransUnion* doesn't require decertification. Mylan argues that *TransUnion* requires a plaintiff have standing "at all stages of litigation" and to "demonstrate standing with the manner and degree of evidence required at the successive stages of the litigation." *TransUnion, 141 S. Ct. at 2208* (citations and internal quotation marks omitted). At this stage of the case, plaintiff's updated damages theory based on EpiPen overcharges satisfies this standing requirement.

TransUnion addressed the question whether every class member in that class action had satisfied the requirement of to demonstrate "Article III standing in order to *recover individual damages*" in the class action. *Id. at 2208* (emphasis added). *TransUnion* held that "the 6,332 class members whose internal TransUnion credit files" contained misleading information "did not suffer a concrete harm" because their credit files "were not disseminated to third-party businesses." *Id. at 2212*. As a consequence, those 6,332 class members lacked standing to assert *Fair Credit Reporting Act* claims against TransUnion. *Id. at 2214*. Thus, *TransUnion* deals with the standing requirement in the context of a class member's ability to recover damages. *TransUnion* never holds or even implies that class certification requires every class member to demonstrate standing. To the contrary, **[*88]** the Supreme Court said explicitly that it wasn't addressing that question. *See* *id. at 2208 n.4* ("We do not here address the distinct question whether every class member must demonstrate standing *before* a court certifies a class."). In short, *TransUnion* provides no reason to disturb the court's class certification Order.

Third, Mylan contends that Prof. Rosenthal's analysis extends only to third party payors ("TPPs")—not individual consumers. *See* Doc. 2412-2 at 9-10 (Rosenthal Decl. ¶ 13 & Fig. 3) (analyzing "the TPP EpiPen price per prescription, both gross and net of rebates" and concluding that it "decreased after the Mylan AG entry and, more importantly, continued to do so after the Teva generic's entry"). Thus, Mylan argues, Prof. Rosenthal's overcharge damages theory can't support class certification for an entire class that includes TPPs as well as consumers. Prof. Rosenthal disagrees with Mylan's argument, explaining that her analysis shows the same results—*i.e.*, decreasing EpiPen prices after generic entry—for both cash payors and insured consumers as it shows for TPPs. Doc. 2438-2 at 4-8 (Rosenthal Sur-Reply Decl. ¶¶ 5-8 & Figs. 3-5). As plaintiffs argue, Prof. Rosenthal's opinion means that all

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[7] Mylan never applied to the court for permission to take Prof. Rosenthal's deposition about the opinions she's formed based on the updated data. When it comes to litigating aggressively, no one can accuse either side of the caption of shyness.

consumers **[*89]** sustained injuries in the real world where Mylan allegedly delayed generic entry. Based on Prof. Rosenthal's explanation, the court concludes that plaintiffs have come forward with opinion evidence capable of supporting a finding of classwide harm based on generic delay damages. Whether the finder of fact accredits that testimony is a separate question, but it's not one the court can decide on a pretrial motion.

But, Mylan also argues, Prof. Rosenthal's overcharge damages opinion isn't even plausible for insured consumers who paid a fixed co-pay. Mylan asserts that these class members are uninjured because they paid the same out-of-pocket co-pay regardless of the EpiPen's price. And so, Mylan argues, individualized inquiries are required to identify and exclude these uninjured insured consumers from the class. Plaintiffs respond, arguing that insured consumers still sustained an injury because the collateral source rule bars evidence of insurance payments since those insurance payments are independent of Mylan's conduct. According to plaintiffs, the collateral source doctrine permits insured consumers to assert their antitrust claims because they sustained injury even when the injury **[*90]** was reimbursed by insurance. *See, e.g., Goda v. Abbott Labs., No. 01445-96, 1997 D.C. Super. LEXIS 69, 1997 WL 156541, at *9 (D.C. Super. Ct. Feb. 3, 1997)* (applying the collateral source rule to a consumer class alleging antitrust injuries from paying overcharges for branded prescription drugs, even though consumers' insurance companies paid the overcharges, and finding "no reason why a wrongdoer should gain because his target has paid for coverage either through his dollars or through his [health care coverage]").

At class certification, the court addressed the parties' arguments about the collateral source doctrine. It concluded "that it need not decide—as a matter of law—whether the collateral source rule applies to plaintiffs' claims" on the certification motion because "the question whether the collateral source doctrine applies to plaintiffs who used insurance to pay for their EpiPen purchases is a legal issue that presents a common question that applies classwide." Doc. 2018-1 at 56. Also, the court noted, plaintiffs "expressly" had excluded from the class definitions: "'Single flat co-pay' consumers who purchased EpiPens or generic EpiPens only via a fixed dollar co-payment that is the same for all covered devices, whether branded or generic (*e.g.*, $20 for all branded and generic devices)." **[*91]** *Id.* at 55; *see also id.* at 127 (excluding from the class definition "'Single flat co-pay' consumers"). None of the parties raise this point in the briefing on the current motion. But, from the court's perspective, the certified class already excludes this group of consumers—*i.e.*, the single, flat co-pay consumers—who Mylan claims are uninjured, and thus lack standing. Based on this exclusion, the court can't find that Mylan's argument about insured consumers who paid flat co-pays provides a reason for the court to decertify the class.

Fourth, Mylan argues that Prof. Rosenthal's updated data fails to show injury to all TPPs. Specifically, Mylan argues that brand-loyal TPPs didn't sustain injury from the alleged generic delay because the Wholesale Acquisition Cost (WAC) never changed after Teva launched its generic EAI. Invoking opinions rendered by Mylan's own expert, Dr. Johnson, *see* Doc. 2423-2 at 13 & n.28 (Johnson Decl. ¶ 15), Mylan attacks Prof. Rosenthal's opinion that the branded EpiPen's price would have decreased in the but-for world for all TPPs because, Mylan argues, she bases that opinion on data showing the average third-party price *per prescription*. But, Mylan argues, any **[*92]** number of factors may affect a TPP's price per prescription. Those factors may include coverage changes, pharmacy discounts, or PBM policies—and not necessarily the entry of a generic competitor. Mylan's arguments go to the weight of Prof. Rosenthal's opinions. Plaintiffs have shown that her opinions are capable of proving injury to all TPPs based on her analysis of the decreasing price for branded EpiPen prescriptions. Mylan can attack Prof. Rosenthal's opinions through vigorous cross-examination or with contrary evidence—just as Mylan has done by offering Dr. Johnson's competing expert opinions supporting this Motion to Decertify. *See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 596, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)* ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); *see also In re Syngenta AG MIR 162 Corn Litig., No. 14-md-2591-JWL, 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *10 (D. Kan. Sept. 26, 2016)* (concluding that defendants' criticisms of plaintiffs' experts' methodologies failed to show that they "are so unreliable as to preclude certification" but instead, "[m]ore importantly for purposes of certification, these criticisms present common questions that do not undermine a finding of predominance"); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-md-02503, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *10 (D. Mass. Oct. 16, 2017)* (concluding, at class certification **[*93]** stage, "any disagreement [about expert's method of calculating damages] does not overcome the Plaintiffs' showing that damages will be substantially shown by common proof"). But, the conflicting expert opinions don't provide a reason for the court to decertify the state antitrust class. Instead, the conflicting opinions present a jury question whether all TPPs sustained injury from the alleged generic delay. And, this issue is one common to the class. Thus, Mylan's arguments on this fourth point don't require the court to decertify the class.

Fifth, Mylan argues that the updated data doesn't solve the problem of having uninjured class members in the certified class because the updated data reveals two additional categories of class members who are not injured. According to Mylan, the two additional categories consist of: (1) consumers who would have switched to the Auvi-Q or the Adrenaclick authorized generic; and (2) TPPs who paid more for the Teva generic than the branded EpiPen device.

For the first group—consumers who would have switched to the Auvi-Q or the Adrenaclick authorized generic—Mylan argues that these consumers (and their TPPs who reimbursed their purchases) weren't injured **[*94]** by the alleged delay of the Teva generic (the only claim remaining in the case) because they didn't switch to the Teva generic when it became available but, instead, switched to Auvi-Q or Adrenaclick's authorized generic. But as plaintiffs explain, neither of Mylan's arguments establish that the class necessarily includes uninjured class members. First, for consumers who purchased an EpiPen during the relevant class period, plaintiffs have adduced evidence capable of supporting a finding that they sustained injury because they paid an inflated price caused by generic delay. This outcome—if accredited by the factfinder—establishes an injury even if these consumers later switched to Auvi-Q or Adrenaclick's EAI.[8] Second, Mylan's argument assumes that these consumers—who switched from EpiPen to Auvi-Q or Adrenaclick in the actual world—never would have purchased a generic EAI in a but-for world where the generic EAI would have been available to purchase years earlier than in the real world. In sum, plaintiffs have demonstrated that they can prove injuries common to class members consisting of consumers (and their TPPs who reimbursed their purchases) who switched from purchasing the EpiPen **[*95]** to purchasing the Auvi-Q or the Adrenaclick authorized generic.

For the second group—TPPs who paid more for Teva's generic than the branded EpiPen device—Mylan argues that these class members are uninjured because these TPPs actually paid less for EpiPens before a generic entered the EAI market. Mylan asserts that Prof. Rosenthal's new data shows EpiPen prices paid by TPPs as well as the rebates Mylan paid to those TPPs. But her data doesn't include any information about rebates Teva paid to TPPs—if it paid any at all. Mylan's expert, Dr. Johnson, has analyzed Prof. Rosenthal's data, and he opines that it shows prices were "higher for TPPs whose members switched to the 'independent' Teva generic product than if they had stayed with the branded product." Doc. 2423-2 at 9-10 (Johnson Decl. ¶ 10 & Fig. 2). Mylan argues that the only way to determine whether TPPs paid more for EpiPen or the Teva generic is to conduct an individualized inquiry of each TPP's rebate arrangements with Mylan and Teva. And, Mylan contends, these individual issues preclude *Rule 23(b)(3)*'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members[.]" **[*96]** *Fed. R. Civ. P. 23(b)(3)*; *see also CGC Holding Co. v. Broad & Cassel, 773 F.3d 1076, 1087 (10th Cir. 2014)* (explaining that plaintiffs bear the burden under *Rule 23(b)(3)* to "show that common questions subject to generalized, classwide proof *predominate* over individual questions").

Plaintiffs respond, arguing that Dr. Johnson's comparison of actual-world, net EpiPen prices to actual-world, gross Teva generic prices is not the appropriate measurement to determine whether TPPs sustained injury. Instead, plaintiffs explain through Prof. Rosenthal's opinions that the correct comparison compares the net price paid by TPPs for EpiPen in the real world with the price TPPs would have paid for Teva's generic in the but-for world. Doc. 2438-2 at 9 (Rosenthal Sur-Reply Decl. ¶ 11). Prof. Rosenthal calculates Teva's generic price on a per prescription basis, in the but-for world, at $163 per prescription. Doc. 2132-7 at 97 (Rosenthal Merits Expert Report Attach. C.6.a). And, she explains that the Teva generic's price in the but-for world is well below the prices Dr. Johnson provides in his analysis. Doc. 2438-2 at 9-12 (Rosenthal Sur-Reply Decl. ¶¶ 10-14 & Figs. 6, 7, 8).

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[8] The class only consists of consumers or TPPs who purchased EpiPens during the relevant class period. Plaintiffs aren't asserting claims based on Auvi-Q or Adrenaclick purchases.

Mylan criticizes Prof. Rosenthal for relying on real-world data, in some instances, to show declining EpiPen prices after generic entry **[*97]** while also asserting that the but-for world generic price is the correct comparison to show that TPPs sustained injury from alleged generic delay. Prof. Rosenthal's approach, Mylan contends, is inconsistent. But, Prof. Rosenthal provides an adequate explanation why she makes the actual and but-for world comparisons and why her expert opinion shows that TPPs sustained injury from the alleged generic delay in the form of paying more for EpiPen than the Teva generic. *See* Doc. 2438-2 at 9-13 (Rosenthal Sur-Reply Decl. ¶¶ 10-17 & Figs. 6, 7, 8). Prof. Rosenthal's opinions provide plaintiffs a method for proving classwide injury through common evidence. Thus, the court declines to decertify the class on this basis.[9]

2. Motion to Decertify Portions of the Class for States That Allegedly Have No Adequate or Typical Class Representative

As an alternative to decertifying the entire state law antitrust class, Mylan asks the court to decertify certain portions of the class. Mylan contends there are portions of the class that lack an adequate and typical class representative who properly can assert state antitrust generic delay claims on behalf of the class.

Two of *Rule 23(a)*'s class certification requirements **[*98]** are that the representative class members (1) must assert claims or defenses that "are typical of the claims or defenses of the class" and (2) that they "will fairly and adequately protect the interest of the class." *Fed. R. Civ. P. 23(a)(3)—(4)*. Mylan asserts that two groups of named plaintiffs no longer satisfy *Rule 23(a)*'s typicality and adequacy requirements, and thus they can't serve as class representatives in this certified class action. *First*, Mylan argues that Local 282 isn't an adequate or typical class representative to represent third-party payors ("TPPs") in 14 of the 16 Antitrust States because it never reimbursed the purchase of an EpiPen in those states. *Second*, Mylan contends that the court should decertify the antitrust class in at least seven of the Antitrust States because those states lack an adequate or typical class representative to represent individual end-payor consumers. The court addresses the two arguments, separately, below. It begins with the argument about Local 282.

a. Local 282

Mylan argues that Local 282 is no longer a typical or adequate class representative to represent TPPs because it never reimbursed the purchase of an EpiPen device in 14 of the 16 Antitrust States during the class **[*99]** period. Mylan asserts, correctly, that Local 282 is the only named plaintiff who is a TPP. And, Mylan argues, because Local 282 never reimbursed EpiPen purchases in 14 of the Antitrust States, it has no antitrust claim under these 14 states' laws. As a consequence, Mylan argues, Local 282 can serve as the class representative only for claims relying on New York and Florida law—the two states where it reimbursed EpiPen purchases during the class period. And, Mylan asks the court to decertify the TPP antitrust claims in the other 14 states where Local 282 made no EpiPen reimbursements during the class period.

Plaintiffs respond, arguing that Mylan bases its argument on the flawed premise that the court certified two separate antitrust classes—one for TPPs and one for individual consumers. As plaintiffs correctly explain, the court did no such thing. The TPPs are not a separate class. Instead, the court's class certification Order certified a state antitrust class action consisting of "[a]ll persons and entities in the Antitrust States who paid or provided reimbursement for

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[9] Plaintiffs' Opposition to the Motion to Decertify also argues that consumers sustained injury caused by the alleged generic delay through a "loss of choice" to purchase a generic EAI. Doc. 2404 at 12. As Mylan correctly argues, the court's summary judgment Order recognized that "those class members who chose to purchase branded EpiPen products over a generic sustained no loss of choice." Doc. 2381 at 179. Also, plaintiffs conceded at summary judgment that "Prof. Rosenthal's 'loss of choice' opinion is not a measure of damages." *Id.* (citing Doc. 2183-1 at 20). So, Mylan argues, plaintiffs' loss of choice argument isn't evidence of classwide injury sufficient to support class certification of the state antitrust class. Because the court already has determined that plaintiffs have come forward with evidence of classwide injury consisting of Prof. Rosenthal's overcharge theory of damages, the court need not further address plaintiffs' "loss of choice" argument.

some or all of the purchase price of Branded EpiPens at any time" in the class period "for the purpose of consumption, **[*100]** and not resale, by themselves, their family member(s), insureds, plan participants, employees, or beneficiaries." Doc. 2018-1 at 126 (footnote omitted). Under this definition, the certified class includes both TPPs and individual consumers—as long as they made qualifying EpiPen purchases during the class period. And, because Local 282 is an "entity" who reimbursed EpiPen purchases in two of the 16 Antitrust States during the class period, it is an adequate and typical class representative to represent the interests of the class. *See In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 531 (3d Cir. 2004)* (finding that trial court didn't err by including TPPs in the certified class because "TPPs, like individual consumers, suffered direct economic harm when, as a result of [defendant's] alleged misrepresentations, they paid supracompetitive prices for [a prescription drug] instead of purchasing lower-priced generic warfarin sodium").

For the other 14 states "where Local 282 does not have beneficiaries," plaintiffs argue that "the individual consumer Class representatives can serve as the class representative" for those states. Doc. 2404 at 27. The court generally agrees with plaintiffs' argument, but there's a problem with their argument for two states: **[*101]** Nevada and North Carolina. Local 282 is the only named plaintiff for Nevada[10] and North Carolina.[11] But, Local 282 reimbursed no EpiPen purchases after March 14, 2014 (the alleged but-for generic entry date) in these two states. Thus, Mylan argues, Local 282 did not sustain any injury in Nevada or North Carolina produced by Mylan's alleged generic delay. And, as a consequence, Local 282 doesn't have standing to assert antitrust claims under the laws of Nevada and North Carolina.

Plaintiffs don't respond directly to Mylan's argument that Local 282's failure to reimburse EpiPen purchases after the but-for generic entry date in these two states makes it an inadequate and atypical class representative. Based on plaintiffs' failure to respond and because the Pretrial Order doesn't include any other properly-named plaintiff who can serve as an adequate representative for claims under Nevada or North Carolina law, the court agrees with Mylan's argument. Lacking an adequate representative to make these claims on the class's behalf, the court must decertify the portion of the state antitrust class action asserting claims under the antitrust laws of Nevada and North Carolina. So, for this reason, **[*102]** the court grants Mylan's request to decertify the state antitrust classes for Nevada and North Carolina.

Also, Mylan's Reply raises two new arguments about TPPs in response to plaintiffs' proffer of Prof. Rosenthal's updated analysis. *First*, Mylan argues that the court must exclude TPPs from the class because of a class conflict. For support, Mylan again cites its own expert's opinion. They rely on Dr. Johnson's analysis of Prof. Rosenthal's data which—he opines—shows that TPPs paid more for the Teva generic in the real world than they paid for the branded EpiPen device. Thus, Mylan argues, TPPs have a conflict with individual consumers who—plaintiffs allege—would have paid less for a Teva generic than a branded EpiPen. Prof. Rosenthal disagrees with Dr. Johnson's opinions. She has come forward and explained adequately why she compared actual and but-for prices. Prof. Rosenthal also explains how her comparison concluded that TPPs would have paid less for the Teva generic in the but-for world. Thus, Prof. Rosenthal opines, TPPs sustained injuries from the alleged generic delay. If the trier of fact accepts Prof. Rosenthal's explanation, no class conflict exists between TPPs and individual **[*103]** consumers because, according to Prof. Rosenthal, both of these groups sustained injury from Mylan's alleged generic delay. Thus, based on the current record, the court declines to exclude TPPs from the class.

Second, Mylan argues that a conflict exists between TPPs and consumers because they each paid a portion of the EpiPen's price, and should plaintiffs prevail on their generic delay claims, each is entitled to recover a portion of the

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[10] Originally, the Consolidated Class Action Complaint named two plaintiffs who purchased EpiPens in Nevada: Local 282 and Miriam Clarke. Doc. 60 at 11, 19 (Compl. ¶¶ 10, 41). Ms. Clarke voluntarily dismissed her claims against Mylan on February 7, 2018. Doc. 139 at 1. Thus, Local 282 is the only remaining named plaintiff and class representative for Nevada EpiPen purchasers.

[11] Likewise, the Consolidated Class Action Complaint named two plaintiffs who purchased EpiPens in North Carolina: Local 282 and Cassandra Cobb. Doc. 60 at 11, 20 (Compl. ¶¶ 10, 47). Ms. Cobb voluntarily dismissed her claims against Mylan on February 7, 2018. Doc. 139 at 1. Thus, Local 282 is the only remaining named plaintiff and class representative for North Carolina EpiPen purchasers.

alleged overcharges. Mylan contends that this scenario pits TPPs and consumers against each other because each group will argue that they paid a higher portion of the alleged overcharge, and thus are entitled to a bigger share of the recovery. Mylan concedes that it already raised this argument at the class certification stage, and the court previously rejected it. *See* Doc. 2018-1 at 41-44; *see also id.* at 43 (explaining that "defendants don't persuade the court that the alleged conflict between consumers and third-party payors precludes class certification" because "the current record shows that consumers and third-party payors share" the same interest in that "they both seek to prove that defendants' illegal conduct caused them to sustain injuries **[*104]** in the form of overpaying for the EpiPen"). But, Mylan contends that the court should revisit this issue because—Mylan argues—there is no named plaintiff TPP for 14 of the 16 states. Thus, Mylan contends, no plaintiff exists who can represent TPPs' interests adequately in 14 of the 16 Antitrust States.

The court isn't persuaded by Mylan's argument. As it found at the class certification stage, the court concludes that Mylan's argument is "merely speculative" and it "has not shown that the composition of any class will create internal competition for damages shares." *Id. at 41-42*. So, the court again denies Mylan's request to exclude TPPs from the class based on this speculative conflict argument.

b. Consumer Named Plaintiffs

Next, Mylan argues that no named plaintiff in at least seven of the Antitrust States (Alabama, Florida, Hawaii, Maine, Minnesota, Nebraska, and New York) sustained damages from any alleged generic delay because either: (a) the class representatives for those states testified that they were EpiPen brand loyalists; or (b) the purchasing records show that they only purchased branded devices. Thus, Mylan argues, the class representatives for these seven states are uninjured, and **[*105]** so they can't serve as adequate or typical class representatives for the class members.

With this argument, Mylan asks to relitigate issues its already litigated and lost. Mylan asserted this argument at class certification. Doc. 2018-1 at 37-40. Mylan's argument didn't persuade the court then, *id.* at 39-40, and it still doesn't convince the court now. As plaintiffs explained on class certification, Prof. Rosenthal opines that the named plaintiffs' purchasing history isn't indicative of brand loyalty because the alleged generic delay affected consumer switching patterns. *Id.* at 37. Prof. Rosenthal opines that consumers would have switched to a generic earlier in the but-for world where a generic would have become available to purchase sooner than it was in the real world because of the alleged generic delay. *Id.* at 38. Prof. Rosenthal's opinion is capable of showing that named plaintiffs who purchased branded EAIs still sustained injury because they would have switched to a generic earlier in that but-for world. Also, her updated opinion shows that these named plaintiffs—even if brand loyalists—sustained injury in the form of paying overcharges for EpiPen. Thus, plaintiffs have demonstrated **[*106]** sufficiently that the named representative plaintiffs sustained an injury from Mylan's alleged anticompetitive conduct, thus making them typical and adequate class representatives to represent the interests of class members.

Also, Mylan argues that testimony by named class representatives establishes that they are brand loyalists who weren't injured by any generic delay. Plaintiffs respond, arguing that Mylan misrepresents their testimony. The court agrees that these seven class representatives' deposition testimony doesn't establish that they are uninjured brand loyalists who are atypical and inadequate class representatives. Instead, the deposition testimony shows that these plaintiffs didn't know generic alternatives were available and, in fact, many of them testified that they likely would have purchased a generic had they known one was available or if it was cheaper than buying a branded EpiPen. And, importantly, all seven of these plaintiffs were deposed before November 2018, when the Teva generic launched. So, no AB-rated generic was available for purchase when these plaintiffs gave their deposition testimony.

For the Alabama claim, named representative plaintiff Kenneth James **[*107]** Evans's testimony shows that he didn't know a generic was available, and had he known about a generic, he testified he probably would have purchased one. Doc. 2404-13 at 4 (Evans Dep. 106:8-15). Thus, Mr. Evans's testimony shows that he was willing to purchase a generic, and thus wasn't brand loyal.

For Florida, named representative plaintiff Lee Seltzer testified that he didn't know a generic EAI was available. Doc. 2404-15 at 7 (Seltzer Dep. 157:16-22). Also, he testified that he purchased an Auvi-Q EAI—which is another branded product. *Id.* at 4 (Seltzer Dep. 76:4-24). But, it's not an EpiPen so his testimony shows he was not brand loyal to EpiPen. None of Mr. Seltzer's testimony establishes that he was brand loyal and never would have purchased a generic. To the contrary, his testimony shows that he was willing to buy devices other than EpiPen and that he didn't know a generic was available to purchase.

For Hawaii, named representative plaintiff Linda Wagner testified that she preferred the branded EpiPen because her doctor prescribed it for her, but she also testified that she would prefer a generic EAI if it was cheaper and her doctor prescribed it for her. Doc. 2404-7 at 4 (Wagner **[*108]** Dep. 116:13-24). Thus, Ms. Wagner's testimony fails to show that she was brand loyal and never would have purchased a generic. To the contrary, Ms. Wagner testified that she was amenable to buying a generic.

For Maine, named representative plaintiff Lorraine Wight testified that she purchased generic EpiPens. Doc. 2404-8 (Wight Dep. 150:13-20). But, Mylan argues, Ms. Wight only made these generic purchases because there was a shortage of branded EpiPens in her area, and according to Mylan, Ms. Wight testified that EpiPen was the "only acceptable option." Doc. 2390-4 at 6 (Wight Dep. 26:9-13). But, in context, Ms. Wight testified that *her doctor* had told her that the EpiPen was her "only acceptable option" because other EAI devices weren't available on the market. *Id.* at 5-6 (Wight Dep. 25:16-26:8). And, Ms. Wight specifically testified that she was "asking about other alternatives" to EpiPen, thus showing that she wasn't brand loyal. *Id.* at 5 (Wight Dep. 25:23).

For Minnesota, named representative plaintiff Heather Marie DeStefano testified that she didn't know other EAI devices were available because all she'd ever heard about was EpiPen. Doc. 2404-12 at 3-4 (DeStefano Dep. 127:17-128:6). **[*109]** And for Nebraska, named representative plaintiff Mark Kovarik testified that he was unaware that a generic EpiPen was available. Doc. 2404-14 at 4-5 (Kovarik Dep. 79:24-80:1). So, neither Ms. DeStefano nor Mr. Kovarik testified that they are brand loyalists. Instead, they testified that they didn't know other options were available to purchase. This testimony doesn't show that either Ms. DeStefano or Mr. Kovarik lacks standing to assert generic delay claims.

Finally, for New York, named representative plaintiff Donna Wemple testified that she "would be more likely to purchase the generic" because it's priced lower. Doc. 2404-11 at 3-4 (Wemple Dep. 257:25-258:17). Thus, Ms. Wemple's testimony contradicts Mylan's argument that she's brand loyal. Instead, as Ms. Wemple testified, she says she's more likely to buy a generic.[12]

None of this testimony shows that these seven plaintiffs were brand loyal. To the contrary, it shows that these plaintiffs either were unaware of other buying options or that they likely would purchase a generic EAI if it was made available to them. Thus, plaintiffs have shown that these seven named plaintiffs have sustained injury from the alleged generic delay. **[*110]** And, the seven named plaintiffs thus are typical and adequate class representatives to represent the class members. The court refuses to decertify the state ***antitrust law*** claims for these seven Antitrust States based on Mylan's argument that they lack an injured named plaintiff to represent the class.

Last, Mylan argues that the court should dismiss plaintiff Anastasia Johnston's claims because her EpiPen purchase records show that she paid $0 for her EpiPen purchases. Doc. 2390-3 at 2 (citing Doc. 1636-2 at 192). Mylan argues that Ms. Johnston sustained no injuries and lacks standing to assert her antitrust generic delay claims under Michigan law. *See* Doc. 60 at 17 (Compl. ¶ 35) (alleging that Ms. Johnston is a resident and citizen of Michigan). Plaintiffs concede that Ms. Johnston doesn't satisfy the class definition and thus is not a proper class representative. Doc. 2404 at 26. And, they concede that her claims are subject to dismissal. *Id.* But, as plaintiffs

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[12] Mylan makes similar arguments about named plaintiffs Teia Amell (Maryland) and Meredith Krimmel (Texas)—*i.e.*, that their deposition testimony establishes they are brand loyalists who sustained no injury. *See* Doc. 2423-1 at 32 n.20. But, these named plaintiffs aren't part of the state antitrust class action because Maryland and Texas aren't included in the 16 Antitrust States. In any event, the court agrees with plaintiffs. These two named plaintiffs' deposition testimony doesn't establish definitively that they are EpiPen brand loyalists.

correctly assert, Ms. Johnston's dismissal doesn't require the court to decertify the Michigan state law antitrust class action because another named plaintiff—Annette Sutorik—purchased EpiPens in Michigan, and thus, she is **[*111]** a properly-named plaintiff who brings antitrust claims under Michigan law. *See* Doc. 60 at 18 (Compl. ¶ 36).

III. Motions for Leave to File Under Seal

Both sides of the caption have moved to file under seal certain portions of their briefs and some exhibits supporting or opposing the Mylan Defendants' Motion to Decertify. *See* Docs. 2423, 2438, 2439, 2446, 2460, 2461. The court rules those motions in the following fashion, after reciting the governing legal standard.

The Supreme Court recognizes a "general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc., 435 U.S 589, 597, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978)* (citations omitted). Nevertheless, a party may rebut the presumption of access to judicial records by demonstrating that "countervailing interests heavily outweigh the public interests in access." *Mann v. Boatright, 477 F.3d 1140, 1149 (10th Cir. 2007)* (citation and internal quotation marks omitted). The party seeking to deny access must shoulder the burden to establish a sufficiently significant interest outweighing the presumption of access. *Id.* (citation and internal quotation marks omitted); *see also United States v. Bacon, 950 F.3d 1286, 1293 (10th Cir. 2020)* ("[T]he party seeking to keep records sealed bears the burden of justifying that secrecy," and it must "articulate a sufficiently significant **[*112]** interest that will justify continuing to override the presumption of public access[.]" (citation and internal quotation marks omitted)). The decision whether a judicial record qualifies for sealing under this governing standard "is a matter left to the sound discretion of the district court." *Mann, 477 F.3d at 1149* (citing *Nixon, 435 U.S. at 599*).

The parties' sealing requests fall into three categories.

First, Mylan moves for leave to file under seal preliminarily its Reply in Support of the Motion to Decertify. Doc. 2423. The motion seeks leave to file under seal Mylan's Reply and Exhibit 2 to the Reply which is the Declaration of Dr. John H. Johnson, IV. *Id.* at 2. Later, Mylan filed a renewed motion for leave to file under seal after conferring with plaintiffs and relevant third parties about the information they believe qualifies for sealing in these documents. Mylan's renewed motion seeks leave to file under seal certain portions of its Reply and certain portions of Exhibit 2 that Mylan, plaintiffs, or third party CVS asserts qualifies for sealing. Doc. 2439.

The court denies as moot the preliminary motion seeking leave to file under seal (Doc. 2423). And, the court grants the renewed motion seeking leave to file under seal **[*113]** (Doc. 2439). Mylan asks to redact limited portions of the Reply and Exhibit 2 to the Reply that contain commercially sensitive data including pricing and market share information. Mylan asserts that, if disclosed, this information could harm Mylan or third party CVS. Also, some of the proposed redactions contain IQVIA data that was produced to the parties under an agreement containing a confidentiality clause. Given these interests, the court finds that Mylan has shouldered its burden. It has established that the need to preserve the confidentiality of the specific and limited redactions they seek outweighs the public's right to access the material. The court thus grants its request for leave to file under seal certain portions of the Reply and Exhibit 2 to the Reply. The court directs Mylan to do two things: (1) file under seal the Reply and Exhibit 2, and (2) file publicly the Reply and Exhibit 2, redacting the limited information that Mylan has shown qualifies for sealing.

Second, plaintiffs filed an Unopposed Motion for Leave to Provisionally File Under Seal Their Sur-reply to Mylan's Motion to Decertify the State Antitrust Class. Doc. 2438. The motion seeks leave to file under **[*114]** seal plaintiffs' Surreply and Exhibit O to the Surreply which is Prof. Rosenthal's Surreply Declaration. After the parties conferred about the information that may qualify for sealing in these documents, Mylan filed a Renewed Motion for Leave to File Under Seal Plaintiffs' Sur-reply to Motion to Decertify. Doc. 2460. It seeks the court's leave permitting plaintiffs to file under seal just certain portions of the Surreply and Exhibit O because they contain sensitive commercial information.

The court denies as moot plaintiffs' preliminary motion (Doc. 2438). And, the court grants Mylan's renewed motion seeking leave for plaintiffs to file their Surreply and Exhibit O under seal (Doc. 2460). As Mylan sufficiently explains, these narrow portions of the Surreply and Exhibit O that it seeks leave for plaintiffs to file under seal "reference conclusions drawn from IQVIA and rebate data regarding the pricing of EpiPen devices and competitor EAI devices." Doc. 2460-1 at 2. As already discussed, this data is commercially sensitive information that could harm Mylan if disclosed. Also, the IQVIA data is highly confidential and was produced under an agreement with a confidentiality clause. Applying **[*115]** the governing legal standard, the court finds that Mylan has established that the need to preserve the confidentiality of the specific and limited redactions they seek outweighs the public's right to access the material. So, the court directs plaintiffs to file: (1) their Surreply and Exhibit O under seal, and (2) their Surreply and Exhibit O publicly with the limited redactions Mylan has shown qualify for sealing.

Third, Mylan has filed a Motion for Leave to Preliminarily File Under Seal Its Response to Plaintiffs' Sur-reply to Motion to Decertify. Doc. 2446. It seeks leave to file under seal Mylan's Response to plaintiffs' Surreply because, Mylan asserts, it contains confidential information. After conferring with plaintiffs about its sealing requests, Mylan filed a Renewed Motion for Leave to File Under Seal Its Proposed Response to Plaintiffs' Sur-reply to Motion to Decertify. Doc. 2461.

The court denies as moot Mylan's preliminary motion seeking leave to file under seal (Doc. 2446). And, the court grants Mylan's renewed motion for leave to file under seal (Doc. 2461). Like the motions already discussed, Mylan seeks leave to file under seal portions of its Response to plaintiffs' **[*116]** Surreply that discuss IQVIA and rebate data. For the same reasons already discussed, the court finds these limited portions qualify for sealing because the need to preserve the confidentiality of this information outweighs the public's right to access the material. So, the court directs Mylan to: (1) file under seal its Response to plaintiffs' Surreply, and (2) file publicly its Response to plaintiffs' Surreply with the limited redactions they have shown qualify for sealing.

IV. Conclusion

For reasons explained in this Order, the court grants the Mylan Defendants' Motion to Decertify the State Antitrust Class (Doc. 2389) in part and denies it in part. Also, the court grants the class plaintiffs' Motion for Leave to File a Surreply (Doc. 2437). And, the court rules the parties' Motions for Leave to File Under Seal (Docs. 2423, 2438, 2439, 2446, 2460 & 2461) consistent with the conclusions reached in this Order's Part III.

Also, as discussed above on page 12, the court directs the parties to confer and propose appropriate jury instructions and verdict form addressing whether each class member has sustained damage from the generic delay. The parties should include these proposed instructions **[*117]** and verdict form with their submission of joint jury instructions, as the Amended Trial Order directs. *See* Doc. 2415 at 3.

IT IS THEREFORE ORDERED BY THE COURT THAT the Mylan Defendants' Motion to Decertify the State Antitrust Class (Doc. 2389) is granted in part and denied in part. The court grants Mylan's motion to decertify the Nevada and North Carolina state law antitrust claims' class actions because no named plaintiff purchased an EpiPen in those two states after the alleged but-for generic entry date, and thus, no named plaintiff sustained injury under the antitrust laws of Nevada or North Carolina based on any generic delay. Also, the court grants Mylan's request to dismiss plaintiff Anastasia Johnston's claims because she sustained no financial injury. But, the court denies the motion in all other respects.

IT IS FURTHER ORDERED THAT the class plaintiffs' Motion for Leave to File a Surreply (Doc. 2437) is granted.

IT IS FURTHER ORDERED THAT Mylan's Motion for Leave to Preliminarily File Under Seal Its Reply in Support of the Motion to Decertify (Doc. 2423) is denied as moot.

IT IS FURTHER ORDERED THAT Mylan's Renewed Motion for Leave to File Under Seal its Reply in Support of **[*118]** the Motion to Decertify (Doc. 2439) is granted.

IT IS FURTHER ORDERED THAT Class Plaintiffs' Unopposed Motion for Leave to Provisionally File Under Seal Their Sur-reply to Mylan's Motion to Decertify the State Antitrust Class (Doc. 2438) is denied as moot.

IT IS FURTHER ORDERED THAT Mylan's Renewed Motion for Leave to File Under Seal Plaintiffs' Sur-reply to Motion to Decertify (Doc. 2460) is granted.

IT IS FURTHER ORDERED THAT Mylan's Motion for Leave to Preliminarily File Under Seal Its Response to Plaintiffs' Sur-reply to Motion to Decertify (Doc. 2446) is denied as moot.

IT IS FURTHER ORDERED THAT Mylan's Renewed Motion for Leave to File Under Seal Its Proposed Response to Plaintiffs' Sur-reply to Motion to Decertify (Doc. 2461) is granted.

IT IS SO ORDERED.

Dated this 15th day of December, 2021, at Kansas City, Kansas.

/s/ Daniel D. Crabtree

Daniel D. Crabtree

United States District Judge

In re Turk. Antitrust Litig. v. Agri Stats, Inc.

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

December 16, 2021, Decided; December 16, 2021, Filed

Case No. 19 C 8318

Reporter

2021 U.S. Dist. LEXIS 250390 *; 2021 WL 6428398

IN RE TURKEY ANTITRUST LITIGATION. JOHN GROSS AND COMPANY, INC., et al., Plaintiffs, v. AGRI STATS, INC., et al., Defendants.

Subsequent History: Costs and fees proceeding at, Settled by, Request granted *In re Turk. Antitrust Litig., 2022 U.S. Dist. LEXIS 7693, 2022 WL 122943 (N.D. Ill., Jan. 10, 2022)*

Prior History: *Olean Wholesale Grocery Coop., Inc. v. Agri Stats, Inc., 2020 U.S. Dist. LEXIS 193318, 2020 WL 6134982 (N.D. Ill., Oct. 19, 2020)*

Core Terms

discovery, purchasers, downstream, overcharge, turkey, indirect, Defendants', antitrust, pass-through, Reply, motion to compel, products, cases, damages, requests, pricing

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For Tyson Foods Inc., Tyson Fresh Meats Inc., Tyson Prepared Foods Inc., The Hillshire Brands Company, Defendants: Kenina J Lee, Tiffany Rider Rohrbaugh, Lindsey Strang Aberg, PRO HAC VICE, Axinn Veltrop & Harkrider LLP, Washington, DC; Brandon Tyler Boxbaum, PRO HAC VICE, Axinn Veltrop & Harkrider, Washington, DC; Sahrish Moyeed, Jordan Matthew Tank, Lipe Lyons Murphy Nahrstadt & Pontikis, Chicago, IL; Jarod G. Taylor, PRO HAC VICE, Axinn Veltrop & Harkrider LLP, Hartford, CT; Rachel Johanna Adcox, Axinn, Washington, DC.

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Bernie's LLC, Plaintiff, Pro se.

Gnemi LLC d/b/a Logan Farms, Plaintiff, Pro se.

Liberty Holding Company, Plaintiff, Pro se.

Maquoketa Care Center, Plaintiff, Pro se.

Thyme Cafe & Market, Plaintiff, Pro se.

Social Kitchen, Plaintiff, Pro se.

Judges: GABRIEL A. FUENTES, United States Magistrate Judge. District Judge: Virginia M. Kendall.

Opinion by: GABRIEL A. FUENTES

Opinion

ORDER

Before us are two motions to compel. One was filed in Case No. 19 C 8318 by Defendants Agri Stats, Inc., Butterball LLC, Cargill Meat Solutions Corporation, Cargill, Inc., Cooper Farms, Inc., Farbest Foods, Inc., Foster Farms, LLC, Foster Poultry Farms, Hormel Foods Corporation, Hormel Foods, **[*6]** LLC, House of Raeford Farms, Inc., Perdue Farms, Inc., Perdue Foods LLC, The Hillshire Brands Company, Tyson Foods, Inc., Tyson Fresh Meats, Inc., Tyson Prepared Foods, Inc. ("Defendants")[1] against Plaintiffs Olean Wholesale Grocery Cooperative, et al., also known for purposes of this motion as the "Direct Purchaser Plaintiffs" ("DPPs") (D.E. 242: Mot. to Compel DPPs). The second motion addressed by this Order was filed in Case No. 20 C 2295[2] by Defendants against Plaintiffs Sandee's Bakery, et al., also known as the "Indirect Purchaser Plaintiffs" ("IPPs") (D.E. 163, 20 C 2295: Mot. to Compel IPPs). Although Defendants' initial brief was identical in both cases, each set of Plaintiffs filed its own - different - response (D.E. 249: DPPs' Resp. to Mot.; D.E. 172 (No. 20 C 2295): IPPs' Resp. to Mot.), to which Defendants filed identical replies (D.E. 252: Reply to DPPs; D.E. 176 (No. 20 C 2295): Reply to IPPs).

I. BACKGROUND

All Defendants except Agri Stats are breeders, processors, and sellers of turkeys and turkey products who are accused by Plaintiffs of artificially inflating turkey prices through the exchange of information in reports created by Defendant Agri Stats. The DPPs buy turkey **[*7]** and turkey products directly from Defendants. The IPPs purchase turkey and turkey products either from a DPP or another IPP. Both the DPPs and the IPPs contend that Defendants' alleged anticompetitive behavior caused them to be overcharged for turkey they purchased - the DPPs when they bought turkey from one or more Defendants and the IPPs when they bought turkey that "passed on," to them, the artificially inflated price. At issue in the motions to compel is Defendants' request for certain so-called "downstream discovery," related to the sale and pricing of turkey as it was sold and resold by the DPPs and IPPs to other buyers.[3]

II. MOTIONS TO COMPEL

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[1] After the filing of the instant motions, Defendants Tyson Foods, Inc., Tyson Fresh Meats, Inc., Tyson Prepared Foods, Inc. are in the process of settling the class claims against them in this matter. (D.E. 265.)

[2] On May 26, 2020, the district court consolidated Case No. 19 C 8318 with Case No. 20 C 2295 (D.E. 139.) Except where noted, citations to docket entries in this order are to the docket in No. 19 C 8318. This matter is before the magistrate judge on a referral for discovery supervision. (D.E. 267, 268.)

[3] "Downstream discovery" refers to "documents and data reflecting a purchaser's use or sale of a product after the purchase." ***In re Plasma-Derivative Protein Therapies Antitrust Litig., 09 C 7666, 2012 U.S. Dist. LEXIS 61114, 2012 WL 1533221, *1 (N.D. Ill. April 27, 2012)***. Specifically, Defendants seek the following information from both the DPPs and the IPPs: (1) documents sufficient to show how prices for turkey are set (RFP 22); (2) sales data for turkey (RFP 26); (3) documents sufficient to show orders and backlog of turkey sold by Plaintiffs (RFP 27); (4) documents sufficient to show the geographic markets for which Plaintiffs sell turkey (RFP 29); (5) documents sent to, or received from others regarding actual or potential sales or purchases of turkey (RFP 32); and (6) documents sent to, or received from others regarding the processing of turkey (RFP 33). (Def. Mots. to Compel. at 4). All parties appear to accept that all of these requests concern "downstream data," discussed below in Part III.

District courts - including magistrate judges - have broad authority to manage their dockets, including determining the scope of allowable discovery. *Jones v. City of Elkhart, 737 F.3d 1107, 1115 (7th Cir. 2013)*. In making our decision on this motion to compel, we are guided as always by *Fed. R. Civ. P. 26(b)(1)*, which provides that parties may obtain discovery regarding any non-privileged matter that is relevant to the claim or defense of any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative **[*8]** access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. *In re Broiler Chicken Antitrust Litig., No. 16 C 8637, 2018 U.S. Dist. LEXIS 116658, 2018 WL 3398141, at *1 (N.D. Ill. July 12, 2018)* ("*Broiler I*"). At the discovery stage, "relevant" evidence under *Rule 26(b)(1)* is broader than it would be at trial; evidence does not need to be admissible to be discoverable. *Coleman v. Illinois, No. 19 C 3789, 2020 U.S. Dist. LEXIS 177020, 2020 WL 5752149, at *3 (N.D. Ill. Sept. 25, 2020)*.

III. DOWNSTREAM DISCOVERY

This discovery dispute turns on the question of whether "downstream discovery" is relevant to these consolidated-for-discovery antitrust cases, one brought by direct purchasers and one brought by indirect purchasers.[4] There is no absolute bar to downstream discovery in private antitrust cases, but it is usually not relevant in federal antitrust cases brought *solely* by direct purchaser plaintiffs, because federal ***antitrust law*** does not recognize a cause of action for indirect purchasers to claim they were overcharged amounts that were "passed on" from direct purchasers (who were first allegedly overcharged by defendants/sellers). Therefore, when only direct purchasers bring suit, defendants are barred from arguing as a defense that the allegedly overcharged amounts were "passed on" by the direct purchasers **[*9]** to indirect purchasers downstream. *Broiler I, 2018 U.S. Dist. LEXIS 116658, 2018 WL 3398141, at *1*, citing *In re Plasma-Derivative Protein Therapies Antitrust Litig., No. 09 C 7666, 2012 U.S. Dist. LEXIS 61114, 2012 WL 1533221, at *2 (N.D. Ill. Apr. 27, 2012)* (citing a "plethora of case law").

Defendants argue that downstream discovery is within the scope of *Rule 26(b)(1)* in the DPP and IPP cases here. The IPP case is clearly a different posture, in that the IPPs sue for damages from being overcharged in the purchases they made indirectly (i.e., through others) from Defendants, and those claims exist in the IPP case under various state laws, including "repealer" (of the federal law prohibition on indirect purchaser antitrust claims) laws or unjust enrichment statutes.[5] As were the direct purchaser plaintiffs in *Broiler I*, the DPPs are third parties in the IPP matter, and downstream discovery from direct purchasers sometimes has been held to be relevant in indirect purchaser antitrust lawsuits because the information about direct purchaser pricing practices can be relevant to the relevant overcharge the indirect purchasers claim they paid. *See Broiler I, 2018 U.S. Dist. LEXIS 116658, 2018 WL 3398141, at *2*; *In re Broiler Chicken Antitrust Litig., No. 16 C 8637, 2019 U.S. Dist. LEXIS 114664, 2019 WL 2764260, at *2 (N.D. Ill. May 6, 2019)* (*Broiler II*"); *In re Cathode Ray Tube (CRT) Antitrust Litig., 301 F.R.D. 449, 453-54 (N.D. Cal. 2014)*. But "the mere possibility that [downstream discovery] may be relevant to the defendant's ability to defend against a pass-through claim or to oppose class certification by indirect purchasers" does not automatically entitle the antitrust defendant to downstream discovery. **[*10]** *Broiler I, 2018 U.S. Dist. LEXIS 116658, 2018 WL 3398141, at *2*, citing *In re Vitamins Antitrust Litig., 198 F.R.D. 296, 299 (D.D.C. 2000)* ("[I]n order to determine whether the individualized downstream data is discoverable, the Court must first determine whether this data is relevant to the subject matter at issue and then if it is deemed relevant, the Court must weigh

[4] There are three other related cases that have been consolidated with the two cases here - 21 C 3763, 21 C 4131, and 21 C 3551 - that are not at issue in this motion.

[5] The Supreme Court held in *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 (1968)*, and *Illinois Brick Co. v. Illinois, 431 U.S. 720, 735, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, that only direct purchasers had standing to bring suit under the federal antitrust laws. A number of states subsequently passed "Illinois Brick repealer statutes" which allow indirect purchasers to sue for "passed-on" damages under the particular state's ***antitrust law***. *In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 815 (N.D. Ill. 2017)*. A pass-through (or pass-on) defense says that in such state cases, a defendant is liable only for damages for alleged overcharges that were not "passed on" by the direct purchaser to successive buyers.

the benefits of this information to the defendants against the burden or expense that discovery of this information would impose on the plaintiffs.") The foregoing approach to evaluating requests for downstream discovery in federal antitrust cases thus mirrors *Rule 26(b)(1)* as amended in 2015: The Court examines these requests, in the DPP and IPP cases here, for their relevance and proportionality.

A. Downstream Discovery from Direct Purchaser Plaintiffs

Defendants argue that downstream discovery from the DPPs is relevant both to the issues of pass-through[6] and also for non-pass-through reasons such as class certification, market definition, and competitive effects.

In seeking downstream discovery from the DPPs (John Gross Company and Maplevale) Defendants argue that the information is relevant because of its direct linkage to the overcharge the IPPs say they paid for turkey (in their purchases from DPPs or other IPPs), so that the IPPs will need the information **[*11]** to make their damage claims, and the DPPs will need the information to defend against the IPP claims that they were overcharged.[7] (Def. Reply in Support of Mot. to Compel at 2.) Accordingly, Defendants say, the downstream discovery sought here is directly relevant.

The DPPs respond that in this case, their downstream pricing practices are not relevant because they are only two smaller entities, so that the amounts they charged the IPPs does not fix the amount of the IPPs' claimed overcharge. The DPPs suggest that Defendants should instead seek discovery from the large direct purchasers/resellers that control or controlled a significant portion of the indirect purchaser market. (DPP Response at 8.) Notably, in Defendants' reply, they acknowledge that proving the IPPs' initial overcharge will in fact require discovery from large direct purchasers, or from many small ones, to generate an adequate data set. Defendants' contention that downstream discovery from only the two DPPs here is relevant to help *defend* against claims of common overcharge by pointing out lack of uniformity among direct purchasers, or by establishing the failure of the IPPs' statistical models to describe all class **[*12]** members, (Def. Reply at 17), was not persuasive. The argument relies heavily on Defendants' supposition about the breadth of discovery the IPPs may need to establish their claims or to put defenses to those claims in sharper focus.

Notably, in *Broiler I*, the court's refusal to compel downstream discovery from the direct purchasers in that case rested in large part on the court's concerns that Defendants could only speculate, in the absence of additional discovery, about what the indirect purchaser plaintiffs' pass-through arguments or expert analysis would be. *2018 WL 3398141, at *2-3*. The Court takes a similar view of the posture of the instant case in denying the Defendants' motion to compel DPP downstream discovery at this time.

The two cases Defendants cite in support of downstream discovery from the DPPs are of little aid. In *Broiler II*, the Court allowed indirect purchaser plaintiffs to obtain downstream discovery from an entity that was a single, large, third-party direct purchaser (named "Porky Products"), based on the relevance of the information to claims made by end-user plaintiffs and commercial and institutional indirect purchaser plaintiffs, and to defenses to such claims. *2019 U.S. Dist. LEXIS 114664, 2019 WL 2764260, at *1-2*. The *Broiler II* court even distinguished the discovery **[*13]** allowed from Porky Products from other downstream discovery the same court had denied when it

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[6] Although it appears that this issue was debated at the parties' meet-and-confer sessions, Plaintiffs' briefs do not dispute the existence of state antitrust laws or that at least some of them allow for a pass-through defense in certain situations, including some of the statutes under which the IPPs have sued Defendants. Plaintiffs argue that none of the situations that allow pass-through exist in this case for any of the various state antitrust statutes. However, as we explain below, our decision on this motion is not the proper vehicle for detailed statutory construction of a dozen or more state antitrust statutes. We are comfortable that there is a better-than-likely chance that pass-through will be an issue under one or more statutes and therefore for the purposes of this decision we accept that such defense is available to Defendants to some extent, although we give no opinion about the exact scope of any individual statute or the evidence needed to prove the defense.

[7] The third named direct purchaser plaintiff, Olean Wholesale Grocery Cooperative, was voluntarily dismissed from the case with prejudice on October 11, 2021. (D.E. 309.)

was sought from direct purchasers that were "relatively smaller players in the distribution chain," explaining that sufficient information might be better learned from other sources. *Id.*, quoting *In re Broiler Chickens Antitrust Litig., No. 16 C 8637, 2018 U.S. Dist. LEXIS 27155, 2018 WL 999899, at *4 (N.D. Ill. Feb. 21, 2018)*. Similarly, in *Cathode Ray Tube*, the direct purchaser from which the court ordered downstream discovery was a large company - Best Buy - whose purchases and resales of the product at issue were highly relevant to the issue of pass-through damages, and the opinion did not suggest that any real question existed as to the relevance, to the indirect purchaser overcharge issues, of downstream discovery or "competitive intelligence" information in the possession of this large direct purchaser. *301 F.R.D. at 453-54*.[8]

Nor is the Court persuaded by defendants' argument that downstream discovery is sufficiently relevant to class-certification, anti-competitive effects, and market definition for the Court to compel this discovery now. The Court sees Defendants' two leading cases, *Valley Drug Co. v. Geneva Pharm., Inc., 350 F.3d 1181 (11th Cir. 2003)* and *In re Urethane Antitrust Litig., 237 F.R.D. 454 (D. Kan. 2006)*, as not analogous. The discovery requests in *In re Urethane* had been specifically tailored solely to address issues of class certification among all Plaintiffs, **[*14]** and the requests encompassed more than downstream discovery information. *237 F.R.D. at 459*. In *Valley Drug*, the Eleventh Circuit reversed a grant of class certification because the district court had not properly addressed whether there was a conflict between certain wholesalers and the rest of the class, allowing some downstream discovery into this specific issue, and noting that "the district court retains discretion in determining how much discovery is enough" [to address the issue]. *350 F.3d at 1195*. Notably, *Valley Drug* did not concern the fairness of prices paid for products sold to direct and indirect purchasers. *See also* *Broiler II, 2019 U.S. Dist. LEXIS 114664, 2019 WL 2764260, at *1* ("DPPs are relatively smaller players in the distribution chain, and Defendants may be able to obtain sufficient discovery to address the commonality and predominance issues in the IPP case from other sources.").

We deny Defendants' motion to compel the DPPs, but the denial is without prejudice to the issue being raised later in the case when relevance and proportionality of this discovery is established more clearly.

B. Discovery from Indirect Purchaser Plaintiffs

Defendants' argument for the relevance of downstream discovery from the IPPs is simple. They say that the IPPs' case depends on not only proving that **[*15]** they were overcharged by the DPPs, but also that the IPPs did not pass on that overcharge to their own customers downstream. Therefore, Defendants contend that discovery concerning what the IPPs did with the turkey they purchased from the DPPs is highly relevant to the claims and defenses in this case. Generally speaking, the IPPs see the discovery as irrelevant under a theory that pass-through defenses are limited under the *Illinois Brick* repealer statutes giving rise to their causes of action to those situations where an indirect purchaser even further down the line brings suit. They contend that the named IPPs "occupy a unique space in antitrust price-fixing litigation" because they use the turkey products they purchase as a component in the production of meals sold to their customers, and that other components include labor, other ingredients, and the fixed costs of running a business. (IPPs' Response to Mot. to Compel at 1.) Therefore, the IPPs say they should be treated as end users, taking the turkey products to make finished meals, and that downstream discovery is not relevant because "no one is suing for overcharges on restaurant meals." (*Id.* at 3.) To put it another way, the IPPs say that **[*16]** absent a risk of duplicative damages (that is, Defendants being found

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[8] Some of the DPPs' cases are of little help either. *In re Plasma-Derivative Protein Therapies Antitrust Litig. Nos. 09-cv-7666, 11-cv-1468, 2012 U.S. Dist. LEXIS 61114, 2012 WL 153321, at *3 (N.D. Ill. April 27, 2012)*, disallowed downstream discovery, but the matter before the court in that case was a direct purchaser action only. *In re Vitamins Antitrust Litigation, 198 F.R.D. at 299*, involved both direct and indirect purchaser plaintiff cases, but the disallowed downstream discovery was not relevant because defendants did not seek it to assert a pass-through defense but instead to assert consumer demand, and Plaintiffs' expert had used publicly available information to make his determinations, rendering additional discovery unnecessary.

liable for the same overcharge paid by two different purchasers) there can be no pass-through defense, and absent a pass-through defense, downstream discovery is not relevant.[9]

In their Reply, Defendants reiterate their argument that downstream discovery is relevant because the IPPs are entitled to recover only the net overcharges they absorbed, and therefore, Defendants are entitled to seek information concerning how much of those overcharges the IPPs passed on to other purchasers. They dispute the IPPs' attempt to create a new "conflicting claimant rule" that no state antitrust statute would permit a pass-through defense unless an end-user has already filed suit and there is a risk of duplicative damages. Moreover, Defendants ask the Court to reject the IPPs' assertion that there could never be a conflicting claimant because the IPPs should be treated as end-users. (Def. Reply in Support of Mot. to Compel at 4.)

As an initial matter, we decline to engage in individual statutory construction for all 23-some state antitrust statutes at issue in this case, not to mention the common law of unjust enrichment for 25-some **[*17]** states under which the IPPs have also brought suit. As Defendants point out in their Reply, in addition to the question of duplicative damages, some of the state statutes at issue limit plaintiffs to "actual damages," which suggests the need to determine how much overcharge any particular purchaser absorbed in order to prevent it from receiving a windfall if no other downstream purchasers file suit themselves. (*Id.* at 7, *citing* *Vitamins, 259 F. Supp. 2d at 3-5, 7-9*.) Moreover, the Court is not ready to declare that claims of unjust enrichment are never subject to a pass-through defense. *See* *Kickham Hanley PLLC v. George W. Kuhn Drainage Dist., No. 351317, 2021 Mich. App. LEXIS 234, 2021 WL 137773, at *6-7 (Mich. Ct. App. January 14, 2021)* (distinguishing between federal ***antitrust law*** for which there is no pass-through and state claims of unjust enrichment and finding that Plaintiffs did not suffer damages because the overcharge at issue was passed on to customers.) We respectfully decline to indulge the IPPs in their suggestion that every state antitrust statute and state common law is so well-settled as to denying pass-through so that downstream discovery is irrelevant to every claim and defense in the IPP case. We also decline to find that the IPPs should be considered "end-users" as a matter of law. Although the IPPs contend that their transformation of the turkey **[*18]** they purchase into meals and other such products means that there are no other indirect purchasers down the line to file suit, we do not have enough evidence before us to make that sort of fact-intensive determination, which is a matter for discovery. Moreover, Defendants point out that even individual IPPs treat turkey in different ways, transforming some into sandwiches to be sold to customers as well as reselling whole turkeys and turkey breasts. (Def. Reply at 13.) We are satisfied that at this time and on these facts, downstream discovery from the IPPs is relevant.

The IPPs offer little argument that producing downstream discovery will be burdensome. Instead, they offer a compromise to Defendants that they will not withhold any downstream documents on the basis of their objections to downstream discovery to the extent that those documents are also being produced as response to non-downstream discovery requests. (IPPs' Resp. to Mot. to Compel at 13.) But offering not to withhold documents that it has already agreed to produce for other reasons does not fulfill the IPPs' obligation to also produce any additional downstream discovery Defendants request and that this Court finds relevant **[*19]** and proportional. The motion to compel the IPPs to produce of downstream discovery is granted.

CONCLUSION

For the reasons stated above, Defendants' Motion to Compel Direct Purchaser Plaintiffs (D.E. 242) is denied without prejudice and Defendants' Motion to Compel Indirect Purchaser Plaintiffs (D.E. 163) is granted.

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[9] For example, IPPs site *Clayforth v. Pfizer, Inc., 233 P.3d 1066, 1070 (Cal. 2010)*, which discussed California's Cartwright Act. (IPP's Response to Mot. to Compel at 5). In *Clayforth*, the court explained that where multiple levels of purchasers have sued or there remains a risk they may sue, and damages are to be allocated among "various levels of injured purchasers," defendants assert a pass-through defense to avoid duplicative damages. The IPPs suggest in their response that the Cartwright Act is "like New York's Donnelly Act, under which Defendants seek downstream discovery from CIIPP Sandee's." (IPPs' Resp. to Mot. to Compel at 5.)

SO ORDERED.

ENTER:

/s/ Gabriel A. Fuentes

GABRIEL A. FUENTES

United States Magistrate Judge

DATED: December 16, 2021

In re Insulin Pricing Litig.

In re Insulin Pricing Litig.

United States District Court for the District of New Jersey

December 17, 2021, Decided; December 17, 2021, Filed

Case No. 2:17-cv-00699 (BRM) (ESK)

Reporter

2021 U.S. Dist. LEXIS 241582 *; 2021 WL 5980629

IN RE INSULIN PRICING LITIGATION

Notice: NOT FOR PUBLICATION

Subsequent History: Motion denied by In re Insulin Pricing Litig., 2022 U.S. Dist. LEXIS 131480 (D.N.J., Feb. 18, 2022)

Prior History: Barnett. v. Novo Nordisk Inc. (In re Insulin Pricing Litig.), 2017 U.S. Dist. LEXIS 150919 (D.N.J., Sept. 18, 2017)

Core Terms

purchaser, racketeering, indirect, civil conspiracy, motion to dismiss, civil action, courts, antitrust statute, antitrust, highest court, state law, state-law, predict, cause of action, federal court, violations, survives, underlying claim, interpreting, consumers, insulin, consumer fraud, provisions, damages, drug manufacturer, construing, products, factual allegations, anti trust law, allegations

Counsel: **[*1]** For INSULIN PRICING LITIGATION, In Re: JAMES E. CECCHI, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; Mediator, HON. DAVID R. HERNDON, LEAD ATTORNEY; DAVID R. HERNDON, LEAD ATTORNEY, HERNDON RESOLUTION, EDWARDSVILLE, IL.

For JUDGE DENNIS H. CAVANAUGH, U.S.D.J. (ret.), Special Master: DENNIS M. CAVANAUGH, LEAD ATTORNEY, MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP, MORRISTOWN, NJ.

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Judges: HON. BRIAN R. MARTINOTTI, UNITED STATES DISTRICT JUDGE.

Opinion by: BRIAN R. MARTINOTTI

Opinion

MARTINOTTI, DISTRICT JUDGE

Before the Court is Defendants Novo Nordisk, Inc. ("Novo Nordisk"), Sanofi-Aventis U.S. LCC ("Sanofi"), and Eli Lilly and Company's ("Eli Lilly") (collectively, "Defendants") Partial Motion to Dismiss the putative Plaintiffs' ("Plaintiffs") Third Amended Class Action Complaint ("Third Amended Complaint") pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (ECF No. 422.) Plaintiffs oppose the motion (ECF No. 455), and Defendants filed a reply (ECF No. 468). Having reviewed the parties' submissions filed in connection with the Motion and having declined to hold oral argument pursuant to *Federal Rule of Civil Procedure 78(b)*, for the reasons set forth below and for good cause having been shown, Defendants' Partial Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**.

I. BACKGROUND[1]

For the purpose of this motion to dismiss, the Court accepts the factual allegations in the Third Amended Complaint as true and draws all **[*12]** inferences in the light most favorable to Plaintiffs. *See* *Phillips v. Cty. of Allegheny, 515 F.3d 224, 228 (3d Cir. 2008)*. The Court also considers any "document integral to or explicitly relied upon in the complaint." *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997)* (quoting *Shaw v. Digit. Equip. Corp., 82 F.3d 1194, 1220 (1st Cir. 1996)*).

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[1] The factual and procedural backgrounds of this matter are well-known to the parties and were previously recounted by the Court in its Opinion granting in part and denying in part Defendants' Motion to Dismiss the First Amended Complaint (ECF No. 252), as well as the Court's Opinion granting in part and denying in part Defendants' Motion to Dismiss the Second Amended Complaint (ECF No. 304). Therefore, the Court includes only the facts and procedural background relevant to this Motion.

Plaintiffs are 80 individuals who filed the Third Amended Complaint on behalf of themselves and a proposed nationwide class of analog insulin consumers. (ECF No. 411 ¶¶ 25-185.) Plaintiffs bring this action on behalf of themselves and all others similarly situated under *Federal Rule of Civil Procedure 23(a)* and *23(b)(3)*. (*Id.* ¶ 322.) Plaintiffs define their class as:

> All individual persons in the United States and its territories who paid any portion of the purchase price for a prescription of Apidra, Basaglar, Fiasp, Humalog, Lantus, Levemir, Novolog, Tresiba, and/or Toujeo at a price calculated by reference to a list price, AWP (Average Wholesale Price)[2], or WAC (Wholesale Acquisition Price) for purposes other than resale.

(*Id.*) Specifically, the class includes uninsured consumers, consumers in high-deductible health plans, consumers who reach the Medicare Part D donut hole, and consumers with high coinsurance rates. (*Id.* ¶ 325.) Defendants are pharmaceutical companies headquartered in the United States. (*Id.* ¶¶ 186-88.) Defendants research, develop, and manufacture **[*13]** prescription medications. (*Id.*) Defendant Eli Lilly manufactures Humalog and Basaglar; Defendant Novo Nordisk manufactures Fiasp, Novolog, Levemir, and Tresiba; and Defendant Sanofi-Aventis manufactures Apidra, Lantus, and Toujeo. (*Id.*)

On March 29, 2018, Plaintiffs filed the First Amended Class Action Complaint against Defendants (ECF No. 131), and on May 14, 2018, Defendants moved to dismiss (ECF No. 158). In the First Amended Complaint, Plaintiffs brought claims under the federal *Racketeer Influenced and Corrupt Organization Act* ("RICO") pursuant to *18 U.S.C. §§ 1961, et seq.* (ECF No. 131.) The Court held oral argument on January 22, 2019. (ECF No. 247.) On February 15, 2019, the Court issued an Opinion and Order (the "February 2019 Order") granting in part and denying in part Defendants' Motion to Dismiss the First Amended Class Action Complaint. (ECF Nos. 252-53.) In the February 2019 Order, the Court dismissed Plaintiffs' federal RICO claims, finding "[a]lthough Plaintiffs have adequately pled the various elements of a RICO claim," they were indirect purchasers and, therefore, they "lack[ed] standing to maintain [the] action." (ECF No. 252 at 25.)

On March 18, 2019, Plaintiffs filed the Second **[*14]** Amended Class Action Complaint ("Second Amended Complaint") alleging forty-nine counts against Defendants. (ECF No. 255.) In the Second Amended Complaint, Plaintiffs sought an injunction "to prevent [Defendants] from reporting benchmark prices that do not approximate their true net prices." (*Id.* at 142.) Plaintiffs also included claims relating to additional insulin products not alleged in the First Amended Complaint. (*Compare* ECF No. 131 *with* ECF No. 255.) Further, Plaintiffs included several state consumer protection law claims under the state laws of Arizona, California, Colorado, Georgia, Louisiana, Minnesota, Mississippi, Utah, Washington, and West Virginia. (ECF No. 225.) On May 17, 2019, Defendants filed a Partial Motion to Dismiss the Second Amended Complaint. (ECF No. 263.) Plaintiffs opposed the motion (ECF No. 269), and Defendants replied (ECF No. 273).

On February 20, 2020, the Court issued an Opinion and Order (the "February 2020 Order") granting in part and denying in part Defendants' Motion to Dismiss the Second Amended Complaint. (ECF Nos. 304-05.) In the February 2020 Order, the Court held that a private party may not seek equitable relief under RICO and dismissed Plaintiffs' **[*15]** request for injunctive relief under RICO. (ECF No. 304 at 7.) The Court also denied Defendants' Partial Motion to Dismiss the claims related to the new insulin products, finding the Second Amended Complaint adequately alleged a detailed depiction of a fraudulent scheme as it related to the added insulin products. (*Id.* at 8.) The Court granted Defendants' Partial Motion to Dismiss with respect to state consumer protection law causes of action under the state laws of Arizona, Georgia, Mississippi, Washington, and West Virginia, but the Court denied Defendants' Partial Motion to Dismiss with respect to state consumer protection law causes of action under the state laws of Colorado and Utah. (ECF No. 305 at 1.) The Court further granted Defendants' Partial Motion to Dismiss to the extent that: (1) Plaintiffs sought disgorgement and restitution under California law; (2) Plaintiffs sought injunctive relief under Louisiana law; and (3) Plaintiff's sought an award of monetary damages under Minnesota law. (*Id.* at 1-2.)

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[2] The Plaintiffs frequently use the terms "benchmark price" and "sticker price" to refer to the AWP. (*See, e.g.*, ECF No. 411 ¶¶ 2, 3, 202, 343.)

On April 20, 2021, Plaintiffs filed the Third Amended Complaint, now alleging the following: violation of *Arizona's Civil Racketeering Statute, Ariz. Rev. Stat. §§ 13-2314.04, et seq.*, (Count Three); violation of **[*16]** *Colorado's Organized Crime Act, Colo. Rev. Stat. §§ 18-17-101, et seq.*, (Count Four); violation of *Florida's Civil Remedies for Criminal Practices Act, Fla. Stat. Ann. §§ 772.101, et seq.*, (Count Five); violation of *Georgia's Racketeer Influenced and Corrupt Organizations Act, Ga. Stat. Ann. §§ 16-14-1, et seq.*, (Count Six); violation of *North Carolina's Racketeer Influenced and Corrupt Organization Act, N.C. Gen. Stat. §§ 75D-1, et seq.*, (Count Seven); violation of *Utah's Pattern of Unlawful Activity Act, Utah Code Ann. §§ 76-10-1601, et seq.*, (Count Eight); violation of *Wisconsin's Organized Crime Control Act, Wis. Stat. §§ 946.80, et seq.*, (Count Nine); and civil conspiracy under the common law of thirty-six different states (Count Ten).[3] (ECF No. 411.) On June 11, 2021, Defendants filed a Partial Motion to Dismiss the Third Amended Complaint. (ECF No. 422.) On July 30, 2021, Plaintiffs opposed (ECF No. 455), and on September 13, 2021, Defendants replied (ECF No. 468).

II. Legal Standards

A. *Rule 12(b)(6)*

In deciding a motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, a district court is "required to accept as true all factual allegations in the complaint and draw all inferences from the facts alleged in the light most favorable to [the non-moving party]." *Phillips, 515 F.3d at 228*. "[A] complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citations omitted). However, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Id. at 548* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*). A court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*. Instead, **[*17]** assuming the factual allegations in the complaint are true, those "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555*.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id. at 663* (citing *Twombly, 550 U.S. at 556*). This "plausibility standard" requires the complaint allege "more than a sheer possibility that a defendant has acted unlawfully," but it "is not akin to a 'probability requirement.'" *Id. at 678* (citing *Twombly, 550 U.S. at 556*). "Detailed factual allegations" are not required, but "more than an unadorned, the-defendant-unlawfully-harmed-me accusation" must be pled; it must include "factual enhancements" and not just conclusory statements or a recitation of the elements of a cause of action. *Id.* (citations omitted).

"Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." **[*18]** *Id. at 679*. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* (quoting *Fed. R. Civ. P. 8(a)(2)*). Indeed, after *Iqbal*, it is clear that conclusory or "bare-bones" allegations will no longer survive a motion to dismiss: "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id. at 678*. To prevent

[3] Under Count Ten of the Third Amended Complaint, Plaintiffs assert "[t]his claim is brought by all plaintiffs against Defendants Novo Nordisk, Sanofi, and Eli Lilly, and alleges violations of the civil conspiracy laws of the following states: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and Wisconsin." (ECF No. 411 ¶ 525.)

dismissal, all civil complaints must now set out "sufficient factual matter" to show that the claim is facially plausible. This "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The Supreme Court's ruling in *Iqbal* emphasizes that a plaintiff must show that the allegations of his or her complaints are plausible. *See id. at 670*.

While, as a general rule, the court may not consider anything beyond the four corners of the complaint on a motion to dismiss pursuant to *Rule 12(b)(6)*, the Third Circuit has held that "a court may consider certain narrowly defined types of material without converting the motion to dismiss [to one for summary judgment pursuant to *Rule 56*]." *In re Rockefeller Ctr. Props. Sec. Litig., 184 F.3d 280, 287 (3d Cir. 1999)*. Specifically, courts may consider **[*19]** any "document *integral to or explicitly relied upon* in the complaint." *In re Burlington Coat Factory, 114 F.3d at 1426* (emphasis added) (quoting *Shaw, 82 F.3d at 1220*).

III. Decision

Defendants' Partial Motion to Dismiss seeks to dismiss Counts Three, Four, Six, Eight and Nine (the "State RICO Claims")[4] and Count Ten (the "State Civil Conspiracy Claims") of the Third Amended Complaint (ECF No. 422 at 6-17.) Defendants also seek to dismiss state-law claims against certain Defendants where no Plaintiff from a given state purchased a product of that Defendant. (*Id.* at 17-21.) The Court addresses each in turn.

A. The State RICO Claims

Defendants assert Plaintiffs lack standing to pursue the State RICO Claims. (ECF No. 422 at 6.) Specifically, Defendants argue because the indirect purchaser rule bars Plaintiffs from pursuing their federal RICO claims, and because the state racketeering statutes Plaintiffs invoke are modeled after the federal RICO statute, the State RICO Claims should be dismissed for the same reasons the federal RICO claims were dismissed.[5] (*Id.* at 6-8.) Plaintiffs assert the State RICO Claims are not subject to the indirect purchaser rule. (ECF No. 455 at 4.) Specifically, Plaintiffs argue the "indirect purchaser rule—as interpreted by the Third **[*20]** Circuit in federal RICO actions—does not bar racketeering claims under state statutes that have no such rule." (*Id.* at 6.)

The Supreme Court developed the indirect purchaser rule in the antitrust context when it held that *Clayton Act* plaintiffs may not demonstrate injury by providing evidence only of indirect purchases. *Illinois Brick Co. v. Illinois, 431 U.S. 720, 737, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. The Supreme Court warned allowing indirect purchasers to recover under such a theory would "transform treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant." *Id. at 740*. The Court further explained the indirect purchaser rule is intended to prevent defendants from exposure to "multiple liability" should both indirect and direct purchasers in a distribution chain be permitted to assert claims arising out of a single overcharge. *Id. at 730*; *see McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 851 (3d Cir. 1996)*. Because *18 U.S.C. § 1964(c)*, RICO's private cause of action, was modeled on the *Clayton Act*, "antitrust standing principles apply equally to allegations of RICO violations." *McCarthy, 80 F.3d at 855*; *see also Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 270-74, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*.

In *Holmes*, the Supreme Court held federal jurisprudence interpreting antitrust principles govern RICO claims because Congress modeled RICO's civil action provision on a substantially similar **[*21]** provision in the *Clayton Act*, explaining:

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[4] Defendants sought to dismiss Counts Five (Florida) and Seven (North Carolina), but Plaintiffs have voluntarily withdrawn both Counts. (ECF No. 455 at 6.) Accordingly, the Court need not address them.

[5] With exception to the voluntarily withdrawn Counts, Defendants do not object to the adequacy of pleadings of the State RICO Claims. Rather, Defendants contend Plaintiffs cannot "sidestep the indirect purchaser rule's bar on federal RICO claims simply by asserting claims under state analogues of RICO." (ECF No. 422 at 8.) Therefore, the Court addresses only the applicability of the indirect purchaser rule to the State RICO Claims.

> The key to better interpretation lies in some statutory history. We have repeatedly observed, see *Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 150-51, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987)* . . . that Congress modeled *§ 1964(c)* . . . [of RICO after] the federal antitrust laws, *§ 4* of the *Clayton Act* . . .
>
> In *Associated General Contractors [v. Carpenters, 459 U.S. 519, 529, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)]* . . . we discussed how Congress enacted *§ 4* in 1914 with language borrowed from *§ 7* of the *Sherman Act*, passed 24 years earlier. Before 1914, lower federal courts had read *§ 7* to incorporate common-law principles of proximate causation . . . and as we reasoned, as many lower federal courts had done before us . . . that congressional use of the *§ 7* language in *§ 4* presumably carried the intention to adopt 'the judicial gloss that avoided a simple literal interpretation.' . . . Thus, we held that a plaintiff's right to sue under *§ 4* required a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well.
>
> The reasoning applies just as readily to *§ 1964(c)* [of RICO]. We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in *§ 7* of the *Sherman Act*, and later in the *Clayton Act*'s *§ 4*. . . . It used the same words, and we can only assume it intended them to have the same **[*22]** meaning that courts had already given them.

503 U.S. at 267-68.

However, the Supreme Court did not foreclose States from permitting indirect purchaser actions under their own state antitrust laws. *See* *California v. ARC Am. Corp., 490 U.S. 93, 103, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)* ("[N]othing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws."); *Supreme Auto Transp., LLC v. Arcelor Mittal USA, Inc., 902 F.3d 735, 743 (7th Cir. 2018)* ("While most states model their antitrust statutes and jurisprudence on federal law, they are under no obligation to do so."); *GEICO Corp. v. Autoliv, Inc., 345 F. Supp. 3d 799, 823 (E.D. Mich. 2018)* (finding several states implemented "*Illinois Brick* repealer statutes" that "allow recovery by indirect purchasers under state law"); *In re EpiPen Mktg., Sales Pracs. & Antitrust Litig., 336 F. Supp. 3d 1256, 1311 (D. Kan. 2018)* (explaining in *Illinois Brick, "*the Supreme Court held that only direct purchasers may bring claims for damages under the federal antitrust laws"); *Bunker's Glass Co. v. Pilkington, PLC, 206 Ariz. 9, 75 P.3d 99, 102 (Ariz. 2003)* (finding both direct and indirect purchasers may sue under Arizona's antitrust statute); *In re Auto. Parts Antitrust Litig., Civ. A. No. 12-2311, 2015 U.S. Dist. LEXIS 189606, at *686 (E.D. Mich. May 1, 2015)* (stating "the Supreme Court held that federal law does not preempt state indirect purchaser statutes").

The role of district courts is to "apply the law of the appropriate jurisdiction." *Panico v. Portfolio Recovery Assocs. LLC, 879 F.3d 56, 58 (3d Cir. 2018)* (citing *City of Philadelphia v. Lead Indus. Ass'n, 994 F.2d 112, 123 (3d Cir. 1993)*. "When interpreting a statute, 'the literal meaning of the statute is the most important, and [courts] are always to read the statute in its ordinary and natural sense.'" **[*23]** *In re Harvard Indus., Inc., 568 F.3d 444, 451 (3d Cir. 2009)* (quoting *Galloway v. United States, 492 F.3d 219, 223 (3d Cir. 2007)*). As a basic premise, "federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Ctr. for Humanities, 518 U.S. 415, 427, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)*. "When the state's highest court has not addressed the precise question presented, a federal court must predict how the state's highest court would resolve the issue[.]" *City of Phila., 994 F.2d at 122-23* (citing *Borman v. Raymark Indus., Inc., 960 F.2d 327, 331 (3d Cir. 1992)*). "There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them." *West v. AT&T Co., 311 U.S. 223, 236, 61 S. Ct. 179, 85 L. Ed. 139 (1940)*. "In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court." *Id.* "State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it[.]" *Id. at 237*.

"In predicting how a matter would be decided under state law," a federal court should examine: "(1) what the [state's] Supreme Court has said in related areas; (2) the decisional law of the [state's] intermediate courts; (3) federal appeals and district court cases interpreting state law; and (4) decisions from other jurisdictions **[*24]** that have discussed the issues we face here." *Hughes v. Long, 242 F.3d 121, 128 (3d Cir. 2001)* (citing *Boyanowski v. Cap. Area Intermediate Unit, 215 F.3d 396, 406 (3d Cir. 2000)*). "[W]here 'two competing yet sensible interpretations' of state law exist," a federal court "should opt for the interpretation that restricts liability, rather than expands it, until the Supreme Court of [the State] decides differently." *Travelers Indem. Co. v. Dammann & Co., 594 F.3d 238, 253 (3d Cir. 2010)* (citing *Werwinski v. Ford Motor Co., 286 F.3d 661, 680 (3d Cir. 2010)*).

Therefore, even if a state's highest court has not decided whether the indirect purchaser rule applies to the State RICO Claims, the Court will predict what the state's highest court may decide by looking into other relevant legal authorities. The five state racketeering statutes at issue are *Arizona's Civil Racketeering Statute, Ariz. Rev. Stat. §§ 13-2314.04, et seq.*, *Colorado's Organized Crime Act, Colo. Rev. Stat. §§ 18-17-101, et seq.*, *Georgia's Racketeer Influenced and Corrupt Organizations Act, Ga. Stat. Ann. §§ 16-14-1, et seq.*, *Utah's Pattern of Unlawful Activity Act, Utah Code Ann. §§ 76-10-1601, et seq.*, and *Wisconsin's Organized Crime Control Act, Wis. Stat. §§ 946.80, et seq.*

1. State Racketeering Statutes

Defendants argue Plaintiffs, as indirect purchasers, lack standing to pursue the state racketeering claims. (ECF No. 422 at 6.) Defendants contend because the state racketeering statutes Plaintiffs invoke are modeled after the federal RICO statute, the indirect purchaser rule barring Plaintiffs' federal RICO claims also bars the state racketeering claims. (*Id.*) Plaintiffs argue the indirect purchaser rule is a judicially-created federal rule that applies to federal RICO claims but not **[*25]** the state racketeering claims. (ECF No. 455 at 7.) Plaintiffs assert Defendants incorrectly "assume that the Third Circuit's interpretation of the indirect purchaser rule to federal RICO claims should apply to these *state* racketeering claims." (*Id.* at 6.) Plaintiffs contend the Court "must interpret state law according to each state's authority or otherwise predict how that state's courts would interpret" the statute. (*Id.* at 6-7.)

As an initial matter, the Court is not aware of, nor have the parties identified, federal or state authority opining on the applicability of the indirect purchaser rule to the state racketeering statutes at issue. The Court begins with examining the relevant statutory language. *In re Harvard Indus., Inc., 568 F.3d at 451*. RICO's civil action provision provides:

> Any person injured in his business or property by reason of a violation of *section 1962* of this chapter [*18 U.S.C. § 1962*] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .

18 U.S.C. § 1964. The civil action provision under Colorado's racketeering statute provides:

> Any person injured by reason of any violation of the provisions of *section 18-17-104* shall have a cause **[*26]** of action for threefold the actual damages sustained. Such person shall also recover attorney fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred . . . .

Colo. Rev. Stat. § 18-17-106. The civil action provision under Georgia's racketeering statute provides:

> Any person who is injured by reason of any violation of Code Section 16-14-4 shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages. Such person shall also recover attorney's fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred. . . .

Ga. Code Ann. § 16-14-6. The civil action provision under Utah's racketeering statute provides:

> A person injured in his person, business, or property by a person engaged in conduct forbidden by any provision of *Section 76-10-1603* may sue in an appropriate district court and recover twice the damages he sustains . . . .

Utah Code Ann. § 76-10-1605. The civil action provision under Wisconsin's racketeering statute provides:

> Any person who is injured by reason of any violation of s. 946.83 or 946.85 has a cause of action for 2 times the actual damages sustained and, when appropriate, punitive damages. The person shall also recover attorney fees and costs of the investigation and litigation **[*27]** reasonably incurred. . . .

Wis. Stat. Ann. § 946.87.

The language in the civil action provisions of these state racketeering statutes is substantially similar to the language in the civil action provision of the federal RICO statute. Indeed, it is well-established the state racketeering statutes of Colorado, Georgia, Utah, and Wisconsin are modeled after the federal RICO statute. *See* Floyd v. Coors Brewing Co., 952 P.2d 797, 803 (Colo. App. 1997) (finding Colorado's Organized Crime Control Act "is patterned after the federal [RICO] Act"), *rev'd on other grounds*, 978 P.2d 663 (Colo. 1999); Gianzero v. Wal-Mart Stores Inc., Civ. A. No. 09-656, 2010 U.S. Dist. LEXIS 38370, at *9 (D. Colo. Mar. 29, 2010) ("The Colorado Organized Crime Control Act (COCCA) is modeled after RICO."); Morast v. Lance, 807 F.2d 926, 933 (11th Cir. 1987) ("Georgia's RICO statutes are essentially identical to the federal RICO statutes."); Williams Gen. Corp. v. Stone, 279 Ga. 428, 614 S.E.2d 758, 760 (Ga. 2005) (finding federal RICO is "a statute which mirrors the Georgia civil RICO statute in both purpose and language"); State v. Squires, 2019 UT App 113, 446 P.3d 581, 593 (Utah Ct. App. 2019) (finding the Utah Pattern of Unlawful Activity Act (UPUAA) "is modeled after the federal [RICO] Act"); State v. Evers, 163 Wis. 2d 725, 472 N.W.2d 828, 831 (Wis. Ct. App. 1991) (finding the Wisconsin Organized Crime Control Act "was patterned after RICO").

Because the state racketeering statutes of Colorado, Georgia, Utah, and Wisconsin are modeled after federal RICO, courts have looked to federal case law construing federal RICO for guidance in interpreting these state racketeering statutes. *See* People v. Pollard, 3 P.3d 473, 476 (Colo. App. 2000) ("Because COCCA is patterned after [RICO], federal decisions **[*28]** construing RICO may be instructive upon similar issues arising under the state statute.") (internal citations omitted); People v. Hoover, 165 P.3d 784, 798 (Colo. App. 2006) (finding the Colorado RICO statute was modeled after the federal RICO statute and is generally interpreted according to the same principles); Albright v. Att'ys Title Ins. Fund, 504 F. Supp. 2d 1187, 1203 n.15 (D. Utah 2007) ("Because provisions of the Utah [Pattern of Unlawful Activity Act (UPUAA)] are nearly identical to those in the federal [RICO statute], federal district courts look to . . . federal case law for guidance."); Zibalstar, L.C. v. Conte, Civ. A. No. 17-563, 2019 U.S. Dist. LEXIS 10943, at *8 (D. Utah Jan. 22, 2019) ("Utah courts applying the UPUAA rely heavily on federal RICO decisional law."); Williams Gen. Corp., 614 S.E.2d at 760 ("Because the Georgia RICO Act was modeled after the federal statute, this Court has found federal authority persuasive in interpreting the Georgia RICO statute."); State v. Judd, 147 Wis. 2d 398, 433 N.W.2d 260, 262 (Wis. Ct. App. 1988) (finding federal case law interpreting RICO is persuasive authority in interpreting the Wisconsin RICO statute). Therefore, the Court looks to federal decisions construing federal RICO's civil action provision for guidance in interpreting the civil action provisions of the state racketeering statutes at issue.

While the federal RICO statute does not explicitly state indirect purchasers lack standing, federal courts have construed the language of RICO's civil action provision **[*29]** to bar indirect purchaser actions. McCarthy, 80 F.3d at 855. Because the language in the civil action provisions of the state racketeering statutes is substantially identical to the language in federal RICO's civil action provision, federal jurisprudence construing federal RICO's civil action provision apply to the civil action provisions of the state racketeering statutes. *See* Holmes, 503 U.S. at 268 (holding antitrust principles apply to RICO claims because when Congress "used the same words, and we can only assume it intended them to have the same meaning that courts had already given them"); Brickyard Homeowners' Ass'n Mgmt. Comm. v. Gibbons Realty Co., 668 P.2d 535, 540 (Utah 1983) ("Identity in language presumes identity of construction, so that we look to federal . . . law for guidance."). A majority of courts have repeatedly construed this civil action provision language to bar indirect purchaser actions. *See* In re Zantac (Ranitidine) Prods. Liab. Litig., Civ. A. No. 20-2924, 546 F. Supp. 3d 1216, 2021 U.S. Dist. LEXIS 122580, at *32 (S.D. Fla. June 30, 2021) (observing "the majority of federal courts to address the issue have applied the [indirect purchaser] rule to RICO claims"); *see also* McCarthy, 80 F.3d at 855; Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 616 (6th Cir. 2004) ("[I]ndirect purchasers lack standing under RICO and the antitrust laws to sue for overcharges passed on to them by middlemen."); *Carter v. Berger, 777 F.2d 1173, 1177 (7th Cir. 1985)*; *Harris Cty., Tex. v. Eli Lilly & Co., Civ. A. No. 19-4994, 2020 U.S. Dist. LEXIS 179199, at *12 (S.D. Tex. Sept. 29, 2020)* (declining "to follow the minority rule" and holding "that indirect purchasers lack standing under RICO"). Absent guidance from a state's **[*30]** highest court, this Court finds no reason to interpret this substantially similar language any differently from how courts have already construed such language.

Further, to the extent Plaintiffs argue that precedent from Tenth Circuit—which rejected the indirect purchaser rule in the federal RICO context—should govern their Colorado and Utah state racketeering claims because Colorado and Utah are in the Tenth Circuit, Plaintiffs misconstrue the guiding principles instructing the Court's analysis.[6] In predicting how a state's highest court would rule on an undecided matter of state law, the Court may look at "decisions from other jurisdictions that have discussed the issues[.]" *Hughes, 242 F.3d at 128*. While the Tenth Circuit declined to apply the indirect purchaser rule, other circuits, including the Third Circuit, have elected to apply it. *In re Zantac (Ranitidine) Prods. Liab. Litig., 546 F. Supp. 3d 1216, 2021 U.S. Dist. LEXIS 122580, at *36* ("Because the Supreme Court's message in *Holmes* was clear, the Court is persuaded to join the prevailing view that the indirect purchaser rule applies to RICO claims."); *McCarthy, 80 F.3d at 855*; *Trollinger; 370 F.3d at 616*; *Carter, 777 F.2d at 1177*. Because the Court utilizes federal RICO case law to guide its interpretation of state racketeering statutes, the Third Circuit's binding and Tenth Circuit's non-binding application of the indirect purchaser **[*31]** rule in the federal RICO context is persuasive for determining the application of the indirect purchaser rule in the state RICO context. "[W]here 'two competing yet sensible interpretations' of state law exist," a federal court "should opt for the interpretation that restricts liability, rather than expands it, until the Supreme Court of [the State] decides differently." *Travelers Indem. Co., 594 F.3d at 253* (citing *Werwinski, 286 F.3d at 680*); *see also* *Pearson v. John Hancock Mut. Life Ins. Co., 979 F.2d 254, 259 (1st Cir. 1992)* (noting a plaintiff "cannot justifiably complain if [a] federal court manifests great caution in blazing new state-law trails") (citations omitted). As discussed in Section III.A., the intent of the indirect purchaser rule was to limit the exposure to "multiple liability." *McCarthy, 80 F.3d at 851* (quoting *Illinois Brick, 431 U.S. at 730*). Therefore, following the guiding principles set forth above, the Court is led to predict the highest courts for the states of Colorado and Utah would hold the indirect purchaser rule applies to their respective state racketeering statutes.

Accordingly, Plaintiffs as indirect purchasers lack standing to bring state racketeering claims under the state racketeering statutes of Colorado, Georgia, Utah, and Wisconsin.[7]

2. Arizona's Civil Racketeering Statute

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[6] To the extent Defendants contend this Court is bound by the Third Circuit's ruling in *McCarthy*, the holding was limited to federal RICO claims. *Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4, 96 S. Ct. 167, 46 L. Ed. 2d 3 (1975)* ("A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits."). Notwithstanding, because the Court utilizes federal RICO case law to guide its interpretation of state RICO statutes, the Third Circuit's reasoning is persuasive for adjudicating the state racketeering claims.

[7] Plaintiffs contend "Georgia courts have not required that plaintiffs be direct purchasers; instead, courts have engaged in a proximate causation analysis." (ECF No. 455 at 12.) However, Plaintiffs are conflating the indirect purchaser rule with the proximate cause requirement, which, "while related, are 'two analytically distinct aspects' of standing." *In re Zantac (Ranitidine) Prods. Liab. Litig., 546 F. Supp. 3d 1216, 2021 U.S. Dist. LEXIS 122580, at *36* (quoting *McCarthy, 80 F.3d at 851*). Indeed, Plaintiffs have not identified any Georgia case law addressing the applicability of the indirect purchaser rule, and the cases they rely on do not involve indirect purchaser standing. *See e.g.* *Quasebarth v. Green Tree Servicing, LLC, 90 F. Supp. 3d 1373, 1382-83 (M.D. Ga. 2015)* (considering standing for mortgagee plaintiffs who directly contacted the mortgage loan servicer defendant); *Wylie v. Denton, 323 Ga. App. 161, 746 S.E.2d 689, 694-95 (Ga. Ct. App. 2013)* (holding a former bank employee lacked standing against former employer because the loss of employment was only indirectly caused by the bank's alleged wrongdoing); *InterAgency, Inc. v. Danco Fin. Corp., 203 Ga. App. 418, 417 S.E.2d 46 (Ga. Ct. App. 1992)* (holding the corporation stated a cause of action under RICO against brokers—without any discussion of standing—where the corporation cancelled its letter of intent to purchase a travel agency from the brokers and the brokers retained the funds).

Plaintiffs contend because the Arizona Supreme Court rejected **[*32]** applying the indirect purchaser rule to its state antitrust statute, the indirect purchaser rule should not apply to Arizona's racketeering statute. (ECF No. 455 at 8.) Defendants argue the Arizona Supreme Court's "decision to repeal the indirect purchaser rule as to its *antitrust* statute has no bearing on whether the rule still applies to the state's *RICO* statute." (ECF No. 468 at 3.) The Court is not aware, nor have the parties identified, any federal or state authority addressing the applicability of the indirect purchaser rule to Arizona's racketeering statute.

The civil action provision under Arizona's civil racketeering statute provides:

> A person who sustains reasonably foreseeable injury to his person, business or property by a pattern of racketeering activity, or by a violation of *section 13-2312* involving a pattern of racketeering activity, may file an action in superior court for the recovery of up to treble damages and the costs of the suit, including reasonable attorney fees for trial and appellate representation.

Ariz. Rev. Stat. § 13-2314.04. "Arizona's racketeering statute was adapted from the [RICO], *18 U.S.C. §§ 1961-1968*, and Arizona courts 'look to federal decisional law for guidance in construing and applying the Arizona statute.'" **[*33]** *Lara-Chacon v. Ashcroft, 345 F.3d 1148, 1156 (9th Cir. 2003)* (citing *Baines v. Superior Court, 142 Ariz. 145, 688 P.2d 1037, 1040 (Ariz. Ct. App. 1984)*); *Rosier v. First Fin. Capital Corp., 181 Ariz. 218, 889 P.2d 11, 13-14 (Ariz. Ct. App. 1994)* ("Arizona's RICO act is patterned after the federal RICO act."); *Hannosh v. Segal, 235 Ariz. 108, 328 P.3d 1049, 1053 (Ariz. Ct. App. 2014)* ("We look to federal interpretation for guidance where the federal and state RICO statutes contain similar provisions.").

In *Bunker's Glass Co. v. Pilkington PLC*, the Arizona Supreme Court explicitly declined to follow *Illinois Brick*'s guidance and held indirect purchasers have standing to sue under Arizona's state antitrust statute. *206 Ariz. 9, 75 P.3d 99, 108 (Ariz. 2003)*. In *Bunker's Glass*, the Arizona Supreme Court reasoned:

> This case turns upon the interpretation of a provision of the Arizona Antitrust Act that permits a "person" to sue to redress an antitrust injury. *A.R.S. § 44-1408(B)*. Generally, the best indicator of the meaning of a statute is its plain language. *Powers v. Carpenter, 203 Ariz. 116, 51 P.3d 338, 340 (Ariz. 2002)*. The [Arizona Antitrust] Act defines "person" as including "an individual, corporation, . . . or any other legal entity." *A.R.S. § 44-1401*. Nothing in this language restricts the right of action to direct purchasers injured by violations of the Arizona Antitrust Act or precludes indirect purchasers from suing. Indeed . . . by defining the term "person" to include an "individual," the legislature signaled its intent to allow indirect purchasers to sue, because individuals are rarely direct purchasers. . . .

Id. at 102. The Arizona Supreme Court continued **[*34]** by addressing the role of federal guidance for interpreting its state antitrust statute, explaining:

> In the absence of the federal guidance clause, Arizona's statutory language would plainly include indirect purchasers. . . . By refusing to construe the federal guidance clause as requiring that Arizona courts follow *Illinois Brick*'s limitation on the scope of the right of action granted by the legislature, the court is simply choosing to follow the expressed legislative intent that persons injured in their business or property by anti-competitive activity have a right of action. The court defers to the legislature, not the federal courts, to create exceptions to the rule.

Id. at 107.

Here, the Court finds the Arizona Supreme Court's rejection of the indirect purchaser rule and its rationale for declining to follow federal guidance when interpreting its state antitrust statute to be instructive for predicting how Arizona's highest court would decide the applicability of the indirect purchaser rule to its state racketeering statute. While true that the court's repeal of the indirect purchaser rule in *Bunker's Glass* was limited to the state antitrust context, Defendants' argument *Bunker's Glass* has no bearing on whether the indirect **[*35]** purchaser rule applies in the state racketeering context strains credulity. Afterall, the indirect purchaser rule was derived from the antitrust context before it was extended to apply to RICO claims. *McCarthy, 80 F.3d at 855* (finding because RICO's civil action provision was modeled on the *Clayton Act*, "antitrust standing principles apply equally to allegations of RICO violations").

The indirect purchaser rule was derived from *§ 4* of the *Clayton Act*, a provision of the federal antitrust statute.[8] The civil action provision in Arizona's antitrust statute was modeled on *§ 4* of the *Clayton Act*.[9] *Bunker's Glass Co., 75 P.3d at 102* (finding *§ 4* of the *Clayton Act* "is phrased almost identically" to the civil action provision in Arizona's antitrust statute). The federal RICO civil action provision was also modeled on *§ 4* of the *Clayton Act*; and Arizona's state RICO civil action provision was modeled on the federal RICO civil action provision. In other words, the federal and state counterparts of the antitrust and RICO statutes are all modeled on the same civil action provision. Arizona's Supreme Court has already construed its state counterpart of this provision to permit indirect purchaser actions. Therefore, the logical extension would be for Arizona's Supreme Court to extrapolate its interpretation of its state **[*36]** antitrust statute, which is modeled on *§ 4* of the *Clayton Act*, to its state RICO statute, which, through the federal RICO statute, is also modeled after *§ 4* of the *Clayton Act*. Accordingly, the Court is led to predict the highest court in the state of Arizona would permit indirect purchaser actions to proceed under Arizona's Civil Racketeering Statute.

3. *Illinois Brick* Repealer Statutes

Plaintiffs **[*37]** argue the indirect purchaser rule should not apply to the Utah and Wisconsin racketeering claims because the Utah and Wisconsin state legislatures enacted laws to reverse the holding of *Illinois Brick* in their state antitrust statutes. (ECF No. 455 at 9.) Specifically, Plaintiffs contend "[t]here's no better evidence that a state would not apply *Illinois Brick* to racketeering claims than that state's refusal to apply *Illinois Brick* to antitrust claims." (*Id.*) Defendants counter "a state's decision to repeal the indirect purchaser rule as to its *antitrust* statute has no bearing on whether the rule still applies to the state's *RICO* statute." (ECF No. 468 at 3.) Defendants argue "the plain language of the repealer statutes make clear that they only apply to the states' *antitrust* statutes." (*Id.*)

"In the absence of any clear precedent of the state's highest court, we must predict how that court would resolve the issue." *Yurecka v. Zappala, 472 F.3d 59, 62 (3d Cir. 2006)* (citing *Polselli v. Nationwide Mut. Fire Ins. Co., 126 F.3d 524, 528 n.3 (3d Cir. 1997)*); *see also* *Hunt v. United States Tobacco Co., 538 F.3d 217, 220 (3d Cir. 2008)*. "In making such a prediction, we should consider 'relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would resolve the issue at hand.'" *Id.* (quoting *Nationwide Mut. Ins. Co. v. Buffetta, 230 F.3d 634, 637 (3d Cir. 2000)* (quoting *McKenna v. Ortho Pharm. Corp., 622 F.2d 657, 663 (3d Cir. 1980)*)). "[A]n **[*38]** intermediate appellate state court is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *Edwards v. HOVENSA, LLC, 497 F.3d 355, 361, 49 V.I. 1133 (3d Cir. 2007)* (quotation marks and ellipsis omitted) (quoting *West., 311 U.S. at 237*); *see also* *Travelers Indem. Co., 594 F.3d at 244*.

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[8] *Section 4* of the *Clayton Act*, *15 U.S.C. § 15(a)*, provides:

> any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[9] The civil action provision in Arizona antitrust statute provides:

> A person threatened with injury or injured in his business or property by a violation of this article may bring an action for appropriate injunctive or other equitable relief, damages sustained and, as determined by the court, taxable costs and reasonable attorney's fees. If the trier of fact finds that the violation is flagrant, it shall increase recovery to an amount not in excess of three times the damages sustained.

Ariz. Rev. Stat. § 44-1408(B).

Several states have enacted "*Illinois Brick* repealer statutes," which are state laws overriding the Supreme Court's holding in *Illinois Brick* to permit indirect purchasers to pursue antitrust claims under their state's antitrust statute. *GEICO Corp., 345 F. Supp. 3d at 842* (observing a number of states have enacted so-called "*Illinois Brick* repealer statutes"); *In re Auto. Parts Antitrust Litig., 2015 U.S. Dist. LEXIS 189606, at *686* ("In response to the Supreme Court's prohibition against antitrust actions by indirect purchasers articulated in [*Illinois Brick*], many states enacted repealer provisions, allowing state actions for indirect purchasers."); *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig., 336 F. Supp. 3d at 1311* ("To avoid the *Illinois Brick* rule, some states have passed 'repealer' statutes allowing indirect purchasers to recover under state antitrust laws.") (citing *In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 818 (N.D. Ill. 2017)*).

Here, Utah and Wisconsin enacted legislation allowing indirect purchasers to pursue antitrust claims by repealing *Illinois Brick*'s holding from applying to their state antitrust statutes.[10] *See In re Aggrenox Antitrust Litig., 94 F. Supp. 3d 224, 251-52 (D. Conn. 2015)* ("Utah has passed an *Illinois Brick* repealer [statute], and its antitrust statute therefore does grant **[*39]** indirect purchasers the right to bring antitrust damages claims."); *Meyers v. Bayer AG, 2007 WI 99, 303 Wis. 2d 295, 735 N.W.2d 448, 462 (Wis. 2007)* ("[W]e noted that the 1980 revision of [the antitrust statute] provided a remedy under the statute to indirect purchasers in response to *Illinois Brick*, . . . which foreclosed recovery to indirect purchasers under the federal statute."). However, Utah and Wisconsin have not enacted legislation allowing indirect purchasers to pursue racketeering claims under their respective state racketeering statutes. As the Supreme Court explained, states can decide to permit indirect purchaser actions even though federal law does not. *ARC Am. Corp., 490 U.S. at 103*. While Utah and Wisconsin enacted legislation that permits such actions to proceed under the antitrust context, they have not done the same to permit such actions to proceed under their state racketeering statutes.[11] It is not the task of this Court to predict what legislation States will pass; rather, the Court is tasked with predicting how the state's highest court would resolve the matter. *See Travelers Indem. Co., 594 F.3d at 244*.

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[10] The Wisconsin *Illinois Brick* repealer provision provides:

> Except as provided under par. (b), any person injured, directly or indirectly, by reason of anything prohibited by this chapter may sue therefor and shall recover threefold the damages sustained by the person and the cost **[*40]** of the suit, including reasonable attorney fees.

Wis. Stat. Ann. § 133.18 (1)(a). The Utah *Illinois Brick* repealer statute provision provides:

> A person who is a citizen of this state or a resident of this state and who is injured or is threatened with injury in his business or property by a violation of the Utah Antitrust Act may bring an action for injunctive relief and damages, regardless of whether the person dealt directly or indirectly with the defendant.

Utah Code Ann. § 76-10-3109(1)(a).

[11] By way of comparison, the Court has identified states that have enacted *Illinois Brick* repealer statutes to their state RICO statutes. Under Ohio's racketeering statute, its civil action provision provides:

> In a civil proceeding under division (A) of this section, ***any person directly or indirectly injured*** by conduct in violation of *section 2923.32 of the Revised Code* or a conspiracy to violate that section, other than a violator of that section or a conspirator to violate that section, in addition to relief under division (B) of this section, shall have a cause of action for triple the actual damages the person sustained.

Ohio Rev. Code Ann. § 2923.34 (emphasis added); *see also Lowe v. Ransier (In re Nicole Gas Prod.), 581 B.R. 843, 849 (B.A.P. 6th Cir. 2018)* ("[T]he Ohio Legislature intended the OCPA to offer standing to a broader class of plaintiffs than federal RICO statutes."); *CSAHA/UHHS-Canton, Inc. v. Aultman Health Found., 2012-Ohio-897, ¶ 74 (Ohio Ct. App. 5th Dist. 2012)* ("[U]nlike RICO, the Ohio [racketeering statute] specifically permits recovery for all damages directly or indirectly caused by [the defendant]."); *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc., 23 F. Supp. 2d 771, 787 (N.D. Ohio 1998)*.

In predicting how the highest courts in the states of Utah and Wisconsin would interpret their state racketeering statutes, the guidance instructing this Court is to consider federal case law construing the federal RICO statute. *See* Roberts v. C.R. England, Inc., 318 F.R.D. 457, 525 (D. Utah 2017) ("While state courts are not required to adopt identical interpretations of UPUAA and RICO, the Utah Supreme Court often considers federal case law on RICO claims when analyzing comparable UPUAA provisions."); **[*41]** Hill v. Estate of Allred, 2009 UT 28, 216 P.3d 929, 938-39 (Utah 2009); State v. Bradshaw, 2004 UT App 298, 99 P.3d 359, 367 (Utah Ct. App. 2004), *rev'd on other grounds*, 2006 UT 87, 152 P.3d 288 (Utah 2006); Bradford v. Moench, 670 F. Supp. 920, 928 (D. Utah 1987); Squires, 446 P.3d at 593; Albright, 504 F. Supp. 2d at 1203 n.15; Zibalstar, 2019 U.S. Dist. LEXIS 10943, at *8; Heritage Christian Schs., Inc. v. ING N. Am. Ins. Corp., 851 F. Supp. 2d 1154, 1157 (E.D. Wis. 2012) ("Because WOCCA was patterned after RICO, Wisconsin courts consider cases interpreting RICO to be persuasive authority as to the interpretation of WOCCA."); State v. Mueller, 201 Wis. 2d 121, 549 N.W.2d 455 (Wis. Ct. App. 1996); Judd, 433 N.W.2d at 262; Evers, 472 N.W.2d at 831; Rinaldi v. Wisconsin, Civ. A. No. 19-3, 2019 U.S. Dist. LEXIS 137372, at *10 (W.D. Wis. Aug. 13, 2019). Therefore, the Court follows the analysis it set forth above, Section III.A.1.

To clarify, there is a distinction between why the Arizona Supreme Court's holding repealing Illinois Brick can be extrapolated to apply to Arizona's racketeering statute and why the Utah and Wisconsin Illinois Brick repealer statutes cannot be extrapolated to apply to the Utah and Wisconsin racketeering statutes. It is not the job of courts to predict what state legislatures will do. Courts are tasked with predicting how the state's highest court would resolve an undecided issue. *See* City of Phila., 994 F.2d at 122-23. As discussed in Section III.A.2., the Arizona Supreme Court in Bunker's Glass was instructive in explaining how it resolved the applicability of the indirect purchaser rule when its state counterpart was modeled after the federal statute. Using this guidance, the Court can predict how the Arizona Supreme Court would resolve the issue of indirect purchaser actions in the state RICO context. There is no such guidance in Utah and Wisconsin. To the extent there is such **[*42]** guidance, courts are instructed to look to interpretations of the federal RICO statute in construing the Utah and Wisconsin racketeering statutes.

By way of example, in May 2006, Utah amended its state antitrust statute to incorporate and enact an Illinois Brick repealer provision to its state statute. GEICO Corp., 345 F. Supp. 3d at 842 (citing Utah Code Ann. 76-10-3109(1)(a)). Prior to the 2006 amendment, courts construing Utah's state ***antitrust law*** applied Illinois Brick's holding barring indirect purchaser actions. In re Auto. Parts Antitrust Litig., Civ. A. No. 12-02311, 2013 U.S. Dist. LEXIS 80338, at *73-74 (E.D. Mich. June 6, 2013) (finding in Utah, "Illinois Brick was applied prior to the 2006 amendment") (citing Boisjoly v. Morton Thiokol, Inc., 706 F. Supp. 795, 805 (D. Utah 1988)); *see also* GEICO Corp., 345 F. Supp. 3d at 855 (dismissing antitrust claims by indirect purchasers under the laws of Utah "arising from conduct that predated the states' enactment of Illinois Brick repealer provisions"); In re Static Random Access Memory Antitrust Litig., Civ. A. No. 07-01819, 2010 U.S. Dist. LEXIS 131002, at *43-44 (N.D. Cal. Dec. 8, 2010) (same). Indeed, before the Illinois Brick repealer statute was enacted, courts applied and interpreted the Utah state antitrust statute to be consistent with its federal counterpart. *See* Boisjoly, 706 F. Supp. at 805 (finding the Utah antitrust statute, "which is modeled after and closely resembles the federal antitrust statute, expressly provides that it is to be applied and interpreted consistently with its federal counterpart"). It was not until after the Illinois Brick repealer statute was enacted that courts applying Utah's ***antitrust law*** began permitting indirect purchaser **[*43]** actions. California v. Infineon Techs. AG, Civ. A. No. 06-4333, 2008 U.S. Dist. LEXIS 120058, at *25 (N.D. Cal. Apr. 15, 2018) (stating in Utah "the 2006 amendment affirmatively altered the legal landscape with respect to indirect purchaser standing").

Therefore, absent legislative intervention, the Court is led to predict the state's highest court would continue to interpret its respective state racketeering statute consistent with its federal counterpart. Accordingly, Defendants' Partial Motion to Dismiss is **GRANTED** as to the State RICO Claims under the laws of Colorado, Georgia, Utah, and Wisconsin (Counts Four, Six, Eight, and Nine), and **DENIED** as to the State RICO Claim under the laws of Arizona (Count Three).

B. The State Civil Conspiracy Claims

Plaintiffs assert civil conspiracy claims under the laws of thirty-six states.[12] (ECF No. 411 ¶¶ 524-38.) Defendants argue the state-law civil conspiracy claims should be dismissed: (1) where the federal and state racketeering claims fail as viable underlying claims; and (2) where any surviving underlying claim renders the civil conspiracy claim duplicative. (ECF No. 422 at 10.) Defendants also assert the civil conspiracy claims brought under Georgia, Arizona, and Pennsylvania law fail for state-specific reasons. (*Id.* at 10.) The Court addresses each in **[*44]** turn.

1. State Civil Conspiracy Claims Based on Racketeering Violations

Defendants assert the state-law civil conspiracy claims fail without a viable underlying claim as a predicate for liability. (ECF No. 422 at 10.) Specifically, Defendants argue the state-law civil conspiracy claims fail to the extent they are based on violations of federal or state racketeering laws that have already been dismissed. (*Id* at 10-13.) Plaintiffs argue any surviving state racketeering or state consumer fraud claim can serve as viable underlying claim for their state-law civil conspiracy claims. (ECF No. 455 at 15.) Plaintiffs also contend they are not required to plead an underlying claim as a separate cause of action for it to serve as a predicate to the state-law civil conspiracy claims. (*Id.* at 16.)

"The established rule is that a cause of action for civil conspiracy requires a separate underlying tort as a predicate for liability." *In re Orthopedic Bone Screw Prods. Liab. Litig., 193 F.3d 781, 789 (3d Cir. 1999)*; *Boyanowski, 215 F.3d at 405-06* ("The rule that civil conspiracy may not exist without an underlying tort is a common one."); *Curbison v. New Jersey, 242 F. App'x 806, 810 (3d Cir. 2007)* ("A civil conspiracy claim requires a separate underlying tort as a prerequisite for liability."); *Hamborsky v. O'Barto, 613 F. App'x 178, 182 (3d Cir. 2015)*. In surveying the civil conspiracy laws of several different states, the **[*45]** Third Circuit found "the law uniformly requires that conspiracy claims be predicated upon an underlying tort that would be independently actionable against a single defendant." *Id.* (collecting cases). The Third Circuit added "we are unaware of any jurisdiction that recognizes civil conspiracy as a cause of action requiring no separate tortious conduct." *Id.* "Thus, one cannot sue a group of defendants for conspiring to engage in conduct that would not be actionable against an individual defendant." *Pardue v. Gray, 136 F. App'x 529, 533 (3d Cir. 2005)* (quoting *Orthopedic Bone Screw, 193 F.3d at 789*).

Here, Plaintiffs allege "[a]mong the unlawful and tortious acts committed pursuant to and in furtherance of the conspiracy were (i) violations of the state and federal racketeering laws, including the predicate acts of mail and wire fraud; and (ii) violations of the various state law consumer fraud statutes." (ECF No. 411 ¶ 537.) Plaintiffs cannot base their state-law civil conspiracy claims on underlying claims that "would not be actionable against an individual defendant." *Pardue, 136 F. App'x at 533* (quoting *Orthopedic Bone Screw, 193 F.3d at 789*). Because the federal racketeering claims were dismissed, the state-law civil conspiracy claims fail to the extent they are based on violations of federal racketeering law. Similarly, because the **[*46]** state racketeering claims were dismissed, Plaintiffs' state-law civil conspiracy claims fail to the extent they are based on violations of state racketeering laws, with the exception of Plaintiffs' civil conspiracy claim under Arizona law.[13] Notwithstanding, because several of Plaintiffs' consumer fraud claims still survive, Plaintiffs have viable underlying claims to maintain their civil conspiracy causes of action. Accordingly, Defendants' Partial Motion to Dismiss Plaintiffs' state-law civil conspiracy claims is **GRANTED IN PART** and **DENIED IN PART**.

2. State Civil Conspiracy Claims Based on Surviving Claims

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[12] Under Count Ten of the Third Amended Complaint, Plaintiffs assert "[t]his claim is brought by all plaintiffs against Defendants Novo Nordisk, Sanofi, and Eli Lilly, and alleges violations of the civil conspiracy laws of the following states: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and Wisconsin." (ECF No. 411 ¶ 525.)

[13] The Court determined Plaintiffs' state racketeering claim under Arizona law survives, and therefore, violations of the Arizona racketeering statute can serve as a predicate for liability to assert a state-law civil conspiracy claim under Arizona law.

Defendants assert the state-law civil conspiracy claims "should be dismissed as duplicative to the extent they are based on a state-law claim that survived [D]efendants' motions to dismiss." (ECF No. 422 at 13.) Defendants also contend the civil conspiracy claims should be dismissed as duplicative "because [P]laintiffs have made no effort to differentiate their civil conspiracy claims from their underlying claims." (ECF No. 468 at 8.) Plaintiffs argue the civil conspiracy claims are not duplicative because Plaintiffs may plead claims in the alternative or allege parallel theories of **[*47]** recovery. (ECF No. 455 at 18.)

Under *Federal Rule of Civil Procedure 8(a)(2)*, a civil plaintiff is required to set forth "a short and plain statement of [his or her] claim showing that [he or she] is entitled to relief." "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555*. While *Rule 8* does not require a plaintiff to provide detailed factual allegations, a plaintiff must provide more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal, 556 U.S. at 678*. Compliance with *Rule 8* requires a plaintiff to "give the defendants fair notice of what the claim is and the grounds upon which it rests." *Twombly, 550 U.S. at 545* (internal citation omitted); *Kanter v. Barella, 489 F.3d 170, 177 (3d Cir. 2007)* (noting the complaint must "provide the opponent with fair notice of a claim and the grounds on which that claim is based").

Here, Defendants' contention that the civil conspiracy claims should be dismissed because they are duplicative to the underlying claims is unconvincing. Defendants are essentially arguing a civil conspiracy claim cannot exist alongside its underlying claim; even though an underlying claim is required for maintaining a civil conspiracy claim. In any event, district courts in this circuit have recognized civil conspiracy claims predicated on underlying consumer **[*48]** fraud claims. *See, e.g.* *Unimed Int'l, Inc. v. Fox News Network, LLC, Civ. A. No. 20-17335, 2021 U.S. Dist. LEXIS 66470, at *12 (D.N.J. Apr. 6, 2021)* (holding because the consumer fraud claim, among others, stated a claim for relief, "[p]laintiff's conspiracy claim also survives dismissal"); *Doherty v. Hertz Corp., Civ. A. No. 10-00359, 2010 U.S. Dist. LEXIS 124714, at *25 (D.N.J. Nov. 24, 2010)* (holding the plaintiff "established a *prima facie* case of civil conspiracy" after successfully pleading her consumer fraud claim); *Aqua Pharms., LLC v. Park Irmat Drug Corp, Civ. A. No. 17-2273, 2018 U.S. Dist. LEXIS 83652, at *13 n.7 (E.D. Pa. May 17, 2018)* (finding "[b]ecause the fraud claim survives, the civil conspiracy claim need not be dismissed"); *Vibra-Tech Eng'rs, Inc. v. Kavalek, 849 F. Supp. 2d 462, 494 (D.N.J. 2012)* (finding a civil conspiracy was adequately pleaded with consumer fraud as one of the underlying claims); *Gray v. CIT Bank, N.A., Civ. A. No. 18-1520, 2018 U.S. Dist. LEXIS 216638, at *22 (D.N.J. Dec. 27, 2018)* (holding because the plaintiff stated a claim for consumer fraud, the "[m]otion to [d]ismiss the conspiracy claim will be denied") *Szelc v. Stanger, Civ. A. No. 08-4782, 2011 U.S. Dist. LEXIS 41827, at *32 (D.N.J. Apr. 15, 2011)* (finding the civil conspiracy claim survived where the alleged state racketeering claim survived to serve as the underlying claim).

Defendants point to no relevant authority in this circuit finding otherwise. To the extent Defendants rely on *Impala Platinum Holdings Ltd. v. A1 Specialized Services & Supplies, Inc.*, the civil conspiracy claims were not dismissed as duplicative, as Defendants contend. *Civ. A. No. 16-1343, 2016 U.S. Dist. LEXIS 127055 (E.D. Pa. Sep. 16, 2016)*. Rather, the court dismissed the plaintiff's civil conspiracy claim for failing to adequately allege malice, an essential element of civil conspiracy under Pennsylvania **[*49]** law. *Id.* at *68-69. Accordingly, Defendants' motion to dismiss Plaintiffs' state-law civil conspiracy claims based on any surviving claims is **DENIED**.[14]

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[14] Defendants assert the state-law civil conspiracy claims should be dismissed as improper "shotgun pleading" because Plaintiffs "cram three dozen claims, each brough under the law of a different state, into a single count." (ECF No. 422 at 9.) Plaintiffs argue their civil conspiracy claims satisfy the notice pleading requirements without needing to separate each state-law civil conspiracy claim into different counts. (ECF No. 455 at 12.) *Federal Rule of Civil Procedure 8(a)(2)* requires pleadings to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A plaintiff is required to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable of the misconduct alleged." *Disc Disease Sols. Inc. v. VGH Sols., Inc., 888 F.3d 1256, 1260 (Fed. Cir. 2018)* (quoting *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 556*)). "Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (citations omitted). Plaintiffs' Third Amended Complaint recounts in nearly 300 pages Defendants' alleged scheme to defraud and conspiracy to inflate prices. The Court finds Defendants have fair notice of the claims asserted against them and the grounds upon which those claims rest.

3. Georgia and Arizona Civil Conspiracy Claims

Defendants argue the Georgia and Arizona civil conspiracy claims fail to the extent they rely on the Georgia and Arizona consumer fraud claims that were dismissed. (ECF No. 422 at 15.) Plaintiffs argue the Arizona and Georgia civil conspiracy claims remain supported by their respective state racketeering allegations. (ECF No. 455 at 16.) Because Plaintiffs' state racketeering claim under Arizona law survives, Plaintiffs' civil conspiracy claim under Arizona law also survives. However, because both the Georgia state racketeering and consumer fraud claims fail, Plaintiffs' civil conspiracy claim under Georgia law also fails. Accordingly, Defendants' motion to dismiss is **GRANTED** as to Plaintiffs' civil conspiracy claim under Georgia law and **DENIED** as to Plaintiffs' civil conspiracy claim under Arizona law.

4. Pennsylvania Civil Conspiracy Claims

Defendants argue the Pennsylvania civil conspiracy claim fails because Plaintiffs have failed to allege malice, which is an essential element for civil **[*50]** conspiracy under Pennsylvania law. (ECF No. 422 at 16.) Plaintiffs argue they alleged "[D]efendants acted intentionally and with intent to mislead, defraud, and deceive," which is sufficient to satisfy the malice requirement under Pennsylvania law to maintain their civil conspiracy claim. (ECF No. 455 at 20.)

Under Pennsylvania law,

> to state a cause of action for civil conspiracy, the following elements are required: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage.

Gen. Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 313 (3d Cir. 2003) (citing *Strickland v. Univ. of Scranton, 700 A.2d 979, 987-88 (Pa. Super. Ct. 1997)* (citation and internal quotations marks omitted)). "Proof of malice is an essential part of a cause of action for conspiracy, and malice requires that the conspirators act with the sole purpose of injuring the plaintiff." *Sarpolis v. Tereshko, 625 F. App'x 594, 601 (3d Cir. 2016)* (citations and quotation marks omitted); *see also* *Conquest v. WMC Mortg. Corp., 247 F. Supp. 3d 618, 637 (E.D. Pa. 2017)* (dismissing a civil conspiracy claim where the plaintiff "fail[ed] to allege any facts that suggest[ed] the [defendants] acted contrary to their own legitimate business interests or with the sole intent to harm him"). "Importantly, to state a claim for **[*51]** conspiracy under Pennsylvania law, 'it must be alleged that the sole purpose of the conspiracy was to injure the Plaintiffs.'" *Zafarana v. Pfizer Inc., 724 F. Supp. 2d 545, 559 (E.D. Pa. 2010)* (quoting *Morilus v. Countrywide Home Loans, Inc., 651 F. Supp. 2d 292, 313 (E.D. Pa. 2008)*). Therefore, "where the facts show that a person acted to advance his own business interests, and not solely to injure the party injured, those facts negate any alleged intent to injure." *Becker v. Chi. Title Ins. Co., Civ. A. No. 03-2292, 2004 U.S. Dist. LEXIS 1988, at *13 (E.D. Pa. Feb. 4, 2004)* (citing *Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 412 A.2d 466, 472 (Pa. 1979)*).

Here, Plaintiffs allege:

> 526. As detailed above, each of the defendant drug manufacturers separately agreed with the PBMs to commit unlawful and tortious actions in fraudulently pricing the insulin products to consumers and the public. Each defendant drug manufacturer separately shared with the PBMs the common purposes of selling, purchasing, and administering the analog insulins to individual plaintiffs and class members and deriving secret profits from thee above-alleged spread scheme. These profits are greater than either the defendant drug manufacturers or the PBMs could obtain absent their fraudulent concealment of the substantial rebates from defendant drug manufacturers to PBMs.
>
> 527. To effectuate this common purpose, the defendant drug manufacturers periodically and systematically inflated the list prices of the analog insulins. They did so willfully, **[*52]** and with knowledge that class members make payments directly based on the manufacturers' list price. They then represented—either affirmatively or through half-truths and omissions—to the general public and consumers, including plaintiffs and the class, that the analog insulin list prices are a reasonable approximation of the actual cost of these medicines and a proper

> basis for consumer payments. The defendant drug manufacturers and PBMs then concealed from the general public and consumers, like the plaintiffs and class members, the reality that the net prices offered to PBMs in exchange for preferred formulary positions are exponentially lower.
>
> . . . .
>
> 532. In order to garner all of these fees from the defendant drug manufacturers, each PBM and each defendant drug manufacturer meet on a regular basis to discuss analog insulin prices, rebates, spreads, marketing opportunities, and coordination of all of the above.
>
> 533. There is a common communication network between each PBM and each manufacturer for the purpose of implementing the rebate scheme and for the exchange of financial rewards for the PBM activities that benefit the defendant drug manufacturers.
>
> 534. At all relevant times, each one **[*53]** of the PBMs was aware of the defendant drug manufacturers' spread scheme, was a knowing and willing participant in that scheme, and reaped profits from that scheme.

(ECF No. 411 ¶¶ 526-27; 532-34.) Plaintiffs' allegations do not sufficiently allege Defendants acted with the sole purpose of injuring Plaintiffs. *Ruta Kretulskie v. Madison Nat'l Life Ins. Co., Civ. A. No. 18-1357, 2019 U.S. Dist. LEXIS 176356, at *16 (M.D. Pa. Oct. 9, 2019)* (dismissing the civil conspiracy claim under Pennsylvania law where the plaintiff "does not fully satisfy the requisites of state law by adequately pleading that the defendants acted with the sole purpose of injuring the plaintiff"). Accordingly, Defendants' Partial Motion to Dismiss Plaintiffs' civil conspiracy claim under Pennsylvania law is **GRANTED**.

C. Standing

Defendants argue Plaintiffs lack standing to pursue certain claims against certain Defendants because no named Plaintiff "suffered an alleged injury from that defendant's product in a given state." (ECF No. 422 at 17.) Plaintiffs do not substantively dispute this issue. Plaintiffs acknowledge the Court's prior ruling regarding the standing of plaintiffs to bring "claims concerning products that [they] neither purchased nor used." (*Id.* at 4 n.17 (citing the February 2019 Order).) Plaintiffs contend, however, "that for **[*54]** each claim, there is at least one plaintiff who has alleged to have purchased one of the insulins at issue, so dismissal of these claims in their entirety would be inappropriate." (ECF No. 455 at 4 n.17.)

The parties' positions are reconcilable. In the February 2019 Order, the Court held: "As Plaintiffs have asserted multiple claims absent allegations of such products being purchased or used in such jurisdictions, such claims cannot withstand this Motion to Dismiss." (ECF No. 252 at 35.) For each state where no named Plaintiff claims to have purchased a certain Defendant's insulin product, such plaintiff's claim under that state's law against said certain defendant is dismissed. Because there is at least one plaintiff who has alleged to have purchased one of the insulins at issue, no individual plaintiff's claim should be dismissed in its entirety. Accordingly, the parties are directed to provide a joint submission with an agreed upon list as to which claims fail as to certain Defendants where no Plaintiff from a given state purchased that Defendant's products.

IV. Conclusion

For the reasons set forth above, Defendants' Partial Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**. **[*55]** Defendants' Partial Motion to Dismiss the state racketeering claims is **GRANTED** with respect to Colorado (Count Four), Georgia (Count Six), Utah (Count Eight), and Wisconsin (Count Nine) and **DENIED** with respect to Arizona (Count Three). Plaintiffs voluntarily withdrew their state racketeering claims with respect to Florida (Count Five) and North Carolina (Count Seven). Defendants' Partial Motion to Dismiss the state-law civil conspiracy claims is **GRANTED** to the extent Plaintiffs base their claims on violations of the federal racketeering law and the state racketeering laws of Colorado, Georgia, Utah, and Wisconsin and **DENIED** to the extent Plaintiffs base their civil conspiracy claim under Arizona law on violations of Arizona's state racketeering law. Defendants' Partial Motion to Dismiss the civil conspiracy claims under Georgia and Pennsylvania law are **GRANTED**. Defendants' Partial Motion to Dismiss the civil conspiracy claims under Arizona law is **DENIED**. Additionally, the

Parties are directed to provide a joint submission with an agreed upon list as to which claims fail as to certain Defendants where no Plaintiff from the respective state purchased that Defendant's products. An accompanying **[*56]** order will follow.

/s/ Brian R. Martinotti

HON. BRIAN R. MARTINOTTI

UNITED STATES DISTRICT JUDGE

Dated: December 17, 2021

ORDER

THIS MATTER is before the Court on Defendants Novo Nordisk, Inc. ("Novo Nordisk"), Sanofi-Aventis U.S. LCC ("Sanofi"), and Eli Lilly and Company's ("Eli Lilly") (collectively, "Defendants") Partial Motion to Dismiss the putative Plaintiffs' ("Plaintiffs") Third Amended Class Action Complaint ("Third Amended Complaint") pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (ECF No. 422.) Plaintiffs oppose the motion (ECF No. 455), and Defendants filed a reply. (ECF No. 468). Having reviewed the parties' submissions filed in connection with the Motion and having declined to hold oral argument pursuant to *Federal Rule of Civil Procedure 78(b)*, for the reasons set forth in the accompanying Opinion and for good cause having been shown,

IT IS on this 17th day of December 2021,

ORDERED that Defendants' Partial Motion to Dismiss (ECF No. 422) the state racketeering claims is **GRANTED** as to Count Four, Count Six, Count Eight, and Count Nine; and it is further

ORDERED that Defendants' Partial Motion to Dismiss (ECF No. 422) the state racketeering claims is **DENIED** as to Count Three; and it is further

ORDERED that Defendants' Partial Motion to Dismiss (ECF **[*57]** No. 422) the state-law civil conspiracy claims is **GRANTED** to the extent Plaintiffs base their claims on violations of the federal racketeering law; and it is further

ORDERED that Defendants' Partial Motion to Dismiss (ECF No. 422) the state-law civil conspiracy claims is **GRANTED** to the extent Plaintiffs base their claims on violations of the state racketeering laws of Colorado, Georgia, Utah, and Wisconsin; and it is further

ORDERED that Defendants' Partial Motion to Dismiss the civil conspiracy claims under Arizona law is **DENIED** to the extent Plaintiffs base their claims on violations of the state racketeering laws of Arizona; and it is further

ORDERED that Defendants' Partial Motion to Dismiss the civil conspiracy claims under Georgia and Pennsylvania law are **GRANTED**; and it is further

ORDERED that Defendants' Partial Motion to Dismiss the civil conspiracy claims under Arizona law is **DENIED**; and it is further

ORDERED that the Parties are to provide a joint submission with an agreed upon list as to which claims fail as to certain Defendants where no Plaintiff from the respective state purchased that Defendant's products.

/s/ Brian R. Martinotti

HON. BRIAN R. MARTINOTTI

UNITED STATES DISTRICT [*58] JUDGE

In re Mallinckrodt PLC

United States Bankruptcy Court for the District of Delaware

December 21, 2021, Decided

Chapter 11, Case No. 20-12522 (JTD)

Reporter

638 B.R. 57 *; 2021 Bankr. LEXIS 3471 **; 2021 WL 6058411

In re: MALLINCKRODT PLC, et al., Debtors.

Core Terms

antitrust, donations, synthetic, programs, manufacturing, prescribing, acquisition, co-pay, post-petition, prescriptions, patients, prices, funds, license, contributions, policies, sales, alleged injury, rights, Pharmaceuticals, competitor, compliance, products, induce, regulatory scheme, antitrust claim, long-acting, but-for, disease, proximate cause

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

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

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

HN1[] **Sherman Act, Claims**

15 U.S.C.S. § 1 of the Sherman Act prohibits entering into agreements that unreasonably restrain trade. An unreasonable restraint is one that inhibits competition in the relevant market.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

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

Antitrust & Trade Law > Sherman Act > Claims

HN2[] Actual Monopolization, Claims

15 U.S.C.S. § 2 of the Sherman Act prohibits the unlawful monopolization of trade. To establish a claim under § 2, a plaintiff must prove that the defendant possesses monopoly power in the relevant market and that the defendant willfully acquired or maintained that power through exclusionary conduct.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN3[] Sherman Act, Claims

In the Third Circuit, a private plaintiff seeking to establish a claim for damages under either 15 U.S.C.S. §§ 1 or 2 of the Sherman Act must first establish that it has antitrust standing. Antitrust standing requires that the plaintiff prove that an antitrust injury was suffered by the plaintiff and that the plaintiff is an appropriate plaintiff to bring the antitrust case.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN4[] Remedies, Damages

In determining antitrust standing, the Third Circuit incorporated several factors set forth in judicial precedent. Those factors were organized into the following multifactor balancing test: (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to prevent; (3) the directness of the injury; (4) the existence of more direct victims; and (5) the potential for duplicative recovery or complex apportionment of damages. Therefore, antitrust standing involves a two-part inquiry: (1) whether the plaintiff experienced an antitrust injury; and (2) whether the plaintiff is the proper plaintiff to bring the suit. In an antitrust case where the plaintiff is seeking damages, an antitrust injury is a necessary element of an antitrust claim.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN5[] Standing, Requirements

Antitrust injury must be caused by the antitrust violation, not a mere causal link, but a direct effect.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN6[] Sherman Act, Claims

An antitrust plaintiff cannot be injured in fact by private conduct excluding him from the market when a statute prevents him from entering that market in any event.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN7[] Reviewability of Lower Court Decisions, Preservation for Review

When a party asserts a claim in pleadings but at trial does not press the claim in any way or present evidence to support it, the party abandons that claim.

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

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

HN8[] Claims, Fraud

To establish liability under the Racketeer Influenced & Corrupt Organizations Act (RICO), the plaintiff must show (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity, plus (5) an injury to business or property. RICO defines racketeering activity as any one of an enumerated lists of different state and federal offenses, also known as predicates. These predicates include any act indictable under specified federal statutes, 18 U.S.C.S. §§ 1961(1)(B)-(C), (E)-(G), as well certain crimes chargeable under state law, 18 U.S.C.S. § 1961(1)(A), and any offense involving bankruptcy or securities fraud or drug-related activity that is punishable under federal law, 18 U.S.C.S. § 1961(1)(D). The plaintiff must show that the defendant committed a RICO predicate act, otherwise the plaintiff's RICO claim fails.

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

HN9[] Private Actions, Racketeer Influenced & Corrupt Organizations

18 U.S.C.S. § 1964(c) provides a private right of action for any person injured in his business or property by reason of a predicate offense. The plaintiff must state an injury to business or property and that a RICO predicate offense not only was a but for cause of injury but was the proximate cause as well. Proximate cause requires some direct relation between the injury asserted and the injurious conduct alleged.

Public Health & Welfare Law > ... > Providers > Payments & Reimbursements > Abuse & Fraud

HN10[] Payments & Reimbursements, Abuse & Fraud

To violate the Anti-Kickback Statute a person or entity must knowingly and willfully offer or pay any remuneration to any person to induce such person to refer an individual to a person for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program. 42 U.S.C.S. § 1320a-7b(b)(2)(A).

Governments > Federal Government > Claims By & Against

Public Health & Welfare Law > ... > Providers > Payments & Reimbursements > Abuse & Fraud

HN11[] Federal Government, Claims By & Against

To find an Anti-Kickback Statute violation, a person or entity must knowingly and willfully offer or pay any remuneration to any person to induce such person to refer an individual to a person for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program. 42 U.S.C.S. § 1320a-7b(b)(2)(A). The False Claims Act imposes liability on any person who (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; or (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim. In addition, the Travel Act prohibits using interstate travel, mail, or facilities with intent to carry out any unlawful activity, 18 U.S.C.S. § 1952(a)(3), or with intent to distribute the proceeds of any unlawful activity. 18 U.S.C.S. § 1952(a)(1).

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

Evidence > Burdens of Proof > Allocation

HN12[] Private Actions, Racketeer Influenced & Corrupt Organizations

Notably, mere correlation does not demonstrate causation under RICO.

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

HN13[] Private Actions, Racketeer Influenced & Corrupt Organizations

When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries.

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Judges: JOHN T. DORSEY, UNITED STATES BANKRUPTCY JUDGE.

Opinion by: JOHN T. DORSEY

Opinion

[*61] OPINION[1] **AND FINAL ORDER**

The price of prescription drugs in the United States has generated a great deal of attention from government officials, the media and parties who must pay what they consider to be unreasonably high prices for medications. At times these high prices lead to litigation against drug manufacturers. Debtors, who produce one of the most expensive drugs in the U.S., are one of those manufacturers.

Prior to filing for bankruptcy protection, Debtors had been sued by numerous parties over the price of their drug, HP Acthar Gel ("**Acthar**"). Acthar was first approved for use in the United States nearly 60 years ago. Until 2003, Acthar sold for less than $1000 per vial. **[**4]** By 2019, it was selling for nearly $40,000 per vial. Certain third-party payors, who are referred to in this proceeding as the Acthar Insurance Claimants ("**AICs**"), sued Debtors prepetition, and filed proofs of claims for prepetition purchases of Acthar, as well as proofs of claims for administrative expenses based upon post-petition purchases, along with a motion for an order allowing the administrative expense claims.[2] Debtors objected to the Administrative Expense Claims.[3] Following denial of Debtors' Motion for Summary Judgment,[4] I conducted a two-week bench trial to determine the validity of the AICs' Administrative Claims.

Charging a high price for a prescription drug is not, in and of itself, illegal. The United States provides limited controls over the pricing of drugs and, generally speaking, a manufacturer is free to charge whatever price it thinks the market will bear. To prevail on their claims, therefore, the AICs needed to prove that Debtors' **[*62]** ability to

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[1] This opinion shall constitute the Court's findings of fact and conclusions of law as required by *Federal Rule of Civil Procedure 52* as made applicable by *Federal Rule of Bankruptcy Procedure 7052*.

[2] D.I. 2159, Motion for Entry of an Order Allowing and Compelling Payment of Administrative Claims Pursuant to 503(b) of the Bankruptcy Code (the "**Motion**").

[3] D.I. 3529, Debtors' Objection to Certain Acthar-Related Administrative Claims (the "**Objection**").

[4] D.I. 4792.

charge a supracompetitive price resulted from some other illegal activity. The AICs, therefore, claim that the price of Acthar was unreasonably high because of Debtors' anti-competitive conduct in violation of **[**5]** the *Sherman Act*, and their illegal payments to certain charities and doctors in violation of the *RICO Act* (among other laws) in order to boost sales of Acthar. Having reviewed the extensive evidence submitted at trial, I conclude that the AICs have failed to meet their burden of proof on either of these allegations. Therefore, for the reasons I will explain, the AICs' Motion is denied and the Debtors' Objection to the Administrative Claims is sustained.

FACTS

I. The History of Acthar and Synacthen

The antitrust claims here revolve around two drugs: Acthar and Synacthen Depot ("**Synacthen**"). The first, Acthar, is a drug manufactured and sold by the Debtors. Acthar is a naturally derived, long-acting complex mix of peptides that includes the full natural human ACTH 1-39 amino acid chain along with additional peptides.[5] It was approved for sale in the United States by the FDA in 1952 and is currently approved to treat 19 conditions or "indications."[6] For one of these conditions, infantile spasms ("**IS**") Acthar is a first line treatment, meaning it is typically the first drug prescribed to treat the condition. For all other indications, it is a second-line or later treatment, meaning it is not the first **[**6]** drug prescribed to treat a condition and is prescribed only after other treatments have failed.[7] Acthar is not covered by a patent, but its manufacturing process is a trade secret.[8]

There is no generic or non-brand name version of Acthar, but there are synthetic ACTH products. Synthetic ACTH products contain 24 of the 39 amino acids found in naturally occurring ACTH. Some of the synthetic ACTH products are short-acting, not long-acting like Acthar, and are approved only for diagnostic use, not therapeutic use, meaning they are approved for use in diagnosing a condition, but not treating it. Cortrosyn is an example of a short-acting synthetic ACTH that is on the market for diagnostic purposes.[9]

While several long-acting synthetic ACTH products have been developed, none have been approved for use in the U.S.[10] One such product, the other drug at the center of this case, is Synacthen. The active ingredient in Synacthen and other long-acting synthetic ACTH products is simply synthetic ACTH 1-24, also known as cosyntropin or tetracosactide.[11] Synacthen is approved for sale in over 40 countries to treat several conditions (many of the same ones for which Acthar is used) but is not approved in the **[**7]** U.S. Synacthen has no patent or trade secret protection.[12]

II. Mallinckrodt's Acquisition of Acthar and the U.S. Rights to Synacthen

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5 DX1; Pretrial Order Stipulated Facts ¶ 19.

6 AICX0091.

7 11-15-21 Transcript at 143.

8 Pretrial Order Stipulated Facts ¶ 27.

9 Pretrial Order Stipulated Facts ¶ 35; 11-17-21 Transcript at 31-32.

10 DX 359; Pretrial Order Stipulated Facts ¶¶ 34-36.

11 11-10-21 Transcript 45, 54, 112.

12 Pretrial Order Stipulated Facts at ¶¶ 34-56.

Acthar was owned by Sanofi (now Aventis) until it was purchased by Questcor **[*63]** Pharmaceuticals, Inc. in 2001.[13] Questcor was struggling to make a profit from its sales of Acthar. Then, in 2003 Acthar received orphan drug designation for IS, though it was not yet approved for that condition. With that designation, and following a change in leadership, Questcor implemented a new aggressive pricing strategy for Acthar and the price jumped from $902 per vial in 2003 to over $23,000 in 2007.[14] In October of 2010, Acthar was approved to treat IS and obtained orphan drug exclusivity for that condition until 2017.[15] Questcor continued to increase the price of Acthar until 2012, when the price reached $28,686.[16]

In the years leading up to 2013, Questcor had been monitoring Synacthen, which was then held by Novartis, as a potential competitor to Acthar.[17] Novartis held global development rights for Synacthen, but never developed it for sale in the U.S., determining that it would be too time-consuming and costly to do so. It decided to auction off the U.S. rights to Synacthen instead. **[**8]** [18]

When Questcor learned that Novartis was shopping the U.S. rights to Synacthen, it acted quickly to bid on those rights. Questcor outbid the competing bidders, Retrophin and Marathon, and secured the license for $135 million ($300 million with the annual milestone payments included).[19] The license provided Questcor with the Synacthen formulation, trademark, post-marketing safety data, manufacturing know-how, and toxicology studies.[20]

Although Questcor's agreement with Novartis included "mechanisms to ensure that Questcor pursue[d] FDA approval and commercialize[d] Synacthen upon approval,"[21] the acquisition -- being one by a competitor of a potentially competing product -- drew the attention of the Federal Trade Commission (the "**FTC**"). Only a month after the Synacthen acquisition, the FTC opened an investigation "to determine whether the acquisition may substantially lessen competition and thereby violate federal antitrust laws."[22] The FTC action was resolved a few years later, as discussed below.

Around the same time that Questcor acquired the Synacthen license, the Debtors had also begun to conduct diligence regarding the potential acquisition of Questcor. In November of 2013, Mallinckrodt's **[**9]** investment banker, Barclay's, delivered its preliminary assessment of Questcor to Mallinckrodt's management.[23] The Barclay's Report highlighted Acthar as Questcor's "Key Product" and noted that upon acquiring Acthar, Questor had increased its manufacturing capacity and increased the price from $1650 per vial to $28,686 per vial. It also noted that "Acthar is not protected by any patents . . . but multiple barriers to entry related to formulation, manufacturing and regulatory make generic synthetics competition less likely."[24]

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[13] Pretrial Order, Stipulated Facts at ¶ 28.

[14] AICX 109.

[15] AICX0091.

[16] AICX0091

[17] AICX-499.

[18] DX 162.

[19] AICX-79, DX 220.

[20] 11-10-21 Transcript at 60; AICX0091

[21] AICX 78

[22] AICX-349

[23] AICX 91.

[24] *Id.*

[*64] The Barclay's presentation also discussed Questcor's recent acquisition of Synacthen, noting there were "immaterial U.S. sales and long projected timeline to U.S. launch."[25] It went on to list the Synacthen acquisition as one of the barriers to entry for Acthar competition, describing Synacthen as "Questcor's main source of potential competition."[26] The Barclay's presentation listed the Synacthen acquisition as one of two defensive moves recently made by Questcor, along with Questcor's acquisition of BioVectra, Questcor's manufacturing partner for the active ingredient in Acthar. As Barclay's explained, the BioVectra acquisition "secured key manufacturing process trade **[**10]** secrets relating to Acthar."[27] The presentation went on to describe the Synacthen acquisition as "a defensive move to acquire a potential future competitor" and noted that it "removes the overhang of potential franchise erosion due to future competition...."[28]

The Debtors' internal due diligence came to similar conclusions about Questcor, describing Acthar as a "protected franchise" due to the complicated formulation, manufacturing, and regulatory requirements and suggesting that Questcor had "walled off possible weaknesses by acquiring ... Synacthen."[29] Mallinckrodt's internal diligence presentations also state that the Synacthen acquisition could "control introduction [of Synacthen] into the U.S. market" and assume that Acthar would "face no competitive threat in the future from synthetic ACTH" under any forecast scenario.[30]

Mallinckrodt's diligence into Questcor also highlighted legal actions and governmental investigations against Questcor, which included the FTC probe, and investigations by the US Attorney's Offices for Pennsylvania and New York, as well as the SEC regarding Questcor's promotional practices related to Acthar with potential fines in the range of $200-400 million. **[**11]** Mallinckrodt's Audit Committee characterized the FTC probe as "a medium risk to achievement of deal value."[31]

With these risks in mind, the Debtors' board voted to proceed with the acquisition and the transaction closed in August of 2014, in a deal worth approximately $5.8 billion.[32]

III. Development of Synacthen and other Synthetic ACTH Products

Thus, by the end of 2014, Mallinckrodt owned both Acthar and the U.S. rights to Synacthen. Since Questcor's agreement with Novartis required it to try to use commercially reasonable efforts to develop and commercialize Synacthen and included milestone deadlines for doing so, it had begun working on developing Synacthen promptly after the acquisition. Questcor quickly discovered that it got less than it had bargained for from Novartis.[33]

Among other things, Questcor learned that there were problems with both Synacthen's drug substance (the drug's active pharmaceutical ingredient or "**API**") and manufacturing that would need to be resolved before any effort to obtain FDA approval could begin. Within a few months **[*65]** of the acquisition of Questcor, Debtors found themselves in the position of having to find a new manufacturer for Synacthen, a process which was **[**12]** delayed

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[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] AICX 103, AICX 106.

[30] AICX 109; AICX 92.

[31] AICX 103.

[32] AICX 1442.

[33] DX 230, DX 231, DX 235, DX 227, DX 317.

by the then current manufacturer's slow release of the necessary records. While they were able to secure a new manufacturer by June of 2014, it was not until October of 2015 that that manufacturer was able to produce an "initial engineering batch" and not until February 2016 that it was able to produce batches for use in clinical trials.[34]

In the meantime, the Debtors needed to determine which indications or medical conditions they would pursue for Synacthen. With the knowledge that Synacthen's approval for any indication for which Acthar was already approved would significantly affect Acthar's sales, the Debtors considered multiple options, all of which would "extend Acthar's lifecycle."[35] In several internal emails, the Debtors' employees expressed concern about bringing Synacthen to the market for any indication. In February of 2016, Josh Schafer, the Debtors' Chief Strategy Officer, prepared a report entitled "Synacthen Scenarios & Assumptions" in which "it is assumed that Synacthen would gain greater than 50% of IS patient share."[36] The report further calculated the cash impact of a Synacthen launch, concluding that a difference of just two years would result in a benefit to **[**13]** Mallinckrodt of potentially hundreds of millions of dollars.[37]

The Debtors ultimately decided to pursue approval for a disease called Duchenne's muscular dystrophy ("**DMD**"), a decision that Mallinckrodt's Chief Scientific Officer, Dr. Steven Romano testified was driven by several factors. Clinically, the Debtors decided on DMD because it was a disease affecting adolescent boys for which there were currently few treatment options and because the data regarding the ways in which Syncathen works in the body suggested that Synacthen might be particularly effective.[38] But the Debtors also chose DMD because they believed they could get orphan drug status for Synacthen if it were approved for this indication, which would give the Debtors exclusivity for several years and enable them to price Synacthen at a higher level than it was priced outside of the U.S. -- roughly $300,000 per year.[39] Debtors knew that obtaining approval of Synacthen for DMD had a low probability of success (about 15%), but as Dr. Romano and others testified, the probability of the FDA approving any drug is relatively low.[40]

While working to get Synacthen approved to treat DMD, the Debtors were also conducting clinical research **[**14]** and market studies to understand the differences between Acthar and Synacthen with the goal of helping both physicians and their own commercial team understand the distinctions between the products.[41] Some of the market research the Debtors had conducted showed that physicians believed Synacthen and Acthar to be clinically similar and therefore if the Debtors failed to differentiate the two products, Acthar sales might quickly decline in favor of Synacthen sales.[42] Accordingly, the Debtors undertook **[*66]** a "full scrub of data to remove any use of Synacthen data in reference to Acthar."[43]

During the same time that the Debtors were working on getting Synacthen approved for treatment of DMD, the losing bidders for the Novartis license — Retrophin and Marathon — also began to work on getting a synthetic ACTH product to market. The Debtors' possession of the rights to Synacthen did not prevent others from

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[34] DX 499, DX 675.

[35] AICX 484.

[36] AICX1302.

[37] *Id.*

[38] 11-10-21 Transcripts at 55-57, 88, 89.

[39] 11-10-21 Transcript at 11.

[40] See, e.g., 11-10-21 Transcript at 10-11, 77.

[41] 11-10-21 Transcript at 19-AICX568, AICX-557.

[42] 11-8-21 Transcript at 144-45; AICX 546

[43] AICX-554, AICX 555.

developing a competing long-acting synthetic ACTH formulation. There was no IP protection on Synacthen, and its active ingredient was relatively easy to reproduce.[44]

Retrophin launched its development efforts immediately after losing its bid for Synacthen. On June 13, 2013, following its failed auction **[**15]** bid, Retrophin's CEO observed that losing the auction was a blessing in disguise, stating "Synacthen was off-patent. The API [active pharmaceutical ingredient] is readily available. We can secure API, formulate the product, file for orphan status, run the trial we intended to run, all without Novartis.... [W]e might even save time given Novartis is still upgrading their CMC and their fill-finish plan is not FDA approved."[45]

By December 2014, Retrophin was able to formulate its own synthetic ACTH product and manufacture "proof of concept" batches.[46] Retrophin sought FDA approval of its product for use in treating infantile spasms and nephrotic syndrome.[47] However, it abandoned the project at the clinical trial stage.[48]

Marathon likewise began working on a synthetic ACTH shortly after it lost the Novartis bid, a project that was later sold to West Therapeutics, Inc.[49] West was also seeking approval of its product for treatment of infantile spasms.[50]

These last few events — the development and manufacturing efforts of the Debtors, Retrophin, and Marathon/West all took place in the three plus years after Questcor acquired the Synacthen license in 2013. As previously noted, shortly after that transaction **[**16]** closed, the FTC launched an investigation into whether the acquisition of the Synacthen license violated antitrust laws. As all the events from 2013 through 2016 unfolded, the FTC continued its investigation and in 2017, the parties reached a settlement. In addition to a $100 million fine, the settlement required the Debtors to (1) sublicense certain of the rights to Synacthen to a third party, royalty free and with an indefinite term, to develop Synacthen and seek approval for use in treating infantile spasms and nephrotic syndrome; (2) provide the sublicensee with all rights and information it had received under the license with Novartis, as well as the Debtors' improvements upon those assets, (3) fulfill contractual obligations to pay Novartis; and (4) file annual reports with the FTC.[51] The FTC approved Marathon (later West) as the sublicensee.

So, although Marathon/West had already begun working on a synthetic ACTH, by 2017 it had received all the **[*67]** Synacthen assets that the Debtors had received from Novartis. West ultimately sought FDA approval for its synthetic ACTH product, Cosyntropin, for a diagnostic indication using what is commonly referred to as a "505(b)(2) application."[52]

[17]** West, using both its own data and the data it received from the Debtors, tried to get approval for Cosyntropin, but following feedback from the FDA regarding the difficulty it would likely encounter in establishing the necessary bridge, West ultimately decided to abandon its attempts to bring a synthetic ACTH product to market.[53]

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44 11-12-21 Transcript at 97-98, 101.

45 DX 331.

46 DX 341 at 1, 5.

47 11-17-21 Transcript at 91.

48 11-17-21 Transcript at 34.

49 Burke Deposition transcript at 34-35, 175-177; 11-17-21 Transcript at 35-39.

50 11-17-21 Transcript at 94.

51 AIXC 0819.

52 11-17-21 Transcript at 36. Burke Deposition at 176-78. A 505(b)(2) application is a somewhat abbreviated route to obtaining drug approval by the FDA because it allows an applicant to rely on the data of an already approved product if it can establish that its product and the already-approved product are similar enough that new data is not necessary. Establishing this connection between the new drug and the already approved drug is referred to as a "bridge". Burke Deposition at 63.

53 11-17-21 Transcript at 37-38; 11-12-21 Transcript at 123-125.

The Debtors, however, were continuing their efforts to get Synacthen approved, working through the various stages of clinical trials. It was then that they began to encounter more difficulties. First, the FDA approved a new drug for DMD, which was priced significantly lower than Synacthen's anticipated price. This drastically changed the economics of the Synacthen project for the Debtors and they decided to write off the value of Synacthen entirely.[54] Debtors continued to work on getting Synacthen approved for DMD for another year, since they had committed to the DMD patients and medical community to use best efforts to complete the studies, but they encountered what they viewed to be insurmountable problems in enrolling patients for the necessary clinical trials.[55] Accordingly, in December of 2019, Debtors abandoned the project.

As Dr. Romano testified, there were **[**18]** multiple considerations, including commercial, regulatory, legal, and practical ones that informed the Debtors' decision not to do anything further with Synacthen at that point in time.[56] There were also financial concerns. Management was informed by Hillary Muldoon, Debtors' head of competitive intelligence, that "a potential launch of [Synacthen] in any therapeutic indication will have a negative impact on the Acthar business."[57] Following their decision to cease development of Synacthen, on July 14, 2020, the Debtors notified Novartis that they were unilaterally and permanently suspending all remaining rights to develop Synacthen.

At this point in time, no one is pursuing the development or marketing of Synacthen or any synthetic ACTH. However, there is one company, ANI Pharmaceuticals, Inc., that was working on reviving a previously approved, but lapsed, non-synthetic natural ACTH product. On November 1, 2021, ANI obtained FDA approval for its product, Purified Cortrophin Gel, for the treatment of acute exacerbations of MS, rheumatoid arthritis, and nephrotic syndrome.[58] ANI's product is expected to hit the market in 2022 and will compete with Acthar.[59]

[*68] IV. <u>Acthar Pricing</u>

Over the years, **[**19]** the Debtors have considered making changes to Acthar's pricing structure multiple times. By early 2020, following the entry of a $650 million judgment against the Debtors by a D.C. Court on claims made by the Centers for Medicare and Medicaid Services ("**CMS**") regarding rebates owed to the federal government due to increases in Acthar's price[60] and the continued negative publicity surrounding Acthar, Debtors again revisited the idea of changing Acthar's pricing structure. On April 30, 2020, Hugh O'Neill sent an email attaching a presentation called "Acthar Gel Pricing Options" in which the Debtors weighed "the financial realities of the company" against "the ability to shed the negative impact" that the pricing of Acthar has had on their corporate reputation.[61] The presentation concludes that "there is no scenario where a [price] reset results in a better financial outcome for the brand. The tradeoff will come down to a choice between reduction of future risk and optimizing short term financial results."[62]

As Mr. Schafer, the Debtors' Chief Strategy Officer explained in May of 2020, "Acthar appears more 'Cash Cow' than 'Star'... we need to evaluate whether to divest or manage for cash. **[**20]** . . .Divesting Acthar could be beneficial because of its impact on capital and negative growth profile, and remove perceptual overhang. However,

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[54] 11-10-21 Transcript at 12-13, 15.

[55] 11-10-21 Transcript at 80-82.

[56] 11-10-21 Transcript at 18.

[57] AICX-303.

[58] DX 654.

[59] 11-10-21 Transcript at 52.

[60] See AICX 485

[61] AICX 320.

[62] *Id.*

our ability to transact at a reasonable value is dependent on cleansing Acthar of its liabilities."[63] Ultimately, the Debtors decided not to change the price of Acthar.

V. Acthar Co-Pay Subsidies

As the price of Acthar steadily increased, Questcor developed relationships with certain non-profit organizations that provide co-pay assistance to patients who cannot afford their copays. As Kathleen Breton, the Debtors' Senior Director of Patient Services and Reimbursement testified, "most Medicare patients' Acthar copays are in the thousands of dollars" and "most Medicare patients end up requiring some form of financial assistance to pay for Acthar."[64]

In 2013, Questcor had been working with an entity called the Chronic Disease Fund ("**CDF**"), a non-profit organization that provides copay assistance for patients who cannot afford the full copay their insurer requires for a particular drug. In December 2013, in response to negative media attention regarding CDF's relationship with Questcor, CDF's president resigned, and the entire board was replaced. CDF **[**21]** subsequently closed the funds that covered Acthar as noncompliant with its new policies.[65]

When CDF closed its funds, Questcor moved its donations to two other foundations, the Caring Voice Coalition ("**CVC**") and The Assistance Fund ("**TAF**"). But by the end of 2015, CVC also terminated its relationship with Questcor, also because of negative media attention.[66]

Questcor, by now Mallinckrodt, continued its relationship with TAF, with whom it worked from 2014 until December **[*69]** 2020.[67] Debtors' donations were allocated across funds for multiple diseases. Before the Debtors started donating to TAF, TAF did not cover copays for Acthar.[68]

Internal emails at Mallinckrodt show that the company was aware that its donations to TAF increased Acthar sales. In an August 2015 email from the Debtors, an employee acknowledged that Mallinckrodt's relationship with TAF, or more specifically its donations to TAF, "significantly increase[d] sales of Acthar..."[69] From 2014 through 2017, the general manager of the Acthar business determined how much to donate to TAF.[70]

However, in 2017, following an industry-wide investigation into 501(c)(3) foundations that provide copay support, and the service of a civil investigative demand **[**22]** upon Debtors by the U.S. Attorney's Office for the District of Massachusetts, Debtors began to implement new policies and procedures regarding their relationships with copay assistance funds. They first transferred responsibility for relationships with these funds from their commercial department to their government affairs department.[71] In 2018, the Government Affairs department implemented a detailed standard operating procedure ("**SOP**") that considered the guidelines issued by the U.S. Department of Health and Human Services' Office of Inspector General (the "**OIG**") regarding how manufacturers can make donations to funds without violating the Anti-Kickback statute.[72] The Debtors' U.S. General Counsel, Mark Tyndall,

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[63] AICX-485.

[64] 11-8-21 Transcript at 173.

[65] AICX-417, AICX-94

[66] AICX 533, 11-8-21 Transcript at 177-78.

[67] AICX-97

[68] Pretrial Order ¶ 103.

[69] AICX-162.

[70] 11-8-21 Transcript at 179-80.

[71] DX17.

testified that Debtors' agreement with TAF expressly incorporated the Debtors' SOP and included firewalls to ensure that the commercial business had no contact with anyone at TAF. Donation requests from TAF to the Debtors were unsolicited and due diligence was conducted to ensure that funds at TAF to which the Debtors' donations were allocated were "defined by reference to widely recognized clinical standards," "without limitation to symptoms, severity of symptoms, or disease **[**23]** stages," and "in a manner that are open to a broad range of products" as the OIG guidance required.[73] Debtors directed TAF to limit the amount of information and data provided to the Debtors to ensure that they could not correlate their contributions to the amount of co-pay assistance provided to Acthar patients.[74]

While Debtors established a Patient Foundation Charitable Contributions Committee to oversee and approve TAF donations, it does not appear that the committee operated in any formal capacity. As Mr. Tyndall testified, the committee did not hold formal meetings, keep minutes, or have bylaws, and they communicated largely by email.[75]

Between 2014 and 2020, the Debtors donated over $120 million to TAF. Over the years, the Debtors had discussed ceasing donations to TAF, but observed that doing so "would have a negative impact of tens of millions of dollars per year on Acthar's net sales."[76] Ultimately, the Debtors decided to stop donations beginning in **[*70]** 2021 because of "concerns about potential legal exposure of continuing to make those donations."[77] When the Debtors did cease donations, they saw "an uptick in the number of patients that [they] sent to [their] free goods programs ... because **[**24]** the funding wasn't available at The Assistance Fund anymore."[78]

VI. <u>Physician Speaker Program</u>

During this time, the Debtors also worked to increase their efforts to market Acthar by hosting speaker programs to educate healthcare professionals about Acthar. The goal of these programs was to increase sales of Acthar.[79] Like with copay fund contributions, the Debtors also have policies in place regarding their speaker programs to prevent abuse.[80] These policies require, among other things, that speakers have a contract in place and are paid fair market value for their services, that speaking training meetings and programs be held in education-appropriate venues, that all meals provided in conjunction with such programs are modest and for a legitimate purpose, and that Debtors publish information about the payments they have made to physicians annually.[81]

Debtors use a third-party speaker program management firm called Veeva to manage logistics and provide Debtors with reports regarding compliance with their policies. Where non-compliance is alleged, it is investigated, and corrective action is taken where necessary.[82]

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[72] DX 002.

[73] 11-9-21 Transcript at 94.

[74] 11-9-21 Transcript at 80, 91, 92, 94, 101-103.

[75] 11-9-21 Transcripts at 63-64.

[76] 11-9-21 Transcripts at 155-156.

[77] 11-9-21 Transcript at 153.

[78] 11-8-21 Transcript at 180-81.

[79] PTO at 19.

[80] DX 52, 55, 58, 62, 63, 67, 71 and DX677.

[81] DX 052, DX 062, DX 071 and 11-17-21 Transcript at 111-113, 121-22.

[82] 11-17-21 Transcript at 142-143.

During the relevant time for this case, which is the post-petition period, the Debtors **[**25]** paid approximately $1.75 million to physicians for at least 443 speaker events and there are ongoing investigations into the Debtors' payments to healthcare providers in at least two states.

ANALYSIS

I. Federal Antitrust Claims

The AICs assert administrative expense claims based on alleged antitrust violations by the Debtors under *Section 1* and *Section 2 of the Sherman Act* during the post-petition period. In connection with Debtors' Motion for Summary Judgment, I concluded that there were material issues of fact regarding whether Debtors' conduct, either pre-petition or post-petition, constituted illegal conduct under the *Sherman Act* that allowed the Debtors to maintain a monopoly giving Debtors the ability to charge supracompetitive prices post-petition.[83]

HN1[] *Section 1 of the Sherman Act* prohibits entering into agreements that unreasonably restrain trade. *LifeWatch Servs. v. Highmark Inc., 902 F.3d 323, 335 (3d Cir. 2018)*. "An 'unreasonable' restraint is one that inhibits competition in the relevant market." *Id.*

HN2[] *Section 2 of the Sherman Act* prohibits the unlawful monopolization of trade. To establish a claim under *Section 2*, a plaintiff must prove that the defendant possesses monopoly power in the relevant market and that the defendant willfully acquired or maintained that power through exclusionary conduct. *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307-08 (3d Cir. 2007)*.

[*71] ***HN3***[] In the Third Circuit, a private plaintiff **[**26]** seeking to establish a claim for damages under either *Section 1* or *Section 2 of the Sherman Act* must first establish that it has antitrust standing. *City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 264 (3d Cir. 1998)* ("The question of standing is a threshold inquiry in all actions."); see also *In re Wellbutrin XL Antitrust Litig., 868 F.3d 132 (3d Cir. 2017)* (same). Antitrust standing requires that the plaintiff prove that an antitrust injury was suffered by the plaintiff and that the plaintiff is an appropriate plaintiff to bring the antitrust case. *Associated General Contractors of California, Inc. v. California State council of Carpenters, 459 U.S. 519, n.31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. Thus, the Debtors argue, the AICs had to prove that but for Questcor's acquisition of the Synacthen license, the FDA would have approved Synacthen for sale in the U.S., which would have created competition for Acthar in the market.

The AICs argue that the Debtors apply the wrong standard for establishing antitrust standing, or what they refer to as causation. They assert that I should apply the standard outlined in *Novell, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.), 699 F. Supp. 2d 730, 748. (D. Md. 2010)*, *rev'd in part on other grounds by* *Novell, Inc. v. Microsoft Corp., 429 Fed. Appx. 254 (4th Cir. 2011)*, that to satisfy the causation requirement a plaintiff need only show that the conduct at issue "contributed significantly to a defendant's continued monopoly power." Thus, the AICs argue, they only needed to present evidence that it was probable that a competitor armed with the Synacthen license would have obtained FDA approval absent Debtors' **[**27]** conduct. The AICs reliance on *Novell* is misplaced. As the *Novell* Court recognized, the "contributed significantly" standard is derived from the Federal Circuit's decision in *United States v. Microsoft, 253 F.3d 34, 80, 346 U.S. App. D.C. 330 (Fed. Cir. 2001)*. The Federal Circuit specifically stated in its ruling that the "contributed significantly" standard applied in "equitable enforcement actions as opposed to actions for money damages." Therefore, I will apply the standard articulated by the Third Circuit in *City of Pittsburgh* and *Wellbutrin*.

HN4[] In determining antitrust standing, the Third Circuit incorporated several factors set forth by the Supreme Court in *Associated General Contractors of California, Inc. v. California State Council of Carpenters. 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. Those factors were organized into the following multifactor balancing test

[83] D.I. 4792.

by the court in *In re Lower Lake Erie Iron Ore Antirust Litig. 998 F.2d 1144, 1165-66 (3d Cir. 1993)*: (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to prevent; (3) the directness of the injury; (4) the existence of more direct victims; and (5) the potential for duplicative recovery or complex apportionment of damages. Therefore, antitrust standing involves a two-part inquiry: (1) whether the plaintiff experienced an antitrust injury; and (2) whether the plaintiff is **[**28]** the proper plaintiff to bring the suit. In an antitrust case where the plaintiff is seeking damages, an antitrust injury is a necessary element of an antitrust claim. *See* *In re Wellbutrin XL Antitrust Litig., 868 F.3d 132 (3d Cir. 2017)* ("antitrust standing is more properly viewed as an element of an antitrust claim..."). Because I find that the AICs failed to carry their burden of proving a but for connection between the Debtors' conduct and their alleged injury, I do not need to address the remaining standing issues. *See* *City of Pittsburgh v. W. Penn Power Co., **[*72]** 147 F.3d 256, 265 (3d Cir. 1998)* ("If antitrust injury is not found, further inquiry is unnecessary.")

Debtors rely on *City of Pittsburgh* to argue that antitrust standing does not exist when a plaintiff's grievance is caused by a regulatory scheme and not the defendant's actions. *147 F.3d 256, 266*. In *City of Pittsburgh*, the City alleged an antitrust injury based on two power companies entering into a pre-merger agreement whereby one power company pulled its application to expand its services to additional zones in Pittsburgh. The City argued that the agreement lessened competition and raised prices. The court reasoned that the antitrust injury was too speculative as the lack of competition was due to a regulatory scheme and the City was merely "foist[ing] [its] version of what might have been on the court under **[**29]** the rubric of antitrust injury." *Id. at 267*. The court also concluded that there was a lack of facts regarding the likelihood that the regulatory authority would have granted the withdrawing power company the approval it had requested.

Debtors contend that *City of Pittsburgh* is dispositive because the court rejected antitrust claims for lack of antitrust injury where "[t]he presence of the regulatory scheme and need for approval" serves to cut "the causal chain and converts what might have been deemed antitrust injury in a free market into only a speculative exercise." *147 F.3d at 267-68*. If no antitrust injury exists where it is unknown whether the regulatory authority would have granted a competitor approval because it never applied, then surely there can be no injury in a case where a competitor sought approval and was denied.

The AICs argue that *City of Pittsburgh* is inapposite because the court made clear that the ruling was specific to the era of regulated electric utility monopolies. At least one decision from the District of Delaware concluded that *City of Pittsburgh* did not apply in the context of a case involving the intersection of the Sherman Act and the *Hatch Waxman Act*. *In re Metoprolol Succinate Direct Purchaser Antitrust Litigation, 2010 U.S. Dist. LEXIS 36303, at *21 (D. Del. Apr. 13, 2010)*. However, that decision was prior to the Third Circuit's decision in *Wellbutrin* where the **[**30]** Court recognized that "[i]n *City of Pittsburgh* we said that no antitrust standing exists when a plaintiff's grievance is caused by a regulatory scheme rather than by the defendant's actions." *868 F.3d at 166*. I conclude that the *Wellbutrin* Court recognized the continuing validity of *City of Pittsburgh* and at least one court has recognized that the *Metoprolol* decision was superseded by *Wellbutrin. See* *United Food & Commer. Workers Local 1776 v. Teikoku Pharma USA, 296 F. Supp. 3d 1142, 1197 (N.D. Cal. 2017)* (noting that *Metoprolol*'s rejection of the concept that certain regulatory requirements could be the cause of the antitrust injury instead of the defendant's conduct was superseded by the *Wellbutrin* and *Nexium* decisions).

In *Wellbutrin*, the appellants claimed that absent certain reverse settlement agreements, Anchen Pharmaceuticals would have launched a generic drug to compete with the defendant's drug. *868 F.3d at 165*. The Court stated that the appellants had to show that the harm - increased drug prices for Wellbutrin XL -was caused by the settlement. *Id. at 164-165*. The court ultimately rejected appellants' argument because it did not account for a regulatory or legislative bar, holding that appellants' antitrust claims fail because the defendant's actions were not the actual cause of the appellants' alleged injury. *Id. at 165-166*. Moreover, the Court concluded that the appellants must produce evidence that it is more likely **[**31]** than **[*73]** not that Anchen Pharmaceuticals, would have obtained a license. *Id. at 167*. Evidence showing that another manufacturer may have obtained a license fails to meet this burden. *Id.*

In *Meijer, Inc. v. Biovail, 533 F.3d 857, 382 U.S. App. D.C. 385 (D.C. Cir. 2008)*, the Court recognized the need for an antitrust plaintiff to prove that the defendant's conduct caused the alleged antitrust injury in the context of a regulatory scheme. The Court concluded: "a would-be purchaser suing an incumbent monopolist for excluding a potential competitor from which it might have bought a product at a lower price must prove the excluded firm was willing and able to supply it but for the incumbent firm's exclusionary conduct." *Id. at 862*. The AICs assert that they have met that burden of proof. I disagree.

Debtors presented evidence at trial, through the expert testimony of Dr. Williams and Dr. Trish as well as the testimony of Mallinckrodt executives, that FDA regulatory requirements created significant barriers to the entry of Synacthen, or any other long-acting synthetic ACTH drug, into the market.[84] The documents submitted into evidence corroborate this testimony. For example, the documents show that before Questcor even acquired the Synacthen license, the previous owner, Novartis, concluded that **[**32]** obtaining FDA approval for Synacthen in the U.S. was likely to be so fraught with challenges that it was not worth the effort.[85] Upon acquiring the Synacthen assets from Novartis, Questcor too began to see that what they had purchased was likely not going to be helpful in overcoming the anticipated FDA hurdles.[86] Even after they resolved the biggest unforeseen problem with the Synacthen assets — the fact that the existing Synacthen manufacturer was not FDA approvable—and were able to get a new manufacturer up and running, Questcor (later Mallinckrodt) encountered additional problems at the clinical trial stage that prevented it from satisfying the FDA's stringent requirements.[87]

Further, the problems that the Debtors encountered with the FDA approval process **[*74]** are not ones that are unique to them or ones that could be explained away by reference to their decisions along the way. The evidence at trial suggested that getting beyond the clinical trial stage of the FDA approval process is so difficult that the other manufacturers who sought approval of a synthetic ACTH product either also tried and failed at this stage or only sought approval in a manner that would avoid it entirely.[88] Even the AICs' **[**33]** own expert, Dr. Rheinstein? who also described the rigorous FDA approval process? concluded that he could only opine that Synacthen could have been approved for diagnostic use and not that it would have been approved because there are always other considerations, including whether the development of synthetic ACTH would make business sense.[89] I find this to be persuasive.

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[84] See generally, e.g., 11-10-21 Transcript (Romano), 11-17-21 Transcript (Williams), 11-16-21 Transcript (Trish).

[85] DX 162 (discussing possibility of pursuing FDA approval of Synacthen for MS indication and stating that "the team felt there were significant challenges to developing Synacthen as a commercially successful product in this modern era of FDA review and scrutiny compared with the 1952 approval of Acthar Gel in MS.").

[86] DX 231 (discussing change in FDA requirements that lowered the allowed limit of impurifications contained in peptides, stating "up until 2007, both FDA and EMA were allowing peptides to have [ ] limits of 0.2%, 0.5% and 1.0%. It is still allowed at those limits in the EU . . . However, in 2008, FDA started to push peptides to comply with the ICH limits for small molecules (unless justified), so it is now 0.05% report, 0.1% ID, and 0.15% qualified for API. . . Basically, that means that we will need to qualify (with existing tox data hopefully), the two new impurities at the very least."); DX 230 (discussing shortcomings in existing toxicology data); DX 235 (discussing problems Questcor uncovered with Synacthen's existing manufacturer, Takeda, stating "Takeda claims that they are not FDA approved (no problem) but more importantly are not suitable for an FDA inspection (big problem). They also claimed that their Synacthen production processes are complex and not a simple fill/finish operation (bigger problem). Moreover, they claim the production processes need to be developed further to be considered US commercial-ready. It looks as if we have uncovered yet another can of worms with regards to Synacthen CMC.")

[87] 11-10-21 Transcript at 80-82 (Debtors' Chief Scientific Officer discussing inability to satisfy FDA's clinical trial requirements because of difficulties finding patients willing to enroll in studies).

[88] 11-17-21 Transcript at 34 (noting Retrophin abandoned its attempts at FDA approval for its synthetic ACTH at the clinical trial stage); Burke Transcript (West's representative discussing risk associated with clinical trials and their use of a 505(b)(2) application to avoid the need for clinical trials); 11-10-21 Transcript at 77 (likelihood of any drug getting approval from the FDA is less than 10%).

[89] 11-12-21 Transcript at 126.

In addition to the persuasive evidence that the FDA regulatory process was the cause of the inability of either the Debtors or a potential competitor developing Synacthen or another long-acting synthetic ACTH product, the Debtors also presented evidence to refute the AICs' allegations that it was the Debtors' possession of the Synacthen rights that prevented or delayed the entry of a synthetic ACTH product to the market. Several witnesses testified that there was no IP protection for Synacthen, and it was relatively easy to reproduce.[90] Indeed, at least two other companies were able to do so without the Synacthen assets.[91] Further, even after the Debtors turned over the Synacthen assets to Marathon /West after the 2017 settlement with the FTC, West was still unable to obtain FDA approval for its synthetic ACTH product.[92]

All the evidence presented establishes that the FDA's drug approval requirements served as a barrier to the entry of a new synthetic ACTH drug to the market. ***HN5***[] As the *City of Pittsburgh* Court explained:

> [A]ntitrust injury must be caused by the antitrust violation-- not a mere causal link, but a direct effect. Here, the interposition of the regulatory scheme and actions of the parties -- both defendants and plaintiff -- interferes with the chain of causation. The statutory scheme precluded competition without the requisite regulatory permission. ***HN6***[] As Professors Areeda & Hovenkamp describe, "a plaintiff cannot be injured in fact by private conduct excluding him from the market when a statute prevents him from entering that market in any event." Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 363(b), at 222 (1995) (citing *Axis S.p.A. v. Micafil, Inc., 870 F.2d 1105 (6th Cir. 1989)*).

City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 268 (3d Cir. 1998) quoting **[*75]** *429 U.S. at 489*. Just as the regulatory scheme present in *City of* Pittsburgh precluded competition in the utility market without the permission of the Public Utility Commission, here, the FDA precluded competition in the pharmaceutical market without its permission. This regulatory barrier broke the chain of causation and, accordingly, the AICs were unable to prove that the harm they experienced **[**35]** was connected to and in fact caused by the Debtors' alleged anticompetitive conduct. *147 F.3d at 267-68* ("The presence of the regulatory scheme and need for approval . . . cuts the causal chain and converts what might have been deemed antitrust injury in a free market into only a speculative exercise."). For that reason, the AICs claims must fail.

Accordingly, I find that the AICs have failed to present sufficient evidence to support a conclusion that but for Debtors' acquisition of the Synacthen Assets a competitor would have developed either Synacthen or another long-acting synthetic ACTH product that could compete against Acthar. Having failed to prove a causal connection between Debtors' alleged illegal conduct and their damages, the AICs have failed to establish requisite standing to maintain a claim under the *Sherman Act* and, accordingly, an administrative claim under the Bankruptcy Code. Because the AICs lack standing, it is not necessary to address other antitrust elements, including damages.

II. State Law Antitrust Claims

In their administrative claim, the AICs alleged that the Debtors' conduct also violated numerous state laws. The AICs, however, failed to connect any evidence admitted at trial to the alleged **[**36]** state causes of action. Therefore, I conclude that the AICs have abandoned those claims *West v. Gregoire, 184 Wn. App. 164, 336 P.3d 110, 113 (Washington Court of Appeals, 2014)* (***HN7***[] "When a party asserts a claim in pleadings but at trial does not 'press' the claim in any way or present evidence to support it, the party abandons that claim."); *Harbison v.*

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[90] See *e.g.* ***[**34]*** , 11-12-21 Transcript at 97-98, 101; 11-10-21 Transcript at 29.

[91] 11-17-21 Transcript at 34, 37-38; 11-12-21 Transcript at 123-125; 11-17-21 Transcript at 31-39, 91-94 (discussing Retrophin and West's ability to formulate a synthetic ACTH without access to the Synacthen assets).

[92] Burke Deposition at 40 (testimony that none of the information West received was "adequately supportive to be meaningfully additive.").

Little, 723 F. Supp. 2d 1032, 1038 (M.D. Tenn. 2010) ("If a plaintiff fails to include arguments regarding a claim in a post-trial brief, the court is justified in finding that the plaintiff has abandoned that claim.").

III. RICO Claims

In their pre-trial brief, the Claimants argued that the Debtors violated the RICO Act through the Anti-Kickback Statute, False Claims Act, mail fraud, wire fraud, and the Travel Act. The AICs contend that the Debtors violated these federal statutes in two ways. First, the Debtors provided unlawful co-pay subsidies through donations to charitable foundations that provide co-pay assistance to eligible patients. Second, the AICs allege that the Debtors paid healthcare professionals, through speaker fees and other methods to persuade them to prescribe more Acthar. I will address each theory in turn.

A. RICO Standard of Review

HN8[] To establish liability under the Racketeer Influenced & Corrupt Organizations Act ("**RICO**"), the plaintiff must show "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity, plus **[**37]** [(5)] an injury to business or property." Reyes v. Netdeposit, LLC, 802 F.3d 469, 483 (3d Cir. 2015) (internal quotation marks and citations omitted). RICO defines "racketeering activity" as any one of an enumerated lists of different state and federal offenses, also known as predicates. RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 329-30, 136 S. Ct. 2090, 195 L. Ed. 2d 476 (2016). "These predicates include "any act 'indictable' under specified **[*76]** federal statutes, §§ 1961(1)(B)-(C), (E)-(G), as well certain crimes 'chargeable' under state law, § 1961(1)(A), and any offense involving bankruptcy or securities fraud or drug-related activity that is 'punishable' under federal law, § 1961(1)(D)." Id. at 330. The plaintiff must show that the defendant committed a RICO predicate act, otherwise the plaintiff's RICO claim fails. *See* Heinemeyer v. Twp. of Scotch Plains, 198 F. App'x 254, 256 (3d Cir. 2006).

HN9[] Section 1964(c) of Title 18 of the U.S. Code provides a private right of action for "[a]ny person injured in his business or property by reason of [a predicate offense]." Kenney v. Am. Bd. of Internal Med., 847 F. App'x 137, 146 (3d Cir. 2021). The plaintiff must "state an injury to business or property and 'that a RICO predicate offense not only was a but for cause of injury but was the proximate cause as well.'" Kenney, 847 F. App'x at 146 (quoting St. Luke's Health Network, Inc. v. Lancaster Gen. Hosp., 967 F.3d 295, 300 (3d Cir. 2020)). Proximate cause requires "some direct relation between the injury asserted and the injurious conduct alleged." Reyes, 802 F.3d at 483 (quoting Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)).

Therefore, the AICs had to prove that the Debtors committed a predicate act, and one of those predicate acts caused a direct injury to their **[**38]** business dealings. Based on their two theories, the AICs had to prove that either the foundation co-pay subsidy payments or the Debtors' physician payments were not only the but-for cause of their injuries but also the proximate cause of their injuries.

B. Claimants' Co-Pay Subsidy Theory of RICO Liability

Addressing the first argument, the AICs allege that the Debtors' systematic course of conduct in donating millions of dollars to co-pay assistance funds was for the purpose of increasing sales of Acthar. Thus, the Debtors violated the RICO Act when they made these payments post-petition. To prove this claim, the AICs had to demonstrate: (1) Debtors made post-petition contributions that violated the Anti-Kickback Statute; (2) Debtors committed mail or wire fraud by providing false certifications of compliance with specific fraudulent intent; and (3) the purported violation caused injury to AICs' business or property during the post-petition period.

a. Anti-Kickback Statute

HN10[] To violate the Anti-Kickback Statute a person or entity must "'knowingly and willfully' offer[] or pay[] 'any remuneration ... to any person to induce such person ... to refer an individual to a person for the furnishing **[**39]** ... of any item or service for which payment may be made in whole or in part under a Federal health care program.'"

United States ex. Rel. Greenfield v. Medco Health Sols., Inc., 880 F.3d 89, 94-95 (3d Cir. 2018) (quoting 42 U.S.C. § 1320a-7b(b)(2)(A)). In their co-pay subsidy theory, the AICs allege that the Debtors violated the Anti-Kickback Statute because their intent in making the charitable donations was to induce more Acthar prescriptions for Medicare beneficiaries.[93] The AICs state that the Debtors only stopped donating millions of dollars to TAF at the end of 2020 because of "concerns of potential legal exposure of continuing to make those donations."[94]

Regarding the Anti-Kickback Statute, I find the AICs did not meet their **[*77]** burden. First, the AICs presented no evidence at trial of any post-petition contributions by the Debtors that were unlawful. The evidence shows that the Debtors' contributions were allocated to TAF disease funds that were independent, bona fide charitable assistance programs.[95] While the AICs state that the Debtors' compliance programs were "window dressing" to add a hint of legitimacy, there was no evidence establishing that the Debtors failed to follow their policies or the law during the post-petition period. In fact, the evidence at trial demonstrated the opposite. In one example, **[**40]** the AICs asserted in their pre-trial brief that the Debtors' Government Affairs department did not conduct any diligence on the TAF relationship at the time of the transition from commercial. Instead, the evidence showed that the team conducted diligence over the ten months after the initial transition and before making its first recommendation to donate to TAF.[96]

Just because the Debtors' money flowed to TAF and was distributed to Acthar-related disease state funds in the post-petition period, does not mean the Debtors' contributions were illegal. Pharmaceutical companies, under OIG guidance, are allowed to make contributions to 501(c)(3) charitable foundations.[97] The AICs had to demonstrate that the Debtors' contributions were in some way unlawful.[98] From 2018 to 2020, Mallinckrodt donated $56.9 million to TAF.[99] The total amount of assistance TAF provided to Acthar patients was--$39.7 million.[100] TAF allocated the Debtors' contributions to various other disease funds including a juvenile arthritis fund that provided no assistance to Acthar patients and a fund for multiple sclerosis that used only 1.3% of total donations for Acthar.[101] Looking at all the funds in TAF that allocated Debtors' donations, **[**41]** Acthar was the subject of only 3.8% of claims for assistance and only 16.7% of the assistance provided.[102] Providing no evidence to contradict this, the AICs failed to prove the Debtors' contribution were unlawful.

Second, to prevail on their co-pay subsidy theory, the AICs needed to prove the Debtors committed mail or wire fraud by providing false certifications of compliance with specific fraudulent intent. *See* United States v. Hedaithy, 392 F.3d 580, 590 (3d Cir. 2004). However, the AICs provided no evidence and did not even attempt to show that Debtors provided false certifications of compliance and acted with the requisite specific intent to defraud them into covering excess Acthar prescriptions.

Finally, the AICs failed to establish that the alleged RICO predicate acts were the but-for cause of the alleged injury, as required in the Third Circuit. *See* Anderson v. Ayling, 396 F.3d 265, 269 (3d Cir. 2005). To establish the but-for cause, the AICs had to identify specific prescriptions that they would not have reimbursed but for the alleged

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[93] D.I. 5553 at ¶ 81, pg. 39; D.I. 5553 at ¶ 85, pg. 41.

[94] D.I. 5553 at ¶ 87, pg. 42; 11-9-21 Transcript at 153.

[95] Pre-trial Order Stip. Facts at ¶¶ 93-94.

[96] 11-9-21 Transcript at 85.

[97] DX 002 at 70,627; DX 005 at 31,121-22 n. 8.

[98] DX 603, TAF Donations and Assistance Data Compilation Tables.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

fraudulent scheme. Instead, the AICs' expert did not even try to specify which prescriptions were aligned with Mallinckrodt's donations to TAF and failed to specify which prescriptions were associated with any illegal contributions. The AICs failed **[**42]** to provide evidence that even **[*78]** one prescription was the result of Mallinckrodt's TAF donations. The AICs have not met their burden of establishing that the Debtors violated the federal RICO statute through their donations to charitable foundations.

C. Debtors' Interactions with Physicians

Addressing their second argument, the AICs also alleged that the Debtors violated the RICO Act by paying physicians through speaker programs. They assert that the Debtors paid remunerations to prescribing physicians to induce them to prescribe Acthar and encourage other physicians to do the same. Thereby, the Claimants contend the Debtors violated the Anti-Kickback Statute, the False Claims Act, the federal *Travel Act*, as well as state bribery laws through these payments.

HN11[] As previously stated, for me to find an Anti-Kickback Statute violation, a person or entity must "'knowingly and willfully' offer[] or pay[] 'any remuneration ... to any person to induce such person ... to refer an individual to a person for the furnishing ... of any item or service for which payment may be made in whole or in part under a Federal health care program.'" *U.S. ex. Rel. Greenfield, 880 F.3d at 94-95* (quoting *42 U.S.C. § 1320a-7b(b)(2)(A)*). The *False Claims Act* imposes "liability on any person who '(A) knowingly presents, **[**43]** or causes to be presented, a false or fraudulent claim for payment or approval; [or] (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.'" *U.S. ex rel. Greenfield, 880 F.3d at 94*. In addition, "[t]he *Travel Act* prohibits using interstate travel, mail, or facilities with intent to carry out 'any unlawful activity,' *18 U.S.C. § 1952(a)(3)*, or with intent to 'distribute the proceeds of any unlawful activity.'" *United States v. Ferriero, 866 F.3d 107, 113 (3d Cir. 2017)* (quoting *18 U.S.C. § 1952(a)(1)*). The AICs accuse the Debtors of violating a multitude of state bribery laws. Without specifying which states, they claim that the "kickback" scheme to the doctors along with charitable foundation payments constituted bribes.

The AICs had to offer evidence that showed the Debtors' speaker programs specifically departed from the "common practice" and (1) violated federal and state law, in other words, committed a predicate act; (2) that the Debtors had the necessary scienter; and (3) the Debtors' speakers' programs were the but-for and proximate cause of their alleged injuries. I will address each requirement in turn.

a. *Explaining the Predicate Acts*

During the post-petition period, the Debtors paid over $1.7 million to physicians for at least 443 speaker events as part **[**44]** of their speakers' bureau program.[103] Like many other specialty pharmaceutical companies in the field, the Debtors host these speaker programs to educate healthcare professionals about specific drugs, in this case Acthar.[104]

Despite over 440 programs, the AICs could not point to a single example of a post-petition physician payment that qualified as a remuneration in exchange for prescribing a drug for which reimbursement under a federal healthcare program is available in violation of *42 United States Code § 1320a-7b(b)(2)*. In their pre-trial brief, the AICs pointed to documents describing a particular physician, "Pulmonologist A" and his prescribing behavior,[105] but they did not question any witnesses at **[*79]** the trial about this physician or the documents.

The AICs also pointed to ongoing investigations into the Debtors' payments to healthcare providers by the U.S. Attorney's Offices for the Middle District of Florida and Eastern District of Pennsylvania, and the fact that the Debtors have not changed their policies in response to those investigations.[106] They also made vague references

[103] PTO at 19.

[104] 11-12-21 Transcript at 64-66; 11-12-21 Transcript at 142.

[105] Claimants' Pre-Trial Brief ¶¶ 53-54.

[106] 11-17-21 Transcript at 156-160.

to "issues" with the Debtors' speaker programs and certain things that were flagged as violative of Debtors' policies but did not explain how such incidents **[**45]** would support a finding that the Debtors' violated the law. If anything, they support the conclusion that the Debtors' policies were effective by ensuring the incidents were brought to the attention of and resolved by the Debtors' compliance department.

Here, I conclude the AICs again did not meet their burden. The Debtors chose speakers who are experts in the relevant therapeutic areas or have sufficient experience prescribing Acthar to speak about the drug, and they paid fair market value to the speakers and prohibited conducting any type of "return on investment" analysis about the prescribing habits of physicians engaged as speakers.[107] In addition, they monitored their speaker programs closely to prevent abuse, and the compliance team used a third party to manage logistics, including planning events consistent with Debtors' policies; ensuring that speaker compensation is at fair market value; enforcing dozens of other rules related to the programs; and providing detailed real-time, quarterly, and yearly compliance reports.[108] Those reports indicated that the Debtors fully complied with their policies and did not knowingly and willfully induce physicians to write more Acthar prescriptions. **[**46]** [109] The AICs failed to show any violation of federal or state law and therefore have not met the predicate act requirement under the RICO Act.

b. *Lacking the Specific Intent*

The AICs also had to prove the Debtors acted with specific intent that their speaker programs would induce their *speakers* to prescribe more Acthar.[110] Yet, they failed to offer any evidence that would support this conclusion. Throughout the post-petition period, the Debtors had a compliance program, and they consistently reevaluated its policies to update them regarding interactions with physicians to fit within the latest legal and regulatory guidance. There is simply nothing in the evidence that would support the conclusion that the Debtors "knowingly and willfully" tried to induce their speakers to prescribe more Acthar in violation of the law.

c. *The But-for and Proximate Cause of the Speaker Programs*

Finally, under the physician speaker programs theory, the AICs had to **[*80]** show that the speaker programs were the but-for and proximate cause of their alleged injuries. ***HN12***[] Notably, "mere correlation does not demonstrate causation" under RICO. *Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP, 806 F.3d 71, 92 (2d Cir. 2015)*. The AICs attempt to establish the required but for causation by showing that **[**47]** after the speaker program began, there was an increase in demand for Acthar.[111] This is insufficient.

To explain the correlation between the increased prescriptions and the ramp up of the speaker program, the Debtors' expert, Dr. Jena, testified that physicians who prescribe Acthar more frequently tend to be more familiar with it and the relevant therapeutic areas; therefore, they are more qualified to speak about it.[112] Despite that fact, 94% of physicians who wrote prescriptions for Acthar post-petition were not speakers during that period.[113]

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[107] 11-17-21 Transcript at 126, 127-129; 11-17-21 Transcript at 192-193; DX 052, September 2020 Promotional Speaker Program Policy, §§ 6.1.3, 6.2.3.2.

[108] 11-17-21 Transcript at 111-113.

[109] See DX 073, Post-Petition Period Speaker Bureau Metrics; 11-17-21 Transcript at 136-39, 142.

[110] This is not to be confused with an intention on the part of the Debtors that the speaker programs would result in more Acthar prescriptions generally. It is not unlawful for a company to pay a single physician to educate a group of physicians about a drug with the intention that *all* physicians might then increase the number of prescriptions they write for the drug. It is, however, unlawful for a company to pay a single physician to act as a "speaker" at an educational program with the intention that the payment made to that physician will then induce *that* physician to write more prescriptions for the drug.

[111] 11-12-21 Transcript at 169-171.

[112] 11-17-21 Transcript at 192-193.

[113] DX 607, Jena Rep., ex. 5.

Going further, Dr. Jena, based on his physician-level analysis, determined that there was no empirical evidence that Mallinckrodt's speaker payments caused more doctors or speakers to increase prescribing Acthar in the post-petition period or before.[114] In fact, physicians tended to prescribe slightly fewer vials of Acthar per month after receiving their first speaker payment.[115] Even one of the AICs' witnesses, Christopher Ragan, acknowledge that Humana could not establish "an inappropriate relationship" between Debtors and a physician through information on speaker fees and prescribing rates alone.[116] The AICs failed to address this correlation in their argument **[**48]** and could not provide any evidence showing how the Debtors' speaker programs were the but-for cause of their alleged injuries.

In addition to the but-for cause, the AICs had to show the Debtors' speaker programs were the proximate cause of their alleged injuries. ***HN13***[] "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006)*. Therefore, even if the Debtors' speaker programs sought to illegally induce additional prescriptions, the AICs had to show that those RICO violations directly led to more physicians prescribing Acthar to the detriment of the AICs, and that the doctors did not act independently.

In this case, the AICs, again, failed to offer any evidence that any physicians prescribed Acthar against their better judgment. Dr. Jena credibly testified that all the AICs have strict prior authorization requirements for Acthar.[117] The AICs' witness, Mr. Ragan, also admitted he had no knowledge of "any instances of misconduct related to prescriber kickbacks from Acthar in the [post-petition] window."[118] Mr. Ragan further testified that the Humana **[*81]** never took any measure to stop covering **[**49]** Acthar prescriptions made by paid speakers despite having the information of which physicians participated in the Debtors' speaker programs and acknowledging the audit capabilities to address any concerns.[119] The AICs had the ability and leverage to prevent their own alleged injuries by stopping to cover Acthar prescriptions they believed to be fraudulently induced. They had opportunities to audit any provider they had concerns about. The AICs never utilized these abilities despite the power to do so. Therefore, I find the AICs' alleged injury was not caused by the Debtors' conduct. The AICs' physician payments theory of RICO violations must also fail.

IV. Additional State Law Claims

Like the antitrust claims based on state law, because the AICs did not present any evidence at trial regarding their additional state law claims, or brief them in their post-trial briefing, I find they have also been abandoned.

CONCLUSION

In conclusion, I find that the AICs have not met their burden with respect to any of their claims. For that reason, their Motion for an order allowing an administrative expense claim is DENIED and the Debtors' Objection to the AICs' administrative claims is SUSTAINED.

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[114] DX 607, Jena Rep., ex. 8; 11-17-21 Tr. at 180-181.

[115] 11-17-21 Transcript at 189-191.

[116] 11-12-21 Transcript at 66.

[117] In one example, Humana only authorized coverage of Acthar outside of infantile spasms only when steroids were contraindicated or when physicians supplied evidence that their patients could not tolerate them. DX 657, Jena Suppl. Rep. 4-5, 29-31; 11-17-21 Transcript at 174-175, 179-180, 197-198; DX 607, Jena Rep. at pgs. 41-42, 47-49; DX 657 Jena Suppl. Rep. at pgs. 4-5, 29-31.

[118] 11-12-21 Transcript at 65.

[119] 11-12-21 Transcript at 65, 73-74.

NOW, THEREFORE, [50] IT IS HEREBY ORDERED THAT:**

The Motion is **DENIED**.

Dated: December 21, 2021

/s/ John T. Dorsey

JOHN T. DORSEY, U.S.B.J.

Hurley v. Nat'l Basketball Players Ass'n

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

December 22, 2021, Decided; December 22, 2021, Filed

CASE NO. 1:21 CV1099

Reporter

2021 U.S. Dist. LEXIS 244270 *; 2021 WL 6065783

ROSEL C. HURLEY III, Plaintiff, v. NATIONAL BASKETBALL PLAYERS ASSOCIATION, et al., Defendants.

Subsequent History: Affirmed by *Hurley v. Nat'l Basketball Players Ass'n, 2022 U.S. App. LEXIS 35964, 2022 WL 17998878 (6th Cir. Ohio, Dec. 30, 2022)*

Core Terms

Player, Arbitration, Regulations, argues, certification, antitrust, motion to dismiss, anti trust law, exemption, allegations, bargaining, basketball player, negotiating, exam, Hurley's Sherman Act, anticompetitive, nonstatutory

Counsel: **[*1]** Rosel C. Hurley, III., Plaintiff, Pro se, Cleveland, OH.

For National Basketball Players Association, Defendant, Frederick R. Nance, Jr., Kristin L. Bryan, Sean L. McGrane, Squire Patton Boggs (US) - Cleveland, Cleveland, OH.

For National Basketball Association, Defendant: Gregory J. Dubinsky, Michael S. Shuster, Holwell Shuster & Goldberg, New York, NY; Lynn Rowe Larsen, Taft Stettinius & Hollister - Cleveland, Cleveland, OH.

Judges: DONALD C. NUGENT, Senior United States District Judge.

Opinion by: DONALD C. NUGENT

Opinion

MEMORANDUM OPINION

This matter is before the Court on the Motion to Dismiss Plaintiff's Complaint filed by Defendant, National Basketball Association (Docket #14) and the Motion to Compel Arbitration and Dismiss filed by Defendant, National Basketball Players Association (Docket #15).

I. Factual and Procedural Background.

On May 27, 2021, Plaintiff, Rosel C. Hurley III ("Mr. Hurley"), filed his Complaint in this case, *pro se*,[1] alleging Defendants violated the *Sherman Act*, *15 U.S.C. §§ 1*, *2* ("*Sherman Act*"), and the *Federal Arbitration Act*, *9 U.S.C. Chapter 1* ("FAA").[2]

This case stems from the National Basketball Players Association's ("NBPA") denial of Mr. Hurley's Application to become a certified Player Agent with the NBPA. The NBPA, a labor organization within **[*2]** the meaning of *§ 2* of the *National Labor Relations Act ("NLRA")*, *29 U.S.C. § 152*, is recognized by the National Basketball Association ("NBA") as "the exclusive bargaining representative for all professional basketball players employed by each of the NBA member teams." *Collins v. Nat'l Basketball Players Ass'n 850 F. Supp. 1468,1471 (D. Colo. 1991)*, aff'd, *No 92-1022, 1992 U.S. App. LEXIS 24069 (10th Cir. Colo. 1992)*. The NBPA has delegated portions of its exclusive bargaining authority to certified "Player Agents" for purposes of negotiating individual contracts. *Id. at 1475*. The NBPA "is legally entitled to forbid *any* other person or organization from negotiating for its members" and has the "sole[]" discretion to determine "whether, to what extent and to whom to delegate [its exclusive] authority." *Id. at 1475* (emphasis in original).

The NBPA has established "Regulations Governing Player Agents" ("Regulations"), as referenced in Mr. Hurley's Complaint, and one of the primary objectives of said Regulations is to "afford each Player the opportunity to select a certified Player Agent who, in turn, has agreed to comply with these Regulations, to represent or advise Players as a fiduciary with honesty, competency and loyalty, and act consistent with the Player's membership in a collective bargaining unit." (Docket #15-1, Exhibit B, Section A.) The Regulations govern all aspects of the relationship **[*3]** between the NBPA and its Player Agents, including certification, conduct, discipline, and dispute resolution.

In order to apply for certification as a Player Agent, a candidate must complete an Application for Certification as a Player Agent ("Application"). As set forth in § 2A of the Regulations, Applicants agree to comply with the Regulations upon signing and filing an Application:

> The signing and filing of an Application constitutes the applicant's agreement to comply with and to be bound by these Regulations, including the exclusive arbitration remedy set forth in Section 5, and that the failure to comply in any material respect with any provision of these Regulations shall constitute grounds for denial, revocation, or suspension of his certification or other disciplinary action.

(Regulations at § 2A.) Once an Application is filed, the NBPA reviews the Application and performs a background investigation; may request additional materials and information; and, requires each applicant to pass a written examination administered by the NBPA. (Id.)

Section 5 of the Regulations provides as follows with regard to disputes that may arise relative to the certification process, or from the "interpretation, **[*4]** application and enforcement" of the Regulations:

> In establishing this new system for regulating Player Agents it is the intention of the NBPA that the arbitration process shall be the exclusive method for resolving any and all disputes that may arise from denying certification to an applicant or from the interpretation, application or enforcement of these Regulations and the resulting SPACs between Player Agents and individual Players. This will ensure that those disputes - which involve essentially internal matters concerning the relationship between individual Players, the NBPA and its capacity as their exclusive bargaining representative, and Player Agents performing certain delegated

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[1] Although Mr. Hurley is proceeding *pro se*, he is, in fact an attorney practicing in the State of Ohio. His pleadings, therefore, are not entitled to the liberal construction afforded to *pro se* litigants who are not trained in the law. *Ponte v. Chase Bank USA, N.A., 2013 U.S. Dist. LEXIS 155044 (E.D. Mich October 8, 2013* (citing *Sabeti v. Maron, No. 12-2392, 2012 U.S. Dist. LEXIS 78082, *4 (E.D.N.Y. June 4, 2012)* (practicing attorney's complaint not entitled to liberal pro se construction); *Foulke v. Va. State Police, No. 12-00006,2012 U.S. Dist. LEXIS 33816, *1 n.1 (W.D. Va. March 13, 2012)* (active member of Virginia bar's complaint not entitled to extra measure of liberal construction); *Zanke-Jodway v. Capital Consultants, Inc., No. 08-930, 2010 U.S. Dist. LEXIS 19137, *4, *23 (W.D. Mich. March 3, 2010)* (attorney proceeding *pro se* is presumed to be aware of the rules of federal procedure)).

[2] The Complaint filed with the Court as Docket #1 is missing a page, omitting Paragraph 11 and the beginning of Paragraph 12, parts of which were referenced by Mr. Hurley in briefing. The NBPA attaches a complete copy of the Complaint to its Motion at Exhibit 15-6.

> representative functions relating particularly to individual Player compensation negotiations - will be handled and resolved expeditiously by the decision-maker established herein, without need to resort to costly and time-consuming formal adjudication.
>
> The provisions of this Section shall apply with respect to three types of disputes that may arise under these Regulations:
>
> 1. The NBPA denies an Application and the applicant wishes to appeal from that action;
>
> 2. A dispute arises with respect to the meaning, **[*5]** interpretation or enforcement of a SPAC (described in Section 4) entered into between a Player and the Player Agent; and
>
> 3. A dispute arises between two or more Player Agents with respect to their individual entitlement to fees owed, whether paid or unpaid, by a Player who was jointly represented by such Player Agents. In such cases, at the Player's option, any fees paid or payable by the Player after the dispute arises shall be placed in escrow pending final resolution of such dispute, and paid out of escrow in accordance with the Arbitrator's decision.
>
> > With respect to any dispute that may arise pursuant to paragraph (1) above, the procedure for filing an appeal and invoking arbitration is set forth in these Regulations in Section 2.D. Once arbitration has been invoked, the procedure set forth in subparagraphs D through F, below, shall apply. With respect to any dispute that may rise [sic] pursuant to paragraph (2-3) above, the following procedures shall apply ...

(Regulations at § 5.)

On August 19, 2020, Mr. Hurley applied to take the online examination required to become a certified Player Agent. (Complaint at Paragraph 6.) In his Application, Mr. Hurley, an attorney, disclosed the fact that his law **[*6]** license was under suspension.[3] (Complaint at Paragraph 6.) On August 26, 2020, NBPA Director of Security, Eric Rhodes, forwarded Mr. Hurley a Background Questionnaire, which he completed and returned the same day. (Complaint at Paragraph 7.) On September 4, 2020, Mr. Rhodes requested a detailed explanation regarding a bankruptcy discovered during the NBPA's background investigation of Mr. Hurley, and Mr. Hurley provided an explanation the same day. (Complaint at Paragraph 8.)

Mr. Hurley alleges that on December 2, 2020, he was informed by NBPA Legal Operations Manager Meagan Macchirole that "he was approved to take the on-line exam," but that later, on February 10, 2021, he "was called by NBPA Personnel" and told that he would not be permitted to take the February 12, 2021 due to the "law licensing issue" that he had originally disclosed in his Application. (Complaint at Paragraphs 9 and 10.)[4]

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[3] Mr. Hurley notes that a law license is not required to become a certified Player Agent.

[4] The NBPA states that while Mr. Hurley disclosed his law license had been suspended, he did not reveal the circumstances of his suspension in his Application. In its Motion to Dismiss, the NBPA includes information obtained from public records regarding the circumstances precipitating the suspension of Mr. Hurley's law license, along with information regarding additional felony convictions and additional law license suspensions. (Docket #22.) Mr. Hurley responded in briefing that he disclosed his felony conviction and "other issues" at the beginning of the application process but that because his Application was completed and submitted online, he does not have his completed Application for reference. (Docket #22 at p. 3.)

The NBPA explains, "A check of public records shows the suspension was based on a finding that Plaintiff "misrepresented his status as an Ohio lawyer in an attempt to mislead and intimidate small businesses into paying him money" - all while earlier suspensions remained in effect." (Docket #15-1 a p. 3, citing Exhibit A, *152 Ohio St. 3d at 537*.) Further, the NBPA states, "In his application, Plaintiff additionally failed to disclose - as required - that he had pled guilty to "aggravated menacing and telephone harassment," for threatening his ex-wife and ordered to pay a $5,000 fine. (Docket #15-1 at p. 4, citing Ex. D., *Cleveland Metro Bar Ass'n v. Hurley, 143 Ohio St. 3d 69, 2015- Ohio 1568, 34 N.E.3d 116 (Ohio 2015)*. In footnotes, the NBPA provides additional detail as follows:

> FN2 The Cleveland Metro. Bar Ass'n opinion states that Plaintiff also received an interim suspension in March 2013 after he was "convicted of multiple felonies for improperly using the Ohio Law Enforcement Gateway while employed by the Cuyahoga County prosecutor's office." Ex. A, *152 Ohio St. 3d at 537*. Moreover, public records **[*7]** reveal that Plaintiff was additionally suspended in November 2013 based on a finding that Plaintiff fail[ed] to register as an attorney for the 2013-2015 biennium." Exhibit C, *In re Admin. Actions, 136 Ohio St. 3d 1544, 1545, 2013- Ohio 4827, 996 N.E.2d 973*

A. The Complaint.

Mr. Hurley filed his Complaint in this case on May 27, 2021, challenging the denial of his Application and claiming he was wrongfully "denied access to the market of representing prospective and current NBA Basketball players" in violation of the *Sherman Act*. (Docket #23 at p. 3.) Mr. Hurley argues that the actions of the NBA and the NBPA "would cause a reasonable person to believe that the Defendants were acting in concert with and at the behest of a non-labor member or group [the NBA], in order to ensure the Plaintiff's exclusion from the marketplace the Defendants completely control" (Complaint at Paragraph 14), and states as follows:

> The defendants action show they did not want the Plaintiff under any circumstances to take the NBA Agents Exam considering the high possibility he would pass the exam since he has done so in the past. As such, this conduct constitutes a per se violation of *Section 1* and *2* of the *Sherman Act*, *15 U.S.C. §§ 1*,*2* without necessity of further proof, or alternately, under Rule of Reason analysis, conduct subject **[*8]** to treble damages. (Ohio 2013). Plaintiff's law license was also suspended in April 2015 for "conduct underlying his felony convictions and two unrelated misdemeanor convictions." Ex. A., *152 Ohio St. 3d at 537*.
>
> FN3 Plaintiff's application also omitted a misdemeanor conviction for a hit and run where he fled the scene of the accident and was ordered to pay a $500 fine, probation and complete 50 hours of community service. See Henry J. Gomez, Cleveland police officer gets probation, fine, community service for hit-and-run, Cleveland.com, Feb. 15, 2020. (Citation omitted.)

(Complaint at Paragraph 17.) Mr. Hurley references the Collective Bargaining Agreement entered into between the NBPA and the NBA, alleging its provisions regarding Player Agents demonstrate that the NBA benefitted from Defendants' "control [of] the market to represent prospective and current NBA professional basketball players."

Further, Mr. Hurley argues that pursuant to Sections 2D, 6E & F of the Regulations, and the protections set forth in the *Federal Arbitration Act, 9 U.S.C. § 2* ("FAA"), he was entitled to arbitrate his dispute with the NBPA regarding its denial of his Application to sit for the certification exam.

B. The NBA's Motion to Dismiss.

On September 10, 2021, the NBA filed its Motion **[*9]** to Dismiss Plaintiff's Complaint (Docket #14), arguing that the Complaint fails to allege the basic elements of an antitrust claim under *Sections 1* and *2* of the *Sherman Act*, setting forth only conclusory allegations that fail to plead that the NBA took any illegal action, or was involved in any way in the events giving rise to this lawsuit. Further, the NBA argues that because Mr. Hurley's antitrust claims against the NBA rely on the NBA's Collective Bargaining Agreement with the National Basketball NBPA, his claims are barred under the nonstatutory labor exemption to antitrust laws. Finally, the NBA argues that Mr. Hurley has completely failed to allege a violation of the FAA, as there is no allegation that the NBA ever agreed to arbitrate claims with Mr. Hurley, "who is a complete stranger to the organization."

Mr. Hurley filed his Memorandum in Opposition to Dismiss on October 18, 2021. (Docket #23.) Mr. Hurley argues that the allegations set forth in the Complaint are sufficient to withstand dismissal at this stage of proceedings. Mr. Hurley argues that an agency relationship exists between the NBA and the NBPA relative to the certification of Player Agents and, therefore, that the NBA is liable for **[*10]** the actions of the NBPA, including violations of antitrust laws. Mr. Hurley also argues that the NBA is vicariously or secondarily liable for the actions of the NBPA because of their relationship with one another. Finally, Mr. Hurley argues that the NBPA's Player Agent Regulations regarding certification restrict minority access to the certification process.

On November 1, 2021, the NBA filed its Reply Memorandum of Law. (Docket #25.) The NBA reiterates the arguments set forth in its Motion to Dismiss, noting that Mr. Hurley failed to comprehensively address the arguments raised by the NBA in its Motion to Dismiss, and argues that the various principles of agency and tort law discussed by Mr. Hurley have no application to the facts and circumstances in this case. The NBA argues that Mr. Hurley has not pled facts sufficient to state any claims against it whatsoever.

C. NBPA's Motion to Compel Arbitration and Dismiss.

The NBPA filed its Motion to Dismiss on September 10, 2021. (Docket #15.) The NBPA argues that because Mr. Hurley concedes that he agreed to be bound by the NBPA Regulations and applicable law, his challenge to the NBPA's rejection of his Application must be arbitrated. The **[*11]** Arbitration Agreement in this case reads "any prospective agent whose application for certification is denied may appeal that denial by filing a timely demand for arbitration." NBPA Regulations, Section 2C. The NBPA argues that Mr. Hurley's Sherman Act claim falls within the scope of the Arbitration Agreement and, that despite Mr. Hurley's failure to provide notice in accordance with the notice provisions of Section 2C, the NBPA has formally offered, and continues to offer, to extend the 30-day filing deadline and allow Mr. Hurley to proceed with his appeal before an independent arbitrator, but he refuses.

The NBPA argues that even if Mr. Hurley is not required to arbitrate his claims, the Court should dismiss his Complaint for failure to plead any cognizable claim for relief. Citing *Collins*, the NBPA argues that denial of certification as a Player Agent does not constitute an unreasonable restraint on trade under the *Sherman Act*, as labor unions acting in their self-interest and not in combination with nonlabor groups are statutorily exempt from *Sherman Act* liability. *Collins, 1992 U.S. App. LEXIS 24069, at *6* (citing *States v. Hutcheson, 312 U.S. 219, 232, 61 S. Ct. 463, 85 L. Ed. 788 (1941)*). Further, the NBPA argues that Mr. Hurley failed to plead the essential elements of a *Sherman Act* claim - including the failure to allege an antitrust **[*12]** injury, a threshold to requirement to his claim. The NBPA references Paragraph 19 of Mr. Hurley's Complaint, in which he states that "[his] business has been injured by Defendants' anticompetitive actions in violation of *Section 1* and *2*," which the NBPA argues is inadequate to state an antitrust claim. Finally, the NBPA argues that the FAA does not create a private right of action or a substantive claim for relief and serves only to ensure private agreements to arbitrate are enforced according to their terms and, therefore, that Mr. Hurley's FAA claim fails to state a claim upon which relief can be granted.

On October 12, 2021, Mr. Hurley filed his Memorandum in Opposition to Compel Arbitration and Dismiss. (Docket #22.) Mr. Hurley states he "has no opposition to resolving the denial of [his] application for certification by arbitration" and "has always wanted to arbitrate the issue of denial of certification." (Id. at p. 2.) However, Mr. Hurley argues that the "limited Arbitration Agreement" listed in *Section 5 of the NBPA* Regulations does not encompass his *Sherman Act* claim and, therefore, that his *Sherman Act* claim should not be dismissed. (Id. at p. 4.) Mr. Hurley argues that NBPA is not statutorily exempt from antitrust laws and **[*13]** that "only through discovery can it be determined if there is a direct connection between the antitrust violation and the alleged injury." Mr. Hurley argues that the actions of the NBPA were taken "at the behest of a non-union member [the NBA] and had an unreasonable effect on trade," thus constituting a *per se* violation of the *Sherman Act*.

On October 25, 2021, the NBPA filed a Reply Brief, in large part reiterating the arguments in favor of dismissal raised in its initial Motion.

During a telephone status conference, the Parties were given additional time to brief the impact, if any, the recent Sixth Circuit opinion in *Boykin v. Family Dollar Stores of Mich, LLC, 3 F.4th 832 (6th Cir. Mich. 2021)*, may have on the resolution of the NBPA's Motion to the extent the NBPA seeks to compel arbtiration. Briefs were filed on December 3, 2021.

II. Standard of Review.

A motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* allows a defendant to test the legal sufficiency of a complaint without being subject to discovery. *See* *Yuhasz v. Brush Wellman, Inc., 341 F.3d 559, 566 (6th Cir. 2003)*. In evaluating a motion to dismiss, the court must construe the complaint in the light most favorable to the plaintiff, accept its factual allegations as true, and draw reasonable inferences in favorable of the plaintiff. *See* *Directv, Inc. v. Treesh, 487 F.3d 471, 476 (6th Cir. 2007)*. The court will not, however, accept conclusions of law or unwarranted **[*14]** inferences cast in the form of factual allegations. *See* *Gregory v. Shelby County, 220 F.3d 433, 446 (6th Cir. 2000)*.

In order to survive a motion to dismiss, a complaint must provide the grounds of the entitlement to relief, which requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action. *See* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007)*. That is, "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (internal citation omitted). Accordingly, the claims set forth in a complaint must be plausible, rather than conceivable. *See* *Twombly, 127 S. Ct. at 1974*.

On a motion brought under *Rule 12(b)(6)*, the court's inquiry is limited to the content of the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint may also be taken into account. *See* *Amini v. Oberlin College, 259 F.3d 493, 502 (6th Cir. 2001)*. It is with this standard in mind that the instant Motion must be decided.

III. Discussion.

A. The *Sherman Act*.

Section 1 of the *Sherman Act* regulates concerted activity between two or more entities, outlawing "every contract, combination ... or conspiracy, in restraint of trade or commerce among the several States" and is limited to "unreasonable" restraints of **[*15]** trade. *15 U.S.C. § 1*. To prevail on a claim under *§ 1*, a plaintiff must prove: (1) a contract, combination, or conspiracy; (2) producing adverse, anticompetitive effects in the relevant product and geographic markets; (3) that the object of the scheme and the conduct resulting from it was illegal; and, (3) that the scheme was the proximate cause of the alleged antitrust injury. *See* *Expert Masonry, Inc. v. Boone Cty., Ky, 440 F.3d 336, 342 (6th Cir. Ky. 2006)*. *Section 2* of the *Sherman Act* makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." *15 U.S.C. § 2*. To bring a claim under *§ 2*, a claimant must show "'(1) possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident.'" *Tarrant Serv. Agency, Inc. v. Am. Standard, Inc., 12 F.3d 609, 613 (6th Cir. Ky. 1993)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778*, cert. denied, *512 U.S. 1221, 114 S. Ct. 2709, 129 L. Ed. 2d 836(1994)*).

"Antitrust laws were enacted to prevent restraints to free competition in business and commercial transactions that tend to restrict production, control prices or otherwise control the market to the detriment of consumers." *In re Detroit Auto Dealers Ass'n, 955 F.2d 457 (6th Cir. Mich. 1992)* (citing *Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L.Ed. 1311 (1940)*). "Congress provided a statutory labor exemption from the antitrust laws ... **[*16]** demonstrat[ing] a congressional purpose to restrict the application of the antitrust laws when they unduly interfere with the goals of federal labor law." *Id.* (citing *15 U.S.C. §§ 17* and *26*, *29 U.S.C. §§ 52*, *104*, *105* and *113*; *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Unition No. 100, 421 U.S. 616, 621, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)*). "In resolving conflicts in areas where federal antitrust and labor policies seemingly overlap, the Supreme Court has recognized a nonstatutory labor exemption." *Id.*

As thoroughly analyzed by the Court in *Collins v. Nat'l Basketball Players Ass'n, 850 F. Supp. 1468*:

> The NBPA Regulations and Article XXXI of the NBPA-NBA Agreement are exempt from ***antitrust law***. Collins claims that the limitation of the market for the representation of basketball players is an antitrust violation. Although the Regulations do limit agents' representational ability, the identified "market" for the representation of NBA basketball players in salary negotiations is explicitly precluded by the federal labor laws. Were that market not exempt from the *Sherman Act*, then all collective bargaining by labor unions would be a violation of

> the antitrust laws, because in all collective bargaining other potential bargaining agents are entirely excluded from the relevant market. As the exclusive representative for all of the NBA players, the NBPA is legally entitled to forbid any other person or organization **[*17]** from negotiating for its members. Its right to exclude all others is central to the federal labor policy embodied in the NLRA.

(*Collins, 850 F. Supp. 1468, 1475* (citing *NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175,180, 87 S. Ct. 2001, 18 L. Ed. 2d 1123 (1967)*). As succinctly stated by the Tenth Circuit Court of Appeals affirming the District Court's decision in *Collins*, "[t]he statutory labor exemption from the *Sherman Act* permits the NBPA to establish a certification procedure for player agents." *Collins, 1992 U.S. App. LEXIS 24069, at *5-6*. Further, "The nonstatutory exemption immunizes labor arrangements that are the ordinary implication of activities contemplated by the federal labor laws. *Collins, 850 F. Supp. 1468, at *33* (citing 2 ***Antitrust Law*** P 229a, at 192)(nonstatutory exemption applies to preclude a claim that the collective bargaining agreement then in effect between the NBA and the NBPA violated antitrust laws in forbidding teams from negotiating with non-NBPA certified agents.)

Pursuant to the statutory and nonstatutory labor exemptions to antitrust laws, Mr. Hurley fails to state a claim under the *Sherman Act* against either the NBPA or the NBA.

2. Failure to Plead the Elements of a Sherman Act Claim.

In addition to the foregoing, Mr. Hurley has failed to plead the essential elements of a *Sherman Act* claim, including the threshold requirement of an antitrust injury. In order to prove an antitrust injury, "the **[*18]** key inquiry is whether competition - not necessarily a competitor - suffered as a result of the challenged business practice." *CBC Cos. v Equifax, Inc., 561 F.3d 569, 571-72 (6th Cir. Ohio 2009)*. A plaintiff must allege "anti-competitive effects resulting from [the defendant's] actions; absent injury to competition, injury to a plaintiff as a competitor will not satisfy this pleading requirement." *Mizlou Television Network, Inc. v. Nat'l Broad. Co., 603 F. Supp. 677, 683 (D.D. C. 1984)* (emphasis in original). "[A] plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. Speculative injury and conclusory allegations regarding harm to the competition are insufficient. *CBC Cos., 561 F.3d 569, 572*. District courts are required to dismiss claims under *Rule 12(b)(6)* when a plaintiff fails to satisfy antitrust standing. *NicSand, Inc. v. 3M NicSand, Inc., 507 F.3d 442, 450 (6th Cir. Ohio 2007)*.

In his Complaint, Mr. Hurley alleges that the NBPA, "acting in concert with and at the behest of the NBA, wrongfully denied Mr. Hurley's Application to become a certified Player Agent, injuring his business. (Complaint at Paragraph 14.) Mr. Hurley states, "Plaintiff's business has been injured by Defendants' anticompetitive actions in violation of *Section 1* and *2* of the *Sherman Act*." (Complaint at Paragraph 19.) In briefing, Mr. Hurley asserts that as a result of the denial of his Application, he was "denied the possibility **[*19]** to represent" a particular player during contract negotiations. (Docket #22 at p. 15.) Mr. Hurley does not allege injury to competition, but rather individualized injury. This is insufficient to establish antitrust standing.

Furthermore, Mr. Hurley has not pled a contract, combination, or conspiracy; producing adverse, anticompetitive effects in the relevant market; resulting in an antitrust injury - nor has he pled possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power. There are no allegations whatsoever that anyone at the NBA did anything at all, let alone anything that could be construed as a *Sherman Act* violation, relative to any of the allegations set forth in the Complaint. Mr. Hurley states in a conclusory manner that the NBA and the NBPA were acting in concert to ensure Mr. Hurley's exclusion from the marketplace, and in briefing includes discussion regarding principal-agent relationships; joint and several liability; vicarious and secondary liabilty; and, respondeat superior, none of which serve to bolster his *Sherman Act* claims. Mr. Hurley argues that "[o]nly through discovery can it be determined if there consisted of a conspiracy with a non-labor **[*20]** member to deny Plaintiff's approved application and access to the NBPA Agent Certification Exam knowing there was a good chance the Plaintiff would pass the exam since he passed it before, thus showing conduct arising to a per se violation of the Sherman ***Antitrust law***." (Docket #22 at p. 10.) Again, this relates to the NBPA's decision to deny Mr. Hurley's application to become a Player Agent, individualized harm, and whether the denial was justified.

Finally, Mr. Hurley has pled no facts in support of his conclusory statement set forth in briefing that the NBPA's Player Agent Regulations restrict minority access to the certification process.

Accordingly, even if not otherwise barred by the statutory labor exemption, Defendants are entitled to dismissal of Mr. Hurley's Sherman Act claims as he has failed to allege a *Sherman Act* violation.

B. *Federal Arbitration Act*.

As set forth above, Mr. Hurley's Complaint fails to state a claim against Defendants under the *Sherman Act*. Thus, the question of whether Mr. Hurley's Sherman Act claim falls within the agreement to arbitrate set forth in the NBPA Regulations is moot. To the extent that Mr. Hurley challenges the propriety of the NBPA's denial of his Application to become a certified Player **[*21]** Agent, the NBPA and Mr. Hurley agree that the arbitration requirements set forth in the NBPA Regulations apply and, despite the fact that Mr. Hurley failed to comply with the procedures for invoking arbitration set forth in the Regulations, both appear willing to proceed to arbitration on that issue. Accordingly, Defendants' Motions to Dismiss are granted with regard to Mr. Hurley's claim under the *Federal Arbitration Act*.

IV. Conclusion.

For the foregoing reasons, the Motion to Dismiss Plaintiff's Complaint filed by the National Basketball Association (Docket #14) is hereby GRANTED.

The Motion to Compel Arbitration and Dismiss filed by the National Basketball Players Association (Docket #15) is hereby DENIED IN PART AND GRANTED IN PART.

Mr. Hurley's Sherman Act and Federal Arbitration Act claims against both the NBA and NBPA are hereby DISMISSED WITH PREJUDICE.

The NBPA's Motion to Compel Arbitration is hereby DENIED AS MOOT.

IT IS SO ORDERED.

/s/ Donald C. Nugent

DONALD C. NUGENT

Senior United States District Judge

DATED: December 22, 2021

JUDGMENT

For the reasons stated in the Memorandum Opinion filed contemporaneously herewith, the Motion to Dismiss Plaintiff's Complaint filed by the National Basketball Association **[*22]** (Docket #14) is hereby GRANTED.

The Motion to Compel Arbitration and Dismiss filed by the National Basketball Players Association (Docket #15) is hereby DENIED IN PART AND GRANTED IN PART.

Mr. Hurley's Sherman Act and Federal Arbitration Act claims against both the NBA and NBPA are hereby DISMISSED WITH PREJUDICE.

The NBPA's Motion to Compel Arbitration is hereby DENIED AS MOOT.

IT IS SO ORDERED.

/s/ Donald C. Nugent

DONALD C. NUGENT

Senior United States District Judge

DATED: December 22, 2021

In re Oncology & Hematology Specialists, P.A.

Superior Court of New Jersey, Appellate Division

October 20, 2021, Argued; December 22, 2021, Decided

DOCKET NO. A-2080-19

Reporter
2021 N.J. Super. Unpub. LEXIS 3144 *; 2021 WL 6057217

IN THE MATTER OF THE APPLICATION OF ONCOLOGY AND HEMATOLOGY SPECIALISTS, P.A., d/b/a OHS PHARMACY TO OPERATE A PHARMACY IN THE STATE OF NEW JERSEY.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from the New Jersey Board of Pharmacy, Division of Community Affairs, Department of Law and Public Safety.

Core Terms

pharmacy, patients, medical treatment, Codey Law, pharmacists, practitioner, medical practice, tests, drugs, equitable estoppel, pharmaceutical, collaborative, anti-competitive, healthcare services, drug therapy, prescriptions, regulations, dispensing, licensed, ordering, argues, disease, beneficial interest, supervision, laboratory, includes, physician-owned, monitoring, modifying, clinical

Counsel: Richard B. Robins argued the cause for appellant Oncology and Hematology Specialists, P.A. (Mandelbaum Salsburg, PC, attorneys; Richard B. Robins, of counsel and on the briefs; Mohamed H. Nabulsi, on the briefs).

Jodi C. Krugman, Deputy Attorney General, argued the cause for respondent New Jersey Board of Pharmacy (Andrew J. Bruck, Acting Attorney General, attorney; Sookie Bae-Park, Assistant Attorney General, of counsel; Jodi C. Krugman, on the brief).

Judges: Before Judges Hoffman, Geiger, and Susswein.

Opinion

PER CURIAM

Petitioner Oncology and Hematology Specialists, P.A. appeals from the final agency decision of the New Jersey State Board of Pharmacy (the Board), entered on December 11, 2019, denying petitioner's application to register, open, and operate a pharmacy within its medical practice.

Petitioner, a medical practice wholly owned by four medical doctors, sought to open a "closed door clinic pharmacy" within its practice location, exclusively for the patients of its physicians. The Board denied petitioner's pharmacy application, concluding that such a pharmacy would violate the **[*2]** Codey Law, *N.J.S.A. 45:9-22.5(a)*, which prohibits physicians from referring patients to health care services owned by them. The Board further concluded the proposed pharmacy did not fit within an exception to the Codey Law that states : "The restrictions on referral of patients . . . shall not apply to . . . medica l treatment or a procedure that is provided at the practitioner's medical office[,]" *N.J.S.A. 45:9-22.5(b)*, because pharmacies do not provide medical treatment.

On appeal, petitioner argues the Board erred by failing to recognize that pharmacies provide medical treatment and by acting beyond the scope of its authority in considering the Codey Law, which falls under the authority of the Board of Medical Examiners. Petitioner further contends the Board's denial of the application amounted to impermissible anti-competitive conduct, and the doctrine of equitable estoppel required the Board to approve petitioner's application. We reject these arguments and affirm.

I.

In May 2018, petitioner, an oncology and hematology medical practice in Mountain Lakes wholly owned by four physicians, submitted a pharmacy permit application to the Board, seeking to open a new "closed door clinic pharmacy" that would only be accessed by **[*3]** — and fill prescriptions for — petitioner's patients. The proposed pharmacy would be located at petitioner's practice in Mountain Lakes. An affidavit attached to its application specified that the pharmacy would be operated "in compliance with the 'Same Practice' Exception to New Jersey Codey Law . . . ." Thereafter, petitioner's counsel submitted a letter and certification, dated February 11, 2019, setting forth legal arguments and attaching documents in support of the subject application.

On April 24, 2019, the Board considered petitioner's application and voted to deny the application, concluding "the practice structure would create a violation of the Codey Law." On December 11, 2019, the Board issued an order memorializing the denial of petitioner's application, which included a seven - page written explanation of its decision.

The Board explained the Codey Law bars medical practitioners from referring patients to health care services where the practitioners hold "a significant beneficial interest." *N.J.S.A. 45:9-22.5(a)*. Because "[t]he definition of '[h]ealth care service' set forth in *N.J.S.A. 45:9-22.4* expressly includes a pharmacy," the Board stated, "any referral by a physician to a pharmacy, in which the physician **[*4]** has a beneficial interest, would violate the Codey Law, unless an exception to the law applies." *Ibid.* (second alteration in original). Such an unlawful arrangement would exist if the Board approved petitioner's application because petitioner's physicians would have a beneficial interest in the pharmacy, which would only fill prescriptions for patients referred exclusively by the petitioner's physicians.

Moreover, the Board determined the "so-called 'in-office' exception" did not apply because "the proposed pharmacy would have to provide a 'medical treatment or a procedure'" in petitioner's office, but "a pharmacy provides neither 'medical treatments' nor 'medical procedures' to patients." The Board also noted that its decision was consistent with the several advisory opinions rendered by the Board of Medical Examiners, providing "that although physicians may own pharmacies, the Codey Law would prohibit a physician from referring the physician's own patients to the pharmacy in which he or she held an ownership interest."

Before the Board issued its order and accompanying explanation, the Deputy Director of Consumer Affairs, assisted by the Supervising Management Improvement Specialist **[*5]** and the Executive Officer and Chief Investigator of the Legalized Games of Chance Commission, reviewed the Board's then-proposed order and the relevant documentation "to determine whether the denial of a pharmacy permit to a physician-owned medical practice constitutes anti-competitive conduct by the Board . . . ." In a memorandum dated December 10, 2019, the Deputy Director stated, "[w]e unanimously determined the Board's proposed action would not displace competition" because the denial

> in no way suggests that licensed physicians cannot become owners of a pharmacy. The Board's action does not limit ownership of a pharmacy to only licensed pharmacists. Non-licensees, including physicians, may own a pharmacy. The Board's determination to deny the application for a permit was based on the fact that the proposed pharmacy would only have filled prescriptions written by the same physicians who were owners of the pharmacy.

Petitioner now appeals from the December 11, 2019 order that denied its application to register, open, and operate a pharmacy within its medical practice. Petitioner presents the following points of argument:

POINT I

THE BOARD ERRONEOUSLY ACTED BEYOND ITS LAWFUL SCOPE OF **[*6]** AUTHORITY BY SEEKING TO INTERPRET AND APPLY THE CODEY LAW, WHICH DOES NOT GOVERN PHARMACIES, AND WHICH THE BOARD LACKS POWER TO ENFORCE.

POINT II

THE BOARD ERRONEOUSLY FOUND THAT THE IN-OFFICE EXCEPTION TO THE CODEY LAW IS INAPPLICABLE TO THE PRACTICE OF PHARMACY.

POINT III

THE BOARD'S DENIAL OF APPELLANT'S PERMIT APPLICATION WAS PRECLUDED BASED ON THE DOCTRINE OF EQUITABLE ESTOPPEL AND OTHER EQUITABLE GROUNDS.

POINT IV

THE BOARD ERRED BY ENGAGING IN ANTI-COMPETITIVE CONDUCT.

II.

Appellate review of a final agency decision is limited, *Russo v. Bd. of Trs., 206 N.J. 14, 27 (2011)*, in recognition "that agencies have 'expertise and superior knowledge . . . in their specialized fields.'" *Hemsey v. Bd. of Trs., 198 N.J. 215, 223 (2009)* (alteration in original) (quoting *In re License Issued to Zahl, 186 N.J. 341, 353, 895 A.2d 437 (2006)*). Thus, an agency's decision should be upheld "unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." *Russo, 206 N.J. at 27* (quoting *In re Herrmann, 192 N.J. 19, 27-28, 926 A.2d 350 (2007)*).

Likewise, on appeal, appellate courts accord deference to the "agency's interpretation of a statute" it is charged with enforcing. *Thompson v. Bd. of Trs., 449 N.J. Super. 478, 483, 158 A.3d 1195 (App. Div. 2017)* (quoting *Richardson v. Bd. of Trs., 192 N.J. 189, 196, 927 A.2d 543 (2007)*). "Deference to agency interpretation of a statute is appropriate as long as that interpretation is reasonable, and does not conflict with the express or implied intent of the legislature . . . **[*7]** ." *Gilliland v. Bd. of Rev., 298 N.J. Super. 349, 354, 689 A.2d 781 (App. Div. 1997)* (citations omitted). However, an agency's "interpretation of the law outside of its charge is entitled to 'no special deference.'" *Comm. Workers of Am., Local 1034 v. N.J. State Policemen's Benevolent Ass'n, Local 203, 413 N.J. Super. 286, 291 (App. Div. 2010)* (quoting *In re Camden Cnty. Prosecutor, 394 N.J. Super. 15, 23, 925 A.2d 63 (App. Div. 2007)*). *See also* *Teeters v. Div. of Youth and Fam. Servs., 387 N.J. Super. 423, 428, 904 A.2d 747 (App. Div. 2006)* (citations omitted) ("Although we are enjoined to accord respect to an agency's interpretation of the statute it is assigned to administer, we are not bound by an agency's interpretation of law, any more than we are bound by the legal rulings of lower courts").

Under this limited standard of review, "[a] reviewing court 'may not substitute its own judgment for the agency's, even though the court may have reached a different result.'" *In re Stallworth, 208 N.J. 182, 192, 26 A.3d 1059 (2011)* (quoting *In re Carter, 191 N.J. 474, 483, 924 A.2d 525 (2007)*). Rather, an appellate court focuses on three major inquiries: (l) whether the agency's decision conforms with relevant law; (2) whether the decision is supported by substantial credible evidence in the record; and (3) whether, in applying the law to the facts, the administrative agency clearly erred in reaching its conclusion. *Id. at 192*.

Petitioner's principal claim of agency error asserts that the Board erroneously interpreted the Codey Law. We disagree. The Codey Law provides, "[a] practitioner shall not refer a patient or direct an employee of the practitioner to refer a patient to a health care **[*8]** service in which the practitioner, or the practitioner's immediate family, or the practitioner in combination with the practitioner's immediate family has a significant beneficial interest . . . ." *N.J.S.A. 45:9-22.5(a)*. "'Practitioner' means a physician, chiropractor or podiatrist licensed pursuant to Title 45 of the Revised Statutes. " *N.J.S.A. 45:9-22.4*; *see also* *N.J.S.A. 45:9-18*.

> "Health care service" means a business entity which provides on an inpatient or outpatient basis: testing for or diagnosis or treatment of human disease or dysfunction; or dispensing of drugs or medical devices for the treatment of human disease or dysfunction. Health care service includes, but is not limited to, a bioanalytical laboratory, *pharmacy*, home health care agency, rehabilitation facility, nursing home, hospital, or a facility

which provides radiological or other diagnostic imagery services, physical therapy, ambulatory surgery, or ophthalmic services.

. . . .

"Significant beneficial interest" means any financial interest; but does not include ownership of a building wherein the space is leased to a person at the prevailing rate under a straight lease agreement, payments made by a hospital to a physician pursuant to a hospital and physician incentive **[*9]** plan, or any interest held in publicly traded securities.

[*N.J.S.A. 45:9-22.4* (emphasis added).]

The Codey Law includes the following relevant exception to the above rule:

"The restrictions on referral of patients established in this section shall not apply to . . . medical treatment or a procedure that is provided at the practitioner's medical office and for which a bill is issued directly in the name of the practitioner or the practitioner's medical office . . . ." *N.J.S.A. 45:9-22.5(c)*. Neither the statutes governing physicians, nor the Board of Medical Examiners' regulations, define "medical treatment" or "medical procedure."

Petitioner argues the Board's determination that "the 'practice of pharmacy' does not involve 'medical treatment or procedure' . . . was totally erroneous." Petitioner contends a pharmacy's activities fit within "the generally accepted meaning of the language 'medical treatment or procedure, "' which, citing medical and legal dictionaries, OSHA regulations, and New Jersey case law, petitioner asserts "is defined as 'a *broad term covering all the steps taken* to effect a cure of an injury or disease; including examination and diagnosis as well as application of remedies[.]'" Petitioner argues a pharmacy's **[*10]** activities of

dispensing medication, . . . "interpreting and evaluating prescriptions"; "administering and distributing drugs"; "advising and consulting on the therapeutic values, contents, hazards and uses of drugs"; "collecting, analyzing and monitoring patient data"; "providing pharmaceutical care and education"; "collaborative drug therapy management including modifying, continuing or discontinuing drug or device therapy"; "ordering or performing of laboratory tests under collaborative drug therapy management"; and "ordering clinical tests"

[*N.J.S.A. 45:14-41*.]

constitute medical treatment as steps taken to combat illness and the application of remedies. Petitioner also emphasizes the significant training and qualifications of pharmacists to show they administer medical treatment.

The Board's interpretation that pharmacies do not provide medical treatment is also supported by the professional and statutory distinction between medical doctors and pharmacists. Physicians and pharmacists undergo different education and training, and pharmacists are not medical doctors. Moreover, the statutes governing medical practice and those governing pharmaceutical practice occupy two different chapters of New Jersey's **[*11]** Revised Statutes — Chapter 9 governs medical practice, and Chapter 14 governs pharmacy practice.

Physicians are persons "licensed or permitted to practice medicine or surgery in this State[,]" *N.J.S.A. 45:9-27.5(a)*, whereas pharmacists are persons "licensed by this State to engage in the practice of pharmacy[,]" *N.J.S.A. 45:14-41*. These distinctions suggest that only physicians (or those under their supervision) provide medical care while pharmacists provide pharmaceutical care.

Whereas Chapter 9 states that, "'the practice of medicine or surgery' . . . include[s] the practice of any branch of medicine and/or surgery, and any method of treatment of human ailment, disease, pain, injury, deformity, mental or physical condition," *N.J.S.A. 45:9-5.1*, Chapter 14 describes the "practice of pharmacy" in terms of the provision of services, not treatment.

"Practice of pharmacy" means a health care service by a pharmacist that includes: compounding, dispensing and labeling of drugs, biologicals, radio pharmaceuticals or devices; overseeing automated medication systems; interpreting and evaluating prescriptions; administering and distributing drugs, biologicals and devices; maintaining prescription drug records; advising and consulting on the therapeutic **[*12]** values,

> content, hazards and uses of drugs, biologicals and devices; managing and monitoring drug therapy; collecting, analyzing and monitoring patient data; performing drug utilization reviews; storing prescription drugs and devices; supervising technicians, interns and externs; and such other acts, services, operations or transactions necessary, or incidental to, providing pharmaceutical care and education. In accordance with written guidelines or protocols established with a licensed physician, the "practice of pharmacy" also includes collaborative drug therapy management including modifying, continuing or discontinuing drug or device therapy; ordering or performing of laboratory tests under collaborative drug therapy management; and ordering clinical tests, excluding laboratory tests, unless those tests are part of collaborative drug therapy management.
>
> [*N.J.S.A. 45:14-41*.]

Chapter 14 further provides:

> "Pharmaceutical care" means the provision by a pharmacist of drug therapy review and other related patient care services intended to achieve positive outcomes *related to* the treatment, cure or prevention of a disease; control, elimination or reduction of a patient's symptoms; or arresting or slowing **[*13]** of a disease process as defined by the rules and regulations of the board.
>
> [*N.J.S.A. 45:14-41* (emphasis added).]

Notably, under Chapter 9, the practice of medicine involves "any method of treatment of human ailment[,]" *N.J.S.A. 45:9-5.1*, whereas under Chapter 14, pharmaceutical care involves "patient care services intended to achieve positive outcomes *related to* the treatment[,]" *N.J.S.A. 45:14-41* (emphasis added). Pharmaceutical care being related to treatment, but not treatment itself, reflects that pharmacists and pharmacies do not render medical treatment to patients; rather, they are the means by which patients receive access to their treatment needs.

Even where the practice of pharmacy involves working "in conjunction with . . . physicians" to provide "collaborative drug therapy management[,]" *N.J.A.C. 13:39-13.2(a)*, a pharmacist may perform "[o]nly those activities that have been approved by the collaborating physician," *N.J.A.C. 13:39-13.1*, which

> shall only include the collecting, analyzing and monitoring of patient data; ordering or performing of laboratory tests based on the standing orders of a physician as set forth in the written protocol; ordering of clinical tests based on the standing orders of a physician as set forth in the written protocol, . . . modifying, **[*14]** continuing or discontinuing drug or device therapy; and therapeutic drug monitoring with appropriate modification to dose, dosage regimen, dosage forms or route of administration.
>
> [*N.J.S.A. 45:14-41*.]

These activities do not obviously constitute medical treatment and are akin to the others "related to" treatment. Furthermore, to engage in collaborative practice with a physician, a pharmacist must "be pre-approved by the Board." *N.J.A.C. 13:39-13.3*. Petitioner does not indicate that it planned to engage in collaborative practice or would seek permission from the Board to do so.

We acknowledge that in *Kemp*, our Supreme Court interpreted the word "treatment"[1] and held, "[t]he plain meaning of "treatment" encompasses the administration of a vaccine." *147 N.J. at 300-01* (citing various legal and medical dictionaries for the proposition that "treatment" encompasses prevention of diseases). Later in its opinion, the Court explicitly stated, "[t]he introduction of the vaccine into [one]'s body, . . . to cause the body to react in a certain way,

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[1] *Kemp* involved the issue of whether a State entity enjoyed immunity from liability under the Tort Claims Act, *N.J.S.A. 59:6-4*. *147 N.J. at 297, 299*. The statute provided public entities with "absolute immunity for the failure to perform an adequate examination 'for the purpose of determining whether [a] person has a disease or physical or mental condition that would constitute a hazard to the health or safety of himself or others'" unless "the examination is 'for the purpose of treatment.'" *Id. at 300*.

falls within the definition of *medical* treatment." *Id. at 303-04* (emphasis added). Chapter 14 provides, the "[p]ractice of pharmacy . . . includes . . . administering a distributing drugs . . . ." *N.J.S.A. 45:14-41*. It further provides: **[*15]**

> "Administer" means the direct application of a drug to the body of a patient or research subject by subcutaneous, intramuscular or intradermal injection, inhalation or ingestion by a pharmacist engaged in collaborative practice or in accordance with regulations jointly promulgated by the board and the State Board of Medical Examiners.
>
> [*Ibid.*]

While pharmacists provide medical treatment when they administer vaccines, most referrals from physicians to a pharmacy are not for vaccination, but rather for the dispensing of drugs and the other services encompassing the "practice of pharmacy" under *N.J.S.A. 45:14-41*, which do not constitute medical treatment or procedures. Petitioner does not claim its pharmacy would only be administering vaccines. Since the primary functions of a pharmacy do not include medical treatment, the Board did not err by finding the "in-office" exception to the Codey Law inapplicable.

Petitioner also highlights the Board of Medical Examiners' regulations that "permit[] physicians to refer their own patients for bioanalytical tests to laboratories in which the physicians have a financial interest, and which are located at the physicians' offices" and "permit[] physicians to dispense **[*16]** prescription drugs to their own patients in their offices." *N.J.A.C. 13:35-6.16(i)(1)*; *N.J.A.C. 13:35-7.5(a)*. Petitioner argues that if physicians are allowed to provide these services without violating the Codey Law, then they also can lawfully operate a pharmacy within their practice. We disagree.

First, bioanalytical testing may constitute medical treatment and fit within the above-discussed exception to the Codey Law. More importantly, *N.J.S.A. 45:14-41* provides: "'Pharmacy practice site' means any place in this State where drugs are dispensed or pharmaceutical care is provided by a licensed p harmacist, *but shall not include a medical office under the control of a licensed physician*." *N.J.S.A. 45:14-41* (emphasis added). Accordingly, when physicians dispense medication directly to patients per *N.J.A.C. 13:35-7.5*, they do not act as pharmacists or a separate pharmaceutical entity. There is thus no "refer[ral]" . . . to a health care service" that would violate the Codey Law; instead, the dispensing falls within the scope of the doctor's medical practice.

Petitioner maintains the Board exceeded the scope of its authority by interpreting, applying, and enforcing the Codey Law. Petitioner also contends the *Pharmacy Practice Act (PPA), N.J.S.A. 45:14-40 to -82*, only empowers the Board to regulate the practice of pharmacy, and thus the **[*17]** Board was not authorized to enforce the Codey Law, which regulates the profession of physicians; instead, the New Jersey State Board of Medical Examiners has sole and exclusive authority to regulate the conduct of physicians in New Jersey. Citing *Newcomb Sales v. Bd. of Pharmacy, 218 N.J. Super. 69, 71, 526 A.2d 1122 (App. Div. 1987)*, petitioner further argues the Board deviated from the PPA's directives, which "mandates issuance of a pharmacy permit," upon an applicant's satisfaction of the applicable statutory requirements to receive a permit, none of which prohibit physician ownership of pharmacies. Petitioner contends that "the Board may deny an application only for one or more of the eleven grounds specifically enumerated in the PPA." Thus, because it "satisfied each of the enumerated statutory and regulatory permit requirements," petitioner asserts "the Board lacked lawful power to deny the permit application based on a reason that was not enumerated in the controlling statute." We disagree.

N.J.S.A. 45:14-42 provides:

> The [B]oard shall enforce the provisions of this act. The [B]oard shall have all of the duties, powers and authority specifically granted by or necessary for the enforcement of this act, as well as such other duties, powers and authority as it may be granted from time **[*18]** to time by applicable law.

The statute delineating the Board's responsibilities and powers authorizes the Board to "deny . . . the permit of any pharmacy practice site" if the Board finds "that any conduct of the . . . applicant is violative of *any* federal, State or local laws or regulations relating to the practice of pharmacy . . . ." *N.J.S.A. 45:14-75(b)(1)* (emphasis added). The

Codey Law reasonably relates to the practice of pharmacy, as it explicitly defines pharmacies as a health care service, N.J.S.A. 45:9-22.4, to which physicians are barred from referring their patients if they hold a beneficial interest in said pharmacy, N.J.S.A. 45:9-22.5(a). Thus, we conclude the Board acted within the scope of its authority under N.J.S.A. 45:14-75(b) in denying petitioner's application because petitioner, a group of physicians, would violate a state law relating to the practice of pharmacy if permitted to operate the pharmacy.

Petitioner next argues "the doctrine of equitable estoppel precludes the Board from lawfully denying [petitioner]'s application" because petitioner relied on the Board's previous grant and multiple renewals of a pharmacy permit to a similarly-structured in-house physician-owned pharmacy. The Board granted this application to Regional Cancer Care **[*19]** Associates LLC (RCCA) in 2014 and renewed it as recently as May 2019. Petitioner argues it "reasonably expected" its pharmacy permit would be granted, relying on the Board allowin g RCCA to operate a physician-owned pharmacy. Based on this assumption, petitioner asserts it has incurred costs in excess of $512,000 relating to its pharmacy application.

Equitable estoppel "is designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment." *Knorr v. Smeal, 178 N.J. 169, 178, 836 A.2d 794 (2003)*. This equitable doctrine is "founded in the fundamental duty of fair dealing imposed by law" and "is invoked in 'the interests of justice, morality and common fairness.'" *Ibid.* (first quoting *Casamasino v. City of Jersey City, 158 N.J. 333, 354, 730 A.2d 287 (1999)*; and then quoting *Palatine I v. Plan. Bd., 133 N.J. 546, 560, 628 A.2d 321 (1993)*). "[T]o establish equitable estoppel, plaintiffs must show that defendant engaged in conduct, either intentionally or under circumstances that induced reliance, and that plaintiffs acted or changed their position to their detriment." *Ibid.* (citing *Miller v. Miller, 97 N.J. 154, 163, 478 A.2d 351 (1984)*). However, "[s]ubstantial detrimental reliance is not enough, 'only justified and reasonable reliance warrant the application of equitable estoppel[.]'" *Gen. Accident Ins. Co. v. N.Y. Marine and Gen. Ins. Co., 320 N.J. Super. 546, 557, 727 A.2d 1050 (App. Div. 1999)* (quoting *Palatine I v. Plan. Bd., 133 N.J. 546, 563, 628 A.2d 321 (1993)*).

"Equitable estoppel is rarely invoked against a governmental **[*20]** entity. However, equitable estoppel will be applied in the appropriate circumstances unless the application would prejudice essential governmental functions." *Middletown Twp. Policemen's Benevolent Ass'n Local No. 124 v. Twp. of Middletown, 162 N.J. 361, 367, 744 A.2d 649 (2000)* (internal citations and quotation marks omitted) (quoting *Wood v. Borough of Wildwood Crest, 319 N.J. Super. 650, 656, 726 A.2d 310 (App. Div. 1999)*). We recently stated that "equitable considerations are relevant to assessing governmental conduct, and may be invoked to prevent manifest injustice." *Tasa v. Bd. of Trs., 458 N.J. Super. 47, 60, 202 A.3d 663 (App. Div. 2019)* (quoting *In re Johnson, 215 N.J. 366, 378-79, 73 A.3d 440 (2013)*).

We reject petitioner's equitable estoppel argument. The Board has conceded that it made a mistake when it granted the permit to RCCA and has filed an action for the rescission of RCCA's permit. We agree with the Board that "if approval of RCCA's application was in error, it was not required to repeat that error as to [petitioner]."

Additionally, within four months of submitting its application to the Board, petitioner received notice the Board would likely reject its pharmacy application to avoid violating the Codey Law. In May 2018, petitioner submitted the application under review, and in September 2018, the Board denied the application for a physician-owned-pharmacy permit submitted by Summit Medical Group (SMG).[2]

Finally, petitioner has not shown the Board reversing its position on physician-owned pharmacies **[*21]** to be unjust. *See* *Johnson, 215 N.J. at 379-80* ("Equitable estoppel is designed to prevent disavowal of prior conduct if a change of course would be unjust."). "[A]dministrative agencies generally have the inherent power to reopen or to modify and rehear prior decisions [,]" including "decision[s] involving the same parties and the identical subject matter . . . ." *In re Trantino, 89 N.J. 347, 364, 446 A.2d 104 (1982)*.

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[2] The Board voted to deny SMG's application for a specialty pharmacy license at the conclusion of its September 27, 2018 meeting and explained the denial in an October 24, 2018 order and decision.

Additionally, an agency may revise its interpretation of a statute after testing the "wisdom of its policy" and to meet "the demands of changed circumstances . . . ." *Glukowsky v. Equity One, Inc., 180 N.J. 49, 65-66, 848 A.2d 747 (2004)* (citations omitted). Thus, the Board changing course to accord its policy with the Codey Law and the Board of Medical Examiners' position on physician - owned pharmacies did not amount to a "manifest injustice."

We further agree with the Board arguments regarding petitioner's desire to open a pharmacy rather operate a dispensary:

> Most telling, however, is [petitioner's] admission that there is a direct financial incentive for its desire to open a pharmacy rather operate a dispensary. [Petitioner] admits that operating a dispensary "would present a serious payment issue" because pharmacy benefit managers "deter payment by seeking to restrict patient access to physician dispensaries." [Petitioner] **[*22]** thus admits to a direct financial incentive for [its] physicians to prescribe medications to be filled at the proposed pharmacy, where they will obtain additional profit from owning that pharmacy. Nothing would prevent an [petitioner's] physician[s] from choosing to prescribe a drug that will provide a higher profit margin for the pharmacy than a lower cost drug, assuming both would provide a similar benefit for patient treatment, or worse, choosing to prescribe a drug that would be less efficacious but produce a higher profit for the pharmacy and its physician-owners. This potential financial gain should not[,] either actually or potentially[,] influence a treatment decision. This concern is the precise ill the Codey Law was intended to prevent.

Lastly, petitioner argues the Board engaged in anti-competitive conduct by changing its position on physician owned pharmacies and denying petitioner's pharmacy application. Petitioner claims the Board, which is "controlled by active market participants, i.e., practicing pharmacists[,]" denied petitioner (and SMG's) application "to protect its members' financial interests[] by prohibiting non-pharmacists from competing against them in the free **[*23]** market."

Petitioner relies on *N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n, 574 U.S. 494, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015)*. In that case, the United States Supreme Court allowed the Federal Trade Commission (FTC) to bring a complaint against a dentist-run state dentistry board which, "after dentists complained to the Board that non-dentists were charging lower prices for certain services than dentists, "issued cease-and-desist letters to non-dentist teeth whitening service providers and product manufacturers, often warning that the unlicensed practice of dentistry is a crime." *Id. at 494*.

The Court considered whether the Board could claim state-action immunity, not the merits of the FTC's claims alleging "anticompetitive and unfair method of competition." *Id. at 501*. Ultimately, the Court held that "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates" cannot "invoke state-action antitrust immunity" unless the state actively supervises the board for anti-competitive conduct. *Id. at 511-12*. Because the State did not exercise active supervision over the dentistry board, the Court found the board was not immune from suit and affirmed the decision disciplining the board for violating ***antitrust law***. *See* *Id. at 515*.

Petitioner's reliance on this **[*24]** case is unpersuasive. Petitioner did not assert an anti-trust claim against the Board. Moreover, petitioner presents no evidence the Board acted improperly, but instead asks this court to "infer" the Board acted with an anti-competitive motive based on the Board's change-of-position on physician owned pharmacies after a large medical practice, SMG, applied to open a pharmacy.

Furthermore, the State proactively screened the Board's denial of petitioner's pharmacy application for anti-competitive conduct and concluded the denial did not displace competition. Nothing suggests the State's review of the Board's decision was deficient. *See* *N.C. State Bd. of Dental Exam'rs, 574 U.S. at 515* (discussing state supervision over regulatory boards, which requires the supervisor review "the substance of the anticompetitive decision, not merely the procedures followed to produce it"; "the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy"; and "the state supervisor may not itself be an active market participant ").

In sum, petitioner fails to convincingly show the Board acted with an improper motive or arbitrarily, capriciously, or unreasonably.

Affirmed.

Int'l Constr. Prods. LLC v. Ring Power Corp.

United States District Court for the Northern District of Florida, Panama City Division

December 23, 2021, Decided; December 23, 2021, Filed

Case No. 5:20cv226-TKW-MJF

Reporter
2021 U.S. Dist. LEXIS 252480 *; 2021 WL 6755717

INTERNATIONAL CONSTRUCTION PRODUCTS LLC, Plaintiff, v. RING POWER CORPORATION, ZIEGLER, INC. and THOMPSON TRACTOR COMPANY, INC., Defendants.

Prior History: *Int'l Constr. Prods. v. Ring Power Corp., 2020 U.S. Dist. LEXIS 260030, 2020 WL 12189176 (N.D. Fla., Nov. 12, 2020)*

Core Terms

conspiracy, communications, summary judgment, boycott, terminate, website, dealers, heavy construction, antitrust, used equipment, no evidence, Defendants', summary judgment motion, alleged conspiracy, threats, tortious interference, independent action, direct evidence, manufacturers, inferred, speculation, auction, email, business relationship, amended complaint, negotiations, parallelism, asserting, conscious, consign

LexisNexis® Headnotes

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

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

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

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

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

HN1[] **Entitlement as Matter of Law, Appropriateness**

A court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. When considering a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party, but the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case.

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

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

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

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

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

HN2[] **Summary Judgment, Burdens of Proof**

A summary judgment movant has the initial burden to demonstrate the absence of a genuine dispute as to any material fact. The burden can be met by either negating an essential element of the nonmoving party's case or showing that there is no evidence to prove a fact necessary to the nonmoving party's case. If the movant meets its burden, the nonmoving party must point to specific evidence showing a genuine issue for trial. The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. A mere scintilla of evidence in support of the nonmoving party will not suffice to overcome a motion for summary judgment, and unsupported speculation is not enough to create a genuine issue of material fact.

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

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

HN3[] **Summary Judgment, Burdens of Proof**

Speculation does not create a genuine issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN4[] **Sherman Act, Claims**

Section 1 of the Sherman Act makes illegal every contract, combination, or conspiracy, in restraint of trade. *15 U.S.C.S. § 1*. The provision is interpreted to prohibit only unreasonable restraints on trade, so the elements of a *§ 1* claim are: 1) a conspiracy that 2) unreasonably 3) restrains trade.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

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

HN5[] **Sherman Act, Claims**

An agreement to restrain trade is a threshold requirement of every antitrust conspiracy claim. That is so because, as a general matter, the Sherman Act does not restrict the long recognized right of a private enterprise freely to exercise its own independent discretion as to parties with whom it will deal.

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

Evidence > Types of Evidence > Circumstantial Evidence

Evidence > Inferences & Presumptions > Inferences

HN6[] **Per Se Rule & Rule of Reason, Sherman Act**

To prove the existence of an agreement to restrain trade, a plaintiff must establish a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement. The existence of an agreement can be proven by direct evidence of the agreement or inferred from circumstantial evidence tending to establish an agreement. Direct evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption. The evidence must show an explicit understanding to collude. Ambiguous statements are not direct evidence of collusion.

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

Evidence > Types of Evidence > Circumstantial Evidence

Evidence > Inferences & Presumptions > Inferences

HN7[] **Per Se Rule & Rule of Reason, Sherman Act**

It is only in rare cases that a plaintiff can establish the existence of a conspiracy by showing an explicit agreement. Indeed, most conspiracies are inferred from the behavior of the alleged conspirators, and from other circumstantial evidence, such as barriers to entry and other market conditions.

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

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN8[] **Conspiracy to Monopolize, Elements**

Although the existence of a conspiracy can be inferred from circumstantial evidence, ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *15 U.S.C.S. § 1* case. Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. Thus, a plaintiff must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. Although the plaintiff's evidence need not be such that only an inference of conspiracy may be derived from it, the evidence must at least go beyond equivocal complaints and tend to exclude the inference of independent action. The court must consider the evidence as a whole, rather than compartmentalizing the separate factual components.

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

Evidence > Types of Evidence > Circumstantial Evidence

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

HN9[] **Conspiracy to Monopolize, Elements**

A showing of parallel business behavior can be circumstantial evidence of the existence of a conspiracy, but without more, conscious parallelism is not enough to establish a conspiracy. The plaintiff must also show that each defendant engaging in the parallel action acted contrary to its economic self-interest, or show other plus factors tending to establish that the defendants were in a collusive agreement to fix prices or otherwise restrain trade. The existence of the plus factors removes a plaintiff's evidence from the realm of equipoise and renders that evidence more probative of conspiracy than of conscious parallelism. There is no finite list of plus factors; any showing that tends to exclude the possibility of independent action may qualify.

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

Evidence > Inferences & Presumptions > Inferences

HN10[] **Per Se Rule & Rule of Reason, Sherman Act**

To establish that defendants engaged in parallel conduct, a plaintiff must show that they took similar actions to achieve the same end. The defendants' actions need not be simultaneous or identical, but substantial variances in the actions may undercut the inference of a conspiracy.

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

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

HN11[] **Summary Judgment, Burdens of Proof**

A plaintiff cannot defeat a summary judgment motion by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy.

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > ... > Contracts > Intentional Interference > Elements

HN12[] **Intentional Interference, Elements**

Four elements are required to establish tortious interference with a contractual or business relationship: (1) the existence of a business relationship or contract; (2) knowledge of the business relationship or contract on the part of the defendant; (3) an intentional and unjustified interference with the business relationship or procurement of the contract's breach; and (4) damage to the plaintiff as a result of the interference.

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Judges: T. KENT WETHERELL, II, UNITED STATES DISTRICT JUDGE.

Opinion by: T. KENT WETHERELL, II

Opinion

ORDER GRANTING SUMMARY JUDGMENT

This case is before the Court based on Defendants' motions for summary judgment (Docs. 358, 359, 361). Plaintiff filed a combined response in opposition (Doc. 375) to which Defendants **[*2]** filed replies (Docs. 381, 382, 383). No hearing is necessary to rule on the motions, and for the reasons that follow, the Court finds that the motions are due to be granted.

Overview

This case is a spin-off from a still-pending suit filed by Plaintiff in federal court in Delaware nearly 7 years ago.[1] The case has a long and tortured procedural history, but it boils down to a fairly simple question: Did Defendants conspire to keep Plaintiff out of the heavy construction equipment sales market in North America by threatening to withhold their used equipment from the online auction site that Plaintiff had contracted with to sell its new equipment?

Defendants argue in their motions for summary judgment that the answer to this question is "no" because there is simply no record evidence from which a jury could find that they individually did what Plaintiff claims, much less that they conspired with each other (or anyone else) to do so. Having carefully reviewed the evidence and legal memoranda submitted by the parties,[2] the Court agrees.

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[1] *Int'l Constr. Prods., LLC v. Caterpillar, Inc., et al.*, D. De. Case No. 1:15cv108-RGA-SRF (filed Jan. 29, 2015).

[2] Collectively, the parties filed nearly 200 exhibits containing over 3,700 pages (including dozens of condensed four-page-to-one-page deposition transcripts), *see* Attach. to Docs. 355, 356, 357, 376, and more than 200 pages of legal memoranda in support of and in opposition to the motions for summary judgment.

Background

Plaintiff was a distributor of new Chinese-manufactured Lonking heavy construction equipment, **[*3]** and it was also "an authorized reseller" of other Chinese-manufactured heavy construction equipment. Plaintiff's business model was to sell the equipment directly to consumers over the Internet rather than through a dealer network, which was the typical business model in the North American heavy construction equipment market.

Defendants are independently owned and operated heavy construction equipment dealers who sell new and used equipment manufactured by Caterpillar, Inc. in exclusive regional territories around the United States. Defendants sometimes use online auction sites, such as IronPlanet, and auction companies, such as Cat Auction Services (CAS) and Ritchie Bros. Auctioneers, to sell their used equipment.

There was considerable interrelationship between the auction services and the heavy construction equipment manufacturers and dealers. For example, Defendant Ring Power Corporation was a minority shareholder of IronPlanet and Defendant Ziegler, Inc. was a shareholder of CAS. Additionally, Ziegler's president and CEO, Bill Hoeft, was a founding member of CAS and chairman of its board of directors.

In January 2014, after several months of informal discussions, IronPlanet and CAS **[*4]** began formal merger negotiations.[3] The merger was consummated the following year, and in 2016, the combined entity merged with Ritchie Bros.

In March 2014, while the merger discussions were ongoing between CAS and IronPlanet, Plaintiff entered into an agreement with IronPlanet to sell certain new Chinese-manufactured heavy construction equipment on IronPlanet's website.[4] The agreement was announced at a large industry trade show, and as Plaintiff hoped, the announcement generated significant press coverage and "ma[d]e a splash" in the industry.

IronPlanet terminated the agreement the following month, and Plaintiff subsequently went out of business. The circumstances giving rise to the termination of the agreement form the basis of Plaintiff's claims.

There is evidence that IronPlanet terminated the agreement because it did not want to continue devoting substantial resources to a venture that generated only one sale and it wanted to devote its resources to the potentially more lucrative CAS merger. However, there is also evidence that (in the light most favorable to Plaintiff) shows that IronPlanet's decision to terminate the agreement was based, at least in part, on "pressure" exerted on **[*5]** it by industry stakeholders that were not happy with its decision to sell new Chinese-manufactured heavy construction equipment on its website.

The dispositive issue in this case is whether the pressure was the result of concerted action involving Defendants. The facts and evidence pertinent to the resolution of this issue are interspersed in the analysis section below.

Procedural History

In January 2015, Plaintiff filed suit against Caterpillar, CAS, and several other heavy construction equipment manufacturers in federal court in Delaware, alleging antitrust violations and other claims. Over the course of that litigation, the claims against CAS and manufacturers other than Caterpillar and Komatsu America Corporation were dismissed.

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[3] Although Plaintiff devotes substantial discussion in its response to events related to the merger between CAS and IronPlanet to support its conspiracy claim, the Delaware court unequivocally ruled in October 2019 that "because ... the merger agreement between IronPlanet and [CAS] did not restrain trade, [Plaintiff] cannot rely on the merger agreement to establish concerted action." Doc. 238, at 9.

[4] The "representative brands" indentified in the agreement were Lonking, Shantui, Sunward, Zoomlion, XCMG, and Mahindra.

In September 2018, Plaintiff was granted leave to file a second amended complaint to add three Caterpillar dealers (Ring Power, Ziegler, and Thompson Tractor Company, Inc.) as defendants. Nearly two year later, in August 2020, after initially dismissing the claims against these "dealer defendants" for lack of personal jurisdiction, the Delaware court reconsidered the dismissal and transferred the claims against the dealer defendants to this Court. *See* Docs. **[*6]** 294, 295. The Delaware court did not transfer the claims against Caterpillar and Komatsu, and those claims remain pending in the Delaware court.

Three months after the case was transferred to this Court, Plaintiff was granted leave to file an amended complaint that focused solely on the claims against the three named dealer defendants. *See* Doc. 324 (denying Defendants' motion to dismiss and granting Plaintiff's motion to amend). The amended complaint (Doc. 322) asserts four counts against Defendants: two under *Section 1* of the *Sherman Act*, *15 U.S.C. § 1* (Counts 1 and 2) and two tortious interference claims under state law (Counts 3 and 4). Defendants answered the complaints, denying the claims asserted against them and asserting various affirmative defenses. *See* Docs. 325, 326, 327.

Two months later, in January 2021, a scheduling order was entered establishing a phased discovery schedule. *See* Doc. 338, at ¶4.a. Phase 1 was limited to "fact discovery on the issue of the existence of a conspiracy in relation to the alleged agreement to boycott IronPlanet," and Phase 2 was to focus on "expert discovery and the issues of market definition, antitrust injury, and damages." *Id.* Phase 2 was not to proceed until the Court resolved **[*7]** any summary judgment motions concerning the existence of the alleged conspiracy. *Id.* at ¶4.c.; *see also* Doc. 386 (denying Plaintiff's motion to defer consideration of the summary judgment motions to allow it to conduct certain expert discovery).

Phase 1 discovery was completed in July 2021, as scheduled. Defendants thereafter filed motions for summary judgment on all the claims asserted by Plaintiff in the amended complaint.

Briefing on the motions was completed in October 2021. Plaintiff requested oral argument on the motions, but the Court sees no need for it. Thus, the motions are ripe for rulings.

Analysis

HN1[] "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. When considering a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party, but "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

HN2[] The movant has the initial burden to demonstrate the absence of a genuine dispute as to any material fact. **[*8]** *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. This burden can be met by "either negating an essential element of the nonmoving party's case or showing that there is no evidence to prove a fact necessary to the nonmoving party's case." *McGee v. Sentinel Offender Servs., LLC, 719 F.3d 1236, 1242 (11th Cir. 2013)*.

If the movant meets its burden, the nonmoving party must point to specific evidence showing a genuine issue for trial. *See* *Celotex, 477 U.S. at 324*. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. "A mere scintilla of evidence in support of the nonmoving party will not suffice to overcome a motion for summary judgment, and unsupported speculation is not enough to create a genuine issue of material fact." *Franklin v. Tatum, 627 F. App'x 761, 764 n.6 (11th Cir. 2015)* (internal citations and quotations omitted); *see also* *Cordoba v. Dillard's, Inc., 419 F.3d 1169, 1181 (11th Cir. 2005)* ("[U]nsupported speculation ... does not meet a party's burden of producing some defense to a summary judgment motion. ***HN3***[] Speculation does not create a *genuine* issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment." (quoting *Hedberg v. Ind. Bell Tel. Co., 47 F.3d 928, 931-32 (7th Cir.1995)*) (emphasis in original)); *Rollins v. TechSouth, Inc., 833 F.2d 1525, 1529 (11th Cir. 1987)* ("[U]nsubstantiated assertions alone are not enough to withstand a motion for summary judgment.").

Sherman Act Claims (Counts 1 and 2)

Defendants argue that the summary judgment evidence fails to establish **[*9]** the existence of a conspiracy and, as a result, they are entitled to judgment as a matter of law on the antitrust claims asserted in the amended complaint. Plaintiff responds that the summary judgment evidence establishes (directly or circumstantially) the existence of a conspiracy between Defendants and others, or that it at least shows that there are genuine factual disputes on the issue. The Court agrees with Defendants, as explained below.

HN4[] *Section 1* of the *Sherman Act* makes illegal "[e]very contract, combination ..., or conspiracy, in restraint of trade." *15 U.S.C. § 1*. This provision has been interpreted to prohibit only "unreasonable" restraints on trade, so the elements of a *§ 1* claim are [1] a conspiracy, that [2] unreasonably [3] restrains trade. *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co., 917 F.3d 1249, 1260 (11th Cir. 2019)*. Here, only the first element is currently at issue.

HN5[] An agreement to restrain trade is a "threshold requirement of every antitrust conspiracy claim." *City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 569 (11th Cir. 1998)*. This is so because, "as a general matter, the *Sherman Act* 'does not restrict the long recognized right of [a private enterprise] freely to exercise [its] own independent discretion as to parties with whom [it] will deal." *Verizon Commc'ns. Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (quoting *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*).

HN6[] To prove the existence of an agreement to restrain trade, the plaintiff must establish "a unity **[*10]** of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Harcros, 158 F.3d at 569* (quoting *Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1573 (11th Cir. 1991)*). The existence of an agreement can be proven by direct evidence of the agreement or inferred from circumstantial evidence tending to establish an agreement. *Id.*

"Direct evidence" is evidence that "is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." Black's Law Dictionary 699 (11th ed. 2019); *see also* *United Am. Corp. v. Bitmain, Inc., 530 F. Supp. 3d 1258 (S.D. Fla. 2021)* ("Direct evidence is explicit and does not require courts to make inferences to find an agreement."). The evidence must show "an explicit understanding ... to collude." *Golden Bridge Tech., Inc. v. Motorola, Inc., 547 F.3d 266, 272 (5th Cir. 2008)*. Ambiguous statements are not direct evidence of collusion. *See* *Hyland v. HomeServices of Am., Inc., 771 F.3d 310, 318 (6th Cir. 2014)*; *InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 149 (3d Cir. 2003)*.

Here, the summary judgment evidence does not contain any direct evidence of an explicit agreement between Defendants to pressure IronPlanet into terminating its relationship with Plaintiff. Defendants' employees and officials unequivocally denied the existence of such an agreement, and Plaintiff did not point to any direct evidence explicitly showing the existence of an agreement.[5] All of the purported direct evidence cited by Plaintiff in its response would require one or more inferences **[*11]** to find that the Defendants agreed to collude against Plaintiff.

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[5] The Court did not overlook the Eleventh Circuit statement in *De-Long Equip. Co. v. Wash. Mills Abrasive Co., 887 F.2d 1499, 1515 (11th Cir. 1989)*, that the court "must look beyond the defendants' bald denial of concerted action and analyze the substance of [plaintiff's] evidence in order to determine if summary judgment was appropriate," but the Supreme Court has made clear that when faced with sworn testimony denying involvement in the alleged conspiracy, a plaintiff must come forward with something more than an assertion that the denials are not credible to withstand summary judgment, *see* *Anderson, 477 U.S. at 256* (rejecting argument that a plaintiff can defeat a summary judgment motion "by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy").

For example, the telephone conversation in which IronPlanet's president, Jeff Jeter, allegedly told Plaintiff's chairman, Tim Frank, that "Cat[erpillar] and at least one other manufacturer" were "putting pressure" on IronPlanet to terminate its relationship with Plaintiff or "they" (understood by Mr. Frank to be the manufacturers and dealers) would no longer consign equipment to IronPlanet does not directly establish the existence of an agreement rather than parallel independent action, nor does it unambiguously tie the dealer defendants in this case to the agreement.[6] The Court did not overlook Mr. Jeter's contemporaneous notes of this conversation, which stated that Mr. Frank "understands pressure and said he suspects it would be hard to brush off if they [the manufacturers and dealers] are serious." Although this is evidence from which a jury could find that IronPlanet received "pressure" to terminate its agreement with Plaintiff, it is not direct evidence of a conspiracy because the factfinder would be required to infer that the pressure was being exerted through a collective agreement rather than parallel independent **[*12]** action. Additionally, Mr. Jeter's notes and his deposition testimony about the notes do not tie any particular dealer (much less the defendants named in this case) to the pressure being asserted because, although Mr. Jeter confirmed in his deposition that "they" referred to manufacturers and dealers generally, he could not recall the "specificity and granularity" of which manufacturers or dealers were exerting pressure or what pressure they were asserting.

The fact that the summary judgment evidence does not contain direct evidence of a conspiracy is not dispositive (or surprising) because ***HN7***[] "it is only in rare cases that a plaintiff can establish the existence of a conspiracy by showing an explicit agreement." *Harcros, 158 F.3d at 569* (quoting *Seagood Trading Corp., 924 F.2d at 1573*). Indeed, "most conspiracies are inferred from the behavior of the alleged conspirators, and from other circumstantial evidence (economic and otherwise), such as barriers to entry and other market conditions." *Id.*

HN8[] Although the existence of a conspiracy can be inferred from circumstantial evidence, "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case." *Matsushita Elec., 475 U.S. at 588*. "[C]onduct as consistent with permissible competition as with illegal conspiracy **[*13]** does not, standing alone, support an inference of antitrust conspiracy." *Id.* Thus, the plaintiff must present evidence that "tends to exclude the possibility that the alleged conspirators acted independently." *Id.* (internal quotation omitted); *see also Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* ("[P]roof of a *§ 1* conspiracy must include evidence tending to exclude the possibility of independent action .... [C]onspiracy evidence must tend to rule out the possibility that the defendants were acting independently.").

Although the plaintiff's evidence "need not be such that *only* an inference of conspiracy may be derived from it," the evidence must at least "go beyond equivocal complaints and *tend* to exclude the inference of independent action." *Am. Contractors Supply, LLC v. HD Supply Constr. Supply, Ltd., 989 F.3d 1224, 1234 (11th Cir. 2021)* (quoting *De-Long Equip., 887 F.2d at 1509*) (emphasis in original). The Court must consider the evidence as a whole, rather than compartmentalizing the separate factual components. *See Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*.

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[6] Additionally, the statements attributable to Mr. Jeter are hearsay insofar as they are being offered to prove the truth of the matter asserted—that IronPlanet terminated its agreement with Plaintiff due to "pressure" from Caterpillar and others. The statements are not excluded from the definition of hearsay under *Fed. R. Evid. 801(d)(2)(E)* because IronPlanet is not alleged to be a "coconspirator" with Defendants. The statements are not admissible under *Fed. R. Evid. 804(b)(3)(A)* because Mr. Jeter testified in his deposition that he did not recall the substance of his conversion with Mr. Frank, not that he did not recall having a conversation at all. *See Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299, 1317 (11th Cir. 2013)* ("*Rule 804(a)(3)* applies only if the declarant is unable to remember the 'subject matter,' i.e., if 'he has no memory of the events to which his hearsay statements relate.' The fact that the witness does not remember making the statements themselves is irrelevant." (quoting *N. Miss. Commc'ns v. Jones, 792 F.2d 1330, 1336 (5th Cir. 1986)*)).

HN9[] A showing of "parallel business behavior" can be circumstantial evidence of the existence of a conspiracy, but without more, "conscious parallelism"[7] is not enough to establish a conspiracy. *See* *Twombly, 550 U.S. at 561 n.7*. The plaintiff must also show that "each defendant engaging in the parallel action acted contrary to its economic self-interest, or [show] other 'plus **[*14]** factors' tending to establish that the defendants were ... in a collusive agreement to fix prices or otherwise restrain trade." *Harcros, 158 F.3d at 570-71*. The existence of the plus factors "remove[s] [a plaintiff's] evidence from the realm of equipoise and render[s] that evidence more probative of conspiracy than of conscious parallelism." *Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1301 (11th Cir. 2003)*. There is no finite list of plus factors; any showing that "tends to exclude the possibility of independent action" may qualify. *Id. at 1303*.

Here, Plaintiff argues that a conspiracy can be inferred from the fact that each Defendant threatened not to use (i.e., boycott) IronPlanet to sell its used equipment if IronPlanet did not terminate its relationship with Plaintiff. Defendants respond that the summary judgment evidence does not show that they threatened to boycott IronPlanet and even if they had, the evidence fails to show any "plus factors" that would tend to rule out the possibility that they were acting independently. Each point—the existence (or not) of parallel conduct and the existence (or not) of any plus factors—will be discussed in turn.

HN10[] To establish that the defendants engaged in "parallel conduct," the plaintiff must show that they took similar actions to achieve the **[*15]** same end. *See* *SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 427 (4th Cir. 2015)*; *see also* *In re Musical Instruments & Equip. Antitrust Lit., 798 F.3d 1186, 1193 (9th Cir. 2015)* (noting that an example of parallel conduct is when "competitors adopt[] similar policies around the same time in response to similar market conditions"). The defendants' actions need not be simultaneous or identical, but substantial variances in the actions may undercut the inference of a conspiracy. *See* *Anderson News, LLC v. Am. Media, Inc., 899 F.3d 87, 105 (2d Cir. 2018)*.

Here, Plaintiff points to the following communications as evidence that Defendants engaged in parallel conduct by threatening to boycott IronPlanet if it did not terminate its relationship with Plaintiff:

• On March 18, 2014, Ziegler's president and CEO, Bill Hoeft, emailed IronPlanet's CEO, Greg Owens, confirming receipt of IronPlanet's latest merger proposal. The email also included a "side note," stating: "We[8] would like to better understand the relationship [between IronPlanet and Plaintiff], as we are concerned that Caterpillar and the CAT dealers would have significant concerns about any arrangement where IronPlanet is providing auction services for new equipment for a Caterpillar competitor." There is no evidence of any other communications between Mr. Hoeft (or anyone else at Ziegler) and anyone at IronPlanet relating to Plaintiff.

• On April 2 and **[*16]** 3, 2014, Ring Power employee Frank Fowler had several phone calls with Mr. Owens. Neither of them recalled the exact substance of the calls, but contemporaneous notes show that Mr. Fowler was calling Mr. Owens merely "to verify [the rumors] and find out what is going on" with IronPlanet and Plaintiff.

• On April 4, 2014, at the request of a supervisor, Thompson employee Richard Lindley asked IronPlanet employee Bob Winnette "[w]hat does this [the agreement between IronPlanet and Plaintiff] mean?" This communication occurred while Mr. Lindley was negotiating with Mr. Winnette over the consignment of six pieces of heavy equipment to IronPlanent. Mr. Winnette responded by forwarding an email stating that IronPlanet's agreement with Plaintiff had been "suspended." Mr. Lindley requested a more formal statement on

[7] Conscious parallelism is "a common reaction of 'firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions.'" *Quality Auto, 917 F.3d at 1261* (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*).

[8] Plaintiff argues that "we" refers to Ziegler because the signature block on the email identified Mr. Hoeft as the president and CEO of Ziegler. However, even when viewed in the light most favorable to Plaintiff, the summary judgment evidence establishes that the "we" refers to CAS (not Ziegler) because the email was sent in the context of the ongoing merger negotiations between CAS and IronPlanet in which Mr. Hoeft was involved in his capacity as a member of CAS's board of director; the substance of the "side note" closely tracked language proposed by a consultant working for CAS on the merger; and Mr. Hoeft (and Ziegler) had no business relationship with IronPlanet other than Mr. Hoeft's involvement in the merger negotiations.

> IronPlanet letterhead, which Mr. Winnette provided several days later in a letter stating that "IronPlanet has terminated its relationship with [Plaintiff]" and that Plaintiff's equipment had been removed from IronPlanet's website.

These communications do not contain any express or implied threats and, even in the light most favorable to Plaintiff, amount to nothing more than mere **[*17]** inquiries and expressions of concern about the impact of IronPlanet's deal with Plaintiff on the heavy construction equipment industry. This concern is not unreasonable or contrary to Defendants' economic interests considering that the sale of Plaintiff's new equipment on IronPlanet's website could have reduced the price for which Defendants could sell their used equipment on the website. Additionally, the communications were not unusual because Ring Power and Thompson had existing business relationships with IronPlanet and one of them (Ring Power) had an ownership interest in IronPlanet.

There is no evidence that the communications were perceived as boycott threats by Mr. Owens or any other IronPlanet employee. Indeed, IronPlanet's president, Mr. Jeter, unequivocally testified that he did not receive—and that he was unaware of—any threats from Defendants.

Plaintiff did not point to any conflicting evidence regarding the substance or nature of the communications between Defendants and IronPlanet. Plaintiff's speculation and unsupported claims of a group boycott are simply not enough to establish a genuine issue for trial on this record. *See* *Cordoba, 419 F.3d at 1181* ("Speculation does not create a *genuine* issue **[*18]** of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment." (quoting *Hedberg v. Ind. Bell Tel. Co., 47 F.3d 928, 931-32 (7th Cir. 1995)*) (emphasis in original)); *Kemp Pontiac-Cadillac, Inc. v. Hartford Auto Dealers' Ass'n, Inc., 380 F. Supp. 1382, 1389 (D. Conn. 1974)* ("[G]lib and conclusory allegations ... are insufficient to raise genuine issues for trial in the face of the specific denials in sworn depositions and affidavits by and in behalf of the several defendants that they never engaged in any such conduct.").

The Court did not overlook Plaintiff's argument that a jury could reasonably find that Thompson and Ziegler's communications to IronPlanet amount to veiled threats because they implicitly conditioned the outcome of ongoing negotiations on IronPlanet's termination of its relationship with Plaintiff. There are (at least) four problems with this argument.

First, with respect to Ziegler, the summary judgment evidence establishes that Mr. Hoeft's email was sent on behalf of CAS, not Ziegler. Thus, any alleged threat in that email cannot be attributable to Ziegler.

Second, no one at IronPlanet viewed these communications as threats (veiled or otherwise), and based on the substance and context of the communications, it would require a stacking of inferences and/or pure speculation to find them to be **[*19]** boycott threats.

Third, there is no evidence that there was an agreement between Thompson and Ziegler to threaten not to deal with IronPlanet, and it is well established that an independent decision not to do business with someone is not an antitrust violation.

Fourth, it is undisputed that before the events giving rise to this case, Ziegler did not consign equipment to IronPlanet, so a threat from Ziegler to withhold consignments in the future would not have changed the existing status quo or been a real threat.

In sum, on this record, no reasonable jury could find that Defendants individually threatened to boycott IronPlanet if it did not terminate its relationship with Plaintiff. Accordingly, there is no parallel conduct from which the jury could possibly infer the existence of a conspiracy.

Without parallel conduct, the Court need not consider whether the "plus factors" identified by Plaintiff tend to show that Defendants' conduct is more probative of a conspiracy than conscious parallelism. However, for sake of completeness, the Court will address the plus factors below.

Plaintiff identifies six "plus factors" to show that the boycott threats that Defendants allegedly made to IronPlanet **[*20]** are more indicative of a conspiracy than individual action or conscious parallelism: (1) context, (2) uniformity of conduct, (3) common motive to conspire, (4) actions against self-interest, (5) evidence implying a traditional conspiracy, and (6) compliance transparency. Each will be discussed in turn.

First, Plaintiff alleges that the context in which the communications were made is a plus factor. However, the considerations cited by Plaintiff in support of this contention are unconvincing.

The timing of the communications amongst Defendants after they became aware of the IronPlanet deal does not tend to show a conspiracy and exclude independent action because it would be natural for industry players who communicate regularly (both professionally and socially) to discuss new developments in the industry at the time those developments transpire. Moreover, the fact that high-level executives were aware of and may have discussed IronPlanet is unsurprising (and not indicative of a conspiracy) because the relationship between IronPlanet and Plaintiff injected an entirely new business model into the industry.

Likewise, the speed at which IronPlanet switched from devoting resources to build **[*21]** up a website for Plaintiff's sales to taking the website down does not tend to show the existence of a conspiracy rather than independent parallel action. Those actions were taken by IronPlanet, not any of the alleged conspirators, and there is simply no evidence from which it could be inferred that the reason IronPlanet took these actions as quickly as it did is because of a conspiracy rather than independent parallel action. Additionally, it is noteworthy that IronPlanet's actions were not inconsistent with its post hoc explanation that (1) continued devotion of substantial time and resources to a website for Plaintiff was not a fruitful endeavor because the website only generated one sale in the month that it was operational; (2) IronPlanet wanted to expeditiously stop its inefficient use of limited resources and devote more time and money to other initiatives, such as the potentially more lucrative CAS merger; and (3) the juxtaposition of new and used equipment on its website was confusing buyers.

Finally, the threat posed by Plaintiff to the alleged conspirators is speculative at best, given the low volume of sales that actually resulted while the its partnership with IronPlanet **[*22]** was in existence and the novelty and lack of proven success of Plaintiff's proposed business model.

Thus, the context in which the communications and related actions occurred do not tend to make the alleged (but unproven) parallel action more likely to indicate conspiracy than lawful conscious parallelism.

Second, Plaintiff identifies "uniformity of conduct" as a plus factor. However, it seems that the similarity of Defendants' conduct is effectively subsumed within the parallel conduct element of the alleged antitrust violation, because the conduct would have to be sufficiently uniform to qualify as parallel. Although the record shows uniform conduct at a high level of generality, Defendants' conduct was not *so* similar as to portend collusion rather than independent action. For example, Ring Power's alleged boycott threat was not made in the context of ongoing negotiations, as was the case with the threats allegedly made by Thompson and Ziegler; and, Ziegler's alleged threat was in the context of negotiations on the CAS merger, not the sale of equipment as was the case with Thompson's alleged threat. Moreover, the fact that Defendants reacted similarly (by seeking additional information **[*23]** about an understandable concern created by a potential "sea change" in the industry) is at least equally consistent with parallel independent action as it is to the existence of a conspiracy. *See* *Quality Auto, 917 F.3d at 1267* (uniformity of conduct suggestive of agreement only if it "would not plausibly arise from 'independent responses to common stimuli'" (quoting *Twombly, 550 U.S. at 556 n.4*)).

Third, Plaintiff asserts that Defendants were motivated by a desire to eliminate a competitor to maintain their own profits. However, under the circumstances, the particular communications at issue are at least as indicative of a good business practice (curiosity and concern about changes in their industry) than of a group boycott conspiracy designed to eliminate a competitor. *See* *Anderson News, 899 F.3d at 112*. Moreover, because the motive behind most (if not all) anticompetitive agreements is ultimately to protect profits, labelling that common motive a "plus factor" is not particularly helpful to the analysis. *See* *Parker Auto Body Inc. v. State Farm Mut. Auto. Ins. Co., 171 F. Supp. 3d 1274, 1283 (M.D. Fla. 2016)*; *see also* *Quality Auto, 917 F.3d at 1263 n.14* ("This plus factor is more properly invoked in contexts where the motive is unique and specific to the alleged conspirators.").

Fourth, Plaintiff identifies "actions against self-interest" as a plus factor, asserting that Defendants stood to lose money **[*24]** by withholding consignments from IronPlanet. Putting aside that this factor would not squarely apply to Ziegler because the summary judgment evidence shows that it had never listed equipment on IronPlanet prior to the events giving rise to this case, the evidence establishes that IronPlanet was not the only viable auction service that could be used to sell heavy construction equipment. Moreover, because common sense dictates that the price Defendants would have been able to get for their *used* equipment may have decreased if cheaper *new* equipment was being sold on the same website, it would not necessarily have been against their self-interest not to consign their used equipment to IronPlanet if it was also selling the new Chinese-manufactured equipment distributed by Plaintiff. Thus, even when viewing the evidence in the light most favorable to Plaintiff, any conclusion as to whether boycotting IronPlanet would have been against Defendants' individual economic interests would be purely speculative.

Fifth, Plaintiff points out the volume of frequent communications between Defendants and IronPlanet and argues that the timing and circumstances surrounding their communications is a plus **[*25]** factor because it is indicative of a traditional conspiracy. However, considering that the case appears to turn on only a mere handful of calls and emails over the course of several days, the volume and frequency of these communications seems unremarkable, particularly given that the parties communicated fairly regularly anyway. And regardless, this factor cannot overcome the lack of any evidence that those communications contained or constituted parallel threats. Stated another way, in the face of evidence indicating that the communications to IronPlanet were not threatening in nature, it would be implausible and unreasonable to infer that the timing or frequency of the communications amongst Defendants somehow renders them unlawful.

The issue is not whether Defendants communicated with each other. Rather, the issue is whether any of the communications show that Defendants agreed to threaten IronPlanet with a boycott if it did not terminate its relationship with Plaintiff.

The summary judgment evidence establishes that at least Ring Power and Thompson had communications with each other during the pertinent timeframe of March and April 2014. However, the evidence also shows that it was **[*26]** not uncommon for Defendants to communicate with each other regarding the sale of used equipment or other legitimate business matters. Moreover, even if Plaintiff is correct that the communications were more frequent than normal during the pertinent timeframe, that would not be enough to show collusion without evidence of the substance of the communications. *See* *In re Fla. Cement & Concrete Antitrust Lit., 746 F. Supp. 2d 1291, 1316 (S.D. Fla. 2010)* (close relationships and telephonic communications among defendants were merely an opportunity to conspire, and were not enough to show conspiracy); *Nichols Motorcycle Supply Inc. v. Dunlop Tire Corp., 913 F. Supp 1088, 1117-18 (N.D. Ill. 1995)* ("The telephone calls, although significant with respect to the time period in which they were made and the context in which they occurred, do not provide any evidence of a horizontal conspiracy because there is no testimony indicating who called whom or what was said during those conversations."); *see also* *Williamson Oil, 346 F.3d at 1319* ("'[T]he mere opportunity to conspire among antitrust defendants does not, standing alone, permit the inference of conspiracy.' ... [T]he opportunity to fix prices without any showing that [the defendants] actually conspired does not tend to exclude the possibility that they did not avail themselves of such opportunity ...." (quoting *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1456 (11th Cir. 1991)*)).

Here, there is simply no evidence from **[*27]** which a reasonable jury could find that the substance of the communications amongst Defendants involved Plaintiff or an agreement to threaten IronPlanet with a boycott. Although those involved in the communications amongst Defendants did not recall the precise substance of most of the communications (other than that some of the communications between Ring Power and Thompson employees involved the potential sale of particular piece of equipment), they all consistently testified that the communications did not involve a plan to threaten IronPlanet with a boycott over its relationship with Plaintiff. The record contains no evidence to the contrary, and it is well established that ***HN11***[] a plaintiff cannot defeat a summary judgment motion "by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy." *See* *Anderson, 477 U.S. at 256*.

In sum, although evidence of the communications amongst Defendants (and the other alleged conspirators) shows that Defendants had opportunity to formulate an agreement to threaten IronPlanet with a boycott, it does not support an inference that they did so because the summary judgment evidence also shows that Defendants communicated regularly **[*28]** (and did so here) for legitimate purposes, such as negotiating deals for used equipment. *See* *Seagood Trading Corp., 924 F.2d at 1574* ("[W]hen the defendant puts forth a plausible, procompetitive explanation for his actions, [the Court] will not be quick to infer, from circumstantial evidence, that a violation of the antitrust laws has occurred.").

Sixth, Plaintiff lists "compliance transparency," or the ability to monitor or enforce a conspiracy, as a plus factor. *See* *In re Urethane Antitrust Lit., 768 F.3d 1245, 1265 (10th Cir. 2014)* (finding evidence of collusion in the price-fixing context when "defendant companies monitored one another to prevent cheating and to discipline any supplier that was found cheating"). In support, Plaintiff points to evidence that Defendants and other alleged conspirators individually monitored the IronPlanet website, and particularly Plaintiff's section of the website. This is unremarkable, considering that at least Ring Power and Thompson listed their equipment on IronPlanet, and that they and the other alleged conspirators were also likely to keep track of available inventory in order to strategize internally and set their own prices. Moreover, the entire public had the ability to view the website during the pertinent time period, and the fact that Defendants **[*29]** may have done so as well does not show that they were monitoring each other in order to discipline any alleged conspirator who did not conform to the alleged boycott threat. Thus, the fact that Defendants each monitored IronPlanet's website regularly does not tend to show that they acted collusively rather than independently.

In sum, even if there was sufficient evidence of parallel conduct to require consideration of whether any there were any "plus factors" that would tend to show that the parallel conduct was the result of a conspiracy rather than independent action or conscious parallelism, Defendants would still be entitled to summary judgment based on the discussion above.[9] At the very least, based on the summary judgment evidence, Plaintiff has not "remove[d] [its] evidence from the realm of equipoise" such that it is "more probative of conspiracy than of conscious parallelism." *Williamson Oil, 346 F.3d at 1301*. Stated another way, the summary judgment evidence does not tend to exclude the possibility that Defendants acted independently and is "as consistent with permissible competition as with illegal conspiracy." *Matsushita Elec., 475 U.S. at 588*.

Accordingly, because there is no direct or circumstantial evidence that Defendants engaged in **[*30]** a conspiracy to exclude Plaintiff from the heavy construction equipment sales market by threatening to boycott IronPlanet if it did not terminate its relationship with Plaintiff, Defendants are entitled to judgment as a matter of law on the *Sherman Act* claims in Counts 1 and 2 of the amended complaint.

Tortious Interference (Counts 3 and 4)

The tortious interference claims are based on the same general premise as the antitrust claims—i.e., Defendants' threats to boycott IronPlanet if it continued its relationship with Plaintiff caused IronPlanet to terminate the relationship. The parties disagree as to what law governs these claims (North Carolina, Illinois, or Florida), but the Court need not resolve that dispute because the parties agree that there are no material differences in the applicable laws of those states. The Court will cite to Florida law because that is what it is more familiar with.

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[9] Even if the Court considered Plaintiff's untimely and unauthorized expert declaration (Doc. 376-107), the outcome would be the same. The "plus factors" discussed in the declaration are (1) motive to conspire, (2) actions against independent self-interest, (3) evidence of a traditional conspiracy, and (4) compliance transparency. The discussion of the first factor is unhelpful because, like an opportunity to conspire, the fact that defendants have a motive to conspire does not tend to show that they did so. The discussion of the second factor is irrelevant because it focuses on actions by IronPlanet that were against its self-interest, not actions of the alleged conspirators (i.e., Defendants) that were against their self-interests. The discussion of the third and fourth factors is effectively legal argument masquerading as an expert opinion that was fully considered (and rejected) in the Court's consideration of the "plus factors" identified by Plaintiff in its response in opposition.

HN12[] "Four elements are required to establish tortious interference with a contractual or business relationship: (1) the existence of a business relationship or contract; (2) knowledge of the business relationship or contract on the part of the defendant; (3) an intentional and unjustified interference with **[*31]** the business relationship or procurement of the contract's breach; and (4) damage to the plaintiff as a result of the interference." *Howard v. Murray, 184 So. 3d 1155, 1166 (Fla. 1st DCA 2015)* (citing *Tamiami Trail Tours, Inc. v. Cotton, 463 So. 2d 1126, 1127 (Fla. 1985)*). Defendants do not contest the first or fourth elements,[10] but they argue that there is no evidence from which a reasonable jury could find in Plaintiff's favor on the second or third elements. The Court agrees in part.

With respect to the second element, it is undisputed that Ring Power and Thompson had knowledge of the agreement between IronPlanet and Plaintiff because they specifically asked IronPlanet about it. However, Ziegler argues that the summary judgment evidence fails to establish that it was aware that Plaintiff had a contract with Plaintiff. This argument is unpersuasive because it is undisputed that Ziegler (through its president and CEO, Mr. Hoeft) at least knew that IronPlanet and Plaintiff had some sort of "business relationship," which is all that is necessary to prove the second element. *See* *Howard, 184 So.3d at 1166*; *Restatement (Second) of Torts § 766 cmt. i*.

With respect to the third element, Defendants argue that there is no evidence from which a jury could find that they intentionally and unjustifiably interfered with the business relationship between IronPlanet and Plaintiff or induced **[*32]** IronPlanet to breach its agreement with Plaintiff. The Court agrees.

Specifically, as to Ring Power, there is no evidence from which a reasonable jury could find that it intentionally interfered with the agreement between IronPlanet and Plaintiff because, as discussed above in connection with the antitrust claims, the summary judgment evidence fails to show that Ring Power threatened to boycott IronPlanet as Plaintiff claims. Rather, all of the nonspeculative evidence of record shows that the communications Ring Power had with IronPlanet concerning Plaintiff were nothing more than inquires to "find out what is going on" that did not contain or imply (and were not received as) a boycott threat. Thus, Ring Power is entitled to summary judgment on the tortious interference claims against it.[11]

Likewise, as to Thompson, the summary judgment evidence fails to establish that it threatened to boycott IronPlanet if it did not terminate its agreement with Plaintiff. However, even if the communications between Messrs. Lindley and Winnette could be construed as a veiled threat that Thompson would not consign the equipment that was under negotiation to IronPlanet without confirmation from IronPlanet **[*33]** that its deal with Plaintiff had been "suspended," that threat would not be actionable because Thompson was justified in not dealing (or threatening not to deal) with IronPlanet under the circumstances. *See* *Restatement (Second) Torts § 766 cmt. l* ("A's aversion to C is as legitimate a reason for his refusal to deal with B as his aversion to B. If he is merely exercising that freedom, he is not liable to C for the harm caused by B's choice not to lose A's business for the sake of getting C's."); *see also* *Genet Co. v. Annheuser-Busch, Inc., 498 So.2d 683, 684 (Fla. 3d DCA 1986)* ("[T]here can be no claim [for tortious interference] where the action complained of is undertaken to safeguard or promote one's financial or economic interest."). Furthermore, the undisputed evidence establishes that Thompson's concern about the status of the relationship between IronPlanet and Plaintiff was motivated by its legitimate business interests (a concern that its used equipment would sell for less if IronPlanet's website also listed Plaintiff's new equipment), rather than malice. *See* *Menendez v. Beech Acceptance Corp., 521 So.2d 178, 180 (Fla. 3d DCA 1988)* ("[C]onduct engaged in [to protect a competing financial interest], even if tinged with animosity and malice, does not give rise to a cause

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[10] It is undisputed that Plaintiff and IronPlanet had a business relationship (first element), and the issue of damages (fourth element) was deferred until Phase 2 of the case.

[11] Based on this disposition, the Court need not consider Ring Power's alternative argument that any alleged interference would have been "privileged" because it was a minority owner of IronPlanet. *See* *Bridge Fin., Inc. v. J. Fischer & Assocs., Inc., 310 So. 3d 45, 50 (Fla. 4th DCA 2020)* (holding that "because [the defendant] was a partial [5%] owner in [the plaintiff], he was not a stranger to a business relationship, and thus cannot be held liable for tortious interference"). Likewise, the Court need not consider Plaintiff's argument that Ring Power should not be allowed to assert this privilege defense now because it did not raise it in its answer.

of action for interference with a contractual relationship."); *McCurdy v. Collis, 508 So.2d 380, 383 (Fla. 1st DCA 1987)* (noting that the privilege **[*34]** to interfere is only negated "when malice is the sole basis for interference" (emphasis added)). Thus, Thompson is entitled to summary judgment on the tortious interference claims against it.

Finally, as to Ziegler, the summary judgment evidence establishes that Mr. Hoeft's email asking to "better understand th[e] relationship" between IronPlanet and Plaintiff was sent on behalf of CAS, not Ziegler. But, even if the email could be construed to have been sent on behalf of Ziegler, it did not contain or imply (and was not received as) a boycott threat. Additionally, even if that communication was somehow construed as a threat by Ziegler not to use IronPlanet to sell equipment in the future because of IronPlanet's dealings with Plaintiff, that would not be actionable because Ziegler, like Thompson, was free to independently decide who to deal with based on its own business interests. Thus, Ziegler is entitled to summary judgment on the tortious interference claims against it.

Accordingly, because the summary judgment evidence establishes that Defendants did not intentionally or unjustifiably interfere with Plaintiff's business relationship with IronPlanet, Defendants are entitled to judgment **[*35]** as a matter of law on the tortious interference claims in Counts 3 and 4 of the amended complaint.

Conclusion

In sum, although a reasonable jury could find that IronPlanet was "pressured" into terminating its relationship with Plaintiff, there is simply no evidence (direct or circumstantial) from which a jury could find that the dealer defendants named in this case were responsible for exerting that pressure, much less that they unlawfully entered into an agreement to do so. Accordingly, it is

ORDERED that Defendants' motions for summary judgment (Docs. 358, 359, 361) are **GRANTED**. The Clerk shall enter judgment in favor of Defendants and close the case file.

DONE and ORDERED this 23rd day of December, 2021.

/s/ T. Kent Wetherell, II

T. KENT WETHERELL, II

UNITED STATES DISTRICT JUDGE

McCarthy v. Intercontinental Exch., Inc.

United States District Court for the Northern District of California

December 23, 2021, Decided; December 23, 2021, Filed

Case No. 20-cv-05832-JD

Reporter

2021 U.S. Dist. LEXIS 245093 *; 2021 WL 6072817

LISA MCCARTHY, et al., Plaintiffs, v. INTERCONTINENTAL EXCHANGE, INC., et al., Defendants.

Prior History: McCarthy v. Intercontinental Exch., 2021 U.S. Dist. LEXIS 104419, 2021 WL 2806222 (N.D. Cal., June 3, 2021)

Core Terms

interest rate, injunction, variable, plaintiffs', loans, consumer, merits, preliminary injunction, price fixing, banks, defendants', likelihood of success, contracts, formula, price-fixing, irreparable, conspiracy, antitrust, parties

LexisNexis® Headnotes

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

HN1[] **Grounds for Injunctions, Balance of Hardships**

Preliminary injunctions are an extraordinary remedy never awarded as of right. A plaintiff seeking a preliminary injunction must establish that he or she is likely to succeed on the merits, that he or she is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his or her favor, and that an injunction is in the public interest. In the Ninth circuit, a plaintiff may also obtain a preliminary injunction under a sliding scale approach by raising serious questions' going to the merits of plaintiff's claims and showing that the balance of hardships tips sharply in his or her favor. In all cases, at an irreducible minimum, the party seeking an injunction must demonstrate a fair chance of success on the merits, or questions serious enough to require litigation. Because of this importance, when a plaintiff has failed to show the likelihood of success on the merits, we need not consider the remaining three elements.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN2[] **Standing, Burdens of Proof**

Regarding standing under U.S. Const. art. III, federal courts have the power to decide legal questions only in the presence of an actual Case or Controversy. If a plaintiff invokes federal jurisdiction, they bear the burden of showing that they have suffered an injury in fact that is fairly traceable to the conduct being challenged and which will likely be redressed by a favorable decision. Standing to sue under U.S. Const. art. III must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[] **Standing, Burdens of Proof**

Regarding standing at the preliminary injunction stage, plaintiffs must make a clear showing of each element of standing. When there are multiple plaintiffs, the presence of one plaintiff with standing assures that the controversy before the Court is justiciable.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4[] **Injunctions, Preliminary & Temporary Injunctions**

A trial court may give even inadmissible evidence some weight in a preliminary injunction analysis.

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN5[] **Standing, Elements**

Regarding standing under U.S. Const. art. III, to be sure, standing is an ongoing inquiry and the need to satisfy the requirements of U.S. Const. art. III persists throughout the life of the lawsuit, with the later stages of the case requiring more of plaintiffs than is required at earlier stages.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN6[] **Injunctions, Preliminary & Temporary Injunctions**

The threshold inquiry in a preliminary injunction analysis is the plaintiff's likelihood of success.

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

HN7[] **Cartels & Horizontal Restraints, Price Fixing**

In regard to proving a likelihood of success on a price fixing claim, it is certainly true that any combination which tampers with price structures is engaged in an unlawful activity.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

HN8[] **Sherman Act, Claims**

Regarding a claim of price fixing, when two partners set the price of their goods or services they are literally price fixing, but they are not per se in violation of the Sherman Act.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN9[] **Grounds for Injunctions, Irreparable Harm**

Regarding the irreparable harm inquiry in a preliminary injunction analysis, it is well established that a monetary injury is not normally considered irreparable.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN10[] **Injunctions, Preliminary & Temporary Injunctions**

Regarding the public interest factor in a preliminary injunction analysis, this factor looks at an injunction's impact on non-parties rather than parties.

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Judges: JAMES DONATO, United States District Judge.

Opinion by: JAMES DONATO

Opinion

ORDER RE INJUNCTION

Re: Dkt. Nos. 19, 259

In this consumer antitrust action, Lisa McCarthy and twenty-six other plaintiffs allege that a number of banks and financial institutions have engaged in a conspiracy to fix the intra-bank interest rate known as the USD LIBOR. Dkt. No. 1. The gravamen **[*8]** of the complaint is that the LIBOR formula and procedures themselves, which have been publicly known since the 1980s, are inherently anticompetitive, and that defendants' participation in determining LIBOR is itself a conspiracy. In this respect, this case is entirely different from long-running litigation in other courts which alleged that banks and other financial institutions manipulated the submissions used to determine the LIBOR. *See Gelboim v. Bank of America Corp., 823 F.3d 759, 764 (2d Cir. 2016)* ("[i]t is alleged that the Banks colluded to depress LIBOR by violating the rate-setting rules" so that "the payout associated with the various financial instruments was thus below what it would have been" absent the manipulation). Plaintiffs are consumers of loans and credit cards with variable interest rates, and say they paid artificially inflated interest rates as a result of defendants' conduct.

Plaintiffs have filed a motion for preliminary and permanent injunction under *Federal Rule of Civil Procedure 65*, which asks that defendants be prohibited from, among other things, "continuing to engage in their price-fixing scheme" and "enforcing any financial instrument that relies in whole or in part on USD LIBOR." Dkt. No. 19 at iii. Plaintiffs also seek an order "voiding variable **[*9]** interest rate contracts for consumer loans which include LIBOR as a component of the variable interest rate." *Id.*

In a subsequent "application for an order to show cause why an injunction should not issue," Dkt. No. 259, plaintiffs again sought what is effectively the same relief. They asked the Court to issue "an order to show cause why defendants should not be enjoined and prohibited from continuing to engage in their LIBOR price-fixing scheme" and prohibited "from enforcing the LIBOR part of any financial instrument, including mortgages, student loans, credit cards, auto loans and lines of credit, that rely in whole or in part on USD LIBOR." *Id.* at 8. The OSC application also asks the Court to "declare void any agreement or contract for a variable interest rate consumer loan that includes USD LIBOR as a component of its variable interest rate," as well as "require that defendants post a bond to secure the return of their retail customers' price-fixed overpayments and a bond to cover the difference between the federal treasury rate and the LIBOR price-fixed rate." *Id.*

Because the injunction and OSC requests are virtually identical, the Court will resolve both in the *Rule 65* context. The requests **[*10]** are denied.

LEGAL STANDARDS

HN1[] "Preliminary injunctions are 'an extraordinary remedy never awarded as of right.'" *Michigan v. DeVos, 481 F. Supp. 3d 984, 990 (N.D. Cal. 2020)* (quoting *Winter v. NRDC, Inc., 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)*). "'A plaintiff seeking a preliminary injunction must establish that he [or she] is likely to succeed on the merits, that he [or she] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his [or her] favor, and that an injunction is in the public interest.'" *Id. at 990-91* (quoting *Winter, 555 U.S. at 20*); *see also Garcia v. Google, Inc., 786 F.3d 733, 740 (9th Cir. 2015)* (same). "In our circuit, a plaintiff may also obtain a preliminary injunction under a 'sliding scale' approach by raising 'serious questions' going to the merits of plaintiff's claims and showing that the balance of hardships tips 'sharply' in his or her favor." *Michigan, 481 F. Supp. 3d at 991* (quoting *A Woman's Friend Pregnancy Res. Clinic v. Becerra, 901 F.3d 1166, 1167 (9th Cir. 2018)* and *Vanguard Outdoor, LLC v. City of Los Angeles, 648 F.3d 737, 740 (9th Cir. 2011)*).

"In all cases, at an 'irreducible minimum,' the party seeking an injunction 'must demonstrate a fair chance of success on the merits, or questions serious enough to require litigation.'" *Maffick LLC v. Facebook, Inc., No. 20-cv-05222-JD, 2020 U.S. Dist. LEXIS 162517, 2020 WL 5257853, at *1 (N.D. Cal. Sept. 3, 2020)* (quoting *Pimentel v. Dreyfus, 670 F.3d 1096, 1105-06 (9th Cir. 2012)* (cleaned up)); *see also Garcia, 786 F.3d at 740* ("The first factor under *Winter* is the most important -- likely success on the merits."). Because of this importance, when "a plaintiff has failed to show the likelihood of success on the merits, we need not consider the remaining three [*Winter* elements]." **[*11]** *Garcia, 786 F.3d at 740* (internal quotations and citations omitted).

DISCUSSION

I. ARTICLE III STANDING

Defendants say that plaintiffs lack Article III standing to sue. Dkt. No. 133 at 5-6. Consequently, the Court starts, as it must, with the justiciability of this controversy.

HN2[] Under Article III of the Constitution, federal courts have "the power to decide legal questions only in the presence of an actual 'Cas[e]' or 'Controvers[y].'" *Wittman v. Personhuballah, 578 U.S. 539, 543, 136 S. Ct. 1732, 195 L. Ed. 2d 37 (2016)*. Plaintiffs have invoked federal jurisdiction, and so they bear the burden of showing that they have "suffered an 'injury in fact'" that is "'fairly traceable' to the conduct being challenged" and which "will likely be 'redressed' by a favorable decision." *Id.* (quoting *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*).

Standing to sue under Article III "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan, 504 U.S. at 561*. In this "very preliminary stage of the litigation," the Court will take into account the "allegations in [plaintiffs'] complaint and whatever other evidence they submitted in support of" their preliminary injunction motion. *Washington v. Trump, 847 F.3d 1151, 1159 (9th Cir. 2017)*.

HN3[] "At the preliminary injunction stage, plaintiffs must make a clear showing of each element of standing." **[*12]** *Townley v. Miller, 722 F.3d 1128, 1133 (9th Cir. 2013)* (citations omitted). When there are multiple plaintiffs, as is the case here, the presence of one plaintiff with standing "assures that [the] controversy before [the] Court is justiciable." *DOC v. United States House of Representatives, 525 U.S. 316, 330, 119 S. Ct. 765, 142 L. Ed. 2d 797 (1999)* (citing *Director, Office of Workers' Compensation Programs v. Perini North River Assocs., 459 U.S. 297, 303-05, 103 S. Ct. 634, 74 L. Ed. 2d 465 (1983)*).

Defendants' Article III objection is not well taken. The complaint alleges that plaintiffs are "consumers of variable interest rate loans"; "USD LIBOR is an unlawful rate regularly utilized as a component of the pricing in variable interest rate consumer loans by the defendants and their co-conspirators"; and plaintiffs "have been damaged and are threatened with damage in that they have paid and will pay anticompetitive rates in the future for variable interest rate loans." Dkt. No. 1 ¶ 4. On that score, plaintiff McCarthy filed a declaration attesting that she is "a consumer of variable interest rate loans, including a Capital One credit card with a variable interest rate tied to USD LIBOR." Dkt. No. 212-1 ¶ 2. The complaint also alleges that defendants conspired to fix the USD LIBOR rate with an agreed-upon formula that excluded the lowest submitted rates, and that a "reasonable estimate of the competitive price" is "the lowest rate submitted by the contributor banks, which is excluded **[*13]** by virtue of defendants' unlawful combination or conspiracy." Dkt. No. 1 ¶¶ 43, 45. Plaintiffs provided a declaration by Patricia Plonsker, a "financial analyst and management consultant specializing in interest rate risk for financial institutions," who states that "the impact of the US LIBOR price-fixing formula on US consumers is enormous" and has resulted in "excess overcharge interest accrued on outstanding loans." Dkt. No. 19-2 at 3 & ¶ 28.[1]

These factors amply establish plaintiffs' standing to sue under Article III. *HN5*[] To be sure, "[s]tanding is an ongoing inquiry" and the need to satisfy the requirements of Article III "persists throughout the life of the lawsuit," with the later stages of the case requiring more of plaintiffs than is required at this early stage. *Heeger v. Facebook, Inc., 509 F. Supp. 3d 1182, 1188 (N.D. Cal. 2020)* (citation omitted). But at this stage, plaintiffs are positioned to sue.

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[1] nn1 Defendants' requests to strike Plonsker's declarations under *Federal Rule of Evidence 702*, Dkt. Nos. 135, 266, are denied without prejudice to possible consideration down the road. *HN4*[] A "trial court may give even inadmissible evidence some weight" in a preliminary injunction analysis. *Flynt Distributing Co., Inc. v. Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984)*; *see also* *Johnson v. Couturier, 572 F.3d 1067, 1083 (9th Cir. 2009)*. The Court considered the Plonsker declaration at Dkt. No. 19-2 for the specific question of standing, but did not rely on any of Plonsker's declarations for the analysis of the preliminary injunction factors.

II. LIKELIHOOD OF SUCCESS

HN6[] The threshold inquiry under *Winter* is plaintiffs' likelihood of success. Plaintiffs state in the complaint two antitrust violations by defendants: (1) price fixing in violation of *Section 1 of the Sherman Act, 15 U.S.C. § 1*; and (2) a conspiracy to monopolize in violation of *Section 2 of the Sherman Act, 15 U.S.C. § 2*. Dkt. No. 1 ¶¶ 68-85. The injunction requests are based on the *Section 1* claim only, *see* Dkt. No. **[*14]** 19 at 1 & Dkt. No. 259 at 1, and so the merits inquiry focuses on that claim only. The question is whether plaintiffs have demonstrated a likelihood of success, or at the very least a serious question, on their *Section 1* claim that warrants the extraordinary remedy of a preliminary injunction.

They have not. The salient facts for this conclusion are largely undisputed. The parties agree that, since the mid-1980s, a group of banks have worked together to set a daily LIBOR rate. Dkt. No. 1 ¶¶ 32-33. To set the rate, each panel bank provided an answer to the question, "At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 a.m.?" *Id.* ¶ 33. Since management of the LIBOR was handed over from the British Bankers' Association (BBA) to defendant Intercontinental Exchange Benchmark Administration Limited (IBA) in 2014, IBA has continued to solicit this input data from panel banks. *Id.* ¶¶ 36-38. IBA then calculates LIBOR "using a trimmed arithmetic mean" in which "the highest and lowest quartiles of submissions are excluded" and "[a] mean is calculated from the remaining middle quartiles, rounded to five decimal **[*15]** places." *Id.* ¶ 43.

The setting of the daily LIBOR is subject to regulatory oversight. The Financial Conduct Authority (FCA), a creature of U.K. law, is charged with "regulat[ing] LIBOR and supervis[ing] both LIBOR submitters and its administrator." Dkt. No. 133 at 8. The parties agree that the FCA is in the process of phasing LIBOR out. *See* Dkt. No. 212 (plaintiffs' reply brief) at 8 ("Defendants have pledged to sunset the LIBOR formula by the end of 2023"); Dkt. No. 133 (defendants' opposition brief) at 1 ("The global financial community has been carefully planning for the eventual transition from LIBOR to alternative benchmarks through a phase-out process supervised by financial regulators and central banks.").

The parties do not dispute the nearly universal use of the LIBOR rate in the banking world. The complaint alleges that the rate is "used by an estimated US $350 trillion . . . of outstanding contracts in maturities ranging from overnight to more than 30 years." Dkt. No. 1 at 3. Defendants make the same point to the effect that an injunction against "continuing to set or observe LIBOR" would "massively disrupt global financial markets, causing grave uncertainty regarding rights **[*16]** and obligations under contracts that reference LIBOR." Dkt. No. 133 at 12.

Plaintiffs say they have demonstrated a likelihood of success on the merits by virtue of a single United States Supreme Court decision of an older vintage: *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*. That is in effect the entirety of plaintiffs' legal argument. *See* Dkt. No. 19 at 2 ("Plaintiffs' success on the merits is manifest" under *Socony*); *see also id.* at 9-10 (same). Much of plaintiffs' argument simply hurls block quotes from *Socony* like projectiles from a catapult, because plaintiffs "believe that the simple statements by the Supreme Court, which are clear, concise and cogent, are more persuasive than any arguments that anyone else could make." Dkt. No. 288 at 2-4.

This almost exclusive reliance on *Socony* is misplaced. ***HN7***[] It is certainly true that "[a]ny combination which tampers with price structures is engaged in an unlawful activity." *Socony, 310 U.S. at 221*. But plaintiffs' insistence that the merits analysis should stop with a highly general and undisputed proposition of ***antitrust law*** plucked from *Socony* is not correct. To start, plaintiffs overlook the distinguishing fact that *Socony* was a criminal case where the defendants were convicted at trial of a conspiracy that was "not to be found in any **[*17]** formal contract or agreement." *Id. at 177*. In addition, legal developments in the 81 years since *Socony* was published cast considerable doubt on plaintiffs' rather mechanical analysis. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 9, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*, the Supreme Court expressly stated that the question was not "simply [one] of determining whether two or more potential competitors have literally 'fixed' a 'price.'" The Court cautioned that "[l]iteralness is overly simplistic and often overbroad. ***HN8***[] When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." Broadcast Music, 441 U.S. at 9. In Texaco Inc. v. Dagher, 547 U.S. 1, 6, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006), the Court again underscored that the defendants' "pricing policy may be price fixing in a literal sense," but "it is not price fixing in the antitrust sense."

Plaintiffs did not engage with these developments, and simply pound Socony to say that price fixing is illegal. *See, e.g.*, Dkt. No. 288 at 1. This will not do for present purposes. To be sure, the Court embraces the proposition that horizontal price fixing is a *per se* violation of the Sherman Act Section 1. *See* United States v. Florida, No. 4:14-cr-00582-JD, 2017 U.S. Dist. LEXIS 58426, 2017 WL 1374599, at *2 (N.D. Cal. Apr. 17, 2017). But that does not mean that simply adding the LIBOR formula to this legal principle amounts to proof that plaintiffs are entitled to immediately **[*18]** void $350 trillion dollars' worth of contracts on a preliminary basis, especially when the Supreme Court has repeatedly cautioned since Socony that the antitrust laws should not be applied in such a rote manner.

Overall, plaintiffs have not carried their burden of establishing a likelihood of success sufficient to warrant the extraordinary relief of a preliminary injunction. Even if plaintiffs were said to have raised a serious question about the Section 1 claim, an injunction would still be unwarranted because they have failed to satisfy the other Winter factors.[2]

III. IRREPARABLE HARM, BALANCE OF THE EQUITIES, AND THE PUBLIC INTEREST

Plaintiffs have not established an imminent threat of irreparable harm. ***HN9***[] The injury plaintiffs claim is that they paid too much in interest rates, but "[i]t is well established . . . that such monetary injury is not normally considered irreparable." Maffick, 2020 U.S. Dist. LEXIS 162517, 2020 WL 5257853, at *3 (quoting Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 634 F.2d 1197, 1202 (9th Cir. 1980)). Plaintiffs also acknowledge that the LIBOR formula and procedures they attack have been publicly known and in continuous use since the 1980s. Dkt. No. 19 at 4. Why these well-known, decades-old practices are suddenly ripe for emergency relief in 2021 is not explained. This delay further undermines a claim of irreparable **[*19]** harm. *See* Cal. Physicians Serv., Inc. v. Healthplan Servs., Inc., No. 3:18-cv-03730-JD, 2021 U.S. Dist. LEXIS 44170, 2021 WL 879797, at *7 (N.D. Cal. Mar. 9, 2021).

The "balance of equities" does not tip in plaintiffs' favor. *See* Winter, 555 U.S. at 24-31. Other than plaintiff McCarthy, none of the plaintiffs have demonstrated that they are paying a variable interest rate that is tied to LIBOR. Dkt. No. 212-2 - 212-8. Consequently, the hardship to plaintiffs is, on the whole, minor and purely monetary. In contrast, defendants have established that if the Court were to enjoin LIBOR across the board, as plaintiffs propose, substantial and possibly catastrophic consequences would ensue in the global financial market. *See* Dkt. No. 133 at 14-15; Dkt. No. 136. Plaintiffs did not contest this showing.

For the same reason, the public interest factor weighs heavily against plaintiffs. ***HN10***[] This factor looks at an injunction's "impact on non-parties rather than parties." Bernhardt v. L.A. Cnty., 339 F.3d 920, 931 (9th Cir. 2003) (citation omitted). An amicus brief filed by the Chamber of Commerce of the United States of America and others demonstrates that the injunction plaintiffs request would "inject great uncertainty into financial transactions, pose systemic risks to the financial system, and leave parties to millions of contracts without a mechanism to calculate their payment obligations." Dkt. No. 214-1 at 1. Another amicus **[*20]** brief filed by the Federal Reserve Bank of New York and the Board of Governors of the Federal Reserve System also establishes that an "abrupt end to LIBOR without an orderly transition would be detrimental to the public interest with consequences that could include . . . upending consumer contracts, including mortgages and student loans." Dkt. No. 282-1 at 1. Plaintiffs rather glibly dismiss these serious concerns by saying that "[f]inancial disasters are irrelevant in price fixing cases." Dkt.

[2] nn2 Because plaintiffs' merits showing is lacking, the Court need not resolve defendants' other "likelihood of success" arguments, such as antitrust standing or personal jurisdiction. Dkt. No. 133 at 6-7, 9-10. Those issues will be addressed as warranted at a later stage of the case.

No. 318 at 1. Not so under *Winter*. The public interest factor is a critical component of a preliminary injunction analysis, and plaintiffs have failed to show that the public interest supports the injunction they have asked for.[3]

CONCLUSION

The motion for injunction and application for an order to show cause are both denied, Dkt. Nos. 19, 259, as are defendants' requests to strike and their evidentiary objection. Dkt. Nos. 135, 266, 292. The Financial Conduct Authority's motion for leave to file an amicus brief, Dkt. No. 349, is terminated as moot in light of this order. The motions to dismiss that were taken under submission, Dkt. No. 342, will be resolved in a separate order.

IT IS SO ORDERED.

Dated: **[*21]** December 23, 2021

/s/ James Donato

JAMES DONATO

United States District Judge

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[3] nn3 Defendants' objection to new reply evidence, Dkt. No. 292, is terminated as moot. The evidence objected to played no role in this order.

Singh v. Am. Racing-Tioga Downs Inc.

United States District Court for the Northern District of New York

December 28, 2021, Decided; December 28, 2021, Filed

3:21-CV-0947 (LEK/ML)

Reporter

2021 U.S. Dist. LEXIS 246306 *; 2021 WL 6125432

KAPILDEO SINGH, et al., Plaintiffs, -against- AMERICAN RACING-TIOGA DOWNS INC. d/b/a TIOGA DOWNS CASINO AND RACEWAY, et al., Defendants.

Core Terms

antitrust, horses, racetracks, Defendants', motion to dismiss, relevant market, anticompetitive, Sur-Reply, alleges, racing, anti trust law, compete, tracks, harness racing, enforcers, group boycott, stable, ban, interchangeability, competitors, train, rule of reason, actual injury, courts, state law claim, horse owner, violations, boycott, damages, factors

LexisNexis® Headnotes

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

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

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

To survive a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A court must accept as true the factual allegations contained in a complaint and draw all inferences in favor of a plaintiff. A complaint may be dismissed pursuant to *Rule 12(b)(6)* only where it appears that there are not enough facts to state a claim to relief that is plausible on its face. Plausibility requires enough facts to raise a reasonable expectation that discovery will reveal evidence of the alleged misconduct. The plausibility standard asks for more than a sheer possibility that a defendant has acted unlawfully. The pleading standard *Fed. R. Civ. P. 8* announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. Where a court is unable to infer more than the mere possibility of the alleged misconduct based on the pleaded facts, the pleader has not demonstrated that she is entitled to relief and the action is subject to dismissal.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN2[] Standing, Clayton Act

It is a well-established principle that, while the United States is authorized to sue anyone violating the federal antitrust laws, a private plaintiff must demonstrate standing. Antitrust standing is a threshold, pleading-stage inquiry and when a complaint, by its terms, fails to establish the requirement, a court must dismiss it as a matter of law. Plaintiffs must demonstrate antitrust standing whether they seek monetary or injunctive relief.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN3[] Standing, Requirements

A private plaintiff must show two elements to demonstrate antitrust standing: (1) it suffered a special kind of antitrust injury and that (2) it is a suitable plaintiff to pursue the alleged antitrust violations and thus is an efficient enforcer of the antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN4[] Standing, Requirements

Generally, only those that are participants in the defendants' market can be said to have suffered antitrust injury. However, if a plaintiff is a market participant or satisfies the inextricably intertwined exception recognized by the U.S. Court of Appeals for the Second Circuit, then the court must employ the Second Circuit's three-part test for determining whether a plaintiff has alleged an antitrust injury: first, the party asserting that it has been injured by an illegal anticompetitive practice must identify the practice complained of and the reasons such a practice is or might be anticompetitive. Next, the court identifies the actual injury the plaintiff alleges, which requires it to look to the ways in which the plaintiff claims it is in a worse position as a consequence of the defendant's conduct. Finally, the court compares the anticompetitive effect of the specific practice at issue to the actual injury the plaintiff alleges. It is not enough for the actual injury to be causally linked to the asserted violation. Rather, in order to establish antitrust injury, the plaintiff must demonstrate that its injury is of the type the antitrust laws were intended to prevent and that flows from that which makes or might make defendants' acts unlawful.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN5[] Standing, Requirements

If a plaintiff clears the antitrust-injury hurdle, a court employs a four-factor test to determine whether the plaintiff is an efficient enforcer. The factors include: (1) the directness or indirectness of the asserted injury, (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement, (3) the speculativeness of the alleged injury, and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries. The four factors need not be given equal weight: the relative significance of each factor will depend on the circumstances of the particular case.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN6[] **Per Se Rule & Rule of Reason, Sherman Act**

Section 1 of the Sherman Act makes it illegal to enter into a contract, combination, or conspiracy to restrain trade or commerce. 15 U.S.C.S. § 1. To establish a § 1 violation, a plaintiff must produce evidence sufficient to show: (1) a combination or some form of concerted action between at least two legally distinct economic entities; and (2) such combination or conduct constituted an unreasonable restraint of trade either per se or under the rule of reason.

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

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

HN7[] **Per Se Rule & Rule of Reason, Sherman Act**

In evaluating potential Sherman Act violations, courts employ two complementary categories of antitrust analysis. The first category includes agreements that are "illegal per se" because their nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality. The second category includes agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. For that second category of analysis, courts apply the rule of reason. Per se violations include horizontal and vertical price-fixing; division of a market into territories; certain tying arrangements; and some group boycotts involving concerted refusals to deal with a competitor. A "group boycott" and a "refusal to deal" are analytically identical.

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

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

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

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

HN8[] **Horizontal Refusals to Deal, Boycotts**

Precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors. In other words, if there is no horizontal agreement among direct competitors, then there can be no group boycott and the per se rule is inapplicable.

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

HN9[] Motions to Dismiss, Failure to State Claim

In considering a motion to dismiss for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)*, a court may consider the following matters outside the four corners of the complaint: (1) documents attached as an exhibit to the complaint or answer, (2) documents incorporated by reference in the complaint, (3) documents that, although not incorporated by reference, are integral to the complaint, or (4) any matter of which the court can take judicial notice for the factual background of the case.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN10[] Standing, Requirements

To suffer antitrust injury, the putative plaintiff must be a participant in the very market that is directly restrained. Usually, that market is the one in which the defendant operates, such as when the plaintiff is a competitor or consumer of the defendant, but sometimes the defendant will corrupt a separate market in order to achieve its illegal ends, in which case the injury suffered can be said to be inextricably intertwined with the injury of the ultimate target. Regardless, antitrust injury is suffered by participants in the restrained market.

Antitrust & Trade Law > Sherman Act > Claims

HN11[] Sherman Act, Claims

At the first step of the Gatt analysis, plaintiffs need allege only that the defendants have engaged in unlawful anticompetitive conduct. The bar for such a showing is a low one. The second step requires the court to isolate and identify the plaintiffs' actual injury or the ways in which the plaintiff claims it is in a worse position as a consequence of the defendant's conduct.

Antitrust & Trade Law > Sherman Act > Claims

HN12[] Sherman Act, Claims

Gatt Step 2 is construed as having two requirements: (1) plaintiffs must plausibly allege violations of market-wide harm, or in other words, an injury to competition; and (2) plaintiffs must plausibly allege that they are worse off than it would be if the market were free of anticompetitive forces.

Antitrust & Trade Law > Sherman Act > Claims

HN13[] Sherman Act, Claims

At the third step of the Gatt analysis, plaintiffs must demonstrate that the defendants' anticompetitive behavior caused actual injury. In other words, the nature of the plaintiffs' injury must be caused by the defendants' anticompetitive actions and not by something else.

Antitrust & Trade Law > Sherman Act > Claims

HN14[] Sherman Act, Claims

Directness in the antitrust context means close in the chain of causation. That factor turns on principles of proximate causation.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN15[] **Standing, Requirements**

The second factor to determine whether an antitrust plaintiff is an efficient enforcer simply looks for a class of persons naturally motivated to enforce the antitrust laws. Inferiority to other potential plaintiffs can be relevant, but it is not dispositive.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN16[] **Remedies, Damages**

Under the third factor to determine whether an antitrust plaintiff is an efficient enforcer, a court asks whether there would be a high degree of speculation in a damages calculation. The fourth factor traditionally concerns the prospect of different groups of plaintiffs attempting to recover for the same exact injury. However, the potential difficulty in ascertaining and apportioning damages is not an independent basis for denying standing where it is adequately alleged that a defendant's conduct has proximately injured an interest of the plaintiff's that the statute protects. Moreover, at the motion to dismiss stage, any holding that the damages would be speculative is premature.

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

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

HN17[] **Relevant Market, Geographic Market Definition**

Regardless of what standard applies, antitrust plaintiffs must articulate a relevant market. The relevant market is broadly defined as the area of effective competition, which is typically the arena within which significant substitution in consumption or production occurs. Market definition is ordinarily a deeply fact-intensive inquiry. Accordingly, courts often hesitate to grant motions to dismiss for failure to plead a relevant market. Still, where a plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products, the relevant market is legally insufficient and a motion to dismiss may be granted. Merely asserting that a commodity is in some way unique is insufficient to plead a relevant market.

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

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Same Case & Controversy

HN18[] **Supplemental Jurisdiction, Pendent Claims**

28 U.S.C.S. § 1367(c) provides that district courts may decline to exercise supplemental jurisdiction over a state law claim if the district court has dismissed all claims over which it has original jurisdiction Where any federal claims have been dismissed at a relatively early stage of litigation, courts often decline to exercise subject matter jurisdiction.

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For Ira Wallach, Brian Wallach, Yves Sarrazin, Erlin Hill, Bruce Soulsby, Alan Weisenberg, Plaintiffs: Andrew J. Mollica, LEAD ATTORNEY, Office of Andrew J. Mollica, Garden City, NY.

For American Racing-Tioga Downs Inc., doing business as, Tioga Downs Casino and Raceway, American Racing-Vernon Downs Inc., doing business as, Vernon Downs Racetrack, American Racing and Entertainment, LLC, New Meadowlands Racetrack LLC, doing business as, Meadowlands Racetrack, Jeffrey R. Gural, in his individual and official capacities, Defendants: Brian Pandya, Duane Morris LLP, Washington, DC; James Bucci, Genova Burns, Camden, NJ; Lawrence Bluestone, Genova Burns, Jersey City, NJ.

Judges: LAWRENCE E. KAHN, United States District Judge.

Opinion by: LAWRENCE E. KAHN

Opinion

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiffs Kapildeo **[*2]** Singh, Lawrence Dumain, Ira Wallach, Brian Wallach, Yves Sarrazin, Erlin Hill, Bruce Soulsby, and Alan Weisenberg bring this civil action against Defendants American Racing-Tioga Downs Inc. d/b/a as Tioga Downs Casino and Raceway ("Tioga"); American Racing-Vernon Downs Inc. d/b/a Vernon Downs Racetrack ("Vernon"); American Racing and Entertainment, LLC ("American Racing"); New Meadowlands Racetrack LLC d/b/a The Meadowlands Racetrack ("the Meadowlands") ("Tioga," "Vernon," and "the Meadowlands" collectively referred to as the "racetracks"), and Jeffrey R. Gural ("Gural"). See Dkt. No. 1 ("Complaint"). Presently before the Court is Defendants' motion to dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. See Dkt. Nos. 10 ("Motion to Dismiss"), 10-1 ("Defendants' Memorandum of Law"), 16 ("Opposition"), 17 ("Reply"), 19 ("Plaintiffs' Sur-Reply"), 20 ("Defendants' Sur-Reply"). For the reasons that follow, the Court grants the Motion to Dismiss.

II. BACKGROUND

A. Factual History

The following factual allegations contained in the Complaint are assumed to be true. See *Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 76 (2d Cir. 2015)*.

1. The Parties

Plaintiffs are/were owners of racing horses, including horses that they raced or intended to race at the racetracks. Compl. ¶ 19. Plaintiffs **[*3]** had ownership interests in horses they intended to race during the 2021 racing season at the racetracks. Id. ¶¶ 20, 23-24, 26-29, 31-32, 34, 36-37, 39-40. Additionally, Plaintiffs had business relationships with trainers to train their respective horses. Id. ¶¶ 22, 25, 30, 33, 35, 38, 41. Plaintiffs are licensed and in good standing in New York and New Jersey with the New York Gaming Board and the New Jersey Racing Commission. Id. ¶ 42. These licenses give Plaintiffs the ability to compete at the racetracks. Id. To participate in the harness racing industry, Plaintiffs need to have the ability to stable and train their horses, qualify their horses in sanctioned qualifying races, and have the ability to enter into races throughout the New York and New Jersey region. Id. ¶ 43. Furthermore, in order to race in the lucrative stakes program at the Meadowlands, Plaintiffs must make continuing payments to keep their horses eligible, and Plaintiffs made these payments in February 2021. Id. ¶¶ 44-45.

The racetrack defendants directly solicit horse owners and trainers from across the United States and internationally to compete in their stake's races. Id. ¶ 46. These racetracks allegedly comprise **[*4]** a significant share of the harness racing market in the Northeastern United States. Id. ¶ 47. Tioga, Vernon, and the Meadowlands are direct competitors of each other and are separate entities even though they have some common ownership. Id. ¶¶ 49, 51-53.

Defendant Gural is the CEO of American Racing and President of Meadowlands. Id. ¶¶ 14-15. Gural possesses an ownership interest in the racetracks and American Racing, and also owns interests in a number of horses that he races at the above race tracks. Id. ¶¶ 28, 54.

2. Allard Situation and Boycott

Rene Allard is a horse trainer who is currently under investigation and indictment, and as a result of this indictment, Allard does not train horses for racing at any race track. Id. ¶ 57. Pursuant to an agreement with the U.S. Department of Justice, Allard was permitted to work with horses at a stable in Florida provided that the horses are not intended to participate in races. Id. ¶ 58. Plaintiffs allege that Gural used this information as a pretext to reduce his competition by excluding Plaintiffs and others from competing in races at the race tracks. Id. ¶ 59. On March 6, 2021, Gural issued a statement on behalf of Tioga, Vernon, and the **[*5]** Meadowlands:

> The Meadowlands, Tioga & Vernon Downs will exclude any horse being trained or that has been trained in [Rene Allard's Florida] stable in any stake and is actively investigating who owns the horses that are or have been in his stable this winter.
>
> Those owners who currently have or have had horses in Allard's stable this winter are advised that all horses owned wholly or in part by them will be excluded from participation in all Meadowlands, Tioga & Vernon Downs races and that all of horses owned wholly or in part by them will be deemed ineligible to for any/all Meadowlands, Tioga & Vernon Downs administered stakes races for a minimum of three years.
>
> If owners affected by the above are a minority partner on horses with owners that are not affected by the above and are being trained by accepted trainers, they must legitimately divest their interest in those horses, which will be required to be done and demonstrated to the satisfaction of The Meadowlands before the March 15 stakes payments will be accepted on those horses.

Id. ¶ 60; Compl. Ex. A ("March 6th Statement").

Plaintiffs allege that they and other owners were subject to the terms of the March 6th Statement because some **[*6]** horses they had interests in were stabled by Allard. Compl. ¶ 62. This was the case even if Plaintiffs had no intention of racing the horses stabled by Allard. Id. ¶ 63. Plaintiffs further contend that the March 6th Statement's ban was not equally enforced. Id. ¶¶ 66-67. No further stakes payments were accepted for Plaintiffs' horses and the payments they had already made were forfeited. Id. ¶ 68. Plaintiffs had to quickly sell their interests in their horses below market value, and Plaintiffs continue to not be allowed to compete at the tracks for the next three years. Id. ¶¶ 69-70.

Plaintiffs allege the following: (1) group boycott in violation of *15 U.S.C. § 1*; (2) group boycott in violation of *New York General Business Law § 340*; and (3) various tortuous interference with a contractual relationship claims. Id. ¶¶ 72-204.

B. Procedural History

On August 23, 2021, Plaintiffs filed their Complaint against Defendants. See Compl. On October 27, 2021, Defendants filed their Motion to Dismiss. See Mot. to Dismiss. On November 24, 2021, after the parties submitted their initial briefing, the Court requested that the parties submit additional briefing on whether Plaintiffs have antitrust standing. See Dkt. No. 18. The parties promptly filed **[*7]** their sur-replies. Pls.' Sur-Reply; Defs.' Sur-Reply.

III. LEGAL STANDARD

A. *Rule 12(b)(6)* Motion to Dismiss

HN1[] To survive a motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*); see also *Fed. R. Civ. P. 12(b)(6)*. A court must accept as true the factual allegations contained in a complaint and draw all inferences in favor of a plaintiff. See *Allaire Corp. v. Okumus, 433 F.3d 248, 249-50 (2d Cir. 2006)*. A complaint may be dismissed pursuant to *Rule 12(b)(6)* only where it appears that there are not "enough facts to state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 570*. Plausibility requires "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the alleged misconduct]." *Id. at 556*. The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 556*). "[T]he pleading standard *Rule 8* announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Id. (citing *Twombly, 550 U.S. at 555*). Where a court is unable to infer more than the mere possibility of the alleged misconduct based on the pleaded facts, the pleader has not demonstrated that she is entitled **[*8]** to relief and the action is subject to dismissal. See *id. at 678-79*.

B. Antitrust Standing

HN2[] "It is a well-established principle that, while the United States is authorized to sue anyone violating the federal antitrust laws, a private plaintiff must demonstrate 'standing.'" *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 436 (2d Cir. 2005)*. In a recent opinion, the Second Circuit reiterated that "[a]ntitrust standing is a threshold, pleading-stage inquiry" and "when a complaint by its terms fails to establish this requirement we must dismiss it as a matter of law." *In re Am. Express Anti-Steering Rules Antitrust Litig., No. 20-1766, 19 F.4th 127, 2021 U.S. App. LEXIS 34626, 2021 WL 5441263, at *4 (2d Cir. Nov. 22, 2021)* (quoting *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 75 (2d Cir. 2013)*). Plaintiffs must demonstrate antitrust standing whether they seek monetary or injunctive relief. *Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc., 467 F.3d 283, 290 (2d Cir. 2006)*.

HN3[] A private plaintiff must show two elements to demonstrate antitrust standing: (1) "it suffered a special kind of antitrust injury" and that (2) "it is a suitable plaintiff to pursue the alleged antitrust violations and thus is an efficient enforcer of the antitrust laws." *In re Am. Express Anti-Steering Rules Antitrust Litig., 2021 U.S. App. LEXIS 34626, 2021 WL 5441263, at *4* (quoting *Gatt Commc'ns, Inc., 711 F.3d at 76*) (internal quotation marks omitted)).

HN4[] "Generally, only those that are participants in the defendants' market can be said to have suffered antitrust injury." In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 158 (2d Cir. 2016). The Second Circuit has also recognized an "inextricably intertwined" exception. See id. at 158-63. If a plaintiff is a market participant or satisfies the "inextricably intertwined" **[*9]** exception, then the Court must employ the Second Circuit's three-part test for determining whether a plaintiff has alleged an antitrust injury:

> First, the party asserting that it has been injured by an illegal anticompetitive practice must identify the practice complained of and the reasons such a practice is or might be anticompetitive. Next, we identify the actual injury the plaintiff alleges . . . [which] requires us to look to the ways in which the plaintiff claims it is in a worse position as a consequence of the defendant's conduct. Finally, we compare the anticompetitive effect of the specific practice at issue to the actual injury the plaintiff alleges. It is not enough for the actual injury to be causally linked to the asserted violation. Rather, in order to establish antitrust injury, the plaintiff must demonstrate that its injury is of the type the antitrust laws were intended to prevent and that flows from that which makes or might make defendants' acts unlawful.

Gatt Commc'ns, Inc., 711 F.3d at 76 (alterations, citations, and internal quotation marks omitted).

HN5[] If a plaintiff clears the antitrust-injury hurdle, the Second Circuit employs a four-factor test to determine whether a plaintiff is an "efficient enforcer." **[*10]** The factors include: (1) "the directness or indirectness of the asserted injury," (2) "the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement," (3) "the speculativeness of the alleged injury," and (4) "the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries." IQ Dental Supply, Inc. v. Henry Schein, Inc., 924 F.3d 57, 65 (2d Cir. 2019). "These four factors need not be given equal weight: the relative significance of each factor will depend on the circumstances of the particular case." Id.

C. Section 1 of the Sherman Act[1]

HN6[] Section 1 of the Sherman Act makes it illegal to enter into a "contract, combination . . . or conspiracy" to restrain trade or commerce. 15 U.S.C. § 1. "To establish a [Section] 1 violation, a plaintiff must produce evidence sufficient to show: (1) a combination or some form of concerted action between at least two legally distinct economic entities; and (2) such combination or conduct constituted an unreasonable restraint of trade either per se or under the rule of reason." Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 95-96 (2d Cir. 1998).

A district court within the Second Circuit recently explained the difference between the per se and rule of reason approaches:

> HN7[] In evaluating **[*11]** potential Sherman Act violations, courts employ "two complementary categories of antitrust analysis." Nat'l Soc. of Prof'l Engineers v. United States, 435 U.S. 679, 692, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). The first category includes agreements that are "illegal per se" because their "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." Id. The second category includes "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." Id. For this second category of analysis, courts apply the rule of reason. Bogan v. Hodgkins, 166 F.3d 509, 514 (2d Cir. 1999).

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[1] Plaintiffs do not allege that Defendants violated Section 2 of the Sherman Act. The elements of a claim under Section 2 of the Sherman Act are: "(1) proof of a concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the commission of an overt act in furtherance of the conspiracy." Int'l Distrib. Ctrs., Inc. v. Walsh Trucking Co., 812 F.2d 786, 795 (2d Cir. 1987) (internal quotation marks omitted). "A Section 1 violation is legally distinct from that under [Section] 2." Sitts v. Dairy Farmers of Am., Inc., 417 F. Supp. 3d 433, 464 (D. Vt. 2019) (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59, 60 S. Ct. 811, 84 L. Ed. 1129) (internal quotation marks omitted).

PharmacyChecker.com, LLC v. Nat'l Ass'n of Boards of Pharmacy, 530 F. Supp. 3d 301, 343 (S.D.N.Y. 2021). "Per se violations include, for example, horizontal and vertical price-fixing; division of a market into territories; certain tying arrangements; and some group boycotts involving concerted refusals to deal with a competitor." Cap. Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 542-43 (2d Cir. 1993) (internal citations omitted). Plaintiffs allege that Defendants' actions amount to a group boycott and/or a refusal to deal. Compl. ¶ 73. However, a "group boycott" and a "refusal to deal" are "analytically identical." Concord Assocs., L.P. v. Ent. Properties Tr., No. 12-CV-1667, 2013 U.S. Dist. LEXIS 186964, 2014 WL 1396524, at *11 (S.D.N.Y. Apr. 9, 2014) (citing Intellective, Inc. v. Massachusetts Mut. Life Ins. Co., 190 F. Supp. 2d 600, 616 (S.D.N.Y. 2002)), aff'd, 817 F.3d 46 (2d Cir. 2016).

Moreover, the Supreme Court has said that **HN8**[] "precedent limits the per se rule in the boycott context to cases involving horizontal agreements **[*12]** [2] among direct competitors." NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998). The Second Circuit also clarified that "NYNEX . . . squarely held that a horizontal agreement is a prerequisite in a group boycott case." PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 110 (2d Cir. 2002). In other words, if there is no horizontal agreement among direct competitors, then there can be no group boycott and the per se rule is inapplicable. See Concord Assocs., L.P., 2013 U.S. Dist. LEXIS 186964, 2014 WL 1396524, at *11 (first citing Solent Freight Servs., Ltd. Inc. v. Alberty, 914 F. Supp. 2d 312, 320 (E.D.N.Y. 2012); and then citing Team Obsolete Ltd. v. A.H.R.M.A. Ltd., 216 F.R.D. 29, 38 (E.D.N.Y. 2003)).

IV. DISCUSSION

A. Matters Outside the Pleadings

As an initial matter, Plaintiffs ask the Court "to strike all factual averments [relied upon by Defendants] not contained in Plaintiffs' Complaint and additionally ask this Court not to consider any such facts." Opp'n at 3-4. In their Reply, Defendants argue that the public records from Allard's criminal prosecution may be considered because they are integral to Plaintiff's claims and because they are not used to assess the truth of the matters stated. Reply at 1-2.

HN9[] "In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a court may consider the following matters outside the four corners of the complaint: (1) documents attached as an exhibit to the complaint or answer, (2) documents incorporated by reference in the complaint (and provided by the parties), (3) documents **[*13]** that, although not incorporated by reference, are 'integral' to the complaint, or (4) any matter of which the court can take judicial notice for the factual background of the case." Lane v. Tilbe, No. 18-CV-0438, 2018 U.S. Dist. LEXIS 203904, 2018 WL 6289668, at *2 (N.D.N.Y. Dec. 3, 2018) (internal citations omitted) (Kahn, J.). Here, Plaintiffs attached the March 6th Statement to their Complaint. See March 6th Statement. The Exhibit made references to Allard, various indictments, and performance enhancing drugs. See id. At this time, although skeptical of Plaintiffs' argument, the Court does not need to consider the contested factual averments in ruling on the Motion to Dismiss.

B. Antitrust Standing

Plaintiffs argue that they suffered an antitrust injury and are efficient enforcers, Pls.' Sur-Reply at 4-7, while Defendants argue that Plaintiffs lack antitrust standing because they suffered no antitrust injury and are not efficient enforcers, Defs.' Sur-Reply at 3-8. The Court agrees that Plaintiffs have established antitrust standing.[3]

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[2] "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988).

1. Gatt Antitrust Injury Analysis

Before turning to the *Gatt* three-part test for determining whether a plaintiff has alleged an antitrust injury, the Court must determine whether Plaintiffs are market participants or satisfy the "inextricably intertwined" exception. **[*14]**

The Second Circuit has explained that:

> The upshot is that ***HN10***[] to suffer antitrust injury, the putative plaintiff must be a participant in the very market that is directly restrained. Usually, that market is the one in which the defendant operates, such as when the plaintiff is a competitor or consumer of the defendant, but sometimes the defendant will corrupt a separate market in order to achieve its illegal ends, in which case the injury suffered can be said to be "inextricably intertwined" with the injury of the ultimate target. Regardless, antitrust injury is suffered by participants in the restrained market (or markets).

In re Aluminum Warehousing Antitrust Litig., 833 F.3d at 161.

The Court finds that Plaintiffs plausibly allege that they participated in "any of the markets in which the defendants operate." Id. The racetracks directly solicit horse owners (like Plaintiffs) to compete in their stake's races. Compl. ¶ 46. Although the racetracks do not directly compete with Plaintiffs,[4] the racetracks are more akin to consumers of Plaintiffs' labor. The racetracks "compete [against each other] to attract horse owners to race horses on their tracks." Id. ¶ 53. For their part, Plaintiffs compete for, among other things, purse monies. Id. ¶ 85. There **[*15]** is no question that the March 6th Statement's ban took place in the harness racing market, "and that is where the direct, immediate impact [was] felt [by Plaintiffs]." *In re Aluminum Warehousing Antitrust Litig., 833 F.3d at 162*. Plaintiffs were now precluded "from racing for purse monies, stabling at the tracks, accessing the grounds of the tracks for training and qualifying purposes, [and] participating in sanctioned qualifying races. . . ." Compl. ¶ 85.

a. Step 1

HN11[] "At the first step of the *Gatt* analysis, [Plaintiffs] need allege only that the Defendants have engaged in unlawful anticompetitive conduct." *IQ Dental Supply, Inc., 924 F.3d at 63*. "The bar for such a showing is a low one." Id. Thus, the Court finds that Plaintiffs have satisfied this requirement by plausibly alleging that Defendants' March 6th Statement's ban served as a boycott of Plaintiffs. See *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)* ("Group boycotts . . . have long been held to be in the forbidden category [under the antitrust laws].").

b. Step 2

"The second *Gatt* step requires [the Court] to isolate and identify [Plaintiffs'] 'actual injury' or the 'ways in which the plaintiff claims it is in a "worse position" as a consequence of the defendant's conduct.'" *IQ Dental Supply, Inc., 924 F.3d at 63* (quoting *Gatt Commc'ns Inc., 711 F.3d at 76*).

Plaintiffs claim that they are in a worse position than they were before the boycott because **[*16]** "they are prohibited from participating in the harness racing market; they have lost their property; they have been deprived of valuable business relationships; and they have lost foreseeable income/profits." Pls.' Sur-Reply at 5. Defendants'

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[3] To the extent Plaintiffs argue that they sufficiently pleaded an antitrust injury by relying on the "essential facilities" doctrine, Opp'n at 6, the Court does not need to consider this argument.

[4] Defendant Gural, on the other hand, is a direct competitor. Compl. ¶ 83. As for American Racing, it is unclear from the Complaint what role American Racing plays in the harness racing market, but the Court will assume for now that it too is a market participant.

supplemental briefing is silent on whether Plaintiffs are in a worse position; instead they argue that Plaintiffs failed to plausibly allege that Defendants' conduct caused any competitive harm. Defs.' Sur-Reply at 3.[5]

The Second Circuit in *IQ Dental* explained that for *Gatt* Step 2:

> ***Antitrust law*** is concerned with market conditions. Assuming that IQ is operating in a market affected by anticompetitive conduct, the question of actual injury becomes whether IQ is worse off than it would be if the market were free of anticompetitive forces. IQ has alleged that the Defendants' anticompetitive conduct affected the market, and that, after it entered the market, its sales through SourceOne suffered as a result.

IQ Dental Supply, Inc., 924 F.3d at 64 (internal citation omitted and emphasis added).

HN12[] The Court construes *Gatt* Step 2 as having two requirements: (1) plaintiffs must plausibly allege violations of market-wide harm, or in other words, an injury to competition;[6] and (2) plaintiffs must **[*17]** plausibly allege that they are "worse off than it would be if the market were free of anticompetitive forces."

As to the first requirement, Plaintiffs' Complaint adequately alleges an injury to competition. The Complaint includes allegations that the March 6th Statement's ban "reduce[s] competition within the harness racing market." Compl. ¶ 73. The reasoning is that "[a]s a general rule, the race tracks compete for more owners to enter their horses into races in order to increase competition and consumption by the public" and "Defendants' actions decrease the number of competitors in their races and therefore reduces competition at Tioga, Vernon, American Racing, and The Meadowlands." Id. ¶ 82.

Here, for purposes of the motion, Plaintiffs' Complaint plausibly alleges a sufficient injury for the antitrust standing analysis when it alleges Defendant Gural conspired with the other defendants to exclude Plaintiffs (and other horse owners who were impacted by the ban) from competing on the racetracks and within the harness racing market. Id. ¶¶ 55, 74. Other courts have agreed that the prevention of marketwide competition is an "injury **[*18]** of the type the antitrust laws were designed to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; see, e.g., *Intellective, 190 F. Supp. 2d at 613* ("Intellective adequately states an antitrust injury in this regard [because] Intellective alleges that it, and all others, are prevented from competing in

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[5] In a footnote, Defendants argue that Plaintiffs have alleged a two-sided market (horse owners and racing fans), and that Plaintiffs cannot establish antitrust injury because they "have only alleged harm to themselves and have not considered net harms to the two-sided market considered as a whole." Defs.' Sur-Reply at 4 n.3. The Court disagrees for several reasons. First, the argument was made in a footnote and was not properly placed before the Court. See *Young America's Foundation v. Stenger, No. 20-CV-0822, 2021 U.S. Dist. LEXIS 159439, 2021 WL 3738005, at *15 (N.D.N.Y. Aug. 24, 2021)* (Kahn, J.). Second, the Court is not convinced that Plaintiffs have alleged a two-sided market. Although the racetracks connect the market of horse fans to the market of horse owners, the network effects based on the Complaint's allegations run mainly in one direction: "the more owners who race their horses at these racetracks, the more competitive the races are and the more attractive the races are to the public." Compl. ¶ 53. The Complaint provides no allegations regarding why the horse owners would care how many racing fans there are. Third, Defendants rely upon *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2280, 201 L. Ed. 2d 678 (2018)* for their two-sided market standing argument, but as the Second Circuit recently held: "Importantly, American Express did not directly address antitrust standing at all." *Salveson v. JPMorgan Chase & Co., 860 F. App'x 207, 209 (2d Cir. 2021)*.

[6] The Court notes that district courts within the Second Circuit have not been consistent with regard to the step of the *Gatt* analysis in which a court should consider whether a plaintiff plausibly plead an injury to competition. See, e.g., *Sell It Soc., LLC v. Acumen Brands, Inc., No. 14-CV-3491, 2015 U.S. Dist. LEXIS 35404, 2015 WL 1345927, at *4 (S.D.N.Y. Mar. 20, 2015)* (considering it mainly at Step 1), *Arcesium, LLC v. Advent Software, Inc., No. 20-CV-4389, 2021 U.S. Dist. LEXIS 62957, 2021 WL 1225446, at *7 (S.D.N.Y. Mar. 31, 2021)* (considering it at Step 2). In some cases, courts still consider whether a plaintiff plausibly alleges an antitrust injury even if they do not explicitly follow the *Gatt* three-step process. See, e.g., *Bhanusali v. Orange Reg'l Med. Ctr., No. 10-CV-6694 CS, 2013 U.S. Dist. LEXIS 113974, 2013 WL 4828657, at *9 (S.D.N.Y. Aug. 12, 2013)*, aff'd in part, vacated in part, *572 F. App'x 62 (2d Cir. 2014)*, *Ramnarine v. Nationstar Mortg., LLC, No. 19-CV-5544, 2019 U.S. Dist. LEXIS 219328, 2019 WL 7038430, at *3 (E.D.N.Y. Dec. 20, 2019)*.

the relevant market by the Working Group's control of the data necessary to perform a competing study."), *Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 403 (S.D.N.Y. 2004)*, rev'd on other grounds, *369 F.3d 124 (2d Cir. 2004)* ("Clarett has a demonstrable antitrust injury for precisely the same reason [as *Intellective*]: he alleges that the Rule prevents him, and all others similarly situated, from competing in the relevant market."); *HM Compounding Servs., Inc. v. Express Scripts, Inc., No. 14-CV-1858, 2015 U.S. Dist. LEXIS 89062, 2015 WL 4162762, at *10 (E.D. Mo. July 9, 2015)* ("[F]or purposes of a motion to dismiss, [the plaintiff] has sufficiently pled an antitrust injury by asserting that [the defendant] excluded it as a competitor from the marketplace.").

As to the second requirement, which Defendants do not contest, the Court agrees that Plaintiffs have sufficiently alleged they are worse off than they would be if the market were free of anticompetitive forces (*i.e.* no March 6th Statement ban). See Pls.' Sur-Reply at 5.

c. Step 3

HN13[] Finally, at the last step, Plaintiffs "must demonstrate that the Defendants' anticompetitive behavior caused its actual injury." *IQ Dental Supply, Inc., 924 F.3d at 64-65* (citing *Gatt Commc'ns Inc., 711 F.3d at 76*). "In other words, the nature of Plaintiff's **[*19]** injury (or the market-wide harm they allege) must be caused by Defendants' anticompetitive actions and not by something else." *Arcesium, 2021 U.S. Dist. LEXIS 62957, 2021 WL 1225446, at *8*. Plaintiffs easily allege the necessary causal relationship because Plaintiffs' own injuries—their inability to compete in the market—stem from the March 6th Statement's ban.

2. Efficient Enforcer Analysis

Plaintiffs argue that they are efficient enforcers of the antitrust laws because they satisfy all four factors, Pls.' Sur-Reply at 7, while Defendants assert that Plaintiffs are not efficient enforcers because the injuries are "speculative and are unconnected with the antitrust violation they allege," Defs.' Sur-Reply at 7-8. The Court finds that Plaintiffs plausibly allege that they are efficient enforcers of the antitrust laws.

HN14[] "Directness in the antitrust context means close in the chain of causation." *Gatt Commc'ns, Inc., 711 F.3d at 78*. This factor turns on "familiar principles of proximate causation." *Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 412 (2d Cir. 2014)*. Regarding the first factor, Plaintiffs' injuries are relatively clear and direct: horse owners like Plaintiffs who were subject to the ban in the March 6th Statement were directly impacted by it. The first factor weighs in favor of Plaintiffs.

HN15[] "The second factor simply looks for a class **[*20]** of persons naturally motivated to enforce the antitrust laws." *In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 689 (2d Cir. 2009)*. "Inferiority to other potential plaintiffs can be relevant, but it is not dispositive." Id. (internal quotation marks omitted). Here, it is not apparent whether there are more direct victims of the alleged conspiracy than Plaintiffs. Rather, Plaintiffs are "the most-motivated plaintiff with respect to the Defendants' alleged direct boycott" because Plaintiffs are the immediate victims of the March 6th Statement. *IQ Dental Supply, Inc., 924 F.3d at 68*. The second factor also weighs in favor of Plaintiffs.

HN16[] Under the third factor, the Court asks whether there would be "a high degree of speculation in a damages calculation." *Id. at 66-67*. Additionally, the fourth factor "traditionally concerns the prospect of different groups of plaintiffs attempting to recover for the same exact injury." *Fund Liquidation Holdings LLC v. UBS AG, No. 15-CV-5844, 2021 U.S. Dist. LEXIS 189499, 2021 WL 4482826, at *7 (S.D.N.Y. Sept. 30, 2021)*. However, the Supreme Court has noted that the "potential difficulty in ascertaining and apportioning damages is not . . . an independent basis for denying standing where it is adequately alleged that a defendant's conduct has proximately injured an interest of the plaintiff's that the statute protects." *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 135, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)*. Moreover, "[a]t the motion to dismiss stage, any holding that these damages would **[*21]** be speculative is premature." *In re Foreign Exch. Benchmark Rates Antitrust Litig., No. 13-CV-7789, 2016 U.S. Dist. LEXIS 128237, 2016 WL 5108131, at *11 (S.D.N.Y. Sept. 20, 2016)*. There may be considerable challenges in the calculation of damages, but at this time, the Court finds that this factor is neutral. As for the fourth factor, there is no indication that Defendants' conduct was subject to government and regulatory investigations, meaning that "[t]here is nothing before this Court demonstrating that any of the Plaintiffs have received payments as a result of those proceedings. . . ." *Fund Liquidation Holdings LLC, 2021 U.S. Dist. LEXIS 189499, 2021 WL 4482826, at *7*. Plus, "there are various ways to protect against duplicate recoveries or apportionment issues in this action." Id. As a result, the fourth factor weighs in favor of Plaintiffs.

On balance, at the pleading stage, Plaintiffs plausibly allege that they are efficient enforcers of the antitrust laws.

C. *Section 1 of the Sherman Act*

Having established that Plaintiffs can demonstrate antitrust standing, the Court will turn to the merits of the parties' arguments. Defendants argue that (1) Plaintiffs failed to plead concerted action; (2) Plaintiffs' claims are not entitled to per se treatment; and (3) Plaintiffs' claims fail under a rule of reason analysis. Defs.' Mem. of Law at 10-13, 15-18. The Court finds that because Plaintiffs did not adequately allege the **[*22]** relevant market, the antitrust claim must fail and the Court does not need to resolve whether Plaintiffs failed to plead concerted action, whether the claims are subject to the per se rule[7] and whether the claims fail under a per se or rule of reason analysis.

1. Relevant Market

HN17[] Regardless of what standard applies (per se or rule of reason), Plaintiffs "must articulate a relevant market." See *Downtown Music Publishing LLC v. Peloton Interactive, Inc., 436 F. Supp. 3d 754, 765 & n.5 (S.D.N.Y. 2020)*. "The relevant market is broadly defined as 'the area of effective competition,' which is typically 'the arena within which significant substitution in consumption or production occurs.'" *US Airways, Inc. v. Sabre Holdings Corp., 938 F.3d 43, 55 (2d Cir. 2019)* (quoting *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285, 201 L. Ed. 2d 678 (2018)*). "Market definition is ordinarily a deeply fact-intensive inquiry." *Id. at 55* (quoting *Todd v. Exxon Corp., 275 F.3d 191, 199 (2d Cir. 2001)*). Accordingly, courts often "hesitate to grant motions to dismiss for failure to plead a relevant . . . market." *Todd, 275 F.3d at 199-200*. Still, the Second Circuit has explained that "[w]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products," "the relevant market is legally insufficient and a motion to dismiss may be granted." *Sabre, 938 F.3d at 64* (quoting **[*23]** *Chapman v. New York State Div. for Youth, 546 F.3d 230, 238 (2d Cir. 2008)*).[8]

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[7] "[C]ourts have long recognized the existence of 'hub-and-spoke' conspiracies in which an entity at one level of the market structure, the 'hub,' coordinates an agreement among competitors at a different level, the 'spokes.'" ***United States v. Apple, Inc., 791 F.3d 290, 314 (2d Cir. 2015)*** (quoting *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 255 (3d Cir. 2010)*). "Existing case law makes clear that a hub-and-spoke theory is cognizable under *Section 1* only if there are both vertical agreements between the hub and each spoke, and also a horizontal agreement among the various spokes with each other." *In re Zinc Antitrust Litig., 155 F. Supp. 3d 337, 376 (S.D.N.Y. 2016)* (citing ***Apple, 791 F.3d at 314***). The per se rule can apply to "hub-and-spoke" conspiracies. See *Preston Hollow Cap. LLC v. Nuveen LLC, No. 20-CV-5597, 2021 U.S. Dist. LEXIS 150031, 2021 WL 3542255, at *14 (S.D.N.Y. Aug. 10, 2021)*. Although Plaintiffs do not explicitly refer to a "hub-and-spoke" conspiracy in the Complaint, the Court may determine at a later time that Gural acted as a "hub" and racetrack defendants as "spokes."

[8] Although *Chapman* dealt with *Section 2 of the Sherman Act*, other courts in this Circuit have applied *Chapman*'s rationale to *Section 1* claims. See, e.g., *Madison 92nd St. Assocs., LLC v. Courtyard Mgmt. Corp., No. 13-CV-0029, 2014 U.S. Dist. LEXIS 104541, 2014 WL 3728591, at *9 (S.D.N.Y. July 28, 2014)*, aff'd, *624 F. App'x 23 (2d Cir. 2015)*, *Planetarium Travel, Inc. v. Altour Int'l, Inc., 97 F. Supp. 3d 424, 428 (S.D.N.Y.)*, aff'd, *622 F. App'x 40 (2d Cir. 2015)*, *Peloton Interactive., 436 F. Supp. 3d at 765*.

Here, Plaintiffs purport to define the relevant market as the harness racing market in the Northeastern United States. Compl. ¶ 47. However, after carefully reviewing the Complaint, the Court finds that Plaintiffs made no effort to explain the alleged market with reference "to the rule of reasonable interchangeability and cross-elasticity of demand," and the Court must grant the motion to dismiss. See *Global Discount Travel Servs. v. Trans World Airlines, 960 F. Supp. 701, 705 (S.D.N.Y. 1997)* ("plaintiff's failure to define its market by reference to the rule of reasonable interchangeability is, standing alone, valid grounds for dismissal."); *Full Circle United, LLC v. Skee-Ball, Inc., No. 11-CV-5476, 2014 U.S. Dist. LEXIS 202841, 2014 WL 12829195, at *10 (E.D.N.Y. May 13, 2014)* ("Regardless, since FC fails to 'define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand,' the pleading is 'legally insufficient and a motion to dismiss may be granted.'") (quoting *Chapman, 546 F.3d at 238*); *In re AMR Corp., 527 B.R. 874, 884 (Bankr. S.D.N.Y. 2015)* ("Failure to define the market by reference to the rule of interchangeability is, standing alone, valid grounds for dismissal."). Instead, Plaintiffs refer to the Meadowlands as "the premiere track in all of harness racing and no other venue offers an equivalent stakes program" and that it "holds a dominant position in harness racing with no other track having **[*24]** the quality of racing comparable to it." Compl. ¶¶ 48, 78. Still, the Second Circuit has noted that "[m]erely asserting that a commodity is in some way unique is insufficient to plead a relevant market." *Concord Assocs., L.P., 817 F.3d at 54* (quoting *B.V. Optische Industrie De Oude Delft v. Hologic, Inc., 909 F. Supp. 162, 171 (S.D.N.Y. 1995)*). The alleged uniqueness of the Meadowlands does not relieve Plaintiffs of their requirement to refer to the rule of interchangeability in the Complaint when "[t]here is no discussion of other products in the market that potentially compete with the [Meadowlands or the other racetracks], of arguably competing products that should not be included the market, or of the factors that make the [Meadowlands or the other racetracks] a unique market." *Mathias v. Daily News, L.P., 152 F. Supp. 2d 465, 481-82 (S.D.N.Y. 2001)*.

D. Remaining State Law Claims

Because Plaintiffs have not alleged diversity jurisdiction, Compl. ¶ 16, this Court would only have subject matter jurisdiction to consider Plaintiffs' state law claims to the extent that supplemental jurisdiction is provided for under *28 U.S.C. § 1367*. ***HN18***[↑] *Subsection (c)* of that section provides that "district courts may decline to exercise supplemental jurisdiction over a [state law] claim . . . [if] the district court has dismissed all claims over which it has original jurisdiction" *28 U.S.C. § 1367(c)*. Where, as here, any federal claims have been dismissed **[*25]** at a relatively early stage of litigation, courts often decline to exercise subject matter jurisdiction. See *Valencia ex rel. Franco v. Lee, 316 F.3d 299, 306 (2d Cir. 2003)*; *Tops Markets, Inc., 142 F.3d at 103* ("[W]hen all federal claims are eliminated in the early stages of litigation, the balance of factors generally favors declining to exercise pendent jurisdiction over remaining state law claims and dismissing them without prejudice.") (citing *Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)*). The Court elects to do so here. The Court dismisses the state law claims without prejudice for lack of subject matter jurisdiction.

V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that Defendants' Motion to Dismiss (Dkt. No. 10) is **GRANTED**; and it is further

ORDERED, that Plaintiffs' Complaint (Dkt. No. 1) is **DISMISSED WITHOUT PREJUDICE**; and it is further

ORDERED, that the Clerk of the Court is directed to close this action; and it is further

ORDERED, that the Clerk serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

DATED: December 28, 2021

Albany, New York

/s/ Lawrence E. Kahn

LAWRENCE E. KAHN

United States District Judge

Value Drug Co. v. Takeda Pharm., U.S.A., Inc.

United States District Court for the Eastern District of Pennsylvania

December 28, 2021, Decided; December 28, 2021, Filed

CIVIL ACTION NO. 21-3500

Reporter

2021 U.S. Dist. LEXIS 246364 *; 2021 WL 6125355

VALUE DRUG COMPANY v. TAKEDA PHARMACEUTICALS, U.S.A., INC., et al.

Subsequent History: Dismissed by, Without prejudice, Request granted *Value Drug Co. v. Takeda Pharms., U.S.A., Inc., 2021 U.S. Dist. LEXIS 247162, 2021 WL 6200907 (E.D. Pa., Dec. 29, 2021)*

Motion denied by, in part, Dismissed by, in part, Without prejudice, Request granted *Value Drug Co. v. Takeda Pharms., U.S.A., Inc., 2022 U.S. Dist. LEXIS 58574, 2022 WL 952896 (E.D. Pa., Mar. 30, 2022)*

Magistrate's recommendation at *Value Drug Co. v. Takeda Pharms. U.S.A., Inc., 2022 U.S. Dist. LEXIS 60087, 2022 WL 1005310 (E.D. Pa., Mar. 31, 2022)*

Magistrate's recommendation at *Value Drug Co. v. Takeda Pharms. U.S.A., Inc., 2022 U.S. Dist. LEXIS 66330, 2022 WL 1110356 (E.D. Pa., Apr. 11, 2022)*

Related proceeding at *Value Drug Co. v. Takeda Pharms. U.S.A., 2022 U.S. Dist. LEXIS 104717, 2022 WL 2093424 (S.D. Ohio, June 10, 2022)*

Class certification denied by, Without prejudice *Value Drug Co. v. Takeda Pharms., U.S.A., Inc., 2022 U.S. Dist. LEXIS 212260, 2022 WL 17177267 (E.D. Pa., Nov. 23, 2022)*

Magistrate's recommendation at *Value Drug Co. v. Takeda Pharms. U.S.A., Inc., 2022 U.S. Dist. LEXIS 225935 (E.D. Pa., Dec. 8, 2022)*

Magistrate's recommendation at *Value Drug Co. v. Takeda Pharms. U.S.A., Inc., 2022 U.S. Dist. LEXIS 234372, 2022 WL 18106934 (E.D. Pa., Dec. 28, 2022)*

Findings of fact/conclusions of law at, Motion granted by, in part, Motion denied by, in part *Value Drug Co. v. Takeda Pharms., U.S.A. Inc., 2023 U.S. Dist. LEXIS 33102 (E.D. Pa., Feb. 28, 2023)*

Class certification denied by *Value Drug Co. v. Takeda Pharms., U.S.A., Inc., 2023 U.S. Dist. LEXIS 34138, 2023 WL 2314911 (E.D. Pa., Feb. 28, 2023)*

Partial summary judgment denied by, Summary judgment denied by *Value Drug Co. v. Takeda Pharms., 2023 U.S. Dist. LEXIS 109662 (E.D. Pa., May 24, 2023)*

Magistrate's recommendation at *Value Drug Co. v. Takeda Pharms. U.S.A., Inc., 2023 U.S. Dist. LEXIS 109264 (E.D. Pa., May 24, 2023)*

Core Terms

generic, conspiracy, settlement agreement, personal jurisdiction, patents, manufacturer, direct evidence, motion to dismiss, alleges, launching, pleads, discovery, output, brand, generic drug, competitors, antitrust, infringed, selling, Pharmaceuticals, collapse, contacts, conspirators, permission, pharmacy, invalid, license, amend, argues, fails

Counsel: **[*1]** For VALUE DRUG COMPANY, INDIVIDUALLY, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff: ANDREW WILLIAM KELLY, STUART E. DESROCHES, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BRADLEY J. DEMUTH, Faruqi & Faruqi, LLP, NEW YORK, NY; BRUCE E. GERSTEIN, GARWIN GERSTEIN AND FISHER LLP, NEW YORK, NY; CAITLIN G. COSLETT, ZACHARY D. CAPLAN, BERGER MONTAGUE PC, PHILADELPHIA, PA; DAN LITVIN, GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY; DAVID C. RAPHAEL, JR., SMITH SEGURA & RAPHAEL LLP, ALEXANDRIA, LA; DAVID F. SORENSEN, BERGER MONTAGUE PC, United Sta, Philadelphia, PA; JOSEPH T. LUKENS, FARUQI & FARUQI, JENKINTOWN, PA; RUSSELL A. CHORUSH, Heim, Payne & Chorush LLP, HOUSTON, TX; SUSAN C. SEGURA, SMITH SEGURA RAPHAEL & LEGER LLP, ALEXANDRIA, LA; WILLIAM B. COLLIER, JR., HEIM, PAYNE & CHORUSH LLP, HOUSTON, TX; PETER R. KOHN, FARUQI & FARUQI, LLP, JENKINTOWN, PA.

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Judges: MARK A. KEARNEY, JUDGE.

Opinion by: MARK A. KEARNEY

Opinion

MEMORANDUM

KEARNEY, J.

A pharmacy purchaser of pharmaceutical drugs alleges a drug manufacturer with a patented brand name drug conspired to restrict output of a three of its competitors' generic product by agreeing to settle three patent infringement lawsuits it brought against three of the generic drug manufacturers. The pharmacy alleged the brand name manufacturer gave three of its alleged infringing generic competitors with exclusive periods to sell an approved generic of its brand name drug before its patent expired. The pharmacy claims the three settlement agreements are actual evidence of one overarching joint venture conspiracy created by the brand name manufacturer designed to restrict the output of the drug and maintain higher prices and greater profits. The competing generic companies and the brand name company move to dismiss arguing the pharmacy pleads no direct or circumstantial evidence of a single agreement to conspire, no antitrust injury, and we lack personal jurisdiction over an Israeli company acquiring some of the assets and liabilities of one of the generic companies. The pharmacy responds by partially shifting to an unplead **[*4]** theory after reviewing the three settlement agreements but stands on the same plead facts. The pharmacy insists the three settlement agreements are still direct evidence of a single horizontal conspiracy among four competitors in a market with six or seven other admitted non-party competitors.

But the settlement agreements themselves do not demonstrate a single conspiracy among the brand and generics to provide exclusive distribution rights. They do exactly the opposite. The pharmacy argues it plead circumstantial evidence of a conspiracy from the close timing and similarity of the three settlement agreements even though the agreements depend on none of the other six or seven non-conspiring generic manufacturers seeking to sell this drug through a court order allowing their sale or otherwise. The pharmacy swears the competitors admitted adding more manufacturers will lead to a price collapse and lost profits. We also reject the pharmacy's initial thoughts concerning exercising personal jurisdiction over the Israeli purchaser based on the allegations and record adduced to date but grant its request for limited discovery.

We grant the brand name manufacturer's and three generic manufacturers' **[*5]** motions to dismiss for failure to plead an antitrust conspiracy but grant the pharmacy's request for leave to amend. We further grant the pharmacy's request for limited expedited discovery into our specific personal jurisdiction over the Israeli purchaser should it not amend the complaint and instead wish to continue suing only the Israeli purchaser. We decline a request to sanction the pharmacy for not amending its complaint after reviewing the three settlement agreements.

I. Alleged facts

Medical professionals prescribe the pharmaceutical drug Colcrys to treat gout and familial Mediterranean fever. It contains the active ingredient colchicine, which "had been used in the United States for decades before the [Food and Drug Administration]" approved Colcrys.[1] But in 2006, the Food and Drug Administration "encouraged the pharmaceutical industry to submit New Drug Applications ('NDAs') for previously unapproved drugs to facilitate the FDA evaluation of older drug products by contemporary standards."[2]

Takeda Pharmaceuticals U.S.A., Inc.'s predecessor applied for three New Drug Approvals for colchicine's treatment of familial Mediterranean fever and the treatment and prevention **[*6]** of gout in 2008.[3] The Food and Drug Administration approved Colcrys as "the first pharmaceutical product contain[ing] colchicine as the sole active ingredient" on July 29, 2009.[4] It "granted Takeda's colchicine product a three-year exclusivity for the treatment of gout and seven-year exclusivity for the treatment of familial Mediterranean fever."[5] Takeda's exclusivity period ended on July 29, 2016.[6]

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[1] ECF Doc. No. 1 ¶ 28. Colchicine is "a very old drug" which doctors used to treat gout "for a very long time." *Id.* ¶ 30. The ancient Greeks used colchicine to treat gout more than two thousand years ago. *Id.* Dr. Stephen Goldfinger "reported successful use of colchicine" to treat familial Mediterranean fever in 1972. *Id.* Gout is "a type of severe arthritis often characterized by painful 'flares' (severe and sudden attacks of pain, redness, inflammation, and tenderness in joints) resulting from the build-up of uric acid)." *Id.*

[2] *Id.* ¶ 28.

[3] *Id.* ¶ 32.

[4] *Id.* ¶¶ 29, 32.

[5] *Id.* ¶ 32.

Par, Watson, and Amneal file Abbreviated New Drug Applications certifying their generic versions of Colcrys do not infringe on Takeda's patents or Takeda's patents are invalid.

Once a name brand drug comes to market, generic drug companies attempt to bring an AB-rated[7] generic form of the drug to market by filing an Abbreviated New Drug Application with the Food and Drug Administration, which significantly lowers the price of the brand drug once there are "many generic competitors" on the market.[8] "[B]arriers to entry by a generic drug manufacturer are high"; they must "first formulate a generic version of the brand-name drug; conduct bioequivalence and other studies needed to support an Abbreviated New Drug Application to [the Food and Drug Administration]; file the [Abbreviated New **[*7]** Drug Application] and work with [the Food and Drug Administration] on any issues that arise regarding approval; and invest in manufacturing facilities for the commercialization of the product."[9] To incentivize generic drug companies "to seek approval of generic alternatives to branded drugs, the first generic manufacturer to file an [Abbreviated New Drug Application] containing a certification that the generic version does not infringe on any valid patent listed in the [Food and Drug Administration's] 'Orange Book' against the reference-listed brand drug . . . gets 180 days of protection from competition from other generic versions of the drug."[10] If a generic drug manufacturer files the Abbreviated New Drug Application certifying its drug does not infringe on the brand name drug's patents, the brand name manufacturer can sue the generic manufacturer for patent infringement, which delays final Food and Drug Administration approval of the Abbreviated New Drug Application for up to thirty months.[11]

Par Pharmaceuticals, Inc. filed an Abbreviated New Drug Application with the Food and Drug Administration in December 2011 seeking approval for its generic version of Colcrys.[12] **[*8]** Par certified "all pertinent patents that Takeda listed in the [Food and Drug Administration's] Orange Book under the Colcrys [New Drug Application] were either invalid or not infringed."[13] This certification entitled Par "to a 180-day period of regulatory exclusivity during which the Food and Drug Administration would not approve other generic manufacturers to sell a generic version of Colcrys."[14] Amneal Pharmaceuticals, LLC and Watson Laboratories, Inc., along with six other generic drug companies, also filed Abbreviated New Drug Applications "seeking approval to sell generic versions of Colcrys and made similar . . . certifications that any listed patents were invalid or not infringed."[15]

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[6] *Id.*

[7] "An AB rating means that the generic drug is pharmaceutically equivalent and bioequivalent to the corresponding reference-listed brand drug." *Id.* ¶ 37. "An AB-rating is particularly significant because . . . pharmacists may (an in many states, must) substitute an AB-rated generic version of a drug for the brand-name drug automatically at the pharmacy counter, without seeking or obtaining permission from the prescribing physician." *Id.*

[8] *Id.* ¶¶ 33-36.

[9] *Id.* ¶ 39.

[10] *Id.* ¶ 40.

[11] *Id.*¶ 41.

[12] *Id.* ¶¶ 39 (defining "ANDA"), 42. The application number is 203976. *Id.* ¶ 42.

[13] *Id.* ¶¶ 40, 42.

[14] *Id.* ¶ 42.

[15] *Id.* ¶ 43. Value Drug conceded this allegation is not accurate during oral argument because all eight generic filers did not file at the same time; eight generic manufacturers filed over the course of the allegations in the complaint, presumably from 2011 to 2019. ECF Doc. No. 148, Tr. 23:17-24:2.

Takeda sues the generic drug companies including Par, Watson, and Amneal; launches its own Authorized Generic; and settles the litigation with Par, Watson, and Amneal.

Takeda responded by suing all the generic drug company filers for patent infringement.[16] Takeda sued Par first in August 2013, then sued the other generic drug companies at an unplead time.[17] But Takeda's Colcrys patents are allegedly "fatally weak" and "had already been found to have not been infringed . . . in litigation regarding another product called Mitigare."[18]

While proceeding with its patent infringement litigations, Takeda agreed non-party Prasco could distribute its authorized generic of Colcrys "to try to lock up generic sales for Takeda" and keep the profits "otherwise lost to generic competitors."[19] Prasco distributed the generic Colcrys "at a price just slightly lower than branded Colcrys" and "collected and remitted back to Takeda virtually all of the revenues" from generic Colcrys sales.[20]

Par **[*9]** obtained tentative Food and Drug Administration approval for its Abbreviated New Drug Application in February 2015.[21] Watson also obtained tentative approval in October 2015.[22] But Par and Watson still needed final approval to market their generic drug.

Value Drug Company, a pharmacy chain purchaser of pharmaceutical drugs, sees these developments as incentivizing Takeda and the generics to conspire to limit output and keep prices higher: Takeda faced devastation in profits if more generics than only its authorized generic came to market; Par faced an "unpleasant prospect of entering" the market with its generic because Prasco already had a generic in the market, forcing Par "to offer very low prices to dislodge and gain market share, depriving Par of the benefits of its 180-day exclusivity as the first [Abbreviated New Drug Application] filer"; and Watson and Amneal faced "the unattractive prospect of entering a market where Prasco and Par had already been fighting for market share for 180 days" thereby making both offer "rock-bottom prices to gain sales and share."[23]

So on the eve of trial in Takeda's patent infringement suit against Par, "Takeda, Par, Watson, and Amneal agreed **[*10]** to a scheme to restrain price competition to Colcrys by concertedly reducing generic Colcrys output, and agreed to share in the monopoly profits maintained thereby until January of 2024."[24] These four competitors (with six or seven others on the sidelines) entered into a single horizontal conspiracy effected through Takeda settling its patent infringement suits against Par, Watson, and Amneal under agreements presumably providing benefits to all litigants. Par and Takeda settled in November 2015, Watson and Takeda settled in January 2016, and Amneal and Takeda settled in March 2016—all with separate, written settlement agreements.[25] As for Amneal,

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[16] ECF Doc. No. 1 ¶ 44.

[17] *Id.*

[18] *Id.* ¶ 45. While Value Drug places this allegation right after its allegation "Takeda sued Par first, in August 2013," thereby suggesting this ruling came out *before* Takeda sued Par and the other generics, Value Drug conceded at oral argument this ruling <u>did not</u> come out before Takeda filed the lawsuits for patent infringement against the generics. It rather came out in May 2015. ECF Doc. No. 148, Tr. 56:17-57:14.

[19] ECF Doc. No. 1 ¶ 49.

[20] *Id.* ¶¶ 50-51.

[21] *Id.* ¶ 46

[22] *Id.* ¶ 47.

[23] *Id.* ¶ 53.

[24] *Id.* ¶ 54.

although the parties did not execute the formal settlement agreement until March 2016, Takeda and Amneal signed a term sheet with essential terms of the settlement on December 10, 2015—shortly after Takeda and Par settled.[26]

Par and Takeda entered a distribution agreement where Par would refrain from launching its generic version of Colcrys "despite having tentative [Food and Drug Administration] approval" and "[two-and-a-half] years following entry of the agreement (*i.e.* in July of 2018) . . . Par would . **[*11]** . . replace Prasco as the distributor of Takeda's authorized generic Colcrys and remit back to Takeda virtually all of the revenues from sales of authorized generic Colcrys, keeping some of the revenues for itself."[27] Takeda entered into settlement agreements with Watson and Amneal whereby each would get "a defined time, believed to be between [six] and [eighteen] months in duration, to sell generic Colcrys free from competition from all other generic Colcrys sellers" in exchange for "Watson and Amneal stay[ing] off the market for several years until their defined period of marketing commenced."[28]

Takeda and Par's settlement agreement.

Takeda and Par settled Takeda's claim for patent infringement against Par on November 24, 2015.[29] Takeda granted Par a non-exclusive license through a license agreement "to distribute, have distributed, market, sell, or offer for sale a generically-labeled .6 mg colchicine oral tablet product manufactured by Takeda" beginning July 1, 2018.[30] Takeda also granted Par "a fully paid-up, royalty-free, irrevocable, non-exclusive license" to sell its generic of Colcrys.[31] Par and Takeda agreed Par could begin selling its generic of Colcrys beginning on the earlier of **[*12]** January 1, 2024; the date a court finds the patents covering Colcrys invalid or not infringed based on a drug "substantively identical" to Par's generic of Colcrys; the date a "Third Party" begins selling its generic of Colcrys with

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[25] ECF Doc. No. 123-123-2. We may review the settlement agreements on a motion to dismiss without converting it to a motion for summary judgment because the settlement agreements are integral and explicitly relied upon in Value Drug's Complaint. *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997)* ("As a general matter, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings . . . However, an exception to the general rule is that a "document integral to or explicitly relied upon in the complaint" may be considered "without converting the motion [to dismiss] into one for summary judgment." (internal citations omitted) (modification in original)); *see also* *Est. of Roman v. City of Newark, 914 F.3d 789, 796 (3d Cir. 2019)* ("'Although we examine the "complaint, exhibits attached to the complaint, [and] matters of public record,' . . . we can also consider documents 'that a defendant attaches as an exhibit to a motion to dismiss,' . . . if they are "undisputedly authentic" and "the [plaintiff's] claims are based [on them]." (internal citations omitted)), *cert. denied*, ***140 S. Ct. 82, 205 L. Ed. 2d 28 (2019)***, *and cert. denied*, ***140 S. Ct. 97, 205 L. Ed. 2d 28 (2019)***.

[26] ECF Doc. No. 123-2 at 45 (dates term sheet executed).

[27] ECF Doc. No. 1 ¶ 55.

[28] *Id.* ¶ 56.

[29] ECF Doc. No. 123, Ex. 1, at 2.

[30] *Id.* at 16 § 1.1 ("Takeda hereby grants to Par a non-exclusive license, with the right to sublicense to an Affiliate, under the Licensed Patents, to distribute, have distributed, market, sell, and offer for sale a generically-labeled .6 mg colchicine oral tablet product manufactured and supplied by Takeda pursuant to the Takeda NDAs ('***Licensed AG Product***'), subject to the terms set forth in the Distribution and Supple Agreement attached as Exhibit B hereto, and solely during the following period (the '***AG License Term***'): July 1, 2018, through the earlier of: June 30, 2022; or The date Par launches Par's ANDA Product; or The date Par launches any single-ingredient oral colchicine product other than the Licensed AG Product or Par's ANDA Product.").

[31] *Id.* at 16 § 1.2 ("Subject to Paragraph 1.3 below, Takeda hereby grants Par and its respective Affiliates a fully paid-up, royalty-free, irrevocable, non-exclusive license under the Licensed Patens and any other intellectual property rights owned or controlled by [Takeda] and its respective Affiliates as of the Effective Date or at any time in the future, which Licensed Patents and intellectual property rights are necessary to manufacture, have manufactured, use, import, distribute, offer to sell, have sold and sell in the United State the Par ANDA Product and any and all components thereof as necessary to make, have made, manufacture, or have manufactured the Par ANDA Product as described in the Par ANDA (the '***Par ANDA Product License***.')).

Takeda's permission; or a date following another generic drug manufacturer launching "at risk" without permission from Takeda.[32]

Takeda and Watson's settlement agreement.

Takeda and Watson settled Takeda's claim for patent infringement against Watson on January 7, 2016—two months after Takeda settled with Par.[33] Takeda and Watson contemporaneously entered into a license agreement which is part of the settlement agreement granting Watson "a fully paid-up, royalty-free, irrevocable, non-exclusive license" to sell its generic Colcrys.[34] Watson's license is subject to additional terms, including when the license becomes effective. Takeda and Watson agreed Watson could begin selling its generic of Colcrys on the earlier of: October 15, 2020; 135 days before another generic (besides Par or Amneal) begins selling its generic of Colcrys with Takeda's permission; the date Par or Amneal **[*13]** begins selling their generics of Colcrys with Takeda's permission; the date a court finds the patents covering Colcrys invalid or not infringed based on a drug "substantively identical" to Watson's generic of Colcrys; the date another generic starts selling after a court determines the Colcrys patents are invalid or not infringed based on a drug "*not* substantively identical" to Watson's generic of Colcrys; or a date following another generic drug manufacturer launching "at risk" without permission from Takeda.[35]

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[32] *Id.* at 17 § 1.3. The Par ANDA Product License allowed Par to "sell and distribute, without any limitation or restriction, [Par's generic of Colcrys] during the period beginning on the first to occur of the following . . . and continuing until the expiration of the last to expire of the Licensed Patents: (a) January 1, 2024; (b) the date of a Final Court Decision (as defined in Exhibit A) holding that all unexpired claims of the Licensed Patents that were asserted and adjudicated against a Third party are invalid, canceled, or unenforceable or not infringed, where the judgment of non-infringement is based on a label that is substantively identical to the Par label that received tentative approval from the FDA on February 12, 2015; (c) [t]he date a Third Party, pursuant to a license or other authorization by Takeda, is permitted to launch a Generic Equivalent . . . or (e) Subject to Par's payment of the Profit Share as applicable, the date that is the earlier of (i) ten (1) business days after the date of a first commercial sale in the Territory by any Third Party without license or authorization by Takeda, of a Generic Equivalent (such Third Party referred to hereafter as the 'Launcher at Risk' or 'LAR.'" *Id.* "Third Party" is defined as "any person other than a Party or an Affiliate to a Party." *Id.* at 29, Ex. A to License Agreement (Definitions). "Affiliate" is defined as "any Person that directly or indirectly controls, is controlled by, or is under common control with any one of the Parties." *Id.* at 27. "Party" is defined as "[e]ach one of Plaintiff and Defendants," collectively "Parties"—here Takeda Pharmaceuticals USA, Inc., Par Pharmaceutical Companies, Inc., and Par Pharmaceutical, Inc. *Id.* at 15.

[33] ECF Doc. No. 123-1, Ex. 2, at 2.

[34] *Id.* at 2, 16. "Subject to Paragraph 1.2 below, Takeda hereby grants Watson and its respective Affiliates a fully paid-up, royalty-free, irrevocable, non-exclusive license under the Licensed Patents and any other intellectual property rights owned or controlled by [Takeda] and its respective Affiliates as of the Effective Date or at any time in the future, which Licensed Patents and intellectual property rights are necessary to (1) manufacture, have manufacture, use, import, distribute, offer to sell, have sold and sell in the Territory the Watson ANDA Product and any and all components thereof as necessary to make, have made, manufacture, or have manufactured the Watson Anda Product as described in the Watson ANDA, and (ii) to make and have made the Watson ANDA Product outside the Territory only for use, sale and importation in or for the Territory (the "***License***")." *Id.* at 16 § 1.1(a).

[35] *Id.* at 16-17 §§ 1.2(a)-(e), (g) ("Subject to the terms of the License in Paragraph 1.1 above, Watson shall be entitled to make, use, import, market, offer for sale, sell, and distribute [Watson's generic of Colcrys] during the period beginning on the first to occur of the following (each, a '***Generic Entry Date***') and continuing until the expiration of the last to expire of the Licensed Patents: (a) October 15, 2020; (b) [t]he date that is one hundred thirty-five days (135) days prior to the date on which a first commercial sale of a Generic Equivalent by a Third Party (other than the Par ANDA Product or the Amneal ANDA Product) is permitted or authorized pursuant to a license or other authorization by Takeda; (c) [t]he date that, pursuant to a license or other authorization by Takeda, Par is permitted to launch the Par ANDA Product or Amneal is permitted to launch the Amneal ANDA Product; (d) [t]he date of a Final Court Decision . . . holding that all unexpired claims of the Licensed Patents that were asserted and adjudicated against a Third Party are invalid, canceled, or unenforceable or not infringed, where the judgment of a non-infringement is based on a label that is substantively identical to the Watson label that received tentative approval from the FDA

***Takeda and Amneal's settlement agreement*.**

Takeda and Amneal settled Takeda's patent infringement litigation on March 11, 2016.[36] Takeda and Amneal contemporaneously entered into a license agreement as part of the settlement agreement granting Amneal "a fully paid-up, royalty-free, irrevocable, non-exclusive license" to sell its generic Colcrys.[37] Amneal's license is subject to additional terms, including when the license becomes effective. Takeda and Amneal agreed Amneal could begin selling its generic of Colcrys on the earlier of: October 15, 2020; the date a court finds the patents covering Colcrys invalid or not infringed based on **[*14]** a drug "substantively identical" to Amneal's generic of Colcrys; or the date a third party begins selling its generic of Colcrys with Takeda's permission; a date following another generic drug manufacturer launching "at risk" without permission from Takeda.[38]

Amneal received final approval for its generic of Colcrys approximately six months later in September 2016.[39]

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on October 6, 2015; (e) the date of a first commercial sale of a Third Party Generic Equivalent following a Final Court decision of non-infringement by that Third Party based on a label *not* substantively identical to the Watson label that received tentative approval from FDA on October 6, 2015 . . . (g) Subject to Watson's payment of the Profit Share as applicable, the date that is the earlier of (i) ten (10) business days after the date of a first commercial sale in the Territory by any Third Party without license or authorization from Takeda of a Generic Equivalent."). They further agreed: "For the avoidance of doubt, all the Generic Entry Dates in this Paragraph 1.2 are subject to any regulatory exclusivity to which the First Filer is entitled." *Id.* at 18. "Third Party" means "a Person other than a Party or an Affiliate of a Party." *Id.* at 33, Ex. A to License (Definitions). "'Affiliate' means any Person that directly or indirectly controls, is controlled by, or is under common control with any one of the Parties." *Id.* "Party" means "[e]ach Plaintiff and Defendant" collectively "Parties" - here, Takeda Pharmaceuticals USA, Inc. and Watson Laboratories, Inc. *Id.* at 15.

[36] ECF Doc. No. 123-2, Ex. 3, at 2.

[37] *Id.* at 2, 18. "Subject to the terms of this License Agreement, including without limitation Paragraph 1.2 below, Takeda hereby grants Amneal and its respective Affiliates (and to the extent necessary, its suppliers, distributors, and customers, as the case may be): a fully paid-up, royalty-free, irrevocable, non-exclusive license under the Licensed Patents and any other intellectual property rights owned or controlled by Plaintiff and its respective Affiliates as of the Effective Date or at any time in the future, which Licensed Patents and intellectual property rights are necessary to manufacture, have manufactured, use, import, distribute, offer to sell, have sold and sell in or for the Territory the Amneal ANDA Product and any and all components thereof as necessary to make, have made, manufacture, or have manufactured the Amneal ANDA Product as described in the Amneal ANDA (the 'License')." *Id.* at 18 § 1.1.

[38] "Pursuant to the License, Amneal shall be entitled to sell and distribute, without any limitation or restriction, [Amneal's generic of Colcrys] during the period beginning on the first to occur of the following (each, a 'Generic Entry Date') and continuing until the expiration of the last to expire of the Licensed Patents: (a) October 15, 2020; (b) [t]he date of a Final Court Decision . . . holding that all Asserted Claims of the Licensed Patents are invalid, canceled, or unenforceable or not infringed, where the judgment of a non-infringement is based on a label that is substantively identical to the Amneal label pending before the FDA as of the Effective Date of this Agreement; (c) [t]he date of a first commercial sale of a Generic Equivalent in the Territory by any third party permitted or authorized pursuant to a license or other written authorization granted to such third party by Takeda . . . (e) Subject to Amneal's payment of the Profit Share as applicable, the date that is the earlier of (i) ten (10) business days after the date of a first commercial sale in the Territory by any Third Party without license or authorization from Takeda of a Generic Equivalent." *Id.* at 18-19 §§ 1.2(a)-(c), (e). They further agreed: "For the avoidance of doubt, all the Generic Entry Dates in this Paragraph 1.2 are subject to any regulatory exclusivity to which the First Filer is entitled." *Id.* at 19. "Third Party" means "a Person other than a Party or an Affiliate of a Party." *Id.* at 32, Ex. A to License (Definitions). "'Affiliate' means any Person that directly or indirectly controls, is controlled by, or is under common control with any one of the Parties . . . ." *Id.* at 30. Party means "[e]ach Plaintiff and Defendant" collectively "Parties" - here, Takeda Pharmaceuticals USA, Inc. and Amneal Pharmaceuticals LLC. ECF Doc. No. 123-2 at 17. We note third party is not used as the defined term "Third Party" in Amneal's settlement agreement. Value Drug nonetheless concedes if Watson enters the market, so does Amneal. *See* ECF Doc. No. 124 at 9 n.7, 10 n.9 (Value Drug admitting Par and Amneal came in when Watson came in).

[39] ECF Doc. No. 1 ¶ 48.

***The alleged conspiracy comes to an unexpected end*.**

Takeda and the three generics negotiated an "escape clause" in each settlement agreement allowing the three generics to sell their generic Colcrys if another non-party company entered the market.[40]

The escape clause triggered a few months later.[41] Non-party generic Mylan filed and notified Takeda in September 2016 of its Abbreviated New Drug Application with a certification Takeda's patents are either invalid or not infringed.[42] Takeda sued Mylan for patent infringement in October 2016, and Takeda and Mylan settled the litigation in November 2017.[43] The settlement purportedly "permitted Mylan to launch upon a court decision invalidating the patents covering Colcrys."[44] Our Delaware colleague Judge Richard G. Andrews "issued **[*15]** an opinion granting a motion by [non-party] Hikma for summary judgment in patent litigation concerning another product subject to the same patents as Colcrys, which Takeda failed to appeal."[45] Mylan launched its generic of Colcrys in November 2019.[46] Mylan's entry into the market "thereby trigger[ed] the 'escape clause' in Par, Watson, and Amneal's agreements" with Takeda.[47]

***Value Drug sues Takeda, Par, Amneal, Watson, Teva Ltd., and Teva USA for violations of Section I and II of the Sherman Act*.**

Value Drug - a purchaser of brand Colcrys from Takeda and generic Colcrys from Prasco and Par - sued Takeda, Par, Amneal, Watson, Teva Ltd., and Teva USA for violations of *Section I* and *II of the Sherman Act* on August 5, 2021.[48] Value Drug alleges Takeda entered a single conspiracy with Par, Watson, and Amneal "to restrict output and restrain competition" by preventing AB-rated generics of Colcrys from coming to market.[49] The alleged conspiracy depended on all defendants' participation, and Value Drug alleges the co-conspirators enjoyed "supracompetitive Colcrys profits" by virtue of this conspiracy to restrict competition.[50]

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[40] *Id.* ¶ 57 ("Par, Watson, and Amneal would refrain from launching their own generic versions of Colcrys for so long as *non-conspirators* did so. That is, the co-conspirators agreed that if *a non-conspiring seller* of generic Colcrys entered the market, Par, Watson, and Amneal could do so." (emphasis added)).

[41] *Id.* ¶¶ 62, 64, 66.

[42] *Id.* ¶ 63.

[43] *Id.*

[44] *Id.* ¶ 64.

[45] *Id.* ¶ 65.

[46] *Id.* ¶ 66.

[47] *Id.* ¶¶ 62, 65-66.

[48] *Id.* ¶ 7. Value Drug alleges Teva Pharmaceutical Industries Ltd. and Teva Pharmaceuticals USA, Inc. purchased Watson and expressly assumed its liabilities in July 2015 and/or ratified Watson's conduct. *Id.* ¶¶ 12-13. At oral argument, Value Drug conceded Teva Ltd. signed the purchase agreement in July 2015, but the sale did not close until August 2016. The date of the closing is not plead. These facts comprise the extent of Value Drug's allegations involving Teva Ltd. and Teva USA. *See generally* ECF Doc. No. 1.

[49] ECF Doc. No. 1 ¶¶ 1, 7-8, 10-14, 27. Value Drug also sued Endo Pharmaceuticals Inc. We dismissed Endo Pharmaceuticals from the litigation upon the parties' agreement. ECF Doc. No. 125.

[50] ECF Doc. No. 1 ¶¶ 3, 60.

The basic features of the conspiracy derived from Takeda, **[*16]** Par, Watson, and Amneal agreeing: Par would not bring its own generic to market and would rather agree to market Takeda's "authorized generic" previously distributed by Prasco, but Par would not do so until two-and-a-half years after the agreement to lengthen the time Takeda enjoyed the Colcrys market competition-free; Par would pay Takeda a "large royalty"; Watson and Amneal would restrict selling their generics for several years in exchange for a defined period of time to sell their respective generic Colcrys products free from all other generic competition; and Takeda would enter license agreements with other non-conspiring generic companies to delay their entry beyond Watson and Amneal's agreed periods of competition-free sales "thereby giving the co-conspirators long periods of supracompetitive Colcrys profits."[51]

II. Analysis

Value Drug's presently plead claims hinge on Takeda's settlement agreements with Par, Watson, and Amneal. Par, Watson, and Amneal argue the settlement agreements directly contradict Value Drug's plead theory, Value Drug reviewed the settlement agreements but chose not to amend, and we must dismiss the Complaint because the conspiracy is implausible.

Takeda **[*17]** argues the principal points adopted by all competitors: (1) the conspiracy as plead is implausible on its face and directly contradicted by the settlement agreements; (2) Value Drug fails to plead sufficient facts supporting a single, horizontal conspiracy even if it plead a plausible conspiracy; and (3) Value Drug's claims are barred because the settlement agreements forming the basis of the alleged antitrust violations are merely a legitimate exercise of Takeda's patent rights under the *Patent Act*.[52] Amneal and Watson move to dismiss on similar grounds arguing the settlement agreements Value Drug attempts to rely upon as evidence of the conspiracy directly contradict its theory and make the conspiracy implausible, particularly with respect to Watson and Amneal because they did not stand to receive the benefit Value Drug alleges since neither received a defined period of serial exclusivity.[53] Value Drug responds to Takeda, Watson, and Amneal's motions together, arguing: (1) it adequately pleads direct evidence of the conspiracy; (2) alternatively, it adequately pleads circumstantial evidence of the conspiracy; (3) it has adequately plead a single conspiracy; and (4) the *Patent Act* does not immunize Takeda's **[*18]** conduct in settling the patent litigation.[54]

Par moves to dismiss because Value Drug fails to plead an antitrust injury.[55] Par argues it had two independent regulatory bars to launch its generic: (1) lack of final FDA approval; and (2) Takeda's patents, which break the chain of causation.[56] Value Drug counters antitrust injury is not typically decided on a motion to dismiss, it adequately plead Par would have received earlier FDA approval to launch but for the conspiracy, Par's argument regarding Takeda's patents providing an independent barrier to launching is flawed, and even if it is not, Value Drug adequately pleads Takeda's patents are invalid or not infringed by the generic defendants.[57]

Israeli purchaser Teva Ltd. moves to dismiss for lack of personal jurisdiction.[58] Teva Ltd. argues Value Drug fails to adequately plead our personal jurisdiction and exercising personal jurisdiction over it is unconstitutional.[59] Teva

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[51] *Id.* ¶¶ 3(a)-(e).

[52] ECF Doc. No. 103.

[53] ECF Doc. No. 107.

[54] ECF Doc. No. 124.

[55] ECF Doc. No. 104.

[56] *Id.*

[57] ECF Doc. No. 120.

[58] ECF Doc. No. 106.

[59] *Id.*

USA moves to dismiss for failure to plead Teva Ltd. and Teva USA's involvement in the conspiracy or any facts regarding their liability as Watson's successor-in-interest or on a ratification theory.[60]

Because we find Value Drug's plead conspiracy is implausible on its face, **[*19]** we need not reach the substance of Par's and Teva USA's motions to dismiss which joined in the other defendants' arguments. We grant Takeda's, and Watson and Amneal's motions to dismiss because Value Drug fails to plead a plausible conspiracy.[61] We defer Teva Ltd.'s motion to dismiss for lack of personal jurisdiction subject to further review following expedited jurisdictional discovery if Value Drug chooses not to amend its Complaint and intends to proceed against Teva Ltd. alone.

A. Value Drug does not plead a plausible single horizontal conspiracy.

Value Drug brings two claims against Takeda and the three generics—conspiracy to restrain trade in violation of *15 U.S.C. § 1* and conspiracy to monopolize in violation of *15 U.S.C. § 2*—and one claim for monopolization against Takeda only in violation of *15 U.S.C. § 2*.

Section 1 of the Sherman Act provides "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[62] *Section 1* antitrust plaintiffs must establish three things: (1) "a contract, combination . . . or conspiracy"; (2) an unreasonable restraint on trade; and (3) antitrust injury.[63] "[T]he existence of an **[*20]** agreement is the

[60] *Id.*

[61] *Federal Rule of Civil Procedure 12(b)(6)* requires the plaintiff state a claim upon which relief can be granted. The purpose of the Rule is to test the sufficiency of the fact allegations. *Sanders v. United States, 790 F. App'x 424, 426 (3d Cir. 2019)*. If a plaintiff is unable to plead "enough facts to state a claim to relief that is plausible on its face," the court should dismiss the complaint. *Id.* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*); *see also Kajla v. U.S. Bank Nat'l Ass'n as Tr. for Credit Suisse First Boston MBS ARMT 2005-8, 806 F. App'x 101, 104 n.5 (3d Cir. 2020)* (quoting *Warren Gen. Hosp. v. Amgen Inc., 643 F.3d 77, 84 (3d Cir. 2011)*). "A claim has facial plausibility when the plaintiff pleads factual content ... allow[ing] the court to draw the reasonable inference ... the defendant is liable for the misconduct alleged." *Robert W. Mauthe M.D., P.C. v. Spreemo, Inc., 806 F. App'x 151, 152 (3d Cir. 2020)* (quoting *Zuber v. Boscov's, 871 F.3d 255, 258 (3d Cir. 2017)*). While "[t]he plausibility standard is not akin to a 'probability requirement,'" it does require the pleading show "more than a sheer possibility ... a defendant has acted unlawfully." *Riboldi v. Warren Cnty. Dep't of Human Servs. Div. of Temp. Assistance & Soc. Servs., 781 F. App'x 44, 46 (3d Cir. 2019)* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*). "A pleading that merely 'tenders naked assertion[s] devoid of further factual enhancement' is insufficient." *Id.* (quoting *Iqbal, 556 U.S. at 668*). In determining whether to grant a *12(b)(6)* motion, "we accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the plaintiff" but "disregard threadbare recitals of the elements of a cause of action, legal conclusions, and conclusory statements." *Robert W. Mauthe, M.D., P.C., 806 F. App'x at 152* (quoting *City of Cambridge Ret. Sys. v. Altisource Asset Mgmt. Corp., 908 F.3d 872, 878-79, 69 V.I. 1034 (3d Cir. 2018)*). Our Court of Appeals requires us to apply a three-step analysis to a 12(b)(6) motion: (1) we "'tak[e] note of the elements a plaintiff must plead to state a claim'"; (2) we "identify allegations that ... 'are not entitled to the assumption of truth' because those allegations 'are no more than conclusion[s]'"; and, (3) "'[w]hen there are well-pleaded factual allegations,' we 'assume their veracity' ... in addition to assuming the veracity of 'all reasonable inferences that can be drawn from' those allegations ... and, construing the allegations and reasonable inferences 'in the light most favorable to the [plaintiff]'..., we determine whether they 'plausibly give rise to an entitlement to relief.'" *Oakwood Lab'ys LLC v. Thanoo, 999 F.3d 892, 904 (3d Cir. 2021)* (internal citations omitted); *Connelly v. Lane Constr. Corp., 809 F.3d 780, 787 (3d Cir. 2016)*.

[62] *15 U.S.C. § 1*.

[63] *In re Insur. Brokerage Antitrust Litig., 618 F.3d 300, 314-15, 315 n.9 (3d Cir. 2010)*; *see also Howard Hess Dental Lab'ys Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 253 (3d Cir. 2010)* ("A plaintiff asserting a *Section 1* claim also must allege four elements: '(1) concerted action by the defendants; that produced anti-competitive effects within the relevant product and geographic

hallmark of a *Section 1* claim."[64] "Instead of assigning [contract, combination . . . or conspiracy] a distinct meaning, courts have interpreted them collectively to require 'some form of concerted action' . . . in other words, a 'unity of purpose or a common design and understanding or a meeting or minds' or 'a conscious commitment to a common scheme.'"[65]

Section 2, conversely, has "sweeping language" making it unlawful to "monopolize, attempt to monopolize, or conspire to monopolize, interstate or international commerce."[66] "A *Section 2* conspiracy claim has four elements: (1) an agreement to monopolize; (2) an overt act in furtherance of the conspiracy; (3) a specific intent to monopolize; and (4) a causal connection between the conspiracy and the injury alleged."[67] But a litigant may bring a *Section 2* claim for monopolization as well, requiring "'(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'"[68] The second element of a monopolization claim requires "the willful acquisition or maintenance of monopoly power." **[*21]** [69] "As this element makes clear, the acquisition or possession of monopoly power must be accompanied by some anticompetitive conduct on the part of the possessor."[70]

While Value Drug's claim for monopolization does not require the existence of a conspiracy on its face, it requires "some anticompetitive conduct" on Takeda's part to acquire or maintain the monopoly power.[71] Value Drug only alleges Takeda's "conduct" is its participation in the conspiracy with Par, Watson, and Amneal. Because we find Value Drug has not plausibly alleged a conspiracy, we also find Value Drug fails to plead a monopolization claim.[72]

In pleading a conspiracy, a plaintiff must plead "enough factual matter (taken as true) to suggest that an agreement was made."[73] A plaintiff may rely on direct or circumstantial evidence or some combination of both to plead an

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markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action.'") (further citations omitted)).

[64] *In re Insur., 618 F.3d at 315* (citing *In re Baby Food Antitrust Litig., 166 F.3d 112, 117 (3d Cir. 1999)* (further citation omitted)).

[65] *Id.* (citing *In re Baby Food, 166 F.3d at 117* and *In re Flat Glass Antitrust Litig., 385 F.3d 350, 357 (3d Cir. 2004)*) (further citations omitted) (internal quotation omitted).

[66] *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 306 (3d Cir. 2007)* (citing *15 U.S.C. § 2*).

[67] *Howard Hess Dental Lab'ys Inc., 602 F.3d at 253*.

[68] *Broadcom Corp., 501 F.3d at 307*. (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*).

[69] *Id. at 308*.

[70] *Id.* (citing *Verizon Commcn's Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*).

[71] *Id.*

[72] Takeda raises this argument in a footnote in its opening brief. ECF Doc. No. 103-1 at 12, n.4 (citing ECF Doc No. 1 ¶ 104). Value Drug evidently concedes the point, as Value Drug does not address Takeda's argument—rather only arguing it has adequately plead a conspiracy and Takeda's patents do not immunize anticompetitive conduct.

[73] *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (discussing pleading standard for conspiracy in *Sherman Act Section 1* claim); *see also* *In re Insur., 618 F.3d at 320* ("*Twombly's* importance to the case before us, however, goes beyond its formulation of the general pleading standard. *Twombly* is also an essential guide to the application of that standard in the antitrust context, for in *Twombly* the Supreme Court also had to determine whether a *Sherman Act* claim alleging horizontal conspiracy was adequately pled."). We apply the same pleading standards to a *Section 1* and *Section 2* conspiracy claim. *See* *W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 99-100 (3d Cir. 2010)*.

agreement.[74] If relying exclusively on direct evidence of conspiracy, "the complaint must plead 'enough fact to raise a reasonable expectation that discovery will reveal' this direct evidence" of illegality.[75] "And if the plaintiff alternatively expects to rest on the circumstantial evidence of parallel behavior, the complaint's statement of facts must place the **[*22]** alleged behavior in 'a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.'"[76] "[R]egardless of whether the plaintiff expects to prove the existence of a conspiracy directly or circumstantially, it must plead 'enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.'"[77] We look at the conspiracy as a whole when assessing each defendants' involvement, and "[i]n short, the issue is whether the pleading delineates to some sufficiently specific degree that a defendant purposefully joined and participated in the conspiracy."[78]

1. Value Drug's single horizontal conspiracy as plead.

Value Drug alleges Takeda, Par, Watson, and Amneal conspired to restrain trade and monopolize the market on the eve of Par's trial with Takeda in November 2015.[79] They allegedly agreed: Par would refrain from launching its generic of Colcrys and instead distribute Takeda's authorized generic two-and-a-half years after reaching its settlement agreement with Takeda and remit substantial royalty payments back to Takeda; "Watson and Amneal would restrict **[*23]** their output generic of Colcrys for several years, and then would each enjoy a defined period of time to sell their respective generic Colcrys products free from competition from all other would-be generic Colcrys makers;" and Takeda "would enter licenses with [the] other [non-conspiring] generic companies that would delay their entry beyond Watson and Amneal's agreed periods of competition-free sales, thereby giving the co-conspirators long periods of supracompetitive Colcrys profits."[80]

Value Drug swears the conspiracy has "two basic features."[81] First, Takeda and Par settled their patent litigation and "entered into a sham joint venture . . . that concealed the first part of their output restriction conspiracy."[82] Par and Takeda agreed Par would not launch its generic of Colcrys, and in July 2018—two-and-a-half years after they executed the settlement agreement—Par would become the distributor of Takeda's authorized generic of Colcrys.[83] Under this arrangement, Par would "remit back to Takeda virtually all of the revenues from sales of authorized generic Colcrys, keeping some of the revenues for itself."[84] The second feature involved Watson and Amneal.[85]

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[74] *In re Generic Pharms. Pricing Antitrust Litig., 338 F. Supp. 3d 404, 438 (E.D. Pa. 2018)* (quoting *W. Penn Allegheny Health Sys., Inc., 627 F.3d at 99*).

[75] *In re Insur., 618 F.3d at 324* (quoting *Twombly, 550 U.S. at 556*); *see also* *In re Processed Egg Prod. Antitrust Litig., 821 F. Supp. 2d 709, 717 (E.D. Pa. 2011)* (quoting *In re Insur., 618 F.3d at 324*) (further citations omitted)).

[76] *In re Insur., 618 F.3d at 324* (quoting *Twombly, 550 U.S. at 557*).

[77] *Id.* (quoting *Twombly, 550 U.S. at 556*).

[78] *In re Processed Egg Prod., 821 F.Supp.2d at 718-20 (E.D. Pa. 2011)*; *see also* *In re Generic Pharms.., 338 F. Supp. 3d at 438*.

[79] ECF Doc. No. 1 ¶ 54.

[80] *Id.* ¶¶ 3(a)-(e).

[81] *Id.* ¶ 54.

[82] *Id.* ¶ 55.

[83] *Id.*

[84] *Id.*

They too settled their respective **[*24]** litigation with Takeda and entered into separate settlement agreements.[86] Takeda "struck agreements with Watson and Amneal, respectively, offering each a defined time, believed to be between [six] and [eighteen] months in duration, to sell generic Colcrys free from competition from all other generic Colcrys sellers, if Watson and Amneal would stay off the market for several years until their defined periods of marketing commenced."[87] The conspiracy, though, had an escape clause.[88] Under Value Drug's theory, "Par, Watson, and Amneal would refrain from launching their own generic versions of Colcrys only for so long as non-conspirators did so. That is, the co-conspirators agreed that if a non-conspiring seller of generic Colcrys entered the market, Par, Watson, and Amneal could do so . . . Par's selling Takeda's authorized generic Colcrys avoided this escape clause."[89] Value Drug continues: "This escape clause, and its necessary implication that the co-conspirators were willing to restrict their own output only so long as non-conspirators were doing so, too, illustrates the interdependence of the promises of the co-conspirators, the existence of the conspiracy, the fact that the output restriction **[*25]** was against the unilateral economic interests of the conspirators and was only in their joint conspiratorial interests, and demonstrates the singular nature of the conspiracy."[90]

Value Drug alleges this arrangement benefitted all the co-conspirators.[91] According to Par "[t]he distribution agreement between Takeda and Par . . . provides powerful incentives to ensure that the parties preserve the two-entrant market."[92] And Par itself purportedly explained the logic behind the conspiracy: "[A market with] a single branded drug (Takeda's Colcrys) and a single generic version (Par's authorized generic) only functions if the market for Colcrys-equivalent colchicine is limited to those two products. [] Although a drug market can maintain price stability with a single generic version of a drug on the market, multiple entrants often product a market-wide price collapse with mass renegotiation and cancellation of supply agreements. [] The distribution agreement between Takeda and Par recognizes this dynamic and provides powerful incentives to ensure that the parties preserve the two-entrant market."[93] Par also "asserted that even the entry of a single additional competitor **[*26]** would cause its distribution joint venture with Takeda 'to lose approximately 97 million in annual revenue;'" and "with 'two or three other generic ANDA filers enter[ing] the market,' the joint venture would lose even more, because '[a]s additional generic versions of Colcrys enter the market, Par would be forced to swiftly reduce prices to maintain even a portion of its market share.'"[94] Value Drug pleads each defendant had no unilateral interest in this arrangement, and "[t]he conduct among [Takeda, Par, Amneal, and Watson] only makes economic sense if there was an agreement among the four of them to restrain their respective generic and authorized-generic output and prevent the price collapse that Par so vividly described."[95] In other words, under Value Drug's theory, the conspirators agreed Par, Watson,

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[85] *Id.* ¶ 56.

[86] *Id.*

[87] *Id.*

[88] *Id.* ¶ 57.

[89] *Id.*

[90] *Id.*

[91] *Id.* ¶ 58.

[92] *Id.* (ellipses in original).

[93] *Id.* (alterations in original).

[94] *Id.* ¶ 59.

[95] *Id.* ¶¶ 58-60. Value Drug posits Takeda had no unilateral interest to stop selling its generic drug through Prasco, Par had no unilateral interest to restrict its output of generic Colcrys for several years and agree to defined period of sales free from other generic competition, and Watson and Amneal had no unilateral economic interests to agree to restrict their output for several years after Par's 180-day exclusivity elapsed. *Id.*

and Amneal would stay off the market to each enjoy defined periods of competition-free sales to avoid "the price collapse" Par so vividly described when more than a brand drug and one generic drug is on the market.[96]

Value Drug alleges this conspiracy "restricted output of generic Colcrys, kept Colcrys prices at supracompetitive levels, and delayed their fall to competitive **[*27]** levels."[97] Value Drug alleges the conspiracy "was very profitable to both Takeda and Par" even though "Watson and Amneal did not get to enjoy the fruits of the conspiracy."[98] Value Drug alleges Takeda "earned approximately $1 billion more than it would have had it faced generic competition," "Par expected to earn approximately $50-80 million more than it would absent the conspiracy," and "Watson and Amneal each could have expected to earn approximately $12-36 million more during their respective periods as the only generic seller on the market than they would have earned absent the conspiracy."[99]

2. Value Drug pleads no direct evidence of the conspiracy.

"Allegations of direct evidence of an agreement, if sufficiently detailed, are independently adequate" to plead a conspiracy.[100] Direct evidence is "evidence that is explicit and requires no inferences to establish the proposition or conclusion being arrested" such as "a document or conversation explicitly manifesting the existence of the agreement in question."[101] Value Drug argues it offers two forms of direct evidence—the settlement agreements themselves and defendants' judicial admissions in a different litigation.[102]

Value Drug **[*28]** cites a string of cases purportedly supporting its argument the individual, bilateral settlement agreements are direct evidence of the single, horizontal conspiracy among Takeda, Par, Watson, and Amneal.[103] Value Drug fails to appreciate why these cases are distinguishable from what it pleads here. For example, Value Drug cites to one of Judge Goldberg's opinions in the *King Drug Co. of Florence v. Cephalon, Inc.* litigation.[104] Judge Goldberg considered motions for summary judgment on whether individual settlement agreements between the brand and generic defendants *themselves* violated antitrust principles because they *individually* contained large and unjustified reverse settlements following our Supreme Court's holding in *Actavis*.[105] Value Drug seizes on

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[96] *Id.*

[97] *Id.* ¶ 67.

[98] *Id.* ¶ 68.

[99] *Id.* ¶¶ 69-71.

[100] *In re Insur., 618 F.3d at 323-24*.

[101] *Id. at 323-24 n.23*; *see also* *King Drug Co. of Florence, Inc. v. Cephalon, Inc., Nos. 06-1797, 06-1833, 06-2768, 2014 U.S. Dist. LEXIS 84818, 2014 WL 2813312, at *6 (E.D. Pa. June 23, 2014)* (deciding a motion for summary judgment and finding "[w]hether this evidence is properly considered 'direct' depends on whether the fact-finder would have to take an additional logical step in order to conclude that a conspiracy occurred. In other words, an additional step is indicative of circumstantial evidence. Direct evidence requires no extrapolation, as with 'a document or conversation explicitly manifesting the existence of the agreement in question.") (citing *In re Insur., 618 F.3d at 324 n.23*)).

[102] ECF Doc. No. 124 at 11-14. Value Drug argues we can take judicial admission of unplead statements made in a different litigation in front of Judge Andrews. We need not decide whether we can consider these statements to defeat the motion to dismiss because the statements are in support of Value Drug's unplead "Second Wave" theory. We further detail Value Drug's argued "Second Wave" theory in the circumstantial evidence section.

[103] ECF Doc. No. 124 at 11-12.

[104] *88 F. Supp. 3d 402 (E.D. Pa. 2015)*.

Judge Goldberg's footnote "[p]laintiffs have presented direct evidence of concerted action through the settlement agreements between Cephalon and each of the Generic Defendants, and Defendants have not challenged Plaintiffs' ability to meet the concerted action requirement on these claims."[106] But Value Drug fails to acknowledge the concerted action Judge Goldberg is discussing is *not* concerted action among the brand and *all* of the generics, it is concerted action between the brand and **[*29]** *each* of the generics with respect to the individual settlement agreements raising antitrust concerns. Judge Goldberg addressed several agreements; Value Drug alleges one.

Judge Thrash in *In re Androgel Antitrust Litigation (No. II)* considered whether individual settlement agreements between the brand and each generic raised antitrust concerns as a reverse payment settlement on a motion for summary judgment.[107] One of the generics moved for summary judgment arguing the plaintiffs failed to demonstrate a conspiracy to restrain trade in violation of *Sections 1* and *2 of the Sherman Act*.[108] Judge Thrash observed both claims "require the same threshold showing—the existence of an agreement to restrain trade" and "[a] written contract satisfies this requirement 'only if it embodies an agreement to unlawfully restrain trade.'"[109] Judge Thrash concluded the settlement agreements constituted direct evidence of a conspiracy because "the settlement agreements specifically address the conduct the Plaintiffs argue is unlawful."[110] Judge Thrash reasoned: "The parties negotiated and agreed that in exchange for dropping the patent litigation, providing some services, and delaying generic introduction until 2015, the Generics **[*30]** would receive compensation. Whether that common objective—dropping the patent litigation in exchange for compensation—was an illegal restraint of trade is a separate question. But if it was, then the settlements are clear, direct evidence of an agreement to unlawfully restrain trade."[111] In *In re Androgel*, the very conduct purportedly constituting the antitrust violation—"dropping the patent litigation in exchange for compensation" in the form of a reverse payment—appeared in the terms of each individual written settlement agreement between the brand and the generic manufacturer. Thus, as Judge Thrash aptly reasoned, if a jury found this conduct to be in violation of the *Sherman Act*, the settlement agreements

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[105] *F.T.C. v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*; *see also* *King Drug Co. of Florence, 88 F. Supp. 3d at 407-410* (detailing the terms of each settlement agreement between the brand and individual generic manufacturers), 422 (denying defendants' motions for summary judgment).

[106] *King Drug Co. of Florence, 88 F. Supp. 3d at 410 n.9*. In this footnote, Judge Goldberg rejected defendants' argument "there exists a 'special,' heightened standard of review for motions for summary judgment in the antitrust context," distinguishing the cases the defendants relied on because the cases addressed "the limited inferences that may be drawn from ambiguous, circumstantial evidence in establishing concerted action . . . ." *Id.* Judge Goldberg found the plaintiffs presented direct evidence of concerted action in the form of the written settlement agreements.

[107] *No. 09-2084, 2018 U.S. Dist. LEXIS 99716, 2018 WL 2984873, at *1-4 (N.D. Ga. June 14, 2018)*. Solvay—the brand drug—sued two generic manufacturers for patent infringement after they made Paragraph IV certifications when filing their Abbreviated New Drug Applications. *2018 U.S. Dist. LEXIS 99716, [WL] at *2-3*. The separate litigations ran on parallel schedules, and on the same day, Solvay settled the individual cases with the generics. *2018 U.S. Dist. LEXIS 99716, [WL] at *3*. Each settlement agreement also contained "business promotion agreements" wherein the brand drug and generic agreed to share profits of the brand drug and the generic agreed to do something—here either promote the brand drug to physicians or serve as a backup supplier of the brand drug. *2018 U.S. Dist. LEXIS 99716, [WL] at *4*. Judge Thrash found "[t]ogether, these types of settlements are called 'reverse payment' settlements, and they have recently become popular in pharmaceutical litigation." *2018 U.S. Dist. LEXIS 99716, [WL] at *4*. The plaintiffs alleged the defendants violated federal ***antitrust law*** by entering into reverse settlement agreements. *2018 U.S. Dist. LEXIS 99716, [WL] at *5*. This contrasts with our case, where the alleged antitrust violation is a single, horizontal conspiracy among all defendants to restrict the output of Colcrys.

[108] *2018 U.S. Dist. LEXIS 99716, [WL] at *7*.

[109] *Id.* (further citations omitted).

[110] *2018 U.S. Dist. LEXIS 99716, [WL] at *8*.

[111] *Id.* We note Value Drug selectively and misleadingly quotes Judge Thrash's reasoning to support its position here.

constituted *direct evidence* of the conspiracy between the brand and each individual generic as they memorialized the very agreement which violated the *Sherman Act*.

This is not what we have here. Value Drug is not challenging the separate bilateral settlement agreements as individually violative of the *Sherman Act*.[112] Value Drug pleads a single, horizontal antitrust conspiracy among Takeda, Par, Watson, and Amneal. The bilateral settlement agreements are not direct evidence of this alleged conspiracy. We are persuaded **[*31]** by another Judge Goldberg opinion in the *King Drug Co. of Florence, Inc. v. Cephalon, Inc* litigation.[113] Judge Goldberg separately considered whether four individual, bilateral reverse payment settlement agreements executed between the brand drug Cephalon and the generic defendants "were the product of an overall antitrust conspiracy between all of the Defendants" on a motion for summary judgment.[114] As we have here, Judge Goldberg observed "[t]he motions at issue do not concern the legality of the individual, bilateral settlement agreements between Cephalon and each Generic Defendant. What is at issue is Plaintiffs' claim that the separate settlement agreements were in fact the manifestation of a horizonal conspiracy between all Defendants—with Cephalon at the center—to restrain trade in the modafinil market."[115] Judge Goldberg found the individual, bilateral settlement agreements are not direct evidence of an overall antitrust conspiracy.[116] There, the plaintiffs argued the settlement agreements themselves, which contained substantially similar language and structure, constituted direct evidence.[117] Judge Goldberg rejected this argument, reasoning, "[t]he settlement agreements themselves are individual agreements, not global agreements amongst **[*32]** all Defendants. Plaintiffs are unable to point to any direct evidence that the Generics agreed amongst themselves, let alone that such overall agreement also included Cephalon. Indeed, each agreement runs only between Cephalon and a single Generic.

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[112] Value Drug also misplaces reliance on *In re Wellbutrin XL Antitrust Litig., 133 F. Supp. 3d 734 (E.D. Pa. 2015)* and *United Food & Com. Workers Loc. 1776 & Participating Emps. Health & Welfare Fund v. Teikoku Pharma USA, 296 F. Supp. 3d 1142 (N.D. Cal. 2017)*. In *In re Wellbutrin*, the "Wellbutrin Settlement was executed on February 9, 2007" resolving various pending lawsuits between the brand drug and various generic manufacturers and "was comprised of multiple agreements." *In re Wellbutrin XL, 133 F. Supp. 3d at 745*. Not only did the parties sign one settlement agreement (made up of various agreements, including "the Omnibus Agreement"), one generic took the lead initially in negotiating on behalf of *all* generic manufacturers. *Id.* This is not what Value Drug alleges today. Value Drug alleges *separate* settlement agreements between Takeda and Par, Takeda and Watson, and Takeda and Amneal. Value Drug does not allege together these constituted a global settlement agreement, like in *In re Wellbutrin*, nor does it allege either Par, Watson, or Amneal negotiated on behalf of all of them collectively. Similarly, in *United Food & Com. Workers Loc. 1776*, the plaintiffs argued "the Settlement Agreement, **signed by all three defendants**, satisfies the 'contract, combination, or conspiracy' elements" of their antitrust claims. *296 F. Supp. 3d at 1165* (emphasis added). Judge Orrick observed "Defendants **do not dispute this**, although they do dispute the significance, lawfulness, and effect of the various provisions in that Agreement" and therefore granted judgment in favor of plaintiff on the conspiracy element of its claims. *Id.* (emphasis added). We do not have all defendants signing one settlement agreement here. We have individual settlement agreements between Takeda and each generic manufacturer. Nor do the defendants here concede the settlement agreements satisfy the conspiracy claim. Neither of these cases provides teeth to Value Drug's misplaced argument.

[113] *King Drug Co. of Florence, Inc., 2014 U.S. Dist . LEXIS 84818, 2014 WL 2813312, at *6*. We recognize this case involves a motion for summary judgment and thus a different standard than the one we apply to the motion to dismiss before us. Judge Goldberg's reasoning as to why the bilateral settlement agreements are not direct evidence of a single horizontal conspiracy is nonetheless persuasive.

[114] *2014 U.S. Dist. LEXIS 84818, [WL] at *1*.

[115] *2014 U.S. Dist. LEXIS 84818, [WL] at *6*.

[116] *2014 U.S. Dist. LEXIS 84818, [WL] at *1, 6-7*.

[117] *2014 U.S. Dist. LEXIS 84818, [WL] at *6*.

While Plaintiffs are correct that the settlements contain similar terms, and it could be argued that this similarity is evidence of an overall conspiracy, that is classic circumstantial, not direct evidence."[118]

Value Drug pleads the generics individually settled their patent infringement litigations with Takeda around the same time and with bilateral settlement agreements containing similar structure and terms, purportedly manifesting an overarching single, horizontal conspiracy among Takeda, Par, Watson, and Amneal.[119] Value Drug conceded at oral argument there is no provision in the settlement agreements—beside in Watson's agreement which references Par and Amneal's generic Colcrys product—providing *direct* evidence of an agreement among Takeda, Par, Watson, and Amneal to restrict generic Colcrys output.[120] Value Drug further conceded "conspirators **[*33]** normally don't lay out and specifically say, hey, this is what I'm doing."[121] But this is exactly the type of "smoking gun" evidence Value Drug needs if it intends to rely on the settlement agreements as *direct evidence* of a conspiracy.[122] There is simply no direct evidence of an antitrust conspiracy in the individual settlement agreements themselves. The mere fact Watson's agreement mentions two other products may give rise to an *inference* Watson, Par, and Amneal knew of each other's agreements' terms and somehow fell into an overarching output restriction conspiracy. But this is a conclusion requiring us to *infer* something and thus is *not* direct evidence; it is "classic circumstantial" evidence just like Judge Goldberg reviewed on a summary judgment record.

Value Drug also argues it provides direct evidence of the overarching conspiracy in the form of judicial admissions by Par in front of Judge Andrews.[123] This too fails to carry the day for Value Drug. The statements by Par only address Par and Takeda's distribution agreement and the benefits provided to Par and Takeda by maintaining a two-drug market.[124] The statements do not address Watson and Amneal or their agreement and involvement **[*34]** in this alleged overarching conspiracy among Takeda, Par, Watson, and Amneal. Value Drug's reliance on the statements would require us to draw inferences Takeda, Par, Watson, and Amneal entered an overarching conspiracy among each other from Par's statements about its agreement with Takeda and the benefits it draws from it. This reach is classic circumstantial evidence, not direct.

Value Drug pleads no direct evidence of a conspiracy because neither the settlement agreements nor Par's statements are direct evidence of the single, horizontal conspiracy among Takeda, Par, Watson, and Amneal.

3. Value Drug pleads no circumstantial evidence of the conspiracy.

Plaintiffs may plead an anti-competitive conspiracy violating federal law through circumstantial evidence.[125] But mere allegations of parallel conduct are not enough, nor are allegations of "conscious parallelism."[126] "In order 'to

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[118] *2014 U.S. Dist. LEXIS 84818, [WL] at *7*.

[119] *See, e.g.*, ECF Doc. No. 1 ¶¶ 53-57.

[120] ECF Doc. No. 148, Tr. 26:12-27:15.

[121] *Id.*, Tr. 27:10-12.

[122] *Cephalon, 2014 U.S. Dist. LEXIS 84818, 2014 WL 2813312, at *5* (discussing proof of conspiracy by direct evidence and stating "[b]ecause direct evidence of an unlawful conspiracy—a 'smoking gun'—is often unavailable, proof by inferences drawn from circumstantial evidence is the norm.") (citing *InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 159 (3d Cir. 2003)*) (further citation omitted).

[123] ECF Doc. No. 1 ¶¶ 58-59; *see also* ECF Doc. No. 124 at 13 (characterizing its pleading as judicial admissions to Judge Andrews which "conceded the purpose and effect of the conspiracy and the 'joint venture.'").

[124] ECF Doc. No. 1 ¶¶ 58-59.

[125] *See, e.g. In re Ins., 618 F.3d at 321*.

avoid deterring innocent conduct that reflects enhanced, rather than restrained, competition,' . . . and in order to enforce the *Sherman Act*'s requirement of an agreement, the Supreme Court has required that 'a *§ 1* plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were **[*35]** acting independently."[127] "Some courts have denominated these facts, the presence of which may indicate the existence of an actionable agreement, as 'plus factors'" and although not exhaustive, our Court of Appeals recognizes three such plus factors: (1) motive to enter the conspiracy; (2) evidence defendants acted contrary to their interests; and (3) evidence implying a traditional conspiracy.[128] "[P]lus factors are simply circumstances in which the inference of independent action is less likely than that of concerted action."[129]

Value Drug argues it adequately pleads circumstantial evidence of a conspiracy because it pleads conscious parallel conduct, motive to agree, and the conspiring defendants acted contrary to their economic interests.[130] Takeda, Watson, Amneal, and Par counter the conspiracy is implausible, and Value Drug fails to adequately plead circumstantial evidence of a conspiracy nonetheless. We need not decide whether Value Drug plausibly pleads consciously parallel conduct because its conspiracy *as plead* is admittedly implausible belying any inference of concerted action. But we grant Value Drug leave to amend should it be able to plead its later-argued theory **[*36]** consistent with *Rule 11*.

We again start with Value Drug's plead conspiracy. Value Drug's plead purpose of the conspiracy is for "the four [conspirators] to restrain their respective generic and authorized-generic output **and prevent the price collapse that Par so vividly described**"—*i.e.*, the price collapse which occurs when there are more than two entrants (one brand and one generic of a drug) in the market—in order to enjoy and maintain supracompetitive profits.[131] To achieve this purpose, Takeda, Par, Watson, and Amneal agreed to consistently maintain a two-entrant system until January 2024, with Par first enjoying exclusivity well past its 180-day exclusivity provided as the first Abbreviated New Drug Application filer, and then Watson and Amneal each enjoying successive periods of exclusivity—something neither would otherwise enjoy since neither filed their Application first.[132] Understanding other non-conspirator generics could also come to market, the four competitors purportedly agreed Takeda would provide them licenses to enter the market after Watson and Amneal had their exclusivity period.[133] The competitors also purportedly agreed, though, if a non-conspiring generic came to market, all of **[*37]** them could enter too; in other words, they would only restrict their output if the non-conspirator generics did so too.[134] In so doing, they restricted competition and stood to gain supracompetitive profits.[135]

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[126] *Id.* ("Parallel conduct is, of course, consistent with the existence of an agreement; in many cases where an agreement exists, parallel conduct—such as setting prices at the same level—is precisely the concerted action that is the conspiracy's object. But as the Supreme Court has long recognized, parallel conduct is 'just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.'" (quoting *Twombly, 550 U.S. at 554*)).

[127] *Id.* (further citations omitted).

[128] *Id.* (quoting *Flat Glass, 385 F.3d at 360*). Evidence implying a traditional conspiracy "consists of 'non-economic evidence that there was an actual manifest agreement not to compete,' which may include 'proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.'" *Id.* (quoting *Flat Glass, 385 F.3d at 361*) (further citation omitted).

[129] *In re Generic Pharm., 338 F. Supp. 3d at 448* (further citation omitted) (alteration in original).

[130] Value Drug does not argue it pleads evidence implying a traditional conspiracy.

[131] ECF Doc. No. 1 ¶¶ 58-60.

[132] *Id.* ¶¶ 3(a)-(e), 54-57.

[133] *Id.* ¶ 3(e).

[134] *Id.* ¶ 57.

But what Value Drug pleads is belied by the settlement agreements Value Drug attempts to rely on as circumstantial evidence of the conspiracy. It is not disputed Watson and Amneal did not have a defined period of exclusive sales. The purported conspiracy (as best we can tell based on the allegations with all inferences in Value Drug's favor) really worked this way:

• Par agreed to be Takeda's distributor of its authorized generic from July 1, 2018 through the earlier of June 30, 2022 (or the date Par launches its own generic of Colcrys or any other single-ingredient oral colchicine product other than Takeda's or its generic of Colcrys);[136]

• Par also agreed with Takeda it could launch its own generic of Colcrys on the earlier of January 1, 2024; the date a court finds the patents covering Colcrys invalid or not infringed based on a drug "substantively identical" to Par's generic of Colcrys; the date a "Third Party" begins selling its generic of Colcrys with Takeda's permission; **[*38]** or a date following another generic drug manufacturer launching "at risk" without permission from Takeda.[137] Third Party *does not* except Watson and Amneal; rather, it means "any person other than a Party or an Affiliate to a Party."[138]

• Watson agreed with Takeda it could launch its own generic of Colcrys on the earlier of: October 15, 2020; 135 days before another generic (besides Par or Amneal) begins selling its generic of Colcrys with Takeda's permission; the date Par or Amneal begins selling their generics of Colcrys with Takeda's permission; the date a court finds the patents covering Colcrys invalid or not infringed based on a drug "substantively identical" to Watson's generic of Colcrys; the date another generic starts selling after a Court determines the Colcrys patents are invalid or not infringed based on a drug "*not* substantively identical" to Watson's generic of Colcrys; or a date following another generic drug manufacturer launching "at risk" without permission from Takeda.[139]

• And Amneal agreed with Takeda it could launch its own generic of Colcrys on the earlier of: October 15, 2020; the date a court finds the patents covering Colcrys invalid or not infringed based on a drug **[*39]** "substantively identical" to Amneal's generic of Colcrys; the date a third party begins selling its generic of Colcrys with Takeda's permission; or a date following another generic drug manufacturer launching "at risk" without permission from Takeda.[140]

Thus, drawing all inferences in favor of Value Drug but reviewing the agreements Value Drug itself relies on to state its claim, we know:

• Par and Takeda would be the only two sellers on the market, with Takeda distributing its branded Colcrys and Par distributing Takeda's authorized generic, from July 1, 2018 to October 15, 2020 when Watson and Amneal entered the market with their generic products; upon their joint entry, Watson and Amneal would cause the "price collapse" with four market entrants—which, according to Value Drug's own pleading, would cause the generics to "swiftly reduce prices to maintain even a portion" of the market share.

• If Watson's entry date of 135 days before another generic (besides Par or Amneal) got triggered, Watson still would not have a period of exclusivity. Rather, both Par and Amneal could come in with their generics.[141]

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[135] *Id.* ¶ 54.

[136] ECF Doc No. 123, Ex. 1, at 16 § 1.1.

[137] ECF Doc No. 123, Ex. 1, at 17 § 1.3.

[138] ECF Doc. No. 123, Ex. 1, at 29, Ex. A to License Agreement (Definitions).

[139] ECF Doc. No. 123-1, Ex. 2, at 16-17 § 1.2.

[140] ECF Doc. No. 123-2, Ex. 3, at 18-19 §§ 1.2.

[141] ECF Doc No. 123, Ex. 1, at 17 § 1.3(c); ECF Doc. No. 123-1, Ex. 2, at 16-17 § 1.2(b); ECF Doc. No. 123-2, Ex. 3, at 18-19 § 1.2(c); *see also* ECF Doc. No. 124 at 9 n.7, 10 n.9 (Value Drug admitting Par and Amneal came in when Watson came in).

Thus, the market would have: Takeda's brand Colcrys; Takeda's authorized generic of Colcrys; **[*40]** Par's generic Colcrys; Watson's generic Colcrys; and Amneal's generic Colcrys.[142]

• And, as Value Drug pleads, if a non-conspirator came into the market, Par, Watson, and Amneal could also come in then.[143]

We next turn to the purported "Second Wave" theory of conspiracy Value Drug did not plead but raised at oral argument and in its briefing. Value Drug argues the actual unplead purpose of the conspiracy is to "order their market entry" to compete against three generics rather than the potential nine, and thus avoid "the looming Second Wave" of generics which would cause an even larger price collapse than what occurs when there are three generics in the market.[144] In other words, Takeda, Par, Watson, and Amneal did not conspire to totally restrict their output in exchange for defined periods of exclusivity in a two-entrant market and supracompetitive profits to be shared among themselves (as plead); they instead conspired to restrict their output to compete only against *each other* for defined periods of time, rather than all nine generics which could have been on the market. But Value Drug fails to plead facts supporting this theory and effectively concedes its as-plead theory **[*41]** is implausible by not defending it.[145]

Value Drug's conspiracy *as plead* is implausible because in any of these scenarios, the admitted price collapse occurs. Value Drug concedes this result.[146] Rather than doubling down on its theory the four competitors agreed to this scheme to prevent the inevitable price collapse which occurs when "even . . . a single additional" generic enters the market and disrupts the high prices commanded in a two-entrant market, Value Drug argues the purpose of the conspiracy is actually to prevent the *further* price collapse which would occur from the "looming Second Wave" of generic manufacturers also trying to take their generic of Colcrys to market.[147] But Value Drug cannot plead one implausible conspiracy—a conspiracy in which each conspirator joined in order to enjoy defined, competition-free periods of sales in a two-entrant market[148]—and argue because another unplead conspiracy is plausible we should not dismiss its plead implausible allegations.[149]

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[142] We note under Par's license with Takeda, if Par launched its own generic, Par could no longer be the distributor of Takeda's authorized generic. ECF Doc No. 123, Ex. 1, at 16 § 1.1. Even assuming in favor of Value Drug Par decided not to launch and rather continued being Takeda's distributor, Watson still has no exclusivity because the market has branded Colcrys, Takeda's authorized generic, Watson's generic, and Amneal's generic. Conversely, assuming Par did launch *and* Takeda chose to stop distributing its authorized generic, the market is still similarly saturated with the brand drug and three generics. Regardless of whether Par chose to launch its own generic or not, Watson never obtained an exclusive period of time or a scenario where the price collapse Value Drug pleads does not occur. Amneal similarly had no exclusivity in either scenario.

[143] ECF Doc No. 123, Ex. 1, at 17 § 1.3(c); ECF Doc. No. 123-1, Ex. 2, at 16-17 § 1.2(b); ECF Doc. No. 123-2, Ex. 3, at 18-19 § 1.2(c); *see also* ECF Doc. No. 1 ¶ 57.

[144] *See, e.g.*, ECF Doc. No. 124.

[145] Value Drug's allegations in paragraph 57 may be subject to different interpretations. But Value Drug drafted the pleading. And in its briefing, Value Drug swears the "escape clause" it references in paragraph 57 is the escape clauses in each individual settlement agreement. *See, e.g.* ECF Doc. No. 124 at 7 n.1 (discussing entry dates in context of "escape clauses" in settlement agreements); 9 n.7 (same); 10 n.9; 13 n.13 (conceding Par, Watson, and Amneal would all enter at once causing competition from three generics (instead of nine in accordance with Value Drug's new "second wave" theory); 19 n.21 (describing clauses providing entry dates in settlement agreements as "escape clauses"). While we should plausibly infer facts based on the plead facts, we cannot simply create new theories of liability based on arguments attempting to reconstruct sworn allegations. Value Drug's conclusions do not suffice. Its belated arguments attempting to stretch those conclusions into facts also do not suffice.

[146] *See, e.g.*, ECF Doc. No. 124 at 17 (arguing the purpose of the conspiracy is to avoid "the looming Second Wave" of generics).

[147] *Id.* ("By conspiring to order their market entry, Takeda avoided competing against Par, Watson, and Amneal for a period of time, then competed against just the three co-conspirators and avoided a price collapse from the looming Second Wave.").

[148] ECF Doc. No. 1 ¶¶ 3(a)-(e), 4, 56-60, 71.

Value Drug pleads itself out of court by focusing the plead motives of the four competitors to reduce generic output "to prevent the price collapse that Par so vividly described"—*i.e.*, the price **[*42]** collapse which occurs when even one other generic enters the two-entrant market.[150] The settlement agreements themselves preclude Watson and Amneal from selling their generics in a two-entrant market and rather demonstrate the price collapse Par described *will* happen when one of the four competitors brings its generic to market because all three generics, and possibly Takeda's authorized generic, can be sold at once. As plead, we discern no motive for the competitors to enter a *single, horizontal* conspiracy among all of them to cause the very price collapse they allegedly conspired to avoid.[151] This theory makes no economic sense and forecloses an inference of concerted action among the four competitors.[152]

We dismiss Value Drug's plead claims against Takeda, Par, Watson, Amneal, and Teva USA with leave to amend.

B. We defer ruling on Teva Ltd.'s motion to dismiss for lack of personal jurisdiction and allow limited expedited jurisdictional discovery.

Teva Ltd. moves to dismiss Value Drug's complaint arguing we do not enjoy personal jurisdiction over it as an Israeli company with its principal place of business in Israel.[153] Value Drug responds we **[*43]** enjoy personal jurisdiction over Teva Ltd. under Pennsylvania's long arm statute, the *Clayton Act (15 U.S.C. § 22)*, and *Federal Rule of Civil Procedure 4(k)(2)*.[154] Value Drug also argues exercising jurisdiction—either general or specific—is constitutional.[155] In the alternative, Value Drug asks for jurisdictional discovery. We disagree with Value Drug it has adequately plead or proffered adequate evidence our exercise of jurisdiction over Teva Ltd. is constitutional. But we grant Value Drug limited jurisdictional discovery on one plead theory of personal jurisdiction.

1. Value Drug's pleading of personal jurisdiction over Teva Ltd.

Value Drug knowingly sued a foreign company with a foreign principal place of business and yet failed to plead barely a fact regarding our personal jurisdiction over it.[156]

Value Drug bases our personal jurisdiction over Teva Ltd. on four sparse allegations: (1) "Teva Ltd. is successor-in-interest to Watson"; (2) "On July 26, 2015 Teva Ltd. purchased Watson and, as part of that purchase, assumed all

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[149] We do not take a position on whether the "Second Wave" conspiracy is plausible. We simply note Value Drug argues against Takeda, Watson, and Amneal's motions to dismiss arguments by setting forth its unplead second wave theory, not its plead theory of preserving a two-entrant market for as long as possible.

[150] ECF Doc. No. 1 ¶¶ 58-60.

[151] *See, e.g., Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1243 (3d Cir. 1993)* (finding defendants need not share the same motive in entering a conspiracy, "[r]ather, all that is required is that *they each have* a motive to conspire." (emphasis added)).

[152] *See, e.g., Brunson Commc'ns, Inc. v. Arbitron, Inc., 239 F. Supp. 2d 550, 563-64 (E.D. Pa. 2002)* (applying reasoning in *Matsushita* to motion to dismiss and quoting "if the defendants 'had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.") Because we find it makes no economic sense to conspire to cause a price collapse upon entry to the market, we cannot find the defendants' conduct is not equally consistent with other plausible explanations—*i.e.*, each generic defendant unilaterally settled its patent litigation with Takeda for reasons other than to restrict generic output.

[153] ECF Doc. No. 106; ECF Doc. No. 1 ¶ 12 (pleading Teva Ltd.'s incorporation and principal place of business in Israel).

[154] ECF Doc. No. 117.

[155] *Id.*

[156] ECF Doc. No. 1 ¶ 12.

of Watson's liabilities"; and (3) "Moreover, Teva Ltd. ratified Watson's conduct challenged herein"; (4) "Each defendant has transacted business, maintained substantial contacts, and/or committed overt acts in furtherance of the illegal **[*44]** scheme and conspiracy throughout the United States, including in this district. The scheme and conspiracy have been directed at, and have had the intended effect of, causing injury to persons residing in, located in, or doing business throughout the United States, including in this district."[157]

2. Value Drug fails to plead or proffer adequate evidence to establish we enjoy personal jurisdiction over Teva Ltd. but we allow it limited jurisdictional discovery should it decline to timely amend its complaint.

"'[T]he burden of demonstrating the facts that establish personal jurisdiction,' falls on the plaintiff . . . and 'once a defendant has raised a jurisdictional defense,' the plaintiff must 'prov[e] by affidavits or other competent evidence that jurisdiction is proper.'"[158] When, as here, no party requests an evidentiary hearing "'the plaintiff[s] need only establish a prima facie case of personal jurisdiction.'"[159] We are required to "'accept the plaintiff's allegations as true, and . . . to construe disputed facts in favor of the plaintiff.'"[160] "Of course, by accepting a plaintiff's facts as true when a motion to dismiss is originally made, a court is not precluded from revisiting the issue **[*45]** if it appears that the facts alleged to support jurisdiction are in dispute."[161]

"Pennsylvania's long-arm statute gives its courts jurisdiction over out-of-state defendants to the maximum extent allowed by the U.S. Constitution."[162] *Federal Rule of Civil Procedure 4(k)(2)* provides "[f]or a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consisted with the United States Constitution and laws."[163] The *Clayton Act*, which allows nationwide service of process, permits us to consider whether we have personal jurisdiction over Teva Ltd. "on the basis of [its] aggregate contacts with the United States as a whole" under the *Fifth Amendment's Due Process clause*.[164]

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[157] *Id.* ¶¶ 12, 17.

[158] *Metcalfe v. Renaissance Marine, Inc., 566 F.3d 324, 330, 51 V.I. 1219 (3d Cir. 2009)* (quoting *Pinker v. Roche Holdings Ltd., 292 F.3d 361, 368 (3d Cir. 2002)* and *Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1302 (3d Cir.1996)*); *see also* *Middleton v. Trans Union, LLC., No. 20-3756, 2021 U.S. Dist. LEXIS 156481, 2021 WL 3674617, at *2 (E.D. Pa. Aug. 19, 2021)* ("When reviewing a motion to dismiss for lack of personal jurisdiction under *Federal Rule of Civil Procedure 12(b)(2)*, I must accept the plaintiff's allegations as true and resolve disputed facts in favor of the plaintiff . . . However, once a defendant has raised a jurisdictional defense, the plaintiff must 'prove by affidavits or other competent evidence that jurisdiction is proper.' . . . If an evidentiary hearing is not held, a plaintiff 'need only establish a prima facie case of personal jurisdiction.' . . . A plaintiff meets this burden by 'establishing with reasonable particularity sufficient contacts between the defendant and the forum state.'" (internal citations omitted) (further citations omitted)); *Metro Container Group v. AC&T Co., et al., No. 18-3623, 2021 U.S. Dist. LEXIS 234447, 2021 WL 5804374, at *3 (E.D. Pa. Dec. 7, 2021)* ("In ruling on a *Rule 12(b)(2)* motion to dismiss for lack of personal jurisdiction, the Court also takes the allegations of the complaint as true . . . However, once a jurisdictional defense is raised, the plaintiff bears the burden of proving, through affidavits or competent evidence, contacts with the forum state sufficient to establish personal jurisdiction . . . The plaintiff must establish those contacts with reasonable particularity . . . the plaintiff makes out a prima facie case in support of personal jurisdiction, the burden shifts to the defendant to establish that some other considerations exist which would render exercise of personal jurisdiction unreasonable." (internal citations omitted)).

[159] *Metcalfe, 566 F.3d at 330* (quoting *O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 316 (3d Cir. 2007)*).

[160] *Id.* (quoting *Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 457 (3d Cir. 2003)*).

[161] *Id. at 331* (quoting *Carteret Sav. Bank, FA v. Shushan, 954 F.2d 141, 142 n.1 (3d Cir. 1992)*).

[162] *Danziger & De Llano, LLP v. Morgan Verkamp LLC, 948 F.3d 124, 129 (3d Cir. 2020)* (citing *42 Pa. Cons. Stat. § 5322(b)* and *Kubik v. Letteri, 532 Pa. 10, 614 A.2d 1110, 1113-14 (Pa. 1992)*).

[163] *Fed. R. Civ. P. 4(k)(2)*.

Regardless of which statute or rule we operate under, exercising personal jurisdiction over Teva Ltd. must still be constitutional. The parties dispute whether exercising jurisdiction is constitutional and what standard to apply. We apply the same analysis applied to a personal jurisdiction analysis under the *Fourteenth Amendment*.[165]

a. We do not enjoy general personal jurisdiction over Teva Ltd.

Value Drug first argues we enjoy general jurisdiction over Teva Ltd. based on Teva Ltd.'s "continuous and systematic contacts" with the United States or alternatively as Teva USA's alter ego. At the outset, we reject Teva Ltd.'s argument and evidence proffered purportedly supporting its argument we may exercise jurisdiction over Teva Ltd. under an alter ego theory.[166] Value Drug does not plead we have personal jurisdiction over Teva Ltd. under an alter ego theory. It cannot now attempt to rely on an unplead theory through briefing.[167]

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[164] *In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 298 (3d Cir. 2004)* ("We hold that personal jurisdiction in federal antitrust litigation is assessed on the basis of a defendant's aggregate contacts with the United States as a whole. Our holding in *Pinker* and on this appeal is consistent with the *Federal Rule of Civil Procedure 4(k)(2)*. Personal jurisdiction therein is not limited to the defendant's contacts with a particular federal judicial district or the forum state. **We hold further that personal jurisdiction under *Section 12 of the Clayton Act* is as broad as the limits of due [*46] process under the *Fifth Amendment*.**") (citations omitted) (emphasis added); *see also* ECF Doc. No. 140 at 9-10 ("The parties agree that, under Third Circuit precedent, the *Clayton Act*'s provision for nationwide service coupled with *Federal Rule of Civil Procedure 4(k)(2)* means that the *Fifth Amendment* (not the *Fourteenth Amendment*) governs the relevant constitutional inquiry . . . The parties also agree that, under Third Circuit precedent, 'personal jurisdiction in federal antitrust litigation is assessed on the basis of a defendant's aggregate contacts with the United States as a whole.'"); ECF Doc. No. 117 at 14-16 (discussing jurisdiction under *Fed. R. Civ. P. 4(k)(2)* and the *Clayton Act*).

[165] *See Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 293 (3d Cir. 1985)* (discussing contacts analysis under patent law, noting the *Fifth Amendment* "has been construed to impose a general fairness test incorporating *Internal Shoe's*" requirements, and acknowledging "even if the relevant area in delineating contacts were the United States as a whole, we would nonetheless be required to ask whether the quality and quantity of [the defendant's] contacts were constitutionally adequate to support personal jurisdiction. For although the present *fifth amendment* due process inquiry need not address concerns of interstate federalism, it must still consider the remaining elements of the minimum contacts doctrine as developed by *International Shoe* and its progeny" but declining to adopt nationwide contacts analysis in case because no federal statute allowing nationwide service of process within patent laws); *In re Diisocyanates Antitrust Litig., No. 18-1001, 2020 U.S. Dist. LEXIS 40136, 2020 WL 1140245, at *2 (W.D. Pa. Mar. 9, 2020)* (applying same personal jurisdiction analysis to antitrust case involving nationwide contacts); *In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 558 (M.D. Pa. 2009)* (same); *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., No. 13-2445, 2017 U.S. Dist. LEXIS 171322, 2017 WL 4642285, at *3 (E.D. Pa. Oct. 17, 2017)* (same); *see also Livnat v. Palestinian Auth., 851 F.3d 45, 54, 428 U.S. App. D.C. 140 (D.C. Cir. 2017)* ("To be sure, neither the Supreme Court nor this court has expressly analyzed whether the *Fifth* and *Fourteenth Amendment* standards differ. But the Second, Sixth, Seventh, Eleventh, and Federal Circuits have, and all agree that there is no meaningful difference in the level of contacts required for personal jurisdiction. The only difference in the personal-jurisdiction analysis under the two Amendments is the *scope* of relevant contacts: Under the *Fourteenth Amendment*, which defines the reach of state courts, the relevant contacts are state-specific. Under the *Fifth Amendment*, which defines the reach of federal courts, contacts with the United States as a whole are relevant. That difference is not at play in this case." (citations omitted)).

[166] ECF Doc. No. 117 at 20, 23-24.

[167] Value Drug argues we "should not [] ignore[]" its evidence regarding alter ego jurisdiction. ECF Doc. No. 151 at 9 n.5. While Value Drug is correct our inquiry on a *12(b)(2)* motion is not limited to pleadings—in fact a Plaintiff may not rest on its pleading when jurisdiction is challenged—Value Drug is incorrect it can rest on an unplead theory for personal jurisdiction merely by providing evidence of its unplead theory once jurisdiction is challenged. The very case Value Drug relies on for its argument illustrates this principle. *See In re Chocolate Confectionary Antitrust Litig., 641 F. Supp. 2d 367, 381 (M.D. Pa. 2009)* ("Although plaintiffs bear the ultimate burden of proving personal jurisdiction by a preponderance of the evidence, such a showing is unnecessary at the preliminary stages of litigation . . . **Rather, plaintiffs must merely allege sufficient facts to establish a prima facie case of jurisdiction over the person. Once these allegations are contradicted by an opposing affidavit, however, plaintiffs must present similar evidence in support of personal jurisdiction** . . . '[A]t no point may a plaintiff rely

We consider whether we otherwise have general jurisdiction over Teva Ltd. Our inquiry is whether the "corporation's 'affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State."[168] The Supreme **[*47]** Court recently reiterated the standard for general jurisdiction:

> A state court may exercise general jurisdiction only when a defendant is "essentially at home" in the State. General jurisdiction, as its name implies, extends to "any and all claims" brought against a defendant. Those claims need not relate to the forum State or the defendant's activity there; they may concern events and conduct anywhere in the world. But that breadth imposes a correlative limit: Only a select "set of affiliations with a forum" will expose a defendant to such sweeping jurisdiction. In what we have called the "paradigm" case, an individual is subject to general jurisdiction in her place of domicile. And the "equivalent" forums for a corporation are its place of incorporation and principal place of business.[169]

Value Drug concedes Teva Ltd.'s state of incorporation and principal place of business is Israel.[170] Value Drug's argument apparently seizes on our Supreme Court's language in *Daimler* leaving open the possibility of exercising general jurisdiction over a defendant "in an exceptional case . . . [when] a corporation's operations in a forum other than its formal place of incorporation or principal place of business **[*48]** may be so substantial and of such a nature as to render the corporation at home in that State."[171] But "it is incredibly difficult to establish general jurisdiction [over a corporation] in a forum *other* than the place of incorporation or principal place of business."[172] Value Drug argues we have general jurisdiction due to Teva Ltd.'s extensive contacts with the United States.[173] We are unpersuaded by Value Drug's citations to pre-*Daimler* cases and see no "exceptional reason" to exercise general personal jurisdiction over Teva Ltd.

b. We defer ruling on whether we enjoy specific personal jurisdiction over Teva Ltd. following limited jurisdictional discovery.

Value Drug alternatively argues we may exercise specific jurisdiction over Teva Ltd. Specific jurisdiction requires: (1) minimum contacts—"some act by which [the defendant] purposefully avails itself of the privilege of conducting activities within the forum state"; (2) "[t]he plaintiff's claims . . . 'must arise out of or relate to the defendant's contacts' with the forum'"; and (3) exercising jurisdiction does not offend "traditional notions of fair play and substantial justice.'"[174] Value Drug relies on three theories: (1) Teva Ltd.'s contacts with **[*49]** the United States are

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on the bare pleadings alone in order to withstand a defendant's *Rule 12(b)(2)* motion to dismiss for lack of in personam jurisdiction . . . Once the motion is made, plaintiff must respond with actual proofs, not mere allegations.' When the plaintiff responds with affidavits or other evidence in support of its position, the court is bound to accept these representations and defer final determination as to the merits of the allegations until a pretrial hearing or the time of trial." (internal citations omitted) (emphasis added)).

[168] *Daimler AG v. Bauman, 571 U.S. 117, 139, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014)* (quoting *Goodyear Dunlop Tires Operations, S. A. v. Brown, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011)*) (alteration in original).

[169] *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1024, 209 L. Ed. 2d 225 (2021)* (internal citations omitted) (citing *Goodyear, 564 U.S. at 919* and *Daimler, 571 U.S. at 137*).

[170] ECF Doc. No. 1 ¶ 12.

[171] *Daimler, 571 U.S. at 139 n.19*.

[172] *Chavez v. Dole Food Co., Inc., 836 F.3d 205, 223 (3d Cir. 2016)* (alteration and emphasis in original) (quoting *Monkton Ins. Servs., Ltd. v. Ritter, 768 F.3d 429, 432 (5th Cir. 2014)*).

[173] ECF Doc. No. 117 at 19 ("Teva Ltd. cannot continuously and systematically avail itself of the privileges of U.S. capital investment, U.S. intellectual property protections, U.S. federal courts, and U.S. consumer market access as if at home in the U.S., as it has at all relevant times, without also having to answer for its U.S. wrongdoings.").

[174] *Ford Motor Co., 141 S. Ct. at 1024-25* (further citations omitted).

sufficient to exercise specific jurisdiction; (2) we can impute Watson's contacts to Teva Ltd. because Teva Ltd. is Watson's successor-in-interest; and (3) we can impute Watson's contacts to Teva Ltd. because Teva Ltd. ratified its conduct.[175]

We grant limited jurisdictional discovery on Value Drug's first theory.[176] Value Drug pleads "[e]ach defendant has transacted business, maintained substantial contacts, and/or committed overt acts in furtherance of the illegal scheme and conspiracy throughout the United States."[177] Our Court of Appeals has held this bare conclusory pleading is "clearly frivolous" and not warranting of jurisdictional discovery.[178] But in response to Teva Ltd.'s motion to dismiss, Value Drug proffered evidence of Teva Ltd.'s contacts with the United States.[179] What Value Drugs did not do is provide evidence or argument the claims before us now arise from or relate to Teva Ltd.'s contacts with the United States.[180] We are satisfied based on the record before us, including Value Drug's Complaint and proffer of evidence in response to Teva Ltd.'s motion to dismiss, Value Drug's jurisdictional discovery will not be a fishing expedition but rather a targeted inquiry **[*50]** into whether the claims here arise from or relate to Teva Ltd.'s contacts with the United States.[181]

We reject Value Drug's theory of personal jurisdiction under the successor-in-interest and ratification theories.[182] Value Drug does not plead or proffer facts supporting its legal conclusion "Teva Ltd. ratified Watson's conduct challenged herein."[183] We have no basis to provide discovery when we have no facts supporting this theory.

We similarly reject Value Drug's successor liability theory of personal jurisdiction as plead. "[U]nder Pennsylvania law, the acts of a predecessor corporation may be attributed to its successor for purposes of determining whether jurisdiction over the successor is proper."[184] "Accordingly, jurisdiction is established if the successor corporation

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[175] ECF Doc. No. 117.

[176] *See, e.g.*, *Toys "R" Us, Inc., 318 F.3d at 456* ("Although the plaintiff bears the burden of demonstrating facts that support personal jurisdiction . . . courts are to assist the plaintiff by allowing jurisdictional discovery unless the plaintiff's claim is 'clearly frivolous.' If a plaintiff presents factual allegations that suggest 'with reasonable particularity' the possible existence of the requisite 'contacts between [the party] and the forum state, the plaintiff's right to conduct jurisdictional discovery should be sustained.") (internal citations omitted). Our Court of Appeals found "the record before the District Court contained sufficient non-frivolous allegations (and admissions) to support the request for jurisdictional discovery." *Id.*

[177] ECF Doc. No. 1 ¶ 17.

[178] *Massachusetts Sch. of L. at Andover, Inc. v. Am. Bar Ass'n, 107 F.3d 1026, 1042 (3d Cir. 1997)* ("The district court found (at least by implication), and we agree, that [plaintiff's] jurisdictional claims were clearly frivolous. Our result is in accord with other cases which hold that a mere unsupported allegation that the defendant 'transacts business' in an area is 'clearly frivolous.'"); *see also* *Falcone v. WiredLogic, Inc., No. 06-800, 2006 U.S. Dist. LEXIS 113496, 2006 WL 8459813, at *6 (E.D. Pa. Oct. 26, 2006)* ("[M]ere unsupported allegations that a defendant 'transacts business,' has 'contacts,' or 'expressly targeted Pennsylvania residents' are clearly frivolous and discovery will be denied.").

[179] *See, e.g.*, ECF Doc. No. 117.

[180] *See, e.g., id.*

[181] We again note Value Drug does not plead an alter ego or agency theory. Thus, Value Drug's inquiry must not undertake to establish jurisdiction through Teva Ltd.'s subsidiaries' contacts with the United States and involvement with Colcrys.

[182] Because we apply Pennsylvania law to determine personal jurisdiction over Teva Ltd., and because the parties dispute which law may apply *substantively* to Value Drug's theory of successor liability, our finding as to personal jurisdiction has no bearing on whether Teva Ltd. may be liable as a successor under a potentially applicable law besides Pennsylvania.

[183] ECF Doc. No. 1 ¶ 12 (merely pleading a legal conclusion and no further facts in the Complaint about ratification); ECF Doc. No. 117 at 8, 26 (citing to no evidence in the record supporting its ratification theory).

[184] *Falcone, 2006 U.S. Dist. LEXIS 113496, 2006 WL 8459813, at *9* (quoting *Huth v. Hillsboro Ins. Mgmt., 72 F. Supp. 2d 506, 510 (E.D. Pa. 1990)* (citing *Simmers v. Am. Cyanamid Corp., 394 Pa. Super. 464, 576 A.2d 376, 381 (Pa. Super. 1990)*).

may be held liable under Pennsylvania's law of successor liability."[185] Value Drug relies on the "express assumption of liability" exception to Pennsylvania's general rule of no successor liability.[186] The parties dispute whether Value Drug pleading Watson continues to exist precludes a finding of successor liability under Pennsylvania law.[187] In *In re Suboxone Antitrust Litigation* ***[*51]*** , Judge Goldberg considered whether a defendant could be liable as a successor-in-interest under Pennsylvania law when the plaintiff argued the defendant expressly assumed liabilities.[188] Judge Goldberg found it could not for three reasons: (1) the agreement did not expressly transfer liabilities to a successor corporation; (2) "the continued existence of original entity precludes successor liability;" and (3) the plaintiffs failed to allege the original entity had any liability, regardless.[189] Judge Goldberg found: "[i]t is well established that '[i]f the original entity still exists . . . there is no successor, and therefore no successor liability.'"[190] He continued: "[a]t least one district court has concluded that, under Pennsylvania law, the 'cessation of ordinary business operations' factor may be satisfied when the predecessor does not dissolve or completely cease to exist, but rather is reduced to an assetless shell."[191] "Where, however, the original entity is not an assetless shell and does not completely cease ordinary operations, successor liability is precluded."[192]

The plaintiffs in *In re Suboxone* argued it did not matter the predecessor entity still existed, **[*52]** relying on a Massachusetts case applying Massachusetts law.[193] Judge Goldberg found he need not consider the plaintiffs' argument because the Massachusetts case decided under Massachusetts law which Plaintiffs relied on "is inapposite given [his] finding that there was no assumption of liability."[194] Value Drug attempts to distinguish the

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[185] *Id.* (citing Umac, Inc. v. Aqua-Gas AVK Ltd., No. 04-4022, 2005 U.S. Dist. LEXIS 6124, 2005 WL 742497, at *3 (E.D. Pa. Mar. 30, 2005)).

[186] ECF Doc. No. 1 ¶ 12; *see also* Falcone, 2006 U.S. Dist. LEXIS 113496, 2006 WL 8459813, at *9 ("Under Pennsylvania law, 'when one company sells or transfers all of its assets to another company, the purchasing or receiving company is not responsible for the debts and liabilities of the selling company simply because it acquired the seller's property.' However, this general rule of non-liability can be overcome if the plaintiff demonstrates that '(1) the purchaser expressly or implicitly agreed to assume liability, (2) the transaction amounted to a consolidation or merger, (3) the purchasing corporation was merely a continuation of the selling corporation, (4) the transaction was fraudulently entered into to escape liability, or (5) the transfer was without adequate consideration and no provisions were made for creditors of the selling corporation.'" (internal citations omitted)).

[187] ECF Doc. No. 1 ¶ 11 ("Defendant Watson Laboratories, Inc. ***is*** a Nevada Corporation having places of business at 311 Bonnie Circle, Corona, CA 92878 and Morris Corporate Center III, 400 Interpace Parkway, Parsippany, NJ 07054." (emphasis added)).

[188] *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., No. 13-2445, 2017 U.S. Dist. LEXIS 176555, 2017 WL 4810801, at *6 (E.D. Pa. Oct. 25, 2017)*.

[189] *Id.*

[190] *2017 U.S. Dist. LEXIS 176555, [WL] at *7* (citing *Norfolk S. Ry. Co. v. Pittsburgh & W. Va. R.R., 153 F. Supp. 3d 778, 807 (W.D. Pa. 2015)*); *see also* *In re Welding Fume Products Liab. Litig., No. 03-17000, 2010 U.S. Dist. LEXIS 57859, 2010 WL 2403355, at *7 (N.D. Ohio June 11, 2010)* ("Of course, if the original entity still exists, there is no successor—and no successor liability."))

[191] *In re Suboxone, 2017 U.S. Dist. LEXIS 176555, 2017 WL 4810801, at *6* (citing *Lehman Bros. Holdings v. Gateway Funding Diversified Mtg. Servs., L.P., 989 F. Supp. 2d 411, 436 (E.D. Pa. 2013)*).

[192] *Id.* (citing *Norfolk, 153 F. Supp. 3d at 808*).

[193] Interestingly, Value Drug also cites the case the plaintiffs in *In re Suboxone* relied on—*Town of Lexington v. Pharmacia Corp., No. 12-11645, 2015 U.S. Dist. LEXIS 36815, 2015 WL 1321457 (D. Mass. Mar. 24, 2015)*—in its sur-reply. ECF Doc. No. 136 at 11. Value Drug cites it for the proposition it is "the general rule . . . that 'a successor who assumes liabilities of its predecessor may not escape liability simply because the predecessor lives on.'" *Id.*

case on this basis arguing Judge Goldberg did not decide whether the predecessor entity must cease to exist when there is an express assumption of liability.

But we are not persuaded. Judge Goldberg found three independent reasons to deny successor liability—one of which included the predecessor entity still existed. We are persuaded by the analysis presented by Judge Goldberg and other judges to have considered this issue.[195] Value Drug pleads Watson still exists, precluding a finding of successor liability under Pennsylvania law, and thus precluding us from imputing Watson's contacts for purposes of jurisdiction as plead.[196]

We reject Value Drug's argument we enjoy general jurisdiction over Teva Ltd. or we can impute Watson's contacts to Teva Ltd. under **[*53]** a successor-in-interest or ratification theory as plead. But we grant limited jurisdictional discovery on whether Value Drug's claims arise from or relate to Teva Ltd.'s contacts with the United States. Understanding Value Drug may amend its Complaint and plead other theories of our personal jurisdiction for Teva Ltd. to the extent possible under *Rule 11*, we defer jurisdictional discovery until after Value Drug can amend.

3. We deny Watson and Amneal's request for sanctions.

Watson and Amneal move for sanctions against Value Drug in the form of their fees in prosecuting their motion to dismiss under *28 U.S.C. § 1927* if we dismiss Value Drug's complaint with leave to amend.[197] We decline to

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[194] *In re Suboxone, 2017 U.S. Dist. LEXIS 176555, 2017 WL 4810801, at *8 n.10*.

[195] *See, e.g., 2017 U.S. Dist. LEXIS 176555, [WL] at *7-8*; *Fend v. Allen-Bradley Co., No. 17-01701, 2019 U.S. Dist. LEXIS 205730, 2019 WL 6242119, at *1 (E.D. Pa. Nov. 20, 2019)* (rejecting successor theory because predecessor entity still existed); *Norfolk S. Ry. Co. v. Pittsburgh & W. Virginia R.R., 153 F. Supp. 3d 778, 807 (W.D. Pa. 2015)*, *aff'd*, *870 F.3d 244 (3d Cir. 2017)* (post-trial memorandum addressing successor liability under Pennsylvania law and finding "[i]f the original entity still exists, however, there is no successor, and therefore, no successor liability"); *Norfolk S. Ry. Co. v. Pittsburgh & W. Virginia R.R. & Power Reit, No. 11-1588, 2014 U.S. Dist. LEXIS 83209, 2014 WL 2808907, at *16 (W.D. Pa. June 19, 2014)* (denying summary judgment on successor theory when plaintiffs argued under the fraudulent purpose and de facto merger/mere continuation exceptions to general rule (later addressing the same in *Norfolk S. Ry. Co., 153 F. Supp. 3d at 807*) and noting it did not find any binding precedent on this issue but "[s]everal outside jurisdictions have recognized that the continued existence of a predecessor forecloses the availability of successor liability"); *Hyjurick v. Commonwealth Land Title Ins. Co., No. 11-1282, 2012 U.S. Dist. LEXIS 59087, 2012 WL 1463633, at *4 (M.D. Pa. Apr. 27, 2012)* ("The facts alleged in the complaint, however, do not implicate successor liability. Commonwealth is alleged to be a separate corporate entity. Fidelity cannot be Commonwealth's successor if Commonwealth exists as a separate corporation, albeit one that is a wholly owned subsidiary."); *see also Phila. Elec. Co. v. Hercules, Inc., 762 F.2d 303, 307, 309 (3d Cir. 1985)* (finding successor liability under Pennsylvania law when an express assumption occurred but the predecessor entity had been dissolved).

[196] Value Drug relies on *Eagle Nat'l Bank v. ISCP Funding, LLC*, to argue Pennsylvania law does not require the predecessor entity to cease existence when there is an express assumption of liabilities. *No. 00685, 2011 Phila. Ct. Com. Pl. LEXIS 107, 2011 WL 10525397, at *2-3 (Pa. Com. Pl. May 3, 2011)*. The case is inapposite. It does not address successor liability, nor does it involve a claim from a plaintiff trying to establish liability over a defendant under a successor theory. Rather, the case involved the sellers of a company suing the purchaser seeking a preliminary injunction to enjoin the purchaser from using certain disputed funds transferred during the sale. *2011 Phila. Ct. Com. Pl. LEXIS 107, [WL] at *1-2*. In *Eagle National Bank*, the sellers transferred their assets to the purchaser, "including reserve deposits held for the benefit of the branch offices." *2011 Phila. Ct. Com. Pl. LEXIS 107, [WL] at *2*. Certain branches disclaimed affiliation with the purchaser and requested the sellers release any funds in the reserve deposits. *Id.* The sellers forwarded the request to release the funds to the purchaser—who then owned the reserve deposits. *Id.* The purchaser disclaimed it had to pay the branches the deposits. *Id.* The sellers sought a preliminary injunction to stop the purchaser from using the money in dispute, which the sellers transferred to the purchaser during the sale and the sellers argued the purchaser agreed to pay in the purchase agreement when it assumed certain liabilities. *Id.* Judge Bernstein issued the preliminary injunction finding the elements satisfied. *2011 Phila. Ct. Com. Pl. LEXIS 107, [WL] at *5*. The case thus did not involve the issue we have before us nor did it address successor liability.

[197] ECF Doc. No. 131 at 13-14.

sanction Value Drug at this stage. Its pleading is inaccurate and possibly inartful; it is not frivolous and there is no basis to find bad faith or intentional misconduct.

Congress in *section 1927* provides "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." **[*54]** [198] Watson and Amneal argue they are entitled to their fees for moving to dismiss a complaint which Value Drug knew contained false allegations after receiving the settlement agreements and then consciously choose not to amend. We disagree.

Our Court of Appeals instructs sanctions under *28 U.S.C. § 1927* are limited to when an attorney has "(1) multiplied proceedings; (2) unreasonably and vexatiously; (3) thereby increasing the cost of the proceedings; (4) with bad faith or with intentional misconduct."[199] The sanctions are "intended to deter an attorney from *intentionally* and unnecessarily delaying judicial proceedings, and they are limited to the costs that result from such delay," but our Court of Appeals cautions "courts should exercise [this sanctioning power] only in instances of a serious and studied disregard for the orderly process of justice."[200] Congress's allowance of fees in *section 1927* is to be construed narrowly "and with great caution so as not to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law."[201] "Consequently, sanctions may not be imposed under *§ 1927* absent a finding that counsel's conduct resulted from bad faith, rather than misunderstanding, bad judgment, or well-intentioned **[*55]** zeal."[202]

Value Drug's choice to stand on its Complaint and defend against the motions to dismiss is not so clearly frivolous, unreasonable, or vexatious to rise to the level of bad faith warranting sanctions. We decline to sanction Value Drug.

III. Conclusion

Pharmacy chain Value Drug alleges Takeda Pharmaceuticals, manufacturer of a brand name Colcrys—a drug approved by the Food and Drug Administration for the treatment and prevention of gout and familial Mediterranean fever—entered a single conspiracy with generic drug manufacturers Par, Watson, and Amneal to restrict generic Colcrys output in exchange for defined periods of exclusive sales and thus extended periods of supracompetitive profits. But Value Drug fails to plead a plausible single horizontal conspiracy among the four competitors based on settlement agreements. The settlement agreements are to the contrary on their face. We must dismiss its Complaint based on this theory with leave to amend if Value Drug can plead an alternative theory. Value Drug similarly fails to plead multiple theories of personal jurisdiction over an Israeli purchaser of some of Watson's assets but skates by with a bare pleading and a proffer of **[*56]** evidence of one theory entitling it to limited specific jurisdictional discovery before dismissal. We need not reach the substance of Par and Teva USA's alternative arguments for dismissal with an understanding Value Drug is now fully apprised of both entity's arguments should it amend consistent with our Order.

ORDER

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[198] *28 U.S.C. § 1927*.

[199] *LaSalle Nat. Bank v. First Connecticut Holding Grp., LLC, 287 F.3d 279, 288 (3d Cir. 2002)* (further citations omitted).

[200] *Id.* (further citations omitted) (emphasis in original).

[201] *Id. at 289* (further citations omitted) (alteration in original).

[202] *Id.*

AND NOW, this 28th day of December 2021, upon considering Defendant Takeda's Motion to dismiss (ECF Doc. No. 103), Plaintiff's Response (ECF Doc. No. 124), Defendant's Reply (ECF Doc. No. 135), Defendant Par Pharmaceutical's Motion to dismiss (ECF Doc. No. 104), Plaintiff's Response (ECF Doc. No. 120), Defendant's Reply (ECF Doc. No. 134), Defendants Teva Pharmaceutical Industries, LTD.'s and Teva Pharmaceuticals USA, Inc's Motion to dismiss (ECF Doc. No. 106), Plaintiff's Response (ECF Doc. No. 117), Defendants' Reply (ECF Doc. No. 130), Plaintiff's Surreply (ECF Doc. No. 136), Defendants' Response to Plaintiff's Surreply (ECF Doc. No. 140), Defendant Teva Ltd.'s letter brief regarding jurisdiction (ECF Doc. No. 146), and Plaintiff's Response (ECF Doc. No. 151), Defendants Amneal's and Watson's Motion to dismiss (ECF Doc. No. 107), Plaintiff's Response (ECF Doc. No. 124), **[*57]** Defendants' Reply (ECF Doc. No. 131), following extensive oral argument, and for reasons in the accompanying Memorandum, it is **ORDERED**:

1. Defendant Takeda's Motion (ECF Doc. No. 103) is **GRANTED** without prejudice;

2. Defendant Par's Motion (ECF Doc. No. 104) is **GRANTED** without prejudice allowing Par to join the co-defendants' arguments and is dismissed without prejudice;

3. Defendants Amneal Pharmaceuticals, LLC's and Watson Laboratories, Inc's Motion (ECF Doc. No. 107) is **GRANTED** in part without prejudice but **DENIED** in part as to its request for sanctions;

4. Defendants Teva Pharmaceuticals USA, Inc's and Teva Pharmaceutical Industries, Ltd.'s Motion (ECF Doc. No. 106) is **GRANTED in part** and **DEFERRED in part** as to personal jurisdiction over Teva Ltd.:

a. Teva USA may join the co-defendants' arguments and is dismissed without prejudice;

b. Teva Ltd. remains the only defendant subject to an amended complaint and review of our personal jurisdiction over it following expedited limited discovery;

5. We grant Value Drug's request:

a. To file an amended Complaint to address the pleading deficiencies and conform the pleadings to the later arguments compliant with *Rule 11* no later than **January 18, 2022**;

[*58] b. If it elects to not amend the Complaint under the leave granted under this Order, to begin limited expedited discovery into our ability to exercise specific personal jurisdiction over remaining defendant Teva Ltd. through: the issuance of no more than five interrogatories and five document requests to Teva Ltd. and subpoena records from Teva USA issued no earlier than **January 21, 2022** to be responded no later than **January 31, 2022**; and to take no more than three depositions over a virtual sharing platform not exceeding three hours limited to our exercise of specific personal jurisdiction to be completed no later than **February 8, 2022**; and to then supplement its arguments allowing us to exercise personal jurisdiction over Teva Ltd. not exceeding fifteen pages filed no later than **February 15, 2022** with a response from Teva Ltd. due **February 25, 2022**.

/s/ Mark A. Kearney

KEARNEY, J.

Value Drug Co. v. Takeda Pharms., U.S.A., Inc.

United States District Court for the Eastern District of Pennsylvania

December 29, 2021, Decided; December 29, 2021, Filed

CIVIL ACTION NO. 21-3500

Reporter
2021 U.S. Dist. LEXIS 247162 *; 2022 U.S.P.Q.2D (BNA) 3; 2021 WL 6200907

VALUE DRUG COMPANY v. TAKEDA PHARMACEUTICALS, U.S.A., INC., et al.

Prior History: *Value Drug Co. v. Takeda Pharm., U.S.A., Inc., 2021 U.S. Dist. LEXIS 246364, 2021 WL 6125355 (E.D. Pa., Dec. 28, 2021)*

Core Terms

generic, conspiracy, settlement agreement, patents, personal jurisdiction, manufacturer, direct evidence, alleges, launching, output, pleads, brand, motion to dismiss, generic drug, competitors, antitrust, discovery, infringed, selling, collapse, contacts, conspirators, permission, pharmacy, invalid, license, argues, amend, fails, monopolize

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Judges: KEARNEY, J.

Opinion by: KEARNEY

Opinion

AMENDED MEMORANDUM[1]

KEARNEY, J.

A pharmacy purchaser alleges a manufacturer of a patented brand name drug conspired to restrict output of its patented drug by agreeing to settle three patent infringement lawsuits it filed against three generic drug manufacturers then actively seeking to sell generic versions of its product. The pharmacy alleged the brand name manufacturer gave these three alleged infringing generic competitors exclusive periods to sell an approved generic of its brand name drug before its patent expired. The pharmacy claims the three settlement agreements are actual evidence of one overarching joint venture conspiracy created by the brand name manufacturer designed to restrict the output of its drug and maintain higher prices and greater profits. The competing generic companies and the brand name company move to dismiss arguing the pharmacy pleads no direct or circumstantial evidence of a single agreement to conspire, no antitrust injury, and we lack personal jurisdiction over an Israeli company acquiring some of the assets and liabilities of one of the generic companies. The pharmacy responds by partially shifting to an unplead theory after reviewing **[*4]** the three settlement agreements but stands on the same plead facts. The pharmacy insists the three settlement agreements are still direct evidence of a single horizontal conspiracy among four competitors in a market with six or seven other admitted non-party competitors.

But the settlement agreements themselves do not demonstrate a single conspiracy among the brand and generics to provide exclusive distribution rights. They do exactly the opposite. The pharmacy argues it plead circumstantial evidence of a conspiracy from the close timing and similarity of the three settlement agreements even though the agreements depend on none of the other six or seven non-conspiring generic manufacturers seeking to sell this drug through a court order allowing their sale or otherwise. The pharmacy swears the competitors admitted adding more manufacturers will lead to a price collapse and lost profits. We also reject the pharmacy's initial thoughts concerning exercising personal jurisdiction over the Israeli purchaser based on the allegations and record adduced to date but grant its request for limited discovery.

We grant the brand name manufacturer's and three generic manufacturers' motions to dismiss **[*5]** for failure to plead an antitrust conspiracy but grant the pharmacy's request for leave to amend. We further grant the pharmacy's request for limited expedited discovery into our specific personal jurisdiction over the Israeli purchaser should it not amend the complaint and instead wish to continue suing only the Israeli purchaser. We decline a request to sanction the pharmacy for not amending its complaint after reviewing the three settlement agreements.

I. Alleged facts

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[1] We amend our December 28, 2021 Memorandum (ECF Doc. No. 153) only to clarify unwieldly language in our introduction sentence without affecting our legal analysis or import of our December 28, 2021 Order (ECF Doc. No. 154). Our apologies for inartful language.

Medical professionals prescribe the pharmaceutical drug Colcrys to treat gout and familial Mediterranean fever. It contains the active ingredient colchicine, which "had been used in the United States for decades before the [Food and Drug Administration]" approved Colcrys.[2] But in 2006, the Food and Drug Administration "encouraged the pharmaceutical industry to submit New Drug Applications ('NDAs') for previously unapproved drugs to facilitate the FDA evaluation of older drug products by contemporary standards."[3]

Takeda Pharmaceuticals U.S.A., Inc.'s predecessor applied for three New Drug Approvals for colchicine's treatment of familial Mediterranean fever and the treatment and prevention of gout in 2008. **[*6]** [4] The Food and Drug Administration approved Colcrys as "the first pharmaceutical product contain[ing] colchicine as the sole active ingredient" on July 29, 2009.[5] It "granted Takeda's colchicine product a three-year exclusivity for the treatment of gout and seven-year exclusivity for the treatment of familial Mediterranean fever."[6] Takeda's exclusivity period ended on July 29, 2016.[7]

Par, Watson, and Amneal file Abbreviated New Drug Applications certifying their generic versions of Colcrys do not infringe on Takeda's patents or Takeda's patents are invalid.

Once a name brand drug comes to market, generic drug companies attempt to bring an AB-rated[8] generic form of the drug to market by filing an Abbreviated New Drug Application with the Food and Drug Administration, which significantly lowers the price of the brand drug once there are "many generic competitors" on the market.[9] "[B]arriers to entry by a generic drug manufacturer are high"; they must "first formulate a generic version of the brand-name drug; conduct bioequivalence and other studies needed to support an Abbreviated New Drug Application to [the Food and Drug Administration]; file the [Abbreviated New Drug Application] **[*7]** and work with [the Food and Drug Administration] on any issues that arise regarding approval; and invest in manufacturing facilities for the commercialization of the product."[10] To incentivize generic drug companies "to seek approval of generic alternatives to branded drugs, the first generic manufacturer to file an [Abbreviated New Drug Application] containing a certification that the generic version does not infringe on any valid patent listed in the [Food and Drug Administration's] 'Orange Book' against the reference-listed brand drug . . . gets 180 days of protection from competition from other generic versions of the drug."[11] If a generic drug manufacturer files the Abbreviated New

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[2] ECF Doc. No. 1 ¶ 28. Colchicine is "a very old drug" which doctors used to treat gout "for a very long time." *Id.* ¶ 30. The ancient Greeks used colchicine to treat gout more than two thousand years ago. *Id.* Dr. Stephen Goldfinger "reported successful use of colchicine" to treat familial Mediterranean fever in 1972. *Id.* Gout is "a type of severe arthritis often characterized by painful 'flares' (severe and sudden attacks of pain, redness, inflammation, and tenderness in joints) resulting from the build-up of uric acid)." *Id.*

[3] *Id.* ¶ 28.

[4] *Id.* ¶ 32.

[5] *Id.* ¶¶ 29, 32.

[6] *Id.* ¶ 32.

[7] *Id.*

[8] "An AB rating means that the generic drug is pharmaceutically equivalent and bioequivalent to the corresponding reference-listed brand drug." *Id.* ¶ 37. "An AB-rating is particularly significant because . . . pharmacists may (an in many states, must) substitute an AB-rated generic version of a drug for the brand-name drug automatically at the pharmacy counter, without seeking or obtaining permission from the prescribing physician." *Id.*

[9] *Id.* ¶¶ 33-36.

[10] *Id.* ¶ 39.

Drug Application certifying its drug does not infringe on the brand name drug's patents, the brand name manufacturer can sue the generic manufacturer for patent infringement, which delays final Food and Drug Administration approval of the Abbreviated New Drug Application for up to thirty months.[12]

Par Pharmaceuticals, Inc. filed an Abbreviated New Drug Application with the Food and Drug Administration in December 2011 seeking approval for its generic version of Colcrys.[13] Par certified "all **[*8]** pertinent patents that Takeda listed in the [Food and Drug Administration's] Orange Book under the Colcrys [New Drug Application] were either invalid or not infringed."[14] This certification entitled Par "to a 180-day period of regulatory exclusivity during which the Food and Drug Administration would not approve other generic manufacturers to sell a generic version of Colcrys."[15] Amneal Pharmaceuticals, LLC and Watson Laboratories, Inc., along with six other generic drug companies, also filed Abbreviated New Drug Applications "seeking approval to sell generic versions of Colcrys and made similar . . . certifications that any listed patents were invalid or not infringed."[16]

***Takeda sues the generic drug companies including Par, Watson, and Amneal; launches its own Authorized Generic; and settles the litigation with Par, Watson, and Amneal*.**

Takeda responded by suing all the generic drug company filers for patent infringement.[17] Takeda sued Par first in August 2013, then sued the other generic drug companies at an unplead time.[18] But Takeda's Colcrys patents are allegedly "fatally weak" and "had already been found to have not been infringed . . . in litigation regarding another product **[*9]** called Mitigare."[19]

While proceeding with its patent infringement litigations, Takeda agreed non-party Prasco could distribute its authorized generic of Colcrys "to try to lock up generic sales for Takeda" and keep the profits "otherwise lost to generic competitors."[20] Prasco distributed the generic Colcrys "at a price just slightly lower than branded Colcrys" and "collected and remitted back to Takeda virtually all of the revenues" from generic Colcrys sales.[21]

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[11] *Id.* ¶ 40.

[12] *Id.*¶ 41.

[13] *Id.* ¶¶ 39 (defining "ANDA"), 42. The application number is 203976. *Id.* ¶ 42.

[14] *Id.* ¶¶ 40, 42.

[15] *Id.* ¶ 42.

[16] *Id.* ¶ 43. Value Drug conceded this allegation is not accurate during oral argument because all eight generic filers did not file at the same time; eight generic manufacturers filed over the course of the allegations in the complaint, presumably from 2011 to 2019. ECF Doc. No. 148, Tr. 23:17-24:2.

[17] ECF Doc. No. 1 ¶ 44.

[18] *Id.*

[19] *Id.* ¶ 45. While Value Drug places this allegation right after its allegation "Takeda sued Par first, in August 2013," thereby suggesting this ruling came out *before* Takeda sued Par and the other generics, Value Drug conceded at oral argument this ruling did not come out before Takeda filed the lawsuits for patent infringement against the generics. It rather came out in May 2015. ECF Doc. No. 148, Tr. 56:17-57:14.

[20] ECF Doc. No. 1 ¶ 49.

[21] *Id.* ¶¶ 50-51.

Par obtained tentative Food and Drug Administration approval for its Abbreviated New Drug Application in February 2015.[22] Watson also obtained tentative approval in October 2015.[23] But Par and Watson still needed final approval to market their generic drug.

Value Drug Company, a pharmacy chain purchaser of pharmaceutical drugs, sees these developments as incentivizing Takeda and the generics to conspire to limit output and keep prices higher: Takeda faced devastation in profits if more generics than only its authorized generic came to market; Par faced an "unpleasant prospect of entering" the market with its generic because Prasco already had a generic in the market, forcing Par "to offer very low prices to dislodge **[*10]** and gain market share, depriving Par of the benefits of its 180-day exclusivity as the first [Abbreviated New Drug Application] filer"; and Watson and Amneal faced "the unattractive prospect of entering a market where Prasco and Par had already been fighting for market share for 180 days" thereby making both offer "rock-bottom prices to gain sales and share."[24]

So on the eve of trial in Takeda's patent infringement suit against Par, "Takeda, Par, Watson, and Amneal agreed to a scheme to restrain price competition to Colcrys by concertedly reducing generic Colcrys output, and agreed to share in the monopoly profits maintained thereby until January of 2024."[25] These four competitors (with six or seven others on the sidelines) entered into a single horizontal conspiracy effected through Takeda settling its patent infringement suits against Par, Watson, and Amneal under agreements presumably providing benefits to all litigants. Par and Takeda settled in November 2015, Watson and Takeda settled in January 2016, and Amneal and Takeda settled in March 2016—all with separate, written settlement agreements.[26] As for Amneal, although the parties did not execute the formal settlement agreement until **[*11]** March 2016, Takeda and Amneal signed a term sheet with essential terms of the settlement on December 10, 2015—shortly after Takeda and Par settled.[27]

Par and Takeda entered a distribution agreement where Par would refrain from launching its generic version of Colcrys "despite having tentative [Food and Drug Administration] approval" and "[two-and-a-half] years following entry of the agreement (*i.e.* in July of 2018) . . . Par would . . . replace Prasco as the distributor of Takeda's authorized generic Colcrys and remit back to Takeda virtually all of the revenues from sales of authorized generic Colcrys, keeping some of the revenues for itself."[28] Takeda entered into settlement agreements with Watson and Amneal whereby each would get "a defined time, believed to be between [six] and [eighteen] months in duration, to sell generic Colcrys free from competition from all other generic Colcrys sellers" in exchange for "Watson and Amneal stay[ing] off the market for several years until their defined period of marketing commenced."[29]

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[22] *Id.* ¶ 46

[23] *Id.* ¶ 47.

[24] *Id.* ¶ 53.

[25] *Id.* ¶ 54.

[26] ECF Doc. No. 123-123-2. We may review the settlement agreements on a motion to dismiss without converting it to a motion for summary judgment because the settlement agreements are integral and explicitly relied upon in Value Drug's Complaint. *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997)* ("As a general matter, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings . . . However, an exception to the general rule is that a "document integral to or explicitly relied upon in the complaint" may be considered "without converting the motion [to dismiss] into one for summary judgment." (internal citations omitted) (modification in original)); *see also* *Est. of Roman v. City of Newark, 914 F.3d 789, 796 (3d Cir. 2019)* ("'Although we examine the "complaint, exhibits attached to the complaint, [and] matters of public record,' . . . we can also consider documents 'that a defendant attaches as an exhibit to a motion to dismiss,' . . . if they are "undisputedly authentic" and "the [plaintiff's] claims are based [on them]." (internal citations omitted)), *cert. denied*, ***140 S. Ct. 82, 205 L. Ed. 2d 28 (2019)***, *and cert. denied*, ***140 S. Ct. 97, 205 L. Ed. 2d 28 (2019)***.

[27] ECF Doc. No. 123-2 at 45 (dates term sheet executed).

[28] ECF Doc. No. 1 ¶ 55.

[29] *Id.* ¶ 56.

***Takeda and Par's settlement agreement*.**

Takeda and Par settled Takeda's claim for patent infringement against Par on November **[*12]** 24, 2015.[30] Takeda granted Par a non-exclusive license through a license agreement "to distribute, have distributed, market, sell, or offer for sale a generically-labeled .6 mg colchicine oral tablet product manufactured by Takeda" beginning July 1, 2018.[31] Takeda also granted Par "a fully paid-up, royalty-free, irrevocable, non-exclusive license" to sell its generic of Colcrys.[32] Par and Takeda agreed Par could begin selling its generic of Colcrys beginning on the earlier of January 1, 2024; the date a court finds the patents covering Colcrys invalid or not infringed based on a drug "substantively identical" to Par's generic of Colcrys; the date a "Third Party" begins selling its generic of Colcrys with Takeda's permission; or a date following another generic drug manufacturer launching "at risk" without permission from Takeda.[33]

***Takeda and Watson's settlement agreement*.**

Takeda and Watson settled Takeda's claim for patent infringement against Watson on January 7, 2016—two months after Takeda settled with Par.[34] Takeda and Watson contemporaneously entered into a license agreement which is part of the settlement **[*13]** agreement granting Watson "a fully paid-up, royalty-free, irrevocable, non-exclusive license" to sell its generic Colcrys.[35] Watson's license is subject to additional terms, including when the

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[30] ECF Doc. No. 123, Ex. 1, at 2.

[31] *Id.* at 16 § 1.1 ("Takeda hereby grants to Par a non-exclusive license, with the right to sublicense to an Affiliate, under the Licensed Patents, to distribute, have distributed, market, sell, and offer for sale a generically-labeled .6 mg colchicine oral tablet product manufactured and supplied by Takeda pursuant to the Takeda NDAs ('***Licensed AG Product***'), subject to the terms set forth in the Distribution and Supple Agreement attached as Exhibit B hereto, and solely during the following period (the '***AG License Term***'): July 1, 2018, through the earlier of: June 30, 2022; or The date Par launches Par's ANDA Product; or The date Par launches any single-ingredient oral colchicine product other than the Licensed AG Product or Par's ANDA Product.").

[32] *Id.* at 16 § 1.2 ("Subject to Paragraph 1.3 below, Takeda hereby grants Par and its respective Affiliates a fully paid-up, royalty-free, irrevocable, non-exclusive license under the Licensed Patens and any other intellectual property rights owned or controlled by [Takeda] and its respective Affiliates as of the Effective Date or at any time in the future, which Licensed Patents and intellectual property rights are necessary to manufacture, have manufactured, use, import, distribute, offer to sell, have sold and sell in the United State the Par ANDA Product and any and all components thereof as necessary to make, have made, manufacture, or have manufactured the Par ANDA Product as described in the Par ANDA (the '***Par ANDA Product License***.')).

[33] *Id.* at 17 § 1.3. The Par ANDA Product License allowed Par to "sell and distribute, without any limitation or restriction, [Par's generic of Colcrys] during the period beginning on the first to occur of the following . . . and continuing until the expiration of the last to expire of the Licensed Patents: (a) January 1, 2024; (b) the date of a Final Court Decision (as defined in Exhibit A) holding that all unexpired claims of the Licensed Patents that were asserted and adjudicated against a Third party are invalid, canceled, or unenforceable or not infringed, where the judgment of non-infringement is based on a label that is substantively identical to the Par label that received tentative approval from the FDA on February 12, 2015; (c) [t]he date a Third Party, pursuant to a license or other authorization by Takeda, is permitted to launch a Generic Equivalent . . . or (e) Subject to Par's payment of the Profit Share as applicable, the date that is the earlier of (i) ten (1) business days after the date of a first commercial sale in the Territory by any Third Party without license or authorization by Takeda, of a Generic Equivalent (such Third Party referred to hereafter as the 'Launcher at Risk' or 'LAR.'" *Id.* "Third Party" is defined as "any person other than a Party or an Affiliate to a Party." *Id.* at 29, Ex. A to License Agreement (Definitions). "Affiliate" is defined as "any Person that directly or indirectly controls, is controlled by, or is under common control with any one of the Parties." *Id.* at 27. "Party" is defined as "[e]ach one of Plaintiff and Defendants," collectively "Parties"—here Takeda Pharmaceuticals USA, Inc., Par Pharmaceutical Companies, Inc., and Par Pharmaceutical, Inc. *Id.* at 15.

[34] ECF Doc. No. 123-1, Ex. 2, at 2.

[35] *Id.* at 2, 16. "Subject to Paragraph 1.2 below, Takeda hereby grants Watson and its respective Affiliates a fully paid-up, royalty-free, irrevocable, non-exclusive license under the Licensed Patents and any other intellectual property rights owned or

license becomes effective. Takeda and Watson agreed Watson could begin selling its generic of Colcrys on the earlier of: October 15, 2020; 135 days before another generic (besides Par or Amneal) begins selling its generic of Colcrys with Takeda's permission; the date Par or Amneal begins selling their generics of Colcrys with Takeda's permission; the date a court finds the patents covering Colcrys invalid or not infringed based on a drug "substantively identical" to Watson's generic of Colcrys; the date another generic starts selling after a court determines the Colcrys patents are invalid or not infringed based on a drug "*not* substantively identical" to Watson's generic of Colcrys; or a date following another generic drug manufacturer launching "at risk" without permission from Takeda.[36]

Takeda and Amneal's settlement agreement.

Takeda and Amneal settled Takeda's patent infringement litigation on March 11, 2016.[37] Takeda and Amneal contemporaneously entered **[*14]** into a license agreement as part of the settlement agreement granting Amneal "a fully paid-up, royalty-free, irrevocable, non-exclusive license" to sell its generic Colcrys.[38] Amneal's license is subject to additional terms, including when the license becomes effective. Takeda and Amneal agreed Amneal could begin selling its generic of Colcrys on the earlier of: October 15, 2020; the date a court finds the patents

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controlled by [Takeda] and its respective Affiliates as of the Effective Date or at any time in the future, which Licensed Patents and intellectual property rights are necessary to (1) manufacture, have manufacture, use, import, distribute, offer to sell, have sold and sell in the Territory the Watson ANDA Product and any and all components thereof as necessary to make, have made, manufacture, or have manufactured the Watson Anda Product as described in the Watson ANDA, and (ii) to make and have made the Watson ANDA Product outside the Territory only for use, sale and importation in or for the Territory (the "***License***")." *Id.* at 16 § 1.1(a).

[36] *Id.* at 16-17 §§ 1.2(a)-(e), (g) ("Subject to the terms of the License in Paragraph 1.1 above, Watson shall be entitled to make, use, import, market, offer for sale, sell, and distribute [Watson's generic of Colcrys] during the period beginning on the first to occur of the following (each, a '***Generic Entry Date***') and continuing until the expiration of the last to expire of the Licensed Patents: (a) October 15, 2020; (b) [t]he date that is one hundred thirty-five days (135) days prior to the date on which a first commercial sale of a Generic Equivalent by a Third Party (other than the Par ANDA Product or the Amneal ANDA Product) is permitted or authorized pursuant to a license or other authorization by Takeda; (c) [t]he date that, pursuant to a license or other authorization by Takeda, Par is permitted to launch the Par ANDA Product or Amneal is permitted to launch the Amneal ANDA Product; (d) [t]he date of a Final Court Decision . . . holding that all unexpired claims of the Licensed Patents that were asserted and adjudicated against a Third Party are invalid, canceled, or unenforceable or not infringed, where the judgment of a non-infringement is based on a label that is substantively identical to the Watson label that received tentative approval from the FDA on October 6, 2015; (e) the date of a first commercial sale of a Third Party Generic Equivalent following a Final Court decision of non-infringement by that Third Party based on a label *not* substantively identical to the Watson label that received tentative approval from FDA on October 6, 2015 . . . (g) Subject to Watson's payment of the Profit Share as applicable, the date that is the earlier of (i) ten (10) business days after the date of a first commercial sale in the Territory by any Third Party without license or authorization from Takeda of a Generic Equivalent."). They further agreed: "For the avoidance of doubt, all the Generic Entry Dates in this Paragraph 1.2 are subject to any regulatory exclusivity to which the First Filer is entitled." *Id.* at 18. "Third Party" means "a Person other than a Party or an Affiliate of a Party." *Id.* at 33, Ex. A to License (Definitions). "'Affiliate' means any Person that directly or indirectly controls, is controlled by, or is under common control with any one of the Parties." *Id.* "Party" means "[e]ach Plaintiff and Defendant" collectively "Parties" - here, Takeda Pharmaceuticals USA, Inc. and Watson Laboratories, Inc. *Id.* at 15.

[37] ECF Doc. No. 123-2, Ex. 3, at 2.

[38] *Id.* at 2, 18. "Subject to the terms of this License Agreement, including without limitation Paragraph 1.2 below, Takeda hereby grants Amneal and its respective Affiliates (and to the extent necessary, its suppliers, distributors, and customers, as the case may be): a fully paid-up, royalty-free, irrevocable, non-exclusive license under the Licensed Patents and any other intellectual property rights owned or controlled by Plaintiff and its respective Affiliates as of the Effective Date or at any time in the future, which Licensed Patents and intellectual property rights are necessary to manufacture, have manufactured, use, import, distribute, offer to sell, have sold and sell in or for the Territory the Amneal ANDA Product and any and all components thereof as necessary to make, have made, manufacture, or have manufactured the Amneal ANDA Product as described in the Amneal ANDA (the 'License')." *Id.* at 18 § 1.1.

covering Colcrys invalid or not infringed based on a drug "substantively identical" to Amneal's generic of Colcrys; or the date a third party begins selling its generic of Colcrys with Takeda's permission; a date following another generic drug manufacturer launching "at risk" without permission from Takeda.[39]

Amneal received final approval for its generic of Colcrys approximately six months later in September 2016.[40]

***The alleged conspiracy comes to an unexpected end*.**

Takeda and the three generics negotiated an "escape clause" in each settlement agreement allowing the three generics to sell their generic Colcrys if another non-party company entered the market.[41]

The escape clause triggered a few months later.[42] Non-party generic **[*15]** Mylan filed and notified Takeda in September 2016 of its Abbreviated New Drug Application with a certification Takeda's patents are either invalid or not infringed.[43] Takeda sued Mylan for patent infringement in October 2016, and Takeda and Mylan settled the litigation in November 2017.[44] The settlement purportedly "permitted Mylan to launch upon a court decision invalidating the patents covering Colcrys."[45] Our Delaware colleague Judge Richard G. Andrews "issued an opinion granting a motion by [non-party] Hikma for summary judgment in patent litigation concerning another product subject to the same patents as Colcrys, which Takeda failed to appeal."[46] Mylan launched its generic of Colcrys in

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[39] "Pursuant to the License, Amneal shall be entitled to sell and distribute, without any limitation or restriction, [Amneal's generic of Colcrys] during the period beginning on the first to occur of the following (each, a 'Generic Entry Date') and continuing until the expiration of the last to expire of the Licensed Patents: (a) October 15, 2020; (b) [t]he date of a Final Court Decision . . . holding that all Asserted Claims of the Licensed Patents are invalid, canceled, or unenforceable or not infringed, where the judgment of a non-infringement is based on a label that is substantively identical to the Amneal label pending before the FDA as of the Effective Date of this Agreement; (c) [t]he date of a first commercial sale of a Generic Equivalent in the Territory by any third party permitted or authorized pursuant to a license or other written authorization granted to such third party by Takeda . . . (e) Subject to Amneal's payment of the Profit Share as applicable, the date that is the earlier of (i) ten (10) business days after the date of a first commercial sale in the Territory by any Third Party without license or authorization from Takeda of a Generic Equivalent." *Id.* at 18-19 §§ 1.2(a)-(c), (e). They further agreed: "For the avoidance of doubt, all the Generic Entry Dates in this Paragraph 1.2 are subject to any regulatory exclusivity to which the First Filer is entitled." *Id.* at 19. "Third Party" means "a Person other than a Party or an Affiliate of a Party." *Id.* at 32, Ex. A to License (Definitions). "'Affiliate' means any Person that directly or indirectly controls, is controlled by, or is under common control with any one of the Parties . . . ." *Id.* at 30. Party means "[e]ach Plaintiff and Defendant" collectively "Parties" - here, Takeda Pharmaceuticals USA, Inc. and Amneal Pharmaceuticals LLC. ECF Doc. No. 123-2 at 17. We note third party is not used as the defined term "Third Party" in Amneal's settlement agreement. Value Drug nonetheless concedes if Watson enters the market, so does Amneal. *See* ECF Doc. No. 124 at 9 n.7, 10 n.9 (Value Drug admitting Par and Amneal came in when Watson came in).

[40] ECF Doc. No. 1 ¶ 48.

[41] *Id.* ¶ 57 ("Par, Watson, and Amneal would refrain from launching their own generic versions of Colcrys for so long as *non-conspirators* did so. That is, the co-conspirators agreed that if *a non-conspiring seller* of generic Colcrys entered the market, Par, Watson, and Amneal could do so." (emphasis added)).

[42] *Id.* ¶¶ 62, 64, 66.

[43] *Id.* ¶ 63.

[44] *Id.*

[45] *Id.* ¶ 64.

[46] *Id.* ¶ 65.

November 2019.[47] Mylan's entry into the market "thereby trigger[ed] the 'escape clause' in Par, Watson, and Amneal's agreements" with Takeda.[48]

***Value Drug sues Takeda, Par, Amneal, Watson, Teva Ltd., and Teva USA for violations of Section I and II of the Sherman Act*.**

Value Drug — a purchaser of brand Colcrys from Takeda and generic Colcrys from Prasco and Par — sued Takeda, Par, Amneal, Watson, Teva Ltd., and Teva USA for violations of *Section I* and *II of the Sherman Act* on August 5, 2021.[49] Value Drug alleges **[*16]** Takeda entered a single conspiracy with Par, Watson, and Amneal "to restrict output and restrain competition" by preventing AB-rated generics of Colcrys from coming to market.[50] The alleged conspiracy depended on all defendants' participation, and Value Drug alleges the co-conspirators enjoyed "supracompetitive Colcrys profits" by virtue of this conspiracy to restrict competition.[51]

The basic features of the conspiracy derived from Takeda, Par, Watson, and Amneal agreeing: Par would not bring its own generic to market and would rather agree to market Takeda's "authorized generic" previously distributed by Prasco, but Par would not do so until two-and-a-half years after the agreement to lengthen the time Takeda enjoyed the Colcrys market competition-free; Par would pay Takeda a "large royalty"; Watson and Amneal would restrict selling their generics for several years in exchange for a defined period of time to sell their respective generic Colcrys products free from all other generic competition; and Takeda would enter license agreements with other non-conspiring generic companies to delay their entry beyond Watson and Amneal's agreed periods of competition-free sales **[*17]** "thereby giving the co-conspirators long periods of supracompetitive Colcrys profits."[52]

II. Analysis

Value Drug's presently plead claims hinge on Takeda's settlement agreements with Par, Watson, and Amneal. Par, Watson, and Amneal argue the settlement agreements directly contradict Value Drug's plead theory, Value Drug reviewed the settlement agreements but chose not to amend, and we must dismiss the Complaint because the conspiracy is implausible.

Takeda argues the principal points adopted by all competitors: (1) the conspiracy as plead is implausible on its face and directly contradicted by the settlement agreements; (2) Value Drug fails to plead sufficient facts supporting a single, horizontal conspiracy even if it plead a plausible conspiracy; and (3) Value Drug's claims are barred because the settlement agreements forming the basis of the alleged antitrust violations are merely a legitimate exercise of Takeda's patent rights under the *Patent Act*.[53] Amneal and Watson move to dismiss on similar grounds arguing the

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[47] *Id.* ¶ 66.

[48] *Id.* ¶¶ 62, 65-66.

[49] *Id.* ¶ 7. Value Drug alleges Teva Pharmaceutical Industries Ltd. and Teva Pharmaceuticals USA, Inc. purchased Watson and expressly assumed its liabilities in July 2015 and/or ratified Watson's conduct. *Id.* ¶¶ 12-13. At oral argument, Value Drug conceded Teva Ltd. signed the purchase agreement in July 2015, but the sale did not close until August 2016. The date of the closing is not plead. These facts comprise the extent of Value Drug's allegations involving Teva Ltd. and Teva USA. *See generally* ECF Doc. No. 1.

[50] ECF Doc. No. 1 ¶¶ 1, 7-8, 10-14, 27. Value Drug also sued Endo Pharmaceuticals Inc. We dismissed Endo Pharmaceuticals from the litigation upon the parties' agreement. ECF Doc. No. 125.

[51] ECF Doc. No. 1 ¶¶ 3, 60.

[52] *Id.* ¶¶ 3(a)-(e).

[53] ECF Doc. No. 103.

settlement agreements Value Drug attempts to rely upon as evidence of the conspiracy directly contradict its theory and make the conspiracy implausible, particularly with respect to **[*18]** Watson and Amneal because they did not stand to receive the benefit Value Drug alleges since neither received a defined period of serial exclusivity.[54] Value Drug responds to Takeda, Watson, and Amneal's motions together, arguing: (1) it adequately pleads direct evidence of the conspiracy; (2) alternatively, it adequately pleads circumstantial evidence of the conspiracy; (3) it has adequately plead a single conspiracy; and (4) the *Patent Act* does not immunize Takeda's conduct in settling the patent litigation.[55]

Par moves to dismiss because Value Drug fails to plead an antitrust injury.[56] Par argues it had two independent regulatory bars to launch its generic: (1) lack of final FDA approval; and (2) Takeda's patents, which break the chain of causation.[57] Value Drug counters antitrust injury is not typically decided on a motion to dismiss, it adequately plead Par would have received earlier FDA approval to launch but for the conspiracy, Par's argument regarding Takeda's patents providing an independent barrier to launching is flawed, and even if it is not, Value Drug adequately pleads Takeda's patents are invalid or not infringed by the generic defendants.[58]

Israeli purchaser Teva Ltd. moves to dismiss **[*19]** for lack of personal jurisdiction.[59] Teva Ltd. argues Value Drug fails to adequately plead our personal jurisdiction and exercising personal jurisdiction over it is unconstitutional.[60] Teva USA moves to dismiss for failure to plead Teva Ltd. and Teva USA's involvement in the conspiracy or any facts regarding their liability as Watson's successor-in-interest or on a ratification theory.[61]

Because we find Value Drug's plead conspiracy is implausible on its face, we need not reach the substance of Par's and Teva USA's motions to dismiss which joined in the other defendants' arguments. We grant Takeda's, and Watson and Amneal's motions to dismiss because Value Drug fails to plead a plausible conspiracy.[62] We defer

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[54] ECF Doc. No. 107.

[55] ECF Doc. No. 124.

[56] ECF Doc. No. 104.

[57] *Id.*

[58] ECF Doc. No. 120.

[59] ECF Doc. No. 106.

[60] *Id.*

[61] *Id.*

[62] *Federal Rule of Civil Procedure 12(b)(6)* requires the plaintiff state a claim upon which relief can be granted. The purpose of the Rule is to test the sufficiency of the fact allegations. *Sanders v. United States, 790 F. App'x 424, 426 (3d Cir. 2019)*. If a plaintiff is unable to plead "enough facts to state a claim to relief that is plausible on its face," the court should dismiss the complaint. *Id.* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*); *see also* *Kajla v. U.S. Bank Nat'l Ass'n as Tr. for Credit Suisse First Boston MBS ARMT 2005-8, 806 F. App'x 101, 104 n.5 (3d Cir. 2020)* (quoting *Warren Gen. Hosp. v. Amgen Inc., 643 F.3d 77, 84 (3d Cir. 2011)*). "A claim has facial plausibility when the plaintiff pleads factual content ... allow[ing] the court to draw the reasonable inference ... the defendant is liable for the misconduct alleged." *Robert W. Mauthe M.D., P.C. v. Spreemo, Inc., 806 F. App'x 151, 152 (3d Cir. 2020)* (quoting *Zuber v. Boscov's, 871 F.3d 255, 258 (3d Cir. 2017)*). While "[t]he plausibility standard is not akin to a 'probability requirement,'" it does require the pleading show "more than a sheer possibility ... a defendant has acted unlawfully." *Riboldi v. Warren Cnty. Dep't of Human Servs. Div. of Temp. Assistance & Soc. Servs., 781 F. App'x 44, 46 (3d Cir. 2019)* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*). "A pleading that merely 'tenders naked assertion[s] devoid of further factual enhancement' is insufficient." *Id.* (quoting *Iqbal, 556 U.S. at 668*).

In determining whether to grant a 12(b)(6) motion, "we accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the plaintiff" but "disregard threadbare recitals of the elements of a cause of action, legal conclusions, and conclusory statements." *Robert W. Mauthe, M.D., P.C., 806 F. App'x at 152* (quoting *City of Cambridge Ret. Sys. v. Altisource*

Teva Ltd.'s motion to dismiss for lack of personal jurisdiction subject to further review following expedited jurisdictional discovery if Value Drug chooses not to amend its Complaint and intends to proceed against Teva Ltd. alone.

A. Value Drug does not plead a plausible single horizontal conspiracy.

Value Drug brings two claims against Takeda and the three generics—conspiracy to restrain trade in violation of *15 U.S.C. § 1* and conspiracy to monopolize in violation of *15 U.S.C. § 2*—and one **[*20]** claim for monopolization against Takeda only in violation of *15 U.S.C. § 2*.

Section 1 of the Sherman Act provides "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[63] *Section 1* antitrust plaintiffs must establish three things: (1) "a contract, combination . . . or conspiracy"; (2) an unreasonable restraint on trade; and (3) antitrust injury.[64] "[T]he existence of an agreement is the hallmark of a *Section 1* claim."[65] "Instead of assigning [contract, combination . . . or conspiracy] a distinct meaning, courts have interpreted them collectively to require 'some form of concerted action' . . . in other words, a 'unity of purpose or a common design and understanding or a meeting or minds' or 'a conscious commitment to a common scheme.'"[66]

Section 2, conversely, has "sweeping language" making it unlawful to "monopolize, attempt to monopolize, or conspire to monopolize, interstate or international commerce."[67] "A *Section 2* conspiracy claim has four elements: (1) an agreement to monopolize; (2) an overt act in furtherance of the conspiracy; (3) a specific intent to monopolize; and (4) a causal connection between the **[*21]** conspiracy and the injury alleged."[68] But a litigant may bring a *Section 2* claim for monopolization as well, requiring "'(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'"[69] The second element of a

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Asset Mgmt. Corp., 908 F.3d 872, 878-79, 69 V.I. 1034 (3d Cir. 2018)). Our Court of Appeals requires us to apply a three-step analysis to a 12(b)(6) motion: (1) we "'tak[e] note of the elements a plaintiff must plead to state a claim'"; (2) we "identify allegations that ... 'are not entitled to the assumption of truth' because those allegations 'are no more than conclusion[s]'"; and, (3) "'[w]hen there are well-pleaded factual allegations,' we 'assume their veracity' ... in addition to assuming the veracity of 'all reasonable inferences that can be drawn from' those allegations ... and, construing the allegations and reasonable inferences 'in the light most favorable to the [plaintiff]'..., we determine whether they 'plausibly give rise to an entitlement to relief.'" *Oakwood Lab'ys LLC v. Thanoo, 999 F.3d 892, 904 (3d Cir. 2021)* (internal citations omitted); *Connelly v. Lane Constr. Corp., 809 F.3d 780, 787 (3d Cir. 2016)*.

[63] *15 U.S.C. § 1*.

[64] *In re Insur. Brokerage Antitrust Litig., 618 F.3d 300, 314-15, 315 n.9 (3d Cir. 2010)*; *see also* *Howard Hess Dental Lab'ys Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 253 (3d Cir. 2010)* ("A plaintiff asserting a *Section 1* claim also must allege four elements: '(1) concerted action by the defendants; that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action.'") (further citations omitted)).

[65] *In re Insur., 618 F.3d at 315* (citing *In re Baby Food Antitrust Litig., 166 F.3d 112, 117 (3d Cir. 1999)* (further citation omitted)).

[66] *Id.* (citing *In re Baby Food, 166 F.3d at 117* and *In re Flat Glass Antitrust Litig., 385 F.3d 350, 357 (3d Cir. 2004)*) (further citations omitted) (internal quotation omitted).

[67] *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 306 (3d Cir. 2007)* (citing *15 U.S.C. § 2*).

[68] *Howard Hess Dental Lab'ys Inc., 602 F.3d at 253*.

monopolization claim requires "the willful acquisition or maintenance of monopoly power."[70] "As this element makes clear, the acquisition or possession of monopoly power must be accompanied by some anticompetitive conduct on the part of the possessor."[71]

While Value Drug's claim for monopolization does not require the existence of a conspiracy on its face, it requires "some anticompetitive conduct" on Takeda's part to acquire or maintain the monopoly power.[72] Value Drug only alleges Takeda's "conduct" is its participation in the conspiracy with Par, Watson, and Amneal. Because we find Value Drug has not plausibly alleged a conspiracy, we also find Value Drug fails to plead a monopolization claim.[73]

In pleading a conspiracy, a plaintiff must plead "enough factual matter (taken as true) to suggest that an agreement **[*22]** was made."[74] A plaintiff may rely on direct or circumstantial evidence or some combination of both to plead an agreement.[75] If relying exclusively on direct evidence of conspiracy, "the complaint must plead 'enough fact to raise a reasonable expectation that discovery will reveal' this direct evidence" of illegality.[76] "And if the plaintiff alternatively expects to rest on the circumstantial evidence of parallel behavior, the complaint's statement of facts must place the alleged behavior in 'a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.'"[77] "[R]egardless of whether the plaintiff expects to prove the existence of a conspiracy directly or circumstantially, it must plead 'enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.'"[78] We look at the conspiracy as a whole when assessing each defendants' involvement, and "[i]n short, the issue is whether the pleading delineates to some sufficiently specific degree that a defendant purposefully joined and participated in the conspiracy."[79]

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[69] Broadcom Corp., 501 F.3d at 307. (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)).

[70] Id. at 308.

[71] *Id.* (citing Verizon Commcn's Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)).

[72] *Id.*

[73] Takeda raises this argument in a footnote in its opening brief. ECF Doc. No. 103-1 at 12, n.4 (citing ECF Doc No. 1 ¶ 104). Value Drug evidently concedes the point, as Value Drug does not address Takeda's argument—rather only arguing it has adequately plead a conspiracy and Takeda's patents do not immunize anticompetitive conduct.

[74] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (discussing pleading standard for conspiracy in Sherman Act Section 1 claim); *see also* In re Insur., 618 F.3d at 320 ("*Twombly's* importance to the case before us, however, goes beyond its formulation of the general pleading standard. Twombly is also an essential guide to the application of that standard in the antitrust context, for in Twombly the Supreme Court also had to determine whether a Sherman Act claim alleging horizontal conspiracy was adequately pled."). We apply the same pleading standards to a Section 1 and Section 2 conspiracy claim. *See* W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 99-100 (3d Cir. 2010).

[75] In re Generic Pharms. Pricing Antitrust Litig., 338 F. Supp. 3d 404, 438 (E.D. Pa. 2018) (quoting W. Penn Allegheny Health Sys., Inc., 627 F.3d at 99).

[76] In re Insur., 618 F.3d at 324 (quoting Twombly, 550 U.S. at 556); *see also* In re Processed Egg Prods. Antitrust Litig., 821 F. Supp. 2d 709, 717 (E.D. Pa. 2011) (quoting In re Insur., 618 F.3d at 324) (further citations omitted)).

[77] In re Insur., 618 F.3d at 324 (quoting Twombly, 550 U.S. at 557).

[78] *Id.* (quoting Twombly, 550 U.S. at 556).

[79] In re Processed Egg Prods., 821 F.Supp.2d at 718-20 (E.D. Pa. 2011); *see also* In re Generic Pharms.., 338 F. Supp. 3d at 438.

1. Value Drug's single horizontal [*23] conspiracy as plead.

Value Drug alleges Takeda, Par, Watson, and Amneal conspired to restrain trade and monopolize the market on the eve of Par's trial with Takeda in November 2015.[80] They allegedly agreed: Par would refrain from launching its generic of Colcrys and instead distribute Takeda's authorized generic two-and-a-half years after reaching its settlement agreement with Takeda and remit substantial royalty payments back to Takeda; "Watson and Amneal would restrict their output generic of Colcrys for several years, and then would each enjoy a defined period of time to sell their respective generic Colcrys products free from competition from all other would-be generic Colcrys makers;" and Takeda "would enter licenses with [the] other [non-conspiring] generic companies that would delay their entry beyond Watson and Amneal's agreed periods of competition-free sales, thereby giving the co-conspirators long periods of supracompetitive Colcrys profits."[81]

Value Drug swears the conspiracy has "two basic features."[82] First, Takeda and Par settled their patent litigation and "entered into a sham joint venture . . . that concealed the first part of their output restriction conspiracy."[83] Par **[*24]** and Takeda agreed Par would not launch its generic of Colcrys, and in July 2018—two-and-a-half years after they executed the settlement agreement—Par would become the distributor of Takeda's authorized generic of Colcrys.[84] Under this arrangement, Par would "remit back to Takeda virtually all of the revenues from sales of authorized generic Colcrys, keeping some of the revenues for itself."[85] The second feature involved Watson and Amneal.[86] They too settled their respective litigation with Takeda and entered into separate settlement agreements.[87] Takeda "struck agreements with Watson and Amneal, respectively, offering each a defined time, believed to be between [six] and [eighteen] months in duration, to sell generic Colcrys free from competition from all other generic Colcrys sellers, if Watson and Amneal would stay off the market for several years until their defined periods of marketing commenced."[88] The conspiracy, though, had an escape clause.[89] Under Value Drug's theory, "Par, Watson, and Amneal would refrain from launching their own generic versions of Colcrys only for so long as non-conspirators did so. That is, the co-conspirators agreed that if a non-conspiring seller of generic Colcrys **[*25]** entered the market, Par, Watson, and Amneal could do so . . . Par's selling Takeda's authorized generic Colcrys avoided this escape clause."[90] Value Drug continues: "This escape clause, and its necessary implication that the co-conspirators were willing to restrict their own output only so long as non-conspirators were doing so, too, illustrates the interdependence of the promises of the co-conspirators, the existence of the conspiracy, the fact that

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[80] ECF Doc. No. 1 ¶ 54.

[81] *Id.* ¶¶ 3(a)-(e).

[82] *Id.* ¶ 54.

[83] *Id.* ¶ 55.

[84] *Id.*

[85] *Id.*

[86] *Id.* ¶ 56.

[87] *Id.*

[88] *Id.*

[89] *Id.* ¶ 57.

[90] *Id.*

the output restriction was against the unilateral economic interests of the conspirators and was only in their joint conspiratorial interests, and demonstrates the singular nature of the conspiracy."[91]

Value Drug alleges this arrangement benefitted all the co-conspirators.[92] According to Par "[t]he distribution agreement between Takeda and Par . . . provides powerful incentives to ensure that the parties preserve the two-entrant market."[93] And Par itself purportedly explained the logic behind the conspiracy: "[A market with] a single branded drug (Takeda's Colcrys) and a single generic version (Par's authorized generic) only functions if the market for Colcrys-equivalent colchicine is limited to those two products. **[*26]** [] Although a drug market can maintain price stability with a single generic version of a drug on the market, multiple entrants often product a market-wide price collapse with mass renegotiation and cancellation of supply agreements. [] The distribution agreement between Takeda and Par recognizes this dynamic and provides powerful incentives to ensure that the parties preserve the two-entrant market."[94] Par also "asserted that even the entry of a single additional competitor would cause its distribution joint venture with Takeda 'to lose approximately 97 million in annual revenue;'" and "with 'two or three other generic ANDA filers enter[ing] the market,' the joint venture would lose even more, because '[a]s additional generic versions of Colcrys enter the market, Par would be forced to swiftly reduce prices to maintain even a portion of its market share.'"[95] Value Drug pleads each defendant had no unilateral interest in this arrangement, and "[t]he conduct among [Takeda, Par, Amneal, and Watson] only makes economic sense if there was an agreement among the four of them to restrain their respective generic and authorized-generic output and prevent the price collapse that Par so vividly **[*27]** described."[96] In other words, under Value Drug's theory, the conspirators agreed Par, Watson, and Amneal would stay off the market to each enjoy defined periods of competition-free sales to avoid "the price collapse" Par so vividly described when more than a brand drug and one generic drug is on the market.[97]

Value Drug alleges this conspiracy "restricted output of generic Colcrys, kept Colcrys prices at supracompetitive levels, and delayed their fall to competitive levels."[98] Value Drug alleges the conspiracy "was very profitable to both Takeda and Par" even though "Watson and Amneal did not get to enjoy the fruits of the conspiracy."[99] Value Drug alleges Takeda "earned approximately $1 billion more than it would have had it faced generic competition," "Par expected to earn approximately $50-80 million more than it would absent the conspiracy," and "Watson and Amneal each could have expected to earn approximately $12-36 million more during their respective periods as the only generic seller on the market than they would have earned absent the conspiracy."[100]

2. Value Drug pleads no direct evidence of the conspiracy.

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[91] *Id.*

[92] *Id.* ¶ 58.

[93] *Id.* (ellipses in original).

[94] *Id.* (alterations in original).

[95] *Id.* ¶ 59.

[96] *Id.* ¶¶ 58-60. Value Drug posits Takeda had no unilateral interest to stop selling its generic drug through Prasco, Par had no unilateral interest to restrict its output of generic Colcrys for several years and agree to defined period of sales free from other generic competition, and Watson and Amneal had no unilateral economic interests to agree to restrict their output for several years after Par's 180-day exclusivity elapsed. *Id.*

[97] *Id.*

[98] *Id.* ¶ 67.

[99] *Id.* ¶ 68.

[100] *Id.* ¶¶ 69-71.

"Allegations of direct evidence of an agreement, **[*28]** if sufficiently detailed, are independently adequate" to plead a conspiracy.[101] Direct evidence is "evidence that is explicit and requires no inferences to establish the proposition or conclusion being arrested" such as "a document or conversation explicitly manifesting the existence of the agreement in question."[102] Value Drug argues it offers two forms of direct evidence—the settlement agreements themselves and defendants' judicial admissions in a different litigation.[103]

Value Drug cites a string of cases purportedly supporting its argument the individual, bilateral settlement agreements are direct evidence of the single, horizontal conspiracy among Takeda, Par, Watson, and Amneal.[104] Value Drug fails to appreciate why these cases are distinguishable from what it pleads here. For example, Value Drug cites to one of Judge Goldberg's opinions in the *King Drug Co. of Florence v. Cephalon, Inc.* litigation.[105] Judge Goldberg considered motions for summary judgment on whether individual settlement agreements between the brand and generic defendants *themselves* violated antitrust principles because they *individually* contained large and unjustified reverse settlements following our Supreme Court's holding in *Actavis*.[106] Value Drug seizes on **[*29]** Judge Goldberg's footnote "[p]laintiffs have presented direct evidence of concerted action through the settlement agreements between Cephalon and each of the Generic Defendants, and Defendants have not challenged Plaintiffs' ability to meet the concerted action requirement on these claims."[107] But Value Drug fails to acknowledge the concerted action Judge Goldberg is discussing is *not* concerted action among the brand and *all* of the generics, it is concerted action between the brand and *each* of the generics with respect to the individual settlement agreements raising antitrust concerns. Judge Goldberg addressed several agreements; Value Drug alleges one.

Judge Thrash in *In re Androgel Antitrust Litigation (No. II)* considered whether individual settlement agreements between the brand and each generic raised antitrust concerns as a reverse payment settlement on a motion for summary judgment.[108] One of the generics moved for summary judgment arguing the plaintiffs failed to

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[101] *In re Insur., 618 F.3d at 323-24*.

[102] *Id. at 323-24 n.23*; *see also* *King Drug Co. of Florence, Inc. v. Cephalon, Inc., Nos. 06-1797, 06-1833, 06-2768, 2014 U.S. Dist. LEXIS 84818, 2014 WL 2813312, at *6 (E.D. Pa. June 23, 2014)* (deciding a motion for summary judgment and finding "[w]hether this evidence is properly considered 'direct' depends on whether the fact-finder would have to take an additional logical step in order to conclude that a conspiracy occurred. In other words, an additional step is indicative of circumstantial evidence. Direct evidence requires no extrapolation, as with 'a document or conversation explicitly manifesting the existence of the agreement in question.") (citing *In re Insur., 618 F.3d at 324 n.23*)).

[103] ECF Doc. No. 124 at 11-14. Value Drug argues we can take judicial admission of unplead statements made in a different litigation in front of Judge Andrews. We need not decide whether we can consider these statements to defeat the motion to dismiss because the statements are in support of Value Drug's unplead "Second Wave" theory. We further detail Value Drug's argued "Second Wave" theory in the circumstantial evidence section.

[104] ECF Doc. No. 124 at 11-12.

[105] *88 F. Supp. 3d 402 (E.D. Pa. 2015)*.

[106] *F.T.C. v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*; *see also* *King Drug Co. of Florence, 88 F. Supp. 3d at 407-410* (detailing the terms of each settlement agreement between the brand and individual generic manufacturers), 422 (denying defendants' motions for summary judgment).

[107] *King Drug Co. of Florence, 88 F. Supp. 3d at 410 n.9*. In this footnote, Judge Goldberg rejected defendants' argument "there exists a 'special,' heightened standard of review for motions for summary judgment in the antitrust context," distinguishing the cases the defendants relied on because the cases addressed "the limited inferences that may be drawn from ambiguous, circumstantial evidence in establishing concerted action . . . ." *Id.* Judge Goldberg found the plaintiffs presented direct evidence of concerted action in the form of the written settlement agreements.

[108] *No. 09-2084, 2018 U.S. Dist. LEXIS 99716, 2018 WL 2984873, at *1-4 (N.D. Ga. June 14, 2018)*. Solvay—the brand drug—sued two generic manufacturers for patent infringement after they made Paragraph IV certifications when filing their Abbreviated

demonstrate a conspiracy to restrain trade in violation of Sections 1 and 2 of the Sherman Act.[109] Judge Thrash observed both claims "require the same threshold showing—the existence of an agreement to restrain trade" and "[a] written **[*30]** contract satisfies this requirement 'only if it embodies an agreement to unlawfully restrain trade.'"[110] Judge Thrash concluded the settlement agreements constituted direct evidence of a conspiracy because "the settlement agreements specifically address the conduct the Plaintiffs argue is unlawful."[111] Judge Thrash reasoned: "The parties negotiated and agreed that in exchange for dropping the patent litigation, providing some services, and delaying generic introduction until 2015, the Generics would receive compensation. Whether that common objective—dropping the patent litigation in exchange for compensation—was an illegal restraint of trade is a separate question. But if it was, then the settlements are clear, direct evidence of an agreement to unlawfully restrain trade."[112] In *In re Androgel*, the very conduct purportedly constituting the antitrust violation—"dropping the patent litigation in exchange for compensation" in the form of a reverse payment—appeared in the terms of each individual written settlement agreement between the brand and the generic manufacturer. Thus, as Judge Thrash aptly reasoned, if a jury found this conduct to be in violation of the Sherman Act, the settlement agreements constituted **[*31]** *direct evidence* of the conspiracy between the brand and each individual generic as they memorialized the very agreement which violated the Sherman Act.

This is not what we have here. Value Drug is not challenging the separate bilateral settlement agreements as individually violative of the Sherman Act.[113] Value Drug pleads a single, horizontal antitrust conspiracy among Takeda, Par, Watson, and Amneal. The bilateral settlement agreements are not direct evidence of this alleged conspiracy. We are persuaded by another Judge Goldberg opinion in the King Drug Co. of Florence, Inc. v.

New Drug Applications. 2018 U.S. Dist. LEXIS 99716, [WL] at *2-3. The separate litigations ran on parallel schedules, and on the same day, Solvay settled the individual cases with the generics. 2018 U.S. Dist. LEXIS 99716, [WL] at *3. Each settlement agreement also contained "business promotion agreements" wherein the brand drug and generic agreed to share profits of the brand drug and the generic agreed to do something—here either promote the brand drug to physicians or serve as a backup supplier of the brand drug. 2018 U.S. Dist. LEXIS 99716, [WL] at *4. Judge Thrash found "[t]ogether, these types of settlements are called 'reverse payment' settlements, and they have recently become popular in pharmaceutical litigation." 2018 U.S. Dist. LEXIS 99716, [WL] at *4. The plaintiffs alleged the defendants violated federal ***antitrust law*** by entering into reverse settlement agreements. 2018 U.S. Dist. LEXIS 99716, [WL] at *5. This contrasts with our case, where the alleged antitrust violation is a single, horizontal conspiracy among all defendants to restrict the output of Colcrys.

[109] 2018 U.S. Dist. LEXIS 99716, [WL] at *7.

[110] *Id.* (further citations omitted).

[111] 2018 U.S. Dist. LEXIS 99716, [WL] at *8.

[112] *Id.* We note Value Drug selectively and misleadingly quotes Judge Thrash's reasoning to support its position here.

[113] Value Drug also misplaces reliance on In re Wellbutrin XL Antitrust Litig., 133 F. Supp. 3d 734 (E.D. Pa. 2015) and United Food & Com. Workers Loc. 1776 & Participating Emps. Health & Welfare Fund v. Teikoku Pharma USA, 296 F. Supp. 3d 1142 (N.D. Cal. 2017). In *In re Wellbutrin*, the "Wellbutrin Settlement was executed on February 9, 2007" resolving various pending lawsuits between the brand drug and various generic manufacturers and "was comprised of multiple agreements." In re Wellbutrin XL, 133 F. Supp. 3d at 745. Not only did the parties sign one settlement agreement (made up of various agreements, including "the Omnibus Agreement"), one generic took the lead initially in negotiating on behalf of *all* generic manufacturers. *Id.* This is not what Value Drug alleges today. Value Drug alleges *separate* settlement agreements between Takeda and Par, Takeda and Watson, and Takeda and Amneal. Value Drug does not allege together these constituted a global settlement agreement, like in *In re Wellbutrin*, nor does it allege either Par, Watson, or Amneal negotiated on behalf of all of them collectively. Similarly, in United Food & Com. Workers Loc. 1776, the plaintiffs argued "the Settlement Agreement, **signed by all three defendants**, satisfies the 'contract, combination, or conspiracy' elements" of their antitrust claims. 296 F. Supp. 3d at 1165 (emphasis added). Judge Orrick observed "Defendants **do not dispute this**, although they do dispute the significance, lawfulness, and effect of the various provisions in that Agreement" and therefore granted judgment in favor of plaintiff on the conspiracy element of its claims. *Id.* (emphasis added). We do not have all defendants signing one settlement agreement here. We have individual settlement agreements between Takeda and each generic manufacturer. Nor do the defendants here concede the settlement agreements satisfy the conspiracy claim. Neither of these cases provides teeth to Value Drug's misplaced argument.

Cephalon, Inc litigation.[114] Judge Goldberg separately considered whether four individual, bilateral reverse payment settlement agreements executed between the brand drug Cephalon and the generic defendants "were the product of an overall antitrust conspiracy between all of the Defendants" on a motion for summary judgment.[115] As we have here, Judge Goldberg observed "[t]he motions at issue do not concern the legality of the individual, bilateral settlement agreements between Cephalon and each Generic Defendant. What is at issue is Plaintiffs' claim that the separate settlement agreements were in fact the manifestation of a horizonal conspiracy between all Defendants—with Cephalon **[*32]** at the center—to restrain trade in the modafinil market."[116] Judge Goldberg found the individual, bilateral settlement agreements are not direct evidence of an overall antitrust conspiracy.[117] There, the plaintiffs argued the settlement agreements themselves, which contained substantially similar language and structure, constituted direct evidence.[118] Judge Goldberg rejected this argument, reasoning, "[t]he settlement agreements themselves are individual agreements, not global agreements amongst all Defendants. Plaintiffs are unable to point to any direct evidence that the Generics agreed amongst themselves, let alone that such overall agreement also included Cephalon. Indeed, each agreement runs only between Cephalon and a single Generic. While Plaintiffs are correct that the settlements contain similar terms, and it could be argued that this similarity is evidence of an overall conspiracy, that is classic circumstantial, not direct evidence."[119]

Value Drug pleads the generics individually settled their patent infringement litigations with Takeda around the same time and with bilateral settlement **[*33]** agreements containing similar structure and terms, purportedly manifesting an overarching single, horizontal conspiracy among Takeda, Par, Watson, and Amneal.[120] Value Drug conceded at oral argument there is no provision in the settlement agreements—beside in Watson's agreement which references Par and Amneal's generic Colcrys product—providing *direct* evidence of an agreement among Takeda, Par, Watson, and Amneal to restrict generic Colcrys output.[121] Value Drug further conceded "conspirators normally don't lay out and specifically say, hey, this is what I'm doing."[122] But this is exactly the type of "smoking gun" evidence Value Drug needs if it intends to rely on the settlement agreements as *direct evidence* of a conspiracy.[123] There is simply no direct evidence of an antitrust conspiracy in the individual settlement agreements themselves. The mere fact Watson's agreement mentions two other products may give rise to an *inference* Watson, Par, and Amneal knew of each other's agreements' terms and somehow fell into an overarching output restriction

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[114] *King Drug Co. of Florence, Inc., 2014 U.S. Dist. LEXIS 84818, 2014 WL 2813312, at *6*. We recognize this case involves a motion for summary judgment and thus a different standard than the one we apply to the motion to dismiss before us. Judge Goldberg's reasoning as to why the bilateral settlement agreements are not direct evidence of a single horizontal conspiracy is nonetheless persuasive.

[115] *2014 U.S. Dist. LEXIS 84818, [WL at *1*.

[116] *2014 U.S. Dist. LEXIS 84818, [WL] at *6*.

[117] *2014 U.S. Dist. LEXIS 84818, [WL] at *1, 6-7*.

[118] *2014 U.S. Dist. LEXIS 84818, [WL] at *6*.

[119] *2014 U.S. Dist. LEXIS 84818, [WL] at *7*.

[120] *See, e.g.*, ECF Doc. No. 1 ¶¶ 53-57.

[121] ECF Doc. No. 148, Tr. 26:12-27:15.

[122] *Id.*, Tr. 27:10-12.

[123] *Cephalon, 2014 U.S. Dist. LEXIS 84818, 2014 WL 2813312, at *5* (discussing proof of conspiracy by direct evidence and stating "[b]ecause direct evidence of an unlawful conspiracy—a 'smoking gun'—is often unavailable, proof by inferences drawn from circumstantial evidence is the norm.") (citing *InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 159 (3d Cir. 2003)*) (further citation omitted).

conspiracy. But this is a conclusion requiring us to *infer* something and thus is *not* direct evidence; it is "classic circumstantial" evidence just like **[*34]** Judge Goldberg reviewed on a summary judgment record.

Value Drug also argues it provides direct evidence of the overarching conspiracy in the form of judicial admissions by Par in front of Judge Andrews.[124] This too fails to carry the day for Value Drug. The statements by Par only address Par and Takeda's distribution agreement and the benefits provided to Par and Takeda by maintaining a two-drug market.[125] The statements do not address Watson and Amneal or their agreement and involvement in this alleged overarching conspiracy among Takeda, Par, Watson, and Amneal. Value Drug's reliance on the statements would require us to draw inferences Takeda, Par, Watson, and Amneal entered an overarching conspiracy among each other from Par's statements about its agreement with Takeda and the benefits it draws from it. This reach is classic circumstantial evidence, not direct.

Value Drug pleads no direct evidence of a conspiracy because neither the settlement agreements nor Par's statements are direct evidence of the single, horizontal conspiracy among Takeda, Par, Watson, and Amneal.

3. Value Drug pleads no circumstantial evidence of the conspiracy.

Plaintiffs may plead an anti-competitive **[*35]** conspiracy violating federal law through circumstantial evidence.[126] But mere allegations of parallel conduct are not enough, nor are allegations of "conscious parallelism."[127] "In order 'to avoid deterring innocent conduct that reflects enhanced, rather than restrained, competition,' . . . and in order to enforce the *Sherman Act*'s requirement of an agreement, the Supreme Court has required that 'a *§ 1* plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently."[128] "Some courts have denominated these facts, the presence of which may indicate the existence of an actionable agreement, as 'plus factors'" and although not exhaustive, our Court of Appeals recognizes three such plus factors: (1) motive to enter the conspiracy; (2) evidence defendants acted contrary to their interests; and (3) evidence implying a traditional conspiracy.[129] "[P]lus factors are simply circumstances in which the inference of independent action is less likely than that of concerted action."[130]

Value Drug argues it adequately pleads circumstantial evidence of a conspiracy because it pleads conscious parallel conduct, motive to agree, and the conspiring **[*36]** defendants acted contrary to their economic interests.[131] Takeda, Watson, Amneal, and Par counter the conspiracy is implausible, and Value Drug fails to

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[124] ECF Doc. No. 1 ¶¶ 58-59; *see also* ECF Doc. No. 124 at 13 (characterizing its pleading as judicial admissions to Judge Andrews which "conceded the purpose and effect of the conspiracy and the 'joint venture.'").

[125] ECF Doc. No. 1 ¶¶ 58-59.

[126] *See, e.g. In re Ins., 618 F.3d at 321*.

[127] *Id.* ("Parallel conduct is, of course, consistent with the existence of an agreement; in many cases where an agreement exists, parallel conduct—such as setting prices at the same level—is precisely the concerted action that is the conspiracy's object. But as the Supreme Court has long recognized, parallel conduct is 'just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.'" (quoting *Twombly, 550 U.S. at 554*)).

[128] *Id.* (further citations omitted).

[129] *Id.* (quoting *Flat Glass, 385 F.3d at 360*). Evidence implying a traditional conspiracy "consists of 'non-economic evidence that there was an actual manifest agreement not to compete,' which may include 'proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.'" *Id.* (quoting *Flat Glass, 385 F.3d at 361*) (further citation omitted).

[130] *In re Generic Pharms., 338 F. Supp. 3d at 448* (further citation omitted) (alteration in original).

[131] Value Drug does not argue it pleads evidence implying a traditional conspiracy.

adequately plead circumstantial evidence of a conspiracy nonetheless. We need not decide whether Value Drug plausibly pleads consciously parallel conduct because its conspiracy *as plead* is admittedly implausible belying any inference of concerted action. But we grant Value Drug leave to amend should it be able to plead its later-argued theory consistent with *Rule 11*.

We again start with Value Drug's plead conspiracy. Value Drug's plead purpose of the conspiracy is for "the four [conspirators] to restrain their respective generic and authorized-generic output **and prevent the price collapse that Par so vividly described**"—*i.e.*, the price collapse which occurs when there are more than two entrants (one brand and one generic of a drug) in the market—in order to enjoy and maintain supracompetitive profits.[132] To achieve this purpose, Takeda, Par, Watson, and Amneal agreed to consistently maintain a two-entrant system until January 2024, with Par first enjoying exclusivity well past its 180-day exclusivity provided as the first Abbreviated New Drug Application **[*37]** filer, and then Watson and Amneal each enjoying successive periods of exclusivity—something neither would otherwise enjoy since neither filed their Application first.[133] Understanding other non-conspirator generics could also come to market, the four competitors purportedly agreed Takeda would provide them licenses to enter the market after Watson and Amneal had their exclusivity period.[134] The competitors also purportedly agreed, though, if a non-conspiring generic came to market, all of them could enter too; in other words, they would only restrict their output if the non-conspirator generics did so too.[135] In so doing, they restricted competition and stood to gain supracompetitive profits.[136]

But what Value Drug pleads is belied by the settlement agreements Value Drug attempts to rely on as circumstantial evidence of the conspiracy. It is not disputed Watson and Amneal did not have a defined period of exclusive sales. The purported conspiracy (as best we can tell based on the allegations with all inferences in Value Drug's favor) really worked this way:

• Par agreed to be Takeda's distributor of its authorized generic from July 1, 2018 through the earlier of June 30, 2022 (or the **[*38]** date Par launches its own generic of Colcrys or any other single-ingredient oral colchicine product other than Takeda's or its generic of Colcrys);[137]

• Par also agreed with Takeda it could launch its own generic of Colcrys on the earlier of January 1, 2024; the date a court finds the patents covering Colcrys invalid or not infringed based on a drug "substantively identical" to Par's generic of Colcrys; the date a "Third Party" begins selling its generic of Colcrys with Takeda's permission; or a date following another generic drug manufacturer launching "at risk" without permission from Takeda.[138] Third Party *does not* except Watson and Amneal; rather, it means "any person other than a Party or an Affiliate to a Party."[139]

• Watson agreed with Takeda it could launch its own generic of Colcrys on the earlier of: October 15, 2020; 135 days before another generic (besides Par or Amneal) begins selling its generic of Colcrys with Takeda's permission; the date Par or Amneal begins selling their generics of Colcrys with Takeda's permission; the date a court finds the patents covering Colcrys invalid or not infringed based on a drug "substantively identical" to Watson's generic of Colcrys; the date another **[*39]** generic starts selling after a Court determines the Colcrys

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[132] ECF Doc. No. 1 ¶¶ 58-60.

[133] *Id.* ¶¶ 3(a)-(e), 54-57.

[134] *Id.* ¶ 3(e).

[135] *Id.* ¶ 57.

[136] *Id.* ¶ 54.

[137] ECF Doc No. 123, Ex. 1, at 16 § 1.1.

[138] ECF Doc No. 123, Ex. 1, at 17 § 1.3.

[139] ECF Doc. No. 123, Ex. 1, at 29, Ex. A to License Agreement (Definitions).

patents are invalid or not infringed based on a drug "*not* substantively identical" to Watson's generic of Colcrys; or a date following another generic drug manufacturer launching "at risk" without permission from Takeda.[140]

- And Amneal agreed with Takeda it could launch its own generic of Colcrys on the earlier of: October 15, 2020; the date a court finds the patents covering Colcrys invalid or not infringed based on a drug "substantively identical" to Amneal's generic of Colcrys; the date a third party begins selling its generic of Colcrys with Takeda's permission; or a date following another generic drug manufacturer launching "at risk" without permission from Takeda.[141]

Thus, drawing all inferences in favor of Value Drug but reviewing the agreements Value Drug itself relies on to state its claim, we know:

- Par and Takeda would be the only two sellers on the market, with Takeda distributing its branded Colcrys and Par distributing Takeda's authorized generic, from July 1, 2018 to October 15, 2020 when Watson and Amneal entered the market with their generic products; upon their joint entry, Watson and Amneal would cause the "price **[*40]** collapse" with four market entrants—which, according to Value Drug's own pleading, would cause the generics to "swiftly reduce prices to maintain even a portion" of the market share.
- If Watson's entry date of 135 days before another generic (besides Par or Amneal) got triggered, Watson still would not have a period of exclusivity. Rather, both Par and Amneal could come in with their generics.[142] Thus, the market would have: Takeda's brand Colcrys; Takeda's authorized generic of Colcrys; Par's generic Colcrys; Watson's generic Colcrys; and Amneal's generic Colcrys.[143]
- And, as Value Drug pleads, if a non-conspirator came into the market, Par, Watson, and Amneal could also come in then.[144]

We next turn to the purported "Second Wave" theory of conspiracy Value Drug did not plead but raised at oral argument and in its briefing. Value Drug argues the actual unplead purpose of the conspiracy is to "order their market entry" to compete against three generics rather than the potential nine, and thus avoid "the looming Second Wave" of generics which would cause an even larger price collapse than what occurs when there are three generics in the market.[145] In other words, Takeda, Par, **[*41]** Watson, and Amneal did not conspire to totally restrict their output in exchange for defined periods of exclusivity in a two-entrant market and supracompetitive profits to be shared among themselves (as plead); they instead conspired to restrict their output to compete only against *each other* for defined periods of time, rather than all nine generics which could have been on the market.

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[140] ECF Doc. No. 123-1, Ex. 2, at 16-17 § 1.2.

[141] ECF Doc. No. 123-2, Ex. 3, at 18-19 §§ 1.2.

[142] ECF Doc No. 123, Ex. 1, at 17 § 1.3(c); ECF Doc. No. 123-1, Ex. 2, at 16-17 § 1.2(b); ECF Doc. No. 123-2, Ex. 3, at 18-19 § 1.2(c); *see also* ECF Doc. No. 124 at 9 n.7, 10 n.9 (Value Drug admitting Par and Amneal came in when Watson came in).

[143] We note under Par's license with Takeda, if Par launched its own generic, Par could no longer be the distributor of Takeda's authorized generic. ECF Doc No. 123, Ex. 1, at 16 § 1.1. Even assuming in favor of Value Drug Par decided not to launch and rather continued being Takeda's distributor, Watson still has no exclusivity because the market has branded Colcrys, Takeda's authorized generic, Watson's generic, and Amneal's generic. Conversely, assuming Par did launch *and* Takeda chose to stop distributing its authorized generic, the market is still similarly saturated with the brand drug and three generics. Regardless of whether Par chose to launch its own generic or not, Watson never obtained an exclusive period of time or a scenario where the price collapse Value Drug pleads does not occur. Amneal similarly had no exclusivity in either scenario.

[144] ECF Doc No. 123, Ex. 1, at 17 § 1.3(c); ECF Doc. No. 123-1, Ex. 2, at 16-17 § 1.2(b); ECF Doc. No. 123-2, Ex. 3, at 18-19 § 1.2(c); *see also* ECF Doc. No. 1 ¶ 57.

[145] *See, e.g.*, ECF Doc. No. 124.

But Value Drug fails to plead facts supporting this theory and effectively concedes its as-plead theory is implausible by not defending it.[146]

Value Drug's conspiracy *as plead* is implausible because in any of these scenarios, the admitted price collapse occurs. Value Drug concedes this result.[147] Rather than doubling down on its theory the four competitors agreed to this scheme to prevent the inevitable price collapse which occurs when "even . . . a single additional" generic enters the market and disrupts the high prices commanded in a two-entrant market, Value Drug argues the purpose of the conspiracy is actually to prevent the *further* price collapse which would occur from the "looming Second Wave" of generic manufacturers also trying to take their generic of Colcrys to market.[148] But Value **[*42]** Drug cannot plead one implausible conspiracy—a conspiracy in which each conspirator joined in order to enjoy defined, competition-free periods of sales in a two-entrant market[149]—and argue because another unplead conspiracy is plausible we should not dismiss its plead implausible allegations.[150]

Value Drug pleads itself out of court by focusing the plead motives of the four competitors to reduce generic output "to prevent the price collapse that Par so vividly described"—*i.e.*, the price collapse which occurs when even one other generic enters the two-entrant market.[151] The settlement agreements themselves preclude Watson and Amneal from selling their generics in a two-entrant market and rather demonstrate the price collapse Par described *will* happen when one of the four competitors brings its generic to market because all three generics, and possibly Takeda's authorized generic, can be sold at once. As plead, we discern no motive for the competitors to enter a *single, horizontal* conspiracy among all of them to cause the very price collapse they allegedly conspired to avoid.[152] This theory makes no economic sense and forecloses an inference of concerted action among the four competitors. **[*43]** [153]

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[146] Value Drug's allegations in paragraph 57 may be subject to different interpretations. But Value Drug drafted the pleading. And in its briefing, Value Drug swears the "escape clause" it references in paragraph 57 is the escape clauses in each individual settlement agreement. *See, e.g.* ECF Doc. No. 124 at 7 n.1 (discussing entry dates in context of "escape clauses" in settlement agreements); 9 n.7 (same); 10 n.9; 13 n.13 (conceding Par, Watson, and Amneal would all enter at once causing competition from three generics (instead of nine in accordance with Value Drug's new "second wave" theory); 19 n.21 (describing clauses providing entry dates in settlement agreements as "escape clauses"). While we should plausibly infer facts based on the plead facts, we cannot simply create new theories of liability based on arguments attempting to reconstruct sworn allegations. Value Drug's conclusions do not suffice. Its belated arguments attempting to stretch those conclusions into facts also do not suffice.

[147] *See, e.g.*, ECF Doc. No. 124 at 17 (arguing the purpose of the conspiracy is to avoid "the looming Second Wave" of generics).

[148] *Id.* ("By conspiring to order their market entry, Takeda avoided competing against Par, Watson, and Amneal for a period of time, then competed against just the three co-conspirators and avoided a price collapse from the looming Second Wave.").

[149] ECF Doc. No. 1 ¶¶ 3(a)-(e), 4, 56-60, 71.

[150] We do not take a position on whether the "Second Wave" conspiracy is plausible. We simply note Value Drug argues against Takeda, Watson, and Amneal's motions to dismiss arguments by setting forth its unplead second wave theory, not its plead theory of preserving a two-entrant market for as long as possible.

[151] ECF Doc. No. 1 ¶¶ 58-60.

[152] *See, e.g., Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1243 (3d Cir. 1993)* (finding defendants need not share the same motive in entering a conspiracy, "[r]ather, all that is required is that *they each have* a motive to conspire." (emphasis added)).

[153] *See, e.g., Brunson Commc'ns, Inc. v. Arbitron, Inc., 239 F. Supp. 2d 550, 563-64 (E.D. Pa. 2002)* (applying reasoning in *Matsushita* to motion to dismiss and quoting "if the defendants 'had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.") Because we find it makes no economic sense to conspire to cause a price collapse upon entry to the market, we cannot find the defendants' conduct is not equally consistent with other plausible explanations— *i.e.*, each generic defendant unilaterally settled its patent litigation with Takeda for reasons other than to restrict generic output.

We dismiss Value Drug's plead claims against Takeda, Par, Watson, Amneal, and Teva USA with leave to amend.

B. We defer ruling on Teva Ltd.'s motion to dismiss for lack of personal jurisdiction and allow limited expedited jurisdictional discovery.

Teva Ltd. moves to dismiss Value Drug's complaint arguing we do not enjoy personal jurisdiction over it as an Israeli company with its principal place of business in Israel.[154] Value Drug responds we enjoy personal jurisdiction over Teva Ltd. under Pennsylvania's long arm statute, the *Clayton Act (15 U.S.C. § 22)*, and *Federal Rule of Civil Procedure 4(k)(2)*.[155] Value Drug also argues exercising jurisdiction—either general or specific—is constitutional.[156] In the alternative, Value Drug asks for jurisdictional discovery. We disagree with Value Drug it has adequately plead or proffered adequate evidence our exercise of jurisdiction over Teva Ltd. is constitutional. But we grant Value Drug limited jurisdictional discovery on one plead theory of personal jurisdiction.

1. Value Drug's pleading of personal jurisdiction over Teva Ltd.

Value Drug knowingly sued a foreign company with a foreign principal place of business and yet failed to plead barely a fact regarding our personal **[*44]** jurisdiction over it.[157]

Value Drug bases our personal jurisdiction over Teva Ltd. on four sparce allegations: (1) "Teva Ltd. is successor-in-interest to Watson"; (2) "On July 26, 2015 Teva Ltd. purchased Watson and, as part of that purchase, assumed all of Watson's liabilities"; and (3) "Moreover, Teva Ltd. ratified Watson's conduct challenged herein"; (4) "Each defendant has transacted business, maintained substantial contacts, and/or committed overt acts in furtherance of the illegal scheme and conspiracy throughout the United States, including in this district. The scheme and conspiracy have been directed at, and have had the intended effect of, causing injury to persons residing in, located in, or doing business throughout the United States, including in this district."[158]

2. Value Drug fails to plead or proffer adequate evidence to establish we enjoy personal jurisdiction over Teva Ltd. but we allow it limited jurisdictional discovery should it decline to timely amend its complaint.

"'[T]he burden of demonstrating the facts that establish personal jurisdiction,' falls on the plaintiff . . . and 'once a defendant has raised a jurisdictional defense,' the plaintiff must 'prov[e] by affidavits **[*45]** or other competent evidence that jurisdiction is proper.'"[159] When, as here, no party requests an evidentiary hearing "'the plaintiff[s]

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[154] ECF Doc. No. 106; ECF Doc. No. 1 ¶ 12 (pleading Teva Ltd.'s incorporation and principal place of business in Israel).

[155] ECF Doc. No. 117.

[156] *Id.*

[157] ECF Doc. No. 1 ¶ 12.

[158] *Id.* ¶¶ 12, 17.

[159] *Metcalfe v. Renaissance Marine, Inc., 566 F.3d 324, 330, 51 V.I. 1219 (3d Cir. 2009)* (quoting *Pinker v. Roche Holdings Ltd., 292 F.3d 361, 368 (3d Cir. 2002)* and *Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1302 (3d Cir.1996)*); *see also* *Middleton v. Trans Union, LLC., No. 20-3756, 2021 U.S. Dist. LEXIS 156481, 2021 WL 3674617, at *2 (E.D. Pa. Aug. 19, 2021)* ("When reviewing a motion to dismiss for lack of personal jurisdiction under *Federal Rule of Civil Procedure 12(b)(2)*, I must accept the plaintiff's allegations as true and resolve disputed facts in favor of the plaintiff . . . However, once a defendant has raised a jurisdictional defense, the plaintiff must 'prove by affidavits or other competent evidence that jurisdiction is proper.' . . . If an evidentiary hearing is not held, a plaintiff 'need only establish a prima facie case of personal jurisdiction.' . . . A plaintiff meets this burden by 'establishing with reasonable particularity sufficient contacts between the defendant and the forum state.'" (internal citations omitted) (further citations omitted)); *Metro Container Group v. AC&T Co., et al., No. 18-3623, 2021 U.S. Dist. LEXIS*

need only establish a prima facie case of personal jurisdiction.'"[160] We are required to "'accept the plaintiff's allegations as true, and . . . to construe disputed facts in favor of the plaintiff.'"[161] "Of course, by accepting a plaintiff's facts as true when a motion to dismiss is originally made, a court is not precluded from revisiting the issue if it appears that the facts alleged to support jurisdiction are in dispute."[162]

"Pennsylvania's long-arm statute gives its courts jurisdiction over out-of-state defendants to the maximum extent allowed by the U.S. Constitution."[163] *Federal Rule of Civil Procedure 4(k)(2)* provides "[f]or a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consisted with the United States Constitution and laws."[164] The *Clayton Act*, which allows nationwide service of process, permits us to consider whether we have personal jurisdiction over Teva Ltd. "on the **[*46]** basis of [its] aggregate contacts with the United States as a whole" under the *Fifth Amendment's Due Process clause*.[165] Regardless of which statute or rule we operate under, exercising personal jurisdiction over Teva Ltd. must still be constitutional. The parties dispute whether exercising jurisdiction is constitutional and what standard to apply. We apply the same analysis applied to a personal jurisdiction analysis under the *Fourteenth Amendment*.[166]

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*234447, 2021 WL 5804374, at *3 (E.D. Pa. Dec. 7, 2021)* ("In ruling on a *Rule 12(b)(2)* motion to dismiss for lack of personal jurisdiction, the Court also takes the allegations of the complaint as true . . . However, once a jurisdictional defense is raised, the plaintiff bears the burden of proving, through affidavits or competent evidence, contacts with the forum state sufficient to establish personal jurisdiction . . . The plaintiff must establish those contacts with reasonable particularity . . . the plaintiff makes out a prima facie case in support of personal jurisdiction, the burden shifts to the defendant to establish that some other considerations exist which would render exercise of personal jurisdiction unreasonable." (internal citations omitted)).

160 *Metcalfe, 566 F.3d at 330* (quoting *O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 316 (3d Cir. 2007)*).

161 *Id.* (quoting *Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 457 (3d Cir. 2003)*).

162 *Id. at 331* (quoting *Carteret Sav. Bank, FA v. Shushan, 954 F.2d 141, 142 n.1 (3d Cir. 1992)*).

163 *Danziger & De Llano, LLP v. Morgan Verkamp LLC, 948 F.3d 124, 129 (3d Cir. 2020)* (citing *42 Pa. Cons. Stat. § 5322(b)* and *Kubik v. Letteri, 532 Pa. 10, 614 A.2d 1110, 1113-14 (Pa. 1992)*).

164 *Fed. R. Civ. P. 4(k)(2)*.

165 *In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 298 (3d Cir. 2004)* ("We hold that personal jurisdiction in federal antitrust litigation is assessed on the basis of a defendant's aggregate contacts with the United States as a whole. Our holding in *Pinker* and on this appeal is consistent with the *Federal Rule of Civil Procedure 4(k)(2)*. Personal jurisdiction therein is not limited to the defendant's contacts with a particular federal judicial district or the forum state**. We hold further that personal jurisdiction under *Section 12 of the Clayton Act* is as broad as the limits of due process under the *Fifth Amendment***.") (citations omitted) (emphasis added); *see also* ECF Doc. No. 140 at 9-10 ("The parties agree that, under Third Circuit precedent, the *Clayton Act*'s provision for nationwide service coupled with *Federal Rule of Civil Procedure 4(k)(2)* means that the *Fifth Amendment* (not the *Fourteenth Amendment*) governs the relevant constitutional inquiry . . . The parties also agree that, under Third Circuit precedent, 'personal jurisdiction in federal antitrust litigation is assessed on the basis of a defendant's aggregate contacts with the United States as a whole.'"); ECF Doc. No. 117 at 14-16 (discussing jurisdiction under *Fed. R. Civ. P. 4(k)(2)* and the *Clayton Act*).

166 *See* *Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 293 (3d Cir. 1985)* (discussing contacts analysis under patent law, noting the *Fifth Amendment* "has been construed to impose a general fairness test incorporating *Internal Shoe's*" requirements, and acknowledging "even if the relevant area in delineating contacts were the United States as a whole, we would nonetheless be required to ask whether the quality and quantity of [the defendant's] contacts were constitutionally adequate to support personal jurisdiction. For although the present *fifth amendment* due process inquiry need not address concerns of interstate federalism, it must still consider the remaining elements of the minimum contacts doctrine as developed by *International Shoe* and its progeny" but declining to adopt nationwide contacts analysis in case because no federal statute allowing nationwide service of process within patent laws); *In re Diisocyanates Antitrust Litig., No. 18-1001, 2020 U.S. Dist. LEXIS 40136, 2020 WL 1140245, at *2 (W.D. Pa. Mar. 9, 2020)* (applying same personal jurisdiction analysis to antitrust case involving nationwide

a. We do not enjoy general personal jurisdiction over Teva Ltd.

Value Drug first argues we enjoy general jurisdiction over Teva Ltd. based on Teva Ltd.'s "continuous and systematic contacts" with the United States or alternatively as Teva USA's alter ego. At the outset, we reject Teva Ltd.'s argument and evidence proffered purportedly supporting its argument we may exercise jurisdiction over Teva Ltd. under an alter ego theory.[167] Value Drug does not plead we have personal jurisdiction over Teva Ltd. under an alter ego theory. It cannot now attempt to rely on an unplead theory through briefing.[168]

We consider whether we otherwise have general jurisdiction over Teva Ltd. Our inquiry is whether the "corporation's 'affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State."[169] The Supreme Court recently reiterated the standard for general jurisdiction:

> A state court may exercise general jurisdiction only when a defendant is "essentially at home" in the State. General jurisdiction, as its name implies, extends to "any and all claims" brought against a defendant. Those claims need not relate to the forum State or the defendant's activity there; they may concern events and conduct anywhere in the world. But that breadth imposes a correlative limit: Only a select "set of affiliations with a forum" will expose a defendant to such sweeping jurisdiction. In what we have called the "paradigm" case, an individual is subject to general jurisdiction in her place of domicile. And the "equivalent" forums **[*48]** for a corporation are its place of incorporation and principal place of business.[170]

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contacts); *In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 558 (M.D. Pa. 2009)* (same); *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., No. 13-2445, 2017 U.S. Dist. LEXIS 171322, 2017 WL 4642285, at *3 (E.D. Pa. Oct. 17, 2017)* (same); *see also* *Livnat v. Palestinian Auth., 851 F.3d 45, 54, 428 U.S. App. D.C. 140 (D.C. Cir. 2017)* ("To be sure, neither the Supreme Court nor this court has expressly analyzed whether the *Fifth* and *Fourteenth Amendment* standards differ. But the Second, Sixth, Seventh, Eleventh, and Federal Circuits have, and all agree that there is no meaningful difference in the level of contacts required for personal jurisdiction. The only difference in the personal-jurisdiction analysis under the two Amendments is the *scope* of relevant contacts: Under the *Fourteenth Amendment*, which defines the reach of state courts, the relevant contacts are state-specific. Under the *Fifth Amendment*, which defines the reach of federal courts, contacts with the United States as a whole are relevant. That difference is not at play in this case." (citations omitted)).

[167] ECF Doc. No. 117 at 20, 23-24.

[168] Value Drug argues we "should not [] ignore[]" its evidence regarding alter ego jurisdiction. ECF Doc. No. 151 at 9 n.5. While Value Drug is correct our inquiry on a *12(b)(2)* motion is not limited to pleadings—in fact a Plaintiff may not rest on its pleading when jurisdiction is challenged—Value Drug is incorrect it can rest on an unplead theory for personal jurisdiction merely by providing evidence of its unplead theory once jurisdiction is challenged. The very case Value Drug relies on for its argument illustrates this principle. *See* *In re Chocolate Confectionary Antitrust Litig., 641 F. Supp. 2d 367, 381 (M.D. Pa. 2009)* ("Although plaintiffs bear the ultimate burden of proving personal jurisdiction by a preponderance of the evidence, such a showing is unnecessary at the preliminary stages of litigation . . . **Rather, plaintiffs must merely allege [*47] sufficient facts to establish a prima facie case of jurisdiction over the person. Once these allegations are contradicted by an opposing affidavit, however, plaintiffs must present similar evidence in support of personal jurisdiction** . . . '[A]t no point may a plaintiff rely on the bare pleadings alone in order to withstand a defendant's *Rule 12(b)(2)* motion to dismiss for lack of in personam jurisdiction . . . Once the motion is made, plaintiff must respond with actual proofs, not mere allegations.' When the plaintiff responds with affidavits or other evidence in support of its position, the court is bound to accept these representations and defer final determination as to the merits of the allegations until a pretrial hearing or the time of trial." (internal citations omitted) (emphasis added)).

[169] *Daimler AG v. Bauman, 571 U.S. 117, 139, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014)* (quoting *Goodyear Dunlop Tires Operations, S. A. v. Brown, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011)*) (alteration in original).

[170] *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1024, 209 L. Ed. 2d 225 (2021)* (internal citations omitted) (citing *Goodyear, 564 U.S. at 919* and *Daimler, 571 U.S. at 137*).

Value Drug concedes Teva Ltd.'s state of incorporation and principal place of business is Israel.[171] Value Drug's argument apparently seizes on our Supreme Court's language in *Daimler* leaving open the possibility of exercising general jurisdiction over a defendant "in an exceptional case . . . [when] a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State."[172] But "it is incredibly difficult to establish general jurisdiction [over a corporation] in a forum *other* than the place of incorporation or principal place of business."[173] Value Drug argues we have general jurisdiction due to Teva Ltd.'s extensive contacts with the United States.[174] We are unpersuaded by Value Drug's citations to pre-*Daimler* cases and see no "exceptional reason" to exercise general personal jurisdiction over Teva Ltd.

b. We defer ruling on whether we enjoy specific personal jurisdiction over Teva Ltd. following limited jurisdictional discovery.

Value Drug alternatively argues we may exercise specific jurisdiction **[*49]** over Teva Ltd. Specific jurisdiction requires: (1) minimum contacts—"some act by which [the defendant] purposefully avails itself of the privilege of conducting activities within the forum state"; (2) "[t]he plaintiff's claims . . . 'must arise out of or relate to the defendant's contacts' with the forum'"; and (3) exercising jurisdiction does not offend "traditional notions of fair play and substantial justice.'"[175] Value Drug relies on three theories: (1) Teva Ltd.'s contacts with the United States are sufficient to exercise specific jurisdiction; (2) we can impute Watson's contacts to Teva Ltd. because Teva Ltd. is Watson's successor-in-interest; and (3) we can impute Watson's contacts to Teva Ltd. because Teva Ltd. ratified its conduct.[176]

We grant limited jurisdictional discovery on Value Drug's first theory.[177] Value Drug pleads "[e]ach defendant has transacted business, maintained substantial contacts, and/or committed overt acts in furtherance of the illegal scheme and conspiracy throughout the United States."[178] Our Court of Appeals has held this bare conclusory pleading is "clearly frivolous" and not warranting of jurisdictional discovery.[179] But in response to Teva Ltd.'s motion

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[171] ECF Doc. No. 1 ¶ 12.

[172] *Daimler, 571 U.S. at 139 n.19*.

[173] *Chavez v. Dole Food Co., Inc., 836 F.3d 205, 223 (3d Cir. 2016)* (alteration and emphasis in original) (quoting *Monkton Ins. Servs., Ltd. v. Ritter, 768 F.3d 429, 432 (5th Cir. 2014)*).

[174] ECF Doc. No. 117 at 19 ("Teva Ltd. cannot continuously and systematically avail itself of the privileges of U.S. capital investment, U.S. intellectual property protections, U.S. federal courts, and U.S. consumer market access as if at home in the U.S., as it has at all relevant times, without also having to answer for its U.S. wrongdoings.").

[175] *Ford Motor Co., 141 S. Ct. at 1024-25* (further citations omitted).

[176] ECF Doc. No. 117.

[177] *See, e.g., Toys "R" Us, Inc., 318 F.3d at 456* ("Although the plaintiff bears the burden of demonstrating facts that support personal jurisdiction . . . courts are to assist the plaintiff by allowing jurisdictional discovery unless the plaintiff's claim is 'clearly frivolous.' If a plaintiff presents factual allegations that suggest 'with reasonable particularity' the possible existence of the requisite 'contacts between [the party] and the forum state, the plaintiff's right to conduct jurisdictional discovery should be sustained.") (internal citations omitted). Our Court of Appeals found "the record before the District Court contained sufficient non-frivolous allegations (and admissions) to support the request for jurisdictional discovery." *Id.*

[178] ECF Doc. No. 1 ¶ 17.

[179] *Massachusetts Sch. of L. at Andover, Inc. v. Am. Bar Ass'n, 107 F.3d 1026, 1042 (3d Cir. 1997)* ("The district court found (at least by implication), and we agree, that [plaintiff's] jurisdictional claims were clearly frivolous. Our result is in accord with other cases which hold that a mere unsupported allegation that the defendant 'transacts business' in an area is 'clearly frivolous.'"); *see also Falcone v. WiredLogic, Inc., No. 06-800, 2006 U.S. Dist. LEXIS 113496, 2006 WL 8459813, at *6 (E.D. Pa. Oct. 26,*

to dismiss, **[*50]** Value Drug proffered evidence of Teva Ltd.'s contacts with the United States.[180] What Value Drugs did not do is provide evidence or argument the claims before us now arise from or relate to Teva Ltd.'s contacts with the United States.[181] We are satisfied based on the record before us, including Value Drug's Complaint and proffer of evidence in response to Teva Ltd.'s motion to dismiss, Value Drug's jurisdictional discovery will not be a fishing expedition but rather a targeted inquiry into whether the claims here arise from or relate to Teva Ltd.'s contacts with the United States.[182]

We reject Value Drug's theory of personal jurisdiction under the successor-in-interest and ratification theories.[183] Value Drug does not plead or proffer facts supporting its legal conclusion "Teva Ltd. ratified Watson's conduct challenged herein."[184] We have no basis to provide discovery when we have no facts supporting this theory.

We similarly reject Value Drug's successor liability theory of personal jurisdiction as plead. "[U]nder Pennsylvania law, the acts of a predecessor corporation may be attributed to its successor for purposes of determining whether **[*51]** jurisdiction over the successor is proper."[185] "Accordingly, jurisdiction is established if the successor corporation may be held liable under Pennsylvania's law of successor liability."[186] Value Drug relies on the "express assumption of liability" exception to Pennsylvania's general rule of no successor liability.[187] The parties dispute whether Value Drug pleading Watson continues to exist precludes a finding of successor liability under Pennsylvania law.[188] In *In re Suboxone Antitrust Litigation*, Judge Goldberg considered whether a defendant could be liable as a successor-in-interest under Pennsylvania law when the plaintiff argued the defendant expressly assumed liabilities.[189] Judge Goldberg found it could not for three reasons: (1) the agreement did not expressly

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2006) ("[M]ere unsupported allegations that a defendant 'transacts business,' has 'contacts,' or 'expressly targeted Pennsylvania residents' are clearly frivolous and discovery will be denied.").

180 *See, e.g.*, ECF Doc. No. 117.

181 *See, e.g., id.*

182 We again note Value Drug does not plead an alter ego or agency theory. Thus, Value Drug's inquiry must not undertake to establish jurisdiction through Teva Ltd.'s subsidiaries' contacts with the United States and involvement with Colcrys.

183 Because we apply Pennsylvania law to determine personal jurisdiction over Teva Ltd., and because the parties dispute which law may apply *substantively* to Value Drug's theory of successor liability, our finding as to personal jurisdiction has no bearing on whether Teva Ltd. may be liable as a successor under a potentially applicable law besides Pennsylvania.

184 ECF Doc. No. 1 ¶ 12 (merely pleading a legal conclusion and no further facts in the Complaint about ratification); ECF Doc. No. 117 at 8, 26 (citing to no evidence in the record supporting its ratification theory).

185 *Falcone, 2006 U.S. Dist. LEXIS 113496, 2006 WL 8459813, at *9* (quoting *Huth v. Hillsboro Ins. Mgmt., 72 F. Supp. 2d 506, 510 (E.D. Pa. 1990)* (citing *Simmers v. Am. Cyanamid Corp., 394 Pa. Super. 464, 576 A.2d 376, 381 (Pa. Super. 1990)*).

186 *Id.* (citing *Umac, Inc. v. Aqua-Gas AVK Ltd., No. 04-4022, 2005 U.S. Dist. LEXIS 6124, 2005 WL 742497, at *3 (E.D. Pa. Mar. 30, 2005)*).

187 ECF Doc. No. 1 ¶ 12; *see also* *Falcone, 2006 U.S. Dist. LEXIS 113496, 2006 WL 8459813, at *9* ("Under Pennsylvania law, 'when one company sells or transfers all of its assets to another company, the purchasing or receiving company is not responsible for the debts and liabilities of the selling company simply because it acquired the seller's property.' However, this general rule of non-liability can be overcome if the plaintiff demonstrates that '(1) the purchaser expressly or implicitly agreed to assume liability, (2) the transaction amounted to a consolidation or merger, (3) the purchasing corporation was merely a continuation of the selling corporation, (4) the transaction was fraudulently entered into to escape liability, or (5) the transfer was without adequate consideration and no provisions were made for creditors of the selling corporation.'" (internal citations omitted)).

188 ECF Doc. No. 1 ¶ 11 ("Defendant Watson Laboratories, Inc. ***is*** a Nevada Corporation having places of business at 311 Bonnie Circle, Corona, CA 92878 and Morris Corporate Center III, 400 Interpace Parkway, Parsippany, NJ 07054." (emphasis added)).

transfer liabilities to a successor corporation; (2) "the continued existence of original entity precludes successor liability;" and (3) the plaintiffs failed to allege the original entity had any liability, regardless.[190] Judge Goldberg found: "[i]t is well established that '[i]f the original entity still exists . . . there is no successor, and therefore no successor liability.'"[191] He continued: "[a]t least one district court has concluded **[*52]** that, under Pennsylvania law, the 'cessation of ordinary business operations' factor may be satisfied when the predecessor does not dissolve or completely cease to exist, but rather is reduced to an assetless shell."[192] "Where, however, the original entity is not an assetless shell and does not completely cease ordinary operations, successor liability is precluded."[193]

The plaintiffs in *In re Suboxone* argued it did not matter the predecessor entity still existed, relying on a Massachusetts case applying Massachusetts law.[194] Judge Goldberg found he need not consider the plaintiffs' argument because the Massachusetts case decided under Massachusetts law which Plaintiffs relied on "is inapposite given [his] finding that there was no assumption of liability."[195] Value Drug attempts to distinguish the case on this basis arguing Judge Goldberg did not decide whether the predecessor entity must cease to exist when there is an express assumption of liability.

But we are not persuaded. Judge Goldberg found three independent reasons to deny successor liability—one of which included the predecessor entity still existed. We are persuaded by the analysis presented **[*53]** by Judge Goldberg and other judges to have considered this issue.[196] Value Drug pleads Watson still exists, precluding a

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[189] *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., No. 13-2445, 2017 U.S. Dist. LEXIS 176555, 2017 WL 4810801, at *6 (E.D. Pa. Oct. 25, 2017)*.

[190] *Id.*

[191] *2017 U.S. Dist. LEXIS 176555, [WL] at *7* (citing *Norfolk S. Ry. Co. v. Pittsburgh & W. Va. R.R., 153 F. Supp. 3d 778, 807 (W.D. Pa. 2015)*); *see also* *In re Welding Fume Products Liab. Litig., No. 03-17000, 2010 U.S. Dist. LEXIS 57859, 2010 WL 2403355, at *7 (N.D. Ohio June 11, 2010)* ("Of course, if the original entity still exists, there is no successor—and no successor liability."))

[192] *In re Suboxone, 2017 U.S. Dist. LEXIS 176555, 2017 WL 4810801, at *6* (citing *Lehman Bros. Holdings v. Gateway Funding Diversified Mtg. Servs., L.P., 989 F. Supp. 2d 411, 436 (E.D. Pa. 2013)*).

[193] *Id.* (citing *Norfolk, 153 F. Supp. 3d at 808*).

[194] Interestingly, Value Drug also cites the case the plaintiffs in *In re Suboxone* relied on—*Town of Lexington v. Pharmacia Corp., No. 12-11645, 2015 U.S. Dist. LEXIS 36815, 2015 WL 1321457 (D. Mass. Mar. 24, 2015)*in its sur-reply. ECF Doc. No. 136 at 11. Value Drug cites it for the proposition it is "the general rule . . . that 'a successor who assumes liabilities of its predecessor may not escape liability simply because the predecessor lives on.'" *Id.*

[195] *In re Suboxone, 2017 U.S. Dist. LEXIS 176555, 2017 WL 4810801, at *8 n.10*.

[196] *See, e.g.,* *2017 U.S. Dist. LEXIS 176555, [WL] at *7-8*; *Fend v. Allen-Bradley Co., No. 17-01701, 2019 U.S. Dist. LEXIS 205730, 2019 WL 6242119, at *1 (E.D. Pa. Nov. 20, 2019)* (rejecting successor theory because predecessor entity still existed); *Norfolk S. Ry. Co. v. Pittsburgh & W. Virginia R.R., 153 F. Supp. 3d 778, 807 (W.D. Pa. 2015)*, *aff'd*, *870 F.3d 244 (3d Cir. 2017)* (post-trial memorandum addressing successor liability under Pennsylvania law and finding "[i]f the original entity still exists, however, there is no successor, and therefore, no successor liability"); *Norfolk S. Ry. Co. v. Pittsburgh & W. Virginia R.R. & Power Reit, No. 11-1588, 2014 U.S. Dist. LEXIS 83209, 2014 WL 2808907, at *16 (W.D. Pa. June 19, 2014)* (denying summary judgment on successor theory when plaintiffs argued under the fraudulent purpose and de facto merger/mere continuation exceptions to general rule (later addressing the same in *Norfolk S. Ry. Co., 153 F. Supp. 3d at 807*) and noting it did not find any binding precedent on this issue but "[s]everal outside jurisdictions have recognized that the continued existence of a predecessor forecloses the availability of successor liability"); *Hyjurick v. Commonwealth Land Title Ins. Co., No. 11-1282, 2012 U.S. Dist. LEXIS 59087, 2012 WL 1463633, at *4 (M.D. Pa. Apr. 27, 2012)* ("The facts alleged in the complaint, however, do not implicate successor liability. Commonwealth is alleged to be a separate corporate entity. Fidelity cannot be Commonwealth's successor if Commonwealth exists as a separate corporation, albeit one that is a wholly owned subsidiary."); *see also* *Phila.*

finding of successor liability under Pennsylvania law, and thus precluding us from imputing Watson's contacts for purposes of jurisdiction as plead.[197]

We reject Value Drug's argument we enjoy general jurisdiction over Teva Ltd. or we can impute Watson's contacts to Teva Ltd. under a successor-in-interest or ratification theory as plead. But we grant limited jurisdictional discovery on whether Value Drug's claims arise from or relate to Teva Ltd.'s contacts with the United States. Understanding Value Drug may amend its Complaint and plead other theories of our personal jurisdiction for Teva Ltd. to the extent possible under *Rule 11*, we defer jurisdictional discovery until after Value Drug can amend.

3. We deny Watson and Amneal's request for sanctions.

Watson and Amneal move for sanctions against Value Drug in the form of their fees in prosecuting their motion to dismiss under *28 U.S.C. § 1927* if we dismiss Value Drug's complaint with leave to amend.[198] We decline to sanction Value Drug at this stage. Its **[*54]** pleading is inaccurate and possibly inartful; it is not frivolous and there is no basis to find bad faith or intentional misconduct.

Congress in *section 1927* provides "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."[199] Watson and Amneal argue they are entitled to their fees for moving to dismiss a complaint which Value Drug knew contained false allegations after receiving the settlement agreements and then consciously choose not to amend. We disagree.

Our Court of Appeals instructs sanctions under *28 U.S.C. § 1927* are limited to when an attorney has "(1) multiplied proceedings; (2) unreasonably and vexatiously; (3) thereby increasing the cost of the proceedings; (4) with bad faith or with intentional misconduct."[200] The sanctions are "intended to deter an attorney from *intentionally* and unnecessarily delaying judicial proceedings, and they are limited to the costs that result from such delay," but our Court of Appeals cautions "courts **[*55]** should exercise [this sanctioning power] only in instances of a serious and studied disregard for the orderly process of justice."[201] Congress's allowance of fees in *section 1927* is to be

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Elec. Co. v. Hercules, Inc., 762 F.2d 303, 307, 309 (3d Cir. 1985) (finding successor liability under Pennsylvania law when an express assumption occurred but the predecessor entity had been dissolved).

[197] Value Drug relies on *Eagle Nat'l Bank v. ISCP Funding, LLC*, to argue Pennsylvania law does not require the predecessor entity to cease existence when there is an express assumption of liabilities. *No. 00685, 2011 Phila. Ct. Com. Pl. LEXIS 107, 2011 WL 10525397, at *2-3 (Pa. Com. Pl. May 3, 2011)*. The case is inapposite. It does not address successor liability, nor does it involve a claim from a plaintiff trying to establish liability over a defendant under a successor theory. Rather, the case involved the sellers of a company suing the purchaser seeking a preliminary injunction to enjoin the purchaser from using certain disputed funds transferred during the sale. *2011 Phila. Ct. Com. Pl. LEXIS 107, [WL] at *1-2*. In *Eagle National Bank*, the sellers transferred their assets to the purchaser, "including reserve deposits held for the benefit of the branch offices." *2011 Phila. Ct. Com. Pl. LEXIS 107, [WL] at *2*. Certain branches disclaimed affiliation with the purchaser and requested the sellers release any funds in the reserve deposits. *Id.* The sellers forwarded the request to release the funds to the purchaser—who then owned the reserve deposits. *Id.* The purchaser disclaimed it had to pay the branches the deposits. *Id.* The sellers sought a preliminary injunction to stop the purchaser from using the money in dispute, which the sellers transferred to the purchaser during the sale and the sellers argued the purchaser agreed to pay in the purchase agreement when it assumed certain liabilities. *Id.* Judge Bernstein issued the preliminary injunction finding the elements satisfied. *2011 Phila. Ct. Com. Pl. LEXIS 107, [WL] at *5*. The case thus did not involve the issue we have before us nor did it address successor liability.

[198] ECF Doc. No. 131 at 13-14.

[199] *28 U.S.C. § 1927*.

[200] *LaSalle Nat. Bank v. First Connecticut Holding Grp., LLC, 287 F.3d 279, 288 (3d Cir. 2002)* (further citations omitted).

construed narrowly "and with great caution so as not to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law."[202] "Consequently, sanctions may not be imposed under *§ 1927* absent a finding that counsel's conduct resulted from bad faith, rather than misunderstanding, bad judgment, or well-intentioned zeal."[203]

Value Drug's choice to stand on its Complaint and defend against the motions to dismiss is not so clearly frivolous, unreasonable, or vexatious to rise to the level of bad faith warranting sanctions. We decline to sanction Value Drug.

III. Conclusion

Pharmacy chain Value Drug alleges Takeda Pharmaceuticals, manufacturer of a brand name Colcrys—a drug approved by the Food and Drug Administration for the treatment and prevention of gout and familial Mediterranean fever—entered a single conspiracy with generic drug manufacturers Par, Watson, and Amneal to restrict generic Colcrys output in exchange for defined periods of exclusive sales and thus extended periods of supracompetitive profits. **[*56]** But Value Drug fails to plead a plausible single horizontal conspiracy among the four competitors based on settlement agreements. The settlement agreements are to the contrary on their face. We must dismiss its Complaint based on this theory with leave to amend if Value Drug can plead an alternative theory. Value Drug similarly fails to plead multiple theories of personal jurisdiction over an Israeli purchaser of some of Watson's assets but skates by with a bare pleading and a proffer of evidence of one theory entitling it to limited specific jurisdictional discovery before dismissal. We need not reach the substance of Par and Teva USA's alternative arguments for dismissal with an understanding Value Drug is now fully apprised of both entity's arguments should it amend consistent with our Order.

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[201] *Id.* (further citations omitted) (emphasis in original).

[202] *Id. at 289* (further citations omitted) (alteration in original).

[203] *Id.*

Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC

United States Court of Appeals for the Second Circuit

May 24, 2019, Argued; December 30, 2021, Decided

Nos. 17-1569, 17-1915, 17-1989, 17-2056, 17-2343, 17-2347, 17-2351, 17-2352, 17-2360, 17-2376, 17-2381, 17-2383, 17-2413

Reporter

22 F.4th 103 *; 2021 U.S. App. LEXIS 38618 **; 2021 WL 6143556

SCHWAB SHORT-TERM BOND MARKET FUND, SCHWAB TOTAL BOND MARKET FUND, SCHWAB U.S. DOLLAR LIQUID ASSETS FUND, SCHWAB MONEY MARKET FUND, SCHWAB VALUE ADVANTAGE MONEY FUND, SCHWAB RETIREMENT ADVANTAGE MONEY FUND, SCHWAB INVESTOR MONEY FUND, SCHWAB CASH RESERVES, SCHWAB ADVISOR CASH RESERVES, CHARLES SCHWAB BANK, N.A., CHARLES SCHWAB & CO., INC., SCHWAB YIELDPLUS FUND, SCHWAB YIELDPLUS FUND LIQUIDATION TRUST, THE CHARLES SCHWAB CORPORATION, CITY OF NEW BRITAIN, on behalf of itself and all others similarly situated, MAYOR AND CITY COUNCIL OF BALTIMORE, CITY OF HOUSTON, VISTRA ENERGY CORPORATION, YALE UNIVERSITY, JENNIE STUART MEDICAL CENTER, INC., FTC FUTURES FUND PCC LTD, on behalf of themselves and all others similarly situated, NATIONAL CREDIT UNION ADMINISTRATION BOARD, as Liquidating Agent of U.S. Central Federal Credit Union, Western Corporate Federal Credit Union, Members United Corporate Federal Credit Union, Southwest Corporate Federal Credit Union, and Constitution Corporate Federal Credit Union, PENNSYLVANIA INTERGOVERNMENTAL COOPERATION AUTHORITY, CITY OF PHILADELPHIA, DARBY FINANCIAL PRODUCTS, SALIX CAPITAL US INC., CAPITAL VENTURES INTERNATIONAL, PRUDENTIAL INVESTMENT PORTFOLIOS 2, FKA Dryden Core Investment Fund, on behalf of Prudential Core Short-Term Bond Fund, BAY AREA TOLL AUTHORITY, CALIFORNIA PUBLIC PLAINTIFFS, LINDA ZACHER, ELLEN GELBOIM, on behalf of herself and all others similarly situated, GARY FRANCIS, METZLER INVESTMENT GMBH, on behalf of itself and all others similarly situated, 303030 TRADING LLC, ATLANTIC TRADING USA, LLC, FTC FUTURES FUND SICAV, on behalf of themselves and all others similarly situated, NATHANIEL HAYNES, THE COUNTY OF MENDOCINO, COUNTY OF SONOMA, COUNTY OF SAN MATEO, THE SAN MATEO COUNTY JOINT POWERS FINANCING AUTHORITY, CITY OF RICHMOND, RICHMOND JOINT POWERS FINANCING AUTHORITY, SUCCESSOR AGENCY TO THE RICHMOND COMMUNITY REDEVELOPMENT AGENCY, COUNTY OF SAN DIEGO, RIVERSIDE PUBLIC FINANCING AUTHORITY, DAVID E. SUNDSTROM, in his official capacity as Treasurer of the county of Sonoma for and on behalf of the Sonoma County Treasury Pool Investment, CITY OF RIVERSIDE, EAST BAY MUNICIPAL UTILITY DISTRICT, COUNTY OF SACRAMENTO, SAN DIEGO ASSOCIATION OF GOVERNMENTS, REGENTS OF THE UNIVERSITY OF CALIFORNIA, Plaintiffs-Appellants, CARPENTERS PENSION FUND OF WEST VIRGINIA, CITY OF DANIA BEACH POLICE & FIREFIGHTERS' RETIREMENT SYSTEM, individually and on behalf of all others similarly situated, RAVAN INVESTMENTS, LLC, RICHARD HERSHEY, JEFFREY LAYDON, on behalf of himself and all others similarly situated, ROBERTO E. CALLE GRACEY, AVP PROPERTIES, LLC, COMMUNITY BANK & TRUST, BERKSHIRE BANK, individually and on behalf of all others similarly situated, ELIZABETH LIEBERMAN, on behalf of themselves and all other similarly situated, TODD AUGENBAUM, on behalf of themselves and all others similarly situated, 33-35 GREEN POND ROAD ASSOCIATES, LLC, on behalf of itself and all others similarly situated, COURTYARD AT AMWELL II, LLC, ANNIE BELL ADAMS, on behalf of herself and all others similarly situated, JILL COURT ASSOCIATES II, LLC, GREENWICH COMMONS II, LLC, DENNIS PAUL FOBES, on behalf of himself and all others similarly situated, LEIGH E. FOBES, on behalf of herself and all others similarly situated, MAIDENCREEK VENTURES II LP, RARITAN COMMONS, LLC, MARGARET LAMBERT, on behalf of herself and all others similarly situated, LAWRENCE W. GARDNER, on behalf of themselves and all others similarly situated, BETTY L. GUNTER, on behalf of herself and all others similarly situated, TEXAS COMPETITIVE ELECTRIC

HOLDINGS COMPANY LLC, GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO, CARL A. PAYNE, individually, and on behalf of other members of the general public similarly situated, GUARANTY BANK AND TRUST COMPANY, individually and on behalf of all others similarly situated, KENNETH W. COKER, individually, and on behalf of other members of the general public similarly situated, JOSEPH AMABILE, LOUIE AMABILE, individually and on behalf of Lue Trading, Inc., NORMAN BYSTER, MICHAEL CAHILL, RICHARD DEOGRACIAS, individually and on behalf of RCD Trading, Inc., HEATHER M. EARLE, on behalf of themselves and all others similarly situated, HENRYK MALINOWSKI, on behalf of themselves and all others similarly situated, MARC FEDERIGHI, individually and on behalf of MCO Trading, SCOTT FEDERIGHI, individually and on behalf of Katsco, Inc., LINDA CARR, on behalf of themselves and all others similarly situated, ERIC FRIEDMAN, on behalf of themselves and all others similarly situated, ROBERT FURLONG, individually and on behalf of XCOP, Inc., DAVID GOUGH, COUNTY OF RIVERSIDE, JERRY WEGLARZ, BRIAN HAGGERTY, individually and on behalf of BJH Futures, Inc., DAVID KLUSENDORF, NATHAN WEGLARZ, on behalf of plaintiffs and a class, DIRECTORS FINANCIAL GROUP, individually and on behalf of all others similarly situated, RONALD KRUG, CHRISTOPHER LANG, SEIU PENSION PLANS MASTER TRUST, individually and on behalf of all others similarly situated, HIGHLANDER REALTY, LLC, JOHN MONCKTON, PHILIP OLSON, JEFFREY D. BUCKLEY, FEDERAL HOME LOAN MORTGAGE CORPORATION, BRETT PANKAU, DAVID VECCHIONE, individually on behalf of Vecchione & Associates, RANDALL WILLIAMS, JOHN HENDERSON, 303 PROPRIETARY TRADING LLC, MARGERY TELLER, CEMA JOINT VENTURE, NICHOLAS PESA, EDUARDO RESTANI, PRINCIPAL FUNDS, INC., PFI BOND & MORTGAGE SECURITIES FUND, PFI BOND MARKET INDEX FUND, PFI CORE PLUS BOND I FUND, PFI DIVERSIFIED REAL ASSET FUND, PFI EQUITY INCOME FUND, PFI GLOBAL DIVERSIFIED INCOME FUND, PFI GOVERNMENT & HIGH QUALITY BOND FUND, PFI HIGH YIELD FUND, PFI HIGH YIELD FUND I, PFI INCOME FUND, PFI INFLATION PROTECTION FUND, PFI SHORT-TERM INCOME FUND, PFI MONEY MARKET FUND, PFI PREFERRED SECURITIES FUND, PRINCIPAL VARIABLE CONTRACTS FUNDS, INC., PVC ASSET ALLOCATION ACCOUNT, PVC MONEY MARKET ACCOUNT, PVC BALANCED ACCOUNT, PVC BOND & MORTGAGE SECURITIES ACCOUNT, PVC EQUITY INCOME ACCOUNT, PVC GOVERNMENT & HIGH QUALITY BOND ACCOUNT, PVC INCOME ACCOUNT, PVC SHORT-TERM INCOME ACCOUNT, PRINCIPAL FINANCIAL GROUP, INC., PRINCIPAL FINANCIAL SERVICES, INC., PRINCIPAL LIFE INSURANCE COMPANY, PRINCIPAL CAPITAL INTEREST ONLY I, LLC, PRINCIPAL COMMERCIAL FUNDING, LLC, PRINCIPAL COMMERCIAL FUNDING II, LLC, PRINCIPAL REAL ESTATE INVESTORS, LLC, VITO SPILLONE, BRIAN MCCORMICK, MAXWELL VAN DE VELDE, individually and on behalf of all others similarly situated, INDEPENDENCE TRADING, INC., INSULATORS AND ASBESTOS WORKERS LOCAL #14, individually and on behalf of all others similarly situated, COURMONT & WAPNER ASSOCIATES, L.P., on behalf of itself and all others similarly situated, SALIX CAPITAL LTD., FTC CAPITAL GMBH, on behalf of themselves and all others similarly situated, CITY OF NEW BRITAIN FIREFIGHTERS' AND POLICE BENEFIT FUND, DIRECT ACTION PLAINTIFFS, FEDERAL NATIONAL MORTGAGE ASSOCIATION, TRIAXX PRIME CDO 2006-1, LTD., TRIAXX PRIME CDO 2006-2, LTD., TRIAXX PRIME CDO 2007-1, LTD., FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver, FRAN P. GOLDSLEGER, NATIONAL ASBESTOS WORKERS PENSION FUND, PENSION TRUST FOR OPERATING ENGINEERS, HAWAII ANNUITY TRUST FUND FOR OPERATING ENGINEERS, CEMENT MASONS' INTERNATIONAL ASSOCIATION EMPLOYEES' TRUST FUND, individually and on behalf of all others similarly situated, AXIOM INVESTMENT ADVISORS, LLC, AXIOM HFT LLC, AXIOM INVESTMENT ADVISORS HOLDINGS L.P., AXIOM INVESTMENT COMPANY, LLC, AXIOM INVESTMENT COMPANY HOLDINGS L.P., AXIOM FX INVESTMENT FUND, L.P., AXIOM FX INVESTMENT FUND II, L.P., AXIOM FX INVESTMENT 2X FUND, L.P., EPHRAIM F. GILDOR, GILDOR FAMILY ADVISORS L.P., GILDOR FAMILY COMPANY L.P., GILDOR MANAGEMENT, LLC, PRUDENTIAL CORE TAXABLE MONEY MARKET FUND, Plaintiffs, v. LLOYDS BANKING GROUP PLC, BANK OF AMERICA CORPORATION, THE ROYAL BANK OF SCOTLAND GROUP PLC, CREDIT SUISSE GROUP AG, DEUTSCHE BANK AG, JPMORGAN CHASE & CO., THE NORINCHUKIN BANK, HBOS PLC, ROYAL BANK OF CANADA, HSBC BANK PLC, COOPERATIEVE RABOBANK U.A., FKA Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., JPMORGAN CHASE BANK, N.A., THE BANK OF TOKYO-MITSUBISHI UFJ, LTD., BANK OF AMERICA, N.A., BARCLAYS BANK PLC, WESTDEUTSCHE IMMOBILIENBANK AG, PORTIGON AG, FKA WestLB AG, HSBC HOLDINGS PLC, WESTLB AG, SOCIETE GENERALE, COOPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., CREDIT SUISSE INTERNATIONAL, CREDIT SUISSE (USA), INC., THE ROYAL BANK OF SCOTLAND PLC, CREDIT SUISSE AG, HSBC SECURITIES (USA) INC., HSBC BANK USA, N.A., HSBC FINANCE CORPORATION,

BARCLAYS CAPITAL INC., HSBC USA, INC., THE HONG KONG AND SHANGHAI BANKING CORPORATION LTD., RBC CAPITAL MARKETS LLC, BANK OF AMERICA N.A., CITIBANK, N.A., UBS AG, CITIGROUP INC., THE ROYAL BANK OF SCOTLAND PLC, SOCIETE GENERALE S.A., UBS SECURITIES LLC, CITI SWAPCO INC., BBA ENTERPRISES, LTD., BBA LIBOR, LTD., BRITISH BANKERS' ASSOCIATION, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, FKA Banc of America Securities, LLC, CITIGROUP FINANCIAL PRODUCTS INC., J.P. MORGAN BANK DUBLIN PLC, FKA Bear Stearns Bank PLC, UBS LIMITED, CREDIT SUISSE GROUP INTERNATIONAL, Defendants-Appellees, CREDIT AGRICOLE S.A., SUMITOMO MITSUI BANKING CORPORATION, BNP PARIBAS S.A., RBS CITIZENS, N.A., incorrectly sued as the Charter One Bank NA, RBS CITIZENS, N.A., CREDIT SUISSE GROUP, NA, CITIZENS BANK OF MASSACHUSETTS, agent of RBS Citizens Bank, NA, BARCLAYS US FUNDING LLC, DEUTSCHE BANK FINANCIAL LLC, DOES 1 THROUGH 10, SOCIETE GENERALE CORPORATE & INVESTMENT BANKING, NATIONAL ASSOCIATION, STEPHANIE NAGEL, JOHN DOES #1-#5, NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-1, CHASE BANK USA, N.A., J.P. MORGAN CLEARING CORP., BANK OF AMERICA SECURITIES LLC, CENTRALE RAIFFEISEN-BERENLEENBANK B.A., UBS AG, ROYAL BANK OF SCOTLAND GROUP PLC, BANK OF NOVA SCOTIA, CREDIT SUISSE SECURITIES (USA) LLC, RBS GROUP, LLOYDS BANK PLC, FKA LLOYDS BANK PLC, CITIZENS BANK N.A., CREDIT SUISSE SECURITIES (USA) LLC, CITIGROUP GLOBAL MARKETS INC., LLOYDS BANK PLC, CITIGROUP FUNDING, INC., BARCLAYS PLC, J.P. MORGAN SECURITIES LLC, FKA J.P. MORGAN SECURITIES INC., DEUTSCHE BANK SECURITIES INCORPORATED, BANC OF AMERICA SECURITIES, LLC, RBS SECURITIES INC., FKA Greenwich Capital Markets, Inc., LLOYDS TSB BANK PLC, ICAP PLC, J.P. MORGAN MARKETS LTD., BANK OF AMERICA HOME LOANS, MERRILL LYNCH CAPITAL SERVICES, INC., CITIGROUP GLOBAL MARKETS LIMITED, MERRILL LYNCH & CO., INC., MERRILL LYNCH INTERNATIONAL BANK, LTD., BEAR STEARNS CAPITAL MARKETS, INC., BARCLAYS CAPITAL (CAYMAN) LIMITED, INSTITUTE OF INTERNATIONAL BANKERS, THE CLEARING HOUSE ASSOCIATION, L.L.C., Defendants.[*]

Subsequent History: US Supreme Court certiorari denied by *Lloyds Banking Grp. PLC v. Schwab Short-Term Bond Mkt. Fund, 2022 U.S. LEXIS 3018 (U.S., June 21, 2022)*

Prior History: **[**1]** Appeal from the United States District Court for the Southern District of New York. No. 11-md-2262, Naomi Reice Buchwald, Judge.

This appeal arises from a multidistrict litigation alleging that Defendants-Appellees, some of the world's largest banks and affiliated entities, conspired to suppress the London Interbank Offered Rate ("LIBOR"), a benchmark rate used in countless financial instruments around the globe. On appeal are several orders from the United States District Court for the Southern District of New York (Buchwald, J.), granting Defendants-Appellees' motions to dismiss antitrust claims in twenty-three cases based on Plaintiffs-Appellants' lack of antitrust standing and/or the court's lack of personal jurisdiction over Defendants-Appellees.

We agree with the district court that Plaintiffs-Appellants who purchased LIBOR-indexed bonds from third parties lack antitrust standing. To have antitrust standing, a plaintiff must be an "efficient enforcer" of the antitrust laws whose alleged injury was proximately caused by a defendant. Here, the third parties' independent decisions to reference that benchmark severed the causal chain linking Plaintiffs-Appellants' injuries to Defendants-Appellees' **[**2]** misconduct, thereby rendering Plaintiffs-Appellants unsuitable as efficient enforcers. But we disagree with the district court's personal jurisdiction analysis, and hold instead that jurisdiction is appropriate under the conspiracy-based theory first articulated by this Court in *Charles Schwab Corp. v. Bank of Am. Corp., 883 F.3d 68 (2d Cir. 2018)*, which post-dated the district court's ruling. According to that precedent, a defendant purposefully avails itself of the laws of a forum when that defendant or its co-conspirator undertakes an overt act in furtherance of the conspiracy in the forum. Here, the facts alleged by Plaintiffs-Appellants — specifically, that executives and managers for several banks were directing the suppression of LIBOR from within the United States — were sufficient to establish personal jurisdiction over the banks under a conspiracy-based theory of jurisdiction. We thus AFFIRM in part, REVERSE in part, and REMAND to the district court for proceedings consistent with this opinion.

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[*] The Clerk of Court is respectfully directed to amend the caption as set forth above.

In re LIBOR-Based Fin. Instruments Antitrust Litig., 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980 (S.D.N.Y., Dec. 20, 2016)

Core Terms

antitrust, district court, Banks, conspiracy, third party, Bondholder, antitrust claim, personal jurisdiction, bonds, co-conspirator, marks, suppression, quotation, transactions, allegations, enforcer, factors, contacts, damages, minimum contact, anti trust law, purchases, cases, manipulate, alleged conspiracy, overt act, Defendants', products, parties, injuries

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN1[] **Clayton Act, Claims**

Section 4 of the Clayton Act provides for a private right of action and treble damages to any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. 15 U.S.C.S. § 15(a). But the Supreme Court has recognized that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. Accordingly, the private right to seek treble damages for federal antitrust violations has developed limiting contours, which are embodied in the concept of "antitrust standing." To establish antitrust standing, a plaintiff must show (1) antitrust injury, which is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful, and (2) that he is a proper plaintiff in light of four efficient enforcer factors.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN2[] **Standing, Requirements**

Even where a plaintiff has cleared the antitrust-injury hurdle for "antitrust standing," the plaintiff must further show that it is an efficient enforcer of the antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN3[] **Standing, Requirements**

An antitrust plaintiff must show both constitutional standing and antitrust standing.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN4[] **Standing, Requirements**

At its core, the efficient enforcer analysis for antitrust standing requires a court to decide if the plaintiff is a proper party to perform the office of a private attorney general and thereby vindicate the public interest in antitrust enforcement. In Associated General Contractors of California, Inc. v. California State Council of Carpenters the Supreme Court has outlined four factors to guide this analysis: (1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN5[] **Standing, Clayton Act**

For the purposes of antitrust standing, proximate cause is determined according to the so-called "first-step rule." Under that rule, injuries that happen at the first step following the harmful behavior are considered proximately caused by that behavior. Rather, the general tendency of § 4 of the Clayton Act is not to go beyond the first step.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN6[] **Remedies, Damages**

In the context of antitrust standing, highly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN7[] **Remedies, Damages**

The U.S. Supreme Court has warned that antitrust standing should not provide a "get-out-of-court-free card" to be played any time that a damages calculation might be complicated.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN8[] **Standing, Requirements**

In the context of antitrust standing, the fourth Associated General Contractors of California, Inc. v. California State Council of Carpenters factor-the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other-reflects a strong interest in keeping the scope of complex antitrust trials within judicially manageable limits.

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

HN9[] **Federal & State Interrelationships, Erie Doctrine**

In deciding matters of state law, the United States Court of Appeals for the Second Circuit seeks to predict how the state's highest court would resolve the issues that we have identified. Naturally, that means that the Court gives the fullest weight to pronouncements of the state's highest court,-but it also means that the Court looks to the rulings of the state's lower courts as providing important data points for understanding state law.

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

Evidence > Burdens of Proof > Allocation

HN10[] **In Rem & Personal Jurisdiction, In Personam Actions**

To survive a motion to dismiss, a plaintiff must make a prima facie showing that personal jurisdiction exists. While the United States Court of Appeals for the Second Circuit reads the pleadings and any supporting materials in the light most favorable to the plaintiffs, it also requires that plaintiffs make legally sufficient allegations of jurisdiction, including an averment of facts that, if credited, would suffice to establish jurisdiction over the defendant.

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

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN11[] **In Personam Actions, Due Process**

Before a court may exercise personal jurisdiction over a defendant, three requirements must be met: (1) the plaintiff's service of process upon the defendant must have been procedurally proper; (2) there must be a statutory basis for personal jurisdiction that renders such service of process effective; and (3) the exercise of personal jurisdiction must comport with constitutional due process principles.

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

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

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

HN12[] **In Personam Actions, Due Process**

As the U.S. Supreme Court has long held, due process demands that each defendant over whom a court exercises jurisdiction have some minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

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

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

HN13[] **In Personam Actions, Foreseeability**

When the claims arise out of, or relate to, a defendant's contacts with the forum — i.e., specific jurisdiction is asserted — minimum contacts necessary to support such jurisdiction exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there. The contacts must be created by the defendant itself, rather than from the unilateral activity of another party or a third person. That said, a defendant can purposefully avail itself of a forum through the action of a third party by directing its agents or distributors to take action there. The United States Court of Appeals for the Second Circuit has held that a defendant can similarly avail itself of a forum through certain actions taken by a co-conspirator in the forum. Much like an agent who operates on behalf of, and for the benefit of, its principal, a co-conspirator who undertakes action in furtherance of the conspiracy essentially operates on behalf of, and for the benefit of, each member of the conspiracy.

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

Torts > Procedural Matters > Commencement & Prosecution > In Personam Jurisdiction

HN14[] **In Personam Actions, Minimum Contacts**

To assert a conspiracy theory of personal jurisdiction, a plaintiff must plausibly allege that (1) a conspiracy existed; (2) the defendant participated in the conspiracy; and (3) a co-conspirator's overt acts in furtherance of the conspiracy had sufficient contacts with a forum to subject that co-conspirator to jurisdiction in that forum.

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

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

HN15[] **In Personam Actions, Foreseeability**

The conspiracy theory of personal jurisdiction could not get off the ground if a defendant were altogether blindsided by its co-conspirator's contacts with the forum; the conspiratorial contacts must be of the sort that a defendant should reasonably anticipate being haled into court in the forum as a result of them.

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[*] Charles H. Davis subsequently withdrew as counsel. (Doc. No. 873).

Judges: Before: LIVINGSTON, Chief Judge, LYNCH and SULLIVAN, Circuit Judges.

Opinion by: RICHARD J. SULLIVAN

Opinion

[*109] RICHARD J. SULLIVAN, *Circuit Judge*:

Plaintiffs-Appellants in this multidistrict litigation allege an international conspiracy to manipulate the London Interbank Offered Rate ("LIBOR"), a benchmark interest rate for lending money among global financial institutions. Defendants-Appellees are the sixteen panel banks involved in setting LIBOR, about two dozen affiliated banking institutions (together with the panel banks, "Banks"), and the British Bankers' Association ("BBA"), as well as affiliated organizations working with the BBA to set LIBOR (collectively, "Defendants"). On appeal are several orders from the United States District Court for the Southern District of New York (Buchwald, *J.*), granting Defendants' motions to dismiss claims in twenty-three cases for lack of antitrust standing or lack of personal jurisdiction over **[**4]** Defendants.

We agree with the district court that third parties who independently chose to reference LIBOR in their bonds before selling those bonds to Plaintiffs broke the causal chain linking Plaintiffs' harm to Defendants' misconduct. Under well-established antitrust standing principles, this means that those Plaintiffs who purchased such bonds are not the proper parties to enforce the federal antitrust laws against Defendants and thus lack statutory standing. And like the district court, we are persuaded that this statutory standing analysis applies to the antitrust claims brought under California law.

But we disagree with the district court's personal jurisdiction analysis. In our view, jurisdiction is appropriate under a conspiracy-based theory, in which a defendant **[*110]** purposefully avails itself of the laws of a forum when it or its co-conspirator undertakes an overt act in furtherance of the conspiracy in the forum. Here, that requirement — first articulated by this Court in an opinion that postdated the district court's ruling — is satisfied in light of allegations that executives and managers from several Banks were directing the suppression of LIBOR from the United States. We **[**5]** thus **AFFIRM** in part, **REVERSE** in part, and **REMAND** to the district court for proceedings consistent with this opinion.

I. BACKGROUND

A. Factual Allegations

This marks the fourth time in eight years that this case has come before us. *See Charles Schwab Corp. v. Bank of Am. Corp., 883 F.3d 68 (2d Cir. 2018)* ("*Schwab")*; *Gelboim v. Bank of Am. Corp., 823 F.3d 759 (2d Cir. 2016)*; *In re LIBOR-Based Fin. Instruments Antitrust Litig., No. 13-3565-L, 2013 U.S. App. LEXIS 26157, 2013 WL 9557843 (2d Cir. Oct. 30, 2013)*. Consequently, we have had ample occasion to discuss Plaintiffs' factual allegations, which "[d]espite the legal complexity of this case, . . . are rather straightforward." *Gelboim, 823 F.3d at 765* (quoting *In re LIBOR-Based Fin. Instruments Antitrust Litig., 935 F. Supp. 2d 666, 677 (S.D.N.Y. 2013)* ("*LIBOR I*")).

LIBOR is a widely used benchmark that approximates the average rate at which a group of designated banks can borrow money. It serves as an index for a variety of financial instruments, including bonds, interest rate swaps, commercial paper, and exchange-traded derivatives. LIBOR is also used indirectly in calculating rates for short-term, fixed-rate bonds, which do not reference LIBOR but are nevertheless assessed in terms of their spread relative to it. LIBOR has also been licensed to third parties, including the Chicago Mercantile Exchange, which directly incorporate LIBOR as a price component for financial products traded in the United States.

The Banks belonged to the British Bankers' Association ("BBA"), a trade organization for the banking and financial-services **[**6]** sector in the United Kingdom that sets the daily LIBOR rate for various currencies. With respect to the daily LIBOR rate for U.S. dollars,[1] the Banks that comprised the LIBOR panel were asked to disclose the rate at which they could borrow dollars on the inter-bank market. Under LIBOR-setting rules, (1) each Bank was to independently exercise good faith judgment in submitting its estimated interest rates for borrowing funds at different maturity rates, which were to be based on the Bank's knowledge of market conditions; (2) the daily submissions were to remain confidential until after LIBOR was computed and published; and (3) Thomson Reuters, on behalf of the BBA, would then calculate LIBOR based on the average of the middle eight submissions, and publish the final rate, as well as all sixteen individual submissions.

The panel Banks involved in setting LIBOR also bought and sold — in the United States — billions of dollars' worth of financial instruments tied to that benchmark. Even small increases in LIBOR would have allegedly cost the Banks hundreds of millions of dollars. *Gelboim, 823 F.3d at 766*. For instance, JPMorgan Chase stated that it would lose $500 million if LIBOR increased by one percentage point. **[**7]** But if rates instantaneously *decreased* by one percentage point, Citibank, for example, would make $1.935 billion.

During the 2008 financial crisis, several news articles and scholarly pieces reported **[*111]** that LIBOR was suspiciously low as compared to other lending benchmarks. *See* *LIBOR I", 935 F. Supp. 2d at 680*. These comments were promptly refuted by the Banks and the BBA, who provided alternative explanations for LIBOR's failure to track similar benchmarks. *Id.* In early 2011, however, one of the Banks released a report explaining that the United States Department of Justice, along with several other United States and foreign agencies, had subpoenaed information designed to determine whether the panel Banks had manipulated LIBOR during the 2008 financial crisis. *Id.*

B. Procedure

In light of mounting evidence that LIBOR had been artificially suppressed, litigants began flooding courts throughout the country with federal and state antitrust claims and various other claims based on the alleged manipulation. To manage these cases, the Judicial Panel on Multidistrict Litigation ("JPML") established an MDL in the Southern District of New York. *See* *In re: Libor-Based Fin. Instruments Antitrust Litig., 802 F. Supp. 2d 1380 (J.P.M.L. 2011)*. The JPML explained that the cases shared the same allegations that the panel **[**8]** Banks "manipulated L[IBOR] by deliberately and intentionally understating their respective borrowing costs to the BBA, and that, by doing so, they paid lower interest rates to customers who bought [the Banks'] products with rates of return tied to L[IBOR.]" *Id. at 1381*. The MDL has expanded to include dozens of class and individual actions.

As relevant here, four groups of Plaintiffs brought complaints related to the alleged conspiracy:

(1) The Over-the-Counter (or "OTC") Plaintiffs filed a putative class action representing those who directly purchased LIBOR-based interest rate swaps directly from the Banks.

(2) The Bondholder Plaintiffs filed a putative class action on behalf of those who held LIBOR-based bonds issued by third parties.

(3) The Exchange-Based Plaintiffs filed a putative class action for purchasers of LIBOR-based futures on the Chicago Mercantile Exchange.

(4) The remaining Plaintiffs comprise a group filing individual (non-class) actions based on their purchases of various financial instruments from the Banks. Among this group are The Charles Schwab Corporation and related entities (collectively, "Schwab"), which filed three complaints alleging harm from purchases of various LIBOR-indexed **[**9]** financial instruments from the Banks, as well as from LIBOR-based bonds and fixed-rate bonds sold by third parties.

Taken together, Plaintiffs' complaints named about forty Defendants allegedly responsible for the LIBOR suppression. They include the panel Banks involved in setting LIBOR: Bank of America Corporation and Bank of America, N.A. (together, "Bank of America"); Bank of Tokyo-Mitsubishi UFJ Ltd. ("BTMU"); Barclays Bank plc

[1] For the sake of simplicity, this Opinion refers to the U.S.-Dollar LIBOR as "LIBOR."

("Barclays"); Citigroup, Inc. and Citibank, N.A. (together, "Citibank"); Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. ("Rabobank"); Credit Suisse Group AG ("Credit Suisse"); Deutsche Bank AG ("Deutsche Bank"); HSBC Holdings plc and HSBC Bank plc (together, "HSBC"); JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. (together, "JPMorgan Chase"); Lloyds Banking Group plc ("Lloyds"); HBOS plc ("HBOS"); Société Générale S.A. ("SocGen"); The Norinchukin Bank ("Norinchukin"); Portigon AG and Westdeutsche ImmobilienBank AG **[*112]** (together, "WestLB"); Royal Bank of Canada ("RBC"); Royal Bank of Scotland Group plc ("RBS"); and UBS AG ("UBS"). Three of these Banks — Bank of America, Citibank, and JPMorgan Chase — are incorporated and headquartered in the United States, **[**10]** while the remainder are foreign Banks. In addition to naming these Defendants, the complaints (taken together) name about two dozen affiliated banking institutions, most of which are incorporated and/or headquartered in the United States.[2] They also name the BBA, BBA Enterprises, Ltd., and BBA LIBOR, Ltd., each of which participates in setting LIBOR.

The district court initially dismissed the federal antitrust claims in their entirety on the ground that Plaintiffs failed to plead antitrust injury, reasoning that the LIBOR-setting process was collaborative rather than competitive and that Plaintiffs therefore suffered no anticompetitive harm. *See* *LIBOR I, 935 F. Supp. 2d at 686-95*. At the same time, however, the district court denied motions to dismiss certain other contract-based claims that were not linked to the antitrust claims. *Id. at 738*. Several Plaintiffs appealed, and we dismissed the appeal for lack of subject matter jurisdiction for the simple reason that the district court had not yet issued a final order disposing of the entire MDL. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2013 U.S. App. LEXIS 26157, 2013 WL 9557843, at *1. The Supreme Court granted certiorari and reversed, holding that Plaintiffs did not have to wait until the completion of all MDL proceedings to appeal and observing that the parties could **[**11]** take advantage of *Federal Rule of Civil Procedure 54(b)* to obtain partial judgment on subsets of claims. *Gelboim v. Bank of Am. Corp., 574 U.S. 405, 415-16, 135 S. Ct. 897, 190 L. Ed. 2d 789 (2015)*.

With the case once again before our Court, we reversed the district court on the merits. Specifically, we held that Plaintiffs had plausibly alleged a per se antitrust violation involving horizontal price-fixing and had plausibly alleged an inter-bank conspiracy to suppress LIBOR based on parallel conduct, internal communications, and "a common motive" of "increased profits and the projection of financial soundness." *Gelboim, 823 F.3d at 781-82*. We further considered Plaintiffs' statutory "antitrust standing," which turns on whether Plaintiffs "suffered antitrust injury" and whether they are the proper parties to challenge the antitrust violations (so-called "efficient enforcers"). *Id. at 772*. While we determined that Plaintiffs had sufficiently alleged that they suffered an antitrust injury, we concluded that we were "not in a position to resolve" the efficient-enforcer prong, which would "entail further inquiry" best left to the district court in the first instance. *Id. at 778*.

[*113] Back in the district court, Defendants moved to dismiss several antitrust claims, including the federal antitrust claims filed by Schwab and the Bondholder Plaintiffs, on efficient enforcer **[**12]** grounds. The Defendants also moved to dismiss various state-law antitrust claims, such as those filed by Schwab pursuant to California's Cartwright Act, arguing that state law imposed analogous efficient enforcer requirements that certain Plaintiffs could not overcome. Separately, citing a lack of personal jurisdiction, Defendants moved to dismiss all or part of each complaint filed by Schwab and the OTC and Exchange-Based Plaintiffs, as well as the remaining eighteen complaints filed by non-class Plaintiffs.

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[2] Those entities are Citigroup Financial Products, Inc.; Citi Swapco Inc.; Citigroup Global Markets, Inc.; Citigroup Funding Inc.; Credit Suisse Securities (USA) LLC; Credit Suisse (USA) Inc.; Deutsche Bank Securities, Inc.; HSBC Bank USA, N.A.; HSBC Finance Corporation; HSBC Securities (USA) Inc.; HSBC USA Inc.; Chase Bank, USA, N.A.; J.P. Morgan Securities LLC; Merrill Lynch, Pierce, Fenner & Smith Inc. (f/k/a Banc of America Securities LLC); Merrill Lynch Capital Services, Inc.; RBC Capital Markets LLC; RBS Securities Inc. (f/k/a Greenwich Capital Markets, Inc.); UBS Securities LLC; Barclays Capital Inc.; Credit Suisse International; The Hongkong and Shanghai Banking Corporation Ltd.; J.P. Morgan Dublin plc; Merrill Lynch International Bank. Although our case caption lists Credit Suisse Group International, the district court dismissed that party since the complaint referenced it only in the case caption, and the entity otherwise appears to be non-existent. *In re LIBOR-Based Fin. Instruments Antitrust Litig. ("LIBOR IV"), No. 11-mdl-2262 (NRB), 2015 U.S. Dist. LEXIS 147561, 2015 WL 6243526, at *158 (S.D.N.Y. Oct. 20, 2015)*. The caption also lists Rabobank International, but that is merely a tradename for Rabobank.

On December 20, 2016, the district court largely granted the motions to dismiss. On the issue of antitrust standing, the district court concluded that the Bondholder Plaintiffs were not efficient enforcers since they purchased their bonds from third parties who independently chose to reference LIBOR. *In re LIBOR-Based Fin. Instruments Antitrust Litig. ("LIBOR VI"), No. 11-mdl-2262 (NRB), 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *16 (S.D.N.Y. Dec. 20, 2016)*. Such independent action, the court explained, "breaks the chain of causation between [D]efendants' actions and a [P]laintiff's injury." *Id.* The court further held that the efficient enforcer considerations underlying its analysis of the federal antitrust claims applied with equal force to the antitrust claims brought under *California's Cartwright Act*. *2016 U.S. Dist. LEXIS 175929, [WL] at 24*.

But the district court **[**13]** did not address whether Schwab, whose claims depended in part on purchasing LIBOR-related bonds sold by third parties, was an efficient enforcer. Instead, the district court dismissed Schwab's three complaints (and the claims of several other Plaintiffs) on personal jurisdiction grounds. The district court first defined the scope of the conspiracy, which the court deemed to be limited to the Banks' "projection of financial soundness." *2016 U.S. Dist. LEXIS 175929, [WL] at 7*. With this narrow scope in mind, the court rejected the notion that Plaintiffs could "rely on the sales of LIBOR-based financial products in the United States" because "the goal of the conspiracy would have succeeded regardless of whether any defendants based their products on LIBOR and regardless of whether any [D]efendant [B]ank increased or decreased the margin on their LIBOR-based products." *2016 U.S. Dist. LEXIS 175929, [WL] at 8*. Although the court noted several allegations that Bank executives and managers in the United States had directed the suppression of LIBOR from within the United States, the court nevertheless found that the allegations could be "easily discounted, especially in light of the moving [D]efendants' declarations" denying those allegations. *2016 U.S. Dist. LEXIS 175929, [WL] at 11*. **[**14]** After discounting those allegations, and without holding an evidentiary hearing or permitting jurisdictional discovery, the district court concluded that Plaintiffs had failed to plausibly allege any facts supporting a conspiracy-based theory of jurisdiction. *See* *2016 U.S. Dist. LEXIS 175929, [WL] at 8, 14*.

Plaintiffs timely appealed. We received briefing on the antitrust standing issues, separate briefing on the personal jurisdiction issues, and supplemental briefing in light of our decision in *Schwab*. Following oral argument, we granted requests from a number of parties to sever, stay, and remand their appeals to the district court for purposes of concluding settlement negotiations. The district court ultimately approved those settlements on December 16, 2020, prompting us to dismiss those appeals on January 27, 2021.[3] This appeal is now ready for resolution.

[*114] II. DISCUSSION

In broad strokes, Plaintiffs raise two challenges to the district court's opinion. First, Schwab and the Bondholder Plaintiffs challenge the district court's conclusion that those who purchased LIBOR-related bonds from third parties lack antitrust standing under federal law, and (with respect to Schwab only) that California law applies the **[**15]** same statutory standing analysis. Second, each Plaintiff contends that the district court in fact had personal jurisdiction over every Defendant based on multiple theories, including a conspiracy-based theory of jurisdiction. We take each issue in turn.

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[3] Specifically, we dismissed the appeals of the following parties pursuant to ***Federal Rule of Appellate Procedure 42(b)***: (1) Plaintiffs Ellen Gelboim and Linda Zacher's appeal with respect to Citibank, NA and Citigroup, Inc. (Doc. No. 821); (2) Gelboim and Zacher's appeal with respect to J.P. Morgan Chase & Co., J. P. Morgan Chase Bank, N.A., Bank of America Corporation, and Bank of America N.A. (Doc. Nos. 817, 815); (3) Gelboim and Zacher's appeal with respect to Royal Bank of Scotland (Doc. Nos. 819), and (4) the Exchange-Based Plaintiffs Metzler Asset Management GmbH (f/k/a Metzler Investment GMBH), FTC Futures Fund SICAV, FTC Futures Fund PCC Ltd., Atlantic Trading USA, LLC, 303030 Trading LLC, Gary Francis, and Nathaniel Haynes's appeal with respect to Société Générale S.A. (Doc. Nos. 784). We later dismissed HSBC Holdings plc and HSBC Bank plc from one of the Schwab cases. (Doc. No. 838) Most recently, Gelboim and Zacher moved to sever and stay their appeal as to Credit Suisse, The Bank of Tokyo-Mitsubishi UFJ, Ltd. (now known as MUFG Bank, Ltd.), and Norinchukin Bank, which we granted on October 19, 2021; accordingly, this opinion does not resolve any legal issues between those parties.

A. Antitrust Standing

The Bondholder Plaintiffs argue that the district court improperly dismissed their complaint after concluding that they lacked antitrust standing to bring a federal antitrust claim. Schwab purports to join the Bondholder Plaintiffs' appeal on this issue to the extent that its antitrust claims overlap with the Bondholder Plaintiffs', and Schwab further challenges the district court's determination that California's state ***antitrust law*** mirrors its federal analog.

On the issue of federal antitrust standing, we agree with the district court's conclusion that those Plaintiffs who purchased LIBOR-based bonds from third parties did not suffer an antitrust injury *that was proximately caused* by Defendants' alleged conspiracy. Like the district court, we therefore hold that the Bondholder Plaintiffs are not the proper parties to sue under federal ***antitrust law*** because — in the parlance of our antitrust doctrine — the Bondholder **[**16]** Plaintiffs are not "efficient enforcers" of the federal law. The same conclusion necessarily covers Schwab's federal antitrust claims, to the extent that they are based on Schwab's purchase of LIBOR-related bonds from third parties, and Schwab's California antitrust claims, since we are persuaded that California's antitrust standing analysis tracks its federal analog.[4]

1. Antitrust Standing for Federal Antitrust Claims

HN1[] *Section 4 of the Clayton Act* provides for a private right of action and treble damages to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15(a)*. But the Supreme Court **[*115]** has recognized that "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Associated General Contractors of California, Inc. v. California State Council of Carpenters ("AGC"), 459 U.S. 519, 534, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (internal quotation marks omitted). Accordingly, the private right to seek treble damages for federal antitrust violations has "developed limiting contours," which are "embodied in the concept of 'antitrust standing.'" *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 75 (2d Cir. 2013)*.

To establish antitrust standing, "a plaintiff must show (1) antitrust injury, which is 'injury of the type the antitrust laws were intended to prevent and that flows from **[**17]** that which makes defendants' acts unlawful,' and (2) that he is a proper plaintiff in light of four 'efficient enforcer' factors[.]" *In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 688 (2d Cir. 2009)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*).[5] There can be no doubt after our decision in *Gelboim* that all Plaintiffs here, including Schwab and the Bondholder Plaintiffs, have "plausibly alleged antitrust injury" flowing from the Banks' horizontal price-fixing conspiracy. *823 F.3d at 775*. ***HN2***[] But even where a plaintiff "has cleared the antitrust-injury hurdle," the plaintiff must further "show that it is an 'efficient enforcer' of the antitrust laws." *IQ Dental Supply, Inc. v. Henry Schein, Inc., 924 F.3d 57, 65 (2d Cir. 2019)*. Though *Gelboim* did not resolve this efficient-enforcer prong of the antitrust-standing analysis, the district court considered the issue on remand and found that the Bondholder Plaintiffs failed to plausibly allege facts establishing that they were efficient enforcers.

HN4[] At its core, the efficient enforcer analysis requires a court to decide if the "plaintiff is a proper party to perform the office of a private attorney general and thereby vindicate the public interest in antitrust enforcement."

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[4] Even though the district court dismissed Schwab's claims for lack of personal jurisdiction and did not reach Defendants' motion to dismiss Schwab's claims for lack of antitrust standing, we are free to consider that issue on appeal as an alternate basis to affirm the dismissal of Schwab's claims. *See* *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 421 (2d Cir. 2005)*.

[5] ***HN3***[] Of course, an antitrust plaintiff must show both constitutional standing and antitrust standing. *See* *AGC, 459 U.S. at 535 n.31*; *Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121 (2d Cir. 2007)*. But we have already held that constitutional standing is "easily satisfied by [A]ppellants' pleading that they were harmed by receiving lower returns on LIBOR-denominated instruments as a result of [D]efendants' manipulation of LIBOR." *Gelboim, 823 F.3d at 770*.

Gelboim, 823 F.3d at 780 (internal quotation marks omitted). In AGC, the Supreme Court outlined four factors to guide this analysis:

(1) "'the directness or indirectness of the asserted injury'";

(2) "'the **[**18]** existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement'";

(3) "the speculativeness of the alleged injury"; and

(4) "the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries."

Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 66 (2d Cir. 1988) (quoting *AGC, 459 U.S. at 540-45*). We now consider whether the district court properly applied these factors on remand.

a. Directness of the Injury

In our view, the district court correctly "dr[e]w a line between [P]laintiffs who transacted directly with [D]efendants and those who did not," finding that **[*116]** only those who transacted with the Banks suffered a direct antitrust injury. *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *16*. ***HN5***[] For the purposes of antitrust standing, proximate cause is determined according to the so-called "first-step rule." "Under th[at] rule, injuries that happen at the first step following the harmful behavior are considered proximately caused by that behavior." *In re Am. Express Anti-Steering Rules Antitrust Litig., No. 20-1766, 19 F.4th 127, 2021 U.S. App. LEXIS 34626, at *15 (2d Cir. Nov. 22, 2021)*; *see also* Gatt, 711 F.3d at 78 ("Directness . . . means close in the chain of causation.") (internal quotation marks omitted). It is thus not enough that a plaintiff "suffered a loss in some manner that might conceivably be traced to the conduct of the defendants." **[**19]** *In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 157 (2d Cir. 2016)* (internal quotation marks omitted). Rather, "'the general tendency of [§ 4 of the Clayton Act] is not to go beyond the first step.'" *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 417, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (Stevens, J., concurring in the judgment) (internal quotation marks omitted); *see also* *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 126, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)* (citing *AGC, 459 U.S. at 532-33*) (holding that the Clayton Act covers only plaintiffs "whose injuries were proximately caused by a defendant's antitrust violations.")

The first-step rule and traditional proximate cause considerations require drawing a line between those whose injuries resulted from their direct transactions with the Banks and those whose injuries stemmed from their deals with third parties. *See* *In re Am. Express, No. 20-1766, 2021 U.S. App. LEXIS 34626, at *17* (holding that "if there are 'direct victims,' those victims are the merchants to which Amex's Anti-Steering Rules applied," not the appellants who "were allegedly injured when Amex's competitors, . . . raised their own prices"); 2A Phillip Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 335c(3) (2014) ("Beyond the actual customers, most other plaintiffs would be classified as 'remote' and denied standing even though they have suffered injury-in-fact."). This is because the decision of a third party to incorporate LIBOR as a term in a financial instrument could be made without any connection to the actions of **[**20]** the Banks. Such independent decisions snap the chain of causation linking Plaintiffs' injury to the Banks' misconduct.

The disconnect between Plaintiffs' injury and the Banks' alleged benefit further demonstrates the attenuated nature of the causal chain. Schwab and the Bondholder Plaintiffs were allegedly harmed because they received lower-interest payments due to the conspirators' suppression of LIBOR, which resulted in Plaintiffs' counterparties receiving a corresponding benefit of lower-interest payments. But the reduced-interest payment in no way enriched the Banks, who had no financial stake in the transactions whatsoever. Rather, for every Plaintiff who was harmed by a reduced-interest payment, there was a third party who benefited from being the counterparty to the transaction. None of that benefit, however, flowed to the Banks. And while Plaintiffs insist that the Banks derived a reputational benefit from falsely touting their ability to get lower rates on borrowing than was actually the case, that benefit too is wholly unrelated to the purported harm. Though the Banks may have increased their profits by selling LIBOR-indexed instruments, those who purchased from third parties **[**21]** were "not the target" of such harm; they were "simply collateral damage." *IQ Dental Supply, 924 F.3d at 65-66*.

To be sure, some courts have occasionally looked past intervening decisions by **[*117]** third parties to find "umbrella standing," which allows a consumer who dealt with a non-cartel member to pursue antitrust claims against cartel members who rigged the market as a whole. *See* *Gelboim, 823 F.3d at 778* (collecting cases and noting a circuit split). We have never adopted this theory of antitrust standing, and the unique nature of the LIBOR conspiracy makes umbrella standing particularly inappropriate here. *See, e.g.*, *In re Am. Express, No. 20-1766, 2021 U.S. App. LEXIS 34626, at *23* ("[I]t is not the appellants' status of umbrella plaintiffs or otherwise that resolves the antitrust standing question but 'the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff.'" (quoting *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1058 (9th Cir. 1999)*). Unlike the archetypal price-fixing conspiracy, which involves a cartel that controls a market for a good and sells that good at an inflated price, *see, e.g.*, *In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1166 n.24 (5th Cir. 1979)*, the LIBOR conspiracy entailed the fixing of a number that was available for unlimited third parties to reference and incorporate into their own products and transactions without any input from, or involvement by, the Banks. There is **[**22]** no allegation that the Banks controlled the market for LIBOR-referencing products, nor any claim that the Banks pressured third parties to adhere to a LIBOR-based index. Instead, third parties independently decided to peg their bonds' terms to LIBOR.

Simply put, umbrella standing of the sort urged by the Bondholder and Schwab Plaintiffs would yield liability that is far too sweeping and would, therefore, "raise the very concern of damages disproportionate to wrongdoing" emphasized in cases that reject umbrella standing. *Gelboim, 823 F.3d at 779*. Because the harm that befell Schwab and the Bondholder Plaintiffs is far removed from Defendants' conduct, it cannot be said that Defendants proximately caused the alleged antitrust injury.

The Supreme Court's decision in *Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*, is not to the contrary. There, the plaintiff argued that an insurance provider for her employer-purchased group health plan had conspired with psychiatrists to box out psychologists from the psychotherapy market, and as a result of the conspiracy, had refused to reimburse her for treatment provided by a psychologist. *See* *id. at 469-70*. The Supreme Court determined that the plaintiff had successfully pleaded antitrust injury because, even though she did not directly **[**23]** transact with the conspiring defendants, her injury was "inextricably intertwined" with their scheme. *Id. at 484*. In so holding, the Supreme Court merely carved out an exception to the market participant requirement in cases where a plaintiff was "manipulated or utilized by [a defendant] as a fulcrum, conduit or market force to injure competitors or participants in the relevant product and geographical markets." *Aluminum Warehousing, 833 F.3d at 161* (internal quotation marks omitted). *McCready* involved a direct relationship between the pocket-book harm to the plaintiff and the market advantage gained by the defendants, which was the very goal of the conspiracy.

Not so here. As noted above, Defendants derived no benefit from Plaintiffs' transactions with third parties. Those transactions, while arguably foreseeable to the Banks, were entirely separate from the purpose of the alleged conspiracy and took place merely because of LIBOR's unlimited public availability as a reference point for innumerable transactions. This case thus has little in common with *McCready*.

[*118] Likewise, the Seventh Circuit cases on which Plaintiffs rely, *Sanner v. Board of Trade of Chicago, 62 F.3d 918 (7th Cir. 1995)*, and *Loeb Industries, Inc. v. Sumitomo Corp., 306 F.3d 469 (7th Cir. 2002)*, do not support a finding of proximate cause here. In both cases, the Seventh Circuit found antitrust standing for the **[**24]** plaintiffs who bought or sold various physical commodities in the cash market, and who alleged injuries caused by the defendants' manipulation of the futures market for the same commodity. *Sanner, 62 F.3d at 930*; *Loeb Indus., 306 F.3d at 489*. But while these cases accepted a somewhat attenuated chain of causation, they nonetheless emphasized the "lockstep" link between prices in the two markets and the uniquely interrelated nature of a *cash* market for a specific commodity and the *futures* market for that same commodity. In fact, *Sanner* deemed the markets to be "so closely related that the distinction between them is of no consequence to antitrust standing analysis." *62 F.3d at 929* (internal quotation marks omitted). *Sanner* further emphasized that the defendant "intended to impact both the cash and futures markets to bring down prices in both markets" in order to benefit its clients. Id. at 929-30. The same cannot be said here, where the Banks gained no financial benefit from the use of LIBOR as an index number for *third-party* transactions.

We thus reject the attempts of Schwab and the Bondholder Plaintiffs "to impose liability for transactions [that] [D]efendants did not control and of which they were likely not even aware." Sonterra Cap. Master Fund Ltd. v. Credit Suisse Grp. AG, 277 F. Supp. 3d 521, 560 (S.D.N.Y. 2017); *see also* In re Am. Express, No. 20-1766, 2021 U.S. App. LEXIS 34626, at *17; Sullivan v. Barclays PLC, No. 13-cv-2811 (PKC), 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at *17-18; In re Platinum & Palladium Antitrust Litig., No. 14-cv-9391 (GHW), 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *22 (S.D.N.Y. Mar. 28, 2017). As aptly summarized by the district **[**25]** court, the Bondholder Plaintiffs "did not purchase directly from [D]efendants," and "made their own decisions to incorporate LIBOR into their transactions, over which [D]efendants had no control, in which [D]efendants had no input, and from which [D]efendants did not profit." LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *16. The same is true of Schwab insofar as it purchased LIBOR-related bonds from third parties.[6] Accordingly, since Defendants did not proximately cause the injury flowing from the purchases of these LIBOR-related bonds, neither set of Plaintiffs has statutory standing to raise a federal antitrust claim related to those purchases. *See* Lexmark, 572 U.S. at 126.

b. Other *AGC* Factors

While the first factor alone furnishes ample justification for affirming the district court, the other AGC factors, on the whole, likewise cut against a finding of antitrust standing. The second factor - "the existence of more direct victims of the alleged conspiracy," AGC, 459 U.S. at 545 - clearly weighs against antitrust standing since there is no shortage of other parties in this very case who purchased LIBOR-indexed financial instruments directly from the Banks. Those victims' injuries are directly linked to the Banks' profit from the conspiracy, thus underscoring the attenuated nature **[**26]** of the **[*119]** harms allegedly flowing from third-party bond sales. *See id.*

The third factor, which focuses on whether the alleged damages are "highly speculative," id. at 542, also favors Defendants. ***HN6***[] As we previously stated, "highly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement." Gelboim, 823 F.3d at 779. Schwab and the Bondholder Plaintiffs contend that their "damage theory is simple," and only requires the district court to compare the "difference between the fixed price and the price that would have obtained in a competitive market but for the price fixing." Appellant's Antitrust Br. at 37-38.

Though simple to articulate, Plaintiffs' damages theory would be difficult to apply because, at least for those who purchased their bonds during the suppression period, Plaintiffs' theory would require the court to speculate about how the third-party sellers would have factored a non-suppressed LIBOR into the transaction. For example, a bondholder may have received lowered coupon payments from a suppressed rate, but the price of the bond itself may have been correspondingly lowered to account for a suppressed LIBOR. The spread relative to LIBOR could have also been adjusted in light of **[**27]** the lower rate. To answer these and other conjectural hypotheticals, Schwab and the Bondholder Plaintiffs "would have to model far more than basic lost sales and lost profits"; they would essentially have to "creat[e] . . . an alternative universe" based on "multiple layers of speculation." IQ Dental Supply, 924 F.3d at 67 (internal quotation marks omitted). Such "highly speculative" damages claims are disfavored in selecting efficient antitrust enforcers. *See* AGC, 459 U.S. at 542-43.

That said, two considerations persuade us to give this damages-calculation factor only limited weight. First, many of the Bondholder Plaintiffs purchased their bonds prior to the period in which LIBOR was allegedly suppressed. For

[6] Indeed, Schwab's argument is even more tenuous in some respects, since Schwab bases its federal antitrust claim not only on LIBOR-indexed bonds purchased from third parties, but also on fixed-rate bonds that do not reference LIBOR at all. Schwab's theory is that LIBOR exerted a kind of gravitational force, influencing fixed-rate bonds. But that is clearly insufficient to establish antitrust standing.

claims based on these purchases, calculating damages would be more straightforward since it would not turn on how third parties accounted for the suppressed rate when incorporating LIBOR as part of the price term. ***HN7***[] Second, the Supreme Court has warned that antitrust standing should not provide a "get-out-of-court-free card" to be played "any time that a damages calculation might be complicated." *Apple Inc. v. Pepper, 139 S. Ct. 1514, 1524, 203 L. Ed. 2d 802 (2019)*. Though of diminished weight, this factor nevertheless tips the scale slightly in favor of Defendants.

HN8[] Finally, the fourth *AGC* factor - "the **[**28]** importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other" - reflects a "strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits." *AGC, 459 U.S. at 543-44*. This case does not present the problem of upstream and downstream purchasers that is the usual focus of this factor. *See id.* After all, the third parties who sold the bonds — and *benefited* from the suppressed rate — would clearly not be in a position to enforce the antitrust laws. Although the ongoing government enforcement actions might pose some minimal risk of duplicative recoveries, *see* *Gelboim, 823 F.3d at 780*, we nevertheless view this fourth factor as favoring Schwab and the Bondholder Plaintiffs.

But, on the whole, the last three *AGC* factors ultimately bolster the finding that Schwab and the Bondholder Plaintiffs have **[*120]** failed to establish antitrust standing.[7]

2. Antitrust Standing for California Antitrust Claims

Schwab next challenges the district court's decision to apply the *AGC* antitrust standing factors to antitrust claims brought pursuant to California's Cartwright Act. Though state-law authority is sparse and federal cases interpreting the **[**29]** state's requirements are divided, *compare, e.g.*, *In re Am. Express Anti-Steering Rules Antitrust Litig., 433 F. Supp. 3d 395, 413-14 (E.D.N.Y. 2020)* (siding with courts applying the *AGC* factors to California's Cartwright Act), *with, e.g.*, *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig., 383 F. Supp. 3d 187, 258 (S.D.N.Y. 2019)* ("I cannot conclude . . . that the Supreme Court of California would apply the *AGC* factors in accordance with federal precedents. . . ."), we ultimately agree with the court below that California law substantially incorporates the *AGC* factors.

HN9[] In deciding matters of state law, we seek to "predict how the state's highest court would resolve the [issues] that we have identified." *Travelers Ins. Co. v. Carpenter, 411 F.3d 323, 329 (2d Cir. 2005)* (internal quotation marks omitted). Naturally, that means that we "give the fullest weight to pronouncements of the state's highest court," *id.* - but it also means that we look to the rulings of the state's lower courts as providing important data points for understanding state law, *see* *New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 210 (2d Cir. 2006)*.

To date, the California Supreme Court has not addressed the question before us; instead, the best data point for assessing California's antitrust standing analysis is a decision from a California intermediate appellate court, *Vinci v. Waste Mgmt., Inc., 36 Cal. App. 4th 1811, 43 Cal. Rptr. 2d 337, 338-39 (Cal. Ct. App. 1995)*, which expressly described the antitrust standing required under state law in terms of the *AGC* factors. *See also* *Wholesale Elec. Antitrust Cases I & II, 147 Cal. App. 4th 1293, 55 Cal. Rptr. 3d 253, 265 (Cal. Ct. App. 2007)* (quoting federal antitrust standing elements as deciding antitrust **[**30]** standing under California's Cartwright Act). The *Vinci* court looked to federal antitrust elements both because the Cartwright Act contains "similar language" to the federal antitrust statute interpreted in *AGC* and "[b]ecause the Cartwright Act has objectives identical to the federal antitrust acts." *Vinci, 43 Cal. Rptr. 2d at 338 & n.1*.

Schwab nonetheless contends that the California Supreme Court's more recent decision in *Aryeh v. Canon Business Solutions, Inc., 55 Cal. 4th 1185, 151 Cal. Rptr. 3d 827, 292 P.3d 871, 877 (Cal. 2013)*, casts doubt on *Vinci*. While it is true that *Aryeh* stated in dicta that "[i]nterpretations of federal ***antitrust law*** are at most instructive,

[7] Having resolved the antitrust-standing issue in favor of Defendants, we do not reach their alternative argument that Schwab and the Bondholder Plaintiffs have not pleaded an antitrust injury related to bonds purchased before the suppression period.

not conclusive, when construing the Cartwright Act," 292 P.3d at 877, Aryeh does not compel us to conclude that interpretations of federal and state antitrust standing law always diverge. Indeed, we recently held — on the strength of Aryeh's instructions alone — that "the California legislature, like Congress, was 'familiar with the common-law rule' of proximate cause" and did not intend "to displace it *sub silentio*" when it enacted the Cartwright Act. In re Am. Express, No. 20-1766, 2021 U.S. App. LEXIS 34626, at *24 (quoting Lexmark, 572 U.S. at 132). This conclusion is strengthened by Vinci, **[*121]** which remains the California case most directly on point. We therefore hold that Schwab also lacks antitrust standing to bring its state-law claims based on its purchasing of bonds from third parties.

B. Personal [31] Jurisdiction**

We next consider the district court's personal jurisdiction analysis. As noted above, the district court dismissed the federal and state antitrust claims filed by the Exchange-Based, OTC, and non-class Plaintiffs (including Schwab), after concluding that these Plaintiffs failed to sufficiently allege minimum contacts with the United States. Reviewing the district court's dismissal de novo, Chloe v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 163 (2d Cir. 2010), we conclude that the district court had specific personal jurisdiction under the conspiracy theory adopted in *Schwab*.

HN10[] To survive a motion to dismiss, "a plaintiff must make a prima facie showing that [personal] jurisdiction exists." Licci ex rel. Licci v. Lebanese Canadian Bank, SAL, 732 F.3d 161, 167 (2d Cir. 2013) (internal quotation marks omitted). While we read "the pleadings and any supporting materials in the light most favorable to the plaintiffs," *id.*, we also require that the plaintiffs make "legally sufficient allegations of jurisdiction, including an averment of facts that, if credited[,] would suffice to establish jurisdiction over the defendant," Penguin Grp. (USA) Inc. v. Am. Buddha, 609 F.3d 30, 35 (2d Cir. 2010) (alteration in original) (internal quotation marks omitted).

HN11[] Before a court may exercise personal jurisdiction over a defendant, three requirements must be met: (1) "the plaintiff's service of process upon the **[**32]** defendant must have been procedurally proper"; (2) "there must be a statutory basis for personal jurisdiction that renders such service of process effective"; and (3) "the exercise of personal jurisdiction must comport with constitutional due process principles." Waldman v. Palestine Liberation Org., 835 F.3d 317, 327-28 (2d Cir. 2016) (quoting Licci ex rel. Licci, 673 F.3d at 59-60).

Only the third requirement — compliance with due process — is contested here. ***HN12***[] As the Supreme Court has long held, due process demands that each defendant over whom a court exercises jurisdiction have some "minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Wahsington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (internal quotation marks omitted); *see also* Waldman, 835 F.3d at 330-31 (applying analysis to Fifth Amendment). Our inquiry narrows further, however, since the district court did not address traditional notions of fair play and substantial justice, and Defendants do not rely on that prong as an alternative basis for affirmance. We thus likewise limit our analysis to the assessment of Defendants' minimum contacts. *See* Schwab, 883 F.3d at 82.

The district court determined that the "relevant forum for the assessment of minimum contacts is the United States as a whole." LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *8. In reaching this conclusion, the district court cited its analysis **[**33]** in an earlier opinion, *id.*, in which the court had observed that some of Plaintiffs' claims "arise under federal statutes containing provisions authorizing nationwide service of process," LIBOR IV, 2015 U.S. Dist. LEXIS 147561, 2015 WL 6243526, at *23; *see* 15 U.S.C. § 22. There, the district court grounded its nation-based approach on the theory that "[w]hen the national sovereign is applying national law, the relevant contacts **[*122]** are the contacts between the defendant and the sovereign[] nation." LIBOR IV, 2015 U.S. Dist. LEXIS 147561, 2015 WL 6243526, at *23 (quoting In re Oil Spill by Amoco Cadiz, 954 F.2d 1279, 1294 (7th Cir. 1992)); *see also* Chew v. Dietrich, 143 F.3d 24, 28 n.4 (2d Cir. 1998). No party challenges the district court's conclusion that a nation-wide contacts analysis is appropriate here, and neither do we. *See* In re Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 207 (2d Cir. 2003) (assuming that district court correctly decided that the "minimum contacts analysis looks to a corporation's contacts with the United States as a whole," "given that the parties do not question it on appeal").

HN13[] When the claims "arise[] out of, or relate[] to, [a] defendant's contacts with the forum — i.e., specific jurisdiction is asserted — minimum contacts necessary to support such jurisdiction exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there." *Licci, 732 F.3d at 170* (internal quotation marks omitted and alterations adopted); *see also* ***[**34]*** *Bristol-Myers Squibb Co. v. Superior Ct. of California, 137 S. Ct. 1773, 1780, 198 L. Ed. 2d 395 (2017)*. The contacts must be created by the "defendant *[it]self*," *Walden v. Fiore, 571 U.S. 277, 284, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014)* (internal quotation marks omitted), rather than from the "unilateral activity of another party or a third person," *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)*. That said, "a defendant can 'purposefully avail itself of a forum'" through the action of a third party by "directing its agents or distributors to take action there." *Schwab, 883 F.3d at 84* (quoting *Daimler AG v. Bauman, 571 U.S. 117, 135 n.13, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014)*); *see also* *Walden, 571 U.S. at 286* ("[A] defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties.").

In *Schwab*, we held that a defendant can similarly avail itself of a forum through certain actions taken by a co-conspirator in the forum. *See* *Schwab, 883 F.3d at 86-87*. Much like an agent who operates on behalf of, and for the benefit of, its principal, a co-conspirator who undertakes action in furtherance of the conspiracy essentially operates on behalf of, and for the benefit of, each member of the conspiracy. *See* *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* ("In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit.").

HN14[] To assert a conspiracy theory of personal jurisdiction, a plaintiff must plausibly allege that "(1) a conspiracy existed; (2) the defendant **[**35]** participated in the conspiracy; and (3) a co-conspirator's overt acts in furtherance of the conspiracy had sufficient contacts with a [forum] to subject that co-conspirator to jurisdiction in that [forum]." *Schwab, 883 F.3d at 87*. Defendants argue that Plaintiffs cannot meet *Schwab's* third prong, and that, in addition to *Schwab's* test, conspiracy-based jurisdiction "requires a relationship of direction, control, and supervision before a co-conspirator's forum contacts may be imputed to absent defendants for jurisdictional purposes." Appellees' Jurisdiction Sur-reply at 5. We reject both arguments.

1. The Plaintiffs plausibly alleged overt conspiratorial acts in the forum.

Only *Schwab*'s third prong is at **[*123]** issue here.[8] When viewed in favor of the non-moving party, the pleadings and record evidence establish several overt, conspiratorial acts that are sufficient to subject each co-conspirator to personal jurisdiction in the United States. *See* *Licci, 732 F.3d at 167*; *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A., 722 F.3d 81, 85 (2d Cir. 2013)*.

Plaintiffs allege that Bank executives and managers in the United States mandated that their subordinates manipulate LIBOR. For starters, they allege that a "senior UBS manager in Stamford, Connecticut issued [a] standing directive **[**36]** to 'submit low LIBOR contributions' for USD LIBOR, and to keep submissions in the 'middle of the pack of other banks' expected LIBOR submissions.'" Confidential App'x at 3-4 (quoting UBS's admissions to the Department of Justice). Similarly, Plaintiffs rely on emails between a senior JPMorgan Chase executive in New York and the Banks' LIBOR submitter discussing the importance of staying in "the pack" and

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[8] Although Defendants state for the first time in their sur-reply that Plaintiffs failed to satisfy the first two *Schwab* factors, we consider this delayed argument to be forfeited. *See* *McBride v. BIC Consumer Prods. Mfg. Co., 583 F.3d 92, 96 (2d Cir. 2009)* ("[W]e ordinarily will not consider issues raised for the first time in a reply brief."); 16AA Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3974.2 (5th ed.) ("An appellee who fails to include and properly argue a contention in the appellee's brief takes the risk that the court will view the contention as forfeited."). Indeed, even after Plaintiffs' opening brief articulated essentially the same conspiracy-based jurisdictional test later adopted in *Schwab* and relied on *Gelboim* as "confirm[ing] that the first and second elements are met," Appellants' Jurisdiction Br. at 59, Defendants' 73-page response brief on personal jurisdiction did not hint at any disagreement on that score. Under these circumstances, no "manifest injustice" would result from following our ordinary course and declining to consider Defendants' belated argument. *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 428 (2d Cir. 2005)*.

asking the submitter to "err on the low side" when setting LIBOR. *Id.* at 3, 30, 139. They also quote an email in which a U.S.-based employee of Citibank urged the Bank's LIBOR submitter that "we should take a leadership [role] in bringing these LIBORS back to more sensible levels," "[e]xactly as we did 3-4 months back"; the Bank's LIBOR submissions then decreased. *Id.* at 34-35. Finally, Plaintiffs assert that a Barclays' executive "who was based in New York . . . has admitted that he instructed subordinates to submit artificially low USD LIBOR rates." *Id.* at 343.

If true, these communications would establish overt acts taken by co-conspirator Banks in the United States in furtherance of the suppression conspiracy, vesting the district court with personal jurisdiction over each Defendant. **[**37]** *See Schwab, 883 F.3d at 87*; *cf. United States v. Kirk Tang Yuk, 885 F.3d 57, 74 (2d Cir. 2018)* (holding that a phone call to advance a conspiracy made venue proper in the district where the call originated); *Textor v. Bd. of Regents of N. Illinois Univ., 711 F.2d 1387, 1393 (7th Cir. 1983)* (finding conspiracy-based personal jurisdiction where a party allegedly discriminated in the forum "[i]n furtherance of, and in accordance with, th[e] conspiracy").[9]

The district court, however, was not convinced because it found each allegation to be "easily discounted, especially in light of **[*124]** the moving [D]efendants' declarations stating that they did not determine or transmit their LIBOR submissions from the United States." *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *11*. But this is not the stage in the litigation to decide competing factual assertions; "in the absence of an evidentiary hearing, it was error for the district court to resolve that factual dispute in [Defendants'] favor." *Dorchester, 722 F.3d at 86*.

Defendants nonetheless argue that Plaintiffs' allegations cannot survive scrutiny. Attacking the allegations concerning the UBS-related LIBOR bids, they contend that the document on which Plaintiffs rely (a non-prosecution agreement with the Department of Justice) actually "contradicts" Plaintiffs' assertion that the UBS manager in Stamford, Connecticut directed subordinates to manipulate the inter-bank rate. Appellee's **[**38]** Jurisdiction Br. at 43. To be sure, the non-prosecution agreement mentions suppression-related emails from a UBS manager "in Zurich," but the agreement further states that the Zurich manager "in turn indicated that the direction came from the Stamford-based Group Treasury senior manager." App'x at 3399, 3408. And while Defendants would discount these statements as "apparently not based on . . . personal knowledge," Appellee's Jurisdiction Br. at 43, we are not at liberty to draw that inference against Plaintiffs at this stage of the litigation. *See Dorchester, 722 F.3d at 85-86*.

Defendants similarly challenge the characterizations of other alleged conspiratorial acts. For instance, Defendants would disregard allegations of the U.S.-based requests from upper management at JPMorgan Chase, dismissing those communications as "executives" merely "express[ing] opinions about [LIBOR] submissions." Appellee's Jurisdiction Br. at 44. Once again, this strained reading is clearly incompatible with our obligation to interpret the record in the light most favorable to Plaintiffs. *See Dorchester, 722 F.3d at 85-86*. In the end, Plaintiffs have alleged overt acts taken in the United States to advance the suppression conspiracy; at this stage of the litigation, **[**39]** that is enough to establish personal jurisdiction. *See Schwab, 883 F.3d at 87*.

2. Conspiracy jurisdiction does not require allegations of control.

Defendants next argue that in addition to meeting *Schwab*'s three elements, Plaintiffs must also demonstrate that Defendants directed, controlled, and/or supervised the co-conspirator who carried out the overt acts in the forum. Although Defendants base their argument on our decision in *Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972)*, *abrogated on other grounds by Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010)*, neither that case nor due process principles require more than that a defendant purposefully availed itself of the forum through the overt acts of its co-conspirator.

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[9] In light of this conclusion, we do not address whether other alleged acts, including that the BBA sent a representative to the United States to assure investors that LIBOR was sound and that LIBOR submissions were transmitted to Thomson Reuters in New York, also amount to overt conspiratorial acts in the forum.

In adopting "the appropriate test for alleging a conspiracy theory of jurisdiction," *Schwab* noticeably did not endorse Defendant's argument, even though Defendants advanced the same point there. *Compare* Schwab, 883 F.3d at 86-87, *with* Brief for Defendants-Appellees, Schwab, 883 F.3d 68, 2017 WL 395989, at *30-35. Our silence was not due to oversight — indeed, elsewhere in *Schwab* we discussed the very portions of Leasco on which Defendants now rely. *See* Schwab, 883 F.3d at 85. Leasco, however, did not demand a relationship of control before one defendant's minimum contacts are imputed to its co-conspirator. It held instead that "the mere presence of one conspirator" would **[*125]** not be enough to "confer personal jurisdiction **[**40]** over another alleged conspirator," and that actions taken by a lawyer in the forum could not be attributed to a partner at the law firm merely on the basis of the partnership. Leasco, 468 F.2d at 1343. True, we went on to state in dicta that the "matter could be viewed differently" if the partner had delegated the in-forum tasks, meaning that delegation and control can be important indicia of purposeful availment through a third party. *Id.* But that observation in no way amounts to a holding that a defendant *must* control a co-conspirator before its purposeful availment is imputed to the defendant; rather, *Schwab* provides "the appropriate test for alleging a conspiracy theory of jurisdiction." 883 F.3d at 87.

Moreover, although we conclude that our caselaw does not require a relationship of control, direction, or supervision, we should also underscore that *Schwab*'s three-prong test *serves* the purposeful availment requirement, rather than supplants it. *See id.* (fashioning the test to avoid "inconsisten[cies] with the 'purposeful availment' requirement"). ***HN15***[] To that end, the conspiracy theory could not get off the ground if a defendant were altogether blindsided by its co-conspirator's contacts with the forum; the conspiratorial **[**41]** contacts must be of the sort that a defendant "should reasonably anticipate being haled into court" in the forum as a result of them. *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)*; *see also* Schwab, 883 F.3d at 82 ("[The] minimum contacts necessary to support such jurisdiction exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there.").

Defendants, of course, do not dispute that the overt acts were foreseeable to them. The alleged conspiracy involved the manipulation of U.S.-Dollar LIBOR with co-conspirators who were based in the United States. With this backdrop, the alleged overt acts taken by co-conspirators in the United States to advance the conspiracy should certainly have been anticipated by Defendants, and that is enough to make out a prima facie case that each Defendant has the requisite minimum contacts with the nation.[10] *See* Schwab, 883 F.3d at 87.

III. Conclusion

For the foregoing reasons, we **AFFIRM** the judgment of the district court dismissing the Bondholder Plaintiffs' complaint, as well as dismissing Schwab's federal and state antitrust claims to the extent that they depend on its purchases of LIBOR-related bonds from third parties. But since we hold that Defendants **[**42]** had the relevant minimum contacts with the United States to satisfy due process, we **REVERSE** the judgment in part, and **REMAND** for further proceedings.

APPENDIX A

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[10] Having resolved the specific personal jurisdiction issue in favor of the Plaintiffs, we do not reach Plaintiffs' alternative arguments that Defendants established minimum contacts with the United States by (1) selling trillions of dollars of LIBOR-based instruments in the United States, Appellants' Jurisdiction Br. at 40-42; (2) exploiting U.S. markets for USD-LIBOR-based financial products, *id.* at 42-44; and (3) targeting the United States with their price-fixing conspiracy, *id.* at 42-46.

Liquid Assets Fund, Schwab Money Market Fund, Schwab Value Advantage Money Fund, Schwab Retirement Advantage Money Fund, Schwab Investor Money Fund, Schwab Cash Reserves, Schwab Advisor Cash Reserves, Charles Schwab Bank, N.A., Charles Schwab & Co., Inc., Schwab YieldPlus Fund, Schwab YieldPlus Fund Liquidation Trust, and The Charles Schwab Corporation.

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Josephs v. Marzan

United States District Court for the District of Minnesota

January 5, 2022, Decided; January 5, 2022, Filed

Civil No. 21-0749 (JRT/DTS)

Reporter
2022 U.S. Dist. LEXIS 2035 *; 2022 WL 45041

MICHALEEN JOSEPHS, Plaintiff, v. ALBERTO JOSE MARZAN and PRESS MEDIA GROUP, INC. d/b/a VumaTV, Defendants.

Core Terms

equitable relief, damages, entity, costs, enterprise, expenses, private plaintiff, restraining order, attorney's fees, alleges, monetary damages, treble damages, legislative history, courts, uncontested, equitable remedy, documentation, violations, cases, wire, abuse of process, promissory note, investors, remedies, Default, redress, motion for default, default judgment, interim relief, gap

Counsel: **[*1]** Caitlinrose H. Fisher and Matthew D. Forsgren, FORSGREN FISHER MCCALMONT DEMAREA TYSVER LLP, Minneapolis, MN, for plaintiff.

Alberto Jose Marzan, defendant, Pro se.

Press Media Group, Inc., defendant, Pro se.

Judges: JOHN R. TUNHEIM, Chief United States District Judge.

Opinion by: JOHN R. TUNHEIM

Opinion

MEMORANDUM OPINION AND ORDER GRANTING DEFAULT JUDGMENT

Plaintiff Michaleen Josephs brought this action against Defendants Alberto Jose Marzan and Press Media Group, Inc. ("PMG") in connection with a series of investment loans Josephs made to the Defendants and other payments Josephs made for Defendants' benefit. Josephs filed a Motion for Default Judgment against both defendants requesting monetary damages and equitable relief. The Court will grant the Motion for Default Judgment and will award damages and equitable relief.

BACKGROUND

On March 22, 2021, Josephs filed a Complaint against both Defendants. (Compl., Mar. 22, 2021, Docket No. 1.) The Complaint alleges that Marzan induced Josephs to loan money to and invest in PMG and pay other expenses for Marzan and PMG conditioned on a series of promises that she would be paid back. (*Id.* ¶¶ 45-58, 60-93, 101-19.) Josephs and PMG entered into two written promissory notes **[*2]** guaranteeing repayment of $150,000 that Josephs wired PMG as a loan and of $47,000 in expenses Josephs had paid for PMG's benefit. (*Id.* ¶¶ 88-91;

Compl., Exs. A—B.) Marzan also personally guaranteed these notes in a written contract that also allowed Josephs to recover attorney fees and costs associated with enforcing payment. (Compl. ¶¶ 92-93; Compl., Ex. C.) Josephs also allowed Defendants to use her credit cards, wired money to them, and paid other expenses for their benefit. (Compl. ¶¶ 72-76, 80-83, 106, 108.)

The Complaint alleges that instead of a legitimate investment Marzan and PMG defrauded Josephs. (*See, e.g., id.* ¶¶ 3-8, 44-57, 68-71, 146-157.) For example, Josephs wired PMG a $150,000 loan—later secured by a promissory note—after Marzan represented to her that PMG had secured $2.5 million in funding from other investors and had never taken on debt. (*Id.* ¶¶ 48-49, 51, 56-58.) These representations were false. (*Id.* ¶¶ 50, 52-54.) In furtherance of this fraud, Marzan caused the use of both interstate wires and mail. (*E.g.*, *id.* ¶¶ 147-48.)

The Complaint further alleges that Marzan has a history of engaging in various fraudulent schemes beginning at least by 2013. (*Id.* ¶¶ 31-37.) **[*3]** This includes insurance fraud, another investment-related fraud, and defrauding Josephs and other victims in connection with the scheme alleged in this case. (*Id.* ¶¶ 7, 32, 36, 71, 146.)

In addition to the debts owed to Josephs, the Complaint alleges that Marzan and PMG have a series of unpaid debts, default judgments, and court-ordered restitution awards. (*Id.* ¶¶ 41, 121-23.) According to the Complaint, Marzan has avoided criminal penalties on two occasions on the condition of repaying victims but has failed to fully do so in one case and only repaid another defrauded investor when criminal prosecution resumed after Marzan failed his payment obligations. (*Id.* ¶¶ 32-41.) Outside the Complaint, Josephs documented 8 default judgments from 2014 to 2020 against Marzan, PMG, and another company associated with Marzan. (Decl. of Matthew Forsgren ("1st Forsgren Decl."), Exs. C—J, Aug. 19, 2021, Docket No. 13.)[1]

Marzan has created a new company: Jupiter Rising Film. (Compl. ¶ 137.) The Complaint alleges that Marzan and Jupiter Rising Film seek funding without disclosing Marzan's history of fraud. (*Id.* ¶¶ 139-40.)

Josephs alleges that Marzan sought and received a temporary harassment restraining **[*4]** order against Josephs to prevent her from seeking repayment of the money Josephs was owed. (*Id.* ¶¶ 134-35.) Josephs moved to quash the restraining order and the parties engaged in two discovery conferences and an evidentiary hearing with witnesses that resulted in the Minnesota state district court vacating the restraining order. (1st Forsgren Decl. ¶ 23, Ex. O.) Until the restraining order was lifted, Josephs was unable to seek recovery of the various debts she was owed. (Compl. ¶¶ 6, 134.)

The damages alleged in the Complaint as demonstrated by supporting documentation Josephs filed with the Court show that Josephs loaned PMG or paid for expenses on behalf of PMG totaling $266,233.36 from the written and oral contracts Josephs made with the Defendants over the course of the scheme. Josephs provided a $150,000 loan and paid $47,000 in expenses that were later guaranteed by two promissory notes entered into on January 16, 2020 at 8% interest, compounded annually with a December 13, 2020 maturity date. (*Id.* ¶¶ 87-90; Compl., Exs. A—B, Mar. 22, 2021, Docket No. 1-1.) She made wire transfers and Western Union transfers totaling $20,600. (Compl. ¶ 129; Decl. of Michaleen Josephs ("Josephs **[*5]** Decl.") ¶¶ 9-13, Ex. C at 2-10, Nov. 1, 2021, Docket No. 20; *see also* Josephs Decl., Ex. B at 2, Exs. D—E.) PMG and Marzan used her credit cards to charge a total of $46,097.02 in expenses. (2nd Mem. Supp. Mot. Default J. at 14-15, Nov. 1, 2021, Docket No. 18; Josephs Decl. ¶¶ 15-18, Ex. B at 2-3, Ex. F.)[2] Josephs also incurred $2,536.34 in miscellaneous expenses for PMG and Marzan. (Josephs Decl. ¶¶ 19-25, Ex. B at 3, Exs. G—H.) Josephs has not been repaid any of these loans or expenses. (Compl. ¶¶ 129-31.)

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[1] The Court may take judicial notice of these public judicial opinions and records. *Fed. R. Evid. 201*; *Stutzka v. McCarville, 420 F.3d 757, 760 n.2 (8th Cir. 2005)*.

[2] Paragraph 17 of the affidavit Josephs filed in support of her damages indicates that the Defendants are liable for $5,128.43 in 2019 credit card expenses not reflected in the $47,000 promissory note. (Josephs Decl. ¶ 17.) As Exhibit B shows $5,128.45 and all calculations based on these expenses in Josephs's filings arrive at a sum using $5,128.45, the Court will use $5,128.45 for these expenses.

In addition to these loans and expenses PMG and Marzan induced Josephs to pay as investment and business expenses, the Complaint alleges that Marzan sought her help securing, paying for, and furnishing an apartment for his personal use conditioned on an agreement that he would pay Josephs back. (Compl. ¶¶ 61, 109-10, 119.) Marzan never paid for the apartment and took the furniture without paying Josephs for it. (*Id.* ¶¶ 109, 119, 127-28.) Supporting documentation shows that Josephs paid $25,155.00 in rent, a $3,000 security deposit which she did not recover, and $17,937.19 furnishing the apartment for a total of $46,092.19. (Josephs Decl. ¶¶ 27-28, Exs. B, I—J, M.)

Finally, Josephs **[*6]** has also incurred significant attorney fees and costs seeking to recover in this case as well as opposing the harassment restraining order. (Mem. Supp. Mot. Default J. at 41, Aug. 19, 2021, Docket No. 12; 2nd. Decl. of Matthew Forsgren ("2nd Forsgren Decl.") ¶¶ 8-13, Nov. 1, 2021, Docket No. 19.) Josephs incurred $125,442.60 in attorney fees and costs opposing the restraining order and $58,284.50 through October 2021 in attorney fees and costs in this lawsuit.[3] (2nd Forsgren Decl. ¶¶ 10, 13, Exs. 1-3.)

Both Defendants were served on April 15, 2021. (Summons, May 19, 2021, Docket No. 4.) Neither Defendant made an appearance, answered, or filed any motion in the case. The clerk entered default against both Defendants on May 27, 2021. (Entry of Default, May 27, 2021, Docket No. 8.); *see also* *Fed. R. Civ. P. 55(a)*. On August 19, 2021, Josephs filed a Motion for Default Judgment against both Defendants. (Mot. Default J., Aug. 19, 2021, Docket No. 10.). At the Motion Hearing on October 14, 2021, the Court ordered additional documentation of the requested monetary damages and briefing on the requested equitable relief. (Min. Entry, Oct. 14, 2021, Docket No. 17.) Josephs submitted this documentation and briefing **[*7]** on November 1, 2021. (2nd Mem. Supp. Mot. Default J.; 2nd Forsgren Decl.; Josephs Decl.)

DISCUSSION

I. CAUSES OF ACTION

"Upon default, the factual allegations of a complaint (except those relating to the amount of damages) are taken as true, but it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law." *Murray v. Lene, 595 F.3d 868, 871 (8th Cir. 2010)* (quotation omitted). The Court concludes that the Complaint has properly alleged facts sufficient to support a viable cause of action on each claim.

Count I asserts a Racketeering Influenced and Corrupt Organizations ("RICO") Act claim against Marzan under *18 U.S.C. §§ 1962(c)*, *1964*. A RICO claim must have four elements: (1) an enterprise (2) engaged in racketeering activity (3) forming a pattern of such activity and (4) conduct of the defendant in support of the enterprise. *Crest Const. II, Inc. v. Doe, 660 F.3d 346, 353 (8th Cir. 2011)*.

"Three elements must be proven to show that a RICO enterprise existed: (1) a common purpose that animates the individuals associated with it; (2) an ongoing organization with members who function as a continuing unit; and (3) an ascertainable structure distinct from the conduct of a pattern of racketeering." *United States v. Lee, 374 F.3d 637, 647 (8th Cir. 2004)*. The facts in **[*8]** the Complaint demonstrate a common purpose among Marzan and various entities including PMG of enriching Marzan and paying his personal expenses rather creating actual investment opportunities and legitimate businesses. The undisputed facts also demonstrate there is an ongoing

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[3] In her supplemental brief and in the supporting affidavit from Matthew Forsgren, Josephs asserts that she has incurred $58,584.50 in fees and costs prosecuting this case through October 31, 2021. (2nd Mem. Supp. Mot. Default J at 15; 2nd Forsgren Decl. ¶ 13.) The sum of the fees and expenses documented in Exhibit 3 of the Forsgren affidavit is $51,975.50. (2nd Forsgren Decl. Ex. 3.) When added to the $6,309 in fees and expenses incurred in October 2021 (*Id.* ¶ 12), the documentation shows that Josephs has incurred $58,284.50 in fees and expenses. Therefore, the Court will use the $58,284.50 amount substantiated in the record.

organization with Marzan and various corporate entities functioning for this common purpose. Finally, they show that the structure is sufficiently distinct from the conduct and from Marzan. The entities are distinct from the conduct because they would still exist as businesses even if "the slate were wiped clean of the underlying racketeering activity." *See* Handeen v. Lemaire, 112 F.3d 1339, 1352 (8th Cir. 1997). And the enterprise is sufficiently distinct from Marzan because he is distinct from PMG, a corporate entity with its own legal status and rights. *See* Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163-65, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001). Therefore, Josephs adequately establishes the existence of a RICO enterprise to satisfy this element.

Racketeering activity is defined to include a long list of federal and state offenses including mail and wire fraud. 18 U.S.C. § 1961(1); United States v. Haynie, 8 F.4th 801, 804 (8th Cir. 2021). The Complaint alleges that Marzan's RICO enterprise knowingly intended to defraud Josephs and others to obtain money and property for Marzan's enrichment using mail and wire communications **[*9]** in interstate commerce in violation of 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 1343 (wire fraud). The Complaint sufficiently establishes the enterprise has engaged in racketeering activity.

The RICO pattern element requires "two or more related acts of racketeering activity that amount to or pose a threat of continued criminal activity. To satisfy [this] element, therefore, a plaintiff must provide evidence of multiple predicate acts occurring over a substantial period of time." Crest Const. II, 660 F.3d at 356 (quotations omitted). The Complaint alleges a pattern of fraud including at least (1) insurance fraud in 2013; (2) a similar investment-related fraud targeting another individual in 2014; and (3) multiple acts of fraud targeting Josephs beginning in July 2019. The Complaint, therefore, alleges the pattern of racketeering activity RICO element.

Finally, the conduct element refers to an individual's conduct within the RICO enterprise. Handeen, 112 F.3d at 1347. Hence, the conduct element "authorize[s] recovery only against individuals who participate in the operation or management of the enterprise itself." *Id.* (quotation omitted). The Complaint alleges that Marzan was involved in operating the various entities including PMG set up for the enterprise to defraud **[*10]** people including Josephs. Therefore, the Complaint meets this element. With all four RICO elements met, the Court concludes that the uncontested facts of the Complaint adequately establish a viable RICO Act claim against Marzan.

Count II asserts a fraudulent representation claim against both Defendants. Under Minnesota law, the elements of this claim are (1) a false representation of a past or existing material fact; (2) made with knowledge of its falsity or without knowledge of whether it was true or false; (3) with the intent to induce reliance; (4) actual reliance; and (5) damages as a result of the reliance. Hoyt Props., Inc. v. Prod. Res. Grp., LLC, 736 N.W.2d 313, 318 (Minn. 2007). The Complaint alleges (1) Marzan, on behalf of himself and on behalf of PMG while acting within the scope of his authority, made several false representations (2) Marzan and PMG knew to be false (3) with the intent to induce Josephs to loan PMG money and pay expenses for the Defendants in reliance on those false representations and that (4) Josephs actually relied on those representations and wired money to and paid expenses for the Defendants (5) that she has not been repaid as promised—damages as a result of her reliance. Therefore, the Court concludes that that the uncontested **[*11]** facts of the Complaint adequately establish a viable fraudulent misrepresentation claim against both Defendants.

Count III asserts a breach of contract claim against both Defendants. Under Minnesota law, the elements of this claim are (1) formation of a contract; (2) performance by the plaintiff of any condition precedent to the defendant's performance; and (3) breach of the contract by the defendant. Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co., 848 N.W.2d 539, 543 (Minn. 2014). The Complaint alleges that Josephs entered into multiple written and oral contracts with the Defendants. Josephs provided the Court with the signed, written contracts for two promissory notes with PMG and Marzan's signed personal guaranty of those contracts. She also provided the Court a detailed accounting of the loans and payments she made based on these contracts. Neither Defendant has paid Josephs any amount despite their contractual obligations. Therefore, the Court concludes that that the uncontested facts of the Complaint adequately establish a viable breach of contract claim.[4]

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[4] The Complaint also alleges a promissory estoppel claim (Count IV) in the alternative to the breach of contract claim. Because the Court concludes that the Complaint satisfies the requirements for breach of contract and the damages Josephs suffered

Count V asserts an abuse of process claim against Marzan. Under Minnesota law, the elements of this claim are "the existence of an ulterior purpose and the act of using the process to accomplish a result **[*12]** not within the scope of the proceedings in which it was issued, whether such result might otherwise be lawfully obtained or not." *Kellar v. VonHoltum, 568 N.W.2d 186, 192 (Minn. Ct. App. 1997)* (citing *Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780, 786 (Minn. 1947)*); *accord* *Strei v. Blaine, 996 F. Supp. 2d 763, 793 (D. Minn. 2014)*. The ulterior purpose must be something other than "the very purpose for which [the process] is intended." *Strei, 996 F. Supp. 2d at 794*. The plaintiff must also suffer an injury to the plaintiff's person or property that is more than an indirect injury to the plaintiff's business or "good name." *Hoppe, 28 N.W.2d at 787*. The Complaint alleges that Marzan sought a harassment restraining order for the purpose of and then used it to prevent Josephs from recovering money she was lawfully entitled to—something that is outside the purpose and scope of a Minnesota harassment restraining order. *See* *Minn. Stat. § 609.748*; *Welsh v. Johnson, 508 N.W.2d 212, 214 (Minn. Ct. App. 1993)*. As a result, she was unable to seek recovery of debts owed and had to incur significant costs vacating the restraining order so that she could continue seeking repayment, a direct injury to her property. *See* *Hoppe, 28 N.W.2d at 787*. Therefore, the Court concludes that that the uncontested facts of the Complaint adequately establish a viable abuse of process claim.

II. MONETARY DAMAGES

Once the Court determines that it is appropriate to grant default judgment, the Court must still determine the proper relief to grant. Even **[*13]** if the defendant's liability is established through a default judgment, the plaintiff must prove actual damages to "a reasonable degree of certainty." *Everyday Learning Corp. v. Larson, 242 F.3d 815, 819 (8th Cir. 2001)*; *see also* *Murray, 595 F.3d at 871*. The Court need not hold an evidentiary hearing on damages if the damages are "readily discernable on the basis of undisputed evidence in the record." *Cutcliff v. Reuter, 791 F.3d 875, 883 (8th Cir. 2015)*.

Because the uncontested Complaint has established viable claims, the Court must decide the proper relief to grant. Josephs requests (1) monetary damages against both Defendants for her actual losses, (2) treble damages against Marzan for any damages tied to the RICO claim, and (3) equitable relief against Marzan under the RICO Act. Because the record now substantiates these damages, the Court will award Josephs monetary damages against both PMG and Marzan.

The Court will not conduct an evidentiary hearing on the damages because they are readily discernable from the affidavits and documentary evidence now on the record. *See* *Cutcliff, 791 F.3d at 883*; *see also* *Quality Carriers, Inc. v. Randolph, No. 06-1170, 2007 U.S. Dist. LEXIS 49479, 2007 WL 2027281, at *1 (N.D.N.Y. July 9, 2007)* ("[T]he court may rely on detailed affidavits and documentary evidence to fix damages after a default judgment has been entered.")

A. Business Loan Related Damages

With the additional documentation, Josephs has adequately substantiated the requested **[*14]** monetary damages related to her investment in PMG, including RICO treble damages against Marzan. The record shows that PMG entered into two promissory notes—one for $150,000 and one for $47,000—with Josephs on January 16, 2020 with a maturity date of December 13, 2020. Interest accrues on these promissory notes at a rate of 8% per annum, compounded annually. Marzan also personally guaranteed these notes. Josephs has also substantiated the other business-related damages. The record shows that she transferred a total of $20,600 through wire transfers and Western Union transfers. It also substantiates that Josephs incurred $46,097.02 in credit card expenses and $2,536.34 in miscellaneous expenses on behalf of Defendants. The uncontested facts in the Complaint establish that neither Defendant has repaid any amount. Therefore, the Court will award Josephs $266,233.36 in damages,

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under the promissory estoppel claim are identical to those as the breach of contract claim, the promissory estoppel claim is moot as an alternative theory of recovery.

plus interest on the promissory notes, for Counts II and III from PMG and Marzan, jointly and severally. Because these damages are included in the RICO claim, Josephs is also entitled to treble damages from Marzan on these damages for Count I. *See* *18 U.S.C. § 1964(c)*. The Court will award Josephs $532,466.72, plus treble damages interest **[*15]** on the promissory notes, against Marzan alone.

B. Apartment Related Damages and Attorney Fees and Costs

In addition to the business-related damages for which both Defendants are liable, Marzan alone is individually liable for certain damages.

The uncontested facts in the Complaint demonstrate that Josephs rented and furnished an apartment for Marzan's personal use conditioned on an agreement to repay Josephs. Because nothing indicates—and Josephs does not allege—that PMG is responsible for these costs, Marzan is solely liable for these expenses and these expenses are not related to the RICO enterprise therefore treble damages are not available. The record shows that Josephs incurred apartment and furniture-related expenses in the amount of $46.092.19. The uncontested facts in the Complaint establish that Marzan has not repaid any amount related to these expenses. Therefore, the Court will award Josephs an additional $46,092.19 for Counts II and III against Marzan alone.

C. Attorney Fees and Costs

Josephs also seeks recovery from Marzan alone of the attorney fees and costs she has incurred both in prosecuting this action and in responding to the restraining order. Because Josephs has demonstrated **[*16]** that she is legally entitled to the fees and costs and the expenses are reasonable, the Court will also award these damages against Marzan.[5]

Josephs may recover the costs of this case under two theories. First, RICO includes a fee shifting provision allowing private plaintiffs that successfully bring a civil RICO case to recover "the cost of the suit, including a reasonable attorney's fee" from the defendant. *18 U.S.C. § 1964(c)*. Because the Complaint sufficiently establishes a civil RICO claim against Marzan, Josephs is entitled to the cost of her suit. Second, under Minnesota law, attorney fees are recoverable in a civil action if permitted by a specific contract. *Roach v. Cnty. of Becker, 962 N.W.2d 313, 322-23 (Minn. 2021)*. The guaranty Marzan signed securing the two promissory notes also permitted Josephs to recover her costs and expenses including attorney fees as permitted under Minnesota law in an action to enforce the guaranty. Therefore, the Court will award Josephs her costs including reasonable attorney fees in prosecuting this case.

Josephs may also recover her costs responding to the harassment restraining order under the abuse of process claim. The Minnesota Supreme Court has directed courts to look at a variety of sources to determine the damages **[*17]** available to plaintiffs in abuse of process cases. *Hoppe, 28 N.W.2d at 787 n.2*. Under these sources, plaintiffs may recover their "pecuniary loss" caused by the abuse of process. Restatement (First) of Torts § 682. Here, Josephs's pecuniary loss was the costs she incurred vacating the restraining order so that she could continue seeking repayment of the debts she was owed. Minnesota courts have found awarding attorney fees and costs to plaintiffs appropriate in abuse of process cases. *See, e.g.,* *Winnick v. Chisago Cnty. Bd. of Comm'rs, 389 N.W.2d 546, 549 (Minn. Ct. App. 1986)*; *Dollar Travel Agency, Inc. v. Nw. Airlines, Inc., 354 N.W.2d 880, 883 (Minn. Ct. App. 1984)*. Therefore, the Court will award Josephs her costs including reasonable attorney fees in responding to the restraining order.

[5] Josephs does not seek to recover costs and attorneys from PMG because PMG is not included in the RICO or abuse of process claims and, unlike Marzan's personal guaranty, the promissory notes did not include a provision allowing Josephs to recover expenses incurred enforcing the notes. Therefore, these damages are not awarded against PMG.

Josephs has provided an affidavit and documentation demonstrating the costs and fees she has incurred both in connection with this case and responding to the restraining order for the abuse of process claim. (Forsgren Decl. ¶¶ 3-12, Exs. 1-3.) This filing includes names, credentials, hours spent, descriptions of the activities, and a breakdown of the costs incurred. (*Id.*) This documentation is sufficient to support the reasonableness of the costs and fees. *See* *United HealthCare Corp. v. Am. Trade Ins. Co., 88 F.3d 563, 575 (8th Cir. 1996)*; *FMC Corp. v. Varonos, 892 F.2d 1308, 1317 (7th Cir. 1990)*. The hourly rates are consistent with common rates in the relevant market and the hours expended are reasonable to the issues raised, types of claims involved, and **[*18]** successful results both in this case and in responding to the restraining order. RICO claims are complex and difficult cases that require expertise and specificity that can increase costs. Considering these circumstances and the documentation provided, the $58,284.50 Josephs has incurred in this case is reasonable. While expending $125,442.60 responding to a restraining order may seem unreasonable at first glance, lifting the order entailed an evidentiary hearing involving multiple witnesses and discovery disputes including two discovery conferences. Under these circumstances and as documented, these costs appear to be reasonable. Therefore, the Court will award Josephs $58,284.50 for Counts I and III and $125,442.60 for Count V in reasonable attorney fees and costs against Marzan alone.

III. EQUITABLE RELIEF

In addition to monetary damages, Josephs seeks prospective equitable relief pursuant to *18 U.S.C. § 1964(a)*. Josephs requests that the Court (1) order Marzan to divest himself of any interest in PMG and Jupiter Rising Film; (2) prohibit Marzan from launching any future start-ups; and (3) require Marzan to disclose his history of criminal fraud, a copy of the Complaint in this case, the Motion for **[*19]** Default Judgment, and this Order to investors, potential business partners, and potential employees or contractors of any entity or business in which Marzan is involved. (Compl. at 23; Mem. Supp. Mot. Default J. at 29.) Because RICO allows private plaintiffs to obtain equitable relief, Josephs has standing to receive the relief she seeks, and granting equitable relief here will serve the purposes of RICO's equitable relief and private plaintiff provisions, the Court will grant equitable relief and impose various restrictions on Marzan to dismantle the RICO enterprise.

A. Availability of Equitable Relief to Private Plaintiffs

The Court must first determine whether equitable relief is available to private RICO plaintiffs like Josephs as a court cannot award relief it lacks the power to award to a particular plaintiff. The circuit courts who have addressed whether equitable relief is available to private plaintiffs are split. *Compare* *Chevron Corp. v. Donziger, 833 F.3d 74, 137 (2d Cir. 2016)* (holding that equitable relief is available to private plaintiffs); *Nat'l Org. For Women, Inc. v. Scheidler, 267 F.3d 687, 695 (7th Cir. 2001)*, *rev'd on other grounds*, *537 U.S. 393, 123 S. Ct. 1057, 154 L. Ed. 2d 991 (2003)* (same), *with* *Hengle v. Treppa, 19 F.4th 324, 356, 2021 U.S. App. LEXIS 33964 (4th Cir. 2021)* (holding that equitable relief is not available to private plaintiffs); *Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1088 (9th Cir. 1986)* (same).[6] The Supreme Court has not answered this question. *RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 354 n.13, 136 S. Ct. 2090, 195 L. Ed. 2d 476 (2016)* ("This Court has **[*20]** never decided whether equitable relief is available to private RICO plaintiffs . . . and we express no opinion on the issue today."). The

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[6] Other circuits have addressed but left unresolved whether equitable relief is available to private plaintiffs again. The First and Third Circuits have noted the split but expressed no opinion on the issue. See *Lincoln House, Inc. v. Dupre, 903 F.2d 845, 848 (1st Cir. 1990)*; *Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1355 (3d Cir. 1989)*. The Fourth and Fifth Circuits have expressed doubt that equitable relief is available to private plaintiffs. *See* *Johnson v. Collins Ent. Co., 199 F.3d 710, 726 (4th Cir. 1999)*; *In re Fredeman Litig., 843 F.2d 821, 829-30 (5th Cir. 1988)*

Eighth Circuit has also not answered this question. *Bennett v. Berg, 685 F.2d 1053, 1064 (8th Cir. 1982)* (declining to decide whether equitable remedies are available to private RICO plaintiffs).[7]

A civil cause of action for RICO violations is created in *18 U.S.C. § 1964* which also describes the civil remedies available. "[A]s with any question of statutory interpretation, the court begins its analysis with the plain language of the statute." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Supervalu, Inc., 651 F.3d 857, 862 (8th Cir. 2011)*

The relevant part of RICO's civil remedies section provides:

> (a) **The district courts of the United States shall have jurisdiction to prevent and restrain violations of *section 1962*** of this chapter **by issuing appropriate orders**, including, but not limited to: **ordering any person to divest himself of any interest**, direct or indirect, in any enterprise; **imposing reasonable restrictions on the future activities** or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or **ordering dissolution or reorganization of any enterprise**, making **[*21]** due provision for the rights of innocent persons.
>
> (b) **The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions**, or take such other actions . . . as it shall deem proper.
>
> (c) **Any person injured in his business or property by reason of a violation of *section 1962* of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee** . . . .

18 U.S.C. § 1964 (emphasis added)

Subsection (a) gives district courts the power to issue injunctive relief to prevent and restrain activities that are unlawful under *18 U.S.C. § 1962* in civil RICO cases. Crucially, it does not limit who may obtain such relief or in whose favor courts may exercise this grant of power. Therefore, absent language elsewhere in the statute limiting who may obtain this relief, the most natural reading of *subsection (a)* is that the injunctive relief the subsection authorizes is available to all civil RICO plaintiffs.

Subsections (b) and *(c)* specifically authorize two types of civil RICO plaintiffs: the United States and "any person injured in his business or property by" a **[*22]** RICO violation.

Subsections (b) and *(c)* also authorize additional types of relief and place limits on who is authorized to obtain these additional types of relief. After authorizing the United States to file a civil RICO claim, *subsection (b)* provides that "[p]ending final determination" of the suit, "the court may . . . enter such restraining orders or prohibitions . . . as it shall deem proper." In other words, the United States is able seek interim equitable relief.

This sentence granting the United States the ability to seek interim relief also has the effect of limiting the availability of this relief to the United States. This is so because otherwise this sentence in *subsection (b)* would be superfluous. "A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally." *De Beers Consol. Mines v. United States, 325 U.S. 212, 220, 65 S. Ct. 1130, 89 L. Ed. 1566 (1945)*; *see also* *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 326, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999)* (analyzing and applying *De Beers*). Therefore, if *subsection (a)* remedies are available to the United States—something no court has rejected—and *subsection (a)*'s equitable remedies are available only to the United States, the second sentence of *subsection (b)* would be superfluous because the United

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[7] On rehearing en banc of *Bennett*, one member of the en banc court would have found that equitable relief is available to private plaintiffs. *Bennett v. Berg, 710 F.2d 1361, 1365 (8th Cir. 1983)* (en banc) (McMillan, J. concurring in part and dissenting in part). The rest of the en banc court did not address the issue.

States would already be able to seek interim equitable relief if it sought equitable relief as a final remedy. The only interpretation **[*23]** of *§ 1964* that gives meaning to all of *§ 1964*'s text including the second sentence of *subsection (b)* then is that *subsection (a)*'s permanent equitable remedies are available to all plaintiffs including private plaintiffs, but interim relief is only available to the United States. "[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp., 568 U.S. 371, 386, 133 S. Ct. 1166, 185 L. Ed. 2d 242 (2013)*. Because any other interpretation would render part of *§ 1964* superfluous, the most natural reading of the text allows private plaintiffs to seek equitable remedies.

The conclusion that permanent equitable relief but not interim relief is available to private plaintiffs is further supported by comparing the structures of *subsections (b)* and *(c)*. Both subsections begin by granting the ability to file civil RICO cases to certain parties and then provide specific remedies only available to each type of plaintiff. *Subsection (b)* gives the United States the ability to seek interim equitable relief whereas *subsection (c)* gives private plaintiffs the ability to seek treble damages and attorney fees. To date, no court has found that the United States can seek treble damages and attorney fees suggesting that this should be seen as a grant to private plaintiffs and a limitation **[*24]** on the United States. *See, e.g.*, *Donziger, 833 F.3d at 138*.

Thus, three reasons demonstrate that that the most natural reading of *§ 1964*'s unambiguous text allows private plaintiffs to seek permanent *§ 1964(a)*'s equitable remedies. First, *subsection (a)* itself places no limitation on which plaintiffs can seek the equitable relief provided there, instead expansively giving courts the power to grant such relief. Second, reading the second sentence of *subsection (b)* as a limitation on who can seek just interim equitable remedies while allowing private plaintiffs to seek final equitable remedies eliminates surplusage from *§ 1964*. Third, this reading also allows *subsections (b)* and *(c)* to have a consistent structure. In sum, *§ 1964* begins with a broad grant of power without limitation and nothing else in the statute limits who may obtain final equitable relief in contrast to the limits the statute places on interim equitable relief, treble damages, and attorney fees.

Allowing private plaintiffs to seek the equitable remedies in *subsection (a)* is also in keeping Congress's express intent that the "provisions of [the RICO Act] shall be liberally construed to effectuate its remedial purposes." *Pub. L. 91-452, § 904(a), 84 Stat. 947 (1970)*. Congress's purpose in passing RICO was to eradicate organized crime "by providing enhanced sanctions and new **[*25]** remedies to deal with the unlawful activities of those engaged in organized crime." *Pub. L. 91-452, Statement of Findings and Purpose, 84 Stat. 923 (1970)*. With RICO, Congress intended to "encourag[e] civil litigation not merely to compensate victims but also to turn them into private attorneys general, supplementing Government efforts by undertaking litigation in the public good." *Rotella v. Wood, 528 U.S. 549, 550, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000)*. "Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in *§ 1964*, where RICO's remedial purposes are most evident." *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491 n.10, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*. Allowing a private plaintiff to obtain equitable relief that dismantles a RICO enterprise and imposes restrictions on a person's future activities will enable victims to best undertake litigation in the public good. The availability of treble damages provides a strong deterrent effect and encourages injured parties to bring civil RICO cases to redress past harms; wider availability of permanent injunctions increases the likelihood of preventing future violations of *§ 1962*—the main purpose of RICO.

The courts that have held that equitable relief is not available to private plaintiffs rely primarily on three arguments: (1) a text-based argument that *§ 1964(b)*'s mention of interim equitable relief allows the United States alone to obtain *§ 1964(a)*'s permanent **[*26]** equitable because *§ 1964(c)* lacks a similar mention; (2) the pre-and post-legislative history of RICO's enactment; and (3) a comparison to the *Clayton Act*. *See, e.g.*, *Hengle, 19 F.4th at 353-56* (applying (1) and (3)); *Wollersheim, 796 F.2d at 1084-87* (applying all three).

The Court finds the first argument unpersuasive. As discussed above, it would render the interim relief provision of *§ 1964(b)* superfluous as even without this clause, the United States could seek interim relief under *§ 1964(a)*. The United States gets its ability to seek permanent equitable remedies from *§ 1964(a)*, not *§ 1964(b)* which only references interim relief. This argument would also render the interim relief clause a mere clarification, but if the clause did not exist, the Court would still find that the United States could seek interim relief based on *§ 1964(a)* and there would be no need for this clarification. *Cf.* *Young v. United Parcel Serv., Inc., 575 U.S. 206, 135 S. Ct.*

1338, 1352-53, 191 L. Ed. 2d 279 (2015) (refusing to adopt an interpretation of a statute that would render part of the text an unnecessary clarification). It also does not fit with the overall structure of *§ 1964* which begins with a broad grant of power that does not limit who may seek equitable relief before defining two types of plaintiffs and specifies additional remedies available to each type of plaintiff in *subsections (b)* and *(c)*.

The Court also finds the second argument **[*27]** relying on legislative history unpersuasive. While legislative history can be a useful tool of statutory interpretation in many cases, its application here is not particularly useful. First, courts typically look to legislative history and other sources if the statutory language is ambiguous. *See, e.g., United States v. Smith, 171 F.3d 617, 620 (8th Cir. 1999)*. Because the Court finds that the plain meaning of the statute is not ambiguous, the legislative history is of much less value especially because there is no "'clearly expressed intent to the contrary' that would warrant a different construction" in the legislative history. *Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 261, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994)* (quoting *Reves v. Ernst & Young, 507 U.S. 170, 177, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993)*). Second, the legislative history itself is ambiguous. *See Scheidler, 267 F.3d at 699* (discussing RICO's conflicting legislative history on equitable relief); *Wollersheim, 796 F.2d at 1084-86* (recognizing RICO's conflicting legislative history while still concluding that legislative history supported limiting the availability of equitable relief). Moreover, a part of the history this argument relies on is Congress's failure to expressly expand RICO's civil remedies **after** enacting RICO. *See Wollersheim, 796 F.2d at 1086* (discussing Congressional inaction after RICO's enactment). Post-enactment legislative history and rejected legislative action is rarely a reliable basis for statutory interpretation. **[*28]** *Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242, 131 S. Ct. 1068, 179 L. Ed. 2d 1 (2011)*; *see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994)* (noting that inaction may indicate "that the existing legislation already incorporated the offered change"). The legislative history here cannot overcome the unambiguous meaning of the statute.

The third common argument comparing RICO to the Clayton Act is also unpersuasive because it too points in different directions. Congress modeled RICO's civil enforcement mechanisms contained in *§ 1964* after the Clayton Antitrust Act civil enforcement mechanisms. *See Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 267, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*. Unlike RICO, the Clayton Act's civil enforcement mechanism is spread out over three code sections: *15 U.S.C. §§ 4*, *15*, *26*. *Section 4* authorizes the United States to file antitrust cases that seek equitable relief. *Section 15* authorizes private parties to file cases and allows for treble damages and recovery of attorney fees. *Section 26* specifically authorizes injunctive relief for private parties. *Section 26* was included in the *Clayton Act* that passed in 1914 to fill a gap in the previously enacted *Sherman Antitrust Act* that only authorized the United States to seek equitable relief. *California v. Am. Stores Co., 495 U.S. 271, 285-87, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990)*. There are thus two reasonable but conflicting ways to interpret this history as applied to RICO. On the one hand, the fact that, unlike the *Clayton Act* which specifically authorizes private parties to seek equitable relief in *15 U.S.C. § 26* and meant to **[*29]** fill a gap, RICO does not have explicit language authorizing it and filling the gap could mean that the gap is unfilled. *See Hengle, 19 F.4th at 356* (embracing the unfilled gap approach). On the other hand, because the Supreme Court regularly treats the remedial provisions of RICO and the Clayton Act identically and the Supreme Court has already determined that private parties can obtain injunctive relief under the *Clayton Act*, the same interpretation could apply to RICO even though RICO consolidates its civil remedial provisions into one section while the *Clayton Act* spread them out. *Scheidler, 267 F.3d at 700* (embracing the same interpretation approach). There is an additional inference supporting the same interpretation approach. The *Clayton Act* specifically added equitable relief as an option for private litigants to existing ***antitrust law*** whereas RICO created civil remedies for both the United States and private parties at the same time for an entirely new type of law. So, RICO could be interpreted as consolidating the remedies into one section without needing a separate gap filling section because it never had the gap to begin with. Much like the specific legislative history of RICO, a comparison to the *Clayton Act* at a minimum does not overcome and may support the Court's **[*30]** interpretation of the statute's plain language.

The plain language of *18 U.S.C. § 1964* combined with RICO's express purpose to dismantle criminal enterprises demonstrates that private RICO plaintiffs are authorized to seek prospective injunctive relief. The Court must now decide whether to grant it here.

B. Standing to Receive Equitable Relief

Next the Court must determine whether Josephs has standing to request the equitable relief she seeks. Courts have an obligation to ensure litigants have standing even if the parties themselves do not raise the issue. *Frank v. Gaos, 139 S. Ct. 1041, 1046, 203 L. Ed. 2d 404 (2019)*; *Warth v. Seldin, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)* (noting that standing "is the threshold question in every federal case").

Article III of the Constitution limits the jurisdiction of federal courts to deciding cases and controversies. *Lujan v. Defs. of Wildlife, 504 U.S. 555, 559, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. Standing is essential to the case-or-controversy requirement. *Id. at 560*. "[S]tanding is not dispensed in gross." *Lewis v. Casey, 518 U.S. 343, 385 n.6, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)*. Instead, "a plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 185, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)*; *Digital Recognition Network, Inc. v. Hutchinson, 803 F.3d 952, 956 (8th Cir. 2015)*. Even if a plaintiff has standing for a damages claim, the plaintiff may not be able to pursue injunctive relief. *City of Los Angeles v. Lyons, 461 U.S. 95, 109, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)*. To establish standing, a plaintiff must show (1) that it suffered a concrete and particularized injury in fact that is actual or imminent; (2) a causal connection between the injury **[*31]** and the defendant's conduct; and (3) that it is likely the plaintiff's injury will be redressed by the remedy. *Lujan, 504 U.S. at 560-61*.

Josephs easily meets the first two standing requirements. The uncontested facts establish that Josephs has suffered a concrete and particularized injury caused by Marzan's conduct: his uncontested actions defrauded Josephs and breached their contracts causing her to lose a substantial amount of money. Josephs also easily meets the redressability requirement for the monetary damages—including RICO treble damages—she seeks. It is, however, a closer question whether Josephs meets the redressability requirement for the equitable relief.

In *Lyons*, the Supreme Court held that although a plaintiff had standing to seek monetary damages after being placed in a chokehold under an allegedly impermissible Los Angeles Police Department chokehold policy, the plaintiff lacked standing to seek an injunction against future enforcement of the chokehold because he did not credibly allege that he faced a realistic probability that he would be choked as a result of the policy in the future. *Lyons, 461 U.S. at 106, 106 n.7*. An award of damages would redress the previous chokehold, but the Court found that it was no more than speculation **[*32]** that the injunction would prevent a future injury to the plaintiff even if it was certain that someone else might be the victim of an unconstitutional chokehold. *Id. at 108*. Instead, a plaintiff must show that the plaintiff "personally would benefit in a tangible way from the court's intervention." *Warth, 422 U.S. at 508*.

Josephs argues that equitable relief would redress her injury by making it much more likely that she recovers the money she is owed by both PMG and Marzan. It will increase the likelihood that PMG will pay her, she asserts, because PMG is a potentially viable for-profit company that has partnerships with large, legitimate entities and removing Marzan from his role in PMG increases the likelihood it will develop into a successful entity capable of paying the debts it owes including to Josephs. As for Marzan, Josephs argues that the equitable relief will make it more likely that she can recover from Marzan by making it more difficult for him to hide his assets and income.

Josephs has standing to seek equitable relief. As Josephs admits, it is highly unlikely that she will loan money to or invest in Marzan or PMG again, indeed probably less likely than the risk that the plaintiff in *Lyons* would be placed **[*33]** in a police chokehold again and if she were to that would be entirely her own decision. *Lyons* is still inapposite here. An injunction against the city of Los Angeles would not have increased the likelihood of the plaintiff recovering monetary damages from the city. Cities have routine practices for paying judgments against them and have income streams and fixed assets that a judgment holder can seek recovery against. And even if Los Angeles did not have these things, blocking a chokehold policy would still not have increased the ability of the plaintiff to recover. Here, Josephs sufficiently alleges that equitable relief both increases the likelihood that PMG is financially successful and decreases the likelihood that Marzan is able to hide his assets and income in the future—substantially increasing the likelihood that Josephs recovers at least some of her damages. This case is thus more akin to *Friends of the Earth*, where the Supreme Court held that a private plaintiff had standing to seek civil penalties even though that money would go to the government because the civil penalties "made it likely, as opposed to merely speculative, that the penalties would redress [plaintiff's] injuries." *528 U.S. at 187*. So too here. **[*34]** Even though the direct benefit of the equitable relief will go to others, equitable relief here makes it more likely the monetary damages will redress Josephs's injuries. Just like in *Friends of the Earth*, the actual imposition of statutorily available remedies rather than just their availability is likely to deter future RICO violations. *See id. at 186*.

This conclusion is bolstered by the core concerns that standing doctrine is meant to address. Josephs does not ask for an advisory opinion here as the uncontested facts demonstrate that she has been concretely harmed and is seeking to address that harm. *Hawse v. Page, 7 F.4th 685, 694 (8th Cir. 2021)* ("The doctrine[] of standing . . . , properly applied, ensure[s] that federal courts will decide only concrete disputes and will refrain from publishing advisory opinions or judicial essays on issues of the day.") She has also demonstrated that she is adverse to PMG and Marzan with a sufficient personal stake to illuminate all issues before the Court. *See Flast v. Cohen, 392 U.S. 83, 99, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968)* ("The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends **[*35]** for illumination of difficult constitutional questions.'" (quoting *Baker v. Carr, 369 U.S. 186, 204, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)*)).

Although it is not certain that even with the statutorily authorized equitable relief Josephs will recover all the damages awarded, it is far more likely that such relief will allow Josephs to redress her injuries at least in part. Thus, Josephs has standing to seek equitable relief as she will personally benefit in a tangible way from the Court's intervention. *See Warth, 422 U.S. at 508*.

C. Structuring Equitable Relief

Because the Court finds that RICO's civil equitable relief is available to private plaintiffs and Josephs has standing to seek it, the Court must now decide whether to grant it and if so, how to structure the relief.

The Court will grant equitable relief. Congress explicitly intended to provide new remedies to deal with unlawful activities in order to eradicate them. *18 U.S.C. § 1964(a)* itself is meant to "prevent and restrain violations" of *18 U.S.C. § 1962*. The undisputed facts establish that Marzan has developed a pattern of violating *18 U.S.C. § 1962* over several years and may continue doing so through PMG and Jupiter Rising Film. Implementing the relief requested here would fill the prosecutorial gaps and help eliminate illegal activity as Congress intended. *See Sedima, 473 U.S. at 493*; *Rotella, 828 U.S. at 557*.

[*36] The Court's decision to grant equitable relief here should not be seen as permitting equitable relief in any case where a plaintiff who is requesting monetary damages can prove that the defendant may be unlikely to pay without equitable relief through the Court's traditional equitable powers. *See Califano v. Yamasaki, 442 U.S. 682, 705, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)* ("[F]ederal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction."). Three conditions make this the rare case where it is appropriate to do so. First, the plaintiff is seeking relief under a statute that explicitly empowers this type of relief with the specific purpose of addressing the types of activity the defendant is engaged in. Second, the plaintiff has demonstrated that the defendant has organized his life to avoid his court-ordered obligations. It appears that Marzan has created an enterprise designed to skirt damages awards and is using the enterprise to intentionally evade recovery by the same people and entities harmed by the enterprise. By using corporate entities and investors to pay for his lifestyle, judgment holders are unable to recover court-ordered damages because they cannot attach judgments to any assets or income in his name. Marzan has thumbed his nose at the judicial system by leaving a string of default judgments and unpaid damages awards in his wake even when courts grant him leniency in hopes that such leniency will allow him to pay his victims. Instead, the undisputed facts show that he takes advantage of this leniency to find a new victim. Equitable relief is appropriate when defendants take advantage of the law to shield themselves from accountability at law. *See Gingras v. Think Fin., Inc., 922 F.3d 112, 128 (2d Cir. 2019)*, *cert.*

denied sub nom. Sequoia Cap. Operations, LLC v. Gingras, 140 S. Ct. 856, 205 L. Ed. 2d 458 (2020). Third, the plaintiff has credibly shown that the relief will increase the chances that multiple defendants including a defendant not subject to the equitable relief will pay the monetary damages awarded.

When structuring equitable relief here, the Court is mindful of the conditions leading to this rare circumstance, RICO's purpose, and Joseph's standing to seek this relief and will structure the relief to best conform with these issues. The Court will order the following equitable relief pursuant to *§ 1964(a)*:

- Marzan must immediately divest himself of any interest, direct or indirect, in PMG and Jupiter Rising Film;
- Marzan must immediately cease all management, control, employment, and involvement with PMG and Jupiter Rising Film except to the extent necessary to provide remaining owners, managers, and employees with information and property necessary to continue the operation **[*37]** of the entities which Marzan must handover within 7 days of receiving this Order;
- Upon issuance of this Order, Marzan must not remove any assets from PMG and Jupiter Rising Film including but not limited to intellectual property, proprietary information, physical property, or financial assets including those Marzan believes to be his personal property. To the extent that that Marzan asserts something in the control of PMG or Jupiter Rising Film is his personal property, Marzan may provide evidence of his ownership to the Court which will then adjudicate the proper titleholder of the property;[8]
- Marzan must—without being asked—disclose his 2014 guilty plea to insurance fraud in the State of Minnesota[9] and provide (1) a copy of the Complaint in this case, (2) Josephs' Motion for Default Judgment and the initial accompanying memorandum, declaration, and exhibits filed in support of the motion,[10] and (3) this Order to:
    1. Any potential or actual investor in any entity in which Marzan is involved in the entity's finances, operation, management, and/or control;
    2. Any potential or actual business in any entity in which Marzan is involved in the entity's finances, operation, management, and/or **[*38]** control; and
    3. Any potential or actual employees or contractors of any entity in which Marzan is involved in the entity's finances, operation, management, and/or control;
- Marzan may not form any entity including but not limited to a corporation, limited liability company, or partnership without first obtaining permission from the Court;
- Josephs must provide notice to the Court within 28 days of satisfaction of her judgment against PMG; and
- Josephs must provide notice to the Court within 28 days of satisfaction of her judgment against Marzan.

This relief will prevent and restrain future violations by Marzan's RICO enterprise while protecting innocent investors, owners, managers, and employees of PMG and Jupiter Rising. It will also prevent and restrain future violations by protecting innocent investors, employees, and contractors who would otherwise be unaware of the existence of the RICO enterprise. By preventing and restraining future violations, this relief is the type of conduct RICO's *§ 1964(a)* equitable remedies are directed toward eradicating. It also increases the likelihood that Josephs will be able to recover her damages from PMG and Marzan. **[*39]** By requiring Josephs to report the future satisfaction of her judgments to the Court, the Court will be able to relieve Marzan of the equitable relief if the Court determines Josephs no longer has standing for the equitable relief granted.

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[8] This provision protects the rights of innocent persons and entities involved with PMG and Jupiter Rising Film under *18 U.S.C. § 1964(a)*.

[9] The Court will not require Marzan to directly disclose his charge of Theft By Swindle in Minnesota State Court Case Number 82-CR-14-2262 as it was continued for dismissal. *See* Sentencing Order, *State of Minnesota v. Alberto Jose Marzan*, Case No. 82-CR-14-2262 (Minn. Dist. Ct. Aug. 20, 2018). The facts of the case will still be available to those receiving disclosures because the Complaint in this case must be provided.

[10] Marzan need not disclose the supplemental briefing and documentation Josephs provided at the Court's request. To be clear, in addition to the Complaint and this Order, Marzan must disclose Docket Numbers 10, 12, and 13 including all exhibits attached to Docket Number 13.

To be clear, this Order will not require Marzan to make the disclosures to any entity, owner, or investor of any company in which he is an employee without any management or control over the company and is without any role in the company's finances or operations. Marzan is encouraged to seek clarification from the Court if he is uncertain of these requirements now or if at any time in the future when he is considering his role in a company. Marzan may also request the Court terminate the equitable relief or grant an alteration to or an exception from this Order but must do so before taking any action that would violate the terms of this Order.

CONCLUSION

The undisputed facts adequately establish that Marzan and PMG are jointly and severally liable to Josephs for fraudulent representation and breach of contract and that Marzan alone is liable to Josephs for violation the RICO Act and abuse of process. Therefore, the Court will grant Josephs's Motion **[*40]** for Default Judgment. The Court will award Josephs monetary damages against PMG and Marzan associated with the losses she has demonstrated on the record including interest on the promissory notes against both Defendants and including treble damages and attorney fees against Marzan as authorized by RICO. The Court will also grant Josephs equitable relief against Marzan to prevent and restrain future RICO Act violations because such relief is available to private plaintiffs and Josephs has standing to request it.

ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Plaintiff's Motion for Default Judgment [Docket No. 10] is **GRANTED IN PART and DENIED IN PART** as follows:

1. Alberto Jose Marzan is liable to Michaleen Josephs for violation of the Racketeer Influenced and Corrupt Organizations Act (Count I), fraudulent misrepresentation (Count II), breach of contract (Count III), and abuse of process (Count V).

2. Press Media Group, Inc. is liable to Michaleen Josephs for fraudulent misrepresentation (Count II) and breach of contract (Count III).

3. The motion for default judgment against Alberto Jose Marzan and Press Media Group, Inc. for **[*41]** promissory estoppel (Count IV) is **DENIED** as moot.

4. Michaleen Josephs is awarded $266,233.36, plus accrued interest on the promissory notes of not less than $31,521.73 as of December 20, 2021, with interest continuing to accrue at a rate of $46.63 per day until the date of judgment, against Alberto Jose Marzan and Press Media Group, Inc., jointly and severally.

5. Michaleen Josephs is awarded treble damages for Count I under *18 U.S.C. § 1964(c)* in the amount of $532,466.72, plus not less than $63,043.45 representing treble damages on accrued interest as of December 20, 2021, with damages continuing to accrue at a rate of $93.26 per day until the date of judgment, against Alberto Jose Marzan.

6. Michaleen Josephs is awarded $58,284.50 in additional damages against Alberto Jose Marzan, representing reasonable attorney fees and costs as authorized by *18 U.S.C. § 1964(c)* against Alberto Jose Marzan, arising from Count I and as authorized by the personal guaranty contract, arising from Count III.

7. Michaleen Josephs is awarded $46,092.19 in additional damages against Alberto Jose Marzan, arising from Counts II and III.

8. Michaleen Josephs is awarded $125,442.60 in additional damages against Alberto Jose Marzan, arising from Count **[*42]** V.

9. Pursuant to *18 U.S.C. § 1964(a)*, arising from Count I, until further order of this Court:

    a. Alberto Jose Marzan must immediately divest himself of any interest, direct or indirect, in Defendant Press Media Group, Inc. d/b/a VumaTV and in Jupiter Rising Film;

b. Alberto Jose Marzan must immediately cease all management, control, employment, and involvement with Press Media Group, Inc. d/b/a VumaTV and Jupiter Rising Film except to the extent necessary to provide remaining owners, managers, and employees of these entities with information and property necessary to continue the operation of the entities;

c. Alberto Jose Marzan must handover all information and property relevant to the above section within seven (7) days of receiving this Order;

d. As of the date of this Order, Alberto Jose Marzan must not remove any assets from Press Media Group, Inc. d/b/a VumaTV and Jupiter Rising Film including but not limited to intellectual property, proprietary information, physical property, or financial assets including those Alberto Jose Marzan believes to be his personal property;

e. Alberto Jose Marzan may provide the Court with evidence of his personal ownership of any assets in the control of Press Media Group, **[*43]** Inc. or Jupiter Rising Film who will award title to the proper owner;

f. Albert Jose Marzan must promptly and without request disclose his 2014 guilty plea to insurance fraud in *State of Minnesota v. Alberto Jose Marzan*, Minnesota Case No. 82-CR-13-4853 and provide (1) a copy of the Complaint in this case [Docket No. 1], (2) Michaleen Josephs's Motion for Default Judgment [Docket No. 10.] and initial accompanying memorandum [Docket No. 12], declaration [Docket No. 13], and exhibits [attachments to Docket No. 13] filed in support of the Motion in this case, and (3) this Order to:

i. Any potential or investor in any entity in which Marzan is involved in the entity's finances, operation, management, and/or control;

ii. Any potential or actual business in any entity in which Marzan is involved in the entity's finances, operation, management, and/or control; and

iii. Any potential or actual employees or contractors of any entity in which Marzan is involved in the entity's finances, operation, management, and/or control;

g. Alberto Jose Marzan is enjoined from forming any entity including but not limited to a corporation, limited liability company, or partnership without explicit permission from **[*44]** the Court;

h. Michaleen Josephs must provide notice to the Court within twenty-eight (28) days of satisfaction of the damages awarded in her favor against Press Media Group, Inc.; and

i. Michaleen Josephs must provide notice to the Court within twenty-eight (28) days of satisfaction of the damages awarded in her favor against Alberto Jose Marzan.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: January 5, 2022

at Minneapolis, Minnesota.

/s/ John R. Tunheim

JOHN R. TUNHEIM

Chief Judge

United States District Court

Khan v. Presence Chi. Hosps. Network

United States Court of Appeals for the Seventh Circuit

January 5, 2022*, Submitted; January 5, 2022, Decided

No. 21-2159

Reporter
2022 U.S. App. LEXIS 294 *; 2022 WL 42731

NAZIR KHAN, Plaintiff-Appellant, v. PRESENCE CHICAGO HOSPITALS NETWORK, et al., Defendants-Appellees.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: Rehearing denied by, En banc, Rehearing denied by *Khan v. Presence Chi. Hosps. Network, 2022 U.S. App. LEXIS 3211, 2022 WL 329595 (7th Cir. Ill., Feb. 3, 2022)*

US Supreme Court certiorari denied by *Khan v. Presence Chi. Hosps. Network, 2023 U.S. LEXIS 459 (U.S., Jan. 17, 2023)*

Prior History: **[*1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 20 C 3819. Virginia M. Kendall, Judge.

Khan v. Presence St. Mary and Elizabeth Hosps., 2020 U.S. Dist. LEXIS 214751, 2020 WL 6750535 (N.D. Ill., Nov. 17, 2020)

Disposition: AFFIRMED.

Core Terms

district court, privileges, terminated, state-law, administrative remedy, allegations, admitting, exhausted, argues, cases, supplemental jurisdiction, private right of action, hospital administrator, discrimination claim, review committee, antitrust claim, anti trust law, federal claim, two year, Health Care Quality Improvement Act, right-to-sue, correctly, surgeon, notice, refile, tolled

LexisNexis® Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Complaints

Evidence > Inferences & Presumptions > Inferences

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* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

HN1[] **Pleadings, Complaints**

An appellate court treats all factual allegations in a plaintiff's operative complaint as true, while taking all reasonable inferences in his or her favor.

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

HN2[] **Complaints, Requirements for Complaint**

Dismissal is appropriate when a plaintiff's complaint sets out all the elements of an affirmative defense.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Healthcare Law > ... > Actions Against Facilities > Facility Liability > Hospitals

HN3[] **Standing, Requirements**

To state a claim under the Sherman Act, a plaintiff has to allege not only an injury to himself or herself, but also an injury to the market. Staffing decisions at one hospital do not violate federal ***antitrust law***.

Evidence > ... > Government Privileges > Official Information Privilege > Self-Critical Analysis Privilege

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Hospital Privileges > Professional Review

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

Healthcare Law > Business Administration & Organization > Peer Review > Organizations

HN4[] **Official Information Privilege, Self-Critical Analysis Privilege**

The Health Care Quality Improvement Act does not provide a private right of action, and it immunizes those engaged in good-faith peer review.

Counsel: NAZIR KHAN, Plaintiff - Appellant, Pro se, Burr Ridge, IL.

For PRESENCE CHICAGO HOSPITALS NETWORK, doing business as PRESENCE ST. MARY AND ST. ELIZABETH HOSPITALS, LAURA CONCANON, NORA BYRNE, NORMA THORNTON, THOMAS MULVAR, Defendants - Appellees: David Joseph Tecson, Attorney, Mark Jacob Altschul, Attorney, Daniel J. Fumagalli, Attorney, CHUHAK & TECSON, P.C., Chicago, IL.

Judges: Before FRANK H. EASTERBROOK, Circuit Judge, MICHAEL Y. SCUDDER, Circuit Judge, AMY J. ST. EVE, Circuit Judge.

Opinion

ORDER

Nazir Khan, a surgeon formerly employed by Presence Chicago Hospitals Network, appeals the dismissal of his complaint for failure to state a claim. He alleged that the hospital administrators violated state and federal law by terminating his admitting privileges for not cooperating with an employee review. Because these allegations do not state a federal claim, we affirm.

HN1[] We treat all factual allegations in Khan's operative complaint (his first amended complaint) as true, while taking all reasonable inferences in his favor. *Calderone v. City of Chi., 979 F.3d 1156, 1161 (7th Cir. 2020)*. Khan worked as a cardiothoracic **[*2]** surgeon for nearly twenty years for St. Elizabeth's Hospital (which merged with another hospital and became Presence Chicago Hospitals Network) before the hospital terminated his privileges. He alleges that the hospital administrators removed him from the staff so that other employees could perform his procedures.

In 2017, the hospital's CEO and Chief Medical Officer asked Khan to resign. They referred to an unspecified "pattern" involving his cases. Khan then signed a leave-of-absence agreement, allegedly under duress. A review committee identified four of Khan's cases involving high infection rates and issues with call responsiveness and asked Khan to undergo a physical and psychological examination to address these concerns. Khan refused and asked that a log of his cases be sent to an outside reviewer. The hospital ignored Khan's request and in mid-2018 terminated his admitting privileges.

Two years after his discharge, Khan filed this suit. He amended his complaint several times, primarily alleging claims under federal ***antitrust law***, *Title VII of the Civil Rights Act of 1964*, the *Health Care Quality Improvement Act*, *42 U.S.C. §§ 11101*, *11137*, and various state-law claims.

The court granted the defendants' motion to dismiss. The court dismissed **[*3]** Khan's antitrust claims because Khan did not allege a cognizable antitrust injury; he did not plead sufficient facts of any relevant market or the hospital's control of any market. The court also dismissed Khan's claim under the Health Care Quality Improvement Act because the Act does not provide a private right of action. As for his Title VII discrimination claim, the court found that Khan had not obtained a right-to-sue letter from the Equal Employment Opportunity Commission showing that he had exhausted his administrative remedies. If he could show that he exhausted those administrative remedies, the court added, he then could refile that claim. The court then declined to exercise supplemental jurisdiction over the remaining state-law claims.

Khan amended his complaint again, attaching an EEOC right-to-sue letter indicating that he had exhausted his administrative remedies under Title VII. (He also repleaded a host of other claims that the court properly dismissed because he had not sought leave to bring them, and we do not discuss them further.) The EEOC letter confirmed that the charge Khan filed with the agency was untimely, and so the court dismissed Khan's remaining claims with **[*4]** prejudice.

On appeal, Khan generally challenges the court's dismissal of each of his claims. Regarding his discrimination claim, Khan argues the district court erred in directing him to allege that he filed a charge with the EEOC, only to reverse course after he refiled his claim and dismiss it as time-barred. But the court correctly determined that Khan filed his charge with the EEOC more than two years after the termination of his admitting privileges, well outside Title VII's 300-day window. *42 U.S.C. § 2000e-5(e)(1)*. As the court explained, ***HN2***[] dismissal is appropriate when, as here, a plaintiff's complaint sets out all the elements of an affirmative defense. *NewSpin Sports, LLC v. Arrow Elecs., Inc., 910 F.3d 293, 299-300 (7th Cir. 2018)*.

Khan now argues for the first time that the district court should have tolled the statute-of-limitations period because he did not learn of this requirement until the court dismissed his operative complaint. Waiver aside, *see Markel Ins.*

Co. v. Rau, 954 F.3d 1012, 1018 (7th Cir. 2020), Khan has not alleged anything to suggest that tolling here would serve the filing requirement's purpose of giving prompt notice to the employer. *See* *Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113-121, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)*.

Regarding his antitrust claim, Khan argues that the court wrongly required him to allege that the hospital had established market control. ***HN3***[] But to state a claim under the *Sherman Act*, Khan had **[*5]** to allege not only an injury to himself, but also "an injury to the market." *Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 335 (7th Cir. 2012)*. Moreover, staffing decisions at one hospital do not violate federal ***antitrust law***. *Kochert v. Greater Lafayette Health Servs., 463 F.3d 710, 717 (7th Cir. 2006)*.

As for his claim under the Health Care Quality Improvement Act, Khan maintains that the review committee relied on false statements and denied him appropriate notice and a hearing. But the district court correctly explained that ***HN4***[] this statute does not provide a private right of action, *see, e.g.,* *Patel v. Hamilton Medical Center, Inc., 967 F.3d 1190, 1194 (11th Cir. 2020)*, and indeed, it immunizes those engaged in good-faith peer review. *Austin v. Am. Ass'n of Neurological Surgs., 253 F.3d 967, 974 (7th Cir. 2001)*.

Finally, Khan continues to press his various state-law claims. But because his federal claims were all properly dismissed, the district court was well within its discretion to decline to exercise supplemental jurisdiction over his state-law claims. *28 U.S.C. § 1367(c)(3)*.

We have considered Khan's other arguments and motions; none has merit.

AFFIRMED

Reilly v. Apple Inc.

United States District Court for the Northern District of California

January 7, 2022, Decided; January 7, 2022, Filed

Case No. 21-cv-04601-EMC

Reporter

578 F. Supp. 3d 1098 *; 2022 U.S. Dist. LEXIS 3661 **; 2022 WL 74162

THOMAS M REILLY, Plaintiff, v. APPLE INC., Defendant.

Subsequent History: Dismissed by, Judgment entered by *Reilly v. Apple Inc., 2022 U.S. Dist. LEXIS 74790 (N.D. Cal., Apr. 25, 2022)*

Core Terms

allegations, relevant market, antitrust, developers, antitrust claim, fails, markets, Guidelines, products, users, single-brand, removal, distributing, quotation, marks, cross-elasticity, anticompetitive, brand, motion to dismiss, anti trust law, leave to amend, alleged facts, interchangeability, threshold, remedies, reasons, substitutes, geographic, violations, consumers

Counsel: **[**1]** For Thomas M Reilly, Plaintiff: Omero Banuelos, Claremont, CA.

For Apple Inc., Defendant: Jason C Lo, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, Los Angeles, CA; Mark A. Perry, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, Washington, DC; Jennifer J. Rho, Gibson, Dunn and Crutcher LLP, Los Angeles, CA.

Judges: EDWARD M. CHEN, United States District Judge.

Opinion by: EDWARD M. CHEN

Opinion

[*1103] ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Docket No. 24

I. INTRODUCTION

Plaintiff Thomas M. Reilly, the developer of an app called Konverti which facilitates peer-to-peer, in-person currency exchanges, alleges antitrust violations and unfair and anticompetitive conduct by Apple, Inc. ("Apple") through its monopolist operation of its App Store. Docket No. 1 ("Compl."). Plaintiff's app was allegedly approved and then abruptly removed by Apple from the App Store in 2017. *Id.* ¶ 7. In this action, Plaintiff seeks damages and injunctive relief to restore the Konverti app to the App Store and to alter Apple's operation of the App Store.

Now pending is Apple's motion to dismiss Plaintiff's complaint. Docket No. 24. For the reasons explained below, the Court **GRANTS** Apple's motion to dismiss.

II. BACKGROUND

A. Summary of Allegations

1. Apple's **[**2]** App Approval Process

According to the Complaint, "Apple designs, markets and sells smartphones, personal computers, tablets, wearables and accessories, and sells a variety of related services." Compl. ¶ 2. Apple has created an ecosystem for its iOS devices, such as the iPhone and iPad. *See id.* ¶¶ 18, 20, 52. Apple also operates the App Store, a platform through which iOS users and developers can transact. *Id.* ¶ 2. While Apple develops and distributes its own apps to users, *id.* ¶ 27, most native apps offered for download on the App Store are developed by third-party developers, *id.* ¶ 23. Apps for iOS devices can only be purchased through the App Store. *Id.* ¶¶ 22, 24.

To license Apple's proprietary software and distribute apps through its ecosystem, developers agree to abide by a Developer Program License Agreement ("DPLA"). Compl. ¶¶ 12, 66. This alleged "contract of adhesion" is standardized and imposes the same terms on all developers. *Id.* ¶ 38; *see also id.* ¶ 41. Pursuant to the DPLA, developers agree to abide by Apple's App Review Guidelines. While these Guidelines guide Apple's app review team, Apple retains "sole discretion" to reject any app that a developer seeks for distribution **[**3]** through Apple's App Store. Docket No. 25, Exh. 1 (DPLA) § 6.9(b); *see also id.*, Exh. 2 ("Guidelines") at 1[1] ("We do this by offering a highly curated App Store where every app is reviewed by experts. . . For everything else there is always the open Internet. If the App Store model and guidelines are not best for your app or business idea that's okay, we provide Safari for a great web experience too.").

2. Plaintiff's App and Removal from the App Store

Plaintiff Thomas Reilly alleges that he is the developer of Konverti, which he describes as "a Peer to Peer Currency Exchange." **[*1104]** Compl. ¶ 5. Konverti allegedly "facilitates person to person exchanges of small amounts of currency." *Id.* Aside from alleging that each user's "identification is vetted through Apple's identity management system," *id.* ¶ 6, the Complaint does not otherwise describe Konverti's function or operation. Plaintiff alleges that Konverti was approved by the Google Play Store and is currently available through Google Play for Android system users. *Id.* ¶ 6.

Konverti was allegedly "approved and placed" in Apple's App Store in June 2017 before it was "abruptly removed weeks later without clear cause." Compl. ¶¶ 7, 15, 26. Apple **[**4]** allegedly provided two reasons for Konverti's removal. First, Apple determined that the app was not safe. *Id.* ¶ 15. Second, Apple determined Konverti violated Guideline 5.0. *Id.* This Guideline provides:

> Apps must comply with all legal requirements in any location where you make them available (if you're not sure, check with a lawyer). We know this stuff is complicated, but it is your responsibility to understand and make sure your app conforms with all local laws, not just the guidelines below. And of course, apps that solicit, promote, or encourage criminal or clearly reckless behavior will be rejected. In extreme cases, such as apps that are found to facilitate human trafficking and/or the exploitation of children, appropriate authorities will be notified.

Exh. 2 § 5.0. Plaintiff alleges that Apple explained that it "continue[d] to find [Plaintiff's] app still facilitates individuals meeting in person for currency exchange, which is not an appropriate concept for the App Store" and that Plaintiff should "review [his] app concept and remove all content and features that are illegal in the locations where your app is available." Compl. ¶ 15 (quotation marks omitted). Plaintiff alleges **[**5]** that he unsuccessfully appealed Konverti's removal "multiple times" between June 2017 and 2020. *Id.* Plaintiff alleges that he is aware of no "security, legal or reporting requirements" triggered by Konverti. *Id.* ¶ 6. Plaintiff alleges that because Konverti was initially "approved and placed" on the App Store, Plaintiff was induced "to pay [Apple] monies and spend over

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[1] The agreements and Guidelines are "central" to Plaintiff's claims, and are incorporated by reference in the FAC. *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)*.

$150k developing and marketing Konverti for over two years." *Id.* ¶ 17. Plaintiff alleges he "has been damaged in that Apple's conduct and delays in providing access [to] the [App] Store have caused significant loss of opportunity and impacted the market for Konverti." *Id.*

3. Plaintiff's Antitrust Claim Theory

Plaintiff brings suit under federal and state ***antitrust law***. He explains that "mobile device suppliers, commonly known in the industry as original equipment manufacturers ("OEMs"), will select and install an OS [operating system] prior to shipping their respective devices for sale." *Id.* ¶ 19. He alleges that the "overwhelming majority of mobile devices sold by these OEMs use the Android OS, which is licensed by Google," but, in contrast, "Apple uses a proprietary operating system called iOS, which it installs on the **[**6]** iPhone" and iPad. *Id.* ¶ 20. The "only channel for distributing iOS apps" (apps that are functional on Apple devices that use iOS) is through Apple's App Store. *Id.* ¶ 22.

Plaintiff alleges that Apple monopolizes the "iOS App Distribution Market" through "technical" and "contractual" restrictions. Compl. ¶¶ 18-42. He claims that:

- Apple "unlawfully maintains its monopoly power in the iOS App Distribution Market" in violation of *Section 2 of the Sherman Act* by "prevent[ing] the distribution of iOS apps through means other than the Apple Store and prevent[ing] developers from distributing competing **[*1105]** app stores to iOS users," Compl. ¶ 55 (Count 1);

- Apple violates *Section 2* by denying Konverti access to a purported essential facility, "iOS," *id.* ¶¶ 58-61 (Count 2); and

- The "Developer Agreement and the terms of the Apple Store Review Guidelines unreasonably restrain competition" in violation of *Section 1*, *id.* ¶ 67 (Count 3).

Plaintiff contends that the same conduct violates *California's Cartwright Act* (Count 4) and Unfair Competition Law (Count 5). *Id.* ¶¶ 71-88.

Plaintiff defines the relevant market for his antitrust claims as the "market for distribution of apps compatible with iOS to users of iOS devices" which is comprised of **[**7]** "all of the channels through which apps may be distributed to iOS devices," which, in turn, is limited to Apple's App Store because it is the "only channel for distributing apps" to iOS devices. *Id.* ¶ 28. Plaintiff alleges that the "geographic scope of the iOS App Distribution Market is worldwide, as consumers and developers can access iOS worldwide." *Id.* ¶ 29.

B. Procedural Background

In December 2018, Mill Lane Productions, LLC, purporting to be the developer of the Konverti app and which was represented by the same counsel as Plaintiff, sued Apple in the Superior Court of California, County of Santa Clara alleging negligent misrepresentation and violation of California's unfair competition law for Apple's removal of Konverti from the App Store. Docket No. 25, Exh. 3 ("State Court Compl."). After twice amending its complaint in response to Apple's demurrers, *id.*, Exh. 4, Mill Lane voluntarily dismissed its case without prejudice on February 5, 2020, *id.*, Exh. 5.

Plaintiff Reilly filed this case in June 2021, alleging that he is the developer of Konverti. Compl. ¶ 5. Mill Lane is not mentioned in this action; Plaintiff has not filed a disclosure of non-party interested entities pursuant **[**8]** to *Local Rule 3-15*.

Now pending is Apple's motion to dismiss the complaint for failure to state a claim. Docket No. 24 ("Motion").

III. LEGAL STANDARD

A. Failure to State a Claim (*Rule 12(b)(6)*)

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. A complaint that fails to meet this standard may be dismissed pursuant to *Rule 12(b)(6)*. *See* *Fed. R. Civ. P. 12(b)(6)*. To overcome a *Rule 12(b)(6)* motion to dismiss after the Supreme Court's decisions in *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* and *Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, a plaintiff's "factual allegations [in the complaint] 'must . . . suggest that the claim has at least a plausible chance of success.'" *Levitt v. Yelp! Inc., 765 F.3d 1123, 1135 (9th Cir. 2014)*. The court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)*. But "allegations in a complaint . . . may not simply recite the elements of a cause of action [and] must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Levitt, 765 F.3d at 1135* (quoting *Eclectic Props. E., LLC v. Marcus & Millichap Co., 751 F.3d 990, 996 (9th Cir. 2014)*). "A claim has facial plausibility when the Plaintiff pleads factual content that allows the court to draw the reasonable inference that the Defendant is **[*1106]** liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*. "The plausibility standard **[**9]** is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly, 550 U.S. at 556*).

IV. ANALYSIS

A. Antitrust Claims (Counts 1-4)

Apple seeks to dismiss Plaintiff's antitrust claims because Plaintiffs fail to allege facts sufficient to meet two threshold conditions to proceed on any antitrust theory: (1) a plausible relevant market for their claims, and (2) antitrust injury. For the reasons stated below, the Court dismisses all of the antitrust claims for Plaintiff's failure to satisfy these threshold conditions.

1. Relevant Market for Antitrust Claims

"A threshold step in any antitrust case is to accurately define the relevant market, which refers to 'the area of effective competition.'" *Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 992 (9th Cir. 2020)* (citation omitted); *see also* *Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir. 1997)* ("The relevant market is the field in which meaningful competition is said to exist." (citing *United States v. Continental Can Co., 378 U.S. 441, 449, 84 S. Ct. 1738, 12 L. Ed. 2d 953 (1964)*)). Market definition is an essential predicate to the entire case, for "[w]ithout a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition.'" *Ohio v. American Express Co., 138 S. Ct. 2274, 2285, 201 L. Ed. 2d 678 (2018)*; *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc., 55 Cal. App. 5th 381, 413, 269 Cal. Rptr. 3d 446 (Cal. Ct. App. 2020)* (noting the same under California's Cartwright Act). Accordingly, an antitrust plaintiff must plead a plausible relevant **[**10]** market—including "both a geographic market and a product market"—to state a claim. *Hicks v. PGA Tour, Inc., 897 F.3d 1109, 1120 (9th Cir. 2018)*; *see also* *hiQ Labs, Inc. v. LinkedIn Corp., 485 F. Supp. 3d 1137, 1148 (N.D. Cal. 2020)* ("[T]he relevant market must still be plausibly alleged to make it past a 12(b)(6) challenge.").

a. Plaintiff Fails to Allege a Plausible Relevant Product Market

Where a complaint fails to adequately allege a relevant market underlying its antitrust claims, those claims must be dismissed. *Pistacchio v. Apple Inc., 2021 U.S. Dist. LEXIS 47071. 2021 WL 949422, at *2 (N.D. Cal. Mar. 11, 2021)*; *Coronavirus Reporter v. Apple, Inc., No. 21-CV-05567-EMC, 2021 WL 5936910, at *7 (N.D. Cal. Nov. 30, 2021)*. A relevant product market "must encompass the product at issue as well as all economic substitutes for the product." *Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1045 (9th Cir. 2008)*. "The principle most fundamental to product market definition is 'cross-elasticity of demand' for certain products or services," a measure of interchangeability or substitutability of related products. *Kaplan v. Burroughs Corp., 611 F.2d 286, 291-92 (9th Cir. 1979)*. "Commodities which are 'reasonably interchangeable' for the same or similar uses normally should be included in the same product market for antitrust purposes." *Id.* "This interchangeability is largely gauged by the purchase of competing products for similar uses considering the price, characteristics and adaptability of the competing commodities." *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 380-81, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. "In defining the relevant market, the court must look beyond the particular commodity produced by an alleged monopolist because the relevant **[**11]** product market for determining monopoly power, or the **[*1107]** threat of monopoly control, depends upon the availability of alternative commodities for buyers." *Kaplan, 611 F.3d at 292* (citing *Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F.2d 1296, 1301 (9th Cir. 1978)*). "Illegal monopoly does not exist merely because the production of a particular product is 'monopolized'" without regard to alternative substitutes. *Id.* A plaintiff cannot ignore economic reality and "arbitrarily choose the product market relevant to its claims"; rather, the plaintiff must "justify any proposed market by defining it with reference to the rule of reasonable interchangeability and cross-elasticity of demand." *Buccaneer Energy (USA) v. Gunnison Energy Corp., 846 F.3d 1297, 1313 (10th Cir. 2017)* (internal quotation marks and citation omitted).

Here, Plaintiff alleges a single relevant product market for his antitrust claims: the iOS App Distribution Market he asserts consists entirely and exclusively of Apple's App Store. Compl. ¶¶ 28, 29. Plaintiff's proposed market fails for several reasons.

First, Plaintiff essentially asserts a *single-brand* market *defined* as Apple's App Store. "Single-brand markets are, at a minimum, extremely rare" and courts have rejected such market definitions "[e]ven where brand loyalty is intense." *Apple, Inc. v. Psystar Corp., 586 F. Supp. 2d 1190, 1198 (N.D. Cal. 2008)* (internal quotation marks and citation omitted). On the other hand, as **[**12]** the court in *Epic v. Apple* recently reiterated, "[a] single brand is never a relevant market when the underlying product is fungible." *Epic Games, Inc. v. Apple Inc., No. 4:20-CV05640-YGR, 559 F. Supp. 3d 898, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *87 (N.D. Cal. Sept. 10, 2021)* (citation omitted, emphasis in the original). "It is an understatement to say that single-brand markets are disfavored. From nearly the inception of modern ***antitrust law***, the Supreme Court has expressed skepticism of single-brand markets[.]" *In re Am. Express Anti-Steering Rules Antitrust Litig., 361 F. Supp. 3d 324, 343 (E.D.N.Y. 2019)*; Herbert J. Hovenkamp, Markets in IP & Antitrust, *100 Geo. L.J. 2133, 2137 (2012)* ("[A]ntitrust law has found that a single firm's brand constitutes a relevant market in only a few situations."). To be sure, "[a]ntitrust markets consisting of just a single brand, however, are not per se prohibited. . .. In theory, it may be possible that, in rare and unforeseen circumstances, a relevant market may consist of only one brand of a product." *Psystar Corp. at 1198*.

The Supreme Court and Ninth Circuit have only found single-brand markets plausible in the context of *aftermarkets* which are "wholly derivative from and dependent on the primary market." *Newcal Indus., 513 F.3d at 1049*; *see also* *Streamcast Networks, Inc. v. Skype Techs., S.A., 547 F. Supp. 2d 1086, 1094 (C.D. Cal. 2007)* ("[T]he few cases in which courts have acknowledged the possibility of limiting the relevant market to a single brand have involved markets for replacement parts for specific brands of durable goods where consumers are 'locked-in' **[**13]** to maintaining them.").

Yet Plaintiff does not allege that the "iOS App Distribution Market" is an aftermarket.[2] Despite alleging that the *primary* **[*1108]** market in this case should be a single-brand market, Plaintiff does not cite a single antitrust case that has *ever* recognized a *single-brand primary market. Cf.* Docket No. 31 ("Opp.") at 4-5.

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[2] Plaintiff's opposition brief does not dispute Apple's argument that Plaintiff failed to allege the relevant market as an aftermarket. Indeed, the word "aftermarket" does not appear in Plaintiff's complaint nor in its opposition brief. Nonetheless, setting aside Plaintiff's failure to clearly articulate its intention to propose a single-brand aftermarket, the allegations in the complaint do not suffice to plausibly allege a single-brand aftermarket under Ninth Circuit precedent. Under *Newcal*, to plausibly assert a single-brand aftermarket at the pleading stage, a Plaintiff is required to adequately allege that (1) the aftermarket is wholly derivative from the primary market, (2) the illegal restraints of trade relate only to the aftermarket, (3) the defendant did not achieve market power in the aftermarket through contractual provisions that it obtains in the initial market, and (4) competition in the initial market does not suffice to discipline anticompetitive practices in the aftermarket. *513 F.3d at 1048-50*. At most, Plaintiff's complaint gestures at fourth factor. *See* Compl. ¶¶ 32-34. But even these statements amount to conclusory assertions and formulaic recitations of the element, devoid of specific factual allegations to satisfy *Rule 12(b)(6)*. *Levitt, 765 F.3d at 1135*.

Moreover, the complaint provides no explanation for limiting the relevant market to a *single-brand market* defined around *Apple's distribution of iOS apps* when the complaint concedes that "the overwhelming majority of mobile devices sold by [original equipment manufacturers] *use the Android OS, which is licensed by Google*," and that Plaintiff's app is available through Google Play for Android system users. Compl. ¶¶ 6, 20. Consumers who want Konverti can obtain it through Google Play Store on devices with Android OS. And as Plaintiff conceded at the oral argument, Konverti can be configured as an app available on the Internet, as a web-based app, and then accessed through a web browser on an iOS device. Plaintiff provides no basis for limiting the market definition to the App Store and excluding other platforms that provide access to apps, such as web-based **[**14]** apps that can be accessed from any web browser, including from iOS devices, or the Google Play Store where Plaintiff acknowledges the Konverti app is currently available. Thus, because "[d]istribution can occur through web apps, by web access, and through other [app] stores," *Epic, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925 at *113*, Plaintiff's failure to address or analyze these plausible alternatives is fatal to his proposed market definition, *Pistacchio, 2021 U.S. Dist. LEXIS 47071, 2021 WL 949422 at *2*; *see also* *Hicks, 897 F.3d at 1122-23* (affirming dismissal because alleged market was implausible without explanation of why potential substitutes were not interchangeable); *Streamcast Networks, Inc. v. Skype Techs., S.A., 547 F. Supp. 2d 1086, 1095 (C.D. Cal. 2007)* (rejecting the plaintiff's narrow market definition where alternatives "permit[ted] users to accomplish the same basic task"); *Federal Trade Commission v. Lab. Corp. of Am., No. SACV 10-1873 AG (MLGx), 2011 U.S. Dist. LEXIS 20354, 2011 WL 3100372, at *18 (C.D. Cal. Feb. 22, 2011)* (stating courts "routinely recognize that otherwise identical products are not in separate markets simply because consumers pay for those products in different ways"); *hiQ Labs, Inc. v. LinkedIn Corp., 485 F. Supp. 3d 1137, 2020 WL 5408210, at *7 (N.D. Cal. 2020)* (holding that plaintiff had "not yet shown that it is *plausible* that the relevant market should be defined as that which uses only [defendant's] data" where alternative public channels exist to obtain similar data (emphasis in original)). This Court similarly rejected proposed single-brand antitrust market of "iOS Institutional App Market")in *Coronavirus Reporter, 2021 WL 5936910, at *9-11*.

Although the "principle **[**15]** most fundamental to product market definition is 'cross-elasticity of demand' for certain products or services," *Kaplan, 611 F.2d at 291-92* the complaint lacks any discussion of cross-elasticity of demand for certain products or services. Plaintiff concedes that complaint fails to engage such an analysis or to define "'the area of effective competition.'" *Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 992 (9th Cir. 2020)*; Opp. at 4-5. Instead, Plaintiff **[*1109]** argues his failure to provide analysis of cross-elasticity of demand in the complaint "is not fatal to Plaintiff's claims" because each of the submarkets alleged are well-defined in themselves, and their boundaries can be refined through discovery. Opp. at 4-5 (citing *Brown Shoe Co. v. U.S., 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*). This is incorrect. "Authorities far too numerous to cite or discuss in detail have established" that "[t]he principle most fundamental to product market definition is 'cross-elasticity of demand.'" *Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979)*. "[W]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand," therefore, "the relevant market is legally insufficient." *City of N.Y. v. Grp. Health Inc., 649 F.3d 151, 155 (2d Cir. 2011)*.

In short, a plausible market requires alleged facts explaining why the products *included* in the market *are substitutes* for one another as well **[**16]** as alleged facts explaining why seemingly similar products *excluded* from the market *are not substitutes* for those in the market. Plaintiffs "iOS distribution services market" asserted here lacks justification on both bases.

b. Plaintiff Fails to Allege a Plausible Relevant Geographic Market

Plaintiff has also failed to allege facts indicating that the "area of effective competition where buyers can turn for alternate sources of supply" is worldwide. *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1490 (9th Cir. 1991)* (quotation marks and ellipsis omitted). Taking Plaintiff's proposed market definition of *all* app transactions on the App Store *worldwide*, the relevant inquiry is whether *all* consumers and *all* developers of *all* iOS apps across the world operate in one "area of effective competition." *Moore v. James H. Matthews & Co., 550 F.2d 1207, 1218 (9th Cir. 1977)* (quotation marks omitted). There is no allegation that, *e.g.*, users in every country access the same App Store storefront; that users in different countries can download the same array of apps; or that the commercial realities for developing, marketing, distributing, and supporting apps are the same in every country. Thus, the Complaint does not contain allegations sufficient to support the global geographic scope that Plaintiff's proposes.

c. Conclusion Regarding **[**17]** Relevant Market

In sum, Plaintiff's complaint fails to allege plausible product or geographic markets, which are threshold showings for Plaintiff's antitrust claims. Thus, the Court grants Apple's motion to dismiss as to all of Plaintiff's antitrust claims (Counts 1-4). *See* *Qualcomm, 969 F.3d at 992* (courts cannot "assess[] alleged antitrust injuries . . . in the market where competition is [allegedly] being restrained" without "an accurate definition of the relevant market," which is indispensable to "measur[ing] [the defendant's] ability to lessen or destroy competition").

2. Antitrust Injury

a. Failure to Allege Injury to Competition

Apple's second threshold argument for dismissal of Plaintiff's antitrust claims is that Plaintiff fail to plead antitrust injury. *Somers v. Apple, Inc., 729 F.3d 953, 964 n.5 (9th Cir. 2013)*; *see also* *In re WellPoint, Inc. Out-of-Network "UCR" Rates Litig., No. MDL092074PSGFFMX, 2013 WL 12130034, at *11 (C.D. Cal. July 19, 2013)* (explaining that antitrust injury under the Cartwright Act is analyzed under the same general framework as federal law). To allege antitrust injury, a plaintiff must allege injury to "competition in the market as a **[*1110]** whole"—such as marketwide reduction in output or increase in prices—"not merely injury to itself as a competitor." *Gorlick Distrib. Ctrs., LLC v. Car Sound Exhaust Sys., Inc., 723 F.3d 1019, 1024-25 (9th Cir. 2013)*. Thus, a plaintiff may not merely allege that the defendant is engaged in some anticompetitive conduct and that **[**18]** "some injury is occurring." *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 486-87 (3d Cir. 1992)* (en banc). To state a claim, a "plaintiff must *link* the two showings with a theory of causation that is both plausible and cognizable by the antitrust laws." *Id.* (emphasis added). The alleged harm also must be "'attributable to an anticompetitive aspect of the practice under scrutiny[;]'" "harm that could have occurred under the normal circumstances of free competition" does not suffice. *In re NFL's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1150 (9th Cir. 2019)* (quoting *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*).

Plaintiff's theory of harm is that *his* app was rejected from the App Store notwithstanding *his* investment in Konverti. Compl. ¶ 17. This theory fails to connect his supposed injury to injury to competition generally. *See* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* ("The antitrust laws . . . were enacted for the protection of competition not competitors.") (quotation marks omitted). There is no allegation, for example, that the imposition of the guideline under which Konverti was rejected or that the App Review process stifles marketwide output or increases prices. *See* Compl. ¶¶ 40-41. Nor does Plaintiff contend that Apple's removal of apps erroneously approved for distribution on the App Store—the alleged cause of his lost investment, *id.* ¶ 17—has any deleterious impact on competition. *See* *Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1036 (9th Cir. 2001)* ("The critical **[**19]** question for determining whether there is antitrust injury is whether the harm is of the kind the antitrust laws were meant to protect against"). As this Court ruled in *Coronavirus Reporter, 2021 WL 5936910, at *14*, "The allegations of injury contained in the FAC are either confined to specific harms experienced by Plaintiffs or a small group of competitors, rather than harm to the market. None of the allegations in the FAC allege harm generally to the market of transactions for apps across a relevant market."

Plaintiff cannot demonstrate antitrust injury sufficient to sustain his claims through references to alleged anticompetitive acts that have no relation to Plaintiff or the harm that he experienced. For example, Plaintiff repeatedly notes that Apple does not allow competing app stores on iOS. *See* Compl. ¶¶ 30, 47, 55. But Plaintiff does not allege that he sought to create such a competing store. Similarly, Plaintiff suggests Apple's pre-installation of certain apps, including the App Store, is anticompetitive without an allegation that this affected him or his app, Konverti, in any way. *See id.* ¶¶ 27, 37.

Plaintiff's allegation that "Apple's conduct has substantial anti-competitive effects, including increased prices and costs, **[**20]** reduced innovation and quality of service, and lowered output," Opp. 5-6 (quoting Compl. ¶ 56) is wholly conclusory and simply constitutes "threadbare recitals" of the elements of antitrust injury insufficient to state a claim. Iqbal, 556 U.S. at 663. To plead antitrust injury, one cannot "merely recite the bare legal conclusion that competition has been restrained unreasonably" but must "at a minimum, sketch the outline of [the injury to competition] with allegations of supporting factual detail." Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1198 (9th Cir. **[*1111]** 2012) (quotation marks omitted; alteration in original); *see also* Reveal Chat Holdco, LLC v. Facebook, Inc., 471 F. Supp. 3d 981, 998 (N.D. Cal. 2020) (rejecting as "nothing more than conclusory" allegations that plaintiffs "'had their business and assets destroyed by Facebook's anticompetitive scheme,' and are prevented from entry or reentry into the relevant markets because of Facebook's exclusionary conduct"); NorthBay Healthcare Grp., Inc. v. Kaiser Found. Health Plan, Inc., 305 F. Supp. 3d 1065, 1074 (N.D. Cal. 2018) (dismissing antitrust claims because "there are no non-conclusory allegations that [Defendant's] actions restrained trade in the relevant market or injured overall competition" and the allegations "lack factual enhancement and are conclusory.").[3]

b. Conclusion

Thus, Plaintiff fails to adequately plead antitrust injury. This failure provides a second and independent basis for the **[**21]** Court to dismiss Plaintiff's antitrust claims (Counts 1-4). Because Plaintiff has failed to make the threshold showings of a plausible a relevant market and alleging antitrust injury, the Court need not analyze whether he has alleged facts sufficient to satisfy the substantive elements of Plaintiff's particular antitrust claims. See *e.g.,* Amex, 138 S. Ct. at 2285 (Market definition is an essential predicate to the entire case, for "[w]ithout a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition.'").

B. Unfair Competition Claim (Count 5)

Plaintiff's fifth cause of action under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, is premised on the following allegation:

> Apple's conduct alleged herein constitutes unlawful, unfair and fraudulent conduct under Cal. Bus. And Prof. Code, §17200 ET. Seq. Apple has deceptively and unfairly: failed to implement policies and procedures that would prevent deceptive and unfair conduct; induced Plaintiff to develop an application by making false representations and then arbitrarily removing it from the Apple Store based on information that was available to Apple since the beginning of the relationship but does not qualify reasons for removal.

Compl. ¶ 81. To **[**22]** the extent the claim is derivative of Plaintiff's allegations of antitrust violations, the UCL claim falls with those claims. City of San Jose v. Off. of the Comm'r of Baseball, 776 F.3d 686, 691-92 (9th Cir. 2015) ("An independent claim under California's UCL is therefore barred so long as [the defendant's] activities are lawful under the antitrust laws."); *see also* Aleksick v. 7—Eleven, Inc., 205 Cal. App. 4th 1176, 1185, 140 Cal. Rptr. 3d 796 (Cal. Ct. App. 2012) ("When a statutory claim fails, a derivative UCL claim also fails.").

Plaintiff contends that the UCL claim encompasses an additional claim "on top of the alleged antitrust violations." Opp. at 10. Plaintiff argues Count 5 includes an independent claim under the UCL that "Defendant has deceptively" failed to "implement policies and procedures that **[*1112]** would prevent deceptive practices and induced Plaintiff to develop an application by making false representations and then arbitrarily removing it from the App Store based on information that was available to Defendant since the beginning of their 2-year relationship." *Id.*

Plaintiff's additional UCL claim then sounds in fraud, which requires him to plead it with particularity under Fed. R. Civ. P. 9(b)'s heightened standard. *See* Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009). The complaint, however, falls short of alleging the "who, what, when, where, and how" required by Rule 9. Id. at 1124 (quotation marks omitted).

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[3] Plaintiff's relevant market definition and theory of antitrust injury also fail to apprehend or analyze the two-sided nature of the marketplace of transactions for apps where Apple's App Store functions as an intermediary between the respective sides — app developers and end users. *See* Coronavirus Reporter, 2021 WL 5936910, at *12-15. Although Apple does not advance this argument in the pending motion, should Plaintiff seek to amend his complaint to plausibly state a claim, Plaintiff must allege a relevant market and theory of antitrust injury that addresses the two-sided nature of the relevant market. *See id.*

The complaint only describes **[**23]** specific communications in which Apple explained *its rejection* of his app. *See* Compl. ¶¶ 7, 15. The complaint does not elaborate on any instances in which Apple told him his app would be distributed through the App Store—the supposedly "fraudulent conduct" on which he relied. Opp. 10. The complaint includes vague allegations that someone at Apple represented to Plaintiff at an unidentified time, in an unidentified manner, that Konverti "compli[ed] with all App Store policies." Compl. ¶ 17. This ambiguous, nonspecific and general allegation does not satisfy *Rule 9(b)*. *See* *Kearns, 567 F.3d at 1127* (rejecting "claims of nondisclosure . . . couched in general pleadings alleging Ford's intent to conceal from customers that CPO vehicles were essentially the same as ordinary used vehicles" because "[s]uch general pleadings do not satisfy the heightened pleading requirements of *Rule 9(b)*").

Similarly, Plaintiff fails to plead facts to support "the elements of fraud" as required to state a claim grounded in fraud under the UCL. *Kearns, 567 F.3d at 1126* ("The elements of a cause of action for fraud in California are: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, **[**24]** i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.") (citation omitted). Notably, complaint lacks any allegation of scienter or an intent to defraud associated with the alleged statement that Plaintiff's app complied with Apple's policies. *See id.* Nor are there any allegations that, if true, would show Plaintiff justifiably relied on Apple's alleged statement. *See id.* This is particularly relevant given the complaint's concession that Apple's written Guidelines put the onus Plaintiff to ensure his app was safe and legal. Compl. ¶ 16.

Thus, the Court dismisses Plaintiff's UCL claim (Count 5) for failure to state a claim.

C. Adequate Remedies at Law (Counts 1-5)

Plaintiff's Prayer for Relief seeks exclusively equitable remedies: injunctive relief, a declaration and restitution. Compl. at 26-27. One of the "basic requisites [for] the issuance of equitable relief" from a federal court is "the inadequacy of remedies at law." *O'Shea v. Littleton, 414 U.S. 488, 502, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)*; *see also Sonner v. Premier Nutrition Corp., 971 F.3d 834, 844 (9th Cir. 2020)* (a plaintiff "must establish that she lacks an adequate remedy at law before securing equitable restitution for past harm"); *Mort v. United States, 86 F.3d 890, 892 (9th Cir. 1996)* ("It is a basic doctrine of equity jurisprudence that courts of equity should not act ... when the moving **[**25]** party has an adequate remedy at law.").

Plaintiff, however, merely asserts that he lacks adequate remedies at law, Compl. ¶ 83, but fails to allege facts or reasons why that is the case. Indeed, the complaint seeks redress for Plaintiff's lost investment — allegedly $150,000 that he spent developing the Konverti app — and **[*1113]** lost profits — from Apple's alleged wrongdoing by removing Konverti from the App Store. Plaintiff offers the conclusory assertion that "the only way to protect its property and protect its rights is to obtain an injunction," Opp. at 10; Compl. ¶¶ 85-87, but provides no explanation and alleges no facts as to why a legal remedy is inadequate to remedy his alleged harm. In *Sonner*, like here, the plaintiff declined to request damages and then urged that she had no adequate remedy at law and was entitled to equitable restitution. *971 F.3d at 844-45*. The Ninth Circuit rejected that argument as the plaintiff had not "explain[ed] how the same amount of money for the exact same harm is inadequate or incomplete." *Id. at 844*. Likewise, Plaintiff here could have sought to recoup his lost investment through damages. *Id.*; *see also* *Guzman v. Polaris Indus. Inc., No. 8:19-cv-1543, 2021 U.S. Dist. LEXIS 98389, 2021 WL 2021454, at *11 (C.D. Cal. May 12, 2021)* ("The relevant question, however, is not whether [plaintiff] has *pleaded* legal remedies, **[**26]** but whether he could have *sought* an adequate legal remedy.").

Thus, because Plaintiff fails to adequately allege that he lacks remedies at law, Plaintiff's claims for equitable relief (Counts 1-5) are dismissed. *See* *Anderson v. Apple Inc., 500 F. Supp. 3d 993, 1009 (N.D. Cal. 2020)* (dismissing claims because "[u]nder *Sonner*, the plaintiffs are required, at a minimum, to plead that they lack an adequate remedy at law, which they have not done").

D. Leave to Amend

The Court dismisses all of Plaintiff's claims for the reasons discussed above, but grants Plaintiff leave to amend his claims. Pursuant to *Fed. R. Civ. P. 15(a)*, leave to amend "shall be freely given when justice so requires." This complaint is Plaintiff's first. While it appears doubtful that Plaintiff will be able to cure the fundamental flaws in his complaint, in light of the liberal policy in favor of granting leave to amend, the Court grants leave to Plaintiff to amend his claims. *See* *Pistacchio, 2021 U.S. Dist. LEXIS 47071, 2021 WL 949422, at *3*; *hiQ Labs, 485 F. Supp. 3d 1137, 2020 WL 5408210, at *7* (providing leave to amend to address deficiencies in the allegations underlying the market definition). Plaintiff is cautioned, however, that in amending the complaint, he must comply with *Rule of Civil Procedure 11*.

V. CONCLUSION

The Court **GRANTS** Apple's motion to dismiss the complaint. Docket No. 24. The Court grants Plaintiff leave to amend his complaint. **[**27]** Plaintiff amended complaint must be filed within thirty (30) days from the date of this order.

This order disposes of Docket No. 24.

IT IS SO ORDERED.

Dated: January 7, 2022

/s/ Edward M. Chen

EDWARD M. CHEN

United States District Judge

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FTC v. Facebook, Inc.

United States District Court for the District of Columbia

January 11, 2022, Decided; January 11, 2022, Filed

Civil Action No. 20-3590 (JEB)

Reporter

581 F. Supp. 3d 34 *; 2022 U.S. Dist. LEXIS 5415 **

FEDERAL TRADE COMMISSION, Plaintiff, v. FACEBOOK, INC., Defendant.

Core Terms

allegations, Redacted, acquisitions, networking, users, monopoly power, market share, consumers, barriers, anticompetitive, Platform, policies, competitors, monopoly, antitrust, Chair, metrics, courts, time spent, contends, recusal, relevant market, authorize, switching, views, monopolist's, quotation, effects, marks, anticompetitive conduct

LexisNexis® Headnotes

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

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

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

In evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), courts must treat the complaint's factual allegations as true and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged. Although detailed factual allegations are not necessary to withstand a Rule 12(b)(6) motion, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face, — that is, the facts alleged in the complaint must be enough to raise a right to relief above the speculative level. The court need not accept as true, then, a legal conclusion couched as a factual allegation, nor inferences unsupported by the facts set out in the complaint. And it may consider not only the facts alleged in the complaint, but also any documents either attached to or incorporated in the complaint, and matters of which courts may take judicial notice.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

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

HN2[] Actual Monopolization, Claims

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

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

Evidence > Types of Evidence > Circumstantial Evidence

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

Evidence > Inferences & Presumptions > Inferences

HN3[] Attempts to Monopolize, Elements

The U.S. Supreme Court defines monopoly power as the power to control prices or exclude competition. In other words, a firm is a monopolist if it can profitably raise prices substantially above the competitive level. If a plaintiff can supply direct proof that a firm has in fact profitably done so, the existence of monopoly power is clear. Because such direct proof is rarely available, however, plaintiffs and courts more typically examine market structure in search of circumstantial evidence of monopoly power. In such a case, courts may infer monopoly power from a firm's possession of a dominant share of a relevant market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN4[] Actual Monopolization, Monopoly Power

Because market power is meaningful only if it is durable, a plaintiff proceeding by the indirect method must also show that the firm's dominant share of the relevant market is protected by barriers to entry into the market. Entry barriers' are factors that prevent new rivals from timely responding to an increase in price above the competitive level.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

HN5[] Attempts to Monopolize, Elements

The indirect framework first requires the plaintiff to establish the relevant market in which the defendant firm allegedly has monopoly power. If the plaintiff succeeds at that stage, it must then adequately allege that the defendant has a dominant share of that market, and that its dominance is protected by barriers to entry.

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

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

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

HN6[] **Relevant Market, Geographic Market Definition**

Even though the definition of a relevant antitrust market is typically a factual rather than a legal inquiry, certain legal principles nevertheless govern. It is well established, for instance, that an antitrust market includes two components: the product market and the geographic market. A relevant product market is a term of art in antitrust analysis, and the Circuit has defined it as including all products reasonably interchangeable by consumers for the same purposes. Because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the analysis of market power uses as its denominator all products roughly equivalent to another for the use to which they are put. In other words, courts look at whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other.

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

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

The question of appropriate substitutes looks to both whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN8[] **Actual Monopolization, Monopoly Power**

Courts generally require a 65% market share to establish a prima facie case of market power.

Mergers & Acquisitions Law > Antitrust > Market Definition

HN9[] **Antitrust, Market Definition**

Plaintiffs need not present market shares estimates with the precision of a NASA scientist. The closest available approximation often will do. A reliable, reasonable, close approximation of relevant market share data is sufficient.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN10[] **Actual Monopolization, Monopoly Power**

A plaintiff proceeding under the indirect method of proof who has alleged a dominant market share must also allege that the defendant's possession of a dominant share of a relevant market is protected by entry barriers. Because market share is just a way of estimating market power, which is the ultimate consideration, easy entry and the absence of barriers matter even though the defendant has a large market share. For antitrust purposes, a barrier to entry is best defined as any factor that permits firms already in the market to earn returns above the competitive level while deterring outsiders from entering.

Antitrust & Trade Law > Regulated Industries > Communications > Telecommunications Act

HN11[] Communications, Telecommunications Act

For purposes of analyzing barriers to entry, a network effect is a feature that makes a network more valuable as the number of users increases.

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

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN12[] Actual Monopolization, Claims

Possessing monopoly power in the relevant market is not enough, however. the second element of a § 2 of the Sherman Act claim: has the Federal Trade Commission sufficiently alleged the willful maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

Antitrust & Trade Law > Sherman Act > Claims

HN13[] Actual Monopolization, Claims

Having a monopoly does not by itself violate § 2 of the Sherman Act. The U.S. Supreme Court has explained that the mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct. Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, however, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court, therefore, lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it.

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

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

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

Antitrust & Trade Law > Sherman Act > Claims

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

HN14[] **Actual Monopolization, Claims**

The D.C. Circuit has articulated several principles that emerge from a century of case law on monopolization under § 2 of the Sherman Act. First, to be condemned as exclusionary, a monopolist's act must have an anticompetitive effect. That is, it must harm the competitive process and thereby harm consumers. Second, the plaintiff, on whom the burden of proof of course rests, must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect. Third, if a plaintiff successfully establishes a prima facie case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a procompetitive justification for its conduct. Fourth, if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit. Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of § 2, a court's focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct.

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN15[] **Antitrust, Horizontal Mergers**

It is well established that mergers may constitute one such means' that tend to destroy competition itself via means other than competition on the merits.

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN16[] **Attempts to Monopolize, Elements**

A monopolist's acquisition of an actual or likely potential competitor is properly classified as anticompetitive, for it tends to augment or reinforce the monopoly by means other than competition on the merits.

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

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

The agency must allege harm to competition and consumers; harm to one or more competitors will not suffice.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Mergers & Acquisitions Law > Antitrust > Premerger Notifications

Antitrust & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

HN18[] Deceptive & Unfair Trade Practices, Federal Trade Commission Act

The Hart-Scott-Rodino Act does not require the Federal Trade Commission (FTC) to reach a formal determination as to whether the acquisition under review violates the antitrust laws. On the contrary, it merely obliges the parties to the merger to report certain information to the agency and to wait to consummate the deal until the expiration of the statutory waiting period, which the FTC may extend while it gathers additional information. 15 U.S.C.S. § 18a(a), (b), (e).

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Antitrust & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

Antitrust & Trade Law > Consumer Protection > False Advertising > US Federal Trade Commission

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN19[] Deceptive & Unfair Trade Practices, Federal Trade Commission Act

Section 13(b) of the Federal Trade Commission (FTC) Act therefore contemplates only relief that is prospective, not retrospective. It does not permit the FTC to bring a claim based on long-past conduct without some evidence that the defendant is' committing or is about to commit another violation.

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

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

HN20[] Motions to Dismiss, Failure to State Claim

Although the D.C. Circuit does not appear to have weighed in on the issue, a chorus of other courts has held that a motion to dismiss under Fed. R. Civ. P. 12(b)(6) doesn't permit piecemeal dismissals of parts of claims. Rather, the question at this stage is simply whether the complaint includes factual allegations that state a plausible claim for relief. That conclusion flows from the plain language of Rule 12(b)(6), which permits a party to seek dismissal for failure to state a claim upon which relief can be granted.

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

HN21[] Complaints, Requirements for Complaint

In sum, at the motion-to-dismiss stage, once a court determines that a claim states a viable basis for relief, it cannot further parse out whether other portions of the claim would suffice on their own.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN22[] **Judges, Discretionary Powers**

A trial court enjoys considerable discretion over discovery matters.

Governments > Courts > Court Personnel

HN23[] **Courts, Court Personnel**

Adjudication has its own unique ethical requirements; as a result, the D.C. Circuit has held that the standard is not applicable to non-adjudicatory proceedings, and that courts must not impose judicial roles upon administrators when they perform functions very different from those of judges.

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

Antitrust & Trade Law > Consumer Protection > False Advertising > US Federal Trade Commission

HN24[] **Antitrust & Trade Law, Federal Trade Commission Act**

Even when not acting as an adjudicator, a Federal Trade Commission Commissioner is not absolved of all ethical constraints. For instance, when a Commissioner is engaged in the rulemaking process, she should be disqualified when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding. When considering potential prejudgment in the context of a rulemaking, however, courts have not generally objected to statements made prior to the initiation of agency action and have recognized that administrators, and even judges, may hold policy views on questions of law prior to participating in a proceeding.

Legal Ethics > Prosecutorial Conduct

HN25[] **Legal Ethics, Prosecutorial Conduct**

The standards of neutrality for prosecutors are not necessarily as stringent as those applicable to judicial or quasi-judicial officers, and they may require a stronger showing for a prosecutor than a judge in order to conclude that a conflict of interest exists. In particular, given prosecutors' duties, they are necessarily permitted to be zealous in their enforcement of the law. Of course, this does not waive prosecutors' ethical obligations, as they too must serve the public interest, and their behavior is not immunized from judicial scrutiny in cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law.

Legal Ethics > Prosecutorial Conduct

HN26[] Legal Ethics, Prosecutorial Conduct

True disinterest on the issue of such a defendant's guilt is the domain of the judge and the jury — not the prosecutor.

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Judges: JAMES E. BOASBERG, United States District Judge.

Opinion by: JAMES E. BOASBERG

Opinion

[*40] MEMORANDUM OPINION

Second time lucky? The Federal Trade Commission's first antitrust suit against Facebook, Inc. stumbled out of the starting blocks, as this Court dismissed the Complaint last June. In doing so, the Court concluded that the Commission had failed to plausibly allege "that Facebook has monopoly power in the market for Personal Social Networking (PSN) services." *FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *1-2 (D.D.C. June 28, 2021)*. Because that "defect **[**2]** could conceivably be overcome by re-pleading," however, the Court left the door ajar for the agency to amend the Complaint and reinstate its suit. *560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, [WL] at *1*.

Eagerly accepting such invitation, the FTC has filed an Amended Complaint containing significant additions and revisions aimed at addressing the shortcomings identified in the Court's prior Opinion. The core theory of the lawsuit remains essentially unchanged. The Commission continues to allege that Facebook has long had a monopoly in the market for PSN services and that it has unlawfully maintained that monopoly via two types of actions: first, by acquiring competitors and potential competitors — most notably, Instagram and WhatsApp — that it believed were well situated to eat into its monopoly; and second, by implementing and enforcing policies that prevented interoperability between Facebook and other apps that it viewed as nascent threats. The facts alleged this time around to fortify those theories, however, are far more robust and detailed than before, particularly in regard to the contours of Defendant's alleged monopoly.

Facebook nonetheless moves to dismiss once again, contending that the FTC's latest effort is akin to rearranging **[**3]** the deck chairs on the Titanic. Although the agency may well face a tall task down the road in proving its allegations, the Court believes that it has now cleared the pleading bar and may proceed to discovery. That holding flows from several conclusions. First, the FTC has now alleged enough facts to plausibly establish that Facebook exercises monopoly power in the market for PSN services. Second, it has adequately alleged that the company's dominant market share is protected by barriers to entry into that market. Third, the agency has also explained that Facebook not only possesses monopoly power, but that it has willfully maintained that power through anticompetitive conduct — specifically, the acquisitions of Instagram and WhatsApp. The Court will not, however, allow the allegations surrounding Facebook's interoperability policies (also known as the Platform policies) to move forward; they founder for the same fundamental reasons as explained before: Facebook abandoned the policies in 2018, and its last alleged enforcement was even further in the past.

Last, the company lets fly a new arrow this time around, urging dismissal on the independent basis that the FTC's vote authorizing **[**4]** the Amended Complaint was invalid because Chair Lina Khan's alleged prejudgment of Facebook's antitrust liability required her recusal. The Court believes that such contention misses its target, as Khan was acting in a prosecutorial capacity, as opposed to in a judicial role, in connection with the vote.

Ultimately, whether the FTC will be able to prove its case and prevail at summary judgment and trial is anyone's guess. The Court declines to engage in such speculation and simply concludes that at this motion-to-dismiss stage, where the FTC's allegations are treated as true, the agency **[*41]** has stated a plausible claim for relief under *Section 2* of the Sherman Act. The Court, consequently, will deny Facebook's Motion.

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I. Background

In its prior Opinions in this case and in a parallel antitrust suit filed by a number of States, the Court described in detail the background of social networking, **[**5]** Facebook Blue — *i.e.*, the product that "its millions of users think of when they think of 'Facebook,'" — the company's acquisitions of Instagram and WhatsApp, and the history of Facebook Platform and the company's interoperability policies. See *Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *2-6*; *New York v. Facebook, Inc. (New York), No. 20-3589, 549 F. Supp. 3d 6, 2021 WL 2643724, at *2-6 (D.D.C. June 28, 2021)*. The Court will spare the reader another factual recitation here and will instead confine this brief background section to the case's procedural history. As the critical question in this Motion is whether the FTC's new allegations have filled the holes in its previous Complaint, that will be the focus of the Court's analysis below.

The FTC filed this action on December 9, 2020, asserting one count of monopoly maintenance under *Section 2 of the Sherman Act*. See ECF No. 3 (Redacted Complaint), ¶¶ 169-74. The suit was filed after three of the FTC's five Commissioners voted to authorize it. See FTC, FTC Sues Facebook for Illegal Monopolization (Dec. 9, 2020), https://bit.ly/30Q3I8Y. Chair Khan was not yet a Commissioner at the time. Id. As noted in the Court's previous Opinions, although this FTC suit was initially assigned to Judge Christopher R. Cooper of this district, he reassigned it to this Court, which was handling the earlier-filed and related State case. See *Facebook, 560 F. Supp. 3d 1, 2021*

U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *7; **[**6]** see also No. 20-3590, Minute Order of Jan. 12, 2021. Facebook subsequently moved to dismiss both cases. While the Court granted the dismissal of the States' entire case, New York, 549 F. Supp. 3d 6, 2021 WL 2643724, at *29, here it dismissed only the Complaint, "leaving the agency the chance to replead if it believes it can successfully remedy the infirmities described" in the Court's Opinion. Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *7.

Despite a change in leadership since the lawsuit was initially filed, the FTC took the Court up on its offer, filing an Amended Complaint in August 2021. See ECF No. 76 (Amended Complaint filed under seal); ECF No. 82 (Redacted Am. Compl.). (In this Opinion, the Court cites a copy of the Amended Complaint that has minor redactions to protect confidential business information.) As with the initial Complaint, three of the five Commissioners voted to authorize the updated filing. See FTC, **[*42]** FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts to Innovate (Aug. 19, 2021), https://bit.ly/3q8Ku76. This time around, however, Chair Khan — who was appointed earlier in 2021 — was one of those three. Id.; see also ECF No. 83-1 (Motion to Dismiss) at 5.

The Amended Complaint again alleges unlawful monopoly **[**7]** maintenance under Section 2 of the Sherman Act, although it now lists two counts. See Redacted Am. Compl., ¶¶ 230-42. The allegations in the second count incorporate those in the first, while also alleging additional conduct. Specifically, Count I alleges that "Facebook has willfully maintained its monopoly power through its course of anticompetitive conduct consisting of its anticompetitive acquisitions." Id., ¶ 232. Count II, meanwhile, alleges that "Facebook has willfully maintained its monopoly power through its course of conduct that includes both anticompetitive acquisitions and . . . maintaining and enforcing anticompetitive agreements relating to Facebook Platform to deter competitive threats to its personal social networking monopoly." Id., ¶ 238 (emphasis added). Plaintiff again invokes Section 13(b) of the FTC Act, id., ¶ 243, which authorizes the agency to seek an injunction against an entity that "is violating" or "is about to violate" the antitrust laws. See 15 U.S.C. § 53(b). The Government hopes to procure an injunction aimed at preventing the allegedly unlawful conduct in the future, as well as an order mandating "divestiture of assets, divestiture or reconstruction of businesses (including, but not limited to, Instagram and/or **[**8]** WhatsApp), and such other relief sufficient to restore the competition that would exist absent the conduct alleged in the Complaint." Redacted Am. Compl. at 79.

Believing the FTC's recent effort as flawed as its predecessor, Facebook has now moved to dismiss the Amended Complaint.

II. Legal Standard

Facebook relies on Federal Rule of Civil Procedure 12(b)(6), which permits dismissal of a complaint where it fails to state a claim upon which relief can be granted. See MTD at 6. ***HN1***[] In evaluating such a motion to dismiss, courts must "treat the complaint's factual allegations as true . . . and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1113, 342 U.S. App. D.C. 268 (D.C. Cir. 2000) (quoting Schuler v. United States, 617 F.2d 605, 608, 199 U.S. App. D.C. 23 (D.C. Cir. 1979)). Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Twombly, 550 U.S. at 570) — that is, the facts alleged in the complaint "must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555. The court need not accept as true, then, "a legal conclusion couched as a factual allegation," Trudeau v. FTC, 456 F.3d 178, 193, 372 U.S. App. D.C. 335 (D.C. Cir. 2006) (quoting Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)), nor "inferences . . . unsupported by the facts set out in the complaint." Id. (quoting **[**9]** Kowal v. MCI Commc'ns Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994)). And it may consider not only "the facts alleged in the complaint," but also "any documents either attached to or incorporated in the complaint[,] and matters of which [courts] may **[*43]** take judicial notice." Equal Emp't Opportunity Comm'n v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624, 326 U.S. App. D.C. 67 (D.C. Cir. 1997).

III. Analysis

HN2[] As set forth in the Court's prior Opinion, the offense of monopoly maintenance under *Section 2* of the Sherman Act "has two elements: '(1) the possession of monopoly power in the relevant market and (2) the willful . . . maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *United States v. Microsoft Corp., 253 F.3d 34, 50, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (*en banc*) (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*); see *Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *7*. Facebook seeks dismissal on the ground that the FTC has not adequately pleaded either of those prerequisites. Specifically, Defendant contends that, as before, the Commission has not alleged facts plausibly establishing monopoly power, see MTD at 6-20, and that the agency has also not adequately alleged legally cognizable exclusionary conduct. Id. at 20-38. Separately, Facebook also urges the Court to conclude that the FTC's vote purporting to authorize the Amended Complaint was invalid because of Chair Khan's biased participation. Id. at 38-45. The Court examines each of those arguments in turn. **[**10]**

A. Monopoly Power

Consider first the threshold inquiry of a monopoly-maintenance claim: has the FTC plausibly alleged that Facebook has monopoly power in a relevant market? ***HN3***[] "The Supreme Court defines monopoly power as 'the power to control prices or exclude competition.'" *Microsoft, 253 F.3d at 51* (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*). In other words, "a firm is a monopolist if it can profitably raise prices substantially above the competitive level." Id. (citations omitted). If a plaintiff can supply direct proof that a "firm has in fact profitably done so, the existence of monopoly power is clear." Id. (citations omitted). Because such "direct proof" is "rarely available," however, plaintiffs and courts "more typically examine market structure in search of circumstantial evidence of monopoly power." Id. In such a case, courts may infer monopoly power from "a firm's possession of a dominant share of a relevant market." Id.; see *Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 937 (7th Cir. 2000)* (market power can be proven "through direct evidence of anticompetitive effects" or, "more conventional[ly]," "by proving relevant product and geographic markets and by showing that the defendant's share exceeds [some] threshold"); *S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co., 740 F.2d 980, 1000 (D.C. Cir. 1984)* ("[C]ourts frequently approach the problem of measuring market power by defining **[**11]** the relevant product and geographic market and computing the defendant's market share. Monopoly power is then ordinarily inferred from a predominant share of the market.").

HN4[] Because "[m]arket power is meaningful only if it is durable," a plaintiff proceeding by the indirect method must also show that the firm's dominant share of the relevant market is protected by "barriers to entry" into the market. See *Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 762 F.3d 1114, 1123-25 (10th Cir. 2014)*; *Microsoft, 253 F.3d at 51*. "'Entry barriers' are factors . . . that prevent new rivals from timely responding to an increase in price above the competitive **[*44]** level." *Microsoft, 253 F.3d at 51*; see *S. Pac. Commc'ns Co., 740 F.2d at 1001-02*.

In its Opposition, the FTC contends that it has alleged both indirect and direct evidence of Facebook's monopoly power, although it devotes far more attention to the indirect-proof argument. See ECF No. 85 (Redacted FTC Opposition) at 4-15. Because the Court concludes that the FTC has adequately alleged indirect evidence of such monopoly power, it need not separately address whether this is the rare case in which the agency has also pleaded direct evidence. ***HN5***[] The indirect framework first requires the plaintiff to "establish[] the relevant market" in which the defendant firm allegedly has monopoly power. See *Sky Angel U.S., LLC v. Nat'l Cable Satellite Corp., 947 F. Supp. 2d 88, 102 (D.D.C. 2013)* (quoting *Neumann v. Reinforced Earth Co., 786 F.2d 424, 429, 252 U.S. App. D.C. 11 (D.C. Cir. 1986)*). If the plaintiff succeeds **[**12]** at that stage, it must then adequately allege that the defendant has a dominant share of that market, and that its dominance is protected by barriers to entry. Id; see, e.g., *FTC v. AbbVie Inc., 976 F.3d 327, 373-74 (3d Cir. 2020)* (above 60% market share sufficient); *Image Tech. Servs. v. Eastman Kodak Co., 125 F.3d 1195, 1206 (9th Cir. 1997)* ("Courts generally require a 65% market share to establish a prima facie case of market power.").

1. *Market Definition*

HN6[] As the Court explained in its previous Opinion, even though the definition of a relevant antitrust market is typically a "factual" rather than a "legal" inquiry, certain "legal principles" nevertheless govern. *Newcal Indus., Inc. v. Ikon Off. Sol., 513 F.3d 1038, 1045 (9th Cir. 2008)*; see *Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *9*. It is well established, for instance, that an antitrust market includes "two components: the product market and the geographic market." *Sky Angel, 947 F. Supp. 2d at 102*. "A 'relevant product market' is a term of art in antitrust analysis," *United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 50 (D.D.C. 2011)*, and the Circuit has defined it as including "all products reasonably interchangeable by consumers for the same purposes." *Microsoft, 253 F.3d at 52* (internal quotation marks and citation omitted). "Because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level," *id at 51* (internal citation omitted), the analysis of market power uses as its denominator all products "roughly equivalent to another for the use to **[**13]** which [they are] put." *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 437 (3d Cir. 1997)* (citation omitted). "In other words, courts look at whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other." *H & R Block, 833 F. Supp. 2d at 51* (internal quotation marks and citation omitted).

The Court found in its prior Opinion that the FTC had plausibly established a relevant antitrust market. *Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *9-11*. The FTC alleges the same market in its Amended Complaint, and Defendant does not object to that market definition here. See Redacted Am. Compl., ¶¶ 165-80; Redacted FTC Opp. at 3 ("The Court has already determined, correctly, that the FTC has adequately pleaded a relevant antitrust market for PSN services in the United States."); MTD at 6-13 (noting Court's prior market definition without objection, while arguing that FTC still has not alleged dominant share of that market). The Court will briefly recount the relevant findings of its previous Opinion on market definition, as that **[*45]** will help frame the question of whether the FTC has sufficiently alleged that Facebook has a dominant share of such market.

Unlike a relatively obvious market for, say, tires or doughnuts, the relevant market here is considerably more **[**14]** nuanced. The Court previously endorsed the agency's definition of the market for PSN services in the United States as consisting of "online services that enable and are used by people to maintain personal relationships and share experiences with friends, family, and other personal connections in a shared social space." *Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *10* (quoting Redacted Compl., ¶ 52). Such PSN services are "defined, and distinguished from other services, by their having '[t]hree key elements.'" Id. (quoting Redacted Compl., ¶ 52). "First, [they] are built on a social graph that maps the connections between users and their friends, family, and other personal connections." Redacted Compl., ¶ 53. "Second, [they] include features that many users regularly employ to interact with personal connections and share their personal experiences in a shared [virtual] social space, including in a one-to-many 'broadcast' format." Id., ¶ 54. And "'[t]hird, [they] include features that allow users to find and connect with other users, to make it easier for each user to build and expand their set of personal connections. The social graph also supports this feature by informing [the user] which [new] connections' might be available based **[**15]** on her existing network." *Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *10* (quoting Redacted Compl., ¶ 55). Here, the Amended Complaint provides an essentially identical definition of PSN services. See Redacted Am. Compl., ¶¶ 166-69.

Having approved the FTC's definition of PSN services, the Court's previous Opinion then turned to the agency's allegation that certain other well-known "types of internet services" are not "adequate substitutes." *Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *10* (quoting Redacted Compl., ¶ 57). The Commission put forth a number of reasons why other technology services — such as LinkedIn, YouTube, Spotify, and Netflix — do not qualify. For instance, it alleged that "'specialized social networking services' that 'focus on professional . . . connections' (*e.g.*, LinkedIn) are not substitutes because they are designed for and used primarily by professionals for sharing professional content," as opposed to PSN's design and primary use of "maintain[ing] personal relationships and shar[ing] experiences with friends, family, and other personal connections." Id. (quoting Redacted Compl., ¶¶ 52, 58). The Amended Complaint provides substantially similar allegations here, while acknowledging other players in the PSN market, "including Snapchat, Google+, Myspace, **[**16]** Path, MeWe, Orkut, and Friendster." Redacted Am. Compl., ¶¶ 171-77, 200.

In its first Opinion, the Court concluded that "[w]hile there are certainly bones that one could pick with the FTC's market-definition allegations, the Court does not find them fatally devoid of meat." *Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *10*. It rejected, for example, Facebook's contentions that the market definition "contains an internal contradiction," and that the FTC "neglected to allege any facts regarding the cross-elasticity of demand between [PSN services] and [potential] substitutes for it." *560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, [WL] at *10-11* (internal quotation marks and citations omitted). Notably, the Court parried Defendant's argument "that the Complaint impermissibly distinguishes PSN services from other possible substitutes based on their primar[y] uses." *560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, [WL] at *11* (internal quotation marks and citations omitted). ***HN7***[] As the Court explained, the question **[*46]** of appropriate substitutes "looks to both 'whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other.'" Id (quoting *H & R Block, 833 F. Supp. 2d at 51*) (emphasis added); see also *United States v. Aetna Inc., 240 F. Supp. 3d 1, 19 (D.D.C. 2017)*. In sum, although "the agency certainly could have provided more on that front, the fact that other services are **[**17]** not primarily used for the sort of personal sharing that is the hallmark of a PSN service seems a plausible reason why little switching would occur." Id.

Given that the Amended Complaint provides an essentially identical definition of the relevant market, see Redacted Am. Compl., ¶¶ 166-69, and that Facebook lodges no objection to the Court's prior finding, the Court sees no reason to revisit its earlier analysis and conclusion. See MTD at 6-13; Redacted FTC Opp. at 3. The Amended Complaint's allegations thus do enough to make out a plausible market for PSN services. See Redacted Am. Compl., ¶¶ 165-80.

2. *Market Share*

With the market defined, the Court now addresses what has thus far been the FTC's Achilles' heel: sufficiently alleging Facebook's market dominance. In the last go-round, the Commission alleged "only that Facebook has 'maintained a dominant share of the U.S. personal social networking market (in excess of 60%)' since 2011, and that 'no other social network of comparable scale exists in the United States.'" *Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *12* (quoting Redacted Compl., ¶¶ 3, 64). The Court concluded that such bare allegations — "which do not even provide an estimated actual figure or range for Facebook's market **[**18]** share at any point over the past ten years — ultimately fall short of plausibly establishing that Facebook holds market power." Id. Because it was conceivable "that the agency may be able to 'cure [these] deficiencies' by repleading," however, the Court dismissed the Complaint without prejudice, leaving Plaintiff "free to amend [its] pleading and continue the litigation." *560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, [WL] at *14* (quoting *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*; *Ciralsky v. CIA, 355 F.3d 661, 666, 359 U.S. App. D.C. 366 (D.C. Cir. 2004)*).

The FTC has now done precisely that, adding substantial new allegations about the contours of Facebook's market share. Most notably, the Amended Complaint alleges far more detailed facts to support its claim that "Facebook has today, and has maintained since 2011, a dominant share of the relevant market for U.S. personal social networking services." Redacted Am. Compl., ¶ 190. Specifically, the Amended Complaint includes allegations regarding Facebook's market share of daily average users (DAUs) and monthly average users (MAUs) of PSN services in the United States, as well as its share of users' average time spent on PSN services. Id. For instance, the FTC alleges that, "[b]ased on an analysis of data maintained by Comscore, a commercially-available data source," "Facebook's share of DAUs of apps providing **[**19]** personal social networking services in the United States has exceeded 70% since 2016 and was at least as high in 2011." Redacted Am. Compl., ¶¶ 182, 200. Indeed, the Amended Complaint alleges that, from "September 2016 through December 2020, Facebook's share of DAUs among apps providing personal social networking services in the United States averaged 80% per month for smartphones, 86% per month in tablets, and 98% per month for desktop computers, and that Facebook's share of DAUs has not dropped below 70% in any month on any device-type." Id., ¶ 200(a). "The combined **[*47]** shares of other [PSN] providers," meanwhile — which the FTC identifies as "including Snapchat, Google+, Myspace, Path, MeWe, Orkut, and Friendster" — "did not exceed 30% on any device type during any month in this period." Id.

The agency's allegations concerning MAUs tell the same story. Again relying on Comscore data, the FTC alleges that "Facebook's share of MAUs of apps providing personal social networking services in the United States has exceeded 65% since 2012 and was at least as high in 2011." Id., ¶ 201. Similarly, the "combined shares of other providers . . . did not exceed 32% on either device type, mobile or **[**20]** desktop, in any month during" the period of September 2012 to December 2020. Id., ¶ 201(a). Plaintiff's allegations concerning "Facebook's share of the time spent by users of apps providing personal social networking services in the United States" are also in accord with the DAU and MAU data. In fact, the FTC alleges that Facebook's share of users' time spent on such services "has exceeded 80% since 2012 and was at least as high in 2011." Id., ¶ 199.

The Amended Complaint also adequately alleges that the three metrics offered to measure market share — DAUs, MAUs, and time spent — are appropriate indicators. The FTC explains, consistent with common sense, that "a personal social networking service's attractiveness to users, and therefore its competitive significance, is related to its number of users and to how intensively its users engage with the service." Id., ¶ 192. Significantly, the Amended Complaint alleges that Facebook itself uses these metrics to assess its performance, as well as that of rival PSN services. Indeed, "in the ordinary course of business, Facebook's executives and investors, rival personal social networking providers, and industry observers have assessed the performance **[**21]** of Facebook Blue, Instagram, and other personal social networking providers using measures of active user base and how much people use the services—with DAUs, MAUs, and the amount time spent by users on the service being common units of measure." Id., ¶ 193. For instance, "Facebook's internal presentations assessing the performance of Facebook Blue and Instagram focus on time spent per month, MAUs, and DAUs," and the company "relies on these same metrics to assess its rivals' competitive significance." Id., ¶ 194.

The FTC similarly alleges that other firms offering PSN services cite these metrics. Snapchat, for example, regularly compares its performance with that of "Instagram by observing the firms' MAUs, DAUs, and time spent" metrics. Id., ¶ 195. Relatedly, the FTC also alleges that "[c]ommercial data sources track the usage of online services within the United States" using metrics such as "MAUs, DAUs, and time spent." Id., ¶ 196.

Considering these new allegations and granting Plaintiff "the benefit of all inferences that can be derived from the facts alleged," *Sparrow, 216 F.3d at 1113* (internal citation omitted), means that the Amended Complaint "contain[s] sufficient factual matter, accepted as true, **[**22]** to 'state a claim to relief that is plausible on its face.'" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 570*). In stark contrast with its predecessor, this Complaint provides reinforcing, specific allegations that all point toward the same conclusion: Facebook has maintained a dominant market share during the relevant time period. Accepting the market definition (which Defendant does) and the truth of Plaintiff's market-share allegations (which the Court must at this stage), Facebook's market share comfortably exceeds the levels that courts ordinarily find sufficient to establish monopoly **[*48]** power. See, e.g., *AbbVie Inc., 976 F.3d at 373* (above 60% market share sufficient); *Eastman Kodak Co., 125 F.3d at 1206* ("***HN8***[] Courts generally require a 65% market share to establish a prima facie case of market power."); *2301 M Cinema LLC v. Silver Cinemas Acquisition Co., 342 F. Supp. 3d 126, 140 (D.D.C. 2018)*.

Not prepared to throw in the towel, Defendant offers several rejoinders, none of which is persuasive at this stage. First, it contends that the Comscore data on which the FTC relies "itself warns against reliance on this data, disclaiming responsibility for its 'accuracy or completeness.'" MTD at 7-8 (quoting Redacted Am. Compl., ¶ 182 n.1). Such an attack on the reliability of the underlying data, however, is inapposite at the motion-to-dismiss stage. Facebook will be given ample **[**23]** opportunity to advance such arguments down the line, perhaps in a potential "battle of the experts." At this juncture, however, the Court "must treat the complaint's factual allegations as true." *Sparrow, 216 F.3d at 1113* (internal quotation marks and citation omitted). It thus has no basis now to scrutinize the reliability of the data relied on by the FTC.

Second, Defendant also assails the significance of data concerning time spent on PSN services. Specifically, it contends that such data "does not track PSNS usage; it instead tracks users of online services and total time spent on those services (PSNS and non-PSNS alike)." MTD at 7. Here, Facebook gains more traction, though its argument does not ultimately carry the day. It is correct, as the Court previously acknowledged, that data measuring the amount of time users spend on Facebook (and on other PSN service providers) likely captures time not spent engaging with a PSN service — *e.g.*, watching a movie trailer embedded on the official page of the movie — given how the FTC defined the market. *Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627,* at *13 ("[A]t least some of the features offered by a Facebook or Instagram or Path are not, seemingly, part of those firms' PSN-services offerings as defined by the FTC; **[**24]** time spent on those apps or websites, accordingly, is not necessarily time spent on a PSN service."). But that does not mean that the metric tells the Court nothing about Facebook's market share, as the company suggests. See MTD at 7-10. The Amended Complaint alleges, for instance, that Facebook Blue and Instagram "are predominantly used as personal social networking services." Redacted Am. Compl., ¶ 202. Indeed, the FTC states that Facebook itself recognizes that Facebook Blue provides "personal social networking services, and that personal social networking services are the predominant value and use of Facebook Blue to users." Id., ¶ 178 (emphasis added). Numerous statements from Facebook CEO Mark Zuckerberg fortify the premise that the company understands Facebook Blue and Instagram to be focused on delivering PSN services. See, e.g., id., ¶¶ 177-79, 202.

While Defendant is correct that data capturing time spent on platforms providing PSN services includes more than time spent just using such services, that imperfection is not fatal at this stage. ***HN9***[] As courts in this district have recognized, "[P]laintiffs 'need not present market shares . . . estimates with the precision of a NASA **[**25]** scientist. The closest available approximation often will do.'" *United States v. Anthem, Inc., 236 F. Supp. 3d 171, 207 (D.D.C. 2017)* (quoting *FTC v. Sysco Corp., 113 F. Supp. 3d 1, 54 (D.D.C. 2015)*) (internal quotation marks and citation omitted); see *H & R Block, Inc., 833 F. Supp. 2d at 72* (citation omitted) ("A reliable, reasonable, close approximation of relevant market share data is sufficient."). Here, moreover, Plaintiff is not relying solely on the time-spent data — which **[*49]** indicates a market share well over the necessary threshold — but instead supports that allegation with MAU and DAU metrics that reinforce the same conclusion. See *Twombly, 550 U.S. at 563* ("[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."). In light of those allegations, it would be improper to dismiss the FTC's Amended Complaint just because it does not have perfect data (which may not exist) about precisely what percentage of users' time spent on Facebook Blue and Instagram includes interacting with friends, family, and other personal contacts, as opposed to engaging in activity — such as passively viewing a music video — that falls outside of the market definition. See, e.g., *United States v. Bazaarvoice, Inc., No. 13-133, 2014 U.S. Dist. LEXIS 3284, 2014 WL 203966, at *32 (N.D. Cal. Jan. 8, 2014)* ("The data that exist regarding this market are imperfect, in part because the market is relatively new. But that does not **[**26]** mean that one should ignore the existing data or the market realities. For example, there is no real dispute that the overwhelming majority of [Defendant's] business came from [Ratings and Reviews platforms (R & R)], so to complain that [the Government's expert] did not distinguish between revenue from R & R and other [of] the parties' other offerings that complement R & R is unconvincing.").

Facebook's third central counterargument focuses on the FTC's use of MAU and DAU figures. See MTD at 12. Defendant posits that those metrics "cannot plausibly be used to calculate relative market share, both because the same individuals may (and often do) use more than one service and, more fundamentally, because the mere fact that an individual uses a service says nothing about how much time (if any) that person spends consuming PSNS on that service." Id. Not so. With regard to the first point, the FTC indicates that a single user's consumption of services from multiple providers is reflected in the MAU and DAU metrics. See Redacted FTC Opp. at 8. In other words, if one person used both Instagram and Snapchat on the same day, both uses would be included in the denominator to determine the total **[**27]** shares in the market for PSN services. Id. As for Facebook's contention that MAU and DAU figures do not account for intensity of use of PSN services, that argument merely underscores the utility of looking to time-spent data as well and considering the three metrics holistically. Indeed, while each metric captures consumption of PSN services on somewhat different terms, that reality may in fact strengthen the FTC's case because each measurement paints the same picture: Facebook has maintained a dominant market share during the relevant time period. In any event, to the extent that DAUs and MAUs do not fully capture consumers' intensity of use, the Amended Complaint alleges that Facebook's share of the relevant market actually increases when one looks to time-spent data, which accounts for intensity of use within a day or month. See Redacted Am. Compl., ¶¶ 199-201.

In short, the FTC has done its homework this time around and has put forth detailed factual allegations that "raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true." *Twombly, 550 U.S. at 555* (citations omitted). To allege market dominance, the agency used multiple metrics designed **[**28]** to capture output or consumption — "the usual measure of a market and of the shares within it."

Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, vol. IIB, ¶ 535, at 308 (5th ed. 2021). Each of those metrics buttresses one another and demonstrates a market share that courts **[*50]** typically find significant enough to infer monopoly power. And the Amended Complaint extensively alleges that the metrics are regularly used by Facebook, its competitors, and relevant data collectors to assess market power. While Defendant may ultimately be able to disprove these allegations as litigation continues, that issue is not before the Court today. Rather, it suffices to conclude that the FTC has plausibly alleged that Facebook maintained a dominant share of the U.S. personal-social-networking market since 2011.

3. *Barriers to Entry*

As the prior Opinion in this case concluded that the Commission had fallen short on its market-share allegations, the Court did not "address the issue of whether the FTC has sufficiently alleged entry barriers." *Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *12*. Because the agency has now plausibly alleged such a market share, the Court must take on the issue.

HN10[] As explained above, a plaintiff proceeding under the indirect **[**29]** method of proof who has alleged a dominant market share must also allege that the defendant's "possession of a dominant share of a relevant market [] is protected by entry barriers." *Microsoft, 253 F.3d at 51*. "Because market share is just a way of estimating market power, which is the ultimate consideration, easy entry and the absence of barriers matter even though the defendant has a large market share." Areeda & Hovenkamp, ¶ 420, at 78 (internal quotation marks and citations omitted). "For antitrust purposes, a barrier to entry is best defined as any factor that permits firms already in the market to earn returns above the competitive level while deterring outsiders from entering." Id., ¶ 420, at 77; see *Microsoft, 253 F.3d at 51* ("'Entry barriers' are factors . . . that prevent new rivals from timely responding to an increase in price above the competitive level.").

The FTC alleges that "Facebook's dominant position in the U.S. personal social networking market is durable due to significant entry barriers, including direct network effects and high switching costs." Redacted Am. Compl., ¶ 212. The Court concludes that such allegations, set forth in more detail below, are sufficient at this stage.

Start with network effects. A leading antitrust treatise explains, ***HN11***[] "For purposes of **[**30]** analyzing barriers to entry, a network effect is a feature that makes a network more valuable as the number of users increases." Areeda & Hovenkamp, ¶ 421h, at 95. A telephone system, for example, is traditionally "more valuable as it has more subscribers, thus enabling more people to communicate with one another." Id. Here, the FTC advances a modern variation on that well-established barrier to entry. It alleges that "because a core purpose of personal social networking is to connect and engage with personal connections, it is very difficult for a new entrant to displace an established personal social network in which users' friends and family already participate." Redacted Am. Compl., ¶ 212. In other words, why would new users go to a social space that does not include their important contacts?

The Amended Complaint also alleges that "[i]n addition to facing these network effects, a potential entrant in personal social networking services would also have to overcome the high switching costs faced by users." Id., ¶ 213. It explains: "Over time, users of Facebook's and other personal social networks build more connections and develop a history of posts and shared experiences, which they cannot easily transfer to another **[**31]** personal social networking provider." Id. Indeed, these "switching costs can increase over time" as **[*51]** a "user's collection of content and connections, and investment of effort in building each, continually builds with use of the service." Id.

It is at least plausible that these twin doctrines pose barriers to entry in the market for PSN services. Off the bat, there can be little doubt that network effects and switching costs are commonly recognized types of barriers to entry — a proposition that Facebook does not meaningfully contest. See ECF No. 87 (Reply) at 9-12; see also, e.g., *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 476-77, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (discussing switching costs); *Microsoft, 253 F.3d at 55-56* (discussing network effects); Areeda & Hovenkamp, ¶ 421h. Against that backdrop, the FTC has supported its claims with ample allegations in the Amended Complaint. For example, that Defendant itself "recognized the significant advantage Facebook enjoyed due to these structural barriers." Redacted Am. Compl., ¶ 212. Indeed, a Facebook executive expressed the sentiment as follows: "Why are we hard to compete with[?] Your friends are here. You have made a big investment in your Facebook network and identity." Id. Zuckerberg, furthermore, stated about the company's network effects, "Perhaps the most valuable **[**32]** thing about Facebook is that it is by far the world's most comprehensive directory of people and their connections[, which is] a huge structural advantage." Id.

The Amended Complaint also alleges the same with regard to switching costs. It states that Facebook executives recognized that "one of the most important ways we can make switching costs very high for users - if we are where all users' photos reside[, it] will be very tough for a user to switch if they can't take those photos and associated data/comments with them." Id., ¶ 216. The FTC also notes that "these switching costs can increase over time — a 'ratchet effect' — as each user's collection of content and connections, and investment of effort in building each, continually builds with use of the service." Id., ¶ 213. Finally, it alleges that Facebook was also well aware of this dynamic, with "a Facebook ordinary course document not[ing] that there are 'many lines of evidence for a substantial ratchet effect' and that ratchet effects 'can confer [a] permanent advantage.'" Id.

Taken together, those allegations are sufficient at this early stage in the ligation. While this case involves a novel market, it is at least plausible **[**33]** that Facebook's network effects and the high cost of switching away prevent new rivals from entering that market. In short, the Amended Complaint's allegations concerning barriers to entry are "enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555*.

Facebook resists this conclusion, insisting that the FTC has "pleaded itself out of court" by alleging that "other service providers with substantial networks could add PSNS offerings along with other services." MTD at 13. In other words, Defendant contends that there cannot be significant entry barriers because a "non-PSNS can add PSNS features after establishing a network outside the PSNS market." Reply at 10. But the FTC's allegation about the growth of non-PSN services does not necessarily contradict the existence of entry barriers into the market for PSN services. Indeed, the Amended Complaint describes how "well-known, sophisticated, and well-financed firms" such as Google "also tried but failed to successfully enter the U.S. personal social networking market" and how Facebook's market power has nonetheless endured for years. See Redacted Am. Compl., ¶ 187. The Amended Complaint further alleges that Zuckerberg **[*52]** himself recognized, **[**34]** "[T]here are network effects around social products and a finite number of different social mechanics to invent." Redacted Am. Compl., ¶ 66. In addition, while Defendant's prediction about non-PSN services' ability to grow before eventually adding PSN services may ultimately be vindicated, at this stage the Court is required to "grant [P]laintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Sparrow, 216 F.3d at 1113* (quoting *Schuler, 617 F.2d at 608*). To accept Facebook's theory about barriers to entry would require the Court to do the inverse and all but ignore the FTC's well-pleaded allegations about network effects and switching costs. The Court declines Defendant's invitation, while noting that Facebook is of course free to pursue the theory as the litigation progresses.

B. Anticompetitive Conduct

HN12[] Possessing monopoly power in the relevant market is not enough, however. The Court now turns to the second element of a *Section 2* claim: has the FTC sufficiently alleged the "willful . . . maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident"? *Microsoft, 253 F.3d at 50* (quoting *Grinnell, 384 U.S. at 570-71*). Count I alleges that Facebook engaged in anticompetitive conduct **[**35]** by acquiring firms such as Instagram and WhatsApp. Count II, meanwhile, alleges that those acquisitions, together with Defendant's agreements and practices related to Facebook Platform — *i.e.*, the company's "set of tools that allowed software developers to create interoperability between their products and Facebook Blue," *Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *5* — constitute a course of anticompetitive conduct. The Court thus considers whether the FTC has satisfied the second element of its monopoly-maintenance claim with respect to each of the two counts.

1. *Count I*

a. Legal Framework

HN13[] "[H]aving a monopoly does not by itself violate *§ 2*." *Microsoft 253 F.3d at 58*. The Supreme Court has explained that the "mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system . . . . To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. "Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition," however, "can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, **[**36]** are myriad." *Microsoft 253 F.3d at 58*. "The challenge for an antitrust court," therefore, "lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it." Id.

Addressing that challenge, the D.C. Circuit has articulated several principles that "emerge" from "a century of case law on monopolization under *§ 2*." Id. ***HN14***[] "First, to be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive process and thereby harm consumers." Id. "Second, the plaintiff, on whom the burden of proof of course rests, must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect." *Id. at 58-59* (internal citations omitted). "Third, if a plaintiff successfully **[*53]** establishes *a prima facie* case under *§ 2* by demonstrating anticompetitive effect, then the monopolist may proffer a 'procompetitive justification' for its conduct." *Id. at 59*. "Fourth, if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." Id. Finally, "in considering whether the monopolist's conduct **[**37]** on balance harms competition and is therefore condemned as exclusionary for purposes of *§ 2*, [a court's] focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct." Id.

b. Application

With those principles in mind, the Court examines whether Count I in the Amended Complaint — which focuses on Facebook's acquisitions of Instagram and WhatsApp — plausibly alleges legally cognizable anticompetitive conduct.

HN15[] As its last Opinion recognized, "It is well established that mergers may constitute one such 'means'" that tend to "'destroy competition itself' via 'means other than competition on the merits.'" *Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *22* (quoting *Microsoft, 253 F.3d at 58, 62*). Indeed, there is no shortage of authorities observing that "[h]istorically and today, merging viable competitors to create a monopoly is a clear *§ 2* offense." Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, vol. III, ¶ 701a, at 200 (4th ed. 2015). ***HN16***[] Further, a monopolist's acquisition of "an actual or likely potential competitor is properly classified as anticompetitive, for it tends to augment or reinforce the **[**38]** monopoly by means other than competition on the merits." Id.; see also, e.g., *Grinnell, 384 U.S. at 576* (finding *Section 2* violation based in part on acquisitions of competitors); *BRFHH Shreveport, LLC v. Willis Knighton Med. Ctr., 176 F. Supp. 3d 606, 622 (W.D. La. 2016)* ("[A]cquisitions of viable competitors alone may establish the anticompetitive conduct element of a *section 2* claim."); *Behrend v. Comcast Corp., No. 03-6604, 2012 U.S. Dist. LEXIS 51889, 2012 WL 1231794, at *20 (E.D. Pa. Apr. 12, 2012)* (same).

Against that backdrop, the key question is whether the FTC has plausibly alleged that Facebook engaged in such anticompetitive conduct by acquiring actual or potential competitors, harming the competitive process, and thereby harming consumers. Before delving into that question, it is worth noting preliminarily that while the Amended Complaint references Facebook's acquisitions of companies other than Instagram and WhatsApp, the agency concedes that it does not allege that those acquisitions "each standing alone[] violated the antitrust laws. Instead, the allegations provide factual context for Facebook's anticompetitive course of conduct." Redacted FTC Opp. at 21 (emphasis omitted). The Court therefore focuses on the allegations with regard to the acquisitions of Instagram and WhatsApp.

Start with Instagram. The FTC alleges that it was long "a serious threat to Facebook's dominance," which led Defendant to "initially tr[y] **[**39]** to compete on the merits with mobile photo-sharing capabilities." Redacted Am. Compl., ¶¶ 80, 83. "As Instagram soared," however, "Facebook's leaders began to focus on the prospect of acquiring Instagram rather than competing with it." Id., ¶ 87. Indeed, Zuckerberg internally "repeatedly explained the case for acquisition in terms of Instagram's threat as a personal social networking competitor." Id., ¶ 89; see id., ¶¶ 87-92. According to the Amended Complaint, that **[*54]** sentiment was consistent with the "deeply rooted view within Facebook that, as Mr. Zuckerberg put it in a June 2008 internal email, 'it is better to buy than compete.'" Id., ¶ 64. Eventually in April 2012, Facebook announced that it had reached an agreement to acquire Instagram for $ 1 billion, the company's most expensive acquisition to date. Id., ¶ 95. The Amended Complaint also alleges that both internally and externally, commentators viewed the purchase as designed to neutralize a competitor. See, e.g., id., ¶¶ 95-104. "Less than two weeks after the acquisition was announced," moreover, "Zuckerberg suggested canceling or scaling back investment in Facebook's own mobile photo app as a direct result of the Instagram deal," **[**40]** which Facebook went on to do in the ensuing years. Id., ¶ 98.

The story is much the same with regard to WhatsApp. The Amended Complaint alleges that "[a]fter neutralizing the threat from Instagram, Facebook turned to what it considered 'the next biggest consumer risk' for Facebook Blue": WhatsApp, "the popular and widely used mobile message app." Id., ¶ 107. Although WhatsApp was not yet active in the personal-social-networking market, Facebook feared that once the app reached sufficient scale, it "could, by adding additional features and functionalities, enter the personal social networking market at competitive scale and undermine or displace Facebook Blue's personal social networking monopoly." Id., ¶ 108. In other words, Facebook viewed WhatsApp as a likely potential competitor. Id., ¶ 118 ("Facebook executives and employees repeatedly identified WhatsApp internally as a unique threat to Facebook Blue."). Once again, Facebook briefly attempted to compete with WhatsApp before "decid[ing] to acquire WhatsApp rather than compete with it, in an effort to neutralize a significant competitive threat to its personal social networking monopoly." Id., ¶ 120. Indeed, Zuckerberg wrote in 2012, **[**41]** "[I]'m the most worried about messaging. WhatsApp is already ahead of us in messaging in the same way Instagram was 'ahead' of us in photos . . . . I'd pay $ 1b for them if we could get them." Id. Ultimately, in February 2014, Facebook announced an agreement to buy WhatsApp for $ 19 billion. Id., ¶ 121.

Those facts sufficiently allege that Facebook acquired Instagram and WhatsApp in order to neutralize actual and likely future competitors. Although Defendant briefly contends that the FTC has not alleged the "objective likelihood that WhatsApp would be a significant PSNS rival" and that there may in fact have been "little actual overlap" between Instagram and Facebook Blue, see MTD at 24, the question at this stage is merely whether the agency has plausibly alleged that Instagram and WhatsApp were actual or potential competitors. See Areeda & Hovenkamp, ¶ 701a, at 200 (4th ed. 2015). The Amended Complaint has plainly done so, as evidenced by the above allegations, as well as by numerous others put forth by the FTC and not expressly recited above. See Redacted Am. Compl., ¶¶ 80-129. In fact, Facebook drops this argument in its Reply, see Reply at 14-19, implying a lack of faith. See, **[**42]** e.g., *Wal-Mart Stores, Inc. v Sec'y of Labor, 406 F.3d 731, 736 n.*, 365 U.S. App. D.C. 395 (D.C. Cir. 2005)* (construing moving party's "silence in reply" brief as indication that party had "abandoned [its initial] argument"); *Hunter v. D.C. Child & Family Servs. Agency, 710 F. Supp. 2d 152, 157 (D.D.C. 2010)*.

Defendant finds slightly surer footing, however, in its contention that the FTC must allege some anticompetitive effect — that is, that the acquisitions "harm the competitive process and thereby harm consumers." *Microsoft, 253 F.3d at 58*. ***HN17***[] Facebook **[*55]** is correct inasmuch as the agency must allege harm to competition and consumers; "harm to one or more competitors will not suffice." Id. It is right, moreover, that the FTC has not, and could not, allege harm in the archetypal form of increased consumer prices, given that Facebook Blue, Instagram, and WhatsApp are all provided free of charge. See Reply at 17; see also *Microsoft, 253 F.3d at 51* ("[A] firm is a monopolist if it can profitably raise prices substantially above the competitive level."). Notwithstanding that unusual aspect of this antitrust suit, the FTC contends — and the Court ultimately agrees — that the Amended Complaint sufficiently alleges "harm to the competitive process and thereby harm [to] consumers." *Microsoft, 253 F.3d at 58*.

Setting aside price increases, the FTC does identify a host of other harms to the competitive process and to consumers of PSN services from the **[**43]** acquisitions. Namely, Plaintiff alleges a decrease in service quality, lack of innovation, decreased privacy and data protection, excessive advertisements and decreased choice and control with regard to ads, and a general lack of consumer choice in the market for such services. See Redacted Am. Compl., ¶¶ 218-24. Indeed, the FTC specifically alleges that the lack of "meaningful competition" has allowed Facebook to "provide lower levels of service quality on privacy and data protection than it would have to provide in a competitive market." Id., ¶ 222. Elsewhere the Amended Complaint alleges that, after acquiring Instagram and

WhatsApp, Facebook halted development of its own competing services and slowed innovation and promotion of the newly acquired products. Id., ¶¶ 98-105; 126-27. And the agency further contends that, in a competitive market, "[c]ompeting social networks may also have explored and developed alternative advertising models that consumers . . . could have preferred." Id., ¶ 226. In short, the FTC alleges that even though Facebook's acquisitions of Instagram and WhatsApp did not lead to higher prices, they did lead to poorer services and less choice for consumers.

c. **[**44]** Facebook's Counterarguments

Defendant resists the above conclusion, maintaining that the FTC is merely speculating about the harm to competition and consumers. At this stage, however, the Court inquires merely into whether Plaintiff's allegations, taken as true, state a plausible claim for relief. Here, they do, as the FTC has alleged that consumers had access to inferior products and less choice in the market for PSN services than they would have had in the absence of Facebook's acquisitions.

The Amended Complaint alleges, for example, that while WhatsApp "embraced privacy-focused offerings and design" before its acquisition, Facebook has provided lesser privacy and data protections since, which it could not have done in a competitive market. Id., ¶¶ 127, 221. It is certainly plausible, moreover, as the Amended Complaint alleges, that consumers would prefer services that offered fewer ads or different ad frameworks. Indeed, the advent of federal legislation addressing various privacy and advertising concerns related to consumer technology is consistent with the intuitive notion that consumers care about these issues and may prefer stronger protections in their PSN services. See, e.g. **[**45]** , *15 U.S.C. § 6101 et seq.* (Telemarketing and Consumer Fraud and Abuse Prevention Act); *15 U.S.C. § 7701 et seq.* (Controlling the Assault of Non-Solicited Pornography and Marketing Act); *47 U.S.C. § 227* (Telephone Consumer Protection Act). As for harm to consumer choice, Plaintiff's allegations that Facebook scaled down and eventually shuttered its own mobile-sharing app after acquiring Instagram is consistent **[*56]** with the assertion that consumers would have a better and broader market of services to choose from had the acquisition never occurred. See Redacted Am. Compl., ¶¶ 98, 102-04.

While the FTC has not yet proven the requisite anticompetitive effect, it is not required to do so at this stage. The Commission has alleged that the acquisitions at issue harmed competition and that "[w]ithout meaningful competition, Facebook has been able to provide lower levels of service quality . . . than it would have to provide in a competitive market." Redacted Am. Compl., ¶ 222. The agency will need to substantiate these allegations at later stages in the litigation — likely with expert testimony or statistical analysis — but lack of proof at this juncture does not equate to impermissible speculation, as Defendant contends. Relatedly, Facebook insists that there is no way to know how the market **[**46]** for PSN services would have developed but for its acquisitions. Yet that is also not a reason to draw the negative inference that Plaintiff's allegations must be false; rather, it reinforces the notion that the FTC down the road will have to prove its allegations about how the acquisitions affected market conditions and competition. Cf. *Microsoft, 253 F.3d at 79* ("[N]either plaintiffs nor the court can confidently reconstruct a product's hypothetical technological development in a world absent the defendant's exclusionary conduct. To some degree, the defendant is made to suffer the uncertain consequences of its own undesirable conduct.") (internal quotation marks and citation omitted).

Facebook's final critique on this issue involves the FTC's review of the acquisitions prior to their closing. As the Court's previous Opinion in this case explained:

> As required by the Hart-Scott-Rodino Act, *15 U.S.C. § 18a*, the FTC reviewed the acquisition [of Instagram] prior to closing to assess whether it posed anticompetitive concerns. Whereas most mergers are cleared quickly, in this instance the review took over four months. During that scrutiny, the agency took the rare step of "requir[ing] the submission [by the parties] of additional **[**47]** information or documentary material relevant to the proposed acquisition." *15 U.S.C. § 18a(e)(1)(A)*. Eventually, however, Facebook and Instagram satisfied the agency's concerns, and in August (over four months after the merger was announced), the Commission voted 5-0 to allow it to proceed without any challenge or conditions. See FTC, FTC Closes its Investigation into Facebook's Proposed Acquisition of Instagram Photo Sharing Program (Aug. 22, 2012), https://bit.ly/3bDa2mp.

Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *4. Facebook's acquisition of WhatsApp was "also subject to Hart-Scott-Rodino Act pre-merger review, but the FTC, once again, did not block it." Id. (citation omitted). "Although the FTC [again] conveniently omits any mention of this review in its Complaint, the Court may take judicial notice of that public agency action." Id. (citations omitted).

Facebook thus argues that because the FTC "unconditionally cleared both acquisitions under Section 7 of the Clayton Act, which Congress enacted to address incipient threats to competition that Section 2 would not condemn," it is hypocritical for the agency to now claim that the acquisitions run afoul of Section 2. See MTD at 21. The FTC, for its part, counters that "HSR filings do not result in acquisitions being approved or blessed **[**48]** by the FTC or DOJ," that the HSR Act "merely established reporting requirements for acquisitions over a certain size," and that the prior HSR reviews are simply beside the point here. See Redacted FTC Opp. at 21.

[*57] The FTC has the better argument, at least insofar as its HSR reviews at the time of the acquisitions do not bear significantly on the issue now before the Court. ***HN18***[] The HSR Act does not require the FTC to reach a formal determination as to whether the acquisition under review violates the antitrust laws. On the contrary, it merely obliges the parties to the merger to report certain information to the agency and to wait to consummate the deal until the expiration of the statutory waiting period, which the FTC may extend while it gathers additional information. See 15 U.S.C. § 18a(a), (b), (e). Indeed, while the FTC conducted an investigation of the challenged acquisitions here and eventually voted to close the investigation, its closing letter to Facebook expressly stated, "This action is not to be construed as a determination that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves **[**49]** the right to take such further action as the public interest may require." FTC, Closing Letter Regarding Proposed Acquisition of Instagram, Inc., by Facebook, Inc. (Aug. 22, 2012), https://bit.ly/3p1UMGF. That letter is in keeping with the Act's explicit language making clear that the FTC can bring post-review challenges, notwithstanding the previous closing of HSR review without an antitrust-violation determination: "Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law." 15 U.S.C. § 18a(i)(1).

In light of that reality, the FTC's decisions to close the investigations into Facebook's acquisitions do not provide a basis to grant the company's Motion. The Commission could have decided to close the investigations for many reasons, and it would be improper to draw a merits conclusion about the legality of the mergers on the basis of those decisions, especially at the motion-to-dismiss stage. Cf Steves & Sons, Inc. v. JELD-WEN, Inc., 988 F.3d 690, 713-14 (4th Cir. 2021) (affirming district **[**50]** court's exclusion of evidence relating to Department of Justice's investigation of merger without challenging it and holding that Department's "decision not to pursue the matter isn't probative as to the merger's legality because many factors may motivate such a decision, including the Department's limited resources").

In sum, the Court concludes that Count I of the Amended Complaint adequately alleges both elements of the offense of unlawful monopoly maintenance under Section 2 of the Sherman Act: (1) Facebook's monopoly power in the market for PSN services; and (2) the company's willful maintenance of that power via anticompetitive acquisitions. See Microsoft 253 F.3d at 50.

2. *Count II*

That leaves Count II, which alleges that Facebook "has willfully maintained its monopoly power through its course of conduct that includes both anticompetitive acquisitions and its anticompetitive conditional dealing practices, and maintaining and enforcing anticompetitive agreements relating to Facebook Platform to deter competitive threats to its personal social networking monopoly." Redacted Am. Compl., ¶ 238 (emphases added). Primarily relying on the Court's first Opinion, Defendant urges dismissal of this count.

Because the prior Opinion's **[**51]** lengthy discussion of Plaintiff's challenges to the Platform policies forms the backdrop for the **[*58]** instant dispute, it is worth briefly reviewing the key points of that decision. In its initial Complaint, the FTC alleged the following:

> Facebook adopted and enforced a number of anticompetitive policies governing the use of its [application programming interfaces]. Most prominently, in 2013 it announced a policy of refusing to allow third-party, freestanding apps . . . to access those APIs if they replicate[d] [Facebook's] core functionality — *i.e.*, if they competed with Facebook Blue. Facebook then enforced that policy against a number of freestanding apps, revoking API permissions after having previously offering them access.

*Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *14* (internal quotation marks and citations omitted). The Court sided with the company, however, and explained that these allegations did not provide "a viable basis for an injunction under Section 13(b) of the FTC Act." Id. That holding was buttressed by three conclusions: (1) "Facebook's general policy of refusing to provide API access to its competitors does not itself violate *Section 2*"; (2) "although specific instances in which Facebook revoked a competitor's API permissions **[**52]** (after previously providing it access) might have violated *Section 2*, the last alleged instance occurred in 2013, so there is no way in which Facebook 'is violating' or 'is about to violate' the antitrust laws, which is a necessary condition for an injunction under Section 13(b)"; and (3) "Plaintiff has failed to plead facts to support a 'conditional dealing' theory." Id. (citation omitted).

In response to the FTC's Amended Complaint, Facebook suggests that the Court should not even engage with the new allegations surrounding the Platform policies because Plaintiff was not invited to replead on that issue. See MTD at 33. Such a position is not without support. See *Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *2* ("Regardless of whether the FTC can amend its Complaint to plausibly allege market power and advance this litigation, then, the conduct it has alleged regarding Facebook's interoperability policies cannot form the basis for *Section 2* liability."). The Court need not decide whether the FTC was allowed to replead these allegations, however, because in any event it has failed to successfully do so. Similarly, while the parties further dispute whether the Platform-related allegations are barred by the law of the case, the Court can sidestep any **[**53]** analysis of the technical elements of that doctrine. Regardless of whether the law of the case formally applies, the FTC has supplied no persuasive justification for departing from the sensible ethos that the doctrine embodies — *viz.*, for reaching a different result on the ultimate question of whether there is a "viable basis for an injunction under Section 13(b)." *Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *14*; see *LaShawn A. v. Barry, 87 F.3d 1389, 1393, 318 U.S. App. D.C. 380 (D.C. Cir. 1996)* ("[T]he same issue presented a second time in the same case in the same court should lead to the same result.") (emphasis omitted).

In other words, the Court concludes that even if the Amended Complaint's new allegations satisfied the exacting requirements previously set forth for showing that a *Section 2* violation occurred at some point in the past, that would not be enough under Section 13(b). This is because, as the Court previously explained, "While it is possible that Facebook's implementation of th[ose] polic[ies] as to certain specific competitor apps may have violated *Section 2*, such finding would not change the outcome here: all such revocations of access occurred in 2013, seven years before this suit was filed, and the FTC lacks statutory authority to seek an injunction 'based on **[*59]** [such] long-past conduct.'" *560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, [WL] at *2* (quoting *FTC v. Shire ViroPharma, Inc., 917 F.3d 147, 156 (3d Cir. 2019)*). Put **[**54]** differently, the Court held that "to the extent that Facebook's Platform-related conduct is actionable, it occurred nearly eight years ago, rendering an injunction under Section 13(b) unavailable as a matter of law." *560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, [WL] at *8*.

Plaintiff has not put forth material new allegations requiring the Court to change tack on its Section 13(b) conclusion. As discussed at length in the prior Opinion, Section 13(b) allows the FTC to "bring suit in a district court of the United States to enjoin" allegedly unlawful conduct only where it has "reason to believe . . . that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the [FTC]." *15 U.S.C. § 53(b)*. ***HN19***[] Section 13(b) therefore contemplates only "relief that is prospective, not retrospective." *AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1348, 209 L. Ed. 2d 361 (2021)*; see *FTC v. Credit Bureau Ctr., LLC, 937*

F.3d 764, 774 (7th Cir. 2019) ("Section 13(b) serves a . . . forward-facing role: enjoining ongoing and imminent future violations."). It "does not permit the FTC to bring a claim based on long-past conduct without some evidence that the defendant 'is' committing or 'is about to' commit another violation." Shire ViroPharma, Inc., 917 F.3d at 156.

Here, as before, "the FTC cannot use 13(b) to challenge Facebook's Platform-related conduct because it has not pleaded that any actual Section 2 violation is **[**55]** ongoing or about to occur." Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *18. The closest the agency comes is its allegation that, "[h]aving suspended its anticompetitive platform policies [in December 2018] in response to anticipated public scrutiny, Facebook is likely to reinstitute such policies if such scrutiny passes." Redacted Am. Compl., ¶ 151. Astute readers will recognize that allegation as identical, word-for-word, to the one that the Court already deemed insufficient for purposes of Section 13(b). Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *18 (quoting Redacted Compl., ¶ 149). To be sure, the FTC now mentions an additional developer that was allegedly subject to the API restrictions in 2016, whereas the last such instance alleged in the initial Complaint was in 2013. Compare Redacted Am. Compl., ¶ 158(d), with Redacted Compl., ¶¶ 152-56. But that in no way affects the Court's previous conclusion that the FTC has not alleged that Facebook's enforcement of the Platform policies "is violating, or is about to violate, any provision of law enforced by the [FTC]." 15 U.S.C. § 53(b). Once again, the temporal gap between the complained-of conduct and this lawsuit is "fatal to the agency's claim for injunctive relief under Section 13(b) here . . . because it means that no actionable violation **[**56]** is either ongoing or about to occur." Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *18.

* * *

This conclusion requires resolution of one remaining issue with respect to Count II. As mentioned above, the count is not limited to Facebook's Platform policies; rather, the FTC combines its challenge to those policies with its allegations concerning the contested acquisitions. See Redacted Am. Compl., ¶¶ 238-40. (Count I, conversely, deals with only the acquisitions.) The agency contends that the Court thus may not dismiss Count II because "the Instagram and WhatsApp acquisitions form the basis for Count 2 as well as Count 1." Redacted FTC Opp. at 36. In other words, where a claim contains valid and invalid components, dismissal is not appropriate. It is certainly true that the acquisitions could be subject to Section **[*60]** 13(b); indeed, the Court previously held that "an injunction under Section 13(b) is a theoretically available remedy in a Section 2 challenge to long-ago mergers so long as the defendant still holds the purchased assets or stock, as is the case here," Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *23 — a proposition the company does not contest this time around. Compare MTD at 37-38 (arguing that Platform policies cannot be challenged under Section 13(b)), with id. at 20-33 (no mention **[**57]** of similar challenge to the acquisitions). The question therefore is what to do with Count II: should the Court dismiss the portion that encompasses challenges to the Platform policies, or must it allow the count to remain given its incorporation of the acquisitions?

The Court concludes that the latter is the better course, with an important caveat. ***HN20***[] Although the D.C. Circuit does not appear to have weighed in on the issue, a chorus of other courts has held that a "motion to dismiss under Rule 12(b)(6) doesn't permit piecemeal dismissals of parts of claims." BBL, Inc. v. City of Angola, 809 F.3d 317, 325 (7th Cir. 2015) (citation omitted). Rather, "the question at this stage is simply whether the complaint includes factual allegations that state a plausible claim for relief." Id.; see also, e.g., FTC v. Nudge, LLC, 430 F. Supp. 3d 1230, 1246 (D. Utah 2019) ("As many courts have recognized, parties may not use rule 12(b)(6) to dismiss only parts of a claim . . . . And because Defendants' asserted defenses do not dispose of the Division's claims in their entirety, those claims cannot be dismissed at this stage."); Redwind v. W. Union, LLC, No. 18-2094, 2019 U.S. Dist. LEXIS 118297, 2019 WL 3069864, at *4 (D. Or. June 21, 2019) (same and collecting cases). That conclusion flows from the plain language of Rule 12(b)(6), which permits a party to seek dismissal for "failure to state a claim upon which relief can be granted." See, e.g., Charles v. Front Royal Volunteer Fire and Rescue Dep't, Inc., 21 F. Supp. 3d 620, 629 (W.D. Va. 2014) ("A plain reading of Rule 12(b)(6) **[**58]** indicates that the rule may be used only to dismiss a 'claim' in its entirety.") (internal quotation marks and citation omitted); Doe v. Napa Valley Unified Sch. Dist., No. 17-3753, 2019 U.S. Dist. LEXIS 118297, 2018 WL 4859978, at *2 (N.D. Cal. Apr. 24, 2018) ("By its own terms, there does not appear to be any way to grant partial dismissal of a claim under Fed. R. Civ. P. 12(b)(6).") (internal quotation marks and citation omitted).

HN21[] In sum, at the motion-to-dismiss stage, once a court determines that a claim states a viable basis for relief, it cannot further parse out whether other portions of the claim would suffice on their own. Since the allegations relating to Facebook's acquisitions state a plausible claim for relief, even though the Platform-policy ones do not, Count II should not be dismissed.

Of course, "[s]ummary judgment is different." BBL, Inc., 809 F.3d at 325. In stark contrast to Rule 12(b)(6), Rule 56 "explicitly allow[s] for '[p]artial [s]ummary [j]udgment' and require[s] parties to 'identif[y] each claim or defense—or the part of each claim or defense—on which summary judgment is sought.'" Id. (quoting Fed. R. Civ. P. 56(a)). "At the summary-judgment stage, the court can properly narrow the individual factual issues for trial by identifying the material disputes of fact that continue to exist." Id. (emphasis omitted); see Nudge, 430 F. Supp. 3d at 1246 ("[I]f Defendants wish to challenge only parts of Plaintiffs' claims, such a challenge would be appropriate at summary judgment."). The Platform portion of Count **[**59]** II can thus be sliced out at summary judgment.

In the meantime, the Court will not award the FTC a discovery windfall for using Count II as a Trojan horse to smuggle in the Platform policies. Instead, **[*61]** it will not permit what would certainly be time-consuming and costly discovery on such policies. HN22[] "A trial court enjoys considerable discretion over discovery matters." TIG Ins. Co. v. Firemen's Ins. Co. of Washington, D.C., 718 F. Supp. 2d 90, 95 (D.D.C. 2010) (citing Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1341, 238 U.S. App. D.C. 190 (D.C. Cir. 1984)). Here, in light of the Court's conclusion that the Platform-related allegations are legally infirm, there is no reason "that discovery should be allowed of information that has no conceivable bearing on the case." Food Lion, Inc. v. United Food & Com. Workers Int'l Union, AFL-CIO-CLC, 103 F.3d 1007, 1012, 322 U.S. App. D.C. 301 (D.C. Cir. 1997) (quoting 8 Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2008 (1994)). Even if discovery fully corroborated Plaintiff's allegations about the Platform policies, there still would be no basis for a trial on that portion of Count II. While Facebook may argue that this is why dismissal is appropriate now, the Court does not read Rule 12(b)(6) to permit such a result. In any event, the discovery bar means that Facebook is not prejudiced by the Court's ruling. Such a determination is one that best balances judicial economy and the parties' time with fidelity to the Federal Rules of Civil Procedure. **[**60]**

C. Recusal of Chair Khan

Rebuffed on its frontal assault on the updated allegations, Facebook last assays a flanking maneuver. It requests that this Court either dismiss the Amended Complaint as "not properly authorized by the Commission" or require that the FTC address the merits of a petition that Defendant filed with the agency seeking the recusal of Chair Khan. See MTD at 40. The company contends that Khan's participation in the vote to authorize the Amended Complaint violated federal law given her extensive past work on antitrust issues involving major technology platforms, including "purported factual findings and legal conclusions to the effect that Facebook has violated Section 2 of the Sherman Act" in a Report of the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law. See ECF No. 83-3 (Petition for Recusal) at 20.

Khan served as counsel to the Subcommittee and "led the congressional investigation into digital markets and the publication of [the] final report." Id. (citing to Lina M. Khan, Bio (link no longer active)). Among the report's conclusions were that Facebook had "monopoly power" in the "social networking market" and had acquired both Instagram and **[**61]** WhatsApp to further that market dominance. Id. at 11-12 (citing Majority Staff of H. Subcomm. on Antitrust, Com. & Admin. Law of the Comm. on the Judiciary, 116th Cong., Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations, at 12, 13, 151, 154-55 (Oct. 2020)). Khan's academic and other writing prior to joining the FTC also addressed at length the question of whether certain platforms, including Facebook, are anticompetitive. These include tweets about the initial filing of this case. See, e.g., ECF No. 83-4 at 63-82 (Expert Declaration of Professor Daniel B. Rodriguez (Appendix of Statements by Chair Lina M. Khan)); Petition for Recusal, Exh. D at 76-78. The Court takes judicial notice of these publications, Defendant's Petition for Recusal, and statements of the agency relating to the Petition. See Washington Post v. Robinson, 935 F.2d 282, 291, 290 U.S. App. D.C. 116 (D.C. Cir. 1991) ("[C]ourt may take judicial notice of the existence of newspaper articles"); Connecticut v. Dep't of the Interior, 344 F. Supp. 3d 279, 306 n.23 (D.D.C. 2018) (court can "take judicial notice of . . . correspondence from the Department").

[*62] The FTC did not address the Petition's merits, but instead dismissed it as improperly filed since the Commission has no process for addressing the "disqualification or recusal of a Commissioner" **[**62]** other than when she is involved in either a rulemaking or an adjudication. See ECF No. 83-9 (Email from April J. Tabor, Office of the Sec'y, FTC, to Geoffrey M. Klineberg (Aug. 19, 2021)); see also Redacted FTC Opp. at 43. Because Khan was not recused, Facebook believes that the FTC did not properly make the decision through a vote of the Commission to "bring suit in a district court of the United States." *15 U.S.C. § 53(b)*. The FTC rejoins that the decision to dismiss the Petition was proper and that there was no need for Khan's recusal. The Court concurs.

Before addressing the specific legal arguments that the parties raise, the Court notes that Khan's vote to authorize the Amended Complaint hardly occurred on a blank slate. The FTC originally filed its Complaint in this case in December 2020, well before she joined the Commission in June 2021. See Redacted Compl.; FTC, Lina M. Khan Sworn in as Chair of the FTC, https://bit.ly/3JDleyK (June 15, 2021). When this Court dismissed the Complaint in June 2020, its Opinion expressly recognized that the FTC might well refile. *Facebook, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *8* ("[t]o promote clarity and efficiency going forward in the event Plaintiff amends its Complaint"); *560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, [WL] at *14* ("Whether and how the agency chooses **[**63]** to [replead] is up to it."). It was hardly surprising when the FTC did in fact replead, moving to file an Amended Complaint in August 2021. See ECF No. 76-2 (Unredacted Amended Complaint). Like the original Complaint, the FTC's authorization of the Amended Complaint came down to a 3-2 vote among the five Commissioners, this time with Khan among the three who voted to authorize. See FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts to Innovate, https://bit.ly/3q8Ku76. Although the Court recognizes the importance of her vote, it is an exaggeration to treat Kahn as the sole instigator of the current case.

The Court also notes the unique circumstances in which the FTC operates as an agency that may bring suit, conduct rulemaking, and act as an adjudicator. In selecting a chair for a Commission with these diverse responsibilities — as with choosing the head of any agency — it is natural that the President will select a candidate based on her past experiences and views, including on topics that are likely to come before the Commission during her tenure, and how that administrator will implement the Administration's priorities. **[**64]** *Ass'n of Nat. Advertisers, Inc. v. FTC, 627 F.2d 1151, 1174, 201 U.S. App. D.C. 165 (D.C. Cir. 1979)* ("An administrator's presence within an agency reflects the political judgment of the President and Senate."). Courts must tread carefully when reviewing cases in this area lest we "eviscerate the proper evolution of policymaking were we to disqualify every administrator who has opinions on the correct course of his agency's future action." Id.

1. *Chair Khans Role*

Turning to the specific legal arguments, Facebook gets off on the wrong foot by asserting that "[b]inding D.C. Circuit precedent requires an FTC Commissioner's recusal where 'a disinterested observer' would 'conclude that [she] has in some measure adjudged the facts as well as the law of a particular case in advance.'" MTD at 40 (quoting *Cinderella Career Coll. & Finishing Schs., Inc. v. FTC, 425 F.2d 583, 591, 138 U.S. App. D.C. 152 (D.C. Cir. 1970)*). What Defendant fails to note is that both Cinderella Career Colleges **[*63]** and a similar out-of-Circuit case, *American Cyanamid Co. v. FTC, 363 F.2d 757, 763 (6th Cir. 1966)*, deal with an agency official adjudicating the merits of a case, not authorizing the filing of one. See Redacted FTC Opp. at 42.

In *American Cyanamid Co.*, then-FTC Chair Paul Rand Dixon had conducted work similar to Khan's because he had "played an 'active role' in an investigation by [a Senate] Subcommittee of many of the same facts and issues and of the same parties as are involved in this [FTC] proceeding, **[**65]** and participated in the preparation of the report of the Subcommittee on the same facts, issues and parties." *363 F.2d at 763, 767*. That case — unlike this one — involved "[t]he question of when a judicial officer is disqualified to sit in judgment in a particular case," *id. at 763* (emphasis added), not whether Dixon could have voted to authorize a suit filed in district court. Similarly, in Cinderella Career Colleges, then-Chair Dixon took part in the Commission's review and reversal of the decision of a hearing examiner. See *425 F.2d at 589*. ***HN23***[] Adjudication has its own unique ethical requirements; as a result, our Circuit has held that "the *Cinderella* standard is not applicable" to non-adjudicatory proceedings, and that courts "must not impose judicial roles upon administrators when they perform functions very different from those of judges." *Ass'n of Nat. Advertisers, 627 F.2d at 1154, 1168*. The FTC thus has the better of the argument that these cases are not relevant because it was not acting there as an adjudicatory body as provided under 15 U.S.C. § 45(b), but instead simply filing a case in federal court. Id. at § 53(b); see Redacted FTC Opp. at 42.

HN24[] To be sure, even when not acting as an adjudicator, an FTC Commissioner is not absolved of all ethical constraints. For instance, when a Commissioner is engaged **[**66]** in the rulemaking process, she should be disqualified when "there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding." Ass'n of Nat. Advertisers, 627 F.2d at 1170; see also Reply at 23. When considering potential prejudgment in the context of a rulemaking, however, courts have not generally objected to statements made "prior to the initiation of agency action" and have recognized that "[a]dministrators, and even judges, may hold policy views on questions of law prior to participating in a proceeding." Ass'n of Nat. Advertisers, 627 F.2d at 1173-74. Although Khan has expressed views on Facebook's monopoly status and even on this specific case before she joined the FTC, she "remained free, both in theory and in reality, to change h[er] mind upon consideration of" the suit given her new role and other factors. Id. at 1172; see also Consumers Union of U.S., Inc. v. FTC, 801 F.2d 417, 427, 255 U.S. App. D.C. 203 (D.C. Cir. 1986) (rejecting challenge to FTC Chairman's impartiality, as articulation of his "own considered position" "gives no indication of a mind that has been closed to the evidence in the past or that would disregard any significant new material subsequently introduced"). In any event, it is not clear that the same rulemaking standard would necessarily apply to an administrator's **[**67]** vote to authorize the filing of a lawsuit in federal court.

So what role does provide the best analogy for analyzing Chair Khan's actions in voting to file this case? The Court concludes it is that of a prosecutor. **HN25**[] "[T]he standards of neutrality for prosecutors are not necessarily as stringent as those applicable to judicial or quasi-judicial officers. . . . [, and they] may require a stronger showing for a prosecutor than a judge in order to conclude that a conflict of **[*64]** interest exists." Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 810-11 (1987), 107 S. Ct. 2124, 95 L. Ed. 2d 740. In particular, given prosecutors' duties, they "are necessarily permitted to be zealous in their enforcement of the law." Marshall v. Jerrico, Inc., 446 U.S. 238, 248, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980). Of course, this does not waive prosecutors' ethical obligations, as they "too must serve the public interest," and their behavior is not "immunize[d] from judicial scrutiny in cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law." Id. at 249. Facebook maintains that this is just such a case, in that Khan has "an 'axe to grind' against the defendant or [is] not otherwise impartial" given the views articulated in her past work. See MTD at 43 (quoting Wright v. United States, 732 F.2d 1048, 1056 (2d Cir. 1984)).

Although Khan has undoubtedly expressed views about Facebook's **[**68]** monopoly power, these views do not suggest the type of "axe to grind" based on personal animosity or financial conflict of interest that has disqualified prosecutors in the past. See, e.g., Wright, 732 F.2d at 1055 ("appearance of impropriety" found because prosecutor's wife was both "a political opponent of [the defendant's]" and had, among other actions, brought multiple "complaints to federal authorities [about the defendant] that could have resulted in criminal charges against him . . . and who almost certainly harbored personal animosity against [the defendant]"); State v. Snyder, 256 La. 601, 605, 237 So. 2d 392 (1970) (requiring recusal of district attorney who expressed views in mayoral campaign that "relator was guilty of criminal offenses"); State v. Hohman, 138 Vt. 502, 505, 420 A.2d 852 (1980), overruled on other grounds by Jones v. Shea, 148 Vt. 307, 532 A.2d 571 (1987) (defendant prejudiced at plea-bargaining stage as state's attorney's advertisement during campaign stated that he would "vigorously prosecute [defendant] and obtain a second conviction" because past conviction improperly overturned). Here, there is no allegation that Khan has a personal animosity against Facebook beyond her own views about ***antitrust law***, nor does she have a financial conflict of interest. Rather, her situation is more analogous — although not a perfect fit — to one **[**69]** in which an individual has "simultaneous involvement in investigative and prosecutorial aspects of federal enforcement proceedings." In re Perlin, 589 F.2d 260, 265 (7th Cir. 1978) (quoting United States v. Dondich, 460 F. Supp. 849, 856 (N.D. Cal. 1978)). This has not been found "to present the kind of conflict of interest" from which prosecutors are barred. Id.

The very caselaw on which Defendant relies makes clear that, "[o]f course, a prosecutor need not be disinterested on the issue [of] whether a prospective defendant has committed the crime with which he is charged. . . . **HN26**[] True disinterest on the issue of such a defendant's guilt is the domain of the judge and the jury — not the prosecutor." Wright, 732 F.2d at 1056. There is no indication that Chair Khan's decision to seek reinstatement of the FTC's suit against Facebook was based on anything other than her belief in the validity of the allegations. Such behavior does not necessitate recusal.

2. *Other Ethical Issues*

Facebook also contends that Khan's behavior independently violated federal ethics rules — namely, 5 C.F.R. § 2635.501(a), which instructs a federal employee "to avoid an appearance of loss of impartiality in the performance of [her] official duties" by not participating in "a particular matter involving specific parties **[*65]** which [s]he knows is likely to affect the financial **[**70]** interests of a member of h[er] household, or in which [s]he knows a person with whom [s]he has a covered relationship is or represents a party, if [s]he determines that a reasonable person with knowledge of the relevant facts would question [her] impartiality in the matter." Id; see also 5 C.F.R. § 2635.101(b)(14) ("Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part."); Reply at 24.

Here, there is no indication that this case would affect "the financial interests of a member of [Khan's] household" or that an individual with whom she has a covered relationship is involved in the case. To the extent that Facebook is making an appearance-of-impropriety argument, the Court believes that its above discussion lays that to rest. Although Khan has worked extensively on matters relating to antitrust and technology, including expressing views about Facebook's market dominance, nothing the company presents suggests that her views on these matters stemmed from impermissible factors. Indeed, she was presumably chosen to lead the FTC in no small part because of her published views. The Court thus concludes that Khan's participating **[**71]** in the FTC's vote did not violate ethical rules; as a result, the Amended Complaint was properly authorized.

IV. Conclusion

For the foregoing reasons, the Court will deny Facebook's Motion to Dismiss. A separate Order so stating will issue this day.

/s/ James E. Boasberg

JAMES E. BOASBERG

United States District Judge

Date: January 11, 2022

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Defendant's Motion to Dismiss is DENIED; and
2. Defendant shall file its Answer to Plaintiff's Amended Complaint by January 25, 2022.

/s/ *James E. Boasberg*

JAMES E. BOASBERG

United States District Judge

Date: January 11, 2022

AMC Entm't Holdings, Inc. v. iPic-Gold Class Entm't, LLC

Supreme Court of Texas

September 16, 2021, Argued; January 14, 2022, Opinion Delivered

No. 20-0014

Reporter
638 S.W.3d 198 *; 2022 Tex. LEXIS 43 **; 65 Tex. Sup. J. 249

AMC Entertainment Holdings, Inc., AMC Entertainment, Inc., and American Multi-Cinema, Inc., Petitioners, v. iPic-Gold Class Entertainment, LLC and iPic Texas, LLC, Respondents

Prior History: **[**1]** On Petition for Review from the Court of Appeals for the First District of Texas.

iPic-Gold Class Entm't, LLC v. AMC Entm't Holdings, Inc., 592 S.W.3d 946, 2019 Tex. App. LEXIS 10510, 2019 WL 6598175 (Tex. App. Houston 1st Dist., Dec. 5, 2019)

Core Terms

iPic, theater, clearance, conspiracy, film, distributors, requests, antitrust, alleges, summary judgment, conspire, Studio, clearing, email, movie, zone, self-interest, communicated, day-and-date, act independently, first-run, factors, opened, plans, exhibitor's, implausible, competitor, megaplex, license, alleged conspiracy

LexisNexis® Headnotes

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

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN1[] **Conspiracy to Monopolize, Sherman Act**

The Texas Free Enterprise and Antitrust Act, Tex. Bus. & Com. Code Ann. §§ 15.01-15.22, provides that it shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes. Tex. Bus. & Com. Code Ann. § 15.05(a) is comparable to, and indeed taken from 15 U.S.C.S. § 1. The United States Supreme Court has held that to survive a motion for summary judgment, a plaintiff seeking damages for a violation of § 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

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

Governments > Legislation > Interpretation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

The Texas Antitrust Act's (Act) stated purpose is to maintain and promote economic competition in trade and commerce in the state and to provide the benefits of that competition to consumers. Tex. Bus. & Com. Code Ann. § 15.04. To the extent consistent with that purpose, the Act's provisions should be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3[] **Public Enforcement, State Civil Actions**

Tex. Bus. & Com. Code Ann. § 15.05(a) states that every contract, combination, or conspiracy in restraint of trade or commerce is unlawful. Tex. Bus. & Com. Code Ann. § 15.21 authorizes any person whose business or property has been injured by a violation of § 15.05 to sue for damages and injunctive relief.

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

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

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

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

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

HN4[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Like the language of its federal counterpart, the broad language of Tex. Bus. & Com. Code Ann. § 15.05(a) indicates that every conspiracy in restraint of trade is unlawful. Yet the United States Supreme Court has, since its earliest decisions, recognized that 15 U.S.C.S. § 1 was intended to prohibit only unreasonable restraints of trade. Some kinds of conspiratorial agreements—a horizontal agreement to fix prices—are considered per se illegal. Most, however, are evaluated on a case-by-case basis under the rule of reason, which requires the court to determine whether a restraint is unreasonable by examining a defendant's purpose in implementing the restraint and the restraint's effect on competition as well as all factors relevant to that examination.

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

HN5[] **Regulated Practices, Price Fixing & Restraints of Trade**

Tex. Bus. & Com. Code Ann. § 15.21 authorizes any person whose business or property has been injured by reason of any conduct declared unlawful under Tex. Bus. & Com. Code Ann. § 15.05 to sue for damages or injunctive relief.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Evidence > Inferences & Presumptions > Inferences

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

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

HN6[] Conspiracy to Monopolize, State Regulation

When an appeal arises from a summary judgment for a party, the lower courts' judgments are reviewed de novo, taking as true all evidence favorable to the mother party and indulging every permissible inference in its favor. But when federal ***antitrust law*** guides construction of the Texas Free Enterprise and Antitrust Act, Tex. Bus. & Com. Code Ann. §§ 15.01-15.22, examination of the evidence must also take into account federal caselaw limiting what inferences are reasonable when the plaintiff's evidence is ambiguous and the alleged conspiracy is not plausible.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

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

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

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

HN7[] Sherman Act, Claims

For anticompetitive conduct to give rise to liability under 15 U.S.C.S. § 1 or Tex. Bus. & Com. Code Ann. § 15.05(a), of the Texas Antitrust Act, the conduct must stem from an agreement, tacit or express, rather than from independent action. Because ***antitrust law*** does not prohibit unreasonable restraints of trade as such—but only restraints effected by a contract, combination, or conspiracy—it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms. Thus, ***antitrust law*** generally distinguishes between unilateral and multilateral conduct, treating multilateral conduct as the more dangerous and more likely to warrant judicial intervention. In the federal context, challenges to multilateral conduct are brought under § 1 of the Sherman Act (the federal analogue to § 15.05(a)), and challenges to unilateral conduct are brought under 15 U.S.C.S. § 2 (the federal analogue to § 15.05(b)).

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

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

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

Because a 15 U.S.C.S. § 1 claim challenges multilateral conduct, its very essence is the existence of an agreement. Indeed, the relevant danger or activity that warrants § 1 scrutiny is the sudden joining of two independent sources of economic power previously pursuing separate interests. After a plaintiff establishes the existence of an illegal contract or combination, it must then proceed to demonstrate that the agreement constituted an unreasonable restraint of trade either per se or under the rule of reason. However, the question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade.

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

Evidence > Burdens of Proof > Burden Shifting

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

HN9[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

With rare exceptions, courts use a three-step, burden-shifting framework to evaluate 15 U.S.C.S. § 1 claims under the rule of reason. First, the plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market. Second, if the plaintiff succeeds, the burden shifts to the defendant to establish the pro-competitive redeeming virtues of the action. Third, should the defendant carry this burden, the plaintiff must then show that the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition.

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

Evidence > Types of Evidence > Circumstantial Evidence

Business & Corporate Compliance > ... > Contract Formation > Acceptance > Meeting of Minds

Evidence > Inferences & Presumptions > Inferences

HN10[] **Conspiracy to Monopolize, Elements**

A 15 U.S.C.S. § 1 agreement may be found when the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement. Such proof may come in the form of direct evidence, e.g., an explicit admission from a participant that an antitrust conspiracy existed, or circumstantial evidence. Whether a factfinder can properly infer the existence of an agreement or conspiracy from ambiguous or circumstantial evidence will vary with the plausibility of the plaintiffs' theory and the dangers associated with such inferences.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Inferences & Presumptions > Inferences

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

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

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

HN11[] **Sherman Act, Claims**

With regard to antitrust actions, courts should not permit factfinders to infer conspiracies when such inferences are implausible because the effect of such practices is often to deter procompetitive conduct. If the factual context of the alleged conspiracy renders the plaintiff's claim implausible—if the claim is one that simply makes no economic sense—the plaintiff must come forward with more persuasive evidence to survive a motion for summary judgment than would otherwise be necessary. More evidence is required the less plausible the charge of collusive conduct. A corollary to this rule is that conduct that is just as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

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

HN12[] **Entitlement as Matter of Law, Genuine Disputes**

The absence of any plausible motive to engage in the conduct charged is highly relevant to whether a genuine issue for trial exists.

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

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

HN13[] **Motions to Dismiss, Failure to State Claim**

In order to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a plaintiff's conspiracy allegations must be plausible on their face.

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > Elements

HN14[] **Conspiracy Against Rights, Elements**

Parallel business conduct, even if consciously undertaken, is ambiguous: it is just as consistent with conspiracy as with competitive actions unilaterally prompted by common perceptions of the market. At the summary judgment stage evidence of ambiguous conduct is not enough; rather, a 15 U.S.C.S. § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently.

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

Business & Corporate Law > ... > Meetings & Voting > Voting Shares > Proxy Agreements

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

HN15[] **Conspiracy to Monopolize, Elements**

With regard to antitrust actions, caselaw teaches that (1) parallel business conduct, alone, is insufficient to raise a fact issue on the existence of a conspiracy; (2) when the conspiracy alleged is implausible, more persuasive evidence will be required to survive summary judgment; and (3) the plaintiff's evidence must tend to exclude the possibility that the defendants acted independently. Lower federal courts have fleshed out these principles by requiring plaintiffs who base their claim on consciously parallel business behavior to demonstrate the existence of plus factors. These factors serve as proxies for direct evidence of an agreement. There is no definitive list of plus factors, but the following have been listed: (1) actions that would be against the defendants' self-interest if the defendants were acting independently, but consistent with their self-interest if they were acting in concert; (2) a motive to conspire; (3) an opportunity to conspire; (4) market concentration and structure conducive to collusion; (5) pretextual explanations for anticompetitive conduct; (6) sharing of price information; (7) signaling; and (8) involvement in other conspiracies. A plausible allegation that the parallel conduct was not in the alleged conspirators' independent self-interest absent an agreement is generally considered the most important plus factor.

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

HN16[] **Conspiracy to Monopolize, Elements**

A court's task in evaluating the propriety of summary judgment is to view all the evidence and take the plus factors into consideration and determine if the evidence tips the scales in favor of a conspiracy by tending to exclude the possibility that the alleged coconspirators acted independently or based upon legitimate business purposes. The quantum of evidence required to exclude the possibility of independent action or legitimate business purposes is directly related to the plausibility of the plaintiff's theory. If the plaintiff advances a strong, plausible theory then the quantum of evidence tending to exclude independent action is not as great as if the plaintiff advances a weak or implausible theory. Likewise, when there is a risk that the threat of antitrust liability will chill legitimate, procompetitive conduct by market participants, the quantum of evidence is also high.

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN17[] **Private Actions, Sherman Act**

With regard to antitrust actions, one must not characterize a firm's sacrifice of short-run interest in favor of long-run interest as contrary to self-interest. Rather, the inquiry the first plus factor invites is whether the conduct at issue would be against the defendant's self-interest if it were acting independently, but consistent with the defendant's self-interest if it were acting in concert with another.

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

Evidence > Inferences & Presumptions > Inferences

HN18[] **Conspiracy to Monopolize, Elements**

With regard to antitrust actions, allegations of general contacts or even specific contacts that are abstract or vague in nature are not enough to support a reasonable inference of conspiracy under federal law.

Counsel: For AMC Entertainment Holdings, Inc., AMC Entertainment, Inc., American Multi-Cinema, Inc., Regal Entertainment Group, Petitioners: Warren Szutse Huang, Darryl Wade Anderson, Layne E. Kruse, Norton Rose Fulbright US LLP, Houston TX; Barton Wayne Cox, Michael A. Swartzendruber, Norton Rose Fulbright US LLP, Dallas TX; Samuel W. Cooper, Paul Hastings LLP, Houston TX.

For iPic Texas, LLC, iPic-Gold Class Entertainment, LLC, Respondents: Constance H. Pfeiffer, April Lynn Farris, Bryce L. Callahan, R. Paul Yetter, Reagan W. Simpson, Yetter Coleman LLP, Houston TX; Barton Wayne Cox, Norton Rose Fulbright US, LLP, Dallas TX; Michael A. Swartzendruber, Norton Rose Fulbright US LLP, Dallas TX.

Judges: CHIEF JUSTICE HECHT delivered the opinion of the Court. Justice Young did not participate in the decision.

Opinion by: Nathan L. Hecht

Opinion

[*201] Respondents allege that petitioners conspired to restrain trade in the movie-theater market in violation of *Section 15.05(a)* of the Texas Free Enterprise and Antitrust Act ("Texas Antitrust Act").[1] ***HN1***[] The Act provides that it "shall be construed in harmony with federal judicial interpretations of comparable federal antitrust **[**2]** statutes".[2] "*Section 15.05(a)* is comparable to, and indeed taken from, *section 1 of the Sherman Antitrust Act*".[3] **[*202]** The United States Supreme Court has held that "[t]o survive a motion for summary judgment . . . , a plaintiff seeking damages for a violation of *§ 1* must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently."[4] The parties agree that this requirement governs in cases brought under the Texas Act; they disagree on its application in this case. The court of appeals held that respondents satisfied this requirement and reversed the trial court's summary judgment for petitioners.[5] We disagree and thus reverse and render judgment for petitioners.

I

A

AMC[6] and its competitor Regal[7] own the two largest movie-theater chains in North America, with hundreds of theaters each.[8] Both chains specialize in megaplexes—large theaters with 20 or more screens and traditional amenities such as popcorn, soft drinks, and candy.

iPic[9] owns a chain of boutique theaters in the United States. iPic's theaters—there were 13 at the time of the trial court proceedings, and around 15 today—offer an upscale experience with reclining seats situated in pods, full-service waitstaff, chef-prepared meals, **[**3]** and specialty cocktails. A "premium plus" ticket at an iPic theater costs more than twice the typical ticket at an AMC or Regal megaplex.

iPic alleges that starting in early 2013, AMC and Regal conspired to eliminate iPic from the markets in Houston and Frisco, just north of Dallas, by "clearing" a proposed iPic theater near Regal Greenway in central Houston and another near AMC Stonebriar in Frisco. iPic's allegations require an understanding of the film industry.

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[1] *Tex. Bus. & Com. Code §§ 15.01-15.22*.

[2] *Id.* *§ 15.04*.

[3] *DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 687 (Tex. 1990)*; *see* *15 U.S.C. § 1* ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

[4] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*); *accord* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citing *Matsushita*).

[5] *592 S.W.3d 946, 958 (Tex. App.—Houston [1st Dist.] 2019)*.

[6] By "AMC" we refer to petitioners AMC Entertainment Holdings, Inc., AMC Entertainment, Inc., and American Multi-Cinema, Inc.

[7] By "Regal" we refer to Regal Entertainment Group.

[8] AMC and Regal are two-thirds of the "Big Three" U.S. movie-theater chains, the third being Cinemark.

[9] By "iPic" we refer to respondents iPic-Gold Class Entertainment, LLC and iPic Texas, LLC.

AMC, Regal, and iPic are movie *exhibitors*. Historically, exhibitors licensed movies from third-party *distributors*, which acted as liaisons between exhibitors and the production studios. Today, the six largest production studios—Walt Disney Studios, Warner Brothers Entertainment, 20th Century Fox, Paramount Pictures, Sony Pictures, and Universal Studios—act as their own distributors. But there remain independent distributors too, such as Lionsgate, Focus, the Weinstein Company, Bleeker Street, Broad Green, and Open Road Films.

Open Road is an independent distributor formed in 2011 as a joint venture between AMC and Regal. Open Road has since **[*203]** een sold, but at all times relevant to this lawsuit, it was owned by AMC and Regal, **[**4]** and executives of both companies sat on its board.

When theaters in close proximity show the same first-run (new release) film, they are playing the film *day-and-date*. To prevent playing day-and-date with a competitor, a theater can request that a film's distributor grant it a *clearance*—an exclusive license to show the film for a period of time. Clearance practices are traceable to the earliest days of the film industry. Because theaters had only a handful of screens, they could not play every first-run film available. Theaters nearby one another thus bid against each other to secure the exclusive license to play a particular film. In exchange for that exclusive license, a theater would pay the distributor a guaranteed sum and take responsibility for advertising and promoting the film in the area.

The parties disagree about what role clearances have played in the industry in more recent history. At a pretrial hearing in the trial court, iPic presented witness testimony that clearances began phasing out in the 1980s when distributors moved to an allocation system. Later, when megaplexes began sprouting up in the mid-1990s, allocating films was no longer necessary because a megaplex can **[**5]** play every first-run movie available.

Regal is no longer a party to this case, but its historical clearance practices are central to iPic's conspiracy allegations against AMC. Regal CEO Amy Miles testified that when she joined the company in 1999, Regal already had a general policy of seeking clearances against theaters in proximity to a Regal theater. Miles explained that Regal recognizes 70 clearance zones across the country in which Regal seeks clearances against any class of theater within three miles, and distributors therefore allocate first-run films between Regal and the theater nearby. In Houston, for example, Regal Greenway sought clearances against the River Oaks Theatre beginning in 1999 when the Greenway opened.[10]

In 17 of Regal's clearance zones, Regal clears a theater owned by AMC. In 15, one Regal theater clears another Regal theater. One example is a clearance zone in northern Virginia, where a 20-screen Regal theater clears one of Regal's smaller theaters that offers luxury amenities similar to those offered by iPic. Another example occurs in northwest Austin, where Regal's Gateway 16 does not play day-and-date with its Arbor 8 theater.

Miles **[**6]** testified that Regal believes clearances are beneficial to the entire film-industry ecosystem, including theaters and customers, because clearances ultimately facilitate more films being shown in a geographic area and for longer. Miles projected that without clearance zones, theaters would devote most of their screens to blockbusters, which would play through the theaters faster, resulting in less choice for consumers and less revenue for distributors and theaters.

Miles acknowledged, however, that Regal has made some exceptions to its three-mile policy over the years. Regal usually does not seek clearances in densely populated areas such as Manhattan, where a three-driving-miles rule of thumb does not make sense. Regal's clearance practices have also varied when it has acquired an existing theater. "[I]f we acquire a theater that didn't assert a clearance prior to the **[*204]** cquisition, we don't go back and try to change that, post-acquisition", Miles explained.

In 2008, Regal declined to clear a dine-in theater within its Redmond, Washington clearance zone that later became an iPic. In 2010, Regal declined to clear the iPic Austin, which opened less than three miles from Regal's Gateway **[**7]** 16 and Arbor 8 theaters. Miles testified that these exceptions to Regal's three-mile policy were tests

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[10] The historic River Oaks Theatre opened in Houston's River Oaks District in 1939 and closed permanently in March 2021. The theater was a Houston landmark known for playing *The Rocky Horror Picture Show* on Saturdays.

conducted at the request of distributors to determine whether luxury theaters—then a new and innovative concept—would truly compete with traditional ones. There is conflicting evidence on what the data from the Redmond and Austin tests show, but Miles testified that once luxury theaters took off, Regal came around to viewing them as competitors to Regal's more traditional theaters.

B

Before 2012, AMC had never requested clearances against competing theaters. But that year it adopted its own corporate policy of requesting clearances against theaters within roughly three miles of an AMC theater. An internal report prepared by AMC in November 2012 reflects AMC's determination that asserting clearances could help fend off "competitive encroachment".

In December 2012, AMC made a presentation on the new policy to various studios and to Open Road personnel. Written materials from that presentation project that without a change in clearance policy, new competition would negatively affect AMC's revenue. The materials reflect that AMC had considered the matter "carefully" and would "stand behind" **[**8]** the decision to start asserting clearances "for the long-term health of [its] . . . business".

In January 2013, Regal's president and COO, Greg Dunn, who also sat on the board of Open Road, directed Regal's head film buyer, Ted Cooper, to clear all luxury or dine-in theaters within three miles of a Regal theater. Around the same time, Regal learned that iPic planned to build a theater in Houston within three miles of Regal Greenway. In April 2013, Regal's Ted Cooper told iPic executive Clark Woods at an industry conference that Regal planned to clear iPic's new Houston theater. A few days later, iPic's CEO, Hamid Hashemi, emailed a colleague that "Regal . . . just told us they are clearing us in Houston", characterizing Regal's decision as "[n]o biggie". Also in April 2013, iPic opened a new theater in Los Angeles within three miles of an AMC theater. Despite its new policy, AMC declined to clear iPic Los Angeles, and the two theaters play day-and-date. It was not until several months later, around December 2013, that iPic began making plans for a Frisco theater.

In April 2014, AMC learned that iPic was in the process of negotiating a lease for a space in Frisco located within three **[**9]** miles of AMC Stonebriar. An internal AMC email characterized the forthcoming iPic as "[a]n obvious clearance situation" and expressed AMC's intention to "move quickly" to communicate its clearance request to distributors. An internal email between AMC personnel dated May 16, 2014, contained this draft clearance request to distributors for the anticipated iPic Frisco:

> Dear XXXXXXXXX,
>
> iPic, a movie exhibition company, is planning a new theatre at Forum at Wade Park located at the corner of Lebanon Rd and Parkwood Blvd in Frisco, TX. This new development is 1.75 direct miles and 2.2 driving miles north of our AMC Stonebriar theatre, with no geographic barriers. This theatre, if it were to play first-run movies, would be in **[*205]** ubstantial competition with AMC Stonebriar 24. In the last twelve months, AMC Stonebriar 24 has grossed $X [amount redacted] and has more than enough capacity to fully serve movie-going demand in this zone that has a 3-mile population of 82,651 people.
>
> Accordingly, AMC will not license [Distributor's] films to be played day-and-date with this proposed new theatre, but instead requests that each film be licensed pursuant to clearances in this particular film licensing **[**10]** zone. Clearances in this zone would clearly be deemed reasonable under the well-established jurisprudence governing the legality of clearances.
>
> We have enjoyed a productive business relationship with [Distributor name] at the Stonebriar 24 since AMC opened this location on 8/4/00. We look forward to continuing that ongoing relationship in this zone.

The letters were not sent out immediately. AMC executive Bob Lenihan testified by deposition that the lack of urgency in sending the requests—construction on iPic Frisco had not even begun—and AMC's being "a big company with a lot of bureaucracy" were the likely reasons for the delay. Another AMC executive, Nathan Reid, testified by deposition that AMC's film department received final approval to send out the requests in late June and that a two-month delay from drafting to sending a clearance request was "[n]ot at all" unusual.

On June 20, AMC's head film buyer, Ryan Wood, forwarded the draft clearance letter to colleagues with a note that the "[p]lan will be to send on Tuesday (7/1)". Still, the letters were not sent out on the 1st. iPic points to calendar entries in the record indicating that on July 2, Lenihan had lunch with Open Road **[**11]** personnel and that an AMC executive had a phone call scheduled with a Regal executive about Open Road matters. There is no evidence that clearances against iPic were discussed at the meeting or on the call.

Ryan Wood testified by deposition that distribution of the letters was delayed by the holiday weekend. "[P]hone calls needed to be made to each of the contacts [AMC was] sending [the letters] to", and it was too "close to July 4th weekend where [AMC and] a lot of the [distributors] were [going to be] closed for certain days". Woods explained that it was AMC's practice not to send a clearance letter until AMC had reached the recipient by telephone first; that with respect to certain distributors, AMC needed to make calls to multiple people; and that this process required "a phone conversation", "not just a voicemail left".

AMC finally started sending out its clearance requests on July 8. That same day, Regal began calling distributors to communicate that it wanted to clear iPic Houston. In these phone calls, Regal communicated to several distributors that it would refuse to play any movie at its Greenway theater that the distributor also offered to iPic Houston. AMC's clearance letters **[**12]** communicated the same message with respect to iPic Frisco.

No distributor bit on AMC's requests to clear iPic Frisco. Each either denied the request outright or refused to address it until iPic solidified its plans for a Frisco theater. In January 2017, AMC emailed all the distributors that it had sent clearance requests to for iPic Frisco and formally withdrew those requests. iPic Frisco was never built for reasons unrelated to this lawsuit, and iPic has not claimed any damages related to that proposed theater.

In response to Regal's requests, three distributor-studios—Sony, Universal, and Fox—decided to allocate their films between **[*206]** egal Greenway and iPic Houston. The rest denied or ignored Regal's request.

C

iPic filed this suit against Regal and AMC in November 2015, just a few weeks after iPic Houston opened. iPic initially alleged several antitrust claims under *Section 15.05* of the Texas Antitrust Act as well as a common-law claim for tortious interference with iPic's business.

In January 2016, the trial court temporarily enjoined Regal from making further clearance requests against iPic Houston or communicating to distributors that it would not play day-and-date with iPic Houston. After that **[**13]** order was affirmed on appeal,[11] Regal settled, leaving AMC as the only defendant. iPic alleges damages in the form of lost revenue and goodwill during the first few months that iPic Houston was open, before the trial court's temporary injunction order.

AMC filed a traditional and no-evidence motion for summary judgment on all claims against it. The trial court granted the motion without stating its reasons and rendered judgment dismissing all iPic's claims. iPic appealed the court's judgment with respect to one claim alleging a horizontal conspiracy between Regal and AMC to restrain trade under *Section 15.05(a)*. The court of appeals reversed the summary judgment and remanded the case for trial.[12] We granted AMC's petition for review.

II

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[11] *Regal Ent. Grp. v. iPic-Gold Class Ent., LLC, 507 S.W.3d 337 (Tex. App.—Houston [1st Dist.] 2016, no pet.)*.

[12] *592 S.W.3d 946 (Tex. App.—Houston [1st Dist.] 2019)*.

HN2[] The Texas Antitrust Act's stated "purpose . . . is to maintain and promote economic competition in trade and commerce" in the state and "to provide the benefits of that competition to consumers".[13] "[T]o the extent consistent with [that] purpose", the Act's provisions should "be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes".[14]

iPic's sole remaining claim alleges a horizontal conspiracy between Regal and AMC under Section 15.05(a) of the **[**14]** Act to "crush iPic with clearances" in order to put iPic out of business in Houston and Frisco. Even though all iPic's damages were sustained by iPic Houston, and AMC only tried to clear the rumored-but-never-built iPic Frisco, iPic argues that under ***antitrust law***, AMC is liable as Regal's co-conspirator for damages to iPic Houston.

HN3[] Section 15.05(a) states that "[e]very contract, combination, or conspiracy in restraint of trade or commerce is unlawful."[15] Section 15.21 authorizes "[a]ny person . . . whose business or property has been injured" by a violation of Section 15.05 to sue for damages and injunctive relief.[16] These provisions are "comparable to, and indeed taken from," Sections 1 and 15 of the Sherman Antitrust Act, respectively.[17] Because "our own caselaw [on the Texas Antitrust Act] is limited," we must "rely heavily on the jurisprudence of the federal courts" in Sherman Act cases to resolve **[*207]** he issues presented here.[18]

HN4[] Like the language of its federal counterpart, the broad language of Section 15.05(a) indicates that *every* conspiracy in restraint of trade is unlawful. Yet the United States Supreme Court has, since its earliest decisions, "recognized that [Section 1] was intended to prohibit only unreasonable restraints of trade."[19] Some kinds of conspiratorial agreements—a horizontal **[**15]** agreement to fix prices, for example—are considered per se illegal.[20] Most, however, are evaluated on a case-by-case basis under the "rule of reason," which requires the court to determine whether a restraint is unreasonable by "examining a defendant's purpose in implementing the restraint and the restraint's effect on competition" as well as all factors relevant to that examination.[21]

The seminal antitrust case on movie-theater clearances is *United States v. Paramount Pictures*.[22] There, the Supreme Court did not reach the issue of whether clearances are unlawful per se under the Sherman Act because the Department of Justice had not appealed the district court's ruling that they are not.[23] But the Supreme Court

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[13] *Tex. Bus. & Com. Code § 15.04*.

[14] *Id.*

[15] *Id.* *§ 15.05(a)*.

[16] *Id.* *§ 15.21(a)-(b)*.

[17] *DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 687 (Tex. 1990)*; *see* *15 U.S.C. §§ 1*, *15*.

[18] *In re Mem'l Hermann Hosp. Sys., 464 S.W.3d 686, 708 (Tex. 2015)* (quoting *Coca-Cola Co. v. Harmar Bottling Co., 218 S.W.3d 671, 688-689 (Tex. 2006)*).

[19] *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)* (citing *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 94, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*).

[20] *Id.; see also* *In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 61 (2d Cir. 2012)* ("An agreement between competitors to fix prices, known as a horizontal price-fixing agreement, categorically constitutes an unreasonable restraint, and, accordingly, is unlawful *per se*." (citing *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*)).

[21] *Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367 (3d Cir. 1996)* (citing *Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*).

[22] *334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260 (1948)*.

noted the district court's conclusion that a clearance asserted to protect a theater's revenue interest in a film is likely reasonable if the clearance does "not unduly extend[] as to area or duration",[24] and the theaters affected are in "substantial competition" with one another.[25]

AMC and iPic vigorously dispute whether iPic is in substantial competition with megaplexes like AMC and Regal. But we need not make that determination because iPic did not raise the issue in its motion **[**16]** for summary judgment.[26] AMC's motion instead **[*208]** ocused on the remaining elements of iPic's claim: (1) whether AMC and Regal made an agreement to "crush iPic with clearances"; and (2) if they did, whether that agreement caused injury to iPic Houston.[27] We need only address the first issue.

III

iPic alleges a conspiratorial agreement between AMC and Regal to "crush iPic with clearances"—i.e., to put iPic out of business in Houston and Frisco by preventing it from obtaining first-run films in those markets. ***HN6***[] Because this appeal arises from a summary judgment for AMC, we review the lower courts' judgments de novo, taking as true all evidence favorable to iPic and indulging every permissible inference in its favor.[28] But because federal

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[23] *Id. at 145*.

[24] *Id.*

[25] *Id. at 146*.

[26] We express no opinion whether the Supreme Court's statements about substantial competition in *Paramount Pictures* survive the Court's subsequent decisions clarifying the scope of the *Sherman Act* and defining the relevant market for antitrust purposes. *Compare Regal Ent. Grp. v. iPic-Gold Class Ent., LLC, 507 S.W.3d 337, 348 (Tex. App.—Houston [1st Dist.] 2016, no pet.)* ("Whether theaters are in substantial competition turns on whether they sell a reasonably interchangeable product in the same geographic area."), *with United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957)* ("Determination of the relevant market is a necessary predicate to a finding of a violation of the *Clayton Act* because the threatened monopoly must be one which will substantially lessen competition within the area of effective competition. Substantiality can be determined only in terms of the market affected." (footnote and quotation marks omitted)), and *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* ("The boundaries of [a well-defined submarket within a broader product market] may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.").

We note, however, that—outside of an inquiry into whether a proposed merger's effect "may be substantially to lessen competition" under the *Clayton Act, 15 U.S.C. § 18*—the words "substantial competition" have not appeared in an antitrust decision from the Supreme Court since *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 74 S. Ct. 257, 98 L. Ed. 273 (1954)*, a decision that also predates the Court's seminal opinions in *Du Pont* and *Brown Shoe*. *Cf. FTC v. Actavis, Inc., 570 U.S. 136, 159, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)* ("In *California Dental*, we held (unanimously) that abandonment of the 'rule of reason' in favor of presumptive rules (or a 'quick-look' approach) is appropriate only where 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.'" (quoting *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*)); *FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)* ("[W]e decline to resolve this case by forcing the Federation's policy into the 'boycott' pigeonhole and invoking the *per se* rule.").

[27] ***HN5***[] *See Tex. Bus. & Com. Code § 15.21* (authorizing any person "whose business or property has been injured by reason of any conduct declared unlawful" under *Section 15.05* to sue for damages or injunctive relief); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* ("To survive petitioners' motion for summary judgment, respondents must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury." (footnote and citation omitted) (citing *FED. R. CIV. P. 56(e)*)).

antitrust law guides our construction of the Texas Antitrust Act, our examination of the evidence must also take into account federal caselaw limiting what inferences are reasonable when the plaintiff's evidence is ambiguous and the alleged conspiracy is not plausible.[29] We begin with an overview of the different types of antitrust claims available under Texas and federal law and the elements **[**17]** required to establish the claim alleged here.

A

HN7[] For anticompetitive conduct to give rise to liability under *Section 1 of the Sherman Act* or *Section 15.05(a)* of the Texas Antitrust Act, the conduct must "stem[] . . . from an agreement, tacit or express", rather than from independent **[*209]** ction.[30] Because ***antitrust law*** "does not prohibit unreasonable restraints of trade as such—but only restraints effected by a contract, combination, or conspiracy—it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms".[31] Thus, ***antitrust law*** generally distinguishes between unilateral and multilateral conduct, treating multilateral conduct as the more dangerous and more likely to warrant judicial intervention.[32] In the federal context, challenges to multilateral conduct are brought under *Section 1 of the Sherman Act* (the federal analogue to *Section 15.05(a) of the Texas Antitrust Act*), and challenges to unilateral conduct are brought under *Section 2 of the Sherman Act* (the federal analogue to *Section 15.05(b)*).[33]

HN8[] Because a *Section 1* claim challenges multilateral conduct, its "very essence . . . is the existence of an agreement."[34] Indeed, the relevant danger or "activity that warrants *§ 1* scrutiny" is the "sudden joining of two independent **[**18]** sources of economic power previously pursuing separate interests".[35]

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[28] *See BPX Operating Co. v. Strickhausen, 629 S.W.3d 189, 195-196 (Tex. 2021)*.

[29] *See Matsushita, 475 U.S. at 588* ("[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a *§ 1* case."); *see also In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 63 (2d Cir. 2012)* ("*Matsushita*, then, stands for the proposition that substantive '***antitrust law*** limits the range of permissible inferences' that may be drawn from ambiguous evidence." (quoting *Matsushita, 475 U.S. at 588*)).

[30] *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Theatre Enters., 346 U.S. at 540*); *see also Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* ("Independent action is not proscribed [under the *Sherman Act*]. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.").

[31] *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 775, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*.

[32] *See Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 190, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* ("The meaning of the term 'contract, combination . . . , or conspiracy' is informed by the 'basic distinction' in the *Sherman Act* 'between concerted and independent action' that distinguishes *§ 1 of the Sherman Act* from *§ 2*." (quoting *Copperweld Corp., 467 U.S. at 767*)); *cf. Copperweld Corp., 467 U.S. at 767-768* ("In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects, Congress authorized *Sherman Act* scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.").

[33] *Cf. Am. Needle, 560 U.S. at 190* ("*Section 1* applies only to concerted action that restrains trade. *Section 2*, by contrast, covers both concerted and independent action, but only if that action 'monopolize[s][]' or 'threatens actual monopolization,' a category that is narrower than restraint of trade." (citations omitted)).

[34] *Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 999 (3d Cir. 1994)*; *see also Monsanto, 465 U.S. at 761* ("Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently."); *Theatre Enters., 346 U.S. at 540* ("The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express."); *In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 396 (3d Cir. 2015)* ("An important corollary to the agreement requirement is that *§ 1* liability cannot be

After a plaintiff "establishes the existence of an illegal contract or combination, it must then proceed to demonstrate **[*210]** hat the agreement constituted an unreasonable restraint of trade either per se or under the rule of reason."[36] However, "[t]he question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade."[37]

HN10[] "A *§ 1* agreement may be found when 'the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'"[38] "Such proof may come in the form of direct evidence, e.g., an explicit admission from a participant that an antitrust conspiracy existed, or circumstantial evidence."[39] Whether a factfinder can properly infer the existence of an agreement or conspiracy from ambiguous or circumstantial evidence will "vary with the plausibility of the plaintiffs' theory and the dangers associated with such inferences."[40]

B

HN11[] In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the Supreme Court warned that "courts should not permit factfinders **[**19]** to infer conspiracies when such inferences are implausible[] because the effect of such practices is often to deter procompetitive conduct."[41] The Court explained that "if the factual context [of the alleged conspiracy] renders [the plaintiff's] claim implausible—if the claim is one that simply makes no economic sense—[the plaintiff] must come forward with more persuasive evidence to [survive a motion for summary judgment] than would otherwise be necessary."[42] A corollary to this rule is that "conduct [that is just] as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."[43]

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predicated on a defendant's unilateral actions, no matter its anticompetitive motivations."); *Cap. Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 542 (2d Cir. 1993)* ("[A] plaintiff claiming a *§ 1* violation must first establish a combination or some form of concerted action between at least two legally distinct economic entities.").

[35] *Copperweld Corp., 467 U.S. at 771*.

[36] *Cap. Imaging Assocs., 996 F.2d at 542*. ***HN9***[] With rare exceptions, courts use a three-step, burden-shifting framework to evaluate *Section 1* claims under the rule of reason. *See, e.g., K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 127 (2d Cir. 1995)* ("Establishing a violation of the rule of reason involves three steps.").

First, the plaintiff "bears the initial burden of showing that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market." *Id.* (quoting *Cap. Imaging Assocs., 996 F.2d at 543*). Second, "[i]f the plaintiff succeeds, the burden shifts to the defendant to establish the pro-competitive redeeming virtues of the action." *Id.* (internal quotation marks omitted) (quoting *Cap. Imaging Assocs., 996 F.2d at 543*). Third, "[s]hould the defendant carry this burden, the plaintiff must then show that the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition." *Id.* (citing *Cap. Imaging Assocs., 996 F.2d at 543*).

[37] *Am. Needle, 560 U.S. at 186*.

[38] *Copperweld Corp., 467 U.S. at 771* (quoting *Am. Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*).

[39] *Chocolate Confectionary Antitrust Litig., 801 F.3d at 396* (citing *InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 159 (3d Cir. 2003)*).

[40] *In re Flat Glass Antitrust Litig., 385 F.3d 350, 357 (3d Cir. 2004)* (quoting *Petruzzi's IGA Supermkts., Inc. v. Darling-Del. Co., 998 F.2d 1224, 1232 (3d Cir. 1993)*).

[41] *475 U.S. 574, 593, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (citing *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762-764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*).

[42] *Id. at 587*; *see also* *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 661 (7th Cir. 2002)* ("More evidence is required the less plausible the charge of collusive conduct.").

Matsushita involved an allegation by American TV manufacturers that a group **[*211]** f Japanese manufacturers had conspired over a 20-year period to drive the American firms from the market by fixing artificially high prices in Japan and artificially low prices in the U.S. The American firms' theory was that once their businesses collapsed, the Japanese firms would raise prices in the U.S. to recoup their losses from the artificially low prices they had imposed previously. The plaintiffs' evidence consisted largely of the prices themselves. The **[**20]** district court concluded that evidence did not raise a fact issue on the existence of a conspiracy and granted summary judgment for the defendants. The court of appeals reversed.

The Supreme Court pointed to several reasons why the plaintiffs' conspiracy theory was implausible. One was that if the conspiracy did exist, it was a failure. Twenty years after the conspiracy was alleged to have commenced, two American firms, including lead plaintiff Zenith, retained the largest shares of the American market. The Court noted that "[t]he alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy [did] not in fact exist."[44] A conspiracy among the defendant firms would also be "incalculably more difficult to execute than an analogous plan undertaken by a single predator."[45] "[S]uccess [would be] speculative and depend[] on a willingness to endure losses for an indefinite period".[46] Moreover, "each conspirator [would have] a strong incentive to cheat, letting its partners suffer the losses necessary to destroy the competition while sharing in any gains if the conspiracy succeed[ed]."[47] Thus, the Court explained, the defendants **[**21]** "had no motive to enter into the alleged conspiracy."[48] ***HN12***[] "[T]he absence of any plausible motive to engage in the conduct charged is highly relevant to whether a 'genuine issue for trial' exists", the Court said.[49]

The Court reversed the court of appeals' judgment and remanded for that court to reconsider the evidence in light of the standards announced.[50] The Court directed the court of appeals to determine whether there was any evidence that was "sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so."[51] Evidence offered to defeat summary judgment "must 'ten[d] to exclude the possibility' that [the defendants] underpriced [the plaintiffs] to compete for business rather than to implement an economically senseless conspiracy", the Court said.[52] Absent evidence meeting that strict standard, the Court explained, "there [was] no 'genuine issue for trial'" under *Federal Rule of Civil Procedure 56(e)*, and the Japanese firms were entitled to summary judgment.[53]

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43 *Matsushita, 475 U.S. at 588* (citing *Monsanto, 465 U.S. at 764*).

44 *Id. at 592*.

45 *Id. at 590*.

46 *Id.*

47 *Id.*

48 *Id. at 595*.

49 *Id. at 596* (quoting *FED. R. CIV. P. 56(e)*).

50 *Id. at 597-598*.

51 *Id. at 597*.

52 *Id. at 597-598* (first alteration in original) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*).

53 *Id. at 598*.

HN13[] The Supreme Court extended the plausibility requirement to the pleading stage in *Bell Atlantic Corp. v. Twombly*, where it held that in order to survive a motion **[**22]** to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*, a plaintiff's conspiracy allegations **[*212]** ust be "plausible on [their] face."[54] In that case, the Court held that the plaintiffs' factual allegations "[came] up short"[55] and failed to "nudge[] their claims across the line from conceivable to plausible"[56] because the allegations rested "on descriptions of parallel conduct and not on any independent allegation of actual agreement among the [defendants]."[57] *HN14*[] The Court reiterated that parallel business conduct, even if consciously undertaken, is ambiguous: it is just as consistent with conspiracy as with competitive actions "unilaterally prompted by common perceptions of the market."[58] "[A]t the summary judgment stage", the Court reminded, evidence of ambiguous conduct is not enough; rather, "a *§ 1* plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently".[59]

C

Matsushita *HN15*[] and *Twombly* teach that (1) parallel business conduct, alone, is insufficient to raise a fact issue on the existence of a conspiracy;[60] (2) when the conspiracy alleged is implausible, more persuasive evidence will be required to survive summary judgment;[61] and (3) the plaintiff's evidence must tend to exclude the possibility **[**23]** that the defendants acted independently.[62]

Lower federal courts have fleshed out these principles by requiring plaintiffs who base their claim on consciously parallel business behavior to demonstrate the existence of "plus factors".[63] These "factors serve as proxies for direct evidence of an agreement" by "ensur[ing] that courts punish 'concerted action'—an actual agreement—instead of the 'unilateral, independent conduct of competitors.'"[64] There is no definitive list of plus factors,[65] but one district court has listed these eight:

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[54] *550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

[55] *Id. at 564*.

[56] *Id. at 570*.

[57] *Id. at 564*.

[58] *Id. at 554*.

[59] *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*).

[60] *Id. at 556-557* ("Without more, parallel conduct does not suggest conspiracy . . . .").

[61] *Matsushita, 475 U.S. at 587* ("[I]f the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.").

[62] *Twombly, 550 U.S. at 554* ("[A]t the summary judgment stage a *§ 1* plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently . . . ."); *Matsushita, 475 U.S. at 588* ("To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of *§ 1* must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*)).

[63] *See, e.g.*, *In re Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004)*.

[64] *Id.* (quoting *In re Baby Food Antitrust Litig., 166 F.3d 112, 122 (3d Cir. 1999)*).

> (1) actions that would be against the defendants' self-interest if the defendants were acting independently, but **[*213]** onsistent with their self-interest if they were acting in concert; (2) a motive to conspire; (3) an opportunity to conspire; (4) market concentration and structure conducive to collusion; (5) pretextual explanations for anticompetitive conduct; (6) sharing of price information; (7) signaling; and (8) involvement in other conspiracies.[66]

"A plausible allegation that the parallel conduct was not in the alleged conspirators' independent self-interest absent an agreement **[**24]** is generally considered the most important 'plus factor.'"[67]

HN16[] A court's task in evaluating the propriety of summary judgment is to "[v]iew[] all the evidence and tak[e] the plus factors into consideration" and determine if the evidence tips the scales in favor of a conspiracy by "tend[ing] to exclude the possibility that the alleged coconspirators acted independently or based upon legitimate business purposes."[68] "[T]he quantum of evidence required to exclude the possibility of independent action or legitimate business purposes is directly related to the plausibility of the plaintiff's theory."[69] "If the plaintiff advances a strong, plausible theory then the quantum of evidence tending to exclude independent action is not as great as if the plaintiff advances a weak or implausible theory. Likewise, when there is a risk that the threat of antitrust liability will chill legitimate, procompetitive conduct by market participants, the quantum of evidence is also high."[70]

IV

We turn to the allegations and evidence in this case.

A

iPic alleges that AMC and Regal conspired to "crush iPic with clearances" in order to "eliminate" it "from the **[**25]** markets of Houston and Frisco." iPic alleges that the conspiracy was formed in January 2013 when, after hearing

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[65] *See id.* ("The question then becomes, what are 'plus factors' that suffice to defeat summary judgment? There is no finite set of such criteria; no exhaustive list exists.").

[66] *In re Pool Prods. Distrib. Mkt. Antitrust Litig., 988 F. Supp. 2d 696, 711 (E.D. La. 2013)* (citing ABA Section of ***Antitrust Law***, *Proof of Conspiracy Under Federal Antitrust Laws* 69-91 (1st ed. 2010) [hereinafter *Proof of Conspiracy*] (collecting cases)).

[67] *Id.* (citing *Proof of Conspiracy, supra* note 66, at 70); *see also In re Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 907-908 (6th Cir. 2009)* (explaining that the "[k]ey to" one of the court's prior decisions reversing a grant of summary judgment for the defendants in a *Section 1* case was that the anticompetitive policy at issue "would not be in either defendant's *independent* economic interest" and that each defendant would have "a natural inclination *not*" to adopt the policy on its own); ***Merck-Medco Managed Care, LLC v. Rite Aid Corp., 201 F.3d 436***, [published in full-text format at *1999 U.S. App. LEXIS 21487], 1999 WL 691840, at *10 (4th Cir. 1999)* (unpublished) ("Evidence of acts contrary to an alleged conspirator's economic interest is perhaps the strongest plus factor indicative of a conspiracy.").

[68] *Merck-Medco Managed Care, 1999 U.S. App. LEXIS 21487, 1999 WL 691840, at *9*.

[69] *1999 U.S. App. LEXIS 21487, [WL] at *8*; *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* ("[I]f the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim that would otherwise be necessary.").

[70] *Merck-Medco Managed Care, 1999 U.S. App. LEXIS 21487, 1999 WL 691840, at *8*; *see also In re Coordinated Pretrial Procs. in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 439 (9th Cir. 1990)* ("*Matsushita* establishes that a trial judge should not permit an inference of antitrust conspiracy from circumstantial evidence where to do so would have the effect of deterring significant procompetitive conduct.").

AMC's presentation to Open Road, Regal president Greg Dunn directed Regal's film department to **[*214]** lear any luxury or dine-in theater concept within three miles of a Regal theater. iPic further alleges that the conspiracy culminated with AMC and Regal's near simultaneous clearance requests on July 8, 2014. iPic claims no damages with respect to iPic Frisco—the theater was never built due to failed lease negotiations, and AMC eventually withdrew its clearance requests with respect to that theater. Rather, iPic alleges that Regal's requests to clear iPic Houston resulted in lost revenue and goodwill to that theater and that AMC is vicariously liable for those losses as Regal's co-conspirator.

In our view, the "factual context" of this case "renders [iPic's] claim implausible".[71] The first problem is that the timeline of events makes the existence of an AMC—Regal agreement to target iPic seem farfetched. Regal first told iPic that its Greenway theater would seek clearances against iPic Houston in April 2013, eight months before iPic even began discussing the possibility of a Frisco **[**26]** theater, and a year before AMC learned about iPic's plans for a Frisco theater.

It is also hard to see why AMC and Regal would have any motive to conspire to seek the specific clearances they sought together as a unit rather than independently.[72] There is no nonspeculative basis in the record for concluding that both exhibitors' participation was essential for either to "recover[], in the form of later monopoly profits, more than the losses suffered."[73] To the contrary, Regal did not need AMC's help to clear iPic in Houston. And when AMC requested clearances against iPic Frisco in July 2014, it was implementing a policy that AMC had unilaterally adopted more than a year-and-a-half earlier, before the conspiracy is alleged to have begun.

iPic argues that by teaming up and making their formal requests on the same day, Regal and AMC would have a greater chance of success with distributors. But it is hard to see why Regal's requests for clearances in Houston would have any impact on a distributor's decision how to allocate films 270 miles away in Frisco, or vice versa.

iPic also contends that Regal and AMC's teaming up sends a stronger message to iPic than either exhibitor's requesting **[**27]** clearances alone would have. But the clearance requests target only two iPics, one of which was never built. Except for iPic Houston, all iPic's theaters have had access to all first-run films since the day they opened their doors. One of these, iPic Los Angeles, opened within a three-mile radius of an AMC theater in April 2013—after the conspiracy allegedly began—and AMC declined to clear it. If AMC and Regal did conspire in January 2013 to "crush iPic with clearances", the conspiracy **[*215]** as a failure.[74]

B

iPic nonetheless contends that it has presented evidence of several plus factors that collectively tip the scales in favor of a conspiracy. We start with the "most important" one: whether the clearance requests "would be against

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[71] *Matsushita, 475 U.S. at 587*.

[72] *Cf. Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 906 F.2d at 444* (noting that "even in highly concentrated markets, a unilateral price hike might be too risky to make without advance agreement if the increase could not be readily reversed without a significant loss of goodwill").

[73] *Matsushita, 475 U.S. at 589*; *accord Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 319, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)* ("Without . . . a reasonable expectation [of recouping its investment in the long run], a rational firm would not willingly suffer definite, short-run losses."); *Interstate Cir. v. United States, 306 U.S. 208, 226, 59 S. Ct. 467, 83 L. Ed. 610 (1939)* ("Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan.").

[74] *See Matsushita, 475 U.S. at 592* ("The alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist.").

[AMC's] self-interest if [it] were acting independently, but consistent with [AMC's] self-interest if [it] were acting in concert" with Regal.[75] iPic relies primarily on three categories of evidence to establish this plus factor:

(1) internal analyses by AMC projecting that a clearance zone in which films are allocated between an AMC theater and a nearby iPic may result in substantially more revenue loss to AMC than its theater's playing day-and-date with a nearby **[**28]** iPic would;
(2) deposition testimony of Regal executive Ted Cooper that the results of Regal's "test" decision not to clear iPic Redmond in 2008 indicated that having an iPic-type luxury theater's playing day-and-date with a nearby Regal theater would actually increase attendance at the Regal theater; and
(3) data indicating that Regal Greenway lost substantial revenue in November 2015 when it refused to play a new Star Wars movie that the studio offered to both iPic and Greenway in defiance of Regal's clearance request.[76]

This evidence supports iPic's assertion that it is against an exhibitor's economic interest—in the short term, at least—to refuse to play day-and-date with a competitor. The court of appeals recognized as much but then leapt to the conclusion that the first and "most important" plus factor had been established.[77] iPic mostly parrots this analysis, and it is incorrect.

There is nothing illegal about a company's pursuing action that trades short-term financial loss for long-term gain. ***HN17***[] Commentators have warned that "[o]ne must not characterize a firm's sacrifice of short-run interest in favor of long-run interest as contrary to self-interest. Such a sacrifice by **[**29]** itself tells us nothing about possible conspiracy[] because a firm often **[*216]** akes this choice . . . ."[78] Rather, the inquiry the first plus factor invites is whether the conduct at issue would be against the defendant's self-interest *if it were acting independently*, but consistent with the defendant's self-interest if it were acting in concert with another.

iPic argues that "a reasonable jury could find that AMC and Regal would only expose themselves to such an economic hit, in tandem with one another, if they expected to jointly drive their new premium boutique competitor out of business in Frisco, Houston, and around the country." But that is simply not a rational inference in the factual context of this case, where it is undisputed that both Regal and AMC have sought other clearances independently. iPic claims that a conspiracy between Regal and AMC to harm iPic's business in Houston and Frisco "would radically expand the area in which iPic [would be] precluded from competing", but the record does not support that assertion. Regal may have been trying to harm iPic's **[**30]** Houston theater, and AMC was undoubtedly trying to preclude an iPic Frisco from even being built. But nothing about the economics of the July 2014 clearance requests

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[75] *In re Pool Prods. Distrib. Mkt. Antitrust Litig., 988 F. Supp. 2d 696, 711 (E.D. La. 2013)*; *see also* Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 475 (6th Cir. 2005) (phrasing this plus factor as "whether the defendants' actions, if taken independently, would be contrary to their economic self-interest"); *City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 570 n.33 (11th Cir. 1998)* ("[W]e read this reference to a defendant's 'economic self-interest' as a reference to what that defendant's legitimate economic self-interest would be under the assumption that it acted alone . . . .").

[76] iPic also argues that "[t]he studios . . . acted against their own interests in allocating films between iPic and Regal" because their stated preference would have been to license films to both Greenway and iPic Houston simultaneously. But iPic has not named any studio as a co-conspirator, and one could just as easily argue that keeping Regal happy would be in a studio's long-term interest.

[77] *See 592 S.W.3d 946, 957 (Tex. App.—Houston [1st Dist.] 2019)* ("Summary-judgment evidence showed that clearances were not necessarily profitable in the short run but could help exhibitors avoid overall losses in the long run. Thus, AMC was acting against its short-term economic interest by seeking a clearance of the proposed iPic Frisco . . . .").

[78] 6 PHILIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW***: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 110 (3d ed. 2010); *see also* *Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1310 (11th Cir. 2003)* ("[W]e must exercise prudence in labeling a given action as being contrary to the actor's economic interests, lest we be too quick to second-guess well-intentioned business judgments of all kinds.").

suggests that they were made pursuant to an otherwise "economically senseless" agreement.[79] Thus, iPic's "concept of 'action against self-interest' . . . merely constitute[s] a restatement of interdependence."[80]

iPic argues that it has also presented evidence of several plus factors found by the court of appeals: motive and opportunity to conspire, communications between the parties, a pretextual explanation for anticompetitive conduct, and facts consistent with a traditional conspiracy.[81] The evidence iPic points to in support of these factors fits roughly into three buckets.

The first bucket consists of evidence of communications between AMC and Regal between 2012 and 2014, sometimes through their joint venture, Open Road. In May 2012, Rich Boynton at AMC emailed his contacts at Open Road and asked them to find out whether Regal would be clearing a dine-in theater called Studio Movie Grill that was rumored to be opening near Regal Greenway. Open Road's Elliot Slutzky responded that Regal had informed him that it would **[**31]** not be clearing that theater. iPic alleges that this exchange violated Open Road's information-sharing guidelines, which forbade AMC and Regal from sharing "competitively sensitive information" about their film-exhibition businesses in order to avoid antitrust allegations.[82]

[*217] he record also contains an internal AMC report dated November 2012 that lists theaters planned by competitors along with a recommendation whether to seek a clearance against each theater. One page of the report analyzes a new Regal theater being built in the Atlanta area and expected to open in 2014. The clearance-recommendation section states: "Further conversation needed with Regal". An email circulated internally at AMC in June 2014 reflects that AMC had decided not to clear that Atlanta Regal and states: "[W]e are going to tell Regal since we decided not to clear you here you should un-clear us at Shirlington."

The second bucket holds the timeline of AMC's and Regal's decisions to start clearing dine-in theaters and their communications with studios about clearing iPic. Included are the facts that AMC and Regal sent their requests to clear iPic on the same day and that each exhibitor's request stated that its **[**32]** theater would refuse to play first-run films offered to iPic—statements that iPic characterizes as "threats".

The third bucket holds a shred of evidence involving Regal's post-clearance-request conduct. In a November 2015 email, Alan Davy, the Regal executive who made the July 2014 clearance requests, reported to the general manager of Regal's MarqE megaplex that iPic "tanked" on *The Peanuts Movie* and then said: "The problem was Studio 30 didn't get the benefit." Studio 30 was an AMC megaplex (now closed) that was located about five miles from both Regal Greenway and iPic Houston.

Taking iPic's evidence together and in the light most favorable to iPic, we conclude that it does not raise a genuine issue of material fact that the conspiracy iPic alleges ever existed. The national clearance strategy that AMC adopted in late 2012 became public knowledge when it was presented directly to distributors around the same time that it was presented to Open Road. It may be that AMC and Regal were monitoring each other's clearance strategies, but there is no evidence that Regal and AMC ever communicated with one another about clearing iPic.

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[79] *Matsushita, 475 U.S. at 596-597*.

[80] *In re Baby Food Antitrust Litig., 166 F.3d 112, 122 (3d Cir. 1999)*; *see also* *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* ("Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power . . . by recognizing their shared economic interests and their interdependence with respect to price and output decisions.").

[81] *592 S.W.3d at 958*.

[82] AMC disputes that clearance decisions are "competitively sensitive information" and contends that it could have obtained the same information from distributors, Studio Movie Grill, or industry reports.

HN18[] Allegations of general contacts or even specific contacts **[**33]** that are abstract or vague in nature are not enough to support a reasonable inference of conspiracy under federal law.[83] That is all iPic has here. The **[*218]** pen Road email chain shows only that AMC obtained information (perhaps wrongfully) about Regal's intentions with respect to *another* dine-in theater in Houston. This exchange occurred a year before iPic even started making plans for a Frisco theater. Other evidence shows that AMC and Regal may have engaged in some horse trading with respect to clearances between their own theaters. That may be normal industry behavior or it may be improper. Regardless, it is not evidence of a conspiracy directed towards iPic. Alan Davy's November 2015 email comment that AMC's Studio 30 "didn't get the benefit" of iPic's poor performance on *The Peanuts Movie* is certainly odd, but there is no link in the evidence between this email and AMC's request to clear iPic Frisco.

* * * *

The conspiracy that iPic has alleged is implausible, and its case rests on parallel conduct and suspicion. That is not enough to survive summary judgment under federal ***antitrust law*** because it does not tend to exclude the possibility that AMC acted independently. **[**34]** [84] Because we construe the Texas Antitrust Act in harmony with federal law, iPic's evidence is not enough to survive summary judgment under the Texas Act either.[85] We reverse the court of appeals' judgment and render judgment for AMC.

Nathan L. Hecht

Chief Justice

OPINION DELIVERED: January 14, 2022

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[83] *See* *Kreuzer v. Am. Acad. of Periodontology, 735 F.2d 1479, 1488, 237 U.S. App. D.C. 43 (D.C. Cir. 1984)* ("The mere showing of frequent relations between alleged co-conspirators, however, is insufficient to infer an illegal agreement."); *id. at 1489* ("These specific contacts between [the defendants] are of too *abstract* a nature for this court to infer a conspiracy to violate the *Sherman Act*."); *see also* *Kleen Prods. LLC v. Georgia-Pac. LLC, 910 F.3d 927, 936 (7th Cir. 2018)* (concluding that plaintiffs' "'proof' of prior knowledge amount[ed] to nothing more than speculation" where the "supposed smoking gun" consisted of a single memo that "could be nothing more than a somewhat accurate industry prediction"); *In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 409 (3d Cir. 2015)* (concluding that three "sporadic communications" between competitors' employees were "insufficient to create a reasonable inference of a conspiracy"); *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., 203 F.3d 1028, 1034-1035 (8th Cir. 2000)* (en banc) ("The price verifications relied upon were sporadic and testimony suggests that price verifications were not always given. The fact that there were several dozen communications is not so significant considering the communications occurred over at least a seven-year period in which there would have been tens of thousands of transactions."); *In re Citric Acid Litig., 191 F.3d 1090, 1105 (9th Cir. 1999)* (concluding that evidence of "sporadic price discussions" between individuals at competing companies was insufficient to survive summary judgment); *Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1357-1358 (9th Cir. 1982)* (noting the trial court's finding "that franchisees had established only sporadic exchanges of price information" and concluding that the exchanges "failed to prove any unlawful conspiracy").

[84] *See* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556-557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *Matsushita, 475 U.S. at 593-598*.

[85] *See* *Tex. Bus. & Com. Code § 15.04* ("The provisions of this Act shall be construed . . . in harmony with federal judicial interpretations of comparable federal antitrust statutes . . . .").

FTC v. Shkreli

United States District Court for the Southern District of New York

January 14, 2022, Decided; January 14, 2022, Filed

20cv00706 (DLC)

Reporter

581 F. Supp. 3d 579 *; 2022 U.S. Dist. LEXIS 7715 **; 2022 WL 135026

FEDERAL TRADE COMMISSION, STATE OF NEW YORK, STATE OF CALIFORNIA, STATE OF OHIO, COMMONWEALTH OF PENNSYLVANIA, STATE OF ILLINOIS, STATE OF NORTH CAROLINA, and COMMONWEALTH OF VIRGINIA, Plaintiffs, -v- MARTIN SHKRELI, Defendant.

Prior History: *FTC v. Vyera Pharms., LLC, 479 F. Supp. 3d 31, 2020 U.S. Dist. LEXIS 149542, 2020 WL 4891311 (S.D.N.Y., Aug. 18, 2020)*

Core Terms

Shkreli, pyrimethamine, generic, manufacturing, bottles, supplier, pharmaceutical, sales, generic drug, pharmacy, patient, testing, customers, distributors, drugs, competitors, acquire, relevant market, products, specialty, pharmaceutical company, toxoplasmosis, disgorgement, compounded, anticompetitive, tablet, launch, branded, profits, prices

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Judges: DENISE COTE, United States District Judge.

Opinion by: DENISE COTE

Opinion

[*589] OPINION AND ORDER

[*590]

DENISE COTE, District Judge:

In 2015, Martin Shkreli raised the price of the life-saving pharmaceutical Daraprim by 4,000% and initiated a scheme to block the entry of generic drug competition so that he could reap the profits from Daraprim sales for as long as possible. Through his tight control of the distribution of Daraprim, Shkreli prevented generic drug companies from getting access to the quantity of Daraprim they needed to conduct testing demanded by the Food and Drug Administration ("FDA"). Through exclusive supply agreements, Shkreli also blocked off access to the two most important manufacturers of the active pharmaceutical ingredient ("API") for Daraprim. Through these strategies, Shkreli delayed the entry of generic competition for at least eighteen months. Shkreli and his companies profited over $64 million from this scheme.

The Federal Trade Commission ("FTC") and seven States[1] (the "States"; collectively, **[*591]** "Plaintiffs") **[**4]** filed this action in 2020. At a bench trial held over seven days between December 14 and 22, 2021, the Plaintiffs carried their burden to establish that Shkreli violated federal and state laws that ban anticompetitive conduct. Based on the trial evidence, Shkreli will be barred for life from participating in the pharmaceutical industry and is ordered to disgorge $64.6 million in net profits from his wrongdoing. This Opinion contains the Findings of Fact and Conclusions of Law from the trial.

Procedural History

The Plaintiffs filed this action on January 27, 2020 and brought claims for violations of *§§ 1* and *2 of the Sherman Act*, *15 U.S.C. §§ 1-2*, *§ 5(a) of the FTC Act, 15 U.S.C. § 45(a)*, and various state statutes.[2] They brought these

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[1] The seven state plaintiffs are the States of New York, California, Ohio, Illinois, and North Carolina, and the Commonwealths of Pennsylvania and Virginia.

[2] The States pursuing statutory claims sue under the *Sherman Act* and under the *California Cartwright Act, Cal. Bus. & Prof. Code § 16700*, and California Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200*; *Illinois Antitrust Act, Ill. Comp. Stat. 10/3(3)*; the *New York Donnelly Act, N.Y. Gen. Bus. Law § 340 et seq.*, and New York Executive Law, *N.Y. Exec. Law § 63(12)*;

claims against Shkreli, Vyera Pharmaceuticals, LLC and its parent company Phoenixus AG ("Phoenixus"; together, "Vyera"), and Kevin Mulleady ("Mulleady"), former Vyera CEO and member of the Phoenixus Board of Directors (collectively, "Defendants"). The Defendants' motion to dismiss was largely denied through an Opinion of August 18, 2020.[3] See *Fed. Trade Comm'n v. Vyera Pharms., LLC, 479 F. Supp. 3d 31 (S.D.N.Y. 2020)*.

Two decisions in 2021 addressed the Plaintiffs' requests for equitable monetary relief.[4] A June 2, 2021 Order granted the FTC's motion for leave to withdraw its prayer for **[**5]** equitable monetary relief pursuant to the Supreme Court's decision in *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n, 141 S. Ct. 1341, 1352, 209 L. Ed. 2d 361 (2021)*. An Opinion of September 24 denied the Defendants' motion for partial summary judgment on the nationwide scope of the States' prayer for equitable monetary relief, and granted the Plaintiffs' cross-motion for summary judgment on the same issue. See *Fed. Trade Comm'n v. Vyera Pharms., LLC, No. 20CV00706 (DLC), 2021 U.S. Dist. LEXIS 183303, 2021 WL 4392481, at *5 (S.D.N.Y. Sept. 24, 2021)*.

Only Shkreli proceeded to trial; on the eve of trial Vyera and Mulleady settled with both the FTC and the States. Before those settlements were reached, the parties' submitted their Joint Pretrial Order, proposed findings of fact and conclusions of law, motions in limine, and pretrial memoranda on October 20. Following rulings on redactions, these submissions were filed on November 29.

As is customary for this Court's non-jury proceedings, and with consent of the parties, the direct testimony of those witnesses under a party's control were submitted with the Joint Pretrial Order.[5] The parties also served copies of all exhibits **[*592]** and deposition testimony that they intended to offer as evidence in chief at trial.[6]

Prior to trial, the motions in limine were decided. On November 5, Shkreli's motion in limine to preclude evidence relating to Retrophin, Inc. ("Retrophin"), a pharmaceutical **[**6]** company that Shkreli and Mulleady founded in 2011, was denied. Id., *2021 U.S. Dist. LEXIS 214751, 2021 WL 5154119 (S.D.N.Y. Nov. 5, 2021)*. On November 10, motions by Shkreli and Mulleady to exclude the testimony of current and former employees of Vyera were addressed in an Opinion that set forth the standards that would govern the admissibility of such testimony. Id., *2021 U.S. Dist. LEXIS 218530, 2021 WL 5236333 (S.D.N.Y. Nov. 10, 2021)*. An Opinion of November 12 denied the Defendants' motion to exclude certain testimony of Plaintiffs' expert Professor C. Scott Hemphill ("Hemphill"), an economist and Professor of Law at New York University, and granted the Plaintiffs' motion to exclude certain opinions offered by Dr. Anupam B. Jena ("Dr. Jena"), a physician, economist, Professor of Health Care Policy and Medicine at Harvard Medical School, and Internal Medicine Specialist in the Department of Medicine at Massachusetts General Hospital. Id., *2021 U.S. Dist. LEXIS 219493, 2021 WL 5279465 (S.D.N.Y. Nov. 12, 2021)*. Opinions of November 15 granted the Plaintiffs' motion to exclude designated deposition testimony of *Rule 30(b)(6), Fed. R. Civ. P.*, deponents that were not based on personal knowledge, id., *2021 U.S. Dist. LEXIS 219964, 2021 WL 5300019 (S.D.N.Y. Nov. 15, 2021)*, and excluded testimony from Defendants' expert Justin McLean, id., *2021 U.S. Dist. LEXIS 221384, 2021 WL 5300031 (S.D.N.Y. Nov. 15, 2021)*. An Opinion of November 16 struck most of the testimony offered by Defendants' **[**7]** expert Sheldon Bradshaw. Id., *2021 U.S. Dist. LEXIS 222166, 2021 WL*

North Carolina Unfair or Deceptive Practices Act, N.C. Gen. Stat. § 75-1 et seq.; *Ohio Valentine Act, Ohio Rev. Code Ann. § 1331*; and Virginia Antitrust Act, Va. Code Ann. § 59.1 et seq. Pennsylvania sues under the *Sherman Act* and its common law doctrine against restraint of trade.

[3] Pennsylvania's statutory claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, *73 P.S. §§ 201-1 et seq.*, was dismissed.

[4] On March 30, 2021, the Plaintiffs waived their right to money damages and therefore their right to a jury trial.

[5] These affidavits were ordered to be filed on the day on which the witness testified or was deemed to have testified at trial.

[6] The Court's procedures for non-jury trials were discussed in detail at a conference of December 10, 2021. As the parties were informed, the Court prepared a draft opinion in advance of the bench trial based on the witness affidavits and other documents submitted with the Pretrial Order and the arguments of counsel in their trial memoranda. At trial, the affiants swore to the truth of the contents of their affidavits and were tendered for cross and redirect examination, and the other trial evidence was formally received.

5336949 (S.D.N.Y. Nov. 16, 2021).[7] On November 18, the Plaintiffs' motion to exclude portions of testimony by Defendants' expert John S. Russell ("Russell"), Managing Partner for ASDO Consulting Group, a pharmaceutical consulting company, was largely granted. Id., 2021 U.S. Dist. LEXIS 224146, 2021 WL 5403749 (S.D.N.Y. Nov. 18, 2021).

At trial, eleven fact witnesses and four expert witnesses called by the Plaintiffs testified. The Plaintiffs' fact witnesses included one current Vyera executive -- Nicholas Pelliccione ("Pelliccione"), Vyera's Senior Vice President of Research and Development ("R&D") -- and four former executives and employees: Howard Dorfman, Vyera's General Counsel between December 2014 and August 2015; Christina Ghorban, Vyera's Head of Marketing and Business Analytics between April 2015 and October 2016; Dr. Eliseo Salinas ("Dr. Salinas"), Vyera's President of R&D between June 2015 and April 2017 and interim CEO between April and July 2017; and Mulleady, who worked at Vyera from October 2014 to June 2016, was appointed to Vyera's Board in June 2017, served as Executive Director and then CEO between October 2017 and February 2019, and was chairman of the Phoenixus **[**8]** Board of Directors until December 2020. The Plaintiffs called six additional fact witnesses: Frank DellaFera ("DellaFera"), CEO and founder of Fera Pharmaceuticals, Inc. ("Fera"); Susan McDougal ("McDougal"), Fera's Vice President; Abhishek Mukhopadhyay ("Mukhopadhyay"), **[*593]** Head of Business Development at Dr. Reddy's Laboratories, Inc. ("Dr. Reddy's"); Nilesh Patel ("Patel"), co-founder and Compliance and Regulatory Officer of InvaTech Pharmaceuticals LLC ("InvaTech"); Manish Shah ("Shah"), co-founder and President of Cerovene Health, Inc. ("Cerovene"); and Satya Valiveti ("Valiveti"), co-founder and co-owner of Reliant Specialty LLC ("Reliant").

The Plaintiffs' expert witnesses were James R. Bruno, managing director of Chemical and Pharmaceuticals Solutions, Inc., a pharmaceutical consulting company; Edward V. Conroy, President and Chief Operating Officer of Ed Conroy & Associates, a pharmaceutical consulting firm; Dr. W. David Hardy, a physician and Adjunct Clinical Professor of Medicine in the Division of Infectious Diseases at the Keck School of Medicine at the University of Southern California and former Chair of the Board of Directors of the HIV Medicine Association ("HIVMA") of **[**9]** the Infectious Diseases Society of America ("IDSA"); and Hemphill.[8]

The Plaintiffs also intended to call at trial three additional fact witnesses to testify: Shkreli; Eve Costopoulos ("Costopoulos"), Vyera's former General Counsel from November 2015 to July 2017; and Anne Kirby ("Kirby"), a member of Vyera's sales team from June 2015 to late 2018, CEO from late 2018 to early 2019, and current Executive Vice President of Commercial and Operations. Shkreli is incarcerated in federal prison, serving a sentence on an unrelated federal conviction.[9] He opted not to attend the trial. The parties agreed that the affidavit that he had prepared to present as his direct testimony would be received at the trial and that his cross-examination and redirect examination would be conducted through the designation of his pretrial deposition testimony.

Neither Kirby nor Costopoulos appeared at trial. The parties agreed that Kirby's affidavit would be received as her direct testimony and that cross-examination and redirect would be conducted by deposition designation. The parties also agreed to designate portions of Costopoulos' deposition to serve as her trial testimony.

At the time the Pretrial Order was **[**10]** submitted, Shkreli intended to call eleven of the Plaintiffs' witnesses in his own case in addition to testifying on his own behalf: Mulleady, Pelliccione, Kirby, Costopoulos, Dr. Salinas, DellaFera, McDougal, Mukhopadhyay, Patel, Shah, and Valiveti.[10] Affidavits constituting the direct testimony of

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[7] Thereafter, Shkreli withdrew the testimony of Bradshaw and the Plaintiffs withdrew the testimony of their rebuttal expert, Mansoor A. Khan.

[8] The Plaintiffs filed affidavits constituting the direct testimony of five of their fact witnesses and all of their experts. The five fact witnesses were DellaFera, McDougal, Mukhopadhyay, Patel, and Shah.

[9] Shkreli was arrested in December 17, 2015 on federal criminal charges. A jury convicted him on August 4, 2017. He was sentenced on March 8, 2018, principally to a term of imprisonment of eighty-four months (seven years). Shkreli was remanded to federal custody on September 13, 2017. He is currently scheduled to be released on October 11, 2023, or one year earlier pending successful completion of an early release program.

defense witnesses Shkreli, Mulleady, Pelliccione, and Kirby were received into evidence. Shkreli also called two expert witnesses: Russell and Dr. Jena.

The parties offered excerpts from the depositions of the following additional witnesses associated with Vyera: Jonathan Haas, Vyera's Former Director of Patient Access; Christopher Lau ("Lau"), Vyera's Director of Analytics and Business Intelligence; Akeel Mithani ("Mithani"), Senior **[*594]** Vice President of Business Development of Vyera and former member of the Phoenixus Board of Directors; Averill Powers, CEO and former Chairman of the Phoenixus Board, and Vyera's General Counsel; Marco Polizzi, CEO of Vyera subsidiary Oakrum Pharma, LLC; Nancy Retzlaff ("Retzlaff"), Vyera's former Chief Commercial Officer; Michael Smith ("Smith"), co-founder of Vyera and former member of the Business Development team; and Ron Tilles ("Tilles"), Vyera's former **[**11]** CEO and Chairman of the Phoenixus Board. They also offered excerpts from the depositions of seventeen additional fact witnesses: Nilaben Desai, former manager at ASD Healthcare ("ASD"); Michael Hatch, Head of Global Project Management for R&D for Mylan N.V. ("Mylan") affiliate Viatris Inc.; Courtney Johnson, former Director of Global Sourcing & Business Development for Cardinal Specialty ("Cardinal"); Hamilton Lenox, Senior Vice President of Business Development at LGM Pharma; Amanda Lopez, Clinical Trial Supervisor for Durbin USA; Jacob Mathew, Chairman of RL Fine Chem. Pvt. Ltd. ("RL Fine"); Ravi Patel, part-owner of Espee Biopharma & Fine Chem; Donovan Quill, founder and CEO of Optime Care, Inc. ("Optime"); Paula Raese, Senior Director of API Sourcing for Mylan; A.R. Ramachandra, General Manager of Marketing and Sales at RL Fine; Dennis Saadeh, Chief of Formulation Strategy for Harrow Health, parent company of Imprimis; Dr. Lucas Schulz, Clinical Coordinator for Infectious Diseases in the Department of Pharmacy at the University of Wisconsin Health; Devang Shah, Director of Aadivignesh Chem.; Dr. Eric Sredzinski, formerly the head of clinical affairs and quality assurance for Avella; **[**12]** Dr. John Vande Waa, Division Director of the Division of Infectious Diseases for the University of South Alabama Health; and Kevin Wessels, Senior Director of Trade Relations at Zinc Health Services, a subsidiary of CVS Health ("CVS").[11]

As noted, the bench trial was held from December 14 to December 22, 2021, and this Opinion presents the Court's findings of fact and conclusions of law. The findings of fact appear principally in the Background section, but also appear in the remaining sections of the Opinion.

Background

I. FDA Drug Approval Process for Generic Drugs

Shkreli's scheme unfolded against the backdrop of the U.S. regulatory process for the approval and sale of pharmaceutical drugs. The FDA is the federal agency that approves the sale of branded and generic drugs in the United States. The *Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585*, commonly known as the *Hatch-Waxman Act*, allows a generic manufacturer of an already approved brand-name drug to obtain expedited approval from the FDA to market the generic equivalent by filing an Abbreviated New Drug Application, or ANDA. See *FTC v. Actavis, Inc., 570 U.S. 136, 142, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)* ("*Actavis*"). The ANDA process is designed to help expedite market introduction of low-cost generic drugs in order to further competition. Id.

Any pharmaceutical company applying **[**13]** for FDA approval of a generic competitor to a branded drug must obtain the API used in the branded drug -- that is, the drug's critical ingredient that provides its therapeutic effect -- from an approved supplier. The API to be used in the generic **[*595]** drug is evaluated for impurities and stability. *21 C.F.R. §§ 211.165*, *211.170*.

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[10] The parties had agreed that each witness would take the stand a single time at trial. To the extent Shkreli had also intended to call the witness on his own case, his "cross-examination" of the witness was not restricted by the scope of the direct testimony.

[11] Excerpts of the deposition of a witness from an API manufacturer, the name of which has been sealed, were also received into evidence.

An API supplier's manufacturing process must also comply with FDA standards known as current Good Manufacturing Practices ("cGMPs"). FDA regulations set minimum standards for the methods, facilities, controls, and documentation for manufacturing, processing, and packing of the pharmaceutical, including its API.

A pharmaceutical company may demonstrate that the manufacturing process of the API used in its drug product complies with cGMPs either by supplying that information to the FDA in the ANDA itself or, more commonly, by referencing information filed by an API supplier with the FDA in a standalone drug master file ("DMF"). The FDA categorizes DMFs for APIs as Type II DMFs. To file a Type II DMF, an API supplier must pay a fee and submit enough materials, including confidential documents about the manufacturer's facilities, processing, packaging, and storing of human drug products, to permit **[**14]** the FDA to conduct a full scientific review for any ANDAs that reference the DMF. The FDA conducts a completeness assessment of an API supplier's newly-filed DMF at the time it is submitted, but does not fully review a DMF's documented manufacturing process for cGMPs compliance until the DMF is referenced in a new drug application ("NDA") or ANDA. *21 CFR § 314.420(a)*.

In order to obtain the API for a particular drug product a pharmaceutical company may invest in developing an API supplier's manufacturing processes, or it may shorten the process significantly by partnering with an API supplier that has already filed a DMF for the API. Because developing and documenting a cGMPs-compliant API manufacturing process from scratch is time-consuming and expensive -- it can take twelve to eighteen months or more and may cost over $1 million -- generic pharmaceutical companies prefer to use a supplier that already has an FDA-approved DMF for the API.

Therefore, any generic company that seeks to launch a product as fast as possible generally attempts to partner with a DMF-holding supplier whose API is already in use in another FDA-approved product. A less desirable option is partnering with an API manufacturer that **[**15]** currently produces the API but does not have a DMF filed in the U.S. The least attractive option is to develop a cGMPs-compliant manufacturing process from scratch, which is costly and can take years.

Proof of therapeutic equivalency is also central to the ANDA process. A generic manufacturer applying for approval of its drug must demonstrate that the generic drug "has the same active ingredients as, and is biologically equivalent to, the already-approved brand-name drug." *Actavis, 570 U.S. at 142* (citation omitted); see also *21 C.F.R. §§ 314.92(a)(1)*, *314.3(b)*.

Bioequivalence ("BE") testing compares the generic product to samples of the branded drug, commonly referred to as the reference listed drug ("RLD"). BE studies are used to evaluate whether there is any significant difference in the rate and extent to which the product's active ingredient becomes available in the body.[12] *21 C.F.R. § 320.33*. BE testing demonstrates to the FDA that the proposed generic **[*596]** drug product is safe, effective, and comparable to the RLD.

In a BE study, human subjects are given dosages of the generic drug and the RLD. These studies, which take two to six weeks to complete, are typically run by a third-party clinical organization concurrently with the FDA-required shelf stability testing **[**16]** for the first batch of the finished generic product. The stability testing can take three to six months.

In order to conduct BE testing, a generic drug applicant must procure sufficient quantities of the brand-name drug or RLD and retain those quantities before and after approval of an ANDA. FDA regulations require applicants to retain at least five times the amount of the RLD needed to perform BE testing. *21 C.F.R. § 320.38(c)*.

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[12] FDA regulations define bioequivalence as "the absence of a significant difference in the rate and extent to which the active ingredient or active moiety in pharmaceutical equivalents or pharmaceutical alternatives becomes available at the site of drug action when administered at the same molar dose under similar conditions in an appropriately designed study." *21 CFR §§ 320.1*, *314.3(b)*.

The RLD used in the testing must come from the same manufacturing lot and be unexpired. Obtaining sufficient quantities of RLD usually takes only a few days or, at most, a month.

Consistent with its policy of encouraging price competition for prescription pharmaceuticals, the FDA expresses the view that "a path to securing samples of brand drugs for the purpose of generic drug development should always be available."[13] By utilizing an RLD license permitting them to buy prescription drugs without a prescription, pharmaceutical companies often procure the RLD samples needed to develop generic drug products through drug wholesalers or specialty pharmacies.

If the FDA determines that a proposed generic drug is therapeutically equivalent to the brand-name drug listed in the FDA's "Orange **[**17]** Book,"[14] the agency assigns an "AB" rating to that drug. But if the FDA finds major deficiencies in an ANDA and the applicant does not address its inquiries during the review period, the FDA sends the applicant a complete response letter detailing the identified deficiencies.

To foster price competition among pharmaceuticals, the law provides various incentives to pharmaceutical companies. See *Generic Drug User Fee Act, 21 U.S.C. § 356h*. These include the FDA's prioritization of its review of the first generic entrant to file an ANDA. The first generic drug product to enter a market in competition against the brand name drug is known in the pharmaceutical industry as the "first-to-market" generic.

As generic drugs typically enter a market at a discount, the entry of the first generic competitor generally results in price erosion of approximately 30% to 40% from the prevailing price of the brand-name drug. The brand name drug's sales volume also experiences a significant decline of approximately 60% to 70% when the first generic enters the market. Six months after generic entry, the brand name drug's sales will typically have fallen by 80%. The branded drug's sales volume **[**18]** and price usually continue to decline as additional generic products enter the market. The full decline in the price of the **[*597]** drug usually occurs after three or four generic drugs have entered the market.

II. Distribution of Prescription Drugs in the U.S.

When introducing a branded drug or its generic equivalent into the U.S. market, the manufacturer can choose to distribute it with fewer or more restrictions. The poles of this spectrum are referred to in the pharmaceutical industry as open distribution, representing the least restrictive means, and specialty distribution, which can range from minor limitations to severe restrictions on how freely a drug is sold. Restrictions are set by the manufacturer in agreements with its distribution partners.

Seventy percent of prescription drugs sold in the U.S. is in open distribution. In an open system, the manufacturer typically partners with a major distributor to deliver the product to licensed dispensaries such as retail pharmacies, hospitals, clinics, and nursing homes. Open distribution maximizes patient access to a given drug and is generally appropriate for pharmaceutical products that do not require special handling, do not present safety **[**19]** concerns, and are self-administered by the patient or are clinically simple to administer.

By contrast, approximately 30% of the volume of U.S. prescription drugs is sold through some degree of specialty distribution. Also known as closed distribution, a drug that is circulated in a specialty distribution system is referred to in the pharmaceutical industry as being "in specialty" or as having a "class of trade" restriction. Drugs in specialty distribution tend to be novel drugs, have special shipping, handling, and storage requirements (such as cold-chain

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[13] Statement from FDA Commissioner Scott Gottlieb, M.D., on New Agency Efforts to Shine Light on Situations Where Drug Makers May Be Pursuing Gaming Tactics to Delay Generic Competition, FDA (May 17, 2018), https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-new-agencyefforts-shine-light-situations-where-drug .

[14] The FDA publication Approved Drug Products with Therapeutic Equivalence Evaluations, commonly known as the Orange Book, "identifies drug products approved on the basis of safety and effectiveness by the [FDA] under the Federal Food, Drug, and Cosmetic Act." Orange Book Preface, FDA (January 21, 2021), https://www.fda.gov/drugs/development-approval-process-drugs/orange-book-preface .

storage), or require ongoing clinical monitoring or skilled patient administration (such as injections). Highly closed distribution systems usually lower patient access and reduce sales.

Safety concerns may also mark a particular drug as a prime candidate for specialty distribution. Specialty distribution is more frequent, for instance, when the FDA requires a "black box" warning on the label of drugs that present safety risks or when it has put the drug in a Risk Evaluation and Mitigation Strategies ("REMS") program. REMS is a drug safety program that the FDA may require for certain medications that present serious safety risks.

The **[**20]** percentage of prescription drugs on the U.S. market that are sold in specialty distribution has risen in recent years. This trend, however, is largely driven by the advent of new, complex therapies for illnesses such as cystic fibrosis and cancer. Drug manufacturers do not commonly put oral tablets that do not require complex patient administration in specialty distribution, as closed distribution reduces sales.

II. Retrophin

Shkreli road-tested the scheme at issue here at another company that he founded, Retrophin. Shkreli is thirty-eight years old. He graduated from Baruch College in 2004 with a degree in Business Administration. After graduation, he worked as a healthcare and technology analyst for a hedge fund until he left in 2006 to found his own investment firm. In 2009, Shkreli founded the hedge fund MSMB Capital Management ("MSMB").

While still working at MSMB, in 2011 Shkreli co-founded Retrophin, a publicly-traded biopharmaceutical company, with Mulleady. Mulleady is now thirty-nine years old. He graduated from Rutgers University in 2005, having majored in mechanical and aerospace engineering. He worked in real estate and finance following graduation. While working at Morgan **[**21]** Stanley Smith Barney (now Morgan Stanley **[*598]** Wealth), he met Shkreli in 2011.

Shkreli hired Mulleady as Chief Operating Officer at MSMB, where Mulleady worked from 2011 to 2013. Shkreli served as Retrophin's CEO from December 2012 to September 2014, and designed its business model. Retrophin acquired brand-name drugs approved to treat so-called orphan diseases[15] that were the sole source in the U.S. for that treatment, closed the drugs' distribution to prevent generic drug manufacturers from acquiring the RLD, and substantially increased the drugs' prices. This was a pattern that Shkreli would repeat at Vyera.

At Retrophin, Shkreli closed the distribution systems of two branded drugs, Chenodal and Thiola, to cut off access to the RLD needed for BE testing and impede generic drug competition. Shkreli described his strategy and its purpose frankly in calls with Retrophin investors. On one such call, he explained that "we do not sell Retrophin products to generic companies" and "[t]he whole model that generics rely upon is turned upside down with specialty pharmacy distribution." He explained in another call that a closed distribution system did not allow generic drug companies to access the **[**22]** branded product "to conduct bioequivalence studies." Shkreli boasted in an email to a potential investor that the specialty distribution method Retrophin had adopted "reliably eliminated" generic competition "by refusing to supply the product to generic companies for [BE] studies required for ANDAs."

As noted, Shkreli put his strategy into practice with two drugs. Retrophin acquired Chenodal, a drug approved for the treatment of cerebrotendinous xanthomatosis ("CTX"), and restricted distribution through distributor agreements.[16] Retrophin then raised Chenodal's price from $100,000 to $515,000 per patient per year. Retrophin also licensed Thiola, a drug approved for the prevention of cystine stone formation in patients with cystinuria,[17] restricted its distribution, and raised its price from $4,000 to $80,000 per patient per year.

III. Vyera is Founded.

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[15] An orphan disease is a rare condition (defined in the United States as affecting fewer than 200,000 people) or a common condition in undeveloped countries that is rare in developed countries.

[16] CTX is a life-threatening cholate excretion disorder. The patient population for CTX is very small, with roughly 2,000 patients in the United States.

[17] Cystinuria is a rare kidney stone disorder, also with a very small patient population.

Only one month after departing Retrophin, in October 2014 Shkreli founded Turing Pharmaceuticals LLC ("Turing"), a privately-held pharmaceutical company with its principal place of business in New York. Shkreli also founded Turing Pharmaceuticals AG ("Turing AG"), Turing's parent company, based in Switzerland. Turing's name was later changed **[**23]** to Vyera, and Turing AG became Phoenixus.

From day one, Shkreli focused his new venture on acquiring sole-source drugs that were the gold standard treatment option for life-threatening diseases with a small patient population and inferior alternative treatments, with the intent to raise their prices, block generic competition, and reap extraordinary profits. Shkreli highlighted to early Turing investors his "track record of successful transactions" at Retrophin and explained that "[e]xclusivity (closed distribution) creates a barrier and pricing power."

Shkreli remained CEO of Turing until his arrest on December 18, 2015 for securities fraud related to his prior business **[*599]** ventures, including at Retrophin. He served as chairman of the Board of Turing AG until January 20, 2016, resigning from the Board entirely on February 10, 2016. After Shkreli departed, Turing was renamed Vyera and Turing AG was renamed Phoenixus in order to distance the companies from Shkreli in the public mind. Shkreli remained the largest shareholder, however, and continued to control them and direct their strategy. At no time after Shkreli left the Board did Vyera deviate from the strategy Shkreli had designed and **[**24]** initiated.

Shkreli brought with him to Vyera several Retrophin executives, including Mulleady, Tilles, Smith, Lau, Edwin Urrutia (a Vyera co-founder and Chief Financial Officer between October 2014 and June 2016), and Patrick Crutcher (a Vyera co-founder and Senior Vice President and Head of Business Development between October 2014 and May 2017). Mulleady in particular was one of Shkreli's closest allies at Vyera before earning Shkreli's ire in 2020. Mulleady held the title of Phoenixus' Managing Director from October 27, 2014 until Vyera terminated his employment on June 3, 2016. Mulleady returned to Vyera a year later when, on June 21, 2017, he was elected to Phoenixus' Board of Directors in a Shkreli power play.

A. Vyera Acquires Daraprim.

At Shkreli's direction, Vyera's sales and business development teams evaluated market opportunities for Vyera to acquire sole-source drugs. By the Spring of 2015, Vyera focused on Daraprim as a prime candidate. Smith, Vyera's Senior Director of Business Development, instructed the sales team in April 2015 to investigate acquiring both Daraprim and another sole-source drug, sulfadiazine (often used in combination with Daraprim), because it would **[**25]** be "the classic closed distribution play." Smith testified that Daraprim provided an opportunity to build a foothold "where no one is paying attention to it." Daraprim was first approved by the FDA in 1953, and approved by the FDA in 1958 for the treatment of toxoplasmosis specifically.

Toxoplasmosis is a parasitic infection that can cause severe disease and death. The parasite is present in approximately 10% of the population, but is usually dormant. An opportunistic infection, toxoplasmosis principally impacts immunosuppressed and immunocompromised individuals such as patients who are HIV positive or recipients of organ transplants. Toxoplasmosis can cause disease in many parts of the body, but the most common manifestations are infections of the brain (toxoplasma encephalitis), eye (ocular toxoplasmosis), and in utero.

Toxoplasma encephalitis is the most common and acute presentation of the disease among immunosuppressed patients. Toxoplasmosis fatalities have dropped significantly since the launch of antiretroviral therapies in 1996, which significantly limited opportunities for a toxoplasmosis infection to become acute in HIV-positive patients. If an infection becomes active and **[**26]** advanced, a patient presenting with toxoplasma encephalitis could die within twelve to twenty-four hours unless treated. There is also a risk of severe brain damage in those who survive. As a result, physicians must have an effective treatment on hand to halt the progress of an active infection as quickly as possible.

The Opportunistic Infections Guidelines (the "Guidelines"), an authoritative publication on which physicians depend,[18] gives its highest recommendation to a pyrimethamine-based regimen for the treatment **[*600]** of acute toxoplasmosis. Pyrimethamine is the API of Daraprim.

The Guidelines rank recommended treatment options for certain diseases with a letter and a numeral. The letter grade signifies the strength of the recommendation and the Roman numerals indicate the quality of the evidence supporting the recommendation. Accordingly, an A-I grade is a recommendation based on the strongest, highest-quality evidence derived from randomized control clinical trials, or, if randomized control trials have not been conducted, methodologically sound cohort studies or meta-analyses. Lower grades are given to treatment options that have been shown to be effective but are not preferred, or are **[**27]** based on less methodologically reliable studies.

Under the Guidelines, pyrimethamine plus sulfadiazine and leucovorin[19] is given the strongest possible recommendation for treating active toxoplasma encephalitis: A-I. The recommended dosage of Daraprim, available only as a 25 milligram tablet, is an initial dose of 200 milligrams (eight pills) followed by 50 to 75 milligrams (two to three pills) daily for at least six weeks. For patients who cannot tolerate a sulfa drug, the recommended treatment is pyrimethamine plus clindamycin.

The pyrimethamine-based regimen is preferred to alternative treatments because of its efficacy and safety, long history of successful clinical use, superior potency in comparison to other treatments, and diagnostic utility when a biopsy is not feasible. A significant decrease in the size, inflation, or number of lesions in the brain following a week or more of treatment confirms the diagnosis. Because a biopsy of the brain carries extreme risks, pyrimethamine's diagnostic utility is particularly important. Pyrimethamine remains the only drug approved by the FDA for the treatment of toxoplasmosis. And, until the entry of FDA-approved generic pyrimethamine in 2020, **[**28]** Daraprim was the only FDA-approved pyrimethamine product on the market.

Before Vyera acquired Daraprim, it commissioned a physician survey to determine whether doctors "would continue to prescribe Daraprim" following a price hike. In response to the survey, doctors indicated that they considered the drug to be the "backbone of therapy" for toxoplasmosis and were "at a loss to think of an appropriate alternative." Shkreli and others at Vyera recognized Daraprim as "the gold standard" therapy for toxoplasmosis, rendering Daraprim "essentially unsubstitutable."

In April 2015, Vyera made Impax Laboratories, Inc. ("Impax"), then the owner of the U.S. licensing rights to Daraprim, an unsolicited offer of $60 million. This offer represented a considerable premium over Daraprim's market value. Annual net sales of Daraprim constituted roughly $4 million at the time, and Impax assessed its net present value as $19 million. In a transaction that closed on August 7, 2015, Vyera paid Impax $55 million, more than eleven times Daraprim's 2014 net revenues.

B. Daraprim's 2015 Price Hike and Vyera's Revenues

Until 2010, Daraprim had been owned by GlaxoSmithKline ("GSK"), a global **[*601]** pharmaceutical company **[**29]** based in the United Kingdom. Between 2011 and 2015, the new owners of Daraprim had raised the list price -- also called the wholesale acquisition cost ("WAC") -- of a tablet from $6.74 to $17.60. These price increases ranged from 15% to 30% at a time. Within days of Vyera's purchase of Daraprim and at Shkreli's direction, Vyera raised the WAC from $17.60 to $750 per tablet effective August 11, 2015. From roughly 2016 to 2019, the average net price of Daraprim (the price per tablet after subtracting discounts, chargebacks, and rebates

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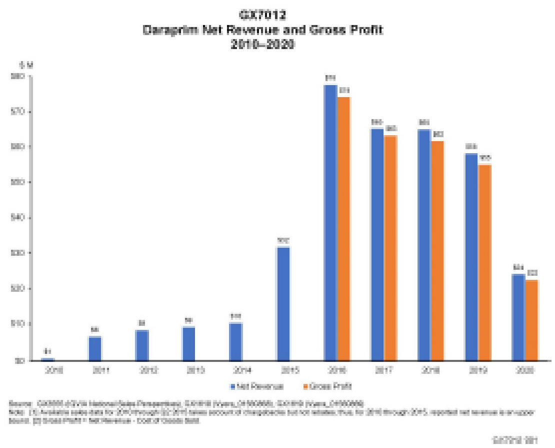
[18] The Guidelines are published by the Centers for Disease Control and Prevention, the National Institutes of Health, and HIVMA. The Guidelines reflect the medical consensus for the benefit of "clinicians, health care providers, patients with HIV, and policymakers in the United States." They are updated and reviewed regularly. The section addressed to the treatment of toxoplasmosis was last updated on July 25, 2017, and last reviewed on June 26, 2019.

[19] Leucovorin is administered to mitigate pyrimethamine's suppression of the bone marrow, which would decrease white and red blood cells if left untreated.

off the WAC) ranged between $228 and $305 per tablet. Dr. Salinas testified that the price hike was the "poster child of everything that is considered wrong about the pharmaceutical industry."

Comparing the nine-month period preceding and following Vyera's price hike, Daraprim's sales volume dropped by 66%. In September 2015, sales data from IQVIA (formerly IMS Health), a commercial data aggregator commonly used for market research in the pharmaceutical industry, indicated that the market size for Daraprim was around one million tablets annually. After that steep decline, the sales volume stabilized at roughly 200,000 to 250,000 tablets per year between **[**30]** 2016 and 2019. These sales remained steady until the first generic pyrimethamine product entered the market in March 2020.

From 2016 through 2019, Vyera made between $55 and $74 million in annual gross profits from its sales of Daraprim. Daraprim revenues in the years between 2010 to 2014 had amounted at most to $10 million a year. Vyera's estimated gross profit margin from Daraprim, calculated by subtracting Vyera's reported production costs, ranged between 89% and 98% in 2016 through 2019. The Figure below illustrates net revenue and gross profit for Daraprim sales between 2010 and 2020.



[*602] From August 2015 to the end of 2019, Daraprim sales amounted to over 96% of Vyera's total revenues.[20]

IV. Vyera's Implementation of a Closed Distribution System for Daraprim

Even before finalizing its acquisition of the rights to the drug, Shkreli made it a priority to close the Daraprim distribution channels. In June 2015, Shkreli directed Retzlaff, who ran Vyera's sales team, to move Daraprim from retail distribution into a closed distribution system "as swiftly as possible." As the interim project manager in charge of the initiative, Mulleady ensured that Shkreli's wishes for Daraprim's closed distribution **[**31]** system were implemented.

Shkreli recognized that generic entry into the pyrimethamine market was inevitable, but Shkreli hoped to delay that entry for at least three years. In July 2015, Shkreli remarked to an investor that he felt "very good that there are no incoming generics and now that it is closed distribution there will not be any going forward . . . even if we get 3 years, it is a great payout."

Daraprim had been in open distribution from its introduction into the market in the 1950s until 2015. After he had initiated his own plans to move Daraprim into specialty distribution, Shkreli learned that a prior owner of Daraprim had already begun to do so. By the time Vyera acquired Daraprim, Daraprim was distributed through two wholesale distributors and specialty pharmacies, AmerisourceBergen Corporation ("ABC") and Walgreens Specialty Pharmacy ("Walgreens").[21] Vyera continued the terms of the assigned contract with Walgreens and slowly expanded the

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[20] In that period, Vyera earned revenue only from sales of one other drug, Vecamyl.

[21] Impax had just transitioned Daraprim from retail distribution to Walgreens specialty distribution. Orders to Walgreens were to be fulfilled by another distribution partner that Vyera inherited when it acquired Daraprim, ICS, an affiliate of ABC and ASD.

number of distribution partners for Daraprim to five distributors and specialty pharmacies. They were ASD (a subsidiary of ABC), BioRidge Pharma LLC ("BioRidge"), Cardinal, Optime, and Walgreens (together, the "Distributors"). Despite expanding **[**32]** the number of distribution partners, however, Vyera imposed class of trade restrictions in its distribution contracts, limiting the types of customers who could buy Daraprim. The end result was that no Distributor could sell Daraprim to a retail pharmacy or a generic drug company without Vyera's approval.

Vyera's distribution restrictions on Daraprim were not justified by a need to protect either patient health or Vyera from lawsuits asserting that a patient had experienced an adverse drug reaction. As noted above, Daraprim had been sold through open distribution for decades. It was considered a safe drug; the FDA never put Daraprim in a REMS program or required a black box warning on the label. Daraprim is an oral tablet that does not require special shipping, handling, storage, or administration. When the first generic pyrimethamine product was launched in March 2020, it was sold through an open distribution system.

A. Class of Trade Restrictions

Between 2015 and 2020, Vyera's Distributors were restricted to selling only to authorized customers that included government customers, hospitals, specialty pharmacies, and other specialized entities. The authorized customers or types of customers **[**33]** approved to buy Daraprim did not include generic drug companies or their agents. No Distributor was permitted to **[*603]** sell Daraprim to a generic drug manufacturer or their agent without Vyera's express approval. There is no evidence that Vyera ever gave such approval.

Vyera's contract with ASD, executed on September 2015, provides an example of the class of trade restrictions. It simply stated that the "Distributor may only sell Daraprim to Government Customers and hospitals."[22] In 2016, Vyera expanded ASD's authorized customer list to include "certain state AIDS Drug Assistance Programs (ADAPs), subject to the Company's prior written approval." An amendment in 2018 revised the authorized customer clause as follows:

> Distributor may only sell Daraprim to licensed wholesalers and specialty pharmacies that support certain state [ADAPs], subject to the Company's prior written approval, Government Customers, hospitals, and 'covered entities', as defined by *Section 340B of the Public Health Services Act* ("340B Customers"). [Vyera] will approve any new authorized customers via email and will maintain and update a monthly authorized customer file.[23]

Effective February 25, 2020 -- just as the first generic competitor **[**34]** to Daraprim was about to receive FDA approval -- the authorized customer list was expanded to permit sales to "340B contract pharmacies, any customers on the approval list provided by Company, and any new customers approved by Company in writing (with email being sufficient)."

Equivalent restrictions were in place for each Vyera Distributor. For example, as of December 2015, BioRidge was only authorized to distribute Daraprim to Walgreens Specialty Pharmacies. In 2017, Vyera entered a contract with Cardinal that limited distribution to hospitals, ADAPs, and *§ 340B* entities. A 2018 contract with Optime permitted distribution to hospitals, ADAPs, government customers, health departments ("with a valid 340b ID"), hospital distributors ("defined as a distributor that supplies a single hospital system"), and correctional facilities.

Vyera also had contracts with roughly a hundred hospitals to supply them with Daraprim directly at a discounted price so long as they agreed to limit their use of it to their "own use" and not to resell Daraprim. For example, Vyera's agreement with one distinguished medical system provided that "[p]rices available under this Term Sheet

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[22] Government Customers were defined in the contract as the Department of Veterans Affairs or Department of Defense sites.

[23] Entities covered by *§ 340B* of the Public Health Services Act, a federal discount pricing program for entities that serve indigent populations, may purchase prescription drugs at steep discounts. *42 U.S.C. § 256b*. A *§ 340B* entity was permitted to buy Daraprim for $1 per 100-pill bottle.

shall only apply with respect **[**35]** to product purchased by Hospital for its 'own use' as that term is described in *Abbott Laboratories Inc. v. Portland Retail Druggists, 425 U.S. 1, 96 S. Ct. 1305, 47 L. Ed. 2d 537 (1976)*, [without regard to whether Company is a non-profit entity described in *section 501 of the Internal Revenue Code*]."

B. Bottle Limits

Vyera also controlled the distribution of Daraprim by imposing limits on the number of Daraprim bottles that a single customer could purchase at a time. For example, in December 2015, ASD agreed to cap orders from *§ 340B* program participants to five bottles "per week per order," with any exceptions for larger orders requiring approval from Vyera. Vyera's Director of Patient Access openly admitted that the quantity limits imposed in 2015 were introduced to make it harder for generic drug **[*604]** companies to acquire "large quantities" of Daraprim "in order to copy the drug and compete with it." He was quoted in a news article published on October 5, 2015, stating that if a generic drug maker tried to order Daraprim,

> Most likely I would block that purchase. . . . We spent a lot of money for this drug. We would like to do our best to avoid generic competition. It's inevitable. They seem to figure out a way [to make generics], no matter what. But I'm certainly not going to make it easier for them.

Vyera added similar restrictions to **[**36]** its contracts with other Distributors. For example, under its 2018 contract with Optime, "[a]ll orders greater than 3 bottles require[d] Vyera approval."

As the entry of generic competition became more imminent, Shkreli urged that the limits on the sale of Daraprim bottles be further tightened. On August 8, 2019, while incarcerated following his conviction for securities fraud, Shkreli was recorded asking Mithani about the likelihood that a doctor could order more than one bottle of Daraprim at a time. When Mithani responded that it is "very likely", Shkreli responded that "that's what I've been stressing to you guys for the last three years, to look at that very carefully, you know, meet those doctors." Shkreli went on to say "there has to be some way to tighten the supply chain a bit . . . I just want to make sure you guys are doing everything you can." When Mithani told Shkreli that Vyera "can't say no" to hospitals, Shkreli responded, "Okay. Well, that's a shame."

Just days before, upon learning of the efforts made by the generic pharmaceutical company Fera to purchase Daraprim RLD, Shkreli had urged Vyera to limit all sales of Daraprim to one bottle at a time. Shkreli told Mulleady **[**37]** that

> the company should, you know, just make sure it really doesn't sell more than one bottle at a time, you know. That would be -- the number one thing I would do and just really screen every doctor that, you know -- even if it drops sales a little bit, it's a good -- you know, really make sure he's [referring to Fera's owner] not getting his hands on anything.

C. Surveillance

Vyera monitored its Distributors' daily and weekly sales reports to prevent the diversion of Daraprim to generic drug companies for BE testing. It promptly followed up on any sales it considered unusual to stop any leakage.

The monitoring began as soon as Vyera acquired Daraprim. For example, on August 13, 2015 -- just two days after the Daraprim price hike -- Vyera saw a sales report from ICS reflecting a sale of 40 bottles to a customer. Vyera asked ICS to cap the maximum number of bottles sold to any one customer, explaining Vyera's

> concern that a generic company could access multiple bottles of our product, perhaps attained through a hospital reselling it or distributing product to surrounding retail pharmacies, and use it to create a generic version.

In response, ICS agreed to limit sales to five bottles at a **[**38]** time. Shkreli was informed of the "[n]eed to investigate the 40 unit buy."

Vyera repeatedly instructed its Distributors to refrain from selling Daraprim to potential competitors for clinical trials. For example, in February 2017, a company that obtains RLD for generic pharmaceutical companies ordered a 30-count bottle of Daraprim from ASD. ASD advised Vyera that it had denied the request due to "the conversation around generics." Later in 2017, Vyera directed ASD to rebuff another **[*605]** company that reached out to ASD to buy Daraprim for use in a clinical trial.

The speed and effectiveness of Vyera's surveillance system is dramatically illustrated by its interception of five bottles of Daraprim intended for a generic drug distributor -- Dr. Reddy's -- in April 2018. On April 5, ASD delivered the five bottles to a pharmacy pursuant to an order placed on April 4. Vyera's surveillance system flagged the purchase on April 5, investigated the purchaser, learned the bottles were destined for a company that supplies RLD for bioequivalence and clinical trials, and by April 6, Mulleady met with the company's owner in a parking lot to repurchase the bottles for $750,000. This was twice the price the **[**39]** pharmacy had paid for the bottles.

Vyera's frantic interception of this purchase prompted it to lock down Daraprim distribution even more strictly. Vyera instructed ASD to block that pharmacy's access to any Daraprim. It then dramatically shrank the number of customers to which ASD and Cardinal were permitted to sell Daraprim without specific prior authorization from Vyera. For ASD, this resulted in a reduction of approved customers from approximately 13,000 to roughly 555. Vyera similarly cut Cardinal's list of approved accounts from about 14,700 to fewer than 1,500. Vyera also reduced the number of bottles that ASD could sell to any one of the pre-approved customers, reducing the number to four bottles unless the customer was a *§ 340B* customer.

D. Benefits to Distributors

The Distributors benefitted financially from their contracts with Vyera despite the restrictions on their sales of Daraprim. This was true for as long as Daraprim was sold at a high price. Vyera compensated the Distributors with either a fixed fee (Optime) or a percentage of WAC based on volume sold (ASD, Cardinal, BioRidge, and Walgreens). ASD, for example, received $2,062.50 for each 100-count bottle of Daraprim it sold. **[**40]** By contrast, when Dr. Reddy's launched its generic pyrimethamine product in March 2020, it offered ASD's parent company a price of only $877.50 per bottle.

V. Vyera's Restriction of Access to the API Pyrimethamine

Besides blocking access to the Daraprim that generic drug manufacturers needed to conduct BE testing, Shkreli also worked to block their access to pyrimethamine, the API in Daraprim. He was well aware that the sooner a generic company could find an established API manufacturer the sooner it could launch a generic version of Daraprim. Vyera locked up the supply of pyrimethamine to U.S.-based generic drug companies through exclusive supply agreements with the two most attractive pyrimethamine suppliers: Japan's Fukuzyu Pharmaceutical Company ("Fukuzyu") and India's RL Fine.

A. Fukuzyu

Fukuzyu, an established and prominent Japanese chemical manufacturer, was the long-term supplier of pyrimethamine for Daraprim. Fukuzyu had been producing pyrimethamine since 1966, had held a DMF for pyrimethamine since 1992, and is the manufacturer referenced in Daraprim's NDA. The only other manufacturer to have filed a pyrimethamine DMF, Ipca, had lost its right to sell pyrimethamine in the United **[**41]** States in 2015.[24]

Fukuzyu typically requires a customer to provide an estimate of how much API it will require for a given period. Such clauses mitigate a purchaser's supply risk and **[*606]** help Fukuzyu manage its production schedule.

Fukuzyu's contract with GSK, for example, requires GSK to produce forecasts of how much API it will need for a defined period and requires Fukuzyu to deliver that amount. GSK holds the worldwide rights to Daraprim outside of North America. The contract states that GSK "[s]hall provide [Fukuzyu's] Agent with a rolling forecast schedule of demand showing their estimated requirements for PYRIMETHAMINE for the following twelve (12) months ('Forecast Schedule')," and "[t]he Product detailed in the first 3 months ('Firm Order Period') of each Forecast Schedule will represent firm orders for PYRIMETHAMINE" to which Fukuzyu must respond within five days. "[E]ach Firm Order will be regarded by the Parties as a binding irrevocable commitment" to purchase pyrimethamine from

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[24] The FDA imposed an import ban on Ipca in 2015.

Fukuzyu, which in turn obligates Fukuzyu to manufacture enough API to meet the order. The GSK contract also requires Fukuzyu to ensure that it has "at all times sufficient manufacturing capacity to meet **[**42]** [GSK]'s . . . requirements for PYRIMETHAMINE as shown in the Forecast Schedule." GSK's contract with Fukuzyu does not include an exclusivity clause.

Impax, the company from which Vyera purchased Daraprim, had purchased pyrimethamine from Fukuzyu through a broker without even entering into a supply contract. Shkreli was immediately interested in reversing that practice. He wanted an exclusive supply agreement with Fukuzyu. With the help of a consultant, Vyera eventually succeeded by representing that it had several ambitious projects and hoped to use Fukuzyu as a long-term API supplier for each of those projects. In October 2016, three Vyera executives traveled to Japan to visit Fukuzyu. They were Pelliccione, then Vyera's Senior Vice President for Regulatory Affairs, Dr. Salinas, and Vyera's Head of Chemistry, Manufacturing, and Controls.

Vyera bluntly explained to Fukuzyu that it needed an exclusive supply contract to prevent generic Daraprim from entering the United States market. In November 2016, Dr. Salinas directed Vyera's consultant to inform Fukuzyu that "[i]f generic products are put on the U.S. market" Vyera will face a "serious problem, and may eventually terminate the marketing **[**43]** of Daraprim as well as the R&D in toxoplasmosis"; that generic pyrimethamine "will hamper" Vyera's plans to develop new pharmaceutical products and "may leave toxoplasmosis as a forgotten disease with insufficient therapeutic effects"; and that Vyera's plans are "ONLY POSSIBLE" if Vyera has exclusive access to Fukuzyu's API. The consultant was also to stress that Fukuzyu would "not benefit" if generic companies sold pyrimethamine in the U.S. market since generic companies would sell pyrimethamine at a "significantly lower" price.

By November 22, 2016, Fukuzyu had agreed not to sell pyrimethamine "to generic companies." According to Vyera's consultant, Fukuzyu's CEO was particularly pleased that Vyera planned to "develop four more new compounds and would like [Fukuzyu] to work together" with it on those compounds.[25]

On January 25, 2017, Phoenixus entered into a three-year exclusive supply agreement with Fukuzyu. The exclusivity term states that

> [Fukuzyu] shall provide the API Bulk Drug Substance, pyrimethamine exclusively to [Phoenixus] for the use, sale, and/or distribution in the Territory. To **[*607]** be clear, the use, sale, and/or distribution of pyrimethamine described in this section refers **[**44]** to the use, sale, and/or distribution of the API Bulk Drug Substance for humans only.[26]

The Territory was defined as the United States.

The Fukuzyu contract also provided that the minimum purchase quantity of pyrimethamine was 50 kilograms. Vyera, which contracts for the manufacture of pyrimethamine, needs 35 kilograms for a batch of Daraprim to be manufactured. Since executing the exclusive supply agreement, Vyera has twice purchased pyrimethamine from Fukuzyu.

The agreement with Fukuzyu does not ensure that Vyera will have a supply of pyrimethamine or require Fukuzyu to prioritize Vyera's orders over those from its other customers. It does not, for instance, require Vyera to forecast its API requirements or obligate Fukuzyu to reserve any quantity of pyrimethamine or manufacturing capacity to produce pyrimethamine. It does not even require Fukuzyu to fill a Vyera order.

Under the agreement, Vyera must submit a purchase order to Fukuzyu. If Fukuzyu does not acknowledge the order in writing within ten days, it has no obligation to fill the order. The agreement states that:

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[25] As of 2021, Vyera has filed investigative new drug applications ("INDs") for new potential drugs but has not launched any new product.

[26] Since Fukuzyu sells pyrimethamine to a veterinary drug company that uses it to produce drugs for horses in the United States, there was a carveout permitting Fukuzyu to continue selling the API to other U.S. drug companies for use in animals.

> [Daraprim] is historically a low volume product for [Vyera]. Due to the infrequent need to manufacture [Daraprim], [Vyera] **[**45]** will provide [Fukuzyu] a Firm Order for API, in the form of a Purchase Order. Receipt of the Purchase Order denotes [Vyera]'s binding request to purchase API within 180 days of date of Purchase Order. [Fukuzyu] will accept Firm Orders by sending an acknowledgement to [Vyera] within 10 business days of its receipt of the Firm Order.

What Vyera obtained through its agreement with Fukuzyu was the right to bar other buyers, and Vyera strictly enforced that right. For example, in November 2017, Fukuzyu inquired whether it could sell pyrimethamine to a company that intended to resell it to a U.S.-based pharmaceutical company for a drug to be sold in South America. Vyera asked Fukuzyu to include in the sales agreement that the API sold to the US company "will not be used to make pyrimethamine drug product, for human use, that will find its way back to the US for commercial purposes," and "that the API will ONLY be used for drug products sold and used in South America." Fukuzyu agreed.

B. RL Fine

As of 2015, most generic drug companies would have sought to purchase pyrimethamine from Fukuzyu. Vyera closed off that avenue of supply with its exclusive supply agreement with Fukuzyu. After Fukuzyu, **[**46]** RL Fine was the second most attractive source of supply. In 2017, after Shkreli learned that generic companies were going to obtain pyrimethamine from RL Fine, he moved quickly to cut off that source of supply as well.

RL Fine is based in Bangalore, India and had been manufacturing pyrimethamine since at least 2004. RL Fine sells pyrimethamine directly to customers; it does not use distributors. As of 2016, RL Fine had a European pyrimethamine DMF but had not filed a U.S. DMF.

In 2017, in defending against an investigation that preceded the filing of this lawsuit, **[*608]** Vyera emphasized the importance of RL Fine to generic drug manufacturers. It downplayed the significance of its exclusive supply agreement with Fukuzyu in a letter to the Office of the New York Attorney General dated May 5, 2017, by asserting that "generics manufacturers can obtain pyrimethamine API from a variety of sources, even without the option to purchase it from Fukuzyu". It cited RL Fine as one of those alternatives. Vyera explained that

> the cost for a potential competitor to qualify API from the European DMF holder RL Fine Chemicals would be less than $100,000, as the company has already validated its production process **[**47]** and has a DMF ready to file in the United States. Such a cost can hardly be deemed a barrier to entry, especially when viewed as part of the overall process of drug development.

Yet when Vyera learned from its consultant on August 7, 2017, that two generic drug companies, Mylan and Sandoz, were planning to buy pyrimethamine from RL Fine, Shkreli acted quickly to block their access. On August 24, Shkreli drafted an email from prison for Mithani to send to RL Fine. The email represented that Vyera was "looking to purchase 10-20kg/annually of pyrimethamine API with a US DMF" for a "combination product with leucovorin." Mithani sent Shkreli's drafted email to RL Fine verbatim. RL Fine replied that it was "already working on pyrimethamine and would not be able to offer [it] to you." Vyera was undeterred and continued to negotiate with RL Fine.

In October 2017, Vyera received independent confirmation from executives attending a trade conference in Frankfurt that RL Fine was supporting generic drug companies that would soon file ANDAs. On October 25, Shkreli texted Mulleady from prison using a contraband phone:[27] "its shkreli -- trying to get in touch with you urgently -- hearing pyri ANDA approval **[**48]** in december 2017."

Within eight days of that email, on November 2 Mulleady offered RL Fine $1,250,000 per year and other financial enticements "to formalize our exclusive agreement" for pyrimethamine API. In late November, Mulleady and Mithani

[27] For a period of time, Shkreli had a contraband phone in prison that he used to communicate with, among others, Mulleady and Mithani. *Fed. Trade Comm'n v. Vyera Pharms., LLC, No. 20CV00706 (DLC), 2021 U.S. Dist. LEXIS 102757, 2021 WL 2201382 (S.D.N.Y. June 1, 2021)*.

flew to India to meet with RL Fine. By November 25, Vyera and RL Fine had agreed on the terms of an exclusive supply agreement.

Vyera made no bones about its motive for entering this exclusive supply agreement. It needed to block the access of generic manufacturers to RL Fine pyrimethamine. The minutes of the December 15, 2017 Phoenixus board meeting present the rationale for Vyera's costly agreement with RL Fine as "the potential market entry by generics manufacturers and distributors." According to the minutes, "one or two potential competitors are currently in the process of preparing their market entry." The minutes report that Mulleady and Mithani, by then Board members of Phoenixus and in control of the company's management functions, believed "addressing potential generic competitors are in the Vyera Group's interest" and justified the extraordinary price Vyera agreed to pay RL Fine.

On December 17, Vyera executed two contracts with RL Fine: **[**49]** A Distribution and Supply Agreement ("Supply Agreement") and a Product Collaboration Agreement ("Collaboration Agreement"). The twenty-five-page Supply Agreement gave Vyera "the exclusive right to sell, distribute, and market" RL Fine's pyrimethamine for five years and limited RL Fine to **[*609]** selling pyrimethamine for use outside India only "with the consent" of Vyera.

In return, Vyera paid RL Fine $1 million "towards expenses for filing the US" DMF for pyrimethamine. Vyera also agreed to pay RL Fine royalty payments in the amount of 7.5% of net revenues on its sales of Daraprim, with a guaranteed minimum payment of $3 million. Under the Supply Agreement, Vyera's obligation to make royalty payments other than the guaranteed amount of $3 million would terminate if and when a generic pyrimethamine product entered the U.S. market.

Under the Collaboration Agreement, which had a one-year term, Vyera paid a non-refundable $1 million towards R&D expenses and preparation of a DMF. The Collaboration Agreement acknowledged the parties' Supply Agreement.

Having signed the Supply Agreement, RL Fine stopped supplying pyrimethamine to the generic drug manufacturers Cerovene and InvaTech. Vyera has paid **[**50]** RL Fine approximately $300,000 to $450,000 a month in royalty payments. By October 2019, Vyera had paid RL Fine almost $7 million in monthly royalty payments alone, and almost $9.5 million in total. Vyera's payments to Fukuzyu pale in comparison. Over this time period, Vyera has paid Fukuzyu approximately $500,000.

Neither the Supply Agreement nor the Collaboration Agreement required RL Fine to file a DMF with the FDA or conditioned any payment on RL Fine completing any of the steps necessary to file a U.S. DMF. RL Fine never paid even the $57,795 DMF filing fee to the FDA, despite receiving $1 million from Vyera to do so, or took any other steps toward filing a DMF for pyrimethamine. Similarly, Vyera never sought FDA approval to use RL Fine's API in Daraprim, or took any other steps to be able to use RL Fine as a backup supplier of pyrimethamine. Pelliccione, Vyera's executive in charge of regulatory matters, didn't even know of the RL Fine contract until he was preparing for this trial. It had never even crossed his mind that Vyera needed a second source for pyrimethamine. In sum, Vyera received nothing in return for the millions of dollars it paid to RL Fine except the foreclosure **[**51]** of generic competitors' access to RL Fine's pyrimethamine.

Facing regulatory pressure, on October 20, 2019, Vyera paid RL Fine $750,000 to terminate the Supply Agreement. RL Fine threatened to speak to the FTC if it did not get a termination fee.

VI. Delay of Generic Entry

Shkreli's efforts to delay the entry of generic competition to Daraprim succeeded. The following chart sets out the dates on which the four generic manufacturers filed their ANDAs, and the dates on which three of those ANDAs were approved.

Generic	**ANDA Filed**	**Approved**	**Time to Approval**
Cerovene/Dr. Reddy's	5/8/2014	2/28/2020	70 months
InvaTech	7/28/2017	Pending as	53+ months

Generic	ANDA Filed	Approved	Time to Approval
		of January 2022	
Fera	12/19/2019	7/27/2021	31 months
Teva Pharmaceuticals	1/27/2021	8/13/2021	7 months

[*610] Vyera's multifaceted campaign to delay the entry of generic pyrimethamine succeeded in substantially delaying the entry of at least Cerovene and Fera. Vyera made it exceedingly difficult for each of them to obtain the pyrimethamine API and a sufficient quantity of Daraprim RLD for BE testing.

A. Barriers to Entry

As of 2015 only two API suppliers held a pyrimethamine DMF in the United States: Fukuzyu and Ipca. Fukuzyu was the long-term supplier of the API for Daraprim. Because **[**52]** Ipca's supply of pyrimethamine became subject to an FDA-imposed import ban, Fukuzyu was the only option for any pharmaceutical company in the United States seeking a pyrimethamine API supplier that held an active DMF.

RL Fine was the next-best option for a supply of pyrimethamine for generic drug companies seeking to compete with Daraprim because it was familiar with the FDA's requirements; it had DMFs on file with the FDA for other APIs. In addition, it marketed its drug products globally, already manufactured significant quantities of pyrimethamine, and held a European pyrimethamine DMF. Possession of a European DMF typically indicates that one can also meet U.S. DMF standards.

With its exclusive supply agreements, Vyera blocked access to these two sources of API. Shkreli began efforts to obtain an exclusive supply agreement with Fukuzyu in 2015. Vyera and Fukuzyu came to terms in November of 2016 and executed their contract in January of 2017. In 2017, at Shkreli's urging, Vyera also entered into an exclusive supply agreement with RL Fine. It paid RL Fine millions of dollars to do so.

Shkreli also cut off access to the RLD that generic drug companies needed to do the BE testing required **[**53]** for FDA approval of an ANDA. Understanding the importance of access to the RLD, Shkreli adopted a closed distribution system for the sale of Daraprim. This was the model he had adopted at Retrophin to block generic competition to Retrophin's pharmaceuticals.

Against this backdrop, several generic drug companies worked for years to obtain an API supplier and quantities of the RLD, a process that in the ordinary course should have taken weeks. Cerovene was the first to get its ANDA approved and its efforts to obtain an API supplier and the requisite RLD will be described first. Fera's path to entering the market will be described next. Finally, there will be brief descriptions of the experiences of InvaTech and Mylan.

B. Cerovene and Dr. Reddy's Laboratories

Cerovene, a pharmaceutical research and development firm founded in 2006, is focused on the development of generic drugs. Cerovene does not manufacture API, but manufactures the finished drug product, creates the documents necessary to submit the ANDA to the FDA, works with the FDA to gain approval, and produces a finished product for distribution after approval.

Dr. Reddy's is Cerovene's generic pyrimethamine marketing partner. Dr. **[**54]** Reddy's is a large multinational pharmaceutical company that sells about 150 drug products, primarily generic versions of innovator drugs (that is, the first FDA-approved drug created containing a specific API). As it did with Cerovene, Dr. Reddy's often licenses a third party's developed drug or partners with a third party to develop a drug for Dr. Reddy's to bring to market. After a seven-year effort, Cerovene received FDA approval of its ANDA for generic pyrimethamine on February **[*611]** 28, 2020, and Dr. Reddy's launched the generic product on March 20, 2020.

Cerovene began developing generic Daraprim in 2013 and submitted its ANDA to the FDA on May 8, 2014. It expected that a generic version of Daraprim would be profitable based on the price of Daraprim at the time, which was approximately $12 per tablet. In late 2015, Dr. Reddy's explored developing a generic version after Vyera dramatically hiked up Daraprim's price. It learned in March 2016 that Cerovene had already filed an ANDA, and on January 3, 2017, Dr. Reddy's and Cerovene entered into a licensing agreement.

In evaluating the market opportunity of generic Daraprim, Dr. Reddy's conservatively expected that Cerovene's ANDA would **[**55]** be approved by August 2017, with the product launch occurring by early 2018. Dr. Reddy's also projected that Cerovene's generic would launch at a 55-70% discount off Daraprim's list price (depending on how many other generic competitors entered the market) and expected to take a significant fraction of the branded drug's sales.

Cerovene's experience in acquiring RLD to support its 2014 ANDA was typical of the process generic drug companies generally encounter. Cerovene had done the BE testing that it included in its May 2014 ANDA with nine 100-tablet bottles of Daraprim that it had purchased in 2013 from an independent pharmacy for a total price of just over $10,000. Shah, Cerovene's co-founder and President, recalled that it had taken approximately one day for the pharmacy to acquire the nine Daraprim bottles on Cerovene's behalf.

Cerovene then encountered a setback. It had planned to obtain pyrimethamine from Ipca and had referenced Ipca's DMF in its ANDA, but the 2015 FDA import ban on Ipca's products required it to find a new supplier. In October 2015 and March 2016, Cerovene and Ipca wrote letters to the FDA seeking an exemption to the import ban for Ipca-manufactured pyrimethamine. **[**56]** The FDA denied the requests on April 15, 2016.

Meanwhile, Cerovene attempted to purchase 50 kilograms of pyrimethamine from Fukuzyu. Cerovene first contacted Fukuzyu in 2015, and Fukuzyu supplied a sample of pyrimethamine for Cerovene to assess for suitability. By September 2016, Shah believed that Fukuzyu had agreed to supply Cerovene with pyrimethamine to develop its generic product. But in October -- the same month that Vyera executives visited Japan -- Fukuzyu refused to supply the API. In a letter to Cerovene dated October 4, 2016, Fukuzyu explained that it would not supply pyrimethamine "to anyone because of low business potential and high risk associated with the business." Yet, as described above, Fukuzyu executed an exclusive supply agreement with Vyera in January 2017.

Cerovene promptly turned its sights on RL Fine as the next-best option. Although RL Fine did not have an FDA-approved DMF for pyrimethamine, Cerovene considered it a promising alternative supplier due to its experience manufacturing pyrimethamine for use outside the U.S. and because it held DMFs for other products.

On November 16, 2016, Cerovene and RL Fine executed a five-year supply agreement. The agreement **[**57]** obligated RL Fine to provide a pyrimethamine DMF that would be referenced in an amendment to Cerovene's ANDA. In return, Cerovene paid RL Fine $100,000, with another $100,000 due upon approval of its ANDA.

Cerovene's agreement with RL Fine had an exclusivity provision. That provision was intended to protect Cerovene's investment in getting RL Fine qualified as an API supplier in the United States and forestall free riding by other generic drug companies on Cerovene's investment. RL **[*612]** Fine confirmed that it would support Cerovene's pyrimethamine ANDA in early 2017 and supplied 33.5 kilograms of API, which was enough for Cerovene to test and launch its product.

On April 2, 2017, Cerovene submitted a major amendment to its ANDA changing its API supplier from Ipca to RL Fine. In the amendment, Cerovene informed the FDA that RL Fine had been manufacturing pyrimethamine on a commercial basis in European and Asian markets and noted that the FDA had inspected RL Fine as recently as June 2015. Cerovene included RL Fine's manufacturing information as an amendment to its ANDA instead of relying on RL Fine to handle the DMF process separately. This appeared to Cerovene to be the fastest way to get **[**58]** FDA approval.

Because of the switch in supplier from Ipca to RL Fine, the FDA issued a complete response letter to Cerovene's amended ANDA dated December 26, 2017, requiring Cerovene to conduct new BE testing using RL Fine's API and an unexpired lot of RLD. New BE testing was the only substantial correction required by the FDA, but the Daraprim that Cerovene had purchased in 2013 had expired, so Cerovene immediately tried to buy five more bottles.

Cerovene made an extensive search for the RLD that proved futile. It tried and failed to acquire RLD from five different suppliers, on occasion making simultaneous prepayments. It made multiple applications to the FDA requesting partial waivers of the BE retesting requirement. After roughly twelve months of effort, Cerovene had purchased only three bottles of Daraprim. It did so in November 2018 at a total cost of $375,000.

Cerovene first sought RLD on December 29, 2017, from the pharmacy that had supplied it with Daraprim bottles in 2013, but the pharmacy was no longer able to supply it with Daraprim. The next day, Cerovene ordered five bottles at a cost of $112,000 each from another pharmacy but cancelled the order in February 2018 when the **[**59]** pharmacy proved unable to fill the order.

On January 22, 2018, Cerovene asked the FDA to reconsider its new BE testing requirement due to its difficulty acquiring Daraprim RLD. Cerovene explained that "the RLD is inaccessible and unavailable in the US for BE or other testing because it is the subject of a restricted distribution program." On June 29, 2018, the FDA denied Cerovene's requests to conduct new BE testing by using its expired lots of Daraprim or to conduct alternative studies. The FDA noted that it "did not have additional recommendations that can address the issue of RLD inaccessibility" and that "Daraprim is not subject to a REMS, and the restrictions on supply of Daraprim described in your letter are not required by the [FDA]." The agency added,

> If you have been unable to obtain supplies of the drug from the manufacturer or other distributers, and you believe this refusal constitutes anticompetitive behavior, we encourage you to raise the matter with the Federal Trade Commission, which is responsible for addressing anticompetitive practices.

Throughout 2018, Cerovene struggled to find a distributor that could deliver sufficient RLD. Dr. Reddy's did not typically help its **[**60]** partners procure RLD but by the end of January, it had stepped in to aid Cerovene. As a far larger company, Dr. Reddy's believed that its connections might work.

Dr. Reddy's efforts included prepaying $550,000 in March 2018 to Reliant for five bottles of Daraprim. Reliant is a New Jersey-based pharmaceutical wholesale company that "procure[s] branded Innovator Samples/Reference Listed Drugs for bioequivalence **[*613]** and clinical trials." Reliant, however, was unable to purchase any Daraprim from its normal sources.

When Reliant tried to buy Daraprim bottles from ASD, ASD directed Reliant to place its order directly with Vyera. Vyera never responded to Reliant's request for five bottles.

Relying on a family connection, Reliant turned to a small New Jersey pharmacy and arranged for the pharmacy to order five bottles of Daraprim from ASD. As described above, Vyera immediately flagged that transaction and hurried to repurchase the five bottles for twice their purchase price during a meeting in a Starbucks parking lot in New Jersey.

The pharmacy had placed its order with ASD on April 4, 2018 for five bottles, which were delivered the next day. Vyera's Kirby emailed ASD on April 5 to verify that the **[**61]** pharmacy was an "approved account type[]" and requested that ASD put a hold on the pharmacy's account for "placing further orders until we can determine if there is alignment with our distribution model." ASD answered that it had approved the sale in error and confirmed that the purchase could not be stopped as the bottles had already shipped. A Vyera employee then called the pharmacy and spoke to the owner.

Vyera repurchased the five bottles for $750,000 on April 6, 2018. Vyera's CEO Mulleady drove to Parsippany, New Jersey to meet Reliant's owner in a Starbucks parking lot and repurchased the bottles. Mulleady also handed the owner of Reliant a draft contract titled "Product Purchase and Collaboration Agreement." The document proposed that Reliant and its affiliates "agree not to purchase, directly or indirectly, or their own account or on account of others, or to cause or direct any third party to purchase, directly or indirectly, any Daraprim, except directly through normal commercial channels." Reliant never signed the document. Despite its continuing efforts, Reliant only delivered one bottle of Daraprim in June of 2018.

Cerovene and Dr. Reddy's also used a Swiss distributor, ProSupplier **[**62]** GmbH ("ProSupplier"), which also required an advance payment to begin locating Daraprim RLD. Cerovene and Dr. Reddy's initially resisted prepaying both Reliant and ProSupplier for RLD that may never materialize; they had also heard that ProSupplier was in fact attempting to obtain Daraprim through Reliant. As more time passed, however, Dr. Reddy's and Cerovene decided to accept the risk of holding open two orders at the same time and prepaid $375,000 to ProSupplier in September for three bottles of Daraprim, with another $375,000 to be paid after delivery.

ProSupplier delivered three bottles of Daraprim in November 2018, but as they came from a different manufacturing lot than the one bottle obtained by Reliant, the four bottles could not be combined to meet the FDA's BE testing and the RLD retention requirements. With the three bottles in hand, Dr. Reddy's cancelled its outstanding order with Reliant.

Cerovene had written the FDA again in July 2018 to stress that Daraprim appeared to be subject to a restricted distribution program and was inaccessible in the United States. It requested a reduction in the amount of RLD needed for BE testing and retention. In April 2019, the FDA permitted **[**63]** Cerovene to conduct BE testing with just the three bottles of Daraprim that it had been able to acquire from ProSupplier.

Meanwhile, due to Vyera's interference, Cerovene was forced to search for yet another API supplier. During a November 30, 2017 meeting in India, RL Fine informed Cerovene's Shah that, notwithstanding their five-year contract, it would **[*614]** no longer supply Cerovene with any more pyrimethamine.

Cerovene returned to Ipca, which had acquired another company with manufacturing facilities. Cerovene executed a supply agreement on February 19, 2019, that was conditioned on FDA approval of Ipca's affiliate as Cerovene's API supplier. Cerovene invested in developing the company's pyrimethamine manufacturing capacity from scratch, but even with Ipca transferring its manufacturing process, it took until late 2019 for the company to provide Cerovene with the materials necessary to supplement its ANDA.

From May to June 2019, Cerovene proceeded to conduct BE testing using the RL Fine API that it had received in 2017 and the three bottles of Daraprim obtained from ProSupplier in November 2018. It submitted its results to the FDA in September 2019. Then, on February 25, 2020 -- after Vyera **[**64]** terminated its exclusive agreement with RL Fine in October 2019 -- RL Fine agreed once more to supply Cerovene with pyrimethamine pursuant to their 2016 agreement. Three days later, Cerovene's generic pyrimethamine product received FDA approval and an AB rating to Daraprim. Dr. Reddy's launched the generic on March 20, 2020. Cerovene began manufacturing commercial batches of generic pyrimethamine using RL Fine's API in 2021.

Vyera delayed Cerovene's entry into the market by roughly thirty months, that is, from September 2017 to its actual entry date of March 2020. This timeline is premised on Cerovene having been able to obtain API from Fukuzyu in October 2016 and being able to obtain Daraprim without any delay. Cerovene, as explained at trial by its principal, would have needed approximately eleven months to obtain approval for an amended ANDA in these circumstances.[28] Shah testified that it would have taken one month to manufacture a registration batch of the generic drug product. He would have redone the BE testing during the three-month period needed for stability testing. He predicted that he would have filed an amended ANDA changing Cerovene's API supplier to Fukuzyu in or around **[**65]** February 2017. Assuming that the FDA would have taken six months to review of Cerovene's amendment, it would have approved Cerovene's ANDA by August 2017. Dr. Reddy's would have launched Cerovene's FDA-approved generic pyrimethamine one month later, by September 2017.

As was true when Dr. Reddy's actually launched Cerovene's generic competitor to Daraprim in 2020, the effect of the entry of FDA-approved generic pyrimethamine on the price of Daraprim would have been immediate. Upon the

[28] Shkreli did not challenge this testimony at trial.

entry of the Dr. Reddy's generic product, Vyera began to compete on price by offering steep rebates and brand-for-generic deals to various pharmacies and pharmaceutical benefit managers.[29]

C. Fera

The second pharmaceutical company to bring FDA-approved generic pyrimethamine to the market is Fera. Fera is based in Locust Valley, New York, and develops generic and branded drugs. DellaFera founded Fera in 2009 to develop niche products that face barriers to entry and **[*615]** are often overlooked by the pharmaceutical industry.

Fera is a virtual drug company, which means that it does not have its own manufacturing capacity; it contracts with other manufacturers to produce its products. When developing a new drug, Fera **[**66]** usually partners with reputable API suppliers that have experience complying with the FDA's cGMPs regulations.

In September 2015, Fera decided to develop generic pyrimethamine after learning about Vyera's Daraprim price hike in the media. After confirming that about one million tablets of Daraprim were being sold per year at the time, Fera began to search for API suppliers holding a U.S. DMF for pyrimethamine.

In February 2016, Fera inquired of Fukuzyu about purchasing pyrimethamine. Fukuzyu did not respond.

On June 13, 2016, Fera entered into an agreement with another manufacturer to develop a pyrimethamine API manufacturing process exclusively for Fera's use. That manufacturer had never made pyrimethamine. Fera invested about $2 million for the development of a pyrimethamine manufacturing process. The company completed its work in October 2017.[30]

Meanwhile, Fera continued its efforts to acquire the API from an already established source. Despite its investment in an API development process, Fera understood that its ANDA would be approved more quickly if it relied on a supplier that already had an FDA-approved pyrimethamine DMF.

In September 2017, Fera reached out to Fukuzyu a second time. **[**67]** Fera sought a sample of pyrimethamine API to test against the API being produced by its manufacturing partner, and also hoped that Fukuzyu would agree to become its pyrimethamine supplier for generic Daraprim. That proved to be impossible. At Vyera's direction, Fukuzyu's agent told Fera that it had to guarantee that Fukuzyu's pyrimethamine would not be used in a drug for human use in the United States "either via normal prescription drug distribution" or via compounding.[31]

In the Fall of 2016, Fera also sought to purchase Daraprim RLD for BE testing and to use as a comparator with the product being produced by its manufacturing partner. Its efforts were largely fruitless.

On November 7, 2016, Fera's McDougal reached out to Pharmaceutical Buyers, Inc. ("PBI"), a distributor, to acquire samples of Daraprim. PBI responded that Daraprim was "only available to hospitals and government facilities at this time." McDougal next inquired of a hospital pharmacist at a major university, who responded that "according to our hospital policy and distributor contract, I can only procure from what is defined as own use for hospital business." Fera was finally able to acquire small amounts of Daraprim by **[**68]** using a physician's prescription at a pharmacy. That Daraprim would not meet FDA requirements for BE testing, however, because the sample contained too few tablets, was provided in an unsealed vial, and had no manufacturing lot number.

Fera also attempted to procure Daraprim through its contract research organization ("CRO"), Xcelience. Fera had entered into an agreement with Xcelience on **[*616]** December 22, 2016, to develop a generic prototype and

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[29] A brand-for-generic rebate is a rebate offered on the price of a brand name drug by a pharmaceutical company in exchange for a pharmacy agreeing to dispense the brand name drug in lieu of the generic version when filling prescriptions. The end payer pays the generic cost of the copay despite receiving the brand name drug.

[30] Due to the difficulty obtaining RLD, Fera did not begin working on a DMF until late 2018. It filed the DMF on May 28, 2019.

[31] Drug compounding is a practice whereby a pharmacist combines, mixes, or alters pharmaceutical ingredients to create a medication in a non-FDA-approved facility. Compounded drugs are not reviewed by the FDA for safety or efficacy.

manufacture the end product. Xcelience quickly ran into the same roadblocks Fera had met in its own efforts to acquire RLD. On January 4, 2017, Xcelience relayed to Fera that "the manufacturer is now limiting distribution of Daraprim only to hospitals and government agencies directly." When Xcelience reached out to Vyera, Vyera explained that Fera would have to enter into an agreement accepting full liability from any use of Daraprim. This is the first time a purchase of RLD had been conditioned on Fera executing an indemnification clause. Fera replied by striking the proposed indemnity clause, which ended negotiations.

McDougal continued to inquire of PBI in February and again in May of 2017, to no avail. In July 2017, Fera ended its relationship **[**69]** with Xcelience at least in part because it had failed to procure the RLD.

Fera signed a development contract with another CRO in November 2017. Fera also negotiated a partnership with a contract manufacturing organization ("CMO"). That CMO completed its first manufacture of Fera's generic pyrimethamine product in March 2019.

Meanwhile, in January 2018, Fera succeeded in purchasing two 100-count bottles of Daraprim from Reliant at a cost of $115,000 per bottle. Fera declined to purchase more bottles at that time, partly because the bottles came from a manufacturing lot that expired in Summer 2019, that is, before Fera was sure that it could conduct BE testing. Fera intended to purchase additional bottles from Reliant as its development timeline became clearer. In April 2018, Reliant informed Fera that Vyera's Mulleady had repurchased its inventory of Daraprim and that it could not acquire more.

Using an industry broker, Vyera's Mulleady asked to meet with Fera in April of 2018. DellaFera met with Mulleady in April and May of 2018. Following instructions from Shkreli, Mulleady quizzed DellaFera about his plans, dangling the possibility of a joint venture as he did. Mulleady told DellaFera **[**70]** that he had repurchased Reliant's entire stock of Daraprim. He also related that he had flown to India to lock RL Fine into an exclusive contract in order to prevent it from supplying two major pharmaceutical companies, Mylan and Sandoz, with pyrimethamine. He explained that Vyera was paying RL Fine a royalty on Daraprim sales. When Mulleady added that he knew the identity of Fera's API supplier, DellaFera understood this as a threat that Vyera was willing to interfere with Fera's source of API as well. At this point, DellaFera became concerned that Fera might never get pyrimethamine into the market. DellaFera had no interest in a joint venture with Vyera and the discussions came to a close.

Like Cerovene, Fera had already asked the FDA for a waiver of its BE testing requirements due to difficulty acquiring RLD. In October 2017, Fera proposed performing a pharmacokinetic study, which would not require Daraprim RLD, in lieu of BE testing. Fera explained that

> the unavailability due to the restricted access program created by the RLD has made the development of a generic version of the product largely impossible. Additionally, the cost of the RLD is exorbitant, forcing even patients to **[**71]** forego this medically necessary treatment.

The FDA denied Fera's request.

On June 1, 2018, Fera requested a competitive generic therapy designation from the FDA that would allow for expedited review of Fera's application. It also asked for a meeting with the relevant FDA officials to ensure that its ANDA was on track. In August 2018, Fera sought a waiver "for the minimum number of RLD samples required to be retained from the conduct **[*617]** of the Fed and Fasting BE studies." Fera pointed out that

> [t]he RLD sponsor for this drug product, Vyera, utilizes a closed pharmacy distribution model. This has resulted in extreme difficulty in obtaining sufficient samples of drug product normally needed to meet all ANDA test analysis and BE study requirements.

In January 2019, the FDA again denied Fera's request.

On March 4, 2019, Fera's team participated in a call with the FDA's Office of Generic Drugs. DellaFera stressed how difficult it was to locate RLD and that it had taken over a year to buy just two bottles. He described his conversations with Mulleady, including Mulleady's admission that Vyera had entered an exclusive API supply agreement with RL Fine to eliminate competition from Mylan and Sandoz. **[**72]** In April, Fera formally requested another waiver to conduct BE testing with only two bottles of Daraprim, which the FDA granted in June.

Fera immediately conducted BE testing of its generic pyrimethamine product, undertook six months of stability testing, and filed its ANDA in December 2019. The FDA responded by requiring Fera to conduct additional tests on its API, and in August 2020, the FDA sent Fera a complete response letter citing deficiencies in the impurity profile of Fera's API. Due to the COVID-19 pandemic, it took Fera until December 2020 to complete the resubmission. On July 27, 2021, the FDA approved Fera's generic pyrimethamine ANDA.

Vyera delayed Fera's entry into the generic pyrimethamine market by roughly twenty-four months. This timeline assumes that Fukuzyu would have agreed to supply Fera with pyrimethamine after Fera reached out to it for a second time in September 201 and that Fera had unimpeded access to Daraprim RLD. DellaFera estimates that, operating on those assumptions, Fera's generic Daraprim would have entered the market twenty-three months later, or in August 2019 instead of shortly after Fera's ANDA was approved in July of 2021.

As DellaFera explained at **[**73]** trial, Fera would have acted promptly to finalize an agreement with a CMO partner to manufacture the drug. The CMO would have taken between three o four months -- or up to April 2018 at the latest -- to manufacture the necessary batches of generic pyrimethamine for six months of stability testing, bringing the timeline to October 2018. During this six-month period, Fera would have conducted BE testing, assembled its ANDA, and been prepared to file its ANDA by November 2018. Presuming eight months for review, the FDA would have approved Fera's ANDA in July 2019, avoiding any delays caused by the COVID-19 pandemic. As Fera's CMO would have been producing batches of generic pyrimethamine for commercial sales while awaiting FDA approval, Fera would have been ready to launch its product within a month, or by August 2019.[32]

D. InvaTech

InvaTech has also filed an ANDA for generic pyrimethamine. Identifying RL Fine as its supplier of API, InvaTech filed an ANDA on July 28, 2017. Due to its exclusive supply agreement with Vyera, however, RL Fine stopped cooperating with InvaTech and InvaTech was forced to find a new supplier of API. Although Vyera's actions have delayed InvaTech's entry into the **[**74]** market, there are too many unknowns to attribute any particular period of delay to Vyera. InvaTech has still not received FDA approval for its ANDA.

InvaTech, founded in 2009, is a New Jersey pharmaceutical company that develops **[*618]** and markets around twenty products. In 2014, it began its effort to develop generic pyrimethamine. In October of 2014, InvaTech bought six 100-tablet bottles of Daraprim for a total of just over $8,000.

Like Cerovene, InvaTech initially chose Ipca as its API supplier, but was forced to look elsewhere following the FDA's 2015 Ipca import ban. In the summer of 2015, RL Fine agreed to supply pyrimethamine to InvaTech. In February 2017, InvaTech and RL Fine executed a Preliminary Collaboration Agreement covering pyrimethamine and two other products for which RL Fine would supply the API. RL Fine agreed to file a DMF for pyrimethamine. While the Agreement left RL Fine free to supply pyrimethamine to other companies, InvaTech was given preferential pricing. The Agreement specified that InvaTech would file its pyrimethamine ANDA in either 2017 or 2018.

InvaTech used RL Fine's API to conduct BE testing. Because RL Fine had not yet filed a DMF, InvaTech requested in June **[**75]** 2017 that RL Fine provide it with the documentation regarding its pyrimethamine manufacturing process for InvaTech to include in its ANDA. With that information, on July 28, 2017, InvaTech filed its pyrimethamine ANDA.

On September 11, 2017, the FDA sent a response that included questions about RL Fine's API, setting an answer deadline of September 18. InvaTech sought assistance from RL Fine, but RL Fine ignored each of its requests. By that time, Vyera and RL Fine were in the midst of negotiating their exclusive supply agreement.

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[32] At trial, Shkreli did not take issue with this timeline.

Given the urgency of the situation, Patel flew to India in September for a two-hour meeting with RL Fine. In that meeting and through other communications, Patel learned that RL Fine would no longer support InvaTech's pyrimethamine ANDA even though it continued to support InvaTech's work on the other two products.

On May 22, 2018, the FDA issued a complete response letter to InvaTech's ANDA. The FDA cited major deficiencies, including deficiencies with the API information. RL Fine again ignored InvaTech's requests for help.

Having lost first Ipca and then RL Fine as its API supplier, InvaTech turned to a third company. On July 31, 2019, InvaTech amended its ANDA **[**76]** to reflect the transfer of its API source to that third company. To this day, InvaTech continues to work toward approval of a generic Daraprim product.

E. Mylan

Vyera was successful in preventing one of the largest manufacturers of generic drugs in the United States from entering the market. Prompted by the dramatic increase in Daraprim's price, Mylan explored developing generic pyrimethamine. In February 2016, Mylan began to search for potential pyrimethamine API suppliers. By December 2016 Mylan concluded that RL Fine was the only supplier that could provide pyrimethamine "off the shelf and not require a development agreement." By that time, however, RL Fine had entered the exclusive supply agreement with Cerovene.

Like Cerovene and Fera, Mylan was also unable to acquire Daraprim RLD through its regular distributors and approved vendors. It could not get "even a single bottle." Mylan's Head of Global Project Management can only recall two or three other times out of hundreds of projects in which Mylan had such trouble. In those instances, the difficulties were easily explained by the fact that the RLD was part of a REMS program. Unable to find a source of the API or to obtain Daraprim, **[**77]** Mylan abandoned its nascent plans to develop generic pyrimethamine.

[*619] VII. Impact of Competition on Prices of Daraprim

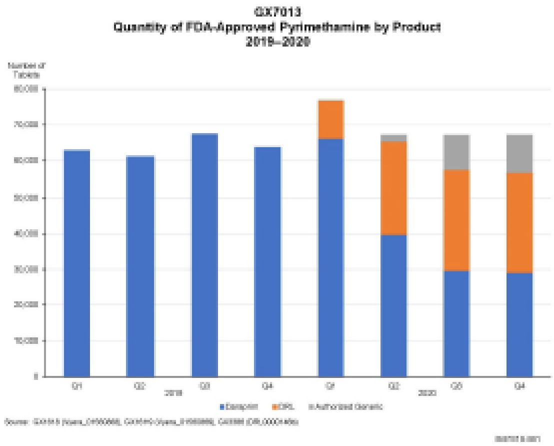
In early 2020, Vyera braced for the imminent approval of Cerovene's ANDA and subsequent launch of Dr. Reddy's FDA-approved generic pyrimethamine product. In an internal forecast prepared in March 2020, Vyera projected that the net price for a Daraprim tablet would immediately drop from $278 to $126 after generic entry, based on the assumption that Dr. Reddy's generic would launch at a 61% discount on April 1, 2020. Assuming that another generic competitor would enter the market on September 1, Vyera projected that the business lost by the end of the year due to generic competition would increase to $2.1 million per month and amount to close to $13 million for the year 2020.

Dr. Reddy's FDA-approved generic pyrimethamine launched with a WAC of $292.50. Daraprim immediately faced stiff price competition, and the net price of FDA-approved pyrimethamine products dropped substantially. During its first nine months on the market, the average net price of Dr. Reddy's generic pyrimethamine was $197 per tablet, a significant discount from $228, which was the average net price of **[**78]** Daraprim in the prior year. By the end of 2020, Dr. Reddy's generic pyrimethamine had captured 41% of the sales volume for all FDA-approved pyrimethamine. At the same time as the price of FDA-approved pyrimethamine dropped, the total volume of FDA-approved pyrimethamine sales increased. The sales volume expanded by 9% when 2020 sales are compared to 2019 sales. This expansion recovered some of the sales lost when Vyera hiked Daraprim's price by 4,000% in 2015.

In March 2020, Vyera launched its own generic pyrimethamine tablet (the "Vyera AG").[33] The Vyera AG had captured only 16% of the FDA-approved pyrimethamine market by the end of 2020.

The chart below illustrates the relative market share of Daraprim, the Vyera AG (identified as "Authorized Generic"), and

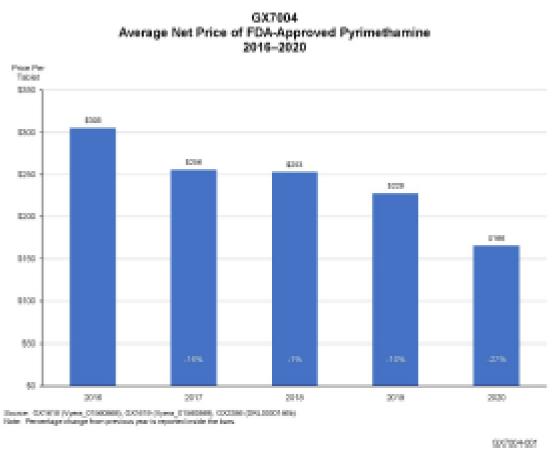
[33] A generic of a brand name drug may be launched under the brand's preexisting FDA approval. It is known as an authorized generic.



[*620]

Dr. Reddy's generic pyrimethamine (identified as "DRL") between the first quarter of 2019 and the last quarter of 2020.

The next chart illustrates the change in the average net price of all FDA-approved pyrimethamine, which dropped from $228 in 2019 to $166 in 2020 -- a decrease of 27%. This rate of decrease exceeded any year-over-year net price drop that had occurred since 2016.



[*621] In response to the entry of Dr. Reddy's generic pyrimethamine, **[**79]** Vyera cut the net price of Daraprim through steep rebates and brand-for-generic offers to pharmacies and pharmacy benefit managers. Despite these offers from Vyera, the availability of generic alternatives to Daraprim allowed pharmacy benefit managers to cover the cheaper generic competitors at the lowest tiers of their formularies and to exclude Daraprim from their formularies. For example, in January 2021 CVS Caremark moved Daraprim to "excluded status" on its standard control formulary. It explained its decision as follows: CVS Caremark, like most payors, promotes a "generic-first strategy." Where the branded drug is expensive and two generics became available, it is "a very cost-effective strategy" to exclude the brand from the formulary. With the entry of more generic competitors in the FDA-approved pyrimethamine market, the price of FDA-approved pyrimethamine can be expected to fall further.

VIII. The Role of Martin Shkreli at Vyera

Shkreli founded Vyera. He did so with the intention to use Vyera to acquire a pharmaceutical that was the sole source of treatment for a life-threatening ailment, raise the drug's price sky-high, and keep it sky-high for as long as possible by blocking **[**80]** generic competition.

Shkreli was Vyera's first CEO, a position he held from October 10, 2014 to December 18, 2015. It was Shkreli who made the decision to acquire Daraprim and to implement his scheme with Daraprim. He directed his team to identify a small, essential drug out of patent protection and without generic competition that could be priced exorbitantly.

That drug was Daraprim. Shkreli signed off on Vyera's unsolicited bid to acquire it at a price far above its present value.

[*622] Shkreli raised the price of Daraprim to $750 per tablet. When Vyera's General Counsel objected to the price hike, Shkreli fired him.

To block generic competition, Shkreli devised a highly restrictive, closed distribution system for Daraprim and told Vyera that it was a top priority to put it in place by the time of the price hike. Shkreli also instructed his staff to buy back Daraprim inventory from wholesalers and distributors.

Having checked the FDA's pyrimethamine DMF list, Shkreli decided to pursue an exclusive supply contract with Fukuzyu. As Tilles, Shkreli's immediate successor as CEO, explained, the 2017 Fukuzyu contract was "something [Shkreli] wanted and it happened." As the arrival of a generic competitor **[**81]** grew more likely, in 2017 Shkreli decided to pursue an exclusive supply contract with pyrimethamine manufacturer RL Fine as well.

Shkreli remained in functional control of Vyera's management and its business strategy even after his arrest in December 2015 and in spite of management's occasional resistance. He was Vyera's largest shareholder and at any one time controlled between 43.07% and 49.44% of its voting shares. Even during his incarceration, Shkreli worked to ensure that his grand strategy not only remained in place but actually worked. Critically, none of the resistance put up by Shkreli's successors included unwinding Vyera's anticompetitive strategy. To the contrary, all of Vyera's CEOs pursued Shkreli's original vision.

Shkreli recruited employees and agents to carry out his vision at Vyera and picked the men who ran Vyera after he stepped down as its CEO. That those agents' names appear on documents executed after Shkreli's formal departure in lieu of his own does not shield him as the scheme's prime mover from individual liability. Shkreli initiated every anticompetitive decision that Vyera pursued to its conclusion. He maintained "shadow control" of the company, staying **[**82]** in close contact with Vyera's directors and officers, providing guidance on how to maintain control of the market, and threatening to use his authority as the largest shareholder to call an extraordinary general meeting ("EGM") that would install more pliant officers and directors. He did exactly that in 2017 and again in 2020, each time installing loyalists.

As Tilles has testified, he couldn't do anything "major" as CEO of Vyera without Shkreli's approval. When Shkreli became frustrated with Tilles, he replaced him with Dr. Salinas. Shkreli quickly became dissatisfied with Dr. Salinas too, proclaiming in one email that Dr. Salinas was a "cockroach that needed to be stomped or crushed."

Utilizing his controlling voting shares, Shkreli replaced Dr. Salinas with Mulleady. In June of 2017, Shkreli called an EGM of the shareholders to vote on a new slate of Directors. The Phoenixus Board and Shkreli put up competing slates.

In its Invitation to shareholders, the Board strongly opposed Shkreli's slate as unqualified and conflicted. The Board advised that

> many third parties -- including regulatory authorities -- will likely deem the newly elected Board members to be serving merely as straw **[**83]** men acting on Mr. Shkreli's behalf, and could further deem Mr. Shkreli to be in a position to influence, direct or control the Board and thus, the Company as well.

At the EGM held on June 21, 2017, Shkreli's slate was elected.

The new Board members notably lacked experience in the pharmaceutical industry. Those new members included Mulleady and Mithani. Tilles had fired Mulleady after **[*623]** Shkreli's arrest because Mulleady lacked "any skills" to offer the company. Mithani had graduated from college just three years earlier. His only prior employment was at a distressed debt brokerage firm, which he had quit to manage his own investment portfolio. Mithani has admitted that he was not qualified to join the board of a pharmaceutical company and that he was placed on the Board because Shkreli wanted "people he can trust."

The next day, the Board placed Dr. Salinas, then interim CEO, on leave and established an Executive Committee to "perform executive functions and take over the task of the Senior Management (CEO, CFO, CCO and CLO)." The Executive Committee had only two members: Mulleady and Mithani.

Mulleady promptly sent a reassuring email to Vyera's sales force, which was confronting an FDA **[**84]** announcement that it would expedite review of pyrimethamine ANDAs. He explained,

> In my opinion, this not an immediate concern. Getting to the point of filing an ANDA is a cumbersome process. Personally, I can tell you the FDA approval is generally not the main barrier to entry for generics in our class. Amongst other necessities, a company would have to successfully create the active ingredient on scale using a well-controlled process and then formulate. Next they would have to obtain RLD (registered listed drug), 10 labelled and unexpired bottles (informed estimation), of Daraprim to complete a study in healthy volunteers to demonstrate bioequivalence.
>
> Getting to the front of the line is helpful, but getting to the line is not an easy task. I can't imagine ANDA submission preparation taking less than 18 months (extremely conservative). Since [Vyera] actively collects competitive intelligence concerning other potential developers, we would most likely be aware of this process going on and have plenty of time to prepare.

Mulleady also ordered a "full out audit" of Daraprim to know where "every bottle" of Daraprim went. He made sure that Shkreli got the audit results.

If anything, Shkreli **[**85]** tightened his control over Vyera as his criminal problems progressed. Concern was expressed at an August 30, 2017 Board meeting that the company was buying back shares at a price below par value "to increase Martin Shkreli's holding in the Company and to facilitate his control over it." At Mulleady and Mithani's urging, the Board nonetheless approved the buyback. The Board then appointed Mulleady CEO in October 2017.[34]

Shkreli kept in regular contact with both Mulleady and Mithani to discuss when a generic Daraprim drug might enter the market and what should be done to slow that entry. As shown in an Excel spreadsheet maintained by Mulleady, between December 26, 2019 and July 14, 2020 alone, at a time when Shkreli was in prison, Mulleady and Shkreli communicated over 1,500 times.

In the few recordings of Shkreli's conversations from prison with Vyera management that are part of the trial record, Shkreli openly discussed his control over Vyera. He observed that he had "EGM power." Shkreli said "I have no problem firing everybody to be frank, if you guys **[*624]** can't figure it out." In September 2020, Shkreli told Mulleady that any dissenters amongst the Directors needed to understand that "being **[**86]** on the board of Phoenixus means, you know, you're on the Martin and Kevin board." Shkreli compared himself to Mark Zuckerberg and Vyera to Facebook, noting that Zuckerberg "just happens to own the thing and that's the way it is," and "[y]ou can't go in there and tell Zuckerberg what to do."

In February 2020, Shkreli used his EGM power to change Vyera's management team once again. This time, he removed Mulleady. Mulleady had added a "confidential" item to the agenda of an upcoming Board meeting. It was intended to address Shkreli's meddlesome involvement with Vyera. But before it could be discussed, Shkreli called for an EGM, Mulleady was removed from the Board, and Shkreli's new directors were installed.

Discussion

The FTC has brought claims against Shkreli for violations of *§§ 1* and *2 of the Sherman Act*. The States have brought claims against Shkreli based on violations of various state statutes and Pennsylvania common law, all of which follow federal precedent. After finding that the Plaintiffs have carried their burden of proving by a

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[34] Mulleady served as the interim Executive Director of Vyera and Phoenixus from October to December 2017, then became Vyera's CEO from January 1, 2018 until February 19, 2019. Mulleady was removed as the Chairman of the Board of Phoenixus on November 17, 2020 and removed from the Board on December 11 at another EGM called by Shkreli.

preponderance of the evidence that Shkreli violated *§§ 1* and *2 of the Sherman Act* and the state laws at issue here, the Plaintiffs' requests for relief will be addressed.

I. Legal Standard **[**87]**

A. Section 5 of the FTC Act

The FTC brings this action pursuant to authority given to it in the FTC Act. The FTC Act declares "[u]nfair methods of competition" to be unlawful, *15 U.S.C. § 45*, and directs the FTC to prevent violations of the FTC Act. "Unfair methods of competition" under the FTC Act encompass violations of the *Sherman Act*. *FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454-55, 465-66, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*.

B. *Section 1 of the Sherman Act*

Section 1 of the Sherman Act outlaws "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. The "primary purpose of the antitrust laws is to protect interbrand competition. Low prices . . . benefit consumers." *State Oil Co. v. Khan, 522 U.S. 3, 15, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*.

To prove a *§ 1* violation, a plaintiff must show that there was "a combination or some form of concerted action between at least two legally distinct economic entities that constituted an unreasonable restraint of trade." *United States v. Apple, Inc., 791 F.3d 290, 313 (2d Cir. 2015)* (citation omitted). "[O]fficers or employees of the same firm do not provide the plurality of actors imperative for a *§ 1* conspiracy" because "an internal agreement to implement a single, unitary firm's policies does not raise the antitrust dangers that *§ 1* was designed to police." *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*.

"The first crucial question in a *Section 1* case is . . . whether the challenged conduct stems from independent decision or from **[**88]** an agreement, tacit or express." *Apple, 791 F.3d at 314-15* (citation omitted). Courts presumptively apply a rule of reason analysis to challenged agreements to determine whether they restrain trade. *1-800 Contacts, Inc. v. Fed. Trade Comm'n, 1 F.4th 102, 114 (2d Cir. 2021)* (citing *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*). Therefore, "antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." *Texaco, 547 U.S. at 5*. **[*625]** Anticompetitive effects may be shown through direct evidence of increased prices in the relevant market. *1-800 Contacts, 1 F.4th at 118*.

Under the rule of reason,

> [a] plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market. After a prima facie case of anticompetitive conduct has been established, the burden shifts to the defendant to proffer procompetitive justifications for the agreement. Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means.

Id. at 114 (citation omitted).

The rule of reason analysis requires a court to weigh "the relevant circumstances of a case to decide whether a restrictive practice constitutes an **[**89]** unreasonable restraint on competition." *Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 183 (2d Cir. 2012)* (quoting *Monsanto Co. v. Spray—Rite Service Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*). Such factors may include "specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co., 522 U.S. at 10*.

Exclusive dealing arrangements "implicate *§ 1* because they have the potential unreasonably to exclude competitors or new entrants from a needed supply, or to allow one supplier to deprive other suppliers of a market for their goods." *Geneva Pharms. Tech. Corp. v. Barr Lab'ys Inc., 386 F.3d 485, 508 (2d Cir. 2004)*. Exclusive dealing is a § 1 violation "only when the agreement freezes out a significant fraction of buyers or sellers from the market." Id.

Exclusive dealing agreements may "have pro-competitive purposes and effects, such as assuring steady supply, affording protection against price fluctuations, reducing selling expenses, and promoting stable, long-term business relationships." Id. In analyzing the procompetitive effects of these agreements, "courts must take care to consider the competitive characteristics of the relevant market." Id.

C. Section 2 of the Sherman Act

Under § 2 of the Sherman Act, it is unlawful to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States." 15 U.S.C. § 2. A claim brought under § 2 of the Sherman Act has two **[**90]** elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United Food & Com. Workers Loc. 1776 & Participating Emps. Health & Welfare Fund v. Takeda Pharm. Co. Ltd., 11 F.4th 118, 137 (2d Cir. 2021) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)). "To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." In re Adderall XR Antitrust Litig., 754 F.3d 128, 133 (2d Cir. 2014) (quoting Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)).

Monopoly Power

Monopoly power is "the power to control prices or exclude competition." Geneva Pharms., 386 F.3d at 500 (quoting United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 334, 81 S. Ct. 1243, 6 L. Ed. 2d 318 **[*626]** (1961)). Defendants with monopoly power have "the ability (1) to price substantially above the competitive level and (2) to persist in doing so for a significant period without erosion by new entry or expansion." AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, 227 (2d Cir. 1999). A plaintiff can establish a defendant's monopoly power either "directly through evidence of control over prices or the exclusion of competition, or it may be inferred from a firm's large percentage share of the relevant market." Geneva Pharms., 386 F.3d at 500.

"While market share is not the functional equivalent of monopoly power, it nevertheless is highly relevant to the determination of monopoly power." Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 98 (2d Cir. 1998). As such, "defining a relevant market is generally a necessary component **[**91]** of analyzing a monopolization claim." PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 108 (2d Cir. 2002). "Once a relevant market is determined, the defendant's share in that market can be used as a proxy for market power." Id.

"The relevant market must be a market for particular products or services, the outer boundaries of which are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." US Airways, Inc. v. Sabre Holdings Corp., 938 F.3d 43, 64 (2d Cir. 2019) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)). "[A] single brand of a product or service may be a relevant market under the Sherman Act if no substitute exists for that brand's products or services." US Airways, 938 F.3d at 66 (citation omitted). On the other hand, products "need not be identical" to exist in the same market. AD/SAT, 181 F.3d at 227. Pharmaceutical drugs that are "therapeutically equivalent" can nevertheless exist in separate markets. Geneva Pharms., 386 F.3d at 496. To define the boundaries of the relevant market, courts can look toward

> such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

US Airways, 938 F.3d at 64 (quoting Brown Shoe, 370 U.S. at 325).

Courts will find sufficient cross-elasticity of demand if "consumers **[**92]** would respond to a slight increase in the price of one product by switching to another product." Geneva Pharms., 386 F.3d at 496. One of the tests that courts employ to discern the relevant market is the hypothetical monopolist test ("HMT"). Under that test, courts ask "[w]hether a hypothetical monopolist acting within the proposed market would be substantially constrained from increasing prices by the ability of customers to switch to other products." *United States v. Am. Express Co., 838 F.3d 179, 198-199 (2d Cir. 2016)* (citation omitted).

> The Court implements the HMT by imagining that a hypothetical monopolist has imposed a small but significant non-transitory increase in price ("SSNIP") within the proposed market. If the hypothetical monopolist can impose this SSNIP without losing so many sales to other products as to render the SSNIP unprofitable, then the proposed market is the relevant market. By contrast, if consumers are able and inclined to switch away from the products in the proposed market in sufficiently high numbers to render the SSNIP unprofitable, then the proposed market definition **[*627]** is likely too narrow and should be expanded.

Id. at 199.

The Department of Justice and the FTC most often use a SSNIP of five percent. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines **[**93]** § 4.1.2 (2010). Once the relevant market is established, courts have found that "a market share of over 70 percent is usually strong evidence of monopoly power." *Tops Markets, 142 F.3d at 99*.

Anticompetitive Conduct

The second element of the monopolization claim "requires a plaintiff to establish that the defendant has engaged in improper conduct that has or is likely to have the effect of controlling prices or excluding competition." *Takeda, 11 F.4th at 137* (citation omitted). "For there to be an antitrust violation, generics need not be barred from all means of distribution if they are barred from the cost-efficient ones." *New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 656 (2d Cir. 2015)* ("*Actavis PLC*") (citation omitted).

"[O]nce a plaintiff establishes that a monopolist's conduct is anticompetitive or exclusionary, the monopolist may proffer nonpretextual procompetitive justifications for its conduct. The plaintiff may then either rebut those justifications or demonstrate that the anticompetitive harm outweighs the procompetitive benefit." *Actavis PLC, 787 F.3d at 652* (citation omitted).

II. Plaintiff States' Laws

Seven States have joined in this action. They are the States of New York, California, Ohio, Illinois, and North Carolina, and the Commonwealths of Pennsylvania and Virginia.

A. New York

The New York Donnelly Act, New York's antitrust statute, declares **[**94]** illegal

> Every contract, agreement, arrangement or combination whereby . . . [c]ompetition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby . . . for the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained.

N.Y. Gen. Bus. Law § 340(1). The New York Donnelly Act is "modeled after the *Sherman Act* and should generally be construed in light of Federal precedent." *Biocad JSC v. F. Hoffmann-La Roche, 942 F.3d 88, 101 (2d Cir. 2019)* (citation omitted).

Section 63(12) of the New York Executive Law authorizes the New York Attorney General to seek equitable relief. In relevant part, *§ 63* provides:

> Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply . . .

> for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, [and] directing restitution **[**95]** and damages . . . . The term "persistent fraud" or "illegality" as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct. The term "repeated" as used herein shall include repetition of any separate and distinct fraudulent or illegal act, or conduct which affects more than one person.

N.Y. Exec. Law § 63(12).

"Any conduct which violates state or federal law or regulation is actionable" **[*628]** under *Executive Law § 63(12)*. *People ex rel. Vacco v. World Interactive Gaming Corp., 185 Misc. 2d 852, 714 N.Y.S.2d 844, 848 (N.Y. Sup. Ct. 1999)*. When a defendant engages in conduct within New York prohibited by *Executive Law § 63(12)*, the Attorney General is authorized to seek relief on behalf of out-of-state residents injured by the wrongdoing. *People ex rel. Cuomo v. H & R Block, Inc., 58 A.D.3d 415, 870 N.Y.S.2d 315, 316 (1st Dep't 2009)*; see also *Vyera, 2021 U.S. Dist. LEXIS 183303, 2021 WL 4392481, at *4*.

B. California

The *California Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq.*, prohibits "conspiracies or agreements in restraint or monopolization of trade." *Exxon Corp. v. Superior Ct., 51 Cal. App. 4th 1672, 60 Cal. Rptr. 2d 195, 200 (1997)*, as modified on denial of reh'g (Feb. 13, 1997). The analysis of claims brought under California's Cartwright Act "mirrors the analysis under federal law because the Cartwright Act . . . was modeled after the *Sherman Act*." *Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)* (citation omitted).

The California Unfair Competition Law prohibits "any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. In actions brought by the Attorney General, courts may "grant such mandatory injunctions as may be reasonably necessary to restore and preserve fair **[**96]** competition in the trade or commerce affected by the violation." *Cal. Bus. & Prof. Code § 16754.5*.

C. Illinois

The Illinois Antitrust Act ("IAA") instructs that "[w]hen the wording of this Act is identical or similar to that of a federal ***antitrust law***, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act." *740 Ill. Comp. Stat. 10/11*. "Illinois courts interpret the state ***antitrust law*** in harmony with federal case law construing analogous provisions of federal legislation." *McGarry & McGarry, LLC v. Bankr. Mgmt. Sols., Inc., 937 F.3d 1056, 1062 (7th Cir. 2019)* (citation omitted). *Section 10/7(1) of the IAA* authorizes the Illinois Attorney General to bring actions to prevent and restrain violations of *§ 3 of the IAA*, and courts are directed to enter such judgment as they consider necessary to remove the effects of any such violations. *740 Ill. Comp. Stat. 10/7(1)*.

D. North Carolina

Under the *North Carolina Unfair or Deceptive Practices Act, N.C. Gen. Stat. § 75-1*, "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal." *N.C. Gen. Stat. § 75-1*. The Attorney General is authorized to investigate "all corporations or persons doing business in this State . . . with the purpose of acquiring such information as may be necessary to enable him to prosecute **[**97]** any such corporation, its agents, officers and employees for crime, or prosecute civil actions against them if he discovers they are liable and should be prosecuted." *N.C. Gen. Stat. § 75-9*.

E. Ohio

The *Ohio Valentine Act, Ohio Rev. Code Ann. § 133*, is "patterned after the *Sherman Antitrust Act*, and as a consequence [Ohio's highest] court has interpreted the statutory language in light of federal judicial construction of the *Sherman Act*." *C. K. & J. K, Inc. v. Fairview Shopping Ctr. Corp., 63 Ohio St. 2d 201, 407 N.E.2d 507, 509 (Ohio 1980)*. "Ohio has long followed federal law in interpreting the Valentine Act." *Johnson v. Microsoft Corp., 106*

Ohio St. 3d 278, 2005- Ohio 4985, 834 N.E.2d 791, 794-95 ***[*629]*** *(Ohio 2005)*. The Ohio Attorney General has a duty to "do all things necessary" to enforce the antitrust laws, by bringing suits for "equitable relief." *O.R.C. § 109.81*.

F. Pennsylvania

To establish a claim under Pennsylvania's common law doctrine against unreasonable restraint of trade, the plaintiff may show that "the illegal bargain tends to create or has for its purpose to create a monopoly in prices or products," or that "competition has in fact been restricted by the monopolistic agreement." *Collins v. Main Line Board of Realtors, 452 Pa. 342, 304 A.2d 493, 496-97 (Pa. 1973)*. The Pennsylvania Supreme Court has applied federal courts' interpretation of the *Sherman Act* to state common law antitrust claims. See id.

G. Virginia

Virginia Code § 59.1-9.5 parallels *§ 1 of the Sherman Act* and provides that "[e]very contract, combination or conspiracy in restraint of trade or commerce of this Commonwealth is unlawful." *Section § 59.1-9.6* parallels *§ 2 of the Sherman Act* **[**98]** and provides that "[e]very conspiracy, combination, or attempt to monopolize, or monopolization of, trade or commerce of this Commonwealth is unlawful." The Virginia Antitrust Act, Va. Code Ann. § 59.1 et seq, requires that the statute "shall be applied and construed to effectuate its general purposes in harmony with judicial interpretation of comparable federal statutory provisions." *Va. Code Ann. § 59.1-9.17*. The Virginia Attorney General may seek "injunctive relief" for violations of the Act. *Virginia Code § 59.1-9.15(a)*.

III. Liability

The Plaintiffs have shown that Shkreli is liable for Vyera's unreasonable restraint of trade and monopolization of the FDA-approved pyrimethamine market in violation of *§§ 1* and *2 of the Sherman Act*. His conduct also violated the competition laws of each of the Plaintiff States.

Shkreli's anticompetitive scheme was made up of two simple but effective sets of vertical restraints.[35] Shkreli does not dispute that it was his intention to impede generic pharmaceutical companies from launching competitive products that would threaten the price of Daraprim. The Plaintiffs have shown that the restraints Vyera implemented succeeded in doing just that.

The two restraints -- restrictive distribution contracts for Daraprim and exclusive supply agreements for pyrimethamine -- exploited **[**99]** features of the FDA approval process for generic drug products by unreasonably and unlawfully restricting the markets for RLD and API. These agreements violated *§ 1 of the Sherman Act*. Through these agreements, Shkreli and Vyera unlawfully and willfully maintained a monopoly in FDA-approved pyrimethamine, which is the relevant market in which Shkreli and Vyera operated their anticompetitive scheme. Vyera maintained that monopoly through anticompetitive conduct and not "from growth or development as a consequence of a superior product, **[*630]** business acumen, or historic accident." *Takeda, 11 F.4th at 137* (citation omitted).

B. The Relevant Market

The analysis under *§§ 1* and *2 of the Sherman Act* relies, as a threshold matter, on the definition of the relevant market. The Plaintiffs have proven that, by any established method, FDA-approved pyrimethamine is the relevant product market and the United States is the relevant geographic market. Shkreli does not dispute that the United States is the relevant geographic market.

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[35] The Plaintiffs proved at trial that separate provisions in Vyera's contracts with Distributors were intended to impede the entry of generic drug companies into the FDA-approved pyrimethamine market by depriving those companies of accurate information about Daraprim sales. Through these data-blocking provisions, Distributors agreed not to provide Daraprim sales data to data aggregators such as IQVIA, Symphony Health, and Wolters Kluwer. Because the absence of this normally available market data did not impede the entry of either Cerovene or Fera, the data-blocking scheme need not be further described. The Cerovene and Fera experiences are central to the calculation of the disgorgement the State Plaintiffs seek.

Apart from a generic equivalent to Daraprim that receives FDA approval, no reasonably interchangeable substitute for Daraprim exists for the treatment of toxoplasmosis. This is true in terms of both the use of Daraprim to treat **[**100]** toxoplasmosis, particularly active toxoplasma encephalitis, as well as the cross-elasticity of demand for FDA-approved pyrimethamine for treatment of that disease.

In terms of its use, Daraprim is the only pharmaceutical to receive an A-I rating in the Guidelines for the treatment of active toxoplasma encephalitis. It has many unique features. Among other qualities, FDA-approved pyrimethamine targets toxoplasmosis specifically, has been successfully used in its treatment for decades, and permits a diagnosis of toxoplasma encephalitis without resort to a biopsy of the brain, which would present significant risks to patients if performed. Because death and/or significant brain damage can occur within hours, its endorsement in the Guidelines assists physicians throughout the United States to treat a highly dangerous infection with confidence, quickly, and successfully.

An analysis of the cross-elasticity of demand for FDA-approved pyrimethamine confirms this definition of the relevant market. Even in response to Vyera's drastic price hike in August 2015, appreciable numbers of physicians and their patients continued to use Daraprim. Vyera was profitably able to keep Daraprim's list price **[**101]** at $750 per tablet and maintain a high average net price for the drug for the four years and seven months that it marketed Daraprim without generic competition. The average net price was very substantially above the competitive price level, whether that level is measured by Daraprim's price in the years before Vyera acquired it, or in the period after its first generic competitor entered the market. As more generic competitors enter the market, of course, the average net price will fall even further.

The high degree of cross-elasticity in demand between Daraprim and FDA-approved generic pyrimethamine is demonstrated as well by the market reaction to Dr. Reddy's March 2020 launch of its first-to-market generic. In the period following that launch, both the price and sales of Daraprim (as well as Vyera's revenue and profits) promptly declined as Dr. Reddy's generic tablet was substituted for Daraprim. Daraprim sales dropped 49% in the nine-month period after March 2020 compared to the same period prior to entry, and Vyera's revenue and gross profits from Daraprim sales declined 59% between 2019 and 2020.

Finally, practical indicia of the relevant market support a finding that it is FDA-approved **[**102]** pyrimethamine. Shkreli and Vyera considered that to be the relevant market, as did Vyera's consultants and those the consultants interviewed. Generic drug companies also assessed the relevant market to be FDA-approved pyrimethamine. There is no evidence that the price hike for Daraprim affected the prices of any other pharmaceutical. Lastly, FDA-approved pyrimethamine is the only FDA-approved drug that specifically targets toxoplasmosis.

[*631] In response to this cascade of evidence that FDA-approved pyrimethamine is the relevant product market, Shkreli argues that drug therapies trimethoprim-sulfamethoxazole ("TMP-SMX") and compounded pyrimethamine are sufficient economic and medical substitutes for Daraprim and that they must be included in the relevant antitrust market. These therapies are not part of the relevant market.

TMP-SMX is a broad-spectrum antibiotic medication approved by the FDA in 1973 and sold under the brand names Bactrim and Septra. TMP-SMX is FDA-approved to treat certain infections, including pneumocystis jirovecii pneumonia ("PCP"). It is also available as a generic. Although TMP-SMX is not FDA-approved to treat toxoplasmosis, a fact that Vyera itself emphasized to the **[**103]** market, it is prescribed in certain circumstances.

TMP-SMX is an effective prophylactic treatment because it has been effective at preventing multiple opportunistic infections that tend to occur together. For example, TMP-SMX is the recommended medication as primary prophylaxis for PCP, and patients at risk for toxoplasma encephalitis but who are not suffering from an acute infection of the brain are also at risk for PCP. These patients are often prescribed TMP-SMX medications to prevent both infections and reduce the "pill burden" for patients. For this reason, TMP-SMX is also effective at the secondary prophylaxis stage, in which the goal is to prevent a relapse in a patient that has recovered from an active infection. TMP-SMX, which may be administered intravenously, is a recommended alternative treatment when a patient is incapable of swallowing pills; pyrimethamine may only be taken orally.

The most difficult stage in treating toxoplasmosis, however, is an active infection. At that point the treatment goal is to medicate the patient within hours of presenting symptoms. A pyrimethamine treatment regimen is the gold standard treatment in the case of an acute infection of toxoplasmosis. **[**104]** Even Vyera's Dr. Salinas viewed TMP-SMX as "medically inferior" because not enough of the drug reaches the brain or the retina (in the case of ocular toxoplasmosis) to treat an infection properly. Studies have shown that TMP-SMX is 25-to 50-times less potent than pyrimethamine. In the Guidelines, TMP-SMX is graded B-I for the treatment of toxoplasma encephalitis and recommended only "if pyrimethamine is unavailable or there is a delay in obtaining it." As a broad-spectrum antibiotic, TMP-SMX also cannot be reliably used to confirm the diagnoses of toxoplasma encephalitis, while pyrimethamine aids in diagnosis because it is targeted to treat toxoplasmosis. Finally, TMP-SMX cannot be taken by patients with a sulfa hypersensitivity or allergy, which constitutes roughly 30-35% of all HIV-positive patients.[36]

The other therapy suggested by Shkreli as a potential substitute for Daraprim is compounded pyrimethamine, which two specialty pharmacies began selling in 2015. Compounding contains no assurance that the end product will deliver the correct amount of the API, and compounded products are not FDA-approved.

[*632] Vyera itself objected to the mass production of compounded drugs as dangerous. On **[**105]** November 30, 2015, Vyera warned the FDA that Imprimis, a compounding pharmacy, intended to mass produce compounded pyrimethamine. Vyera objected that

> [c]ompounded drugs can pose serious health risks to patients. Compounded drugs are not FDA-approved. There is no FDA premarket review. No data and information are required to demonstrate a compounded drug is safe and effective for its intended purposes . . . . Compounding large volumes of drugs without obtaining FDA approval, which Imprimis apparently intends to do, circumvents important public health requirements. As a result, it is not appropriate to use a compounded product in lieu of an FDA approved, commercially available product unless the compounded drug provides a medically necessary and unavailable drug for a specific patient.

Vyera's alarm that compounded pyrimethamine sales might eat into Daraprim sales was unfounded. Despite compounded pyrimethamine capsules being priced at $1 to $5, there were never significant sales of the compounded drug produced by Imprimis. The only way a patient could get Imprimis' compounded pyrimethamine product was with a specific prescription for that product, which did not permit en masse market substitution. **[**106]** Imprimis sold fewer than 22,000 compounded pyrimethamine capsules in 2016, and its sales declined thereafter. Avella, another compounding pharmacy, sold a total of 1,280 compounded pyrimethamine capsules, with no sales after 2018 due to a lack of customers.

Shkreli has pointed out that demand for Daraprim, represented by sales volume, dropped precipitously immediately after the 2015 price hike. The defendant suggests that consumers must have substituted alternative therapies for Daraprim. None of the parties have offered comparative data regarding TMP-SMX to support or contradict that hypothesis. It would be difficult to draw any conclusions from TMP-SMX data in any event because it is a broad-spectrum antibiotic prescribed for multiple infectious diseases. Sales of mass-production compounded pyrimethamine during the period of Vyera's sale of Daraprim were minimal at best. What can be said with certainty is that the market for FDA-approved pyrimethamine was sufficiently bound that Vyera was able to raise Daraprim's price to never before seen heights and earn record revenues and profits after doing so.

The practical indicia enumerated in *Brown Shoe* and the other evidence described above strongly **[**107]** support the conclusion that doctors and pharmaceutical buyers did not react to the astronomical rise in Daraprim's price by freely switching to other, cheaper drugs to treat toxoplasmosis. The demand for FDA-approved pyrimethamine remained relatively stable at approximately 250,000 tablets per year between 2016 and 2019 after the initial drop in

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[36] Although Shkreli made no developed argument regarding this third alternative treatment, Shkreli suggests that atovaquone was another therapeutic alternative to Daraprim for the treatment of toxoplasmosis. Atovaquone is an FDA-approved antimicrobial drug for treatment of PCP and is prescribed for patients who cannot tolerate TMP-SMX. The Guidelines give atovaquone a C-III grade for primary prophylaxis of toxoplasmosis and a B-II grade as an alternative treatment for active toxoplasma encephalitis. Shkreli has not shown that atovaquone was either therapeutically or economically substitutable with Daraprim.

sales in 2015. If there had been any material cross-price elasticity between Daraprim and other products at the time of the 4,000% price hike in 2015, purchasers would have abandoned Daraprim in favor of cheaper products on the market. And if alternative toxoplasmosis treatments had been constraining the price of Daraprim before March 2020, generic entry would not have resulted in the significant drop in the price for FDA-approved pyrimethamine that occurred.

In sum, as a result of its distinctive attributes, FDA-approved pyrimethamine constitutes the relevant market. It treats a distinct patient population; in economic terms, it has a distinct kind of customer.

[*633] C. Monopoly Power

Having defined the relevant market, the conclusion that Vyera had a monopoly in that market follows easily. Vyera controlled 100% of the market for FDA-approved pyrimethamine **[**108]** market between August 2015 and March 2020. Shkreli controlled the price of Daraprim, which he acquired precisely because it was a sole-source drug in a market of its own. Vyera profitably charged a per-tablet average net price for Daraprim ranging between $228 and $305 during the full years of 2016, 2017, 2018, and 2019. These prices were also substantially above any competitive price level, which was at most $160.[37]

D. Anticompetitive Conduct

The Plaintiffs have met their burden under *§ 1 of the Sherman Act* of showing that the contracts at issue here were an unreasonable restraint on trade and had an adverse effect on competition. In response, Shkreli has not shown that the contracts had procompetitive benefits.

Shkreli does not dispute that he intended to block generic competition to Daraprim and strove to do so for as long as possible. Each of the API supply agreements and the restrictive distribution agreements was entered in service of that strategy. Similarly, Vyera's continued monopolistic control of the FDA-approved pyrimethamine market did not occur by accident and self-evidently harmed competition. Shkreli raised the price of Daraprim by 4,000%. Over more than four years, the average net price **[**109]** of a single Daraprim tablet remained hundreds of dollars. Its price did not meaningfully decline until Dr. Reddy's generic pyrimethamine penetrated the market barriers Vyera had erected.

a. Distribution Contracts

Vyera's restrictions in its distribution contracts substantially delayed generic pharmaceutical companies from acquiring sufficient RLD to conduct BE testing and receive FDA approval of their ANDAs. Those restrictions included class of trade restrictions and caps on the number of bottles that could be sold to a customer. Vyera drastically reduced the number of customers to which its distributors were authorized to sell. Vyera monitored distributors' sales closely to ensure there was no leakage. It repurchased inventory and conducted audits to learn where every bottle of Daraprim was heading. Vyera's Mulleady even went to a parking lot in New Jersey to buy back five bottles of Daraprim, paying twice the purchase price, to prevent those bottles from going to a generic pharmaceutical company.

This extraordinarily tight control of the supply of Daraprim had its intended effect. It actually delayed the entry of generic pharmaceutical companies.

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[37] To arrive at a figure of $160, the Plaintiffs' economic expert Hemphill observed the average net price of Daraprim, Dr. Reddy's generic pyrimethamine, and the Vyera AG tablet for a sustained period after Dr. Reddy's generic pyrimethamine entered the market. The real-world evidence of Daraprim's price, volume, and market share after Dr. Reddy's entry in March 2020 starkly demonstrates not only that Vyera had a monopoly over Daraprim, but also that the high price maintained in that monopoly depended entirely on the absence of competition.

Vyera paid a sizeable premium to its **[**110]** downstream partners to keep Daraprim RLD out of the hands of its competitors. Those partners agreed to and enforced the resale restrictions, and in doing so benefitted significantly. They profited handsomely with each sale so long as Daraprim's price remained inflated.

All of Shkreli's purportedly procompetitive justifications for these distribution agreements are pretextual. He has argued **[*634]** that putting Daraprim in specialty distribution benefitted patients by giving them access to services that specialty pharmacies can provide. These purported benefits include advice on defraying the high cost of the drug, assistance in getting insurance coverage, and help reducing and monitoring adverse effects.

Shkreli offered no evidence, however, that patients were assisted in any of these ways. Patients didn't need help figuring out how to pay for Daraprim, of course, until Shkreli raised its price to a scandalous level and put his anticompetitive scheme in place to protect that price. And there is no evidence that FDA-approved pyrimethamine has any serious side effects, much less side effects that could be or were addressed by any specialty pharmacy. Specialty pharmacies and closed distribution **[**111]** are tailor-made for the administration and monitoring of drugs that have an altogether different profile from that of Daraprim. For decades Daraprim was administered safely and without problems through open distribution, and both Dr. Reddy's and Vyera's own generic entrant, the Vyera AG, returned to the open distribution model. In sum, Shkreli has failed to justify his choice of a closed distribution system. It was designed and used solely to restrict competition.

b. Exclusive Supply Agreements

Vyera's agreements with Fukuzyu and RL Fine closed off access to the two most viable suppliers of pyrimethamine for years. Vyera's exclusive supply agreements achieved their intended effect and delayed the entry of generic pyrimethamine into the market.

While the pyrimethamine manufacturing process is relatively simple, it still takes time and money to design the process, set it up, and test it. Shut out of access to Fukuzyu's and then RL Fine's API, Fera, Cerovene, and InvaTech were required to undertake a time-consuming and costly journey to develop alternative API manufacturers. Other than a desire to block competition, there was no reason to tie either Fukuzyu or RL Fine to exclusive supply **[**112]** agreements.

Fukuzyu had provided pyrimethamine for Daraprim in the United States without any exclusive supply agreement, and at times without any supply agreement at all, to Vyera's predecessors. Shkreli decided to change that. After months of courting, Vyera and Fukuzyu entered into an exclusive supply agreement in January 2017. In October 2016, the same month that Vyera's science executives visited Fukuzyu in Japan, Fukuzyu upset Cerovene's plans and refused to supply it with pyrimethamine. In September of 2017, Fukuzyu refused to supply Fera with pyrimethamine in a message that repeated, word-for-word, the restrictions against human use in the United States that Vyera's Pelliccione relayed to Fukuzyu.

Vyera's agreement with RL Fine had a similarly anticompetitive purpose and effect. Vyera had no need for any agreement at all with RL Fine. Learning that generic competitors were working with RL Fine to obtain pyrimethamine, however, Vyera entered into an exclusive supply agreement with RL Fine on December 17, 2017. Vyera's pursuit of this agreement had the immediate effect of disrupting and delaying Cerovene's and InvaTech's ANDA approval process. Vyera paid millions of dollars to RL **[**113]** Fine for the sole purpose of blocking its rivals from access to RL Fine's pyrimethamine. The Phoenixus Board Minutes of December 2017 justified the expense in these very terms. Witness after witness from Vyera has confirmed as much.

The impact on competitors was immediate. In November 2016, Cerovene had entered a five-year exclusive supply agreement with RL Fine. In the months that **[*635]** followed, Cerovene invested heavily first to support RL Fine filing a DMF and then, switching its plans, to support Cerovene itself incorporating the RL Fine manufacturing information and data within its own ANDA. Cerovene amended its ANDA in April 2017 to list RL Fine as its API supplier. But, on November 30, 2017 -- five days after Vyera and RL Fine reached an agreement in principle -- RL Fine reneged on its contract with Cerovene and refused to supply pyrimethamine or cooperate further on a Cerovene pyrimethamine ANDA. RL Fine stopped cooperating as well with InvaTech in the Fall of 2017, preventing

InvaTech from responding to the FDA's questions about RL Fine's API and requiring InvaTech to begin from scratch and develop a new supplier.

Shkreli's attempt to justify the exclusivity provisions in these two **[**114]** agreements fail. He relies on the following procompetitive justifications: that the agreements ensured a steady supply of pyrimethamine and, in the case of Fukuzyu, promoted a long-term business relationship. Shkreli contends that the exclusivity clauses thus mitigated Vyera's supply risk. Neither contract did so.

Shkreli has offered no evidence that any manufacturer of Daraprim had ever been unable to obtain pyrimethamine from Fukuzyu. Moreover, Vyera's contract with Fukuzyu contained no provision that protected it against the risk that Fukuzyu might be unable to supply Vyera with FDA-approved pyrimethamine. For example, it contained no provision requiring Fukuzyu to maintain cGMPs-compliant facilities, to ensure the purity of its API, or to keep an active DMF. It did not even require Fukuzyu to fill Vyera's orders for pyrimethamine. There is nothing in the agreement that prevented Fukuzyu from selling its entire inventory of pyrimethamine to others for use outside the United States or for the treatment of animals in the United States.

There are standard provisions that protect against the risk of a loss of supply. Those provisions were absent in the Vyera contracts, but tellingly, **[**115]** were present in the GSK contract with Fukuzyu. Those provisions include clauses addressed to the forecasting of requirements, customer priority, reserve capacity, and firm order dates.

Moreover, while it may be common for companies to enter into exclusive supply agreements with API manufacturers when a company has invested time and money with that manufacturer to develop a new API manufacturing process, there was no such justification here. Fukuzyu already had a DMF on file and had been supplying pyrimethamine for Daraprim for decades.

Shkreli suggests that its contract with Fukuzyu was motivated by a desire to build a long-term relationship for future toxoplasmosis products. Dr. Salinas testified that Vyera has even filed INDs for some of these nascent projects. While Vyera may have used its promise of future projects to entice Fukuzyu during the contract negotiations, Shkreli has failed to explain the relevance of those projects to his desire to include a pyrimethamine exclusivity clause in the contract. The exclusivity clause had only one purpose, to eliminate competition with Daraprim.

Shkreli's justification for the RL Fine contract fails entirely. Shkreli asserts that it is common **[**116]** in the pharmaceutical industry to have a backup supplier. But, Vyera has failed to offer any evidence that either Vyera or any of its predecessors ever needed a backup supplier of pyrimethamine. Vyera didn't even pursue a contract with RL Fine until it learned that RL Fine was going to supply generic drug companies with pyrimethamine.

[*636] Moreover, Vyera's contract with RL Fine did not ensure that RL Fine could operate as a backup supplier if Vyera ever needed it to do so. The contract did not require RL Fine to file a DMF and RL Fine never did. Nor did the contract require RL Fine to do anything to support Vyera if Vyera amended Daraprim's NDA to include RL Fine's manufacturing process. Instead, during the life of the contract, Vyera paid RL Fine almost $9.5 million to do nothing except stop cooperating with Vyera's competitors. To put this outlay in perspective, through March 2019, Vyera spent only $500,000 buying pyrimethamine from Fukuzyu.

Finally, Shkreli highlights the fact that the exclusive supply agreements were not executed until a date after each supplier refused to supply each generic company. Sophisticated contracts are not executed on the same day they are negotiated. The evidence **[**117]** is overwhelming that Fukuzyu and RL Fine stopped cooperating with generic drug companies who wanted to enter the U.S. market because they were negotiating exclusive supply contracts with Vyera that they considered to be more attractive. The incentives that Vyera offered to RL Fine were so enticing that it even stopped performing on its five-year contract with Cerovene.

c. Degree of Burden on Generic Competitors

Finally, Shkreli argues that the plaintiffs failed to establish that the contracts had a substantial anticompetitive effect in the relevant market. Relying on *Ohio v. American Express Co., 138 S. Ct. 2274, 2284, 201 L. Ed. 2d 678 (2018)* ("*American Express*"), he emphasizes that it is the Plaintiffs' burden to show a "substantial" anticompetitive effect from his activities and that they have failed to do so. Shkreli contends that, whatever his intent may have been, the generic manufacturers made a series of bad business decisions and were unwilling to spend the money necessary to enter the market faster. Shkreli principally points to occasions on which Fera or Cerovene did not accept an offer by an RLD supplier to find more bottles of Daraprim for them.

Shkreli did not actually prove at trial that RLD suppliers were able to acquire more bottles of Daraprim for generic pharmaceutical **[**118]** companies after Vyera set up its closed distribution system. To the contrary, RLD suppliers struggled to fill orders for Daraprim. And, when Reliant used its personal connection to a pharmacy to circumvent Vyera's closed distribution system and succeeded in obtaining five bottles of Daraprim, Mulleady rushed to buy those bottles back and paid twice their purchase price to do so.

Shkreli similarly argues that Vyera's competitors foolishly pursued doomed requests to the FDA to modify BE testing requirements, and in doing so lost precious time waiting for waivers that never came. He argues that it was their flawed tactics and not his restrictive agreements that were responsible for the delays that occurred here. He is wrong.

The Plaintiffs proved that Shkreli's actions had a very substantial impact on competition. Under *§ 1*, the Plaintiffs may show the existence of anticompetitive effects from restraints on trade through direct evidence of increased prices in the relevant market, which they have done. See *1-800 Contacts, 1 F.4th at 118*. Under the rule of reason test, the Plaintiffs have the burden of showing an "actual adverse effect on competition as a whole in the relevant market." *Id. at 114*. Under *§ 2*, the Plaintiffs must show **[**119]** that Shkreli's improper conduct "has or is likely to have the effect of controlling prices or excluding competition." *Takeda, 11 F.4th at 137* (citation omitted). The Plaintiffs **[*637]** have more than carried each of these burdens.

Shkreli's reliance on *American Express* is misplaced. The holding in that case turned on whether the plaintiffs' direct evidence of price increases on just one side of the two-sided credit card transaction market demonstrated any anticompetitive effect at all. *American Express, 138 S. Ct. at 2287*.

More importantly, *American Express*' unremarkable statement of the law did not revise the longstanding rule of reason test in antitrust cases. As the Supreme Court has explained, the rule of reason steps

> do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis. . . . [W]hat is required to assess whether a challenged restraint harms competition can vary depending on the circumstances. The whole point of the rule of reason is to furnish an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint to ensure that it unduly harms competition before a court declares it unlawful.

Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2160, 210 L. Ed. 2d 314 (2021) (citation omitted). Even under Shkreli's rigid view of the law, Shkreli's Daraprim scheme substantially impacted **[**120]** competition in the market for FDA-approved pyrimethamine.

Generic drug companies need not undertake herculean efforts to overcome significant anticompetitive barriers specifically erected to prevent their entry into a market. It bears repeating that "generics need not be barred from all means of distribution if they are barred from the cost-efficient ones." *Actavis PLC, 787 F.3d at 656* (citation omitted). "The test is not total foreclosure, but rather whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." Id. While exclusive supply and restrictive distribution agreements are not inherently unlawful, here their sole purpose and effect was to foreclose generic pharmaceutical companies from acquiring the API and RLD that would have otherwise been readily available to them in the ordinary course and that were critical to their efforts to compete with Vyera.

E. Shkreli is Individually Liable

An individual may be held liable under the *Sherman Act* to the extent that the individual has "participated in violations of" the antitrust laws, such as by "negotiating, voting for[,] or executing agreements which constituted steps in the progress of the conspiracy." *Hartford-Empire Co. v. United States, 323 U.S. 386, 407, 65 S. Ct. 373, 89 L. Ed. 322, 1945 Dec. Comm'r Pat. 607 (1945)*; see also *Lorain Journal Co. v. United States, 342 U.S. 143, 145* *n.2, 72 S. Ct. 181, 96 L. Ed. 162 (1951)* (officers **[**121]** and directors "participated in the conduct alleged to constitute the attempt to monopolize").

Shkreli is liable for the violations of *§§ 1* and *2 of the Sherman Act* and the parallel violations of state law. Shkreli conceived of, implemented, maintained, and controlled Vyera's anticompetitive and monopolistic scheme. His control continued after he stepped down as Vyera's CEO and even after he entered federal prison. As the company's largest shareholder, he freely changed its management and directed its policy.

Shkreli pioneered Vyera's business model at Retrophin and brought many of Retrophin's employees with him to replicate the "classic closed distribution play" at Vyera. Shkreli frankly and repeatedly acknowledged that his goal was to delay entry of a generic competitor with Daraprim for at least three years. He then planned, managed, and controlled the execution of his scheme. He erected and policed **[*638]** barriers around the FDA-approved pyrimethamine market in order to maintain a monopoly price for Daraprim.

Shkreli emphasizes that he did not sign any of the contracts at issue. The absence of his signature from a document does not immunize him from antitrust liability.

Shkreli argues that after December **[**122]** 2015 he was no longer a Vyera executive and that his ability to influence Vyera's operations was severely restricted after he was imprisoned in September 2017. The Plaintiffs have shown that Vyera remained under Shkreli's control throughout the years it maintained its monopoly on FDA-approved Daraprim. Even when incarcerated, Shkreli managed to direct its policies and choose Vyera's executives. Whether he used a smuggled phone or the prison's authorized phones, he stayed in touch with Vyera's management and exercised his power over Vyera as its largest shareholder.

IV. Remedies

The Plaintiffs seek injunctive relief and the State Plaintiffs seek disgorgement. They have shown that Shkreli should be banned for life from the pharmaceutical industry and required to pay $64.6 million in disgorgement.

A. Injunctive Relief

Section 13(b) of the FTC Act authorizes the FTC to pursue permanent injunctive relief in federal court only "in proper cases . . . and after proper proof." *15 U.S.C. § 53(b)*. Plaintiffs must prove an ongoing or likely future violation of the antitrust laws and that injunctive relief will not only remedy that violation but also "be in the interest of the public." Id. *§ 53(b)(1)-(2)*.

A permanent injunction is **[**123]** appropriate where a plaintiff shows that

> there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. . . . To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations.

United States v. W.T. Grant Co., 345 U.S. 629, 633, 73 S. Ct. 894, 97 L. Ed. 1303 (1953) (*Clayton Act*).

To assess the likelihood of recurrence, courts consider

> the fact that defendant has been found liable for illegal conduct; the degree of scienter involved; whether the infraction is an "isolated occurrence;" whether defendant continues to maintain that his past conduct was blameless; and whether, because of his professional occupation, the defendant might be in a position where future violations could be anticipated.

Sec. & Exch. Comm'n v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 100 (2d Cir. 1978).

In assessing whether to issue injunctive relief, a court balances the equities and considers the public interest. *E.E.O.C. v. KarenKim, Inc., 698 F.3d 92, 100 (2d Cir. 2012)*. "A Government plaintiff, unlike a private plaintiff, must seek to obtain relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm." *Apple, 791 F.3d at 339* (quoting *F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S.*

155, 170, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)). "The district court has large discretion to model its judgments to fit the exigencies of the particular case **[**124]** and all doubts about the remedy are to be resolved in the Government's favor." Id. (quoting *E. I. du Pont de Nemours & Co., 366 U.S. at 334*).

In New York, pursuant to the Donnelly Act, the Attorney General may seek and obtain an order on behalf of the **[*639]** State "to restrain and prevent the doing in this state of any act herein declared to be illegal, or any act in, toward or for the making or consummation of any contract, agreement, arrangement or combination herein prohibited." *N.Y. Gen. Bus. Law § 342*. Pursuant to *§ 63(12)* of the Executive Law, New York may seek "an order enjoining the continuance of [illegal or fraudulent] business activity or of any fraudulent or illegal acts." *N.Y. Exec. Law § 63(12)*. Upon finding a violation under *Executive Law § 63(12)*, a court may exercise its discretion to issue a permanent and plenary ban in a particular industry. See, e.g., *People v. Imported Quality Guard Dogs, Inc., 88 A.D.3d 800, 930 N.Y.S.2d 906, 907 (2nd Dep't 2011)* (permanently enjoining the appellant "from selling, breeding, or training dogs, or advertising or soliciting the sale, breeding, or training of dogs").

The Plaintiffs seek a lifetime ban against Shkreli participating in the pharmaceutical industry.[38] Banning an individual from an entire industry and limiting his future capacity to make a living in that field is a serious remedy and must be done with care and only if equity demands. Shkreli's egregious, **[**125]** deliberate, repetitive, long-running, and ultimately dangerous illegal conduct warrants imposition of an injunction of this scope.

The Plaintiffs presented a wealth of evidence that Shkreli conducted a comprehensive scheme that violated the antitrust laws of the United States and the competition laws of the seven States. The FTC and the States are empowered by federal and State law to seek comprehensive equitable relief. The Plaintiffs have demonstrated that a lifetime ban against Shkreli's future participation in the pharmaceutical industry will protect the public from suffering a repetition of the unlawful schemes proven in this case.

Without a lifetime ban, there is a real danger that Shkreli will engage in anticompetitive conduct within the pharmaceutical industry again. Shkreli established two companies, Retrophin and Vyera, with the same anticompetitive business model: Acquiring sole-source drugs for rare diseases so that he could profit from a monopolist scheme on the backs of a dependent population of pharmaceutical distributors, healthcare providers, and the patients who needed the drugs. The Daraprim scheme was particularly heartless and coercive. Daraprim must be administered **[**126]** within hours to those suffering from active toxoplasma encephalitis.

Moreover, in the face of public opprobrium, Shkreli doubled down. He refused to change course and proclaimed that he should have raised Daraprim's price higher.

The context in which Shkreli conducted his schemes cannot be ignored. He cynically took advantage of the requirements of a federal regulatory scheme designed to protect the health of a nation by ensuring that its population has access to drugs that are not only effective but also safe. He recklessly disregarded the health of a particularly vulnerable population, those with compromised immune systems. His scheme burdened those patients, their loved ones, and their healthcare providers.

A lifetime ban would not deprive Shkreli of the opportunity to practice a profession or to exercise a lawful skill for which he trained. In his trial testimony Shkreli does not even express a clear desire to return to the pharmaceutical industry. He reports that he is considering pursuing opportunities **[*640]** "within and outside" the pharmaceutical industry upon his release from prison.

The risk of a recurrence here is real. Shkreli has not expressed remorse or any awareness that his actions **[**127]** violated the law. While he takes full responsibility in his direct testimony for the increase of Daraprim's price from $17.50 to $750 per pill, he denies responsibility for virtually anything else. He argues in his testimony that he is not responsible for Vyera's anticompetitive contracts because he did not negotiate or sign the exclusive supply agreements or the restrictive distribution agreements. He has also denied that what happened here was egregious,

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[38] In their memorandum, filed with the Pretrial Order, the Plaintiffs requested that Shkreli be banned for twenty years from the pharmaceutical industry.

arguing that the Plaintiffs have not proven that any patient died due to the price he set for Daraprim. He chose to not even attend the trial.

Shkreli presents several legal arguments against a lifetime industry ban. He contends that it amounts to a penalty beyond the proper scope of a court's power in equity. He argues that an industry ban is uncommon and reserved only for the most egregious cases and for cases of fraud. He argues that a ban of this scope is not narrowly tailored to match the challenged conduct. For the reasons laid out above, these arguments are unavailing. This is an egregious case; death is not the only relevant metric. If a court sitting in equity is powerless to impose a lifetime industry ban to protect the **[**128]** public against a repetition of the conduct proven at this trial, then the public could rightfully ask whether its wellbeing has been adequately weighed.

Shkreli appears to suggest that any injunction could be limited to banning him from acquiring commercial assets or engaging in the "day-to-day affairs of commercializing medicine." There is no reason to believe that a narrowly crafted injunction will succeed in providing adequate protection against a repetition of illegal conduct. Shkreli has demonstrated that he can and will adapt to restrictions. With help at times from a contraband phone, Shkreli managed to control his company even from federal prison.

Shkreli's anticompetitive conduct at the expense of the public health was flagrant and reckless. He is unrepentant. Barring him from the opportunity to repeat that conduct is nothing if not in the interest of justice. "If not now, when?" Mishnah, Pirkei Avot 1:14.

B. Disgorgement

The State Plaintiffs seek disgorgement in the amount of $64.6 million to return to victims nationwide.[39] Disgorgement is "a remedy tethered to a wrongdoer's net unlawful profits" and "has been a mainstay of equity courts." *Liu v. Sec. & Exch. Comm'n, 140 S. Ct. 1936, 1943, 207 L. Ed. 2d 401 (2020)*. "The district court has broad discretion **[**129]** not only in determining whether or not to order disgorgement but also in calculating the amount to be disgorged." *S.E.C. v. First Jersey Sec., Inc., 101 F.3d 1450, 1474-75 (2d Cir. 1996)* (federal securities laws violations). "The amount of disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation. . . . So long as the measure of disgorgement is reasonable, any risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." *S.E.C. v. Razmilovic, 738 F.3d 14, 31 (2d Cir. 2013)*, as amended (Nov. 26, 2013).

The Second Circuit has "adopted a two-step burden-shifting framework for calculating equitable monetary relief. That framework requires a court to look first to the [plaintiff] to show that its calculations **[*641]** reasonably approximated the amount of the defendants' unjust gains and then shift the burden to the defendants to show that those figures were inaccurate." *Fed. Trade Comm'n v. Moses, 913 F.3d 297, 310 (2d Cir. 2019)* (citation omitted).

New York Executive Law § 63(12) empowers the New York Attorney General to disgorge unlawfully gained profits wherever they were derived. *Vyera, 2021 U.S. Dist. LEXIS 183303, 2021 WL 4392481, at *4*. Contrary to Shkreli's contention, there is no legal distinction between equitable monetary remedies available for fraudulent conduct and other illegal conduct occurring in the State of New York. The Plaintiffs have shown that the anticompetitive **[**130]** conduct in this case is at least as egregious in terms of its willfulness and harm to victims as the frauds typically subject to this equitable remedy under *§ 63(12)*.

The excess profits that Vyera gained from its sales of Daraprim amount, conservatively, to $64.6 million and must be disgorged to the States, subject to a set-off of any amount paid by the settling defendants. Shkreli is liable for this relief.

In arriving at this amount, a threshold determination is the hypothetical date or dates on which generic drug companies would have entered the market but-for Vyera's anticompetitive conduct. Here, the evidence is

[39] The FTC is precluded from seeking disgorgement. *Vyera, 2021 U.S. Dist. LEXIS 183303, 2021 WL 4392481, at *2*.

sufficiently robust to select those dates for two competitors, Cerovene and Fera. The record is insufficiently developed regarding the three other competitors who have entered or tried to enter the market.

a. Cerovene and Dr. Reddy's Hypothetical Entry Date

Cerovene's president Shah estimates that his company's FDA-approved generic pyrimethamine tablet, which entered the market in March of 2020, would have entered the market in September of 2017 if Cerovene had had unfettered access to Fukuzyu's API and the RLD. This is a thirty-month delay. This estimate was unchallenged at trial. **[**131]**

Plaintiff's economic expert Hemphill calculated Vyera's excess profits using two alternative hypothetical entry dates for Cerovene: October 2018 and December 2018. The October 2018 entry date is an extremely conservative date on which to base the calculations, and is adopted for the calculation of excess profits. The difference between October 2018 and March 2020 represents an eighteen-month delay.

b. Fera's Hypothetical Entry Date

Fera's DellaFera estimates that his FDA-approved pyrimethamine tablet, which entered the market soon after it received FDA approval in July of 2021, would have entered the market in August of 2019 if Fera had unfettered access to Fukuzyu's API and to the RLD. This is a delay of roughly twenty-four months. His estimate was unchallenged at trial.

Hemphill calculated Vyera's excess profits on the assumption that Fera's generic drug would have entered the market in October 2019, representing a twenty-three month delay. The October 2019 date is a conservative estimate and is adopted for the calculation of excess profits.

c. Vyera's Excess Profits

Hemphill's model for calculating these counterfactual profits involves four steps. First, he calculated Daraprim's actual **[**132]** revenue from October 2018 to December 2020. Conservatively, it was $130.6 million.

Next, he calculated Vyera's revenue in the but-for world during that same period under a number of conditions, including different generic entry dates, the numbers of generic competitors, and the effect from Vyera launching its own authorized generic earlier. Those calculations based on the October 2018 entry date for Cerovene's drug and the October 2019 entry date for **[*642]** Fera's drug are the relevant calculations here.

Third, using simple arithmetic, Hemphill calculated the difference between Vyera's actual profit and its profits in the but-for world in which competitive entry was not impeded by Vyera's conduct. Hemphill determined that, but-for Vyera's illegal conduct, it would have earned $67.6 million less in Daraprim revenue during that period.

Finally, taking into account that in the counterfactual world Vyera's incremental costs would have been lower because it would be selling less Daraprim, Hemphill deducted an estimated $3 million in costs that Vyera would have avoided. This four-step process yields a conservative estimate of $64.6 million in excess profits.

Shkreli has offered no different calculation **[**133]** of excess profits, including any opposing calculation based on later generic entry dates or competing assumptions. Accordingly, the Plaintiff States' calculation of $64.6 million in excess profits from the sale of Daraprim is adopted.

C. Shkreli's Liability for Vyera's Excess Profits

Disgorgement may be imposed against multiple defendants so long as the order is consistent **[*643]** with equitable principles. See *Liu, 140 S. Ct. at 1949* (remanding to the Ninth Circuit to determine whether "circumstances would render a joint-and-several disgorgement order unjust"). Joint and several liability for disgorgement is properly imposed when multiple defendants have collaborated in an illegal scheme. *S.E.C. v. Pentagon Cap. Mgmt. PLC, 725 F.3d 279, 288 (2d Cir. 2013)*. In *First Jersey*, an individual defendant was required to disgorge net profits accruing to his company where he was "primarily liable" for the fraud that created these profits, was "intimately involved" in the perpetration of the fraud, and was a "controlling person" of the company. *101 F.3d at 1475* (citation omitted).

Shkreli was the prime mover in this anticompetitive scheme. It was his brainchild and he drove it each step of the way. As Vyera's founder and its largest shareholder, any excess profit gained from Shkreli's scheme directly benefited him. Shkreli **[**134]** explains in his direct testimony that he took the actions he did at Vyera based on his belief that the "entry of a generic alternative to Daraprim . . . would have a significant effect on my investment in the company." Liability for the sum of equitable monetary relief determined in this Opinion is, therefore, properly imposed against him.

The sum owed by Shkreli will be reduced by any monies paid by the settling defendants. A settlement payment may properly "be taken into account by the court in calculating the amount to be disgorged." Id.

Shkreli argues that, following the Supreme Court's decision in *Liu*, he may no longer be held jointly and severally responsible for Vyera's excess profits. Shkreli relies on *Liu*'s statement that allowing joint and several liability alongside the remedy of disgorgement "runs against the rule to not impose joint liability in favor of holding defendants liable to account for such profits only as have accrued to themselves." *Liu, 140 S. Ct. at 1945* (citation omitted). According to Shkreli, the amount of disgorgement he may be ordered to pay is limited to any profits he actually took from the scheme, and the Plaintiffs have failed to show that Shkreli personally profited at all.

Liu did **[**135]** not categorically reject a disgorgement order imposed against multiple parties. *Liu* in fact held that joint and several liability for disgorgement orders is permissible as long as they are consistent with equitable principles. *Id. at 1949*. The Supreme Court specifically noted that, since the common law permitted "liability for partners engaged in concerted wrongdoing . . . [t]he historic profits remedy thus allows some flexibility to impose collective liability." Id.

In this case, imposition of a disgorgement order against Shkreli serves the interests of justice, for all the reasons explained above. Shkreli was no side player in, or a "remote, unrelated" beneficiary of, Vyera's scheme. See id. He was the mastermind of its illegal conduct and the person principally responsible for it throughout the years.

Conclusion

Shkreli is liable on each on the claims presented in this action. An injunction shall issue banning him for life from participating in the pharmaceutical industry in any capacity. He is ordered to pay the Plaintiff States $64.6 million in disgorgement.

Dated: New York, New York

January 14, 2022

/s/ Denise Cote

DENISE COTE

United States District Judge

[Klein v. Facebook, Inc.](#)

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

January 14, 2022, Decided; January 14, 2022, Filed

Case No. 20-CV-08570-LHK

Reporter
580 F. Supp. 3d 743 *; 2022 U.S. Dist. LEXIS 8081 **; 2022 WL 141561

MAXIMILIAN KLEIN, et al., Plaintiffs, v. FACEBOOK, INC., Defendant.

Prior History: *Klein v. Facebook, Inc., 2021 U.S. Dist. LEXIS 105516 (N.D. Cal., June 3, 2021)*

Core Terms

Facebook, Advertisers, Consumers, users, network, media, developers, Acquire, online, allegations, gaming, mobile, competitors, Kill, products, interchangeable, Markets, privacy, data privacy, Platform, third party, antitrust, false representation, friends, motion to dismiss, anticompetitive, prices, monopoly power, acquisition, sharing

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Judges: LUCY H. KOH, United States Circuit Judge[*].

Opinion by: LUCY H. KOH

Opinion

[*759] ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS WITH LEAVE TO AMEND

Re: Dkt. No. 97

Plaintiffs Maximilian Klein; Sarah Grabert; and Rachel Banks Kupcho (collectively, "Consumers") **[**8]** and Affilious, Inc.; Jessyca Frederick; Mark Young; Joshua Jeon; 406 Property Services, PLLC; Mark Berney; Jessica Layser; Katherine Looper; and Zahara Mossman (collectively, "Advertisers") individually and on behalf of all others similarly situated, sue Defendant Facebook, Inc. ("Facebook").

Before the Court is Facebook's motion to dismiss the Consolidated Consumer Class Action Complaint and the Consolidated Advertiser Class Action Complaint. ECF No. 97. Having considered the parties' submissions, the parties' arguments at the hearing, the relevant law, and the record in this case, the Court GRANTS IN PART and DENIES IN PART Facebook's motion to dismiss with leave to amend.

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[*760] I. PROCEDURAL HISTORY

On December 3, 2020, Plaintiffs Klein and Grabert filed an initial complaint against Defendant Facebook. ECF No. 1. Subsequently, 11 other antitrust cases were filed by consumers and advertisers against Facebook. On February 9, 2021, the Court: (1) granted motions to relate *Sherman v. Facebook, Kupcho v. Facebook, Dames v. Facebook, Steinberg v. Facebook, Layser v. Facebook*, and *Rosenman v. Facebook* to the instant case; (2) concluded that *Affilious v. Facebook* was related to the instant case; and (3) consolidated these cases with the instant case. ECF No. 47. On February 11, 2021, Plaintiff Rosenman voluntarily dismissed her case. *Facebook v. Rosenman*, No. 21-CV-00336-LHK, ECF No. 17.

On February 25, 2021, the Court granted motions to relate *Kovacevich v. Facebook* and *Garvin v. Facebook* to the instant case and consolidated these cases with the instant case. ECF No. 50. On March 16, 2021, the Court granted a motion to relate *Wasvary v. Facebook* to the instant case and consolidated it with the instant case. ECF **[**11]** No. 68. On April 9, 2021, the Court granted a motion to relate *Ryan v. Facebook* to the instant case and consolidated that case with the instant case. ECF No. 85.

After voluntarily dismissing her federal case on February 11, 2021, Plaintiff Rosenman refiled her case in state court, and Facebook removed the refiled case to federal court. *See Rosenman v. Facebook*, No. 21-CV-2108, ECF No. 1. On April 9, 2021, the Court related the refiled *Rosenman Case* to the instant case. ECF No. 85. On April 26, 2021, Rosenman filed a motion to remand, which the Court denied on August 27, 2021. *Rosenman v. Facebook*, No. 21-CV-02108-LHK, ECF Nos. 17, 26.

On March 18, 2021, the Court held a hearing on motions for appointment as interim class counsel. ECF No. 77. That same day, the Court appointed Stephen A. Swedlow of Quinn Emanuel Urquhart & Sullivan, LLP and Shana A. Scarlett of Hagens Berman Sobol Shapiro LLP as Interim Class Counsel for the Consumer class ("Consumers") and appointed Warren Postman of Keller Lenkner and Brian D. Clark of Lockridge Grindal Nauen P.L.L.P. to serve on Plaintiffs' Executive Committee for Consumers. ECF No. 73.

On March 18, 2021, the Court appointed Yavar Bataee of Bathaee **[**12]** Dunne LLP and Kristen M. Anderson of Scott + Scott LLP as Interim Class Counsel for the Advertiser class ("Advertisers") and appointed Tina Wolfson of Ahdoot & Wolfson, PC and Keith J. Verrier of Levin Sedran & Berman LLP to serve on Plaintiffs' Executive Committee for Advertisers. *Id.*

[*761] On April 22, 2021, Consumers filed a Consolidated Consumer Class Action Complaint. ECF No. 87 ("CC"). Consumers are individuals who use Facebook's services, including Facebook, Facebook Messenger, Instagram, and WhatsApp. *Id.* ¶¶ 19, 23, 26. Consumers allege that, "[a]bsent Facebook's anticompetitive scheme, fair competition would have required Facebook to provide consumers greater value in return for consumers' data on a market-wide basis." *Id.* ¶ 10. Consumers seek to represent a class of "[a]ll persons in the United States who maintained a Facebook profile at any point from 2007 up to the date of the filing of this action." *Id.* ¶ 248. Consumers assert five claims: (1) monopolization of the Social Network Market in violation of *§ 2 of the Sherman Act*; (2) attempted monopolization of the Social Network Market in violation of *§ 2 of the Sherman Act*; (3) monopolization of the Social Media Market in violation of *§ 2 of the Sherman Act*; (4) attempted **[**13]** monopolization of the Social Media Market in violation of *§ 2 of the Sherman Act*; and (5) unjust enrichment under California common law. *Id.* ¶¶ 260-317.

On April 22, 2021, Advertisers filed a Consolidated Advertiser Class Action Complaint. ECF No. 86 ("AC"). Advertisers are individuals, entities, and corporations who purchased advertising from Facebook. *Id.* ¶¶ 24-33. Advertisers allege that they paid prices for advertising that were "higher than they would have been absent Facebook's anticompetitive conduct and unlawfully acquired and/or maintained monopoly." *Id.* ¶ 33. Affilious, Inc.; Jessyca Frederick; Joshua Jeon; and 406 Property Services, PLLC seek to represent a class of "[a]ll persons, entities, and/or corporations in the United States who purchased advertising from Facebook between October 1, 2012, and April 3, 2018, but not after April 3, 2018." AC ¶ 529. Mark Berney, Mark Young, Jessica Layser, Katherine Looper, and Zahara Mossman seek to represent a class of "[a]ll persons, entities, and/or corporations in the United States who purchased advertising from Facebook between April 4, 2018, and the present." *Id.* ¶ 532. Advertisers assert three claims: (1) monopolization of the Social Advertising **[**14]** Market in violation of *§ 2 of the Sherman Act*; (2) attempted monopolization of the Social Advertising Market in violation of *§ 2 of the Sherman Act*; and (3) restraint of trade in violation of *§ 1 of the Sherman Act*. *Id.* ¶¶ 547-69.

On May 7, 2021, Facebook filed a motion to disqualify Keller Lenkner. ECF No. 93. On July 13, 2021, the Court granted Facebook's motion to disqualify Keller Lenkner in advance of the July 15, 2021 hearing on Facebook's motion to dismiss in light of the importance of the issues raised by the motion to disqualify. ECF No. 123. The Court noted that the Court was focusing on preparation for the motion to dismiss hearing and would issue a written decision on the motion to disqualify shortly. *Id.* On July 20, 2021, the Court issued a written decision on the motion to disqualify. ECF No. 127.

On May 20, 2021, Facebook filed the instant motion to dismiss. ECF No. 97 ("Mot."). On June 17, 2021, Plaintiffs filed an opposition. ECF No. 109 ("Opp."). On June 28, 2021, the United States District Court for the District of Columbia issued decisions on Facebook's motions to dismiss in *FTC v. Facebook, Inc.*, No. 20-CV-3590-JEB, and *State of New York v. Facebook*, *Inc.*, No. 20-CV-3589-JEB. On July 1, 2021, the Court permitted **[**15]** Plaintiffs to file a supplemental brief regarding those decisions. ECF No. 115. On July 5, 2021, Plaintiffs filed a supplemental brief. ECF No. 116 ("Pls. Supp. Br."). On July 7, 2021, Facebook filed a reply. ECF No. 117 ("Reply"). The Court held a hearing on the instant motion on July 15, 2021.

[*762] Plaintiff Layser voluntarily dismissed her case on August 5, 2021. ECF No. 129. Plaintiff Mossman voluntarily dismissed her case on November 4, 2021. ECF No. 182. Thus, a total of 11 cases remain.

II. LEGAL STANDARD

A. Motion to Dismiss Under *Federal Rule of Civil Procedure 12(b)(6)*

Rule 8(a) of the Federal Rules of Civil Procedure requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. A complaint that fails to meet this standard may be dismissed pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. *Rule 8(a)* requires a plaintiff to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal **[**16]** quotations omitted).

For purposes of ruling on a *Rule 12(b)(6)* motion, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)*. Additionally, the Court may consider materials referenced in the complaint under the incorporation by reference doctrine, even if a plaintiff failed to attach those materials to the complaint. *Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005)*.

The Court, however, need not accept as true allegations contradicted by judicially noticeable facts, *see Shwarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000)*, and it "may look beyond the plaintiff's complaint to matters of public record" without converting the *Rule 12(b)(6)* motion into a motion for summary judgment, *Shaw v. Hahn, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995)*. Nor must the Court "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Fayer v. Vaughn, 649 F.3d 1061, 1064 (9th Cir. 2011)* (per curiam) (quoting *W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981)*). Mere "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Adams v. Johnson, 355 F.3d 1179, 1183 (9th Cir. 2004)*.

B. Leave to Amend

If the Court determines that a complaint should be dismissed, it must then decide whether to grant leave to amend. Under *Rule 15(a) of the Federal Rules of Civil Procedure*, leave to amend "shall be freely given when justice so requires," bearing in mind "the underlying purpose of *Rule 15* to facilitate decision[s] on the **[**17]** merits, rather than on the pleadings or technicalities," *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)* (en banc) (alteration and internal quotations omitted). When dismissing a complaint for failure to state a claim, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Id. at 1130* (internal quotations omitted). Accordingly, leave to amend generally shall be denied only if allowing amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the moving party has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 532 (9th Cir. 2008)*.

[*763] III. DISCUSSION

Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 2*. To state a claim for monopolization under *Section 2 of the Sherman Act*, a plaintiff must allege: "(1) [p]ossession of monopoly power in the relevant market"; (2) "willful acquisition or maintenance of that power" through exclusionary conduct; and (3) "causal antitrust injury." *SmileCare Dental Grp. v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 783 (9th Cir. 1996)* (internal quotation omitted).

In turn, *Section 1 of the Sherman Act* prohibits "[e]very contract, **[**18]** combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*. "To establish liability under *§ 1*, a plaintiff must prove (1) the existence of an agreement, and (2) that the agreement was in unreasonable restraint of trade." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1178 (9th Cir. 2016)*.

Consumers allege that Facebook violated *Section 2 of the Sherman Act* through a "two-pronged anticompetitive strategy." *See* CC ¶ 219. First, Consumers allege that Facebook acquired and maintained monopoly power in the Social Network and Social Media Markets by making false representations to users about Facebook's data privacy practices. For ease of reference, the Court refers to Consumers' claims based on this theory of liability as Consumers' "data privacy claims." Second, Consumers allege that Facebook's "Copy, Acquire, Kill" strategy allowed Facebook to maintain monopoly power in the Social Network and Social Media Markets. The Court refers to Consumers' claims based on this theory of liability as Consumers' "'Copy, Acquire, Kill' claims."

Consumers also allege that Facebook's conduct constitutes unjust enrichment under California common law. The Court refers to this as Consumers' "Unjust Enrichment claim."

Like Consumers, Advertisers challenge Facebook's **[**19]** "Copy, Acquire, Kill" strategy under *Section 2 of the Sherman Act*. Specifically, Advertisers allege that the "Copy, Acquire, Kill" strategy allowed Facebook to maintain monopoly power in the Social Advertising Market. The Court refers to Advertisers' claims based on this theory of liability as Advertisers' "'Copy, Acquire, Kill' claims."

Additionally, Advertisers allege that Facebook maintained monopoly power in the Social Advertising Market by entering a contract with Google called the Google Network Bidding Agreement ("GNBA"). Advertisers also allege that the GNBA was an unreasonable restraint of trade. Thus, Advertisers challenge the GNBA under *Section 1 of the Sherman Act* and *Section 2 of the Sherman Act*. The Court refers to these claims as Advertisers' "GNBA claims."

Facebook moves to dismiss all of these claims. Specifically, Facebook argues that: (1) neither Consumers nor Advertisers have alleged cognizable product markets; (2) Consumers have not plausibly alleged monopoly power; (3) Consumers' data privacy claims are untimely; (4) Consumers' and Advertisers' "Copy, Acquire, Kill" claims are untimely; (5) Consumers have not plausibly alleged that Facebook's deceptive data privacy practices were anticompetitive; (6) neither Consumers nor **[**20]** Advertisers have plausibly alleged that Facebook's "Copy, Acquire, Kill" strategy was anticompetitive; (7) neither Consumers nor Advertisers have adequately alleged causal antitrust injury; and (8) Consumers **[*764]** have not adequately stated a claim for unjust enrichment. Facebook also argues that Consumers' requests for injunctive relief are barred by the doctrine of laches.

The Court rules as follows: (1) Consumers and Advertisers have adequately alleged that Facebook has monopoly power in cognizable product markets; (2) because Consumers have adequately alleged that their data privacy claims are timely, that Facebook's false representations about its data privacy constitute exclusionary conduct, and that Consumers have suffered a causal antitrust injury, the Court DENIES Facebook's motion to dismiss Consumers' data privacy claims; (3) because Consumers' and Advertisers' "Copy, Acquire, Kill" claims are untimely, the Court GRANTS Facebook's motion to dismiss Consumers' and Advertisers' "Copy, Acquire, Kill" claims with leave to amend; (4) because Advertisers have adequately alleged that they were injured by the GNBA, the Court DENIES Facebook's motion to dismiss Advertisers' GNBA claims; **[**21]** and (5) because Consumers have failed to state a claim for unjust enrichment, the Court GRANTS Facebook's motion to dismiss Consumers' Unjust Enrichment claim with leave to amend. Below, the Court discusses each of these conclusions in turn.

A. Consumers and Advertisers Adequately Allege that Facebook Has Monopoly Power in Cognizable Product Markets

The first element of a claim for monopolization under the *Sherman Act* is the "[p]ossession of monopoly power in [a] relevant market." *SmileCare, 88 F.3d at 783*. Accordingly, Consumers and Advertisers must establish "both that a 'relevant market' exists and that [Facebook] has power within that market." *Newcal Indus., Inc. v. Ikon Off. Sol., 513 F.3d 1038, 1044 (9th Cir. 2008)*.

To "plead a relevant market" for purposes of a *Sherman Act* claim, a plaintiff must allege "both a geographic market and a product market." *Hicks v. PGA Tour, Inc., 897 F.3d 1109, 1120 (9th Cir. 2018)*. All parties agree that the relevant geographic market is the United States.

A product market "must encompass the product at issue as well as all economic substitutes for the product." *Newcal Indus., 513 F.3d at 1045*. "Economic substitutes have a 'reasonable interchangeability of use' or sufficient 'cross-elasticity of demand' with the relevant product." *Hicks, 897 F.3d at 1120* (internal citation omitted). Whether products are reasonably interchangeable depends on the products' "price, use[,] and qualities." **[**22]** *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*; *see also* *United States v. Microsoft Corp., 253 F.3d 34, 51-52, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (explaining that products are in the same market if they are "reasonably interchangeable by consumers for the same purposes"). In turn, there is a cross-elasticity of demand between two products where "an increase in the price of one product leads to an increase in demand for another." *Olin Corp. v. FTC, 986 F.2d 1295, 1298 (9th Cir. 1993)*.

Additionally, "[w]ithin a general product market, 'well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.'" *Hicks, 897 F.3d at 1121* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*). A plaintiff may allege a distinct submarket for a product by alleging "practical indicia" of the submarket. *Brown Shoe, 370 U.S. at 325*. Examples of "practical indicia" include: "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics **[*765]** and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.*

The Ninth Circuit has held that "what constitutes a relevant market is a factual determination for the jury." *Image Tech. Servs. v. Eastman Kodak, 125 F.3d 1195, 1203 (9th Cir. 1997)*. Furthermore, the Ninth Circuit has held that the "definition of the relevant market is basically a fact question dependent upon the special characteristics of the industry involved." *Twin City Sportservice, Inc. v. Charles O'Finley & Co., 676 F.2d 1291, 1299 (9th Cir. 1982)*. Although a defendant may **[**23]** raise market definition in a motion to dismiss, "the question of whether the market should include other products is better resolved at the summary judgment stage." *Datel Holdings Ltd. v. Microsoft Corp., 712 F. Supp. 2d 974, 997 (N.D. Cal. 2010)*. Accordingly, "[o]n a motion to dismiss, the court need not engage in extensive analyses of reasonable interchangeability and cross elasticity of demand." *In re Webkinz Antitrust Litig., 695 F. Supp. 2d 987, 995 (N.D. Cal. 2010)*. In other words, a plaintiff is "not required to identify every alleged competitor in its pleadings." *FTC v. Facebook, Inc., No. 20-CV-3590-JEB, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *13 (D.D.C. June 28, 2021)*.

In turn, a plaintiff can establish market power either with "direct evidence" or with "circumstantial evidence." *Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995)*. Direct evidence includes "evidence of restricted output and supracompetitive prices." *Id.* (citing *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*). However, "such direct proof is only rarely available." *Microsoft, 253 F.3d at 51*. Accordingly, a plaintiff typically establishes market power with circumstantial evidence. *Id.*

The strongest circumstantial evidence of market power is evidence that the "defendant owns a dominant share" of the relevant market and that the market has "significant barriers to entry." *Rebel Oil, 51 F.3d at 1434*. A showing that the defendant has a market share of greater than 65% typically is sufficient to "establish a prima facie case of market power." *Eastman Kodak, 125 F.3d at 1206*. By contrast, "numerous cases hold that a market share of less than 50 percent **[**24]** is presumptively insufficient to establish market power." *Rebel Oil, 51 F.3d at 1438*. In turn, "[e]ntry barriers are 'additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants,' or 'factors in the market that deter entry while permitting incumbent firms to earn monopoly returns.'" *Id. at 1439* (citing *Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422, 1427-28 (9th Cir. 1993)*).

1. Consumers Adequately Allege that Facebook Has Monopoly Power in the Social Network and Social Media Markets

Consumers allege that Facebook has monopoly power in the Social Network and Social Media Markets. Facebook contends that, as defined by Consumers, the Social Network and Social Media Markets are not cognizable product markets. Facebook also contends that, even if those markets are cognizable, Consumers have not plausibly alleged that Facebook has monopoly power. For the reasons below, the Court rejects these arguments.

a. Consumers Adequately Allege that the Social Network and Social Media Markets are Cognizable Product Markets

i. Consumers Adequately Allege the Social Network Market

According to Consumers, a social network service is a distinct type of social **[*766]** media service, which is an online service that enables users "to distribute various forms of media—such as text **[**25]** messages, photos, videos, and music—to other users of the same application." CC ¶ 72. Specifically, a social network service enables "users to find, communicate, and interact with friends, family, personal acquaintances, and other people with whom the users have shared interests or connections." *Id.* ¶ 56. Facebook, for example, allows users to create profiles, to designate other users as "friends," to share media and information with other users, to form groups with other users based on common interests, to plan events with other users, and to play games with other users. *Id.* ¶ 51.

Consumers allege that social network services are not "reasonably interchangeable" with other online services and that there is a distinct Social Network Market, which is a "part or sub-part of the Social Media Market." *Id.* ¶ 56. Under Consumers' definition, Facebook is the only significant social network service and other social network services, such as Diaspora, Ello, Vero, Clubhouse, and Reddit "constitute 'only a very small drop in the ocean compared to Facebook.'" *Id.* ¶ 68. However, in the past, Myspace, Friendster, Orkut, Bebo, Flip.com, and Google+ competed with Facebook in the Social Network Market. **[**26]** *Id.* ¶¶ 36-37.

Facebook contends that Consumers' allegations are inadequate because Consumers have not provided a basis for determining which products are in the Social Network Market and because Consumers unreasonably exclude "countless" services that allow users to "kill time." Mot. at 16-17. For the reasons below, the Court rejects Facebook's contentions.

To plead a product market based on "reasonable interchangeability," a plaintiff must allege details about a product's "'price, use and qualities'" and explain why products without those characteristics are not reasonably interchangeable. *See* Webkinz, 695 F. Supp. 2d at 994 (quoting United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1131 (N.D. Cal. 2004)); *see also* FTC v. Facebook, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *11 (explaining that a plaintiff "may permissibly plead that certain 'factors' of both the service at issue and its potential substitutes—*e.g.*, their 'price, use[,] and qualities'—render them not 'reasonably interchangeable' in the eyes of users"). In other words, the plaintiff must allege that other types of products are not "reasonably interchangeable by consumers for the same purposes." Microsoft, 253 F.3d at 51-52. For example, allegations that a product has "a distinct core functionality," "distinct perceptions by consumers," "distinct customer targeting by manufacturers," "distinct analyses by industry **[**27]** analysts," and "distinct pricing and pricing patterns" are sufficient to establish that there is a distinct market for that product. *See* Datel Holdings, 712 F. Supp. 2d at 997. Additionally, statements by companies explaining which products they see as competitors for their own products are highly probative. *See* Epic Games, Inc. v. Apple Inc., No. 20-CV-05640-YGR, 559 F. Supp. 3d 898, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *51 (N.D. Cal. Sept. 10, 2021).

Furthermore, "[b]ecause every market that encompasses less than all products is, in a sense, a submarket," all the factors relevant for determining whether there is a distinct submarket also "are relevant . . . in determining the primary market." Olin, 986 F.2d at 1299 (citing United States v. Continental Can Co., 378 U.S. 441, 449, 453-55, 84 S. Ct. 1738, 12 L. Ed. 2d 953 (1964)). Thus, a plaintiff may support its product market definition by pleading facts which show "industry or public recognition of the [market] as a **[*767]** separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Brown Shoe, 370 U.S. at 325.

Consumers allege that social network services have three "peculiar characteristics." *Id.* First, every social network service uses a "social graph," which is a system for tracking connections between users. CC ¶ 57. A social graph records both direct connections, like whether two users have designated each other as "friends," **[**28]** and indirect connections, like whether two users list the same interests. *Id.* Social network services often use social graphs to "encourage their users to expand their networks by suggesting new people the users may connect to." *Id.* Second, social network services "provide substantive features to users which facilitate a wide array of interactions among the wide array of people that make up a user's social graph." *Id.* ¶ 58. For example, social networks allow users to create groups based on common interests, hobbies, and backgrounds; organize events; and play interactive games. *Id.* Third, social networks "provide users with the convenience of a 'one-stop shop'" by "combin[ing] multiple substantive features and functionalities into one product." *Id.* ¶ 59. As Facebook CEO Mark Zuckerberg has put it, this "multi-functionality" means that social network services are the "digital equivalent of the town square." *Id.*

Together, these characteristics give social network services a "distinct core functionality": fostering genuine social experiences between users. Datel Holdings, 712 F. Supp. 2d at 997. Facebook itself has stressed to investors that this distinct core functionality sets Facebook's social network service apart from **[**29]** other online services. For example, in a 2012 presentation to investors, Facebook described its service as "social by design, with people and relationships at the center of every experience." ECF No. 97-6 at 1. According to Facebook, this core functionality "creates social experiences that are powerful and universal" and has "achieved a level of engagement *unlike anything else on the web*." *Id.* (emphasis added).

Indeed, statements by Facebook executives provide strong evidence that Facebook has always viewed other social network services as its primary competitors. The most striking example is a statement made after Google's launch of the Google+ social network. Prior to the 2010 launch of Google+, Google offered at least three significant online services: YouTube, Gmail, and Google Search. CC ¶¶ 73, 131. However, it was not until Google announced Google+ that Facebook began to view Google as a direct competitive threat. With Google+, Google "attempt[ed] to build out a 'social graph' that would leverage a common user identity across Google products, including YouTube and Gmail." *Id.* ¶ 131. Specifically, the "planned features for Google+ included a continuous scroll product called the **[**30]** 'stream'; a companion feature called 'sparks,' which related the 'stream' to users' individual interests; and a sharing app called 'Circles' to share information with one's friends, family, contacts, and the public at large." *Id.* ¶ 132. Facebook immediately realized that Google+ posed a competitive threat unlike any other online service. Indeed, although Facebook had been planning to remove a privacy feature in 2011, a Facebook executive vetoed that plan and stated: "IF ever there was a time to AVOID controversy, it would be when the world is comparing our offerings to G+." *Id.* ¶ 134. The executive added that Facebook should postpone any privacy changes "until the direct competitive comparisons begin to die down." *Id.* These statements indicate Facebook's belief that Google+, a social network service, **[*768]** was a competitive threat in a way that YouTube, Gmail, and Google Search were not.

Other internal communications show that Facebook employees have frequently distinguished between social network services and other types of online services. For example, in August 2012, Facebook VP of Business and Marketing Partnerships David Fischer stated that there are at least six distinct categories **[**31]** of online applications: "Social network apps," which included Google+ and Twitter; "Photo sharing apps"; "Messaging apps"; "Local apps"; "Social search apps"; and "Platforms." AC ¶ 136. Similarly, in November 2012, Facebook VP of Global Operations Justin Osofsky stated that Facebook would be making an effort to "define competitive networks." *Id.* ¶ 143. Indeed, when Facebook began planning to remove public access to Facebook's Platform for developers, a Facebook engineer characterized the plan as a "protectionist grab to make sure no one else can make a competing social network." *Id.* ¶ 180.

These statements strongly support Consumers' allegation that there is a distinct Social Network Market. As discussed, a company's statements indicating that it does not view other products as competitive with its own product support a conclusion that the products are not in the same market. *Epic Games, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *51*. In *Epic*, for example, the court highlighted statements by Microsoft, the manufacturer of the Xbox console gaming system, which indicated that Microsoft did "not consider cellular or tablet devices such as the iPhone or iPad as competitors to the Xbox." *Id.* These statements supported a conclusion that there were separate **[**32]** markets for "console gaming" and "mobile gaming." *2021 U.S. Dist. LEXIS 172303, [WL] at *51-52*. Similarly, all of Facebook's statements about the unique properties of social network services support a conclusion that there is a distinct Social Network Market.

Moreover, Consumers explain in detail why social network services and generic social media services are not "reasonably interchangeable by consumers for the same purposes." *Microsoft, 253 F.3d at 51-52*. In contrast to social network services, most social media services do not focus on facilitating social connections and fostering relationships between users. CC ¶ 65. Instead, most social media services focus on the "distribution and consumption of content." *Id.*

Consumers provide two examples to illustrate this distinction: YouTube and TikTok. YouTube is a social media service which "facilitates the sharing of videos of varying temporal length." *Id.* ¶ 36. Unlike a social network service, in which users share content with friends and acquaintances, most videos posted on YouTube can be viewed by "users with a wide range of relationships to the person posting, including by strangers." *Id.* ¶ 65. For example, whereas a "user might use YouTube to access and watch a complete stranger's video—such as a cooking **[**33]** recipe—the same user would use Facebook, not YouTube, to share *that* video with the user's friends, family, and real-world connections." *Id.* (emphasis in original). As the U.S. House of Representative has explained, there is a "fundamental difference" between sharing personal content, like a video of a "child's first steps," with friends on a social network service and "broadcasting it publicly on YouTube." *Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations*, Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary at 91 (Oct. 6, 2020) ("House Report"), https://bit.ly/32JPE1r. Thus, social network services like Facebook and social media services like YouTube have "distinct **[*769]** core functionalit[ies]," *Datel Holdings, 712 F. Supp. 2d at 997*, and are not "reasonably interchangeable by consumers for the same purposes." *Microsoft, 253 F.3d at 51-52*.

In turn, TikTok is a social media service which "allows for the sharing of short-form videos of limited temporal length." CC ¶ 36. Unlike a social network service, users of TikTok primarily post videos to be viewed by strangers. Indeed, TikTok's stated goal is to be a "global platform for users to express their ideas by sharing videos **[**34]** with a broader community." House Report at 91. Accordingly, for all the reasons that apply in the context of YouTube, social network services like Facebook and social media services like TikTok have "distinct core functionalit[ies]," *Datel Holdings, 712 F. Supp. 2d at 997*, and are not "reasonably interchangeable by consumers for the same purposes." *Microsoft, 253 F.3d at 51-52*.

For slightly different reasons, Consumers allege that social network services are distinct from mobile messaging service like Apple's "iMessage." CC ¶ 60. Although iMessage is designed to allow users to share media with friends and acquaintances, iMessage cannot be used to communicate with anybody outside a pre-defined list of contacts and does not offer substantive features besides "delivering messages." *Id.* Thus, unlike social network services, iMessage does not "facilitat[e] a broader online social experience." *Id.* Moreover, iMessage cannot be used by people without Apple devices, whereas social network services can "be used across devices." *See* CC ¶ 60 n.23; House Report at 136 n.752. Thus, social network services like Facebook and mobile messaging services like iMessage have "distinct core functionalit[ies]," *Datel Holdings, 712 F. Supp. 2d at 997*, and are not "reasonably interchangeable by consumers for the **[**35]** same purposes." *Microsoft, 253 F.3d at 51-52*.

Additionally, Consumers explain in detail why social network services are distinct from professional networking services like LinkedIn. Although professional networking services use a social graph to facilitate connections between their users, these services have a relatively narrow purpose: help their users find jobs and learn about their industries. CC ¶ 61. This narrow purpose means that many users "have *both* a LinkedIn and a Facebook account, not one or the other," *id.* ¶ 62, and that most consumers do not view LinkedIn as an "economic substitute" for a social network service. *Newcal Indus., 513 F.3d at 1045*. Indeed, LinkedIn itself has stressed that people use social network services and professional networking services for fundamentally different reasons. As explained by LinkedIn in a presentation to potential advertisers, users of "personal networks" typically share "info on friends" and "info on personal interests," whereas users of "professional networks" typically share "career info." *Id.* ¶ 64. Thus, social network services like Facebook and professional networking services like LinkedIn have "distinct core functionalit[ies]," *Datel Holdings, 712 F. Supp. 2d at 997*, and are not "reasonably interchangeable by consumers for the **[**36]** same purposes." *Microsoft, 253 F.3d at 51-52*.

Consumers also explain why social network services are not reasonably interchangeable with online services outside the sphere of social media. For example, online entertainment services like Hulu limit users to viewing media provided by the services themselves and do not allow users to communicate with each other. *See* CC ¶ 75. Thus, such services do not facilitate the distribution of media between "users of the same application," *id.* ¶ 72, let alone "communication and sharing content **[*770]** among groups of friends," House Report at 91. Moreover, whereas social network services make money by showing users advertisements, online entertainment services like Hulu typically "collect from users a per-use monetary fee or a regularly-occurring (monthly or annual) fee." CC ¶ 76. Accordingly, social network services and online entertainment services have both "distinct core functionalit[ies]" and "distinct pricing." *Datel Holdings, 712 F. Supp. 2d at 997*. Social network services are even more distinct from search engines like Google, Yahoo, and Bing, which do not host their own media and do not allow for communications between users. CC ¶ 60. Accordingly, social network services, online entertainment services, and search **[**37]** engines are not "reasonably interchangeable by consumers for the same purposes." *Microsoft, 253 F.3d at 51-52*.

Finally, Consumers point out that there has been significant "industry or public recognition of the" Social Network Market "as a separate economic entity." *Brown Shoe, 370 U.S. at 325*. For example, the U.S. House of Representatives found during its recent investigation of competition in digital markets that social network services have the distinct purpose of "facilitating communication and sharing content among groups of friends who choose each other and enjoy content in large part because of those relationships." House Report at 91. Based on this finding, the House concluded that "the Social Network Market and the Social Media Market" are related, but distinct, economic markets. *See* CC ¶ 55; House Report at 90. Additionally, Germany's Federal Cartel Office and the United Kingdom's Competition and Markets Authority have made the same distinction. *Id.* This "public recognition" of the

Social Network Market reinforces the Court's conclusion that Consumers have adequately alleged the Social Network Market. *Brown Shoe, 370 U.S. at 325*.

FTC v. Facebook, Inc., No. 20-CV-3590-JEB, 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627 (D.D.C. June 28, 2021), confirms that Consumers have adequately alleged the Social Network Market. In *FTC v. Facebook*, the Federal Trade Commission ("FTC") alleged **[**38]** that Facebook possessed "monopoly power in the market for Personal Social Networking Services." *2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *7*. The FTC's definition of "Personal Social Networking Services" or "PSN services" largely resembled Consumers' definition of "social network services." *2021 U.S. Dist. LEXIS 119540, [WL] at *10*. Specifically, the FTC defined "PSN Services" as "online services that enable and are used by people to maintain personal relationships and share experiences with friends, family, and other personal connections in a shared social space." *Id.* Additionally, like Consumers, the FTC alleged that PSN services have "[t]hree key elements": (1) they "are built on a social graph"; (2) they "include features that many users regularly employ to interact with personal connections"; and (3) they "include features that allow users to find and connect with other users." *Id.*

The FTC's complaint also "explain[ed] why four different kinds of arguably comparable online services are not 'reasonably interchangeable' with PSN services." *Id.* First, the FTC alleged that PSN services are distinct from professional networking services like LinkedIn, which are "designed for and used primarily by professionals for sharing professional content." *Id.* Unlike PSN services, **[**39]** the FTC explained, professional networking services are not used to "maintain personal relationships and share experiences with friends, family, and other personal connections." *Id.* Second, the FTC alleged that PSN services are distinct from "interest-based" networking services that have a specific focus, like physical exercise. *Id.* Third, the FTC alleged that PSN services **[*771]** are distinct from "services that allow for consuming and sharing video or audio content, such as YouTube, Spotify, Netflix, or Hulu." *Id.* "[U]sers of such services," the FTC explained, "mostly consume such content passively or share content created by others (rather than content they have created), and such sharing, where it occurs, is not to the user's network of personal connections but rather to a general and wide audience of unknown users." *Id.* Finally, the FTC alleged that PSN services are distinct from "mobile messaging services," which "lack a 'shared social space' for interaction" and "do not employ a social graph to facilitate users' finding and 'friending' other users." *Id.*

Taking these allegations as a whole, the court concluded that the FTC had adequately alleged a market for PSN services. *2021 U.S. Dist. LEXIS 119540, [WL] at *11-12*. Although Consumers **[**40]** do not address "interest-based" network services, Consumers specifically address every other type of online service addressed by the FTC and provide a detailed explanation for why each service is not reasonably interchangeable with a social network service. Accordingly, the *FTC v. Facebook* court's conclusion that the FTC adequately alleged a market for PSN services confirms that Consumers have adequately alleged the Social Network Market.

Facebook offers several meritless arguments. First, Facebook argues that Consumers "fail to make any factual allegations about 'cross-elasticity of demand.'" Mot. at 17. However, the United States Supreme Court has explained that a plaintiff may establish the "outer boundaries of a product market" with reference to "the reasonable interchangeability of use *or* the crosselasticity of demand between the product itself and substitutes for it." *Brown Shoe, 370 U.S. at 325* (emphasis added). Thus, there is "no authority . . . supporting Facebook's argument that Plaintiff must plead specific facts regarding the price or non-price terms under which . . . users would switch (if ever) to alternatives." *FTC v. Facebook, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *11* (emphasis in original). Indeed, all that is required at the pleading stage is a qualitative description **[**41]** of the product market which shows that "certain 'factors' of both the service at issue and its potential substitutes—*e.g.*, their 'price, use[,] and qualities'—render them not 'reasonably interchangeable' in the eyes of users." *Id.; see also Datel Holdings, 712 F. Supp. 2d at 997* (denying motion to dismiss where complaint described the "distinct" qualities of the product and explained why products without those qualities were not "reasonably interchangeable"). Accordingly, Consumers' failure to address the cross-elasticity of demand is irrelevant.

Facebook also contends that Consumers "fail[] to provide a plausible basis for identifying which firms provide products that consumers consider acceptable substitutes, and which do not." Mot. at 16. According to Facebook, the Social Network Market is implausible because it excludes the "countless gaming, news, messaging, and other apps" that allow users to "kill time." *Id.*

However, even leaving *FTC v. Facebook* aside, Facebook ignores the many cases in which courts have found that entertainment markets may contain multiple distinct submarkets. Indeed, in *Kickflip, Inc. v. Facebook, Inc., 999 F. Supp. 2d 677, 687 (D. Del. 2013)*, the court held that the plaintiff adequately alleged a market for "social-game networks." According to the plaintiff, that market included "Facebook, **[**42]** MySpace, Google+, and other social networks that offer social games to users" and did not include "other platforms that offer games through websites, mobile devices, or stores selling games." *Id.* The plaintiff explained that, in contrast to these **[*772]** other gaming platforms, social network games "allow interactions between players who are not directly connected to a console, are less elaborate and expensive, derive revenue primarily from advertising or in-game purchases, leverage an existing social network, and have a large user base." *Id.* The court held that these allegations were "sufficient to survive Facebook's motion to dismiss." *Id. at 687-88*. Not only does *Kickflip* contradict Facebook's argument that the relevant market must include all online services that allow individuals to "kill time," it directly supports Consumers' argument that social network services are distinct from other types of online services.

Similarly, several courts have found that the market for video games contains multiple distinct submarkets. For example, in *Epic Games v. Apple*, the court rejected Apple's argument that the relevant product market was the "market for all digital video games." *2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *1*. Specifically, after a bench trial, the court found that **[**43]** although there was "some competition amongst the players in the general video game market," this general competition was not "sufficient for purposes of defining a relevant product market." *2021 U.S. Dist. LEXIS 172303, [WL] at *55*. Instead, the evidence showed that the "wider video game market . . . . include[d] at least four distinct submarkets"—(1) "mobile gaming"; (2) "PC gaming"; (3) "console gaming"; and (4) "cloud-based game streaming." *See* *2021 U.S. Dist. LEXIS 172303, [WL] at *47-55*. Similarly, in *Datel Holdings*, the court found plausible the plaintiff's allegation that Microsoft's Xbox 360 and Sony's Playstation 3 were not in the same product market as Nintendo's Wii. *712 F. Supp. 2d at 982, 997*.

Thus, Facebook's suggestion that all "gaming, news, messaging, and other apps" must be included in the same market is implausible. Although it is not Facebook's burden to establish the relevant product market, Facebook's failure to suggest a plausible alternative market supports Consumers' alleged market. Moreover, Facebook's suggestion that social network services are reasonably interchangeable with all online services that can be used to "kill time" directly contradicts Facebook's statement that its social network service has "achieved a level of engagement *unlike anything else on the web*." ECF No. 97-6 **[**44]** at 1 (emphasis added).

Finally, Facebook summarily asserts that Consumers have failed to explain why Twitter, Snapchat, LinkedIn, and TikTok are not substitutes for social network services. Mot. at 16. To the contrary, Consumers explain precisely why social network services, LinkedIn, and TikTok are not "reasonably interchangeable by consumers for the same purposes." *See* *Microsoft, 253 F.3d at 51-52*. Given Consumers' detailed allegations, Facebook's conclusory argument has no merit.

Although the Court agrees that Consumers have not explained why Twitter and Snapchat are not social network services, Facebook does not explain why this omission is fatal to Consumers' complaint. As discussed, the Ninth Circuit has held that "what constitutes a relevant market is a factual determination for the jury." *Eastman Kodak, 125 F.3d at 1203*. Indeed, "the question of whether the market should include other products is better resolved at the summary judgment stage," *Datel Holdings, 712 F. Supp. 2d at 997*, and a plaintiff is "not required to identify every alleged competitor in its pleadings," *FTC v. Facebook, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *13*. Thus, because Consumers "consider and reject multiple conceivably interchangeable substitutes in great factual detail," Consumers have no obligation to address every possible substitute. *RealPage, Inc. v. Yardi* ***[*773]*** *Systems, Inc., 852 F. Supp. 2d 1215, 1225 (C.D. Cal. 2012)*.

Thus, Consumers **[**45]** have adequately alleged the Social Network Market.

ii. Consumers Adequately Allege the Social Media Market

Consumers allege that the "Social Network Market is a distinct part or sub-part of the Social Media Market." CC ¶ 56. Below, the Court finds that Consumers adequately allege the Social Media Market.

As discussed, social media services are online services that enable users "to distribute various forms of media—such as text messages, photos, videos, and music—to other users of the same application." *Id.* ¶ 72. Additionally, instead of "charg[ing] users a monetary price for access," social media services "subject the users to ads . . . or require the users to give up some form of limited data." *Id.* ¶ 76.

Consumers allege that social media services are not "reasonably interchangeable" with other online services and that there is a distinct Social Media Market. *Id.* ¶¶ 72-81. In addition to Facebook, the largest companies in this market are Twitter, TikTok, LinkedIn, Snapchat, and YouTube. *Id.* ¶¶ 36-37. Facebook contends that Consumers' allegations are inadequate because Consumers have failed to identify characteristics that differentiate social media services from other online services **[**46]** and have failed to provide details about the cross-elasticity of demand. Mot. at 17-18. For the reasons below, the Court rejects Facebook's contentions.

To plead a product market based on "reasonable interchangeability," a plaintiff must allege details about a product's "'price, use and qualities'" and explain why products without those characteristics are not reasonably interchangeable. *See* *Webkinz, 695 F. Supp. 2d at 994* (quoting *Oracle, 331 F. Supp. 2d at 1131*). In other words, the plaintiff must allege that other types of products are not "reasonably interchangeable by consumers for the same purposes." *Microsoft, 253 F.3d at 51-52*. For example, allegations that a product has "a distinct core functionality," "distinct perceptions by consumers," "distinct customer targeting by manufacturers," "distinct analyses by industry analysts," and "distinct pricing and pricing patterns" are sufficient to establish that there is a distinct market for that product. *See* *Datel Holdings, 712 F. Supp. 2d at 997*. Additionally, statements by companies explaining which products they see as competitors for their own products are highly probative, *see* *Epic, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *51*, as is "industry or public recognition of the" product market "as a separate economic entity," *Brown Shoe, 370 U.S. at 325*.

As an initial matter, Facebook executives have recognized that Facebook primarily **[**47]** competes with other social media services. For example, Consumers highlight a 2012 presentation by Facebook COO Sheryl Sandberg which directly compared Facebook to other "social media" companies and stated that Facebook was "95% of all social media." CC ¶ 77. This statement strongly supports a conclusion that there is a distinct Social Media Market. *See* *Epic, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *51*.

Moreover, Consumers explain in detail why social media services and other online services which facilitate the consumption of media are not "reasonably interchangeable by consumers for the same purposes." *Microsoft, 253 F.3d at 51-52*. First, Consumers explain that social media services are not reasonably interchangeable with online entertainment services like Hulu. Specifically, online entertainment services like Hulu limit users to viewing media provided by the services themselves and **[*774]** do not allow users to communicate with each other. *See* CC ¶ 75. Thus, such services do not facilitate the distribution of media between "users of the same application," *id.* ¶ 72, let alone "communication and sharing content among groups of friends," House Report at 91. Moreover, whereas social media services make money by showing users advertisements, online entertainment services **[**48]** like Hulu typically "collect from users a per-use monetary fee or a regularly-occurring (monthly or annual) fee." CC ¶ 76. Accordingly, because social media services and online entertainment services have both "distinct core functionalit[ies]" and "distinct pricing," they are not "reasonably interchangeable." *See* *Datel Holdings, 712 F. Supp. 2d at 997*.

Second, Consumers explain that social media services are distinct from search engines like Google, Yahoo, and Bing, which do not host their own media and do not allow for communications between users. CC ¶ 73. Thus, social media services and search engines are not "reasonably interchangeable by consumers for the same purposes." *Microsoft, 253 F.3d at 51-52*.

Finally, Consumers point out that there has been "industry or public recognition" of the Social Media Market. *See* Olin, 986 F.2d at 1299. For example, the U.S. House of Representatives found during its recent investigation of competition in digital markets that social media services have the distinct purpose of "facilitat[ing] the distribution and consumption of content." House Report at 91. Based on this finding, the House concluded that the "Social Media Market" is distinct from markets for other online services. House Report at 89. This "public recognition" of the Social **[**49]** Media Market reinforces the Court's conclusion that Consumers have adequately alleged the Social Media Market. *See* Brown Shoe, 370 U.S. at 325.

Epic Games v. Apple confirms that Consumers have adequately alleged a distinct Social Media Market. The Epic court found after a bench trial that, for at least two reasons, the "wider video gaming market" contained "distinct submarkets" for "mobile gaming," "PC gaming," "console gaming," and "cloud-based game streaming." Epic, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *47-55. First, the court found that each type of gaming system appealed to a specific demographic group interested in playing a specific type of game. For example, whereas mobile gaming appealed to "women gamers of all ages . . . and gen-x male gamers" with a "focus and interest on casual games," console gaming appealed to "millennial male gamers . . . with an interest in playing action games." 2021 U.S. Dist. LEXIS 172303, [WL] at *49, *52. Second, the court found that each type of gaming system had a distinct pricing model. For example, whereas the "overwhelming majority of gaming revenue in mobile gaming derives from free-to-play games," "the gaming revenue generated by console games . . . derived overwhelmingly from pay-to-play or buy-to-play games." 2021 U.S. Dist. LEXIS 172303, [WL] at *49, *52.

The distinctions between gaming systems identified in Epic mirror the distinctions **[**50]** between social media services and online entertainment services identified by Consumers in the instant case. First, like the different gaming systems described in Epic, social media services and online entertainment services offer fundamentally different types of content and thus appeal to different types of users. *See* Epic, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *49, 52; CC ¶ 72, 74-75. Specifically, whereas social media services provide content created by users, online entertainment services provide content created by the service itself. CC ¶ 75. Second, like the different gaming systems described in Epic, social media services and online entertainment services have **[*775]** distinct pricing models. *See* Epic, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *49, 52; CC ¶ 76. Whereas social media services earn revenue by allowing users to access the services for free and then "subject[ing] the users to ads," online entertainment services "collect from users a per-use monetary fee or a regularly-occurring (monthly or annual) fee." CC ¶ 76. Accordingly, like the different gaming systems in Epic, social media services and online entertainment services are not reasonably interchangeable.

Facebook's arguments to the contrary are unconvincing. Facebook argues that Consumers "fail to define the contours of the 'social media' **[**51]** market by reference to cross-elasticity of demand." Mot. at 18. However, as discussed, the United States Supreme Court has explained that a plaintiff may establish the "outer boundaries of a product market" with reference to "the reasonable interchangeability of use *or* the cross-elasticity of demand between the product itself and substitutes for it." Brown Shoe, 370 U.S. at 325 (emphasis added). Indeed, there is "no authority . . . supporting Facebook's argument that Plaintiff must plead specific facts regarding the price or non-price terms under which . . . users would switch (if ever) to alternatives." FTC v. Facebook, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *11 (emphasis in original). Accordingly, Consumers' failure to address the cross-elasticity of demand is irrelevant at this stage.

Additionally, Facebook contends that Consumers "fail to allege any plausible basis for excluding competitors that provide other forms of online entertainment since they, like Facebook, compete for user attention." Mot. at 18. To the contrary, Consumers specifically allege that social media services are distinct from online entertainment services because social media services and online entertainment services have "distinct core functionalit[ies]" and "distinct pricing and pricing patterns." **[**52]** Datel Holdings, 712 F. Supp. 2d at 997. Facebook's conclusory argument regarding online entertainment fails to address these specific allegations.

Moreover, as discussed, Facebook's argument that all online services which provide "entertainment" are in the same market is implausible. For example, multiple courts have found that, although all video game systems provide users with "entertainment," the "wider video game market" contains multiple distinct submarkets. *See* Epic, 2021

U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *55; Datel Holdings, 712 F. Supp. 2d at 996-97 (holding that the plaintiff plausibly alleged that Microsoft's Xbox 360 is not in the same market as Nintendo's Wii); Kickflip, 999 F. Supp. 2d at 687 (holding that the plaintiff plausibly alleged a market for "social-game networks").

Finally, Facebook contends that Consumers unreasonably include within the market applications "that offer in-app distribution (such as WhatsApp and iMessage) while excluding competitors that allow for the distribution of media outside their own applications," such as SMS messaging and email. Mot. at 17-18. Although the Court agrees with Facebook that Consumers have not made clear why SMS messaging and email are not "reasonably interchangeable" with social media services, Facebook fails to explain why this is fatal to Consumers' complaint. As discussed, the **[**53]** Ninth Circuit has held that "what constitutes a relevant market is a factual determination for the jury." Eastman Kodak, 125 F.3d at 1203. Indeed, "the question of whether the market should include other products is better resolved at the summary judgment stage," Datel Holdings, 712 F. Supp. 2d at 997, and a plaintiff is "not required to identify every **[*776]** alleged competitor in its pleadings." FTC v. Facebook, Inc., 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *13. Thus, because Consumers "consider and reject multiple conceivably interchangeable substitutes in great factual detail," Consumers have no obligation to address every possible substitute. RealPage, 852 F. Supp. 2d at 1225.

Thus, Consumers have adequately alleged the Social Media Market.

b. Consumers Adequately Allege that Facebook Has Market Power in the Social Media and Social Network Markets

As discussed, the Ninth Circuit has held that a plaintiff establish monopoly power at the pleading stage by alleging that: (1) the defendant's share of the relevant market exceeds 65%, Eastman Kodak, 125 F.3d at 1206, and (2) the relevant market has "significant barriers to entry," Rebel Oil, 51 F.3d at 1434. Facebook argues that, even if Consumers have adequately alleged the Social Network and Social Media Markets, Consumers have not adequately alleged market power in either market. Specifically, Facebook argues that, "[i]n both market," Consumers "claim without support **[**54]** that Facebook's 'share' exceeds 65%." Mot. at 18-19. Facebook also argues that Consumers' allegations about barriers to entry are insufficient. *Id.* at 19. The Court addresses these arguments in turn.

i. Consumers Adequately Allege that Facebook's Shares of the Social Media Market and the Social Network Market Are Greater than 65%

Consumers allege that Facebook's share of the Social Media Market is between 80% and 95% and that Facebook's share of the Social Network Market is close to 100%. CC ¶¶ 262, 286. Facebook contends that Consumers' market share allegations are implausible because Consumers do not explain how they calculated the market share and because the alleged markets include other large companies. Mot. at 18-19. For the reasons below, the Court rejects these contentions.

Consumers identify two metrics for measuring market share in the Social Media Market: (1) time spent on social media applications; and (2) advertising revenue. Under either metric, Consumers allege, Facebook's share of the Social Media Market exceeds 65%.

First, Consumers allege that because "more than 80% of the time that consumers in the United States spend using social media is spent on Facebook and Instagram," **[**55]** Facebook's share of the Social Media Market exceeds 80%. CC ¶ 286. Consumers present several pieces of evidence which directly support this allegation. In a 2012 presentation to a "large telecommunications firm," Facebook COO Sheryl Sandberg asserted that "Facebook is now 95% of all social media in the US" in terms of "monthly minutes of use." *See* CC ¶ 77; House Report at 138. The same year, a report by the data analytics firm Comscore, on which Facebook previously relied for market research, found that Facebook was the "third largest web property in the world . . . and accounted for approximately 3 in every 4 minutes spent on social networking sites and 1 in every 7 minutes spent online around the world." *See*

House Report at 144; CC ¶ 159. Finally, a 2018 Facebook report showed that, even excluding Instagram, individuals spent more time on Facebook than on Snapchat and Twitter combined. *See* CC ¶ 78; House Report at 137-38.

Second, Consumers allege that, because social media services "generate virtually all of their value to shareholders in the form of advertising revenue," advertising revenue is an effective metric for measuring market share. CC ¶ 79. Using that metric, "Facebook (including **[**56]** Instagram) has over 85% of the U.S. market, with the second-place competitor, Twitter, claiming **[*777]** *less than 3.5%* market share." *Id.* (emphasis in original). Consumers do not describe Facebook's competitors' revenue in detail, but Consumers highlight that in 2018, "Facebook earned over $55 billion in revenue, almost completely from selling targeted advertising," *id.* ¶ 147, and that in 2019, "Facebook collected $70.7 billion in revenue almost entirely from allowing companies to serve ads to its users," *id.* ¶ 311.

Although Consumers do not calculate Facebook's precise share of the Social Network Market, Consumers allege that Facebook is the *only* significant social network service and that its share of the Social Network Market is close to 100%. *Id.* ¶ 68. Specifically, Consumers allege that Facebook is the "undisputed king of the social network market" and that other social network services, such as Diaspora, Ello, Vero, Clubhouse, and Reddit "constitute 'only a very small drop in the ocean compared to Facebook.'" *Id.* (internal citation omitted). Additionally, Consumers allege that, because the Social Network Market is a "distinct part or sub-part of the Social Media Market," Facebook's share **[**57]** of the Social Network Market necessarily is "higher than its share in the Social Media Market." *See id.* ¶¶ 56, 71, 262. The Court agrees with Consumers that, because the Social Network Market is a submarket of the Social Media Market, it follows that Facebook's share of the Social Network Market must be greater than Facebook's share of the Social Media Market.

Consumers provide additional evidence to bolster their market share calculations. For example, Consumers point out that "Facebook's products include three of the seven most popular mobile apps, measured by monthly active persons, reach, and percentage of daily and monthly active persons." *Id.* ¶ 78. Indeed, as of December 2019, the mobile application for Facebook's social network service "had the third highest reach of all mobile apps" in the United States, "reaching 74% of smartphone users," and the mobile application for Facebook Messenger "had the fourth highest reach" of all mobile apps, "reaching 54.1% of U.S. smartphone users." House Report at 137. By contrast, Snapchat's mobile application reached only 31.4% of smartphone users in the United States. *Id.* Similarly, Facebook's 2012 presentation to investors showed that Facebook **[**58]** had "97% penetration [with] 25-34 year olds" in the United States. ECF No. 97-6 at 2.

Under Ninth Circuit law, Consumers' allegations are more than sufficient. Indeed, because the Ninth Circuit has held that a plaintiff need not plead market share with specificity, courts frequently have held that a rough estimate of the defendant's market share is sufficient at the pleading stage. *See* *Newcal Indus., 513 F.3d at 1045* ("There is no requirement that these elements of the antitrust claim be pled with specificity."). For example, in *United Energy Trading, LLC v. Pacific Gas & Electric Co., 200 F. Supp. 3d 1012 (N.D. Cal. 2016)*, the plaintiff brought a *Sherman Act* claim against Pacific Gas & Electric Company ("PG&E") and offered only a single allegation regarding market share: "PG&E currently holds between 70-90% of the natural gas commodity market." Second Amended Complaint ¶ 2, *United Energy Trading, LLC v. Pacific Gas & Electric Co.*, No. 15-CV-02383-RS (N.D. Cal. May 13, 2016), ECF No. 89. In an order denying PG&E's motion to dismiss, the court held that this allegation was sufficient. *United Energy Trading, 200 F. Supp. 3d at 1020*.

Similarly, in *Teradata Corp. v. SAP SE, No. 18-CV-03670-WHO, 2018 U.S. Dist. LEXIS 209872, 2018 WL 6528009 (N.D. Cal. Dec. 12, 2018)*, the plaintiff brought a *Sherman Act* claim against SAP and alleged only that SAP "possesses a market share that ranges, on **[*778]** information and belief, from 60% to 90%." First Amended Complaint ¶ 67, *Teradata Corporation v. SAP SE*, No. 18-CV-03670-WHO **[**59]** (N.D. Cal. Jul. 11, 2018), ECF No. 24. In an order denying SAP's motion to dismiss, the court stated that this allegation "suffice[d] to plead SAP's market power." *Teradata, 2018 U.S. Dist. LEXIS 209872, 2018 WL 6528009, at *15*.

Finally, in *Datel Holdings*, the plaintiff brought a *Sherman Act* claim against Microsoft and alleged only that "Microsoft's share of the Multiplayer Online Dedicated Gaming Systems market was approximately 66% as of July

2009." Complaint ¶ 44, *Datel Holdings Ltd. v. Microsoft Corp.*, No. 09-CV-05535-EDL (N.D. Cal. Nov. 20, 2009), ECF No. 1. In an order denying Microsoft's motion to dismiss, the court held that this allegation was sufficient. *Datel Holdings, 712 F. Supp. 2d at 997-98*.

Consumers' allegations are far more detailed than the allegations deemed sufficient in *United Energy Trading*, *Teradata*, and *Datel Holdings*. The plaintiffs in *United Energy Trading, Teradata*, and *Datel Holdings* did not provide any explanation for how they calculated market share, let alone any specific facts that could support such calculations. *See* *United Energy Trading, 200 F. Supp. 3d at 1020*; *Teradata, 2018 U.S. Dist. LEXIS 209872, 2018 WL 6528009, at *15*; *Datel Holdings, 712 F. Supp. 2d at 997-98*. By contrast, Consumers provide *two* alternate methods for calculating Facebook's share of the Social Media Market and cite detailed facts, including data produced by Facebook itself, which support Consumers' calculations. Additionally, Consumers have provided a plausible explanation for **[**60]** why Facebook's share of the Social Network Market must be even greater. Thus, Consumers' allegations regarding Facebook's shares of the Social Media and Social Network Markets are sufficient.

FTC v. Facebook confirms that Consumers' allegations are sufficient. In *FTC v. Facebook*, the FTC alleged that Facebook's share of the market for "PSN Services" exceeded 65%. *No. 20-CV-3590-JEB, 2022 U.S. Dist. LEXIS 5415, 2022 WL 103308, at *6 (D.D.C. Jan. 11, 2022)*. The FTC offered three metrics to support that calculation, including "Facebook's share of users' time spent on such services." *Id.* Like Consumers, the FTC cited "Facebook's internal presentations" which assessed Facebook's performance using "time spent per month." *2022 U.S. Dist. LEXIS 5415, [WL] at *7*. According to the court, these allegations plausibly established that "Facebook has maintained a dominant market share during the relevant time period." *2022 U.S. Dist. LEXIS 5415, [WL] at *7*. Given Consumers' similar allegations, the Court reaches the same conclusion in the instant case.

Facebook's arguments to the contrary are unconvincing. According to Facebook, Consumers "claim without support that Facebook's 'share' exceeds 65% . . . but they make no allegations about what this number consists of." Mot. at 18. Facebook adds that "[m]erely reciting a percentage without alleging to what it refers—let alone how **[**61]** it was or could be calculated—is conclusory and is not creditable." *Id.* As an initial matter, there is no authority which suggests that antitrust plaintiffs must explain in their complaints how they calculated market share. Indeed, as discussed, courts have repeatedly held that a rough estimation of the defendant's market share, with no explanation of how that estimation was made, is sufficient at the pleading stage. *See* *United Energy Trading, 200 F. Supp. 3d at 1020*; *Teradata, 2018 U.S. Dist. LEXIS 209872, 2018 WL 6528009, at *15*; *Datel Holdings, 712 F. Supp. 2d at 997-98*. Regardless, Facebook's argument fails on its own terms because Consumers provide two independent methods for measuring Facebook's market share and explain why each method results in a market share that exceeds 80%. CC ¶¶ 71, 77-80, 262, 286.

[*779] Moreover, although Facebook relies heavily on *Korea Kumho Petrochemical v. Flexsys Am. LP, No. C07-01057 MJJ, 2008 U.S. Dist. LEXIS 68559, 2008 WL 686834 (N.D. Cal. Mar. 11, 2008)*, and *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc., No. 12-CV-05847-JST, 2013 U.S. Dist. LEXIS 89208, 2013 WL 3242245 (N.D. Cal. June 25, 2013)*, those cases do not support Facebook's argument. Indeed, in *Korea Kumho, 2008 U.S. Dist. LEXIS 68559, 2008 WL 686834, at *9*, the court emphasized that a plaintiff "need not necessarily quantify . . . market share with precision." However, because the plaintiff's sole allegation related to market power was that the defendant had achieved "dominance" in the relevant market, the court dismissed the plaintiff's claim. *Id.*

By contrast here, Consumers have alleged that Facebook's share of the Social Media Market and share of the Social Network **[**62]** Market fall within relatively narrow ranges and have provided detailed explanations for how they calculated those ranges.

In turn, in *Rheumatology Diagnostics, 2013 U.S. Dist. LEXIS 89208, 2013 WL 3242245, at *1, *14*, although the plaintiff alleged that the defendant had a "seventy percent market share of the outpatient testing market in Northern California," this allegation provided no information about the defendant's share of the "relevant markets identified in the Complaint": the "Routine Clinical Laboratory Testing market"; the "Anatomic Pathology Laboratory Testing market"; the "Specialty Rheumatologic Laboratory Testing market"; the "Advanced Lipid Testing market"; and the

"Specialty Breast Pathology Testing market." Accordingly, the court concluded that the plaintiff had failed to allege any facts regarding defendant's share of those "relevant markets." *2013 U.S. Dist. LEXIS 89208, [WL] at *14*. That conclusion has no bearing on the instant case.

Finally, the Court rejects Facebook's argument that Consumers' market share allegations are implausible because Consumers fail to account for "large rivals like Apple's iMessage, Twitter, YouTube, Snapchat, and TikTok." Mot. at 18. As discussed, Consumers allege that, in 2018, individuals spent more time on Facebook than on Snapchat and Twitter combined. **[**63]** *See* CC ¶ 78; House Report at 137-38. Similarly, Facebook has provided evidence that, as of December 2019, the mobile application for Facebook's social networking service had more than double the number of users as Snapchat. House Report at 137. Additionally, Consumers allege that Twitter is the second largest social media service and that, measuring market share using advertising revenue, Twitter has "*less than 3.5%* market share." CC ¶ 80 (emphasis in original).

Accordingly, Consumers have adequately alleged that Facebook's shares of the Social Media Market and Social Network Market exceed 65%.

ii. Consumers Plausibly Allege that the Social Network and Social Media Markets Have Significant Barriers to Entry

As discussed, "[e]ntry barriers are 'additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants,' or 'factors in the market that deter entry while permitting incumbent firms to earn monopoly returns.'" *Rebel Oil, 51 F.3d at 1439* (citing *Los Angeles Land, 6 F.3d at 1427-28*).

Consumers allege in detail that the Social Network and Social Media Markets have at least two classic barriers to entry: (1) network effects and (2) switching costs. In response, Facebook offers one conclusory sentence: "naked **[**64]** assertions about barriers to entry do not suffice." Mot. at 19. However, as Mr. Zuckerberg has explained, "there are network effects around social products and a finite number of different social mechanics to invent." *See* CC ¶ 96. Thus, "[o]nce someone wins at a **[*780]** specific mechanic, it's difficult for others to supplant them without doing something different." *See* House Report at 143. Given this and other contemporaneous statements by Facebook about the power of network effects, Facebook's conclusory argument in the instant motion has no merit. Regardless, the Court discusses Consumers' allegations below.

First, social network services and social media services have strong network effects, which means that the value of a service increases as the number of users increases. *See* CC ¶ 83; *see also* *United States v. Microsoft Corp., 84 F. Supp. 2d 9, 20 (D.D.C. 1999)* ("A positive network effect is a phenomenon by which the attractiveness of a product increases with the number of people using it."). A direct network effect is present when a "service becomes more valuable to users as additional others use the . . . service." CC ¶ 83. Because the goal of a social media service is to provide users with content created by other users of the service, social media **[**65]** services exhibit strong direct network effects. *Id.* ¶ 84. In turn, because the goal and design of a social network service is to enable users to form social connections with other users of the service and to facilitate users' sharing of information with other users of the service, social network services exhibit even stronger direct network effects. *Id.* Indeed, in an October 2018 presentation, an economist working at Facebook "recognized that the network effects of Facebook and its products are 'very strong.'" *Id.* ¶ 96.

An indirect network effect is present when a service becomes more valuable to third parties as the service's user base grows. *Id.* ¶ 83. Because social media services and social network services make money by showing advertisements to users, both types of services exhibit strong indirect network effects. *Id.* ¶ 86.

These network effects create high barriers to entry in the Social Network and Social Media Markets because, even if a new service offers higher quality features than incumbent services, the new service is inherently less valuable because it has a smaller user base than incumbent services. *Id.* ¶ 87.

As noted, Facebook CEO Mark Zuckerberg has displayed a keen understanding **[**66]** of the barriers to entry created by network effects. In 2012, when Facebook was in the process of acquiring Instagram, Mr. Zuckerberg explained to Facebook CFO David Ebersman that "there are network effects around social products and a finite number of different social mechanics to invent." *See Id.* ¶ 96; House Report at 152. "Once someone wins at a specific mechanic," Mr. Zuckerberg stated, "it's difficult for others to supplant them without doing something different." *See* House Report at 143. Other Facebook employees have described Facebook's network effects as a "flywheel" and have stated that "[n]etwork effects make it very difficult to compete with us." CC ¶ 96 (internal citation omitted). Moreover, as the U.S. House of Representatives found during its recent investigation of competition in digital markets, "attracting a critical mass of users is essential to delivering a viable social network, as there is no reason for users to start using a social network if there is no one there with whom they can connect." House Report at 89.

Second, social network services and social media services are characterized by "high switching costs." CC ¶ 87. The United States Supreme Court has explained **[**67]** that "switching costs" are present when consumers have become "locked in" to a product and thus "will tolerate some level of . . . price increases before changing . . . brands." *See* *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 476,* ***[*781]*** *112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*.

Social network services and social media services have high switching costs because, "[o]nce a significant number of users adopt" a social network service or social media service, "they will be reluctant to switch to even a superior competitive alternative because the newer offering will not deliver as much value unless many other users make the switch simultaneously." CC ¶ 87.

As a Facebook executive explained in 2014, "the idea is that after you have invested hours and hours in your friend graph or interest graph or follower graph, you are less likely to leave for a new or different service that offers similar functionality." House Report at 145. Indeed, Facebook's "near monopoly" means that, for most users, "the vast majority of the people with whom they want to exchange feeds are likely on Facebook already." House Report at 144 n.817. "[T]he switching cost for any one user is therefore enormous." *Id.*

These switching costs create high barriers to entry because, "[t]o induce a user to adopt a new" service, **[**68]** a new service "must incur not only the expense of building a superior product, but also the added compensation to defray a user's cost of switching." CC ¶ 88. Accordingly, new social network and social media services must incur "additional long-run costs that were not incurred by incumbent firms." *Rebel Oil, 51 F.3d at 1439*.

Because of the powerful network effects and high switching costs present in social networking services, the Social Network Market has uniquely high barriers. Thus, "there are strong tipping points in the social networking market that create competition *for the market*, rather than competition within the market." CC ¶ 85 (quoting House Report at 41) (emphasis in original). Facebook itself has recognized that, "with respect to social networks, 'either everyone uses them, or no-one uses them.'" *Id.* ¶ 87 (internal citation omitted).

FTC v. Facebook confirms that Consumers' allegations are sufficient. In *FTC v. Facebook*, the FTC alleged that "Facebook's dominant position in the U.S. personal social networking market is durable due to significant entry barriers, including direct network effects and high switching costs." *2022 U.S. Dist. LEXIS 5415, 2022 WL 103308, at *9*. Like Consumers, the FTC pointed to Facebook's statements acknowledging the strong networks effects and **[**69]** high switching costs that are present in social products. *Id.* After explaining that "network effects and switching costs are commonly recognized types of barriers to entry," the court concluded that the FTC's allegations were sufficient. *Id.* Given Consumers' detailed allegations, the same is true in the instant case.

Accordingly, Consumers have adequately alleged that Facebook has monopoly power both in the Social Media Market and in the Social Network Market.

2. Advertisers Adequately Allege that Facebook Has Monopoly Power in the Social Advertising Market

Advertisers allege that Facebook has monopoly power in the Social Advertising Market. Although Facebook argues that Advertisers have not adequately alleged the Social Advertising Market, Facebook does not dispute that, if Advertisers have adequately alleged the Social Advertising Market, Facebook has monopoly power. *See* Mot. at 13-18. Thus, the Court need not address whether Advertisers have adequately alleged monopoly power.

According to Advertisers, a social advertisement is a distinct type of online advertisement offered by social media services like Facebook. AC ¶¶ 413-14. Specifically, a social advertisement gives companies the **[**70]** option to target a group of users on a **[*782]** social media service "based on a range of targeting criteria—location, age group, gender, hobbies, interests." *Id.* ¶ 417.

Advertisers allege that, because social advertisements are not "reasonably interchangeable" with other types of online advertising, there is a distinct Social Advertising Market, which is a "submarket of online advertising." *Id.* ¶ 413. Under Advertisers' definition, Facebook, Twitter, and LinkedIn are the "three largest firms competing in the Social Advertising Market." *Id.* ¶ 450. Facebook contends that these allegations are inadequate because markets limited to a single form of advertising are implausible and Advertisers have failed to define the "contours" of the Social Advertising Market. Mot. at 14-15. For the reasons below, the Court rejects Facebook's contentions.

As discussed, a plaintiff may plead a product market based on "reasonable interchangeability" by alleging details about a product's '"price, use and qualities"' and explaining why products without those characteristics are not reasonably interchangeable. *See* *Webkinz, 695 F. Supp. 2d at 994* (quoting *Oracle, 331 F. Supp. 2d at 1131*). In other words, the plaintiff must allege that other types of products are not "reasonably **[**71]** interchangeable by consumers for the same purposes." *Microsoft, 253 F.3d at 51-52*. For example, allegations that a product has "a distinct core functionality," "distinct perceptions by consumers," "distinct customer targeting by manufacturers," "distinct analyses by industry analysts," and "distinct pricing and pricing patterns" are sufficient to establish that there is a distinct market for that product. *See* *Datel Holdings, 712 F. Supp. 2d at 997*. Additionally, statements by companies explaining which products they see as competitors for their own products are highly probative. *See* *Epic, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *51*. Furthermore, a plaintiff may plead a distinct submarket by alleging facts which show "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe, 370 U.S. at 325*.

Facebook executives have recognized that social advertising is distinct from other prominent forms of advertising. For example, in October 2012, Facebook COO Sheryl Sandberg stated to investors: "We're not TV, we're not search. We are social advertising." AC ¶ 422. Similarly, in a May 2013 earnings call, Ms. Sandberg stated: "As I said **[**72]** before, the thing about brand advertisers is that they got very used to TV, then they got very used to search, and we are a third thing." *Id.* These statements strongly support a conclusion that there is a distinct Social Advertising Market. *See* *Epic, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *51*.

Moreover, there has been widespread "industry . . . recognition of the" Social Advertising Market as distinct from other markets for online advertising. *Brown Shoe, 370 U.S. at 325*. For example, the advertising company Outbrain has stated that "social ads" and "search ads" have fundamentally different purposes. AC ¶¶ 416-18. Outbrain stated that, whereas "[s]ocial ads are best for targeting audience segments who may be interested in your products or services," "search ads" "are great for targeting customers when they are already looking for you." *Id.* Additionally, in October 2019, "industry publication Marketing Lands" published an article which "predicted growth in the social media advertising segment as distinguished from search and television advertising." *Id.* ¶ 421. This industry recognition supports a conclusion that the Social Advertising Market is a **[*783]** "separate economic entity." *Brown Shoe, 370 U.S. at 325*.

Additionally, Advertisers explain in detail why social advertisements and other types **[**73]** of online advertisements are not "reasonably interchangeable by consumers for the same purposes." *Microsoft, 253 F.3d at 51-52*. First, social advertisements are not reasonably interchangeable with search advertisements. Search advertisements are shown to people who enter certain terms into search engines. AC ¶ 418. Accordingly, these advertisements allow companies to target customers who are "already looking for [the company] (*i.e.*, they search [the] company name or product") or who "are searching for a specific product, service, or piece of information." *Id.* ¶¶ 418, 437. By contrast, social advertisements help a company find customers who are not already looking for the company's products. *Id.* Additionally, to buy search advertisements, companies must bid against each other for certain search terms. *Id.* ¶¶ 438, 442. By contrast, because "social advertisers like Facebook can tailor audiences," companies who want to purchase social advertisements do not have to bid against each other. *Id.* ¶ 440. Thus, whereas prices for search advertisements are "sensitive to changes in demand" for particular search terms, the price of a social advertisement "is proportional to the generality of the targeting." *Id.* ¶ 439, 442. As a result, **[**74]** "[s]mall businesses that do not generally have the budget to bid on coveted search results" can negotiate with companies that offer social advertisements to show advertisements to "granularly defined audiences." *Id.* ¶ 437. Accordingly, because social advertisements and search advertisements have distinct "uses," "distinct prices," and "distinct customers," *Brown Shoe, 370 U.S. at 325*, they are not "reasonably interchangeable by consumers for the same purposes." *Microsoft, 253 F.3d at 51-52*.

For similar reasons, social advertisements are not "reasonably interchangeable" with banner advertisements, which are advertisements that appear as rectangular panels at the top of websites. *See* AC ¶¶ 431-32. Because companies place banner advertisements on pre-determined websites, banner advertisements are most useful for companies who already know what kinds of websites their customers are visiting. Thus, banner advertisements do not enable companies to find new customers in the way that social advertisements do. *Id.* Additionally, as with search advertisements, companies must bid against each other to place banner advertisements on the most coveted websites, which means that the prices of banner advertisements are "sensitive to changes in demand." *Id.* ¶ 439. **[**75]** Thus, because social advertisements and banner advertisements have distinct "uses" and "distinct prices," *Brown Shoe, 370 U.S. at 325*, they are not "reasonably interchangeable by consumers for the same purposes." *Microsoft, 253 F.3d at 51-52*.

Epic Games v. Apple confirms that Advertisers' allegations regarding the Social Advertising Market are sufficient. As discussed, the *Epic* court found after a bench trial that, for at least two reasons, the "wider gaming market" had to be divided into "distinct submarkets" for "mobile gaming," "PC gaming," "console gaming," and "cloud-based game streaming." *2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *47-55*. First, the court found that each type of gaming system appealed to a specific demographic group interested in playing a specific type of game. For example, whereas mobile gaming appealed to "women gamers of all ages . . . and gen-x male gamers" with a "focus and interest on casual games," console gaming appealed to "millennial male gamers . . . with an interest in playing action games." *2021 U.S. Dist. LEXIS 172303, [WL] at *49, *52*. Second, the court found that each type of gaming system had a **[*784]** distinct pricing model. For example, whereas the "overwhelming majority of gaming revenue in mobile gaming derives from free-to-play games," "the gaming revenue generated by console games . . . derived overwhelmingly from **[**76]** pay-to-play or buy-to-play games." *2021 U.S. Dist. LEXIS 172303, [WL] at *49, *52*.

The distinctions between gaming systems identified in *Epic* mirror the distinctions between social advertisements and other types of online advertisements. First, like the different gaming systems described in *Epic*, social advertisements and other types of online advertisements appeal to different types of customers. *See id.* Specifically, whereas social advertisements appeal to companies who want to find new customers, other types of online advertisements appeal to companies with established brand or products. AC ¶ 431. Additionally, social advertisements have a particular appeal to small businesses. *Id.* ¶ 437. Second, like the different gaming systems described in *Epic*, social advertisements and other types of online advertisements have distinct pricing models. *See Epic, 2021 U.S. Dist. LEXIS 172303, 2021 WL 4128925, at *49, *52*. Whereas prices for social advertisements determined on a company-by-company basis, prices for search-based advertisements and banner advertisements are "sensitive to changes in demand" for particular search terms and particular websites. AC ¶¶ 439, 442. Thus, like the different gaming systems in *Epic*, social advertisements and other types of online advertisements are not reasonably interchangeable.

[77]** Facebook's arguments to the contrary are unconvincing. Although Facebook is correct that *Hicks v. PGA Tour, Inc., 897 F.3d 1109 (9th Cir. 2018)*, requires courts to be skeptical of narrowly defined advertising markets, *Hicks* does not apply where a plaintiff has alleged that two types of advertising have fundamentally different purposes. In *Hicks*, the plaintiffs alleged that there was a distinct submarket for "'in-play' or 'in-action' advertising during professional golf tournaments (*i.e.*, between commercial breaks)." *897 F.3d at 1121*. The Ninth Circuit concluded that this market was implausible because "[c]ompanies aiming to target professional golf fans" had many other options for advertising and that these forms of advertising were used by the same companies for the same fundamental objective: targeting golf fans. *Id. at 1121-22*. By contrast, Advertisers allege that social advertising has a fundamentally different purpose from other forms of online advertising: enabling advertisers to reach specific purchasers with specific attributes. AC ¶¶ 424-30. Advertisers also have explained in detail that this form of advertising appeals to different types of companies. Thus, unlike the plaintiffs in *Hicks*, Advertisers have established that social advertising has a distinct "use" and "distinct customers." *Brown Shoe, 370 U.S. at 325*.

Additionally, Facebook contends that "Advertisers do not include factual allegations sufficient to define the contours of the market" and "offer[] no plausible basis for excluding other forms of advertising." Mot. at 15. Given Facebook's previous statements recognizing the distinct Social Advertising Market, Facebook's argument is not credible. As Advertisers point out, Facebook has previously stated to investors: "We're not TV, we're not search. We are social advertising." AC ¶ 422. Moreover, the Ninth Circuit has held that "what constitutes a relevant market is a factual determination for the jury." *Eastman Kodak, 125 F.3d at 1203*. Indeed, "the question of whether the market should include other products is better resolved at the summary judgment stage." *Datel Holdings, 712 F. Supp. 2d at 997*. Thus, because Advertisers "consider and reject multiple conceivably interchangeable substitutes in **[*785]** great factual detail," Advertisers have sufficiently defined the contours of the market. *RealPage, 852 F. Supp. 2d at 1225*.

Thus, Advertisers have adequately alleged the Social Advertising Market.

B. The Court Denies Facebook's Motion to Dismiss Consumers' Data Privacy Claims

Consumers' first theory of *Sherman Act* liability **[**78]** is that Facebook acquired and maintained monopoly power by making false representations to users about Facebook's data privacy practices. Consumers claim that these misrepresentations were "instrumental to Facebook gaining and maintaining market share at the expense of its rivals." CC ¶¶ 108, 217.

According to a leading antitrust treatise, a "monopolist's misrepresentations encouraging the purchase of its product can fit [the] general test for an exclusionary practice when the impact on rivals is significant." *See* Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 782b (4th and 5th Eds., 2021 Cum. Supp.) ("Areeda"). In *American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc., 108 F.3d 1147 (9th Cir. 1997)*, the Ninth Circuit relied on an older version of this treatise and held that, under certain circumstances, a company's "false and misleading advertising" may "constitute[] exclusionary conduct" for purposes of the *Sherman Act*. *See id. at 1152* (citing Phillip E. Areeda & Donald F. Turner, ***Antitrust Law*** ¶ 737b at 280-81 (3d ed. 1978)). Specifically, to state a *Sherman Act* claim based on "false and misleading advertising," a plaintiff must show that the company made representations about its own products or its rivals' products that "were [1] clearly false, [2] clearly material, [3] clearly likely **[**79]** to induce reasonable reliance, [4] made to buyers without knowledge of the subject matter, [5] continued for prolonged periods, and [6] not readily susceptible of neutralization or other offset by rivals." *Id.*[1] Although *American Professional Testing Service* dealt with a claim that the defendant had disparaged its rivals' products, courts have applied the same test to a claim that the defendant made false statements about its own product. *See, e.g., National Ass'n of Pharmaceutical Mfrs., Inc. v. Ayerst Laboratories, 850 F.2d 904, 916 (2d Cir. 1988)* (applying test to claim that pharmaceutical company misrepresented that its generic product was superior to a name brand product); *Genus Lifesciences Inc. v. Lannett Co., Inc., 378 F.*

[1] Courts of Appeals across the country have adopted the same six part test. *See National Ass'n of Pharmaceutical Mfrs., Inc. v. Ayerst Laboratories, 850 F.2d 904, 916 (2d Cir. 1988)*; *Am. Council of Certified Podiatric Physicians and Surgeons v. Am. Board of Podiatric Surgery, Inc., 323 F.3d 366, 371 (6th Cir. 2003)*; *Covad Communs. Co. v. Bell Atl. Corp., 398 F.3d 666, 674-75, 365 U.S. App. D.C. 78 (D.C. Cir. 2005)*; and *Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 762 F.3d 1114, 1127 (10th Cir. 2014)*.

Supp. 3d 823, 841 (N.D. Cal. 2019) (applying test to claim that pharmaceutical company misrepresented that its product was approved by the FDA).

Because fraud is an "essential element" of a *Sherman Act* claim based on misrepresentations to buyers, a plaintiff that brings such a claim must satisfy the heightened pleading standard set forth by *Federal Rule of Civil Procedure 9(b)*. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003)*. *Federal Rule of Civil Procedure 9(b)* provides that, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." If any "particular averments of fraud are insufficiently pled under *Rule 9(b)*," the Court must "'disregard' those averments, or 'strip' them from **[*786]** the claim." *Vess, 317 F.3d at 1105*. Then, the Court will "examine the allegations that remain." **[**80]** *Id.*

Facebook argues that Consumers' data privacy claims are barred by the statute of limitations. *See* Mot. at 10-11. Additionally, Facebook argues that Consumers' data privacy claims must be dismissed because (1) Consumers have failed to allege fraud with particularity; (2) Consumers have failed to show that Facebook's alleged misrepresentations were "clearly false"; (3) Consumers have failed to show that Facebook's alleged misrepresentations were "not readily susceptible of neutralization"; (4) Consumers have failed to show that Facebook's misrepresentations were "clearly material"; and (5) Consumers have failed to allege causal antitrust injury. *See* Mot. at 10-11, 19-22. Facebook also argues that Consumers' claim for injunctive relief is barred by the doctrine of laches. Mot. at 8-9. For the reasons below, the Court rejects these arguments.

The Court begins by describing Consumers' allegation that Facebook obtained and maintained monopoly power by deceiving Consumers about Facebook's data privacy practices. Because the Court must "disregard" all non-particularized allegations of fraud and "examine the allegations that remain," the Court then addresses whether Consumers have alleged **[**81]** with sufficient particularity that Facebook made clearly false representations about Facebook's collection and monetization of user data. *Vess, 317 F.3d at 1105*. After this threshold inquiry, Court addresses the remainder of Facebook's arguments in turn.

1. Consumers Allege that Facebook Obtained and Maintained Monopoly Power by Repeatedly Deceiving Users About Facebook's Data Privacy Practices

According to Consumers, Facebook knew that users placed a premium on privacy and that the best way to attract users was to promise to keep user data private. At the same time, Facebook could not make money without selling user data to third parties. Thus, Consumers allege, Facebook systematically deceived users about the extent to which Facebook was collecting and selling user data. This deception allowed Facebook to beat out companies that were truthful about their user data practices or did not collect and sell user data.

The Court begins by describing Consumers' allegations about the relationship between privacy and the value of Facebook's platform. The Court then describes Consumers' allegations that Facebook deceived users with false statements about Facebook's privacy practices. Finally, the Court describes Consumers' **[**82]** allegations that Facebook's deceptive privacy practices allowed Facebook to obtain and to maintain monopoly power.

a. Facebook Knew That Privacy Would Attract Users and Repel Advertisers

According to Consumers, users of social network and social media services always have valued data privacy highly. In a 2004 consumer survey, a majority of such users indicated that privacy was a "really important issue that [they] care about often." CC ¶ 108. In another study, Facebook users indicated that they cared more about privacy policies than about terrorism. *Id.* Accordingly, "[p]rivacy practices were a crucial form of competition in the early days of the Social Network and Social Media Markets." *Id.* ¶ 102.

Indeed, Facebook's initial success in the Social Network and Social Media Markets arose directly from competitors' failure to keep users' data private. Initially, a company called Myspace dominated the Social Network Market. *Id.* ¶

102. Founded in 2003, Myspace offered an "open" social network that allowed individuals to sign up **[*787]** with pseudonyms. *Id.* ¶¶ 102-03. By 2006, Myspace was the most visited website in the United States. *Id.*

However, in 2007, negative headlines began drawing attention to **[**83]** Myspace's "lax privacy practices." *Id.* ¶ 104. Specifically, users and commentators "attributed sexual assaults, suicides, and murders to Myspace," whose open network "cloaked wrong-doers with relative anonymity." *Id.* These controversies provided an opportunity for Myspace's nascent competitors, which included Friendster, Orkut, Bebo, Flip.com, and Facebook. *Id.* ¶ 105.

Facebook immediately recognized that it could take market share from Myspace by offering a social network that required users to register with their real names and allowed users to share information only with users designated as "friends." *See id.* ¶¶ 44, 106. The original version of Facebook "was closed to all but those users who could validate their own real-world identities, such as by verifying that their identities were legitimate via an e-mail address issued by an organization, such as a university or firm." *Id.* ¶ 48.

These features provided users with "a perceived degree of safety and comfort" that Myspace did not offer, and users left Myspace for Facebook. *Id.* (internal citation omitted). Between 2006 and 2009, Facebook went from having one-tenth the users of Myspace to having more users than Myspace. *Id.* ¶¶ 107, **[**84]** 122. In 2011, Mr. Zuckerberg explained that Facebook "became the world's biggest community online" because Facebook made users feel safe with regard to the privacy of their data:

> I founded Facebook on the idea that people want to share and connect with people in their lives, but to do this everyone needs complete control over who they share with at all times.
>
> This idea has been the core of Facebook since day one. When I built the first version of Facebook, almost nobody I knew wanted a public page on the internet. That seemed scary. But as long as they could make their page private, they felt safe sharing with their friends online. Control was key. With Facebook, for the first time, people had the tools they needed to do this. That's how Facebook became the world's biggest community online. We made it easy for people to feel comfortable sharing things about their real lives.

See Id. ¶ 109; Mark Zuckerberg, *Our Commitment to the Facebook Community*, Facebook Newsroom (Nov. 29, 2011), https://bit.ly/3zDEs2A.

Additionally, Facebook's purported privacy features allowed Facebook to obtain valuable data. In a 2008 internal report titled "Facebook Secret Sauce," Facebook observed that "'[u]sers **[**85]** will share more information if given more control over who they are sharing with and how they share.'" CC ¶ 109 (internal citations omitted). Because the registration and "friending" process "fostered an incredible amount of trust," users were willing to "post their cell phone numbers and their birthdays, offer personal photos, and otherwise share information they'd never do outside their circle of friends." *Id.* ¶ 48. Such data was more valuable to advertisers and other third parties than the data generated by a service like Myspace. For example, "[k]nowing the internet habits of 'YankeesFan123' is less valuable than knowing the browsing habits of a specific individual whose love of the Yankees can be linked with data about his shopping habits, income, family, friends, travel, dining, dating, and myriad other data points." *Id.* ¶ 50. As Mr. Zuckerberg put it, Facebook is "one of the only services on the web where people are sharing pretty personal and intimate information." *Id.* ¶ 130.

[*788] However, Facebook knew that users would not give Facebook their data if Facebook did not "promise privacy protection." *Id.* ¶ 46. To a certain degree, privacy is inherent in Facebook's "closed-network approach." **[**86]** *Id.* ¶ 106. Because Facebook is a "walled garden," advertisers and other third parties cannot access user data without Facebook's permission. *See id.* Nevertheless, Facebook made additional promises to gain additional trust. For example, in a 2004 Privacy Policy, "Facebook promised users that it would disclose its 'information and privacy practices' and that it would 'not use cookies to collect private information from any users.'" *Id.*

Indeed, Facebook knew that the success of its business depended on two competing forces. The first force was users' desire for increased control over their data. The second force was advertisers' and other third parties' desire to purchase as much data as Facebook could gather. Whereas increasing privacy protections would reduce Facebook's revenue from advertisers and third parties, reducing privacy protections would potentially cause users to stop sharing data or to leave Facebook altogether. For example, when Google launched a rival platform in 2010, Facebook decided to "postpone any changes to its privacy policies 'until the direct competitive comparisons beg[a]n to die down.'" *Id.* ¶ 134.

Facebook "spent the next fifteen years deceiving consumers about **[**87]** the data privacy protections that it provided to users in exchange for access to their data." *Id.* ¶ 111. By selling increased amounts of data to third parties while representing to users that it was keeping data private, Facebook increased its user base *and* its profits. In the next section, the Court describes Consumers' specific allegations about Facebook's data practices and the misrepresentations Facebook made to hide those practices from users.

b. Facebook's Deceptive Collection and Sale of User Data to Third Parties

Consumers allege specific instances in which Facebook misled users about the scope of Facebook's data collection and monetization practices. For example, despite repeated promises that it would protect users' privacy and give users the tools to keep their data safe, Facebook tracked users across the internet with various deceptive tools and provided users' private information to third party application developers without permission. Below, the Court describes each of the instances.

i. The News Feed Protest

In 2006, an incident involving Facebook's "News Feed" feature reaffirmed that Facebook users cared strongly about controlling their data. The "News Feed" provided each **[**88]** Facebook user with a dynamic list of information and media that the user's friends recently have posted and "was intended as a central destination so users did not have to browse through friends' profiles for updates." CC ¶ 113. However, when the News Feed initially launched, users had little control over what information was pulled from their profiles into their friends' News Feeds. *Id.* ¶ 115. Indeed, many users "argu[ed] that the feature was too intrusive, showing every little moment such as Lucy friending Ben or that John and Sarah broke up." *See* Alyssa Newcomb, *Can You Even Remember How You Coped Before Facebook's News Feed?*, NBC News (Sept. 2, 2016), https://nbcnews.to/3nmr7Xp.

After one million of Facebook's then eight million users joined a "Facebook News Feed protest group," Facebook CEO Mark Zuckerberg publicly stated: "This was a big mistake on our part, and I'm sorry for it. But apologizing isn't enough. I wanted to make sure we did something **[*789]** about it, and quickly. So we have been coding nonstop for two days to get you better privacy controls." CC ¶¶ 114-15. Facebook then instituted settings that "purportedly allowed users greater ability to keep their activities private." **[**89]** *Id.* ¶ 115.

ii. Facebook Deceptively Collected Data Despite Beacon's "No, Thanks" Option

Despite its promise that it would give users tools to control their privacy, Facebook deceived users in 2007 about Facebook's practice of using a tool called "Beacon" to track users' purchases on third party websites. *See* CC ¶ 119. Specifically, when Facebook users made purchases on participating third party websites, Beacon would send the users "'pop-up' notification[s] . . . requesting permission to share details regarding the user[s] [purchase] with Facebook." *Id.* The "'pop-up' notifications" provided users with a "No, Thanks" option, which gave users the impression that they could decline to share their information with Facebook. *Id.*

However, Stefan Berteau, a senior research engineer at California's Threat Research Group, examined the software code used to create Beacon and discovered that "Beacon allowed Facebook to track the activity of even those users that clicked the 'No, Thanks' prompt." *See id.* ¶ 120; ECF No. 97-4 at 57-58. Accordingly, the "No, Thanks" prompt deceived users into thinking that Facebook was providing them with control over their purchasing data when, in reality, Facebook **[**90]** was collecting and selling that data.

When rumors about the full extent of Beacon's functionality began to spread, Facebook executives attempted to silence the rumors. In a 2007 interview, Brad Stone of the New York Times asked Chamath Palihapitiya, Facebook's Vice President of Marketing and Operations, whether Beacon provided Facebook with information about a purchase even if a user "decline[d] to publish the purchase" by clicking "No, Thanks." *See* CC ¶ 120 n.92; ECF No. 97-4 at 57 n.87. Mr. Palihapitiya responded: "Absolutely not." ECF No. 97-4 at 57 n.87. Mr. Palihapitiya also stated that Facebook was trying to "dispel a lot of misinformation that [was] being propagated unnecessarily." *Id.*

After an FTC investigation revealed the truth about Beacon, Facebook modified Beacon so that users had a genuine choice to opt out. CC ¶ 121. In response to significant public outrage and litigation, Facebook CEO Mark Zuckerberg called Beacon a mistake and stated: "I'm not proud of the way we've handled this situation and I know we can do better." *Id.*

iii. Facebook Provided Users' Private Information to Third Party Applications Without Users' Permission

Around the same time that Facebook launched **[**91]** Beacon, and unbeknownst to users, Facebook began giving "app developers access to user content and information, including content marked private." CC ¶ 117.

Indeed, "Facebook explained to third-party app developers in May 2007 that Facebook's core value proposition and business model was 'providing access to a new kind of data—social data, which enables you to build applications that are relevant to users.'" *Id.* ¶ 118 (internal citation omitted). Although Facebook had not expressly promised to keep app developers from accessing user data, Facebook's terms of service stated only that user data would be used for targeted advertising. *See id.* ¶¶ 5-6.

In 2009, Facebook started to provide users with a "Central Privacy Page." *Id.* ¶ 123. The Central Privacy Page invited users to "control who can see your profile and personal information" and gave users the option of sharing their information with "Only Friends." *See id.*; Facebook **[*790]** Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises, Federal Trade Commission (Nov. 29, 2011) ("*2011 FTC Settlement*"), https://bit.ly/3318YHU. The Central Privacy Page did not mention the possibility that application developers could **[**92]** receive users' "personal information." Additionally, although Facebook's "Privacy Settings" stated that applications would receive some of users' information, Facebook assured users that applications would only receive information necessary "for [the applications] to work." Complaint for violation of the *Federal Trade Commission Act* in the matter of Facebook Inc., No. 0923184 at 10 (F.T.C. Dec. 5, 2011) ("*2011 FTC Complaint*"), https://bit.ly/33eqwAa. Taken together, these statements gave users the impression that Facebook was not providing third party application developers with users' personal data for profit. *Id.*

Then, in May 2010, Facebook made three statements that confirmed this impression. First on, May 24, 2010, Facebook CEO Mark Zuckerberg wrote an op-ed in the Washington Post stating that Facebook "do[es] not share your personal information with people or services you don't want," "do[es] not give advertisers access to your personal information," and "do[es] not and never will sell any of your information to anyone." *See* CC ¶ 238(m) n.212; Anita Balakrishnan, et al., *Mark Zuckerberg Has Been Talking About Privacy for 15 Years - Here's Almost Everything He's Said*, CNBC (Apr. 9, 2018), https://cnb.cx/3n7iPTn. **[**93]**

Second, on May 26, 2010, Facebook issued an official press release which stated that Facebook would "give the more than 400 million people who use Facebook the power to control exactly who can see the information and content they share"; that "People have control over how their information is shared"; that "Facebook does not share personal information with people or services users don't want"; that "Facebook does not give advertisers access to people's personal information"; and that "Facebook does not sell any of people's information to anyone." CC ¶ 238(c).

Third, on May 27, 2010, Facebook CEO Mark Zuckerberg stated in an interview with National Public Radio that "[t]here's this false rumor that's been going around which says that we're sharing private information with applications and it's just not true." *Id.* ¶ 238(d).

Despite these statements, Facebook subsequently *increased* the amount of user data that developers could purchase. Specifically, Facebook allowed "third parties to access the data of a Facebook user's friends," even if those friends had not signed up for the third parties' applications. *Id.* ¶ 145.

iv. Facebook Deceptively Collected Users' Data With "Like" Buttons on Third [94] Party Websites**

Around the same time that Facebook increased the amount of user data it was providing to third party applications, Facebook started using the "Like" button tool to collect user data without permission. In early 2010, Facebook began allowing participating third parties to add "Like" buttons as plugins on their external websites. *See* CC ¶ 125. These buttons allowed users to express public approval for a "particular piece of content on a third party's website." *Id.* As of 2018, "Like" buttons "appear[ed] on nearly 3 million websites." ECF No. 97-4 at 41 n.6.

Although users knew that clicking a "Like" button transmitted information to Facebook, "Facebook's 'Frequently Asked Questions' page indicated that 'No data is shared about you when you *see* a social plug-in on an external website.'" *See* CC ¶ 126. However, in 2011, a Dutch computer scientist named Arnold Roosendaal discovered **[*791]** that Facebook used "Like" buttons on third party websites "to monitor users and obtain their data anytime users visited those third-party websites, even when users did *not* click the 'Like' button." *See id.* (emphasis in original); ECF No. 97-4 at 65.

As with Beacon, Facebook attempted to keep the true **[**95]** function of the "Like" button secret. For example, in a May 2011 interview with the Wall Street Journal, Facebook CTO Bret Taylor stated, in reference to the "Like" buttons, "[w]e don't use them for tracking and they're not intended for tracking." ECF No. 97-4 at 66.

v. The 2011 Federal Trade Commission Settlement

In 2011, the FTC filed a complaint against Facebook alleging that Facebook had "deceived customers by telling them they could keep their information on Facebook private, and then repeatedly allowing it to be shared and made public." CC ¶ 127. In particular, the FTC highlighted Facebook's practice of allowing third party app developers to access the data of users' friends. *See id.* ¶ 145; *2011 FTC Complaint, supra*.

Shortly thereafter, Facebook and the FTC agreed to a settlement which "barred Facebook from making any further deceptive privacy claims." CC ¶ 127. Facebook also agreed "to obtain consumers' affirmative express consent before enacting changes that override their privacy preferences," "to prevent anyone from accessing a user's material more than 30 days after the user has deleted his or her account," and "to establish and maintain a comprehensive privacy program designed **[**96]** . . . to protect the privacy and confidentiality of consumers' information." *Id.* ¶ 128.

The settlement also directly addressed Facebook's practice of giving user data to third party app developers. For example, the settlement required Facebook to "give consumers 'clear and prominent' notice and obtain their consent before sharing their information beyond those entities clearly enumerated in consumers' privacy settings." *Id.* ¶ 153.

On November 29, 2011, Mr. Zuckerberg issued a press release which stated that "everyone needs complete control over who they share with at all times." *Id.* ¶ 238(e). Mr. Zuckerberg added that "[t]his idea has been the core of Facebook since day one" and that the reason people originally signed up for Facebook was that, "for the first time," they "could make their page private." Mark Zuckerberg, *Our Commitment to the Facebook Community*, Facebook Newsroom (Nov. 29, 2011), https://bit.ly/3zDEs2A. Indeed, Mr. Zuckerberg explained, the reason "Facebook became the world's biggest community online" was that Facebook "made it easy for people to feel comfortable sharing things about their real lives." *Id.*

Mr. Zuckerberg further stated that, pursuant to the 2011 FTC Settlement, **[**97]** Facebook would be giving users "tools to control who can see your information and then making sure only those people you intend can see it." CC ¶

238(f). Specifically, Mr. Zuckerberg stated that Facebook would be providing users with a "new apps dashboard to control what your apps can access" and a "new app permission dialog that gives you clear control over what an app can do anytime you add one." Mark Zuckerberg, *Our Commitment to the Facebook Community*, Facebook Newsroom (Nov. 29, 2011), https://bit.ly/3zDEs2A.

Mr. Zuckerberg reinforced this message in a February 2012 letter to investors which stated that "giving people control over what they share is a fundamental principle" and, in accordance with that principle, Facebook was dedicated to "build[ing] tools to help people . . . share what they want." CC ¶ 238(g).

[*792] vi. After the 2011 FTC Settlement, Facebook Deceptively Tracked Users Across the Internet With "View Tags"

However, Facebook quickly resumed its deceptive practices. For example, in 2012, Facebook "began using 'View Tags,' which allow advertisers to track Facebook users across the Internet using cookies." CC ¶ 137. View Tags allowed companies to determine whether users who **[**98]** viewed the companies' advertisements on Facebook purchased the companies' products. *Id.* (citing Rebecca Greenfield, *2012: The Year Facebook Finally Tried to Make Some Money*, The Atlantic (Dec. 14, 2012), https://bit.ly/33aUFjF).

This practice contradicted Facebook's 2007 Privacy Policy, which stated that although Facebook would use cookies to collect users' "browser type and IP address," Facebook would use this information only to "confirm that users are logged in." ECF No. 97-4 at 49 n.43, 58. The Privacy Policy also stated that "[t]hese cookies terminate once the user closes the browser." *Id.*

Furthermore, around the time that Facebook started using "View Tags," Facebook made several statements to assure users that Facebook was not using cookies for commercial purposes. For example, in a May 2011 interview with the Wall Street Journal, Facebook CTO Bret Taylor stated that, although "Facebook places cookies on the computers of people that visit facebook.com," the sole purpose of these cookies was to "protect users' Facebook accounts from cyber-attacks." ECF No. 97-4 at 66. Additionally, in September 2011, a Facebook engineer named Arturo Bejar wrote in a blog post that Facebook used **[**99]** cookies only "for safety and protection." *Id.* at 67. Mr. Bejar further stated: "we don't use our cookies to . . . target ads or sell your information to third parties." *Id.* The same month, a Facebook spokesperson stated that Facebook does not use cookies to "track users across the web." *Id.*

vii. After the 2011 FTC Settlement, Facebook Resumed its Practice of Providing Users' Private Information to Third Party Applications Without Users' Permission

Most critically, Facebook resumed its practice of giving third party app developers the data of users who had not signed up for those developers' applications. *See* CC ¶ 145. Indeed, the "volume of data third parties were acquiring from Facebook led one Facebook employee to state: 'I must admit, I was surprised to find out that we are giving out a lot here for no obvious reason.'" *Id.* This practice continued until at least 2018. *Id.* ¶ 146.

Before this practice was uncovered, Facebook made several deceptive statements that obscured the practice from users. For example, in a February 2017 filing with the SEC, Facebook stated that, although "some of our developers or other partners, such as those that help us measure the effectiveness of ads, may **[**100]** receive or store information provided by us or by our users through mobile web applications," Facebook provides only "limited information to such third parties based on the scope of services provided to us." *See id.* ¶ 238(l); Form 10-K Filing for Facebook, Inc., Securities and Exchange Commission (Feb. 2, 2017), https://bit.ly/3q7CtAl.

viii. The Cambridge Analytica Scandal

A 2018 scandal involving the British political consulting firm Cambridge Analytica revealed Facebook's practice of providing users' private information to third party app developers. Specifically, the "Cambridge Analytica scandal" revealed that, although the Cambridge Analytica Facebook application had only 270,000 users, Cambridge Analytica "was able to access the personal data of up to 87 *million* Facebook **[*793]** users." *See* CC ¶ 143 (emphasis added).

Mr. Zuckerberg called the Cambridge Analytica incident a "mistake," pledged to take action against "rogue apps," and stated that "[w]e have a responsibility to protect your data, and if we can't then we don't deserve to serve you."[2] *See* CC ¶ 238(o); *Facebook's Zuckerberg Speaks Out Over Cambridge Analytica 'Breach'*, BBC News (Mar. 22, 2018), https://bbc.in/3GmpZKT.

However, despite **[**101]** Mr. Zuckerberg's statement that Cambridge Analytica was a "mistake," Facebook subsequently announced that at least 10,000 applications had been able to access similar data for the entire period since the FTC settlement. CC ¶ 148.

ix. The 2019 Federal Trade Commission Penalty

Shortly after the Cambridge Analytica Scandal, the Department of Justice ("DOJ") and the FTC filed a complaint alleging that Facebook had breached the 2011 FTC settlement agreement by "deceiv[ing] users about their ability to control the privacy of their personal information." CC ¶¶ 145, 149.

In July 2019, "the FTC and the DOJ announced that Facebook would pay a $5 billion penalty." *Id.* ¶ 149. Although this penalty exceeded the FTC's largest ever penalty by an order of magnitude, the FTC explained that the size was justified because Facebook had made $55.8 billion in 2018 through targeted advertising and because Facebook's promises to users "that they can control the privacy of their information" were central to collecting information for that targeted advertising. *Id.* ¶ 150.

c. Facebook's Deceptive Privacy Practices Helped Facebook Obtain and Maintain Monopoly Power

Consumers allege that Facebook's deceptive practices **[**102]** allowed Facebook to maximize its user base and its revenue. Between 2007 and 2010, Facebook doubled its revenue every year. CC ¶ 124. By 2010, Facebook made over $1 billion in annual revenue and was the "largest social network in the world." *Id.*

In 2012, when Facebook executed an initial public offering, Facebook "had 845 million monthly active users" worldwide. *Id.* ¶ 138. Additionally, data analytics firm Comscore reported that Facebook was the "third largest web property in the world . . . and accounted for approximately 3 in every 4 minutes spent on social networking sites and 1 in every 7 minutes spent online around the world." House Report at 144 (internal citation omitted). Around the same time, Facebook COO Sheryl Sandberg stated in a presentation to a "large telecommunications firm" that Facebook was "95% of all social media" in the United States as measured by "monthly minutes of use." *See* CC ¶ 286; House Report at 138.

In 2018, "Facebook earned over $55 billion in revenue" and had "over 217 million users in the United States." CC ¶ 147. In 2019, Facebook earned over $70 billion in revenue, *id.* ¶ 41, which gave it an 85% share of the Social Media Market as measured by revenue, **[**103]** *id.* ¶ 80.

Additionally, Facebook's deception of users allowed Facebook to prevent sophisticated rivals, like Google, from entering the market. In 2010, Google launched a new social network called Google+. *Id.* ¶ 131. With Google+, Google attempted **[*794]** "to build out a 'social graph' that would leverage a common user identity across Google

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[2] In 2017, "Facebook disclosed to congressional investigators that it had sold to a Russian company, Internet Research Agency (IRA), ads which psychographically targeted American voters, and that up to approximately 126 million could have been targeted with such ads." ECF No. 97-4 at 42 n.10.

products, including YouTube and Gmail." *Id.* Google poured a "massive" amount of resources into Google+ and "conscripted almost all of the company's products to help build Google+." *Id.* ¶ 133. At its peak, "Google+ involved 1,000 employees from divisions across the country." *Id.*

However, around the time Google+ entered the social network market, "prominent investors . . . noted that the social networking market had 'extreme network effects,' making it 'increasingly hard to see a materially successful new entrant, even with all of Google's resources.'" House Report at 144. Accordingly, Google+ needed a way to distinguish itself from Facebook.

Indeed, Facebook realized that it could not allow users to find out about Facebook's privacy practices while Google+ was a viable alternative. For example, in 2011, a Facebook executive stated that it would be unwise to **[**104]** remove privacy protections because "IF ever there was a time to AVOID controversy, it would be when the world is comparing our offerings to G+." CC ¶ 134. The same executive stated that Facebook could remove those protections after "the directive competitive comparisons begin to die down." *Id.*

Without any way to distinguish itself from Facebook and to overcome the extreme network effects, Google+ was not able to compete with Facebook. *Id.* ¶ 135. Thus, in 2018, Google+ left the market. *Id.* ¶ 140.

2. Consumers Allege with Sufficient Particularity that Facebook Made Numerous "Clearly False" Representations About Its Collection and Monetization of Data

Facebook contends that none of the representations identified by Consumers are "'clearly false'" and that, in any event, Consumers have failed to allege those representations with sufficient particularity. Mot. at 20-21 (quoting *Am. Pro. Testing Serv., 108 F.3d at 1152*). For the reasons below, the Court rejects Facebook's arguments.

Although the Ninth Circuit has not specifically addressed what constitutes a "clearly false" statement in the context of the *Sherman Act*, the Ninth Circuit's cases dealing with securities fraud claims provide useful guidance. The Securities Exchange Commission ("SEC") **[**105]** has interpreted *Section 10(b) of the Securities Exchange Act* to prohibit "any untrue statement of a material fact . . . in connection with the purchase or sale of any security." *17 C.F.R. § 240.10b-5(b)*. Thus, "[t]o plead a claim under *section 10(b)*," a plaintiff must allege "a material misrepresentation or omission." *Oregon Pub. Emps. Ret. Fund v. Apollo Grp. Inc., 774 F.3d 598, 603 (9th Cir. 2014)*. To qualify as a "material misrepresentation," a statement must be "capable of objective verification." *Id. at 606*. By contrast, "subjective assessments" and "vague statements of optimism like 'good,' 'well-regarded,' or other feel good monikers" are "non-actionable puffing." *See In re Cutera Sec. Litig., 610 F.3d 1103, 1111 (9th Cir. 2010)*.

The same principles apply to a *Sherman Act* claim based on "false and misleading advertising." Just as the purpose of a securities fraud claim is to hold a company liable for making misrepresentations that caused investors to purchase the company's securities, the purpose of a "false and misleading advertising" claim under the *Sherman Act* is to hold a "monopolist" liable for making "misrepresentations [that] encourag[ed] the purchase of its product." Areeda ¶ 782b. Indeed, the Ninth Circuit's statement that misrepresentations are anticompetitive only if they are "clearly false" and "clearly material" **[*795]** mirror the basic requirements of a securities fraud claim. *Am. Pro. Testing Serv., 108 F.3d at 1152*.

Additionally, as discussed, *Federal Rule of Civil Procedure 9(b)* requires **[**106]** that "the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Vess, 317 F.3d at 1106*. Thus, a plaintiff must allege the "who, what, when, where, and how" of each alleged misrepresentation. *Id.*

Accordingly, the Court must assess whether Consumers have alleged misrepresentations that were "capable of objective verification" and whether Consumers have alleged the "who, what, when, where, and how" of each misrepresentation. As an initial matter, the Court concludes that several of the representations that Consumers highlight are "non-actionable puffing." *See In re Cutera, 610 F.3d at 1111*. For example, Consumers highlight Facebook's statement that "[k]eeping the global community safe is an important part of our mission - and an important part of how we'll measure our progress going forward." CC ¶ 238(n). The Court agrees with Facebook that such representations are "vague statements of optimism" and are not "capable of objective verification." *See In re Cutera Sec. Litig., 610 F.3d at 1111*; *Apollo Grp., 774 F.3d at 606*. Accordingly, the Court must disregard these representations.

However, the Court finds that Consumers have alleged with sufficient **[**107]** particularity that Facebook made numerous "clearly false" representations about Facebook's data privacy practices. Specifically, Consumers have adequately alleged at least the following "clearly false" representations that are "capable of objective verification," *Apollo Grp., 774 F.3d at 606*: (1) Facebook falsely represented that it was not sharing users' private information with third parties, beginning with statements made after the News Feed protest and culminating in statements made during the Cambridge Analytica scandal; (2) Facebook falsely represented that users could prevent the "Beacon" tool from collecting their data; (3) Facebook falsely represented that users could prevent the "Like" button from collecting their data; and (4) Facebook falsely represented that it would not use cookies to collect users' data for commercial purposes, such as tracking users across the internet with "View Tags." Additionally, because Consumers identify the "who, what, when, where, and how" of each of these alleged representations, each alleged representation satisfies *Federal Rule of Civil Procedure 9(b)*. *Vess, 317 F.3d at 1106*.

3. Consumers' Data Privacy Claims Are Timely

Facebook contends that Consumers' data privacy claims are barred by the statute of limitations. *See* Mot. at **[**108]** 6-7. For the reasons below, the Court rejects this contention.

A claim may be dismissed under *Rule 12(b)(6)* on the ground that it is barred by the applicable statute of limitations only when "the running of the statute is apparent on the face of the complaint." *Huynh v. Chase Manhattan Bank, 465 F.3d 992, 997 (9th Cir. 2006)*. Thus, "a complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." *Supermail Cargo, Inc. v. United States, 68 F.3d 1204, 1206 (9th Cir. 1995)*.

The limitations period for private damages claims brought under *Section 2 of the Sherman Act* is four years. *15 U.S.C. § 15b*. However, the "period of limitations for antitrust litigation runs from **[*796]** the most recent injury caused by the defendants' activities rather than from the violation's inception." *Xechem, Inc. v. Bristol-Myers Squibb Co., 372 F.3d 899, 902 (7th Cir. 2004)* (Easterbrook, J.) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*). Under this "continuing violation" doctrine, "each overt act that is part of the [antitrust] violation and that injures the plaintiff . . . starts the statutory period running again." *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)* (internal quotations omitted). However, to qualify as an "overt act," the act must satisfy "two criteria: 1) It must be a new and independent act that is not merely a reaffirmation of a previous act; and 2) it must inflict new and accumulating injury on the plaintiff." *Samsung Elecs. Co., Ltd. v. Panasonic Corp., 747 F.3d 1199, 1202 (9th Cir. 2014)* (internal quotations omitted).

Accordingly, **[**109]** because Consumers filed their complaint on December 3, 2020, Consumers must allege "overt act[s] that [are] part of the [antitrust] violation" that occurred after December 3, 2016. *See Klehr, 521 U.S. at 189*.

Because Consumers have adequately alleged that Facebook made at least two false representations after December 3, 2016, Consumers' claim is timely. First, on February 2, 2017, Facebook stated in an SEC filing that Facebook provides only "limited information to [third party application developers] based on the scope of services provided to us." *See* CC ¶ 238(l); Form 10-K Filing for Facebook, Inc., Securities and Exchange Commission (Feb. 2, 2017), https://bit.ly/3q7CtAl. Second, in March 2018, Mr. Zuckerberg called the Cambridge Analytica incident a "mistake," pledged to take action against "rogue apps," and stated that "[w]e have a responsibility to protect your data, and if we can't then we don't deserve to serve you." *See* CC ¶ 238(o); *Facebook's Zuckerberg Speaks Out Over Cambridge Analytica 'Breach'*, BBC News (Mar. 22, 2018), https://bbc.in/3GmpZKT.

As discussed, Consumers have alleged with sufficient particularity that these representations were "clearly false." Facebook's 2017 statement to the FTC **[**110]** would have given reasonable users the impression that Facebook was not providing third party applications with private information. To the contrary, the Cambridge Analytica scandal revealed that Facebook had provided users' private information to numerous third party applications, including applications for which users were not registered. *See* CC ¶ 143. For example, although Cambridge Analytica had only 270,000 users, Cambridge Analytica "was able to access the personal data of up to 87 *million* Facebook users." *See id.* (emphasis added). Similarly, Mr. Zuckerberg's 2018 statement about Cambridge Analytica would have given reasonable users the impression that Cambridge Analytica was a "rogue app" and that Facebook had not been systematically providing users' private information to third party application developers. However, Facebook subsequently announced that at least *10,000 applications* had been able to access similar data for the entire period since the FTC settlement. *Id.* ¶ 148. Accordingly, because each of these representations is an "overt act that is part of the [antitrust] violation" and occurred after December 3, 2016, Consumers' claim is timely. *Klehr, 521 U.S. at 189*.

Facebook's arguments to the **[**111]** contrary are unconvincing. Facebook argues that any false representation made after 2016 "is, as alleged, a 'reaffirmation of a previous' strategy, not a 'new and independent act' capable of restarting the statute of limitations." Reply at 4-5 (quoting *Bay Area Surgical Mgmt. LLC v. Aetna Life **[*797]** Ins. Co., 166 F. Supp. 3d 988, 999 (N.D. Cal. 2015)*). This argument selectively and misleadingly quotes *Bay Area Surgical Management*, which stated in relevant part that an "overt act restarts the statute of limitations if it . . . is 'a new and independent act that is not merely a reaffirmation of a previous *act*.'" *166 F. Supp. 3d at 999* (quoting *Pace Indus. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir. 1987)*) (emphasis added). Thus, Facebook provides no authority for its argument that an act is not "new and independent" simply because the defendant has previously committed the same type of act as part of a unified anticompetitive strategy.

Facebook's argument ignores the Ninth Circuit's clear guidance that, if a defendant commits the same anticompetitive act multiple times, each new act restarts the statute of limitations for *all* the acts. *See Oliver v. SD-3C LLC, 751 F.3d 1081, 1086 (9th Cir. 2014)* ("[E]ach time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury to the purchaser and the statute of limitations runs from the date of the act."); *Hennegan v. Pacifico Creative Serv., Inc., 787 F.2d 1299, 1301 (9th Cir.1986)* (holding that a new overt act occurred **[**112]** each time tour operators shepherded tourists away from the plaintiffs' shop in exchange for payment). Accordingly, the two representations discussed above were overt acts that restarted the limitations period.

Additionally, Facebook summarily asserts that "even if the post-December 2016 acts could be sufficient, [Consumers] cannot allege—as they must—that the acts inflicted 'new and accumulating injury' on them." Reply at 5. However, this argument ignores Consumers' allegation that each of Facebook's false representations allowed Facebook to maintain a "critical mass of users" by convincing users that Facebook was protecting their data. CC ¶ 217. As the Seventh Circuit has explained, "improperly prolonging a monopoly is as much an offense against the *Sherman Act* as is wrongfully acquiring market power in the first place." *Xechem, 372 F.3d at 902*. Moreover, as explained in the following sections, Consumers have adequately alleged each of the elements required to show that Facebook's false representations had a significant effect on competition. Accordingly, Facebook's conclusory argument is insufficient to show that Consumers "can prove no set of facts that would establish" that each of Facebook's false representations **[**113]** contributed to Consumers' injury. *Supermail Cargo, 68 F.3d at 1206*.

Thus, Consumers' data privacy claims are timely.

4. Consumers Adequately Allege that Facebook's False Representations About Its Data Privacy Practices Were Not Readily Susceptible of Neutralization

Facebook contends that, even if Consumers have adequately alleged that Facebook made false representations, Consumers have failed to allege that these representations were "'not readily susceptible of neutralization or other offset by rivals.'" Mot. at 21-22 (quoting *Am. Pro. Testing Serv., 108 F.3d at 1152*). For the reasons below, the Court rejects this argument.

Although the Ninth Circuit has not explained how to evaluate whether a company's false representations about its own products are reasonably susceptible of neutralization,[3] three cases from the D.C. **[*798]** Circuit provide useful guidance. First, in *Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087, 331 U.S. App. D.C. 226 (D.C. Cir. 1998)*, a radio station in the Caribbean brought a *Sherman Act* claim alleging that a rival radio station had falsely represented to advertisers that the rival station's services "could reach the 'entire Caribbean.'" In reality, the station "reached only a fraction of that area." *Id.* The D.C. Circuit held that these "fraudulent misrepresentations to advertisers" were "well within" the definition of "anticompetitive conduct." **[**114]** *Id.*

Second, in *United States v. Microsoft Corp., 253 F.3d 34, 76, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*, the Department of Justice brought a *Sherman Act* claim alleging that Microsoft had falsely represented to developers that Microsoft's software tools could be used to design applications that would be compatible with other platforms. In reality, "Microsoft's tools included 'certain keywords and compiler directives that could only be executed properly by Microsoft's [software].'" *Id.* (internal citation omitted). The D.C. Circuit held that these false representations fell within the scope of the *Sherman Act*. *Id.*

Third, in *Covad Communs. Co. v. Bell Atl. Corp., 398 F.3d 666, 670, 365 U.S. App. D.C. 78 (D.C. Cir. 2005)*, a provider of Digital Subscriber Line ("DSL") services brought a *Sherman Act* claim alleging that Bell Atlantic had falsely represented to customers in certain areas that Bell Atlantic could provide DSL services. *Id. at 674*. In reality, Bell Atlantic's DSL services were not yet available in those areas. *Id.* However, the D.C. Circuit held that Bell Atlantic's representations were readily susceptible of neutralization because the "falsity of" Bell Atlantic's representation was "necessarily dispelled whenever a consumer trie[d] to obtain the [DSL] service." *Id. at 675*.

The takeaway from these three cases is that a company's false representation is not readily susceptible of neutralization when the representation **[**115]** is about a highly technical aspect of the company's product. In *Caribbean Broadcasting, 148 F.3d at 1087*, the defendant made false representations about the technical capabilities of its radio broadcasting system. Similarly, in *Microsoft, 253 F.3d at 76*, Microsoft made false representations about the technical features of its programming tools. Thus, it would have been difficult for anybody without technical expertise to determine that the representations considered in *Caribbean Broadcasting* and *Microsoft* were false. By contrast, in *Covad, 398 F.3d at 670*, Bell Atlantic falsely represented that its services were available to customers in certain geographic areas. Because any customer who tried to obtain the defendant's services could discover that this representation was false, technical expertise was not required. Indeed, in *Covad*, the D.C. Circuit expressly contrasted Bell Atlantic's representations with the representations considered in *Microsoft. Id.*

Under this standard, Consumers have adequately alleged that Facebook's false representations were "not readily susceptible of neutralization or other offset by rivals." *Am. Pro. Testing Serv., 108 F.3d at 1152*. Consumers explain that Facebook has created a "walled garden" which gives Facebook complete control over user data. *See* CC ¶ 106. Thus, even sophisticated third parties, such as developers **[**116]** and search engines, cannot access user data without Facebook's permission, let alone determine what Facebook is doing with user data. *See id.*

Moreover, Consumers have alleged that each of Facebook's deceptive privacy practices—providing private user data to third party application developers, collecting user data with the Beacon tool, collecting user data with "Like" buttons, and **[*799]** tracking users across the internet with cookies—could not have been revealed by anybody without significant technical expertise. For example, the true nature of the "Beacon" tool was not revealed until "Stefan Berteau, a senior research engineer at California's Threat Research Group" examined the software code

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[3] The Ninth Circuit's decision in *American Professional Testing Service, 108 F.3d at 1152*, dealt with a claim that the defendant had disparaged a rival by posting fliers which falsely stated that the rival "was in financial trouble" and "had been accused of fraud by the SEC." Because these statements were about the rival, and the rival knew the statements were false, the rival was in a good position to "neutralize" the statements. *See id.*

used to create the "Beacon" tool. ECF No. 97-4 at 57-58. Similarly, the true nature of the "Like" button was not revealed until "Dutch researcher Arnold Roosendaal" published a white paper that analyzed the software code used to create "Like" buttons. *Id.* at 65. In turn, Facebook's provision of user data to third party application developers over a seven year period was revealed only because of the Cambridge Analytica scandal. CC ¶ 146. These examples show that, just like the false representations considered **[**117]** by the D.C. Circuit in *Caribbean Broadcasting, 148 F.3d at 1087*, and *Microsoft, 253 F.3d at 76*, users and rivals could not have discovered that Facebook's representations were false without significant technical expertise or access to Facebook's software code. Thus, Facebook's false representations were "not readily susceptible of neutralization or other offset." *Am. Pro. Testing Serv., 108 F.3d at 1152*.

Facebook's conclusory argument to the contrary is unconvincing. Facebook merely states that the "alleged misrepresentations are on their face reasonably susceptible to neutralization by rivals in obvious ways." Mot. at 21. "For example," Facebook contends, "those firms could have improved their own policies, or called attention to Facebook's supposed misstatements." *Id.* However, Facebook makes no effort to explain how rival firms could have known that Facebook's statements were false when Facebook made them.

Additionally, although Facebook relies on *Genus Lifesciences, 378 F. Supp. 3d 823*, that case does not support Facebook's argument. In *Genus Lifesciences*, the plaintiff, who owned the only FDA approved version of a certain drug, brought a *Sherman Act* claim alleging that the defendant had falsely represented that the defendant's version of the same drug also was FDA approved. *Id. at 841-42*. The court held that this representation was readily susceptible of neutralization **[**118]** because FDA approval is a matter of public knowledge and the plaintiff was fully aware that the defendant's drug was not approved. *Id.* By contrast, in the instant case, there was no publicly available information that Facebook's rival could have consulted to determine whether Facebook's representations about its data privacy practices were true.

Accordingly, Consumers have adequately alleged that Facebook's false representations about its data privacy practices were "not readily susceptible of neutralization or other offset by rivals." *Am. Pro. Testing Serv., 108 F.3d at 1152*.

5. Consumers Adequately Allege that Facebook's False Representations Were "Clearly Material"

Facebook argues that Consumers' data privacy claims must be dismissed because Consumers have not adequately alleged that "Facebook's representations impeded competition." Mot. at 21. According to Facebook, Consumers have failed to explain how "Facebook's alleged misrepresentations prevented other well-resourced firms—like Google or Snapchat—from competing effectively." *Id.* at 22. Additionally, Facebook argues that Consumers' "underlying theory is completely implausible" because there are other "competing theories for Facebook's success," "including Facebook's **[**119]** 'realness,' which is alleged to be Facebook's 'distinguishing feature.'" *Id.*

As an initial matter, Facebook's arguments ignore the Ninth Circuit's specific **[*800]** test for determining whether a "monopolist's misrepresentations encouraging the purchase of its product" impede competition. *See* Areeda ¶ 782b. Indeed, as discussed, the Ninth Circuit has stated that a monopolist's misrepresentations about its products constitute "exclusionary conduct" if the misrepresentations "were [1] clearly false, [2] clearly material, [3] clearly likely to induce reasonable reliance, [4] made to buyers without knowledge of the subject matter, [5] continued for prolonged periods, and [6] not readily susceptible of neutralization or other offset by rivals." *Am. Pro. Testing Serv., 108 F.3d at 1152*. Thus, if Consumers have adequately alleged these six elements, Consumers have adequately alleged that Facebook's misrepresentations impeded competition. *See* *Genus Lifesciences, 378 F. Supp. 3d at 841* (explaining that a *Sherman Act* claim based on false statements to buyers survives a motion to dismiss if the plaintiff "allege[s] cumulative facts that would prove the statements" meet the six elements).

Facebook's arguments are conclusory and inconsistent with the six elements articulated by the Ninth Circuit **[**120]** in *American Professional Testing Service, 108 F.3d at 1152*. However, the Court interprets Facebook's argument about "competing theories for Facebook's success" to be an argument that Facebook's false representations were not "clearly material" to users' decision to sign up for Facebook. For the reasons below, the Court rejects this argument as well.

Although the Ninth Circuit has not addressed the meaning of the term "clearly material" in the context of the *Sherman Act*, cases dealing with securities fraud claims and cases dealing with false advertising claims under the *Lanham Act* provide useful guidance. In the context of a securities fraud claim, an "omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976)*. Similarly, in the context of a false advertising claim, a deceptive statement is material if "it is likely to influence the purchasing decision." *Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997)*. Accordingly, to show that a defendant's false representation about its product was "clearly material" for purposes of the *Sherman Act*, the plaintiff must show that customers would consider the representation important in deciding whether to use the defendant's product or that the representation was likely to influence customers to **[**121]** use the defendant's product.

Under this standard, Consumers adequately allege that Facebook's false representations about its data privacy practices were "clearly material." Consumers explain in detail that "[p]rivacy practices were a crucial form of competition in the early days of the Social Network and Social Media Markets." CC ¶ 102. In a 2004 consumer survey, a majority of users indicated that privacy was a "really important issue that [they] care about often." *Id.* ¶ 108. In another study, users indicated that they cared more about privacy than about terrorism. *Id.* Indeed, Facebook recognized on multiple occasions that users would not use Facebook unless Facebook "promise[d] privacy protections." *Id.* ¶ 46. For example, in Facebook's 2008 internal report titled "Facebook Secret Sauce," Facebook observed that "'[u]sers will share more information if given more control over who they are sharing with and how they share.'" *Id.* ¶ 109 (internal citations omitted). Additionally, when Google+ launched in 2010, Facebook decided to "postpone any changes to its privacy policies 'until the direct competitive comparisons beg[a]n to die down.'" *Id.* ¶ 134.

[*801] Indeed, in the aftermath of the 2011 FTC **[**122]** settlement, Mr. Zuckerberg stated that "everyone needs complete control over who they share with at all times" and that this "idea has been the core of Facebook since day one." Mark Zuckerberg, *Our Commitment to the Facebook Community*, Facebook Newsroom (Nov. 29, 2011), https://bit.ly/3zDEs2A. Mr. Zuckerberg added that the reason people originally signed up for Facebook was that, "for the first time," they "could make their page private." CC ¶ 109. Indeed, Mr. Zuckerberg explained, the reason "Facebook became the world's biggest community online" was that Facebook "made it easy for people to feel comfortable sharing things about their real lives." *Id.* As Mr. Zuckerberg put it, Facebook's privacy protections made Facebook "one of the only services on the web where people are sharing pretty personal and intimate information." *Id.* ¶ 130.

Given the value that Facebook's users placed on privacy and given Facebook's express recognition that privacy was the reason "Facebook became the world's biggest online community," it is more than plausible that users would have considered Facebook's representations about its data privacy practices important in determining whether to use Facebook. *Id.* **[**123]** Accordingly, Facebook's false representations about its data privacy practice were clearly material. *See* *TSC Industries, 426 U.S. at 449*; *Southland Sod Farms, 108 F.3d at 1139*.

Genus Lifesciences supports this conclusion. In *Genus Lifesciences*, the plaintiff, who owned the only FDA approved version of a certain drug, brought a *Sherman Act* claim alleging that the defendant had falsely represented that the defendant's version of the same drug also was FDA approved. *378 F. Supp. 3d at 841-42*. To support this claim, the plaintiff alleged that the "FDA approval status of a prescription drug is material to customers because approved drugs provide customers assurance as to the quality of the product not afforded to unapproved prescription drugs." Complaint ¶ 101, *Genus Lifesciences Inc. v. Lannett Co., Inc.*, No. 18-CV-7603 (N.D. Cal. Dec. 18, 2018), ECF No. 1. Citing this allegation, the court concluded that the plaintiff had adequately alleged that the defendant's statements were "clearly material." *Genus Lifesciences, 378 F. Supp. 3d at 842*. Accordingly, because Consumers provide far more detail about the importance of data privacy to users, *Genus Lifesciences* supports Consumers' argument that Facebook's representations about its data privacy practices were "clearly material."

Facebook's arguments to the contrary are unconvincing. Citing *Rambus Inc. v. FTC, 522 F.3d 456, 464, 380 U.S. App. D.C. 431 (D.C. Cir. 2008)*, Facebook argues that Consumers' "theory is not **[**124]** cognizable if they fail to plausibly allege that deception was the but-for cause of Facebook's supposed monopoly." Mot. at 22. However, *Rambus* says nothing of the sort. Instead, *Rambus* explains that deceptive statements are anticompetitive if they "impaired rivals in a manner *tending to bring about or protect* a defendant's monopoly power." *522 F.3d at 464* (emphasis added). Thus, Facebook cites no authority which supports its assertion that conduct is anticompetitive only if it is the "but-for cause" of a defendant's monopoly power.

Additionally, Facebook contends that there are "competing theories for Facebook's success, all more plausible than deception." Mot. at 22. Specifically, Facebook identifies Facebook's "realness" and "its unique emphasis on connecting friends, family, and other 'verified relationships.'" *Id.* (citing CC ¶ 48). However, there is no requirement that deceptive statements be the *only* reason for Facebook's success in **[*802]** order for those deceptive statements to be "clearly material." Instead, as discussed, deceptive statements are clearly material if they influenced users' decision to use Facebook or would have been considered important by users. *See* *TSC Industries, 426 U.S. at 449*; *Southland Sod Farms, 108 F.3d at 1139*.

Moreover, Facebook ignores Consumers' allegations **[**125]** that Facebook's representations about its data privacy practices were essential to creating Facebook's "realness." Although Facebook encouraged users to share their real-world identities and personal information, Facebook knew that it could only induce users to provide their identities and information if it "promise[d] privacy protection." CC ¶ 46. Indeed, the original version of Facebook "was closed to all but those users who could validate their own real-world identities, such as by verifying that their identities were legitimate via an e-mail address issued by an organization, such as a university or firm." *Id.* ¶ 48. Facebook's "Secret Sauce" report expressly recognized that "'[u]sers will share more information if given more control over who they are sharing with and how they share.'" *Id.* ¶ 109 (internal citations omitted). As Mr. Zuckerberg put it, Facebook's privacy protections made Facebook "one of the only services on the web where people are sharing pretty personal and intimate information." *Id.* ¶ 130. Thus, Facebook's perceived "realness" would not have been possible without promises of data privacy.

For all these reasons, Consumers adequately allege that Facebook's false **[**126]** representations about its data privacy practices were "clearly material." Accordingly, Consumers have adequately alleged that Facebook's false representations about its data privacy practices constitute exclusionary conduct under the meaning of the *Sherman Act*.

6. Consumers Adequately Allege Causal Antitrust Injury

Consumers allege that Facebook's monopolization of the Social Network and Social Media Markets has harmed users because, without competition, Facebook can extract additional "personal information and attention" from users. CC ¶¶ 220-22. Facebook contends that Consumers have not adequately alleged causal antitrust injury because "lost 'information and attention' is not a cognizable injury," because users' alleged injury is speculative, and because users' alleged injury was "not caused by lost competition." Mot. at 28-31. For the reasons below, the Court rejects Facebook's arguments.

To plead causal antitrust injury, a plaintiff must allege that the defendant's unlawful conduct caused an injury "that flows" from the unlawful conduct and that is "the type the antitrust laws were intended to prevent." *Somers v. Apple, Inc., 729 F.3d 953, 963 (9th Cir. 2013)*. A cognizable antitrust injury includes harm to a plaintiff's "business or property." *15 U.S.C. § 15* **[**127]** . Business is "that which occupies the time, attention, and labor of [a plaintiff] for the purpose of . . . pecuniary reward." *Fine v. Barry & Enright Prods., 731 F.2d 1394, 1397 (9th Cir. 1984)*. In turn, "property" is a "broad and inclusive" term that includes "anything of material value owned or possessed." *Reiter v. Sonotone Corp., 442 U.S. 330, 338, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)*.

Because Consumers explain in detail that "information and attention" has significant "material value," Consumers adequately allege harm to their "business or property." *Reiter, 442 U.S. at 338*. Consumers allege that their "information and attention" has "material value" because Facebook sells users' "information and attention to third parties, including advertisers." CC ¶ 222. Specifically, **[*803]** "Facebook monetizes user information through targeted advertising, which generated most of the company's $55.7 billion in revenues in 2018." *Id.* ¶ 150. In other words, users provide significant value to Facebook by giving Facebook their information—which allows Facebook to create targeted advertisements—and by spending time on Facebook—which allows Facebook to show users those targeted advertisements. If users gave Facebook less information or spent less time on Facebook, Facebook would make less money. Indeed, as Consumers point out, Facebook "describes its massive advertising earnings in terms of average revenue per user ('ARPU') in its public filings." *Id.* ¶ 7. In 2019, for example, "Facebook **[**128]** reported that its ARPU was over $41.00 per user in the United States and Canada." *Id.* Thus, there is no doubt that Consumers' "information and attention" has "material value." *Reiter, 442 U.S. at 338*; *see also* *United Food & Commercial Workers Local 1776 & Participating Emp'rs Health & Welfare Fund v. Teikoku Pharma USA, Inc., 74 F. Supp. 3d 1052, 1070 (N.D. Cal. 2014)* (explaining that "courts need not restrict the definition of 'payments' . . . to cash").

This Court's recent decision in *Brown v. Google LLC, No. 20-CV-3664-LHK, 2021 U.S. Dist. LEXIS 244695, 2021 WL 6064009 (N.D. Cal. Dec. 22, 2021)*, confirms that Consumers' allegations are sufficient. In *Brown*, the plaintiffs brought a claim under California's Unfair Competition Law ("UCL") alleging that Google had unlawfully collected their browsing data. *2021 U.S. Dist. LEXIS 244695, [WL] at *14*. Citing the UCL's requirement that a plaintiff must establish "lost money or property as a result of the unfair competition," Google moved to dismiss the UCL claim and argued that the plaintiffs had not "plausibly alleged that they 'lost money or property' as a result of Google's conduct." *Id.* (citing *Cal. Bus. & Prof. Code § 17204*). The Court rejected this argument because the plaintiffs had "allege[d] that the 'cash value' of the data which Google collected 'can be quantified' and that there is an active market for such data." *2021 U.S. Dist. LEXIS 244695, [WL] at *15* (internal citation omitted). Specifically, the plaintiffs cited a "recent study that found that internet users are willing to pay up to $52.00/year to keep their browsing histories **[**129]** private" and identified several companies that were willing to pay users for browsing data. *Id.*

Similarly, in the instant case, Consumers allege that users' "information and attention" has a cash value, which can be approximated by Facebook's reported ARPU. CC ¶ 7. Additionally, like the plaintiffs in *Brown*, Consumers identify examples of companies that have been willing to pay users for information and attention. *See id.* ¶¶ 223-24. Indeed, Facebook itself paid certain users "up to $20.00 per month in return for access to those users' emails, private messages in social media apps, photos and videos, web browsing and search activity, and even location information." *Id.* Thus, Consumers have adequately alleged that, by providing Facebook with their information and attention, they "lost money or property." *Brown, 2021 U.S. Dist. LEXIS 244695, 2021 WL 6064009, at *16*.

Indeed, outside the antitrust context, numerous courts have recognized that plaintiffs who lose personal information have suffered an economic injury. *See* *Calhoun v. Google LLC, 526 F. Supp. 3d 605 (N.D. Cal. 2021)* ("[T]he Ninth Circuit and a number of district courts, including this Court, have concluded that plaintiffs who suffered a loss of their personal information suffered economic injury and had standing."); *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig., 440 F. Supp. 3d 447, 461 (D. Md. 2020)* ("[T]he growing trend across courts **[**130]** that have considered this issue is to recognize the lost property value of this information."); *In re Yahoo! Inc. Customer Data Sec. Breach **[*804]** Litig., No. 16-MD-02752-LHK, 2017 U.S. Dist. LEXIS 140212, 2017 WL 3727318, at *13 (N.D. Cal. Aug. 30, 2017)* (holding that plaintiffs had adequately alleged injury in fact based on the loss of value of their personal information); *In re Anthem, Inc. Data Breach Litig., No. 15-MD-02617-LHK, 2016 Case No. 20-CV-08570-LHK, 2016 U.S. Dist. LEXIS 70594, 2016 WL 3029783, at *14 (N.D. Cal. May 27, 2016)* (concluding that the plaintiffs had plausibly alleged injury from the loss of value of their personal information). Thus, there is ample support for Consumers' argument that lost information and attention has material value.

Additionally, Consumers adequately allege that their injury "flows" from Facebook's monopolization of the Social Network and Social Media Markets. *Somers, 729 F.3d at 963*. Consumer allege that, had Facebook not eliminated competition in these markets, Consumers would have been able to "select a social network or social media application which offers consumers services that more closely align the consumers' preferences, such as with respect to the content displayed, quantity and quality of advertising, and options regarding data collection and usage practices." CC ¶ 226. To support this allegation, Consumers point out that, in competitive markets, some companies pay users for their data. For example, "[w]hen consumers agree to use Microsoft's 'Bing' search engine and allow **[**131]** Microsoft to collect their data, Microsoft . . . compensates consumers with items of monetary value." *Id.* ¶ 223.

Furthermore, Consumers allege that, had Facebook not eliminated competition, "Consumers could have benefitted from Facebook's social network and social media offerings without having to surrender as much personal data to Facebook and other third parties that use Facebook for app development or targeted advertising." *Id.* ¶ 226. Indeed, during the period of time when Google+ posed a competitive threat to Facebook, a Facebook executive stated that it would be unwise to remove privacy protections because "IF ever there was a time to AVOID controversy, it would be when the world is comparing our offerings to G+." *Id.* ¶ 134. Taken together, these allegations establish that Consumers have suffered an injury because Facebook "detrimentally changed the market make-up and limited consumers' choice to one source of output." *Glen Holly Ent., Inc. v. Tektronix Inc., 343 F.3d 1000, 1010-11 (9th Cir. 2003)*. Accordingly, Consumers have adequately alleged that their injury "flows" from Facebook's anticompetitive conduct. *Id.*

For all these reasons, the Court concludes that Consumers have adequately alleged causal antitrust injury. Thus, the Court DENIES Facebook's motion **[**132]** to dismiss Consumers' data privacy claims.

7. Consumers' Request for Injunctive Relief as a Remedy for Consumers' Data Privacy Claims Is Not Barred by the Doctrine of Laches

Consumers seek two forms of injunctive relief related to their data privacy claims: "(i) an order prohibiting Facebook from continuing to engage in the wrongful acts described herein; and (ii) requiring Facebook to engage third-party auditors to conduct audits and evaluations of Facebook's data privacy practices, commercial surveillance, and acquisition conduct, and ordering them to promptly correct any problems or issues detected by these auditors." CC ¶ 318(b). Facebook argues that the doctrine of laches bars this injunctive relief because Facebook's 2011 "settlement with the FTC regarding the privacy representations at issue was . . . public." Mot. at 8. For the reasons below, the Court rejects Facebook's argument.

"Claims for injunctive relief . . . are subject to the equitable defense of laches." *Oliver, 751 F.3d at 1085*. "Laches is an equitable time limitation on a party's right to bring suit, resting on the maxim **[*805]** that one who seeks the help of a court of equity must not sleep on his rights." *Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 835 (9th Cir. 2002)* (internal citations and quotations omitted). **[**133]** To invoke a laches defense, the defendant must show that: (1) "the plaintiff knew (or should have known) of the allegedly [unlawful] conduct" yet delayed "the initiation of the lawsuit," and (2) the delay was unreasonable. *Danjaq LLC v. Sony Corp., 263 F.3d 942, 952, 954 (9th Cir. 2001)*.

In antitrust cases, "the four-year statute of limitations in *15 U.S.C. § 15b* 'furnishes a guideline for computation of the laches period.'" *Samsung Elecs., 747 F.3d at 1205* (quoting *Int. Tel & Tel. Corp. v. Gen. Tel. & Elec. Corp., 518 F.2d 913, 926 (9th Cir. 1975)*). "Therefore, in applying laches, [the Ninth Circuit] look[s] to the same legal rules that animate the four-year statute of limitations." *Oliver, 751 F.3d at 1086*.

Thus, because Consumers' data privacy claims are timely, "the strong presumption is that laches is inapplicable." *See Jarrow Formulas, Inc., 304 F.3d at 835*. Facebook's one sentence argument is insufficient to rebut that presumption. Moreover, Facebook fails to explain why Consumers' knowledge of the 2011 FTC settlement would prevent Consumers from seeking injunctive relief based on the numerous false representations which Facebook made after the 2011 FTC settlement. *See* pp. 49-51, *supra*.

Thus, the Court rejects Facebook's argument that Consumers may not seek injunctive relief related to their data privacy claims.

C. The Court Grants Facebook's Motion to Dismiss Consumers' and Advertisers' "Copy, Acquire, Kill" Claims With Leave to [134] Amend**

According to Consumers and Advertisers, Facebook maintained monopoly power through a multipart strategy called "Copy, Acquire, Kill." Specifically, Facebook identified particularly popular mobile social media applications by using Onavo, a spyware application that was disguised as a security and encryption application, but that deceptively harvested information about its users' mobile applications. Using this deceptively obtained information, Facebook executed a three part strategy to eliminate potential competitors. First, Facebook copied several potential competitors' products. Second, Facebook acquired numerous potential competitors, including several of its most successful potential competitors. Third, Facebook enticed thousands of potential competitors to build their products using Facebook's "Platform" then removed access to the Platform.

Consumers and Advertisers both allege that Facebook's "Copy, Acquire, Kill" strategy violated *Section 2 of the Sherman Act*. Additionally, both are clear that they are not challenging individual aspects of the "Copy, Acquire, Kill" strategy. Consumers state that they are not challenging "single acquisitions in isolation," Opp. at 24, and that their theory of **[**135]** liability "do[es] *not* depend on any 'duty to deal' between Facebook and 'third-party app developers,'" Opp. at 27 (emphasis in original). Instead, Consumers challenge "Facebook's overall anticompetitive scheme." Opp. at 25. Similarly, Advertisers state that they are "not assert[ing] claims that impose upon Facebook a duty to deal with competitors." Opp. at 27. Instead, Advertisers "allege[] a multi-part scheme that *includes* Platform-based conduct." *Id.*

Thus, Consumers and Advertisers rely on what some courts have "referred to as a 'course of conduct' or 'monopoly broth' theory" of antitrust liability. *New York v. Facebook, Inc., No. 20-CV-3589-JEB, 549 F. Supp. 3d 6, 2021 U.S. Dist. LEXIS 127227, 2021 WL 2643724, at *26 (D.D.C. June 28, 2021)* (quoting *In re Intuniv Antitrust **[*806]** Litig., 496 F. Supp. 3d 639, 680 (D. Mass. 2020)*). That theory gets its name from *City of Mishawaka v. American Electric Power Co., Inc., 616 F.2d 976, 986 (7th Cir. 1980)*, in which the Seventh Circuit affirmed the district court's decision to analyze the aggregate effect of a series of anticompetitive acts committed by the defendant. The Seventh Circuit rejected the defendant's argument that the district court had erred by failing to analyze each act separately and stated that "[i]t is the mix of the various ingredients of utility behavior in a monopoly broth that produces the unsavory flavor." *Id.*

In *City of Anaheim v. Southern California Edison Co., 955 F.2d 1373, 1376, 1378 (1992)*, the Ninth Circuit endorsed this "monopoly broth" theory and stated that "it would not be proper to focus on **[**136]** specific individual acts of an accused monopolist while refusing to consider their overall combined effect."

Similarly, in *LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003)*, the Third Circuit held that it was necessary to analyze the aggregate anticompetitive effect of the defendant's bundled discount and exclusive dealing contracts, rather than the anticompetitive effect of each individual contract.

Under a "monopoly broth" theory of liability, a plaintiff "can state a *Section 2* claim by alleging a series of practices that are anticompetitive, even if some of the activities would be lawful if viewed in isolation." *Free FreeHand Corp. v. Adobe Systems Inc., 852 F. Supp. 2d 1171, 1180 (N.D. Cal. 2012)* (citing *City of Anaheim, 955 F.2d at 1376*); *see also* *Intuniv, 496 F. Supp. 3d at 680* (explaining that "a plaintiff can allege a series of actions that when taken together make out antitrust liability even though some of the individual actions, when viewed independently, are not all actionable"); *Tele Atlas N.V. v. NAVTEQ Corp., No. C-05-01673 RS, 2008 U.S. Dist. LEXIS 145998, 2008 WL 4911230, at *2 (N.D. Cal. Nov. 13, 2008)* ("To appreciate the effect of otherwise lawful acts, the jury must consider the acts' aggregate effect.").

Facebook argues that Advertisers' and Consumers' "Copy, Acquire, Kill" claims are barred by the statute of limitations. *See* Mot. at 6-7, 8-9. Additionally, Facebook argues that both "Copy, Acquire, Kill" claims must be dismissed because (1) copying competitors' products is not anticompetitive; (2) **[**137]** Facebook's acquisitions were not exclusionary; and (3) Facebook did not have a duty to give potential competitors access to Facebook's "Platform." *Id.* at 22-27. Facebook also argues that Consumers' request for injunctive relief is barred by the doctrine of laches. *Id.* at 8-9. For the reasons below, the Court concludes that Consumers' and Advertisers' "Copy, Acquire, Kill" claims are barred by the statute of limitations. Accordingly, the Court need not reach the remainder of Facebook's arguments.

The Court first describes Consumers' and Advertisers' allegations regarding Facebook's "Copy, Acquire, Kill" strategy. Second, the Court explains why Consumers' and Advertisers' "Copy, Acquire, Kill" claims are untimely.

1. Consumers and Advertisers Allege that Facebook's "Copy, Acquire, Kill" Strategy Allowed Facebook to Maintain Monopoly Power

Below, the Court describes Facebook's "Copy, Acquire, Kill" strategy in detail. First, the Court explains why Facebook viewed mobile social media applications as the biggest competitive threats. Next, the Court describes how Facebook deceptively used Onavo to determine which mobile social media applications were the most popular. In the following sections, **[**138]** the Court describes each part of Facebook's strategy. Although Consumers and Advertisers allege the same basic facts, Advertisers include significantly more detail about **[*807]** some aspects of Facebook's strategy. Accordingly, the Court notes where Consumers' and Advertisers' allegations differ.

a. Facebook Realized that Mobile Social Media Applications Posed the Biggest Competitive Threat to Facebook

Advertisers explain that, besides MySpace and Google+, the biggest threat to Facebook's monopoly power came from mobile social media applications. In 2007, shortly before Facebook overtook Myspace, Apple Inc. ("Apple") released its first iPhone. AC ¶ 84. On July 10, 2008, Apple opened the Apple App Store ("App Store"), which provided a marketplace where developers could sell applications that would run on iPhones. *Id.* ¶ 85. Accordingly, mobile applications proliferated rapidly. *Id.* ¶ 87. By September 2008, the App Store had 100 million downloads, and by 2009, it had 1 billion. *Id.* ¶ 86.

This development was a problem for Facebook. Unlike desktop alternatives to Facebook, mobile social media applications "presented their own specialized value propositions." *Id.* ¶ 90. Streamlined, single-purpose **[**139]** applications were easier to use on mobile devices than Facebook's platform, which was not easily transferrable to a mobile version. *Id.* ¶¶ 94-95. Indeed, the first version of Facebook's mobile application was buggy, prone to crashes, and painfully slow. *Id.* ¶ 95. Thus, because it was clear "that within five years, the number of users who accessed the Internet from mobile devices would surpass the number who accessed it from PCs," Facebook knew that mobile applications would continue to peel away Facebook's users. *Id.* ¶ 92. In its 2012 annual report filed with the Securities Exchange Commission ("SEC"), Facebook disclosed that "[g]rowth in the use of Facebook through our mobile products for a substitute for use on personal computers may negatively affect our revenue and financial results." *Id.* ¶ 98.

Although Consumers do not provide the same level of detail, Consumers allege that Facebook was concerned with the competitive threat posed by mobile applications and was intent on finding a way to measure this threat. According to Consumers, Facebook initially "used its own internal data and data from Comscore, a data analytics and measurement firm, to track the growth of competitive threats." **[**140]** CC ¶ 159. However, in April 2012, Facebook Director of Growth Javier Olivan emailed Facebook CEO Mark Zuckerberg about improving Facebook's "competitive research." *Id.* ¶ 160. Mr. Olivan stated: "I keep seeing the same suspects (Instagram, pinterest, . . .) both on our competitive radar . . . I think having the exact data about their users engagement . . . would help us make more bold decisions on whether they are friends or foes. Back to your thread about 'copying' vs. 'innovating' we could also use this info to inspire our next moves." *Id.* Mr. Zuckerberg responded: "Yeah, let's do it." *Id.* ¶ 161.

b. Facebook Deceptively Used Onavo Spyware to Obtain Information About Which Mobile Social Media Applications Were Popular

After Facebook realized that mobile social media applications threatened Facebook's market power, Facebook engaged Onavo, an "Israeli mobile web analytics company," to determine the precise scope of this threat. CC ¶ 162; AC ¶ 247. Onavo had a suite of mobile applications, including a virtual private network ("VPN") application called "Onavo Protect." CC ¶¶ 162, 166; AC ¶ 252. As Consumers explain, a VPN typically "provides security and encryption to a user" by "scrambling" **[**141]** the data sent from a user's phone to internet servers. CC ¶ 162. Indeed, Onavo billed Onavo Protect, which was downloaded **[*808]** over 33 million times, as a tool that mobile phone owners could use to keep their "data safe" and "[a]dd an extra layer of protection to all [their] mobile data traffic." *Id.* ¶ 166; AC ¶ 252.

Regardless of whether Onavo Protect functioned as a VPN, Onavo Protect was valuable to Facebook for another reason: Onavo Protect operated as a spyware program by "monitor[ing] all web and mobile application traffic on a user's mobile device." CC ¶ 166; AC ¶ 252. Indeed, Onavo Protect collected users' data "whether their screens were on or off, whether they used WiFi or cellular data, and even when the VPN was turned off." CC ¶ 210; AC ¶ 261.

As relevant here, Onavo Protect collected information about which social media applications users were accessing most frequently. Consumers allege that Onavo collected the following information: "every app the user has accessed"; "the number of seconds the user spent in the app per day"; "the percent of time the user spent in a specific app out of their total mobile usage time"; "the actions taken by the user in each app"; and the user's **[**142]** demographic information. CC ¶ 165. In turn, Advertisers allege that Onavo kept track of "which apps and features people were using in real time, how frequently they used the apps, and for how long." AC ¶ 253. Accordingly, Onavo permitted Facebook to assess "the two most important metrics for competing mobile applications": an application's reach, *i.e.*, the size of its user base, and an application's engagement, *i.e.*, how frequently users use the application. *Id.* ¶ 249.

Facebook used data collected by Onavo to determine which mobile social media applications were competitive threats. Advertisers allege that Facebook began paying Onavo for this data in 2011. *Id.* ¶ 256. "By April 2013," Facebook was "using Onavo to track Snapchat, Pinterest, WhatsApp, Tumblr, Foursquare, Google, Path, Vine, Kik, Voxer, MessageMe, Viber, GroupMe, Skype, Line, and Tango." *Id.* ¶ 166. Although Consumers do not identify precisely when Facebook engaged Onavo, Consumers allege that, by 2013, Facebook had been acquiring data through Onavo "for years." CC ¶ 164.

In October 2013, Facebook acquired Onavo and placed Onavo under the supervision of Facebook's "Growth team." CC ¶ 164; AC ¶ 250. At that point, Onavo announced **[**143]** on its blog that it "remain[ed] committed to the privacy of people who use our application, and that commitment will not change." AC ¶ 251.

From thereon, Onavo automatically provided all data it gathered directly to Facebook. *See* CC ¶ 166; AC ¶ 253. However, users of Onavo Protect were unaware of Onavo's association with Facebook because "nowhere on the Onavo Protect website, the Apple App Store, the Google Play Store, or in the advertising for Onavo Protect did Facebook or Onavo disclose to consumers . . . that Onavo Protect would not protect and keep secret users' personal activity data, or that Facebook or Onavo would use personal activity data collected from users for the commercial benefit of Facebook or Onavo." CC ¶ 232.

Facebook and Onavo also released a product called "Onavo Bolt," "which locked apps behind a passcode or fingerprint while it covertly surveilled users—and sent Facebook the results." AC ¶ 266. Onavo Bolt was "installed approximately 10 million times." *Id.*

In 2018, Apple removed Onavo Protect from the App Store "because it violated Apple's rules prohibiting applications from using data in ways far beyond what is required to run the app and provide advertising." CC **[**144]** ¶ 209; AC ¶ 260. "In other words, because Onavo Protect was leveraging far more data than any VPN could **[*809]** conceivably need, it was clear that the true purpose of the app was to spy on Onavo users, and Apple would not allow it." CC ¶ 209; AC ¶ 260.

Facebook attempted to circumvent this removal by repackaging Onavo Protect as an application called "Facebook Research." CC ¶ 211; AC ¶ 262. However, when Apple uncovered this ruse in January 2019, Facebook immediately withdrew Facebook Research from the App Store. CC ¶ 212; AC ¶ 263. In a subsequent investigation of Facebook Research, Apple concluded that Facebook clearly had violated Apple's rules for the App Store. CC ¶ 212; AC ¶ 264.

Similarly, when the "surveillance functionality" of Onavo Bolt was discovered, Facebook immediately "shut that app down." AC ¶ 266.

By that time, however, Facebook already had used data acquired from Onavo to eliminate potential competitive threats. As explained in the following sections, Facebook copied the features of potential competitors identified through Onavo; acquired or attempted to acquire potential competitors identified through Onavo; and weakened potential competitors identified through Onavo by denying **[**145]** those competitors access to Facebook's Platform.

c. Facebook Copied the Features of Applications Identified Through Onavo and Acquired Several Applications Identified Through Onavo

Consumers and Advertisers both allege that, after identifying potential competitors through Onavo, Facebook copied or acquired several of its most successful potential competitors. Overall, Facebook acquired at least 63 companies since its founding in 2004 to approximately April 22, 2021. CC ¶ 157. In 2014, a senior executive at Facebook described this acquisition strategy as a "land grab." *Id.* ¶ 98. Mr. Zuckerberg later boasted that Facebook "can likely always just buy any competitive startups." *Id.* Accordingly, Facebook grew from a single social network service to a technology conglomerate. However, because all parties use the term "Facebook" when referring both to the social network service and the conglomerate, the Court follows that convention.

Consumers and Advertisers highlight that Facebook copied or acquired six social media applications. Both Consumers and Advertisers highlight Facebook's acquisitions of Instagram and WhatsApp and note that Facebook copied several of Snapchat's core features. Consumers **[**146]** also allege that Facebook copied Instagram's core feature before acquiring Instagram, that Facebook copied the core feature of Houseparty, and that Facebook acquired Giphy and tbh.

In the following sections, the Court discusses, in order, Facebook's conduct with respect to Instagram, Whatsapp, Snapchat, Houseparty, Giphy, and tbh.

i. Instagram

Instagram launched in October 2010 as a streamlined photo sharing system that encouraged users to share a single photo at a time. *See* CC ¶¶ 186-87; AC ¶¶ 268, 273. As explained by Advertisers, this feature was appealing to smartphone users who took photos often and shared them individually. AC ¶ 278. By contrast, Facebook's then-current photo sharing system was designed for bulk uploads and thus appealed to digital camera users. *Id.* Accordingly, because the increased popularity of smartphones meant that users were more likely to upload individual photos, Instagram posed a unique threat to Facebook. *Id.*

By December 2010, Instagram had been downloaded 1 million times, and by March 2012, Instagram had 27 million users. CC ¶¶ 187-88; AC ¶¶ 274-76. Although Instagram competed only in the Social Media Market, Facebook believed that Instagram had the potential **[**147]** to move into the Social **[*810]** Network Market because it could attract a large user base with its simple photo-sharing feature and then add other features after building up that base. CC ¶ 189; AC ¶ 279.

Thus, in 2011, Facebook started tracking Instagram through Onavo. CC ¶ 189; AC ¶ 268. According to Consumers, Facebook initially attempted to lessen the appeal of Instagram by copying Instagram's core feature. In June 2011, Facebook launched Facebook Camera, "a standalone app allowing users to shoot, filter, and share photos from their mobile device." CC ¶ 191. One Facebook employee called Facebook Camera "an Instagram clone." *Id.* Other members of the Facebook Camera team later admitted that their job was to "kill" Instagram. House Report at 153 n.882.

After Facebook Camera failed to catch on, Facebook decided to take more drastic measures. In February 2012, Facebook CEO Mark Zuckerberg met with Facebook CFO David Ebersman and proposed that Facebook acquire Instagram. House Report at 151-52. Mr. Ebersman asked Mr. Zuckerberg whether the purpose of the acquisition "would be to: (1) neutralize a potential competitor; (2) acquire talent; or (3) integrate Instagram's product with Facebook's to **[**148]** improve its service." *Id.* at 152.

Mr. Zuckerberg responded that the purpose would be "a combination of (1) and (3)." *Id.* Displaying his knowledge of the relevant barriers to entry, Mr. Zuckerberg stated that "there are network effects around social products and a finite number of different social mechanics to invent." *Id.* Accordingly, Mr. Zuckerberg explained, "[o]nce someone wins at a specific mechanic, it's difficult for others to supplant them without doing something different." *Id.* Mr. Zuckerberg added that "one way of looking at this is that what we're really buying is time" because, "[e]ven if some new competitors spring[] . . . up, buying Instagram, Path, Foursquare, etc . . . now will give us a year or more to integrate their dynamics before anyone can get close to their scale again." *Id.*

In March 2012, Mr. Zuckerberg told Facebook CTO Mike Schroepfer that "acquiring Instagram would provide the company with '[i]nsurance for Facebook's main product." AC ¶ 284. Then, in an April 5, 2012, meeting with Facebook employees, Mr. Zuckerberg stated that, because of "Instagram's rapid growth," Facebook would need to "dig [itself] out of a hole." *Id.* ¶ 285. He added that the "bad news is **[**149]** that [Instagram is] growing really quickly, they have a lot of momentum, and it's going to be tough to dislodge them." *Id.* ¶ 285; CC ¶ 190. In April 2012, Facebook offered to acquire Instagram for $1 billion. CC ¶ 192-94; AC ¶ 286. Consumers allege that, after Facebook made its initial offer, Mr. Zuckerberg threatened Instagram CEO Kevin Systrom that "[h]ow we engage now will determine how much we're partners vs. competitors down the line." CC ¶ 193. Following this conversation, Mr. Systrom spoke with a former Facebook executive, who stated that Mr. Zuckerberg would try to "destroy" Instagram if Instagram rejected Facebook's offer. *Id.*

Shortly thereafter, Instagram accepted Facebook's offer. CC ¶ 194; AC ¶ 286. Advertisers allege that, on March 6, 2019, Facebook announced that it would integrate Instagram and Facebook so that users of Instagram could connect with users of Facebook. AC ¶ 524.

ii. WhatsApp

WhatsApp is a messaging service that uses an internet connection, instead of a cellular network connection, to send text messages and photographs between cell phones. CC ¶ 201; AC ¶ 305. Unlike other messaging applications, WhatsApp "monetized **[*811]** its service through subscriptions for a nominal **[**150]** fee after the first year of use." House Report at 156. Indeed, in a blog post on the WhatsApp website, WhatsApp's founders stated that they strongly opposed advertising because "when advertising is involved **you the user** are the product." *Id.* (emphasis in original). They further explained:

> At every company that sells ads, a significant portion of their engineering team spends their day tuning data mining, writing better code to collect all your personal data, upgrading the servers that hold all the data and making sure that it's all being logged and collated and sliced and packaged and shipped out."

Id. Indeed, in June 2012, WhatsApp stated in its privacy policy that it did "not collect names, emails, location data, or the contents of messages sent through WhatsApp." *Id.*

By 2011, WhatsApp was one of the top twenty paid iPhone applications and by February 2013, WhatsApp had 200 million users. AC ¶¶ 307-09. After WhatsApp achieved initial success, Facebook started tracking WhatsApp through Onavo and discovered that WhatsApp "held third place in terms of user reach among mobile messenger apps for iPhone in the U.S. as of April 2013." *Id.* ¶ 310; CC ¶ 202. Data collected through Onavo also **[**151]** showed that users of WhatsApp sent more than double the messages of users of Facebook's similar Messenger service. AC ¶ 311; CC ¶ 202. As another example of WhatsApp's popularity, Onavo data showed that "WhatsApp reached 99.9% of the smartphone population in Spain." AC ¶ 316. According to Advertisers, Facebook understood this data to mean that WhatsApp had the "unique potential" to overcome the barriers to entry faced by most aspiring social network companies. *Id.* ¶¶ 320-23. Thus, as with Instagram, Facebook suspected that WhatsApp would pivot to being a social networking service after solidifying its core user base. *See id.*

In 2014, Facebook acquired WhatsApp. Although WhatsApp had lost $232 million during the first six months of 2014, Facebook's final purchase price was $22 billion. CC ¶ 203; AC ¶ 321. Accordingly, Consumers and Advertisers allege, Facebook's acquisition of WhatsApp did not make "economic sense" unless it was aimed at preventing WhatsApp from becoming a competitor to Facebook. CC ¶ 203; AC ¶ 321. Indeed, Facebook had paid "thousands of times WhatsApp's revenues" in order "to acquire a money-losing company that created software functionality Facebook itself already **[**152]** had as part of its own products." AC ¶ 321.

After the acquisition was finalized, Mr. Zuckerberg stated: "[w]e are absolutely not going to change plans around WhatsApp and the way it uses user data." House Report at 157. Shortly thereafter, the FTC advised Facebook "that WhatsApp 'must continue to honor' its privacy data security commitments to its users." *Id.*

When Facebook acquired WhatsApp in 2014, Facebook represented to European regulators that Facebook did not have the capability "to establish reliable automated matching between Facebook's users' accounts and WhatsApp users' accounts." AC ¶ 518. Advertisers equate this representation to a statement that Facebook would not be able to integrate WhatsApp. *See id.*

However, in an August 2016 update to WhatsApp's "terms of service and privacy policy," Facebook announced that it had the capability to "link[] WhatsApp users' phone numbers with Facebook users' identities." *Id.* Then, in December 2016, the European Commission found that Facebook had misled European regulators in 2014 because the "possibility of automatically matching Facebook and WhatsApp **[*812]** users' identities already existed in 2014." *Id.* On March 6, 2019, Facebook officially announced **[**153]** that it would begin the process of integrating Facebook and WhatsApp so that users of WhatsApp could connect with users of Facebook. *Id.* ¶ 524.

iii. Snapchat

Facebook also used Onavo to track Snapchat. CC ¶ 197; AC ¶ 166. Consumers explain that Snapchat allows users "to send each other communications—including text, photos, and videos—which appear only for a fixed period of time and then disappear." CC ¶ 196. By 2013, Snapchat was among the five most popular social media applications. *Id.* ¶ 202; AC ¶ 312.

Facebook attempted to acquire Snapchat in early 2013. Consumers allege that, before Facebook made an offer to Snapchat, Facebook tried to weaken Snapchat's position by launching an identical product called "Poke." CC ¶ 198. Then, when Facebook CEO Mark Zuckerberg met with Snapchat founder Evan Spiegel, Mr. Zuckerberg intimated that Facebook would "crush" Snapchat. *Id.* Spiegel, however, rejected Facebook's $3 billion offer. *Id.* ¶ 199; AC ¶ 298.

Having failed to acquire Snapchat, Facebook continued trying to weaken Snapchat. In "late 2016," Facebook copied Snapchat's "stories" feature, which allows a user to post a series of images and videos that remain online for twenty-four hours. CC **[**154]** ¶ 200; AC ¶ 298. According to Consumers, Facebook's version of "stories" was more popular than Snapchat's by April 2017. CC ¶ 200.

iv. Houseparty, Giphy, and tbh

Finally, Consumers allege that Facebook used Onavo to track at least three other social media applications and copied or acquired all three applications.

First, Facebook copied Houseparty, a video chat application that referred to itself as "the internet's living room." CC ¶ 204. Specifically, after Houseparty turned down Facebook's acquisition offer, "Facebook announced that its Messenger app would become a 'virtual living room.'" *Id.* ¶ 205. "Houseparty's active user base fell by half between 2017 and 2018." *Id.*

Second, in October 2017, Facebook acquired tbh, an "anonymous social media app." *Id.* ¶ 207. However, Facebook shut down tbh after less than a year. *Id.*

Third, in May 2020, Facebook acquired Giphy, an application that allows users to share animated images called "GIFs." *Id.* ¶ 206. Facebook paid $400 million for Giphy. *Id.*

d. Facebook Enticed Potential Competitors to Build Their Products Using Facebook's Platform Then Removed Access to the Platform

Consumers and Advertisers also allege that Facebook harmed potential competitors **[**155]** by convincing them to build their products using Facebook's Platform and then removing access to the Platform. Additionally, Advertisers allege that Facebook lied to the public about the reasons for removing access to the Platform. Below, the Court describes this conduct in detail.

i. Facebook Initially Allowed Third Party Developers to Use Facebook's Platform to Build Social Media Applications

In response to the competitive threat posed by mobile social media applications, Facebook decided to increase the number of applications available through Facebook. However, instead of building these applications itself, Facebook provided third party developers with access to the Facebook Platform, a set of tools that allowed developers to build applications that worked in conjunction with Facebook. CC ¶ 170; AC ¶ 99.

[*813] At the center of the Platform were Facebook's custom Application Programming Interfaces ("APIs"). CC ¶ 170; AC ¶ 101. In the computer programming field, an API is a prewritten piece of software code that allows a programmer to execute a complex task without having to write the code from scratch every time the programmer wants to perform the task. *See* *Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1191, 209 L. Ed. 2d 311 (2021)*. Facebook's APIs allowed programmers **[**156]** to communicate with the Facebook network and obtain Facebook data. CC ¶ 170; AC ¶ 101.

Consumers and Advertisers highlight two Facebook APIs that were particularly important for developing applications: the "Friends" API and the "Newsfeed" API. *See* CC ¶ 175; AC ¶ 126. The Friends API allowed a programmer to obtain information from Facebook about a particular Facebook user's friends. CC ¶ 174; AC ¶ 126. In turn, the "Newsfeed" API, which Advertisers also refer to as the "Timeline API," allowed a programmer to obtain information from Facebook about a user's news feed posts. CC ¶ 174; AC ¶ 128.

Advertisers provide a detailed explanation of how developers used these APIs. First, in accordance with Facebook's original plan, many developers used these APIs to build applications for Facebook itself. For example, developers built "social games that allowed [Facebook] users to play with and against each other." AC ¶ 114. These applications directly increased the value of Facebook by stimulating user engagement. *Id.*; CC ¶ 174. Second, Facebook created a way for developers building applications independent of Facebook to show advertisements to Facebook users. AC ¶¶ 118-19. Such developers could **[**157]** use the APIs to identify Facebook users who might like the developers' applications and show those users advertisements for the applications. *Id.* Every time a user downloaded an application because of an advertisement, the developer would pay Facebook a fee. *Id.* ¶ 120.

According to Advertisers, Facebook recognized that giving third parties access to the APIs had risks. Indeed, in a 2012 report to investors, Facebook stated that "Platform partners may use information shared by our users through the Facebook Platform in order to develop products or features that compete with us . . . As a result, our competitors may acquire and engage users at the expense of the growth or engagement of our user base, which may negatively affect our business and financial results." *Id.* ¶ 105.

Initially, Facebook determined that the benefits outweighed the risks. The 2012 report explained that "[e]ngagement with our Platform developers' apps and websites can create value for Facebook in multiple ways: our Platform supports our advertising business because apps on Facebook create engagement that enables us to show ads; our Platform developers may purchase advertising on Facebook to drive traffic to their **[**158]** apps and websites; Platform developers use our Payment infrastructure to facilitate transactions with users on personal computers; Platform apps share content with Facebook that makes our products more engaging; and engagement with Platform apps and websites contributes to our understanding of people's interest and preferences, improving our ability to personalize content." *Id.* ¶ 107.

However, as described in the following sections, Facebook eventually decided that the short-term benefits of allowing third party developers to access the Platform were not worth the risk that one of these developers might leverage Facebook's data to build a service that could compete directly with Facebook.

[*814] ii. In 2012, Facebook Covertly Decided to Threaten to Block Certain Selected Competitors

Towards the end of 2011 and continuing into 2012, Facebook CEO Mark Zuckerberg held discussions with other top Facebook executives about how to prevent third party developers from using Facebook APIs to build services that could compete with Facebook. CC ¶ 173; AC ¶ 126. Using data obtained through Onavo, Mr. Zuckerberg and other Facebook executives identified Line, WeChat, and Instagram as applications that relied **[**159]** on Facebook APIs and posed significant threats to Facebook. CC ¶ 173; AC ¶ 123.

Advertisers allege that, during these 2011 and 2012 meetings, Mr. Zuckerberg and the other Facebook executives "proposed modifying the APIs" to make them less useful. AC ¶ 127. Specifically, the group proposed modifying the Friends API so that a developer could not access "information about a user's friends (and the friends of their friends) unless that developer's application was already installed by a user's friends to begin with." *Id.* The group also proposed removing the Newsfeed API entirely. *Id.* ¶ 128.

Additionally, in mid-2012, Facebook began charging "major competitors" a premium for access to Facebook APIs. CC ¶ 176; AC ¶ 133. Facebook required "major competitors" to sign "reciprocity" agreements which obligated these competitors to provide Facebook with their own data. CC ¶ 176; AC ¶ 133. Most notably, Facebook required "reciprocity" from "Twitter, Instagram, Pinterest, and Foursquare." CC ¶ 176; AC ¶ 134.

Advertisers describe this tactic in further detail. Advertisers allege that, in August 2012, Facebook created an expanded list of competitors and proposed either demanding reciprocity from or banning **[**160]** these competitors. AC ¶ 136. Advertisers highlight an email from Facebook VP of Business and Marketing Partnerships David Fischer which observed that a "large part of the market for [Facebook's] network will come from current and potential competitors." *Id.* Mr. Fischer divided "current and potential competitors" into the following categories:

- Social network apps (Google+, Twitter, Path, etc.)
- Photo sharing apps (Picasa, Flickr, LiveShare, Shutterfly, etc.)
- Messaging apps (WhatsApp, Viber, Imo, KakaoTalk, etc.)
- Local apps (Google+ local, Google Offers, Yelp, yp, etc.)
- Social search apps (HeyStaks, Wajam, etc.)
- Platforms (Google Play, Amazon, etc.)

Id.

In the Fall of 2012, Mr. Zuckerberg formalized a plan to "limit the ability for competitive networks to use [Facebook's] platform without a formal deal in place." *Id.* ¶ 141 (internal citation omitted). As detailed in an October 2012 email from Facebook VP for Engineering Michael Vernal, the plan was to modify the key Friends and News Feed APIs to make them less useful, to provide competitors with API access only if the competitors agreed to "formal deals," and to require data reciprocity from all developers. *Id.* ¶¶ 141-42. Mr. Vernal **[**161]** later characterized the amount of data that Facebook would require from developers as "crazy." *Id.* ¶¶ 147, 151. In November 2012, Facebook VP of Global Operations Justin Osofsky provided the following summary of the plan:

> Policy changes: define competitive networks + require they have a deal with us, regardless of size. Maintain size-based thresholds for all other developers to force business deals. Require data **[*815]** reciprocity for user extended info to ensure we have richest identity.

Id. ¶ 143.

On November 19, 2012, Mr. Zuckerberg "broadly announced" to Facebook employees "his decision to block competitors or require full data reciprocity for continued access." *Id.* ¶ 145. However, instead of announcing the decision to the public, Mr. Zuckerberg "decided to enforce the decision selectively and covertly." *Id.* ¶ 153. Indeed, when Mr. Osofsky "pleaded with" Mr. Vernal "to make an announcement that would send a clear signal to developers," Mr. Vernal "responded that" Mr. Zuckerberg "had already rejected that approach." *Id.* ¶ 157.

In January 2013, Mr. Zuckerberg initiated the plan and "ordered that WeChat, Kakao, and Line be restricted from using the Friends and News Feed APIs and even from advertising **[**162]** on Facebook[]." *Id.* ¶ 154. Mr. Fischer protested that "blocking competitors even from the advertising platform was irrational and unworkable" and stated that Facebook "should be secure enough in the quality of [its] products to enable them to compete effectively in the open marketplace." *Id.* ¶ 155. Mr. Zuckerberg was not swayed. Indeed, later in January, Mr. Zuckerberg "ordered that Facebook competitor Vine be 'shut down' from Facebook's API and Platform, including from advertising." *Id.* ¶ 158. Over the next few months, Facebook demanded reciprocity agreements from Yahoo, Amazon, and Refresh.io. *Id.* ¶¶ 162, 164, 165.

The engineers responsible for Facebook's platform expressed serious concerns about Mr. Zuckerberg's plan. For example, in March 2013, Facebook Director of Engineering for Platform Douglas Purdy stated that the "post facto" nature of this conduct was unfair to the developers who had relied on Facebook. *Id.* ¶ 163. Specifically, Mr. Purdy stated: "The way we are structured today, you build an app on FB and then launch and then we may just shut you down, harming users and the developer." *Id.* Additionally, in August 2013, an engineer named Bryan Klimt stated in an email to Facebook **[**163]** Head of Developer Products Ilya Sukhar that the Friends API "is so core to the developer experience . . . that removing it would be ridiculous on its face." *Id.* ¶ 177. According to Mr. Klimt, there were no "solid technical reasons" to remove API access and the only purpose was a "protectionist grab to make sure no one else can make a competing social network." *Id.* ¶ 180. Mr. Klimt's email further asserted: "We're removing the core API in our developer platform. Out of concerns that someone will steal our social network product." *Id.*

iii. In 2015, Facebook Began to Grant API Access on a Discriminatory Basis Despite Contrary Public Statements

Consumers and Advertisers both allege that, in 2015, Facebook "cut off all public access to the Friends and News Feed APIs." CC ¶ 180; AC ¶ 225. However, Facebook continued to provide access to certain developers on the condition that those developers sign "Whitelist and Datasharing Agreements." CC ¶ 181; AC ¶ 225. Although these agreements allowed chosen developers to access non-public APIs, the agreements obligated developers to make advertising purchases from Facebook. CC ¶ 181; AC ¶¶ 217-18. According to Advertisers, Facebook made agreements in **[**164]** 2015 with the following developers: Tinder, Hinge, Netflix, Nissan, Lyft, Microsoft, Hootsuite, and Walgreens. AC ¶¶ 221, 223, 225. Although Advertisers allege that Facebook made similar agreements with "dozens" of other developers, Advertisers state that it is impossible to know "the precise number and identity" of those developers. *Id.* ¶ 226.

Advertisers provide further details about the process that led to Facebook's **[*816]** decision to remove public access to the APIs. In Summer 2013, Facebook determined that over 40,000 applications were using Facebook APIs. *Id.* ¶ 169. Using data obtained through Onavo, Facebook divided these applications into three categories: (1)

applications that "may cause negative press" if their access to APIs were shut down; (2) applications that "provide strategic value"; and (3) applications that were "competitive" or "not useful." *Id.* ¶ 170. As a direct result of this analysis, Facebook immediately decided to restrict all "lifestyle apps" from using the Friends API because Facebook was "ultimately competitive with all of them." *Id.* ¶ 171. Additionally, Facebook developed "a small list of strategic competitors that" Mr. Zuckerberg "personally reviewed" to determine **[**165]** whether they would receive API access. *Id.* ¶ 189.

Facebook continued to keep these changes as secret as possible. Specifically, Mr. Zuckerberg "decided to announce the API removal under the cover of a major change to the Facebook Platform . . . which would be announced at the next Facebook F8 developers conference." *Id.* ¶ 192. Accordingly, "Facebook's engineers were . . . instructed in September 2013 to bury the changes to the API." *Id.* Indeed, "[a]lthough Facebook knew that the APIs were going to be removed by the next F8 conference, it continued to tell developers to rely on them." *Id.* ¶ 194.

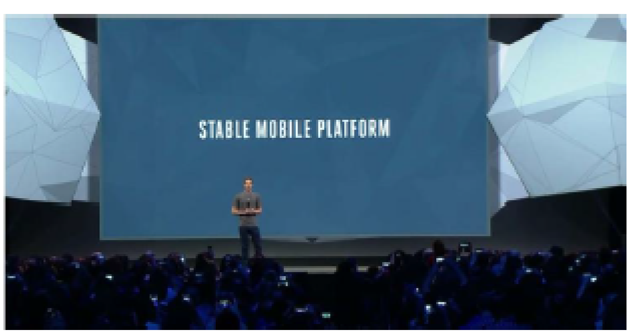
In January 2014, Facebook decided that it would be easier to remove API access from "[t]he bulk of the 41,191 that relied on the Friends or News Feed APIs" and decide on an individual basis which developers should be whitelisted. *Id.* ¶¶ 203-05. For example, "Facebook decided that it would whitelist Tinder and other anointed dating apps and shut down the rest." *Id.*

However, even after this decision was made, "Facebook continued to evangelize the APIs to developers." *Id.* ¶ 206. Indeed, in January 2014, an engineer named George Lee reported to Mr. Purdy and Mr. Vernal, Facebook employees were "still **[**166]** telling people to use" the APIs to build products. *Id.* One Facebook employee remarked that the decision to remove the APIs "seems a little unfair especially when our stance on some of these policies is that they're about ensuring trust[] and a great experience." *Id.* ¶ 208. Facebook Head of Developer Products Ilya Sukhar noted that developers would "get totally fucked," *id.* at 187, by Facebook's removal of the APIs and began referring to the removal as the "switcharoo plan," *id.* ¶ 207. In April 2014, Mr. Vernal remarked to Mr. Sukhar that if the reasons for removing the APIs became public, there would be a "high likelihood of breaking into jail." *Id.* ¶ 210.

On April 30, 2014, Facebook announced the removal of the APIs at the bottom of a long website post about changes to Facebook's Login system. *Id.* ¶ 211. After describing in detail the changes to Facebook's Login system, Facebook stated: "In addition to the above, we are removing several rarely used API endpoints; visit our changelog for details." *Id.* However, the APIs were not rarely used; five out of the top ten Facebook applications in December 2012 relied heavily on the APIs. *Id.* ¶ 212.

The same day, Mr. Zuckerberg took the stage **[**167]** at the F8 Conference and emphasized that Facebook's Platform was a "stable mobile platform":

[*817]



Id. ¶ 213. Mr. Zuckerberg did not mention that Facebook was removing API access. *Id.*

A year later, in April 2015, Facebook "cut off all public access to the Friends and News Feed APIs" and began providing API access only to certain whitelisted developers. *Id.* ¶ 225; CC ¶ 180. According to Advertisers, this practice persisted until April 4, 2018, when Facebook removed access to APIs entirely. AC ¶ 241.

In November 2019, NBC News published internal Facebook documents which revealed to the public Facebook's motivations for removing API access. *Id.* ¶ 516.

2. Consumers' and Advertisers' "Copy, Acquire, Kill" Claims Are Untimely

Because Consumers and Advertisers filed their complaint on December 3, 2020, they must allege that at least one "overt act" that was part of Facebook's "Copy, Acquire, Kill" strategy occurred after December 3, 2016. *See* *Klehr, 521 U.S. at 189*; *15 U.S.C. § 15b*. They must also allege that this overt act "meets two criteria: 1) It must be a new and independent act that is not merely a reaffirmation of a previous act; and 2) it must inflict new and accumulating injury on the plaintiff." *Samsung Elecs., 747 F.3d at 1202*.

Consumers contend that three **[**168]** overt acts that were part of Facebook's "Copy, Acquire, Kill" strategy occurred after December 3, 2016.[4] First, Consumers contend that Facebook "deceptively obtain[ed] data" using Onavo after December 3, 2016. Opp. at 8 (citing CC ¶¶ 209-13). Additionally, Consumers contend that Facebook "acquir[ed] additional competitors" after December 3, 2016. *Id.* (citing CC ¶¶ 206-07). This contention refers to Facebook's October 2017 acquisition of tbh and May 2020 acquisition of Giphy.

In turn, Advertisers contend that four overt acts that were part of Facebook's "Copy, Acquire, Kill" strategy occurred after December 3, 2016. First, similar to **[*818]** Consumers, Advertisers contend that Facebook "spied on users' mobile applications with Onavo spyware" after December 3, 2016. Opp. at 10 (citing AC ¶¶ 247-67). Second, Advertisers contend that Facebook "anticompetitively cloned Snapchat features . . . culminating in the cloned release of Instagram's 'stories' feature at the end of 2016." *Id.* (citing AC ¶¶ 298-99). Third, Advertisers contend that Facebook discriminatorily denied access to the "Platform" "at least until April 4, 2018." ***[**169]*** *Id.* (citing AC ¶¶ 234-44). Fourth, Advertisers contend that Facebook "continued back-end integration of Instagram and WhatsApp into 2020." *Id.* (AC ¶¶ 517-26). In the alternative, Advertisers contend that the limitations period should be tolled under the doctrine of fraudulent concealment. *Id.* at 13-14.

Below, the Court addresses: (1) Consumers' and Advertisers' argument about Facebook's use of Onavo; (2) Consumers' argument about Facebook's acquisitions of tbh and Giphy; (3) Advertisers' argument about Facebook's copying of Snapchat's "stories" feature; (4) Advertisers' argument about Facebook's "Platform"; (5) Advertisers' argument about Instagram and WhatsApp; and (6) Advertisers' fraudulent concealment argument.

a. Consumers and Advertisers Fail to Allege Any Facts That Allow the Court to Evaluate Whether Facebook's Use of Onavo After December 3, 2016 Inflicted a "New and Accumulating Injury"

Consumers and Advertisers both allege that Facebook's use of Onavo Protect was an integral part of the "Copy, Acquire, Kill" strategy and that Facebook collected data with Onavo Protect after December 3, 2016. CC ¶¶ 209-13; AC ¶¶ 247-67. Thus, Consumers and Advertisers contend, their "Copy, Acquire, **[**170]** Kill" claims are timely.

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[4] Consumers' complaint could be read as alleging that Facebook's copying of Houseparty's video messaging feature occurred after December 3, 2016. Specifically, Consumers allege that, after Facebook copied Houseparty, "Houseparty's active user base fell by half between 2017 and 2018." CC ¶ 205. However, Facebook contends that Consumers' allegations with respect to Houseparty are insufficient, Mot. at 13, and Consumers provide no response, *see* Opp. at 8. Moreover, Consumers incorporate into their complaint an article which suggests that Facebook made plans to copy Houseparty prior to December 3, 2016. *See* CC ¶ 164 n.137; Betsy Morris & Deepa Seetharaman, *The New Copycats: How Facebook Squashes Competition from Startups*, The Wall Street Journal (Aug. 9, 2017), https://on.wsj.com/3qbF0tE. Thus, the Court need not address Consumers' allegations regarding Houseparty.

Opp. at 8, 10. In response, Facebook argues that Consumers and Advertisers fail to allege that Facebook's "deceptive access to data through Onavo is itself anticompetitive." *See* Reply at 4.

With an important caveat, the Court agrees with Facebook. As an initial matter, Facebook's use of Onavo Protect was deceptive, and Facebook made deceptive statements about Onavo Protect up until 2019. For example, Facebook and Onavo, which Facebook acquired in 2013, represented to users of Onavo Protect that Onavo Protect would keep their "data safe" and "[a]dd an extra layer of protection to all [their] mobile data traffic." CC ¶ 166; AC ¶ 252. To the contrary, Onavo Protect "monitored all web and mobile traffic application on a user's mobile device" and sent this data to Facebook. CC ¶ 166; AC ¶ 252. Onavo Protect collected users' data "whether screens were on or off, whether they used WiFi or cellular data, and even when the VPN was turned off." CC ¶ 210; AC ¶ 261. Facebook and Onavo also released a product called Onavo Bolt, "which locked apps behind a passcode or fingerprint while it covertly surveilled users—and sent Facebook the results." AC ¶ 266.

In 2018, Apple removed **[**171]** Onavo Protect from the App Store for violating Apple's "rules prohibiting applications from using data in ways far beyond what is required to run the app." CC ¶ 209; AC ¶ 260. Facebook attempted to circumvent this removal by deceptively repackaging Onavo Protect as an application called "Facebook Research," but Apple uncovered Facebook's deception in January 2019, and Facebook immediately removed Facebook Research from the App Store. CC ¶ 212; AC ¶ 263. Similarly, when the "surveillance functionality" of Onavo Bolt was discovered, Facebook immediately "shut that app down." AC ¶ 266.

However, neither Consumers nor Advertisers have alleged any facts to establish **[*819]** that Facebook used Onavo Protect to inflict "new and accumulating injury" after December 3, 2016. *Samsung Elecs., 747 F.3d at 1202*. Specifically, Consumers and Advertisers have not alleged how Facebook used data obtained through Onavo after December 3, 2016. Accordingly, they have failed to show how Facebook's use of Onavo was an overt act in furtherance of any theory of antitrust liability. Indeed, neither Consumers nor Advertisers identify any companies which Facebook tracked using Onavo after December 3, 2016. Nor do they specify whether any users of Facebook's **[**172]** social networking services also were users of Onavo Protect. To the contrary, Consumers' and Advertisers' allegations indicate that the purpose of Onavo Protect was to track users of other social media applications in order to determine which applications besides Facebook were the most popular. CC ¶ 164; AC ¶ 166.

Given the absence of allegations regarding how Facebook used Onavo data after December 3, 2016, the Court cannot evaluate whether Facebook's collection of data through Onavo inflicted a "new and accumulating injury." *Samsung Elecs., 747 F.3d at 1202*. Thus, the Court cannot conclude that Facebook's collection of data through Onavo after December 3, 2016 was an "overt act" that renders Consumers' and Advertisers' "Copy, Acquire, Kill" claims timely. *Id.*

b. Consumers Fail to Allege Any Facts Which Would Allow the Court to Evaluate Whether Facebook's Acquisitions of tbh and Giphy Inflicted "New and Accumulating Injury"

Consumers allege that Facebook's 2017 acquisition of tbh and 2020 acquisition of Giphy were part of Facebook's "Copy, Acquire, Kill" strategy. CC ¶¶ 206-07. Thus, Consumers contend, Consumers' "Copy, Acquire, Kill" claims are timely. Opp. at 8. Facebook argues that, when Facebook filed the instant **[**173]** motion, Facebook's acquisition of Giphy "ha[d] not yet been completed" and thus could not have harmed Consumers. Mot. at 13 n.8. Additionally, Facebook argues that Consumers have offered "no[] allegations to explain how the tbh acquisition lessened competition." Mot. at 13.

The Court agrees that Consumers fail to allege any facts which could allow the Court to determine whether Facebook's acquisitions of tbh and Giphy had anticompetitive effects. Typically, plaintiffs establish that an acquisition is anticompetitive by offering evidence about the "concentration of firms in [the relevant] market" before and after the acquisition. *See FTC v. H.J. Heinz Co., 246 F.3d 708, 715, 345 U.S. App. D.C. 364 (D.C. Cir. 2001)*. Alternatively, plaintiffs can offer direct evidence about the acquired firm to show that removing that firm as a competitor would have a particular anticompetitive effect. *See, e.g., United States v. Aetna Inc., 240 F. Supp. 3d 1,* 43 (D.D.C. 2017) (explaining that an acquisition that "would result in the elimination of a particularly aggressive competitor in a highly concentrated market" could be anticompetitive).

Here, Consumers have failed to offer either type of evidence. Consumers' complaint contains a single sentence about tbh: "Facebook acquired 'tbh'—an anonymous social media app—in October 2017." CC ¶ 207. In **[**174]** turn, although Consumers at least describe the nature of Giphy's business, Consumers provide no information about Giphy which could allow the Court to determine whether Facebook's acquisition of Giphy had anticompetitive effects.[5] **[*820]** *See id.* ¶ 206. Consumers do not, for example, provide any details about Giphy's revenue, user base, or plans for growth.

Given the absence of allegations regarding tbh's and Giphy's businesses, the Court cannot evaluate whether Facebook's 2017 acquisition of tbh and 2020 acquisition of Giphy inflicted a "new and accumulating injury" on Consumers. Samsung Elecs., 747 F.3d at 1202. Accordingly, the Court cannot conclude that those acquisitions were "overt acts" that render Consumers' "Copy, Acquire, Kill" claims timely. *Id.*

c. Advertisers Do Not Adequately Allege that Facebook's Copying of Snapchat Was an Overt Act That Occurred After December 3, 2016

Advertisers allege that "by late 2016," Facebook copied Snapchat's "stories" feature, which allows a user to post a series of images and videos that remain online for twenty-four hours. AC ¶ 298. Because this act was part of Facebook's "Copy, Acquire, Kill" strategy, Advertisers argue, Advertisers' **[**175]** "Copy, Acquire, Kill" claims are timely. Opp. at 10.

The Court rejects this argument. Because Advertisers filed their complaint on December 3, 2016, Advertisers' "Copy, Acquire, Kill" claims are timely only if Advertisers allege overt acts that were part of the "Copy, Acquire, Kill" strategy and occurred *after December 3, 2016.* Klehr, 521 U.S. at 189.

Advertisers' allegations, which state only that Facebook "had launched" a product that copied Snapchat "by late 2016," are insufficient to establish that Facebook copied Snapchat's stories feature after December 3, 2016 for two reasons. AC ¶ 298. First, Consumers' allegation that Facebook copied Snapchat's stories feature "by late 2016" is too vague to support a conclusion that Facebook copied Snapchat's stories feature after December 3, 2016. Second, Consumers' use of the word "launched" does not provide sufficient details about the actions Facebook took to copy Snapchat's stories feature.

Without more specific details, the Court cannot conclude that Facebook's copying of Snapchat's stories feature occurred after December 3, 2016. Thus, that act does not render Advertisers' "Copy, Acquire, Kill" claims timely. Klehr, 521 U.S. at 189.

d. Advertisers Do Not Adequately Allege that Facebook [176] Committed Overt Acts Related to Facebook's APIs After December 3, 2016**

Advertisers allege that, in 2015, Facebook "cut off all public access to the Friends and News Feed APIs" and discriminatorily allowed access only to developers who signed "Whitelist and Datasharing Agreements." AC ¶ 225. Accordingly, Advertisers contend, their "Copy, Acquire, Kill" claims are timely because Facebook continued this discriminatory practice "at least until April 4, 2018." Opp. at 10. For the reason below, the Court rejects this contention.

[5] As noted, Facebook asserts that, as of May 20, 2021, Facebook had not completed its acquisition of Giphy. Mot. at 13 n.8. Moreover, in November 2021, the UK's Competition and Markets Authority blocked Facebook's acquisition of Giphy. Morgan Meaker, *Meta's Failed Giphy Deal Could End Big Tech's Spending Spree*, Wired (Dec. 3, 2021), https://bit.ly/3tkoRUx. Any amended complaint should provide an update on the status of Facebook's acquisition of Giphy.

As an initial matter, Advertisers do not allege that Facebook granted or refused to grant any "Whitelist and Datasharing Agreements" after December 3, 2016. AC ¶ 241. Advertisers allege only that:

- In January 2015, Facebook provided Whitelist and Data Sharing Agreements to the dating apps Tinder and Hinge.
- In February 2015, Facebook refused to provide Airbiquity a Whitelist and Data Sharing Agreement.
- In February 2015, Facebook provided Whitelist and Datasharing Agreements to Netflix, Nissan, and Lyft.

[*821] • In April 2015, Facebook received requests for Whitelist and Data Sharing Agreements with Microsoft, Hootsuite, and Walgreens.

Id. ¶¶ 221-25. Although Advertisers also **[**177]** allege that "dozens of app developers entered into such Agreements with Facebook," Advertisers concede that the "precise number and identity" of these other developers "cannot be known." *Id.* ¶ 226. Moreover, because Advertisers' allegations are "bereft of any dates or details with regards" to Facebook's agreements with these other developers, they do not support Advertisers' argument that Facebook entered Whitelist and Datasharing Agreements after December 3, 2016. *Ryan v. Microsoft Corp., 147 F. Supp. 3d 868, 883 (N.D. Cal. 2015)*.

Because Advertisers have failed to allege that Facebook entered new Whitelist and Data Sharing Agreements after December 3, 2016, Advertisers have failed to allege that Facebook committed an "overt act" related to its discriminatory API restrictions during the limitations period. *Id. at 885*. Thus, those restrictions do not render Advertisers' "Copy, Acquire, Kill" claims timely. *Klehr, 521 U.S. at 189*.

e. Advertisers Do Not Adequately Allege that Facebook's Integration of Instagram and WhatsApp Inflicted a "New and Accumulating Injury"

Advertisers allege that, in 2019, Facebook officially announced that it planned to integrate Facebook, Instagram, and WhatsApp. AC ¶ 524. In essence, integrating Facebook, Instagram, and WhatsApp means that a user of one **[**178]** of those services will be able to communicate with users of the other services without making accounts for those services. *See* Mike Isaac, *Zuckerberg Plans to Integrate WhatsApp, Instagram and Facebook Messenger*, The New York Times (Jan. 25, 2019), https://nyti.ms/3zRQo0Q.[6] Accordingly, Advertisers contend, that their "Copy, Acquire, Kill" claims are timely because Facebook's plan to integrate Facebook, Instagram, and WhatsApp occurred after December 3, 2016 and is an overt act that is part of the Copy, Acquire, Kill strategy. Opp. at 10. For the reasons below, the Court rejects this argument.

Although Advertisers' argument is sparse, Advertisers appear to invoke the "new use" exception to the general rule that, when one firm acquires another firm, subsequent actions by the "merged firm" do not inflict new and accumulating injuries that allow a plaintiff to challenge the original acquisition. *See Midwestern Machinery Co., Inc. v. Northwest Airlines, Inc., 392 F.3d 265, 271-74 (8th Cir. 2004)* ("Even if the merger itself was unlawful, the continued existence of the merged entity is not a continuing violation: It is simply the natural unabated inertial consequence of the merger."). "Under the 'new use' exception, '[i]f assets are used in a different manner from the way that they **[**179]** were used when the initial acquisition occurred, and that new use injures the plaintiff, he or she has four years from the time that the injury occurs to sue.'" *See Free FreeHand, 852 F. Supp. 2d at 1188* (quoting *Midwestern Machinery, 392 F.3d at 273*). However, an important limitation is that the "new use" exception does not apply to an alleged "anti-competitive threat" that "was clear at the time of the merger." *Midwestern Mach., 392 F.3d at 273*. "Otherwise, every business decision could qualify as a continuing violation to restart the statute of limitations **[*822]** as long as the firm continued to desire to be merged." *Id. at 271*.

As an initial matter, Advertisers fail to explain why, when a firm acquires another firm, it is not "clear at the time" of the acquisition that the two firms are going to integrate. *Midwestern Mach., 392 F.3d at 273*. Indeed, a firm's

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[6] The Court takes judicial notice of the article in order to aid its understanding of Advertisers' argument. *See* ***United States v. Black, 482 F.3d 1035, 1041 (9th Cir. 2007)***

acquisition of another firm is potentially anticompetitive *precisely because* the acquisition could result in a single firm that controls an undue share of the market. *See* H.J. Heinz Co., 246 F.3d at 719. Without additional facts or law, the Court cannot conclude that a firm's decision to integrate a purchased asset into its existing business generally is a "new use" that allows a plaintiff to challenge the original purchase.

Advertisers also fail to explain why, in this specific instance, Facebook's 2019 announcement **[**180]** about WhatsApp and Instagram satisfies the "new use" doctrine. Specifically, Advertisers highlight Facebook's 2014 representation that it would not be able to "establish reliable automatic matching between Facebook's users' accounts and WhatsApp users' accounts" and equates this representation to a statement that Facebook would not be able to integrate WhatsApp. *See* AC ¶ 518. Accordingly, Advertisers allege, it was not clear at the time of the acquisition that Facebook planned to integrate WhatsApp. *Id.* However, even if Advertisers are correct, Facebook publicly announced in August 2016 that it *would* be able to "link[] WhatsApp users' phone numbers with Facebook users' identities." *Id.* ¶ 518. Thus, under Advertisers' own logic, Facebook's plan to integrate WhatsApp was clear in August 2016.

In turn, Advertisers allege no facts which suggest that Facebook's plan to integrate Instagram was not clear at the time Facebook acquired Instagram.

Accordingly, the Court cannot conclude that Facebook's 2019 announcement of its plan to integrate Instagram and WhatsApp qualifies as "overt act" that inflicted "new and accumulating injury" after December 3, 2016. Samsung Elecs., 747 F.3d at 1202.

f. Advertisers Do Not Adequately Allege [**181] Tolling Under the Fraudulent Concealment Doctrine

Under the doctrine of fraudulent concealment, a "statute of limitations may be tolled if the defendant fraudulently concealed the existence of a cause of action in such a way that the plaintiff, acting as a reasonable person, did not know of its existence." Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1060 (9th Cir. 2012). The purpose of the doctrine "is to prevent a defendant from 'concealing a fraud . . . until such time as the party committing the fraud could plead the statute of limitations to protect it.'" In re Animation Workers Antitrust Litig., 123 F. Supp. 3d 1175, 1194 (N.D. Cal. 2015) (quoting Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349, 22 L. Ed. 636 (1874)). "To plead fraudulent concealment, the plaintiff must allege that: (1) the defendant took affirmative acts to mislead the plaintiff; (2) the plaintiff did not have 'actual or constructive knowledge of the facts giving rise to its claim'; and (3) the plaintiff acted diligently in trying to uncover the facts giving rise to its claim." *Id.* (quoting Hexcel, 681 F.3d at 1060). Additionally, the plaintiff must plead these elements with the particularity required by Rule 9(b). *Id.*

Advertisers argue that Facebook fraudulently concealed two sets of anticompetitive acts. First, Advertisers argue that Facebook "made false and misleading statements (and omissions) about the Instagram and WhatsApp mergers . . . to prevent discovery **[**182]** of the anticompetitive purposes of those mergers." Opp. at 14 (citing AC ¶¶ 517-26). Second, Advertisers argue that Facebook fraudulently concealed **[*823]** the anticompetitive nature of its API restrictions by stating false reasons for those restrictions. Opp. at 13-14 (citing AC ¶¶ 211-15, 491-92, 500-16). The Court addresses these arguments in turn.

i. Advertisers Fail to Allege that Facebook's 2014 Representation About WhatsApp Tolls Advertisers' "Copy, Acquire, Kill" Claims

Advertisers allege that Facebook fraudulently concealed the anticompetitive purpose of the WhatsApp acquisition by representing to European regulators in 2014 that Facebook did not have the means "to establish reliable automated matching between Facebook's users' accounts and WhatsApp users' accounts." AC ¶ 518. Advertisers equate this statement to a representation that Facebook would not be able to integrate WhatsApp. *Id.* Thus, Advertisers contend, Facebook's 2014 representation tolled the statute of limitations until 2019, when Facebook officially announced its plan to integrate WhatsApp. Opp. at 10.

However, as discussed, Facebook announced in August 2016 that it *did* have ability to match Facebook's users' accounts **[**183]** and WhatsApp users' accounts. *See* pp. 95-96, *supra*. Thus, even assuming that Facebook's 2014 statement to European regulators misled Advertisers about the anticompetitive purpose of the WhatsApp acquisition, Advertisers had "actual or constructive notice" of this purpose prior to December 3, 2016. *Hexcel, 681 F.3d at 1060*.

Moreover, Advertisers have failed to allege that they "acted diligently in trying to uncover the facts giving rise to [their] claim." *Id.* "Where a plaintiff's suspicions have been or should have been excited, there can be no fraudulent concealment where he [or she] 'could have then confirmed his [or her] earlier suspicion by a diligent pursuit' of further information." **[*824]** *Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc., 858 F.2d 499, 504 (9th Cir. 1988)* (quoting *Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978)*). Advertisers fail to explain why Facebook's August 2016 announcement would not have "excite[d] the inquiry of a reasonable person." *Id.* Thus, because Advertisers failed to allege *any* facts that suggest they "acted diligently," Advertisers may not invoke the fraudulent concealment doctrine. *Hexcel, 681 F.3d at 1060*.

Thus, Advertisers have not adequately alleged that Facebook's 2014 statement to the European Commission renders Advertisers' "Copy, Acquire, Kill" claims timely under the fraudulent concealment doctrine. *Id.*

ii. Advertisers Allege [184] No Facts That Show Diligence Regarding Facebook's 2015 Decision to Remove Public Access to APIs**

Advertisers contend that Facebook made a series of misleading statements that concealed the anticompetitive purpose of Facebook's 2015 decision to remove public access to APIs. Opp. at 13-14. According to Advertisers, these statements prevented Advertisers from timely bringing the "causes of action asserted [in the instant case], which all require anticompetitive purpose and/or effect as necessary elements." *Id.* Facebook contends that Advertisers have failed to allege that they were misled by these statements, that Advertisers had actual or constructive notice of the conduct giving rise to their claims, and that Advertisers have failed to allege diligence. Mot. at 9-10. For the reasons below, the Court agrees with Facebook that Advertisers have failed to allege diligence.

"Where a plaintiff's suspicions have been or should have been excited, there can be no fraudulent concealment where he [or she] 'could have then confirmed his [or her] earlier suspicion by a diligent pursuit' of further information." *Conmar, 858 F.2d at 504* (quoting *Rutledge, 576 F.2d at 250*). "The requirement of diligence is only meaningful, however, when facts exist **[**185]** that would excite the inquiry of a reasonable person." *Id.*

As discussed, Advertisers' allegations regarding APIs center on Facebook's decision in 2015 to "cut off all public access to the Friends and News Feed APIs." AC ¶ 225. According to Advertisers, these APIs were so important to developers that Facebook's 2015 decision to remove public API access "simply br[oke] nearly all of the more than 40,000 third-party apps that relied on the APIs." *Id.* ¶ 214.

Advertisers do not allege that they were unaware of Facebook's 2015 decision to remove public access to APIs. Thus, even assuming that Facebook's decision to remove public API access did not itself give Advertisers "actual or constructive knowledge of the facts giving rise to [their] claim," Advertisers' knowledge of Facebook's decision obligated Advertisers to engage in a "diligent pursuit" of "further information." *Hexcel, 681 F.3d at 1060*. Indeed, Facebook's decision to remove public API access in 2015 is the core fact giving rise to Advertisers' claims and Advertisers fail to provide any explanation why this decision would not have "excite[d] the inquiry of a reasonable person." *Conmar, 858 F.2d at 504*.

Accordingly, because Advertisers have failed to allege any facts which suggest **[**186]** that they "acted diligently in trying to uncover the facts" about Facebook's decision to remove public access to APIs in 2015, Advertisers may not invoke the fraudulent concealment doctrine. *Hexcel, 681 F.3d at 1060*. Advertisers' complaint stands in stark contrast to the pleadings of plaintiffs who have successfully invoked the fraudulent concealment doctrine. For example, in *Animation Workers*, the plaintiffs brought a *Sherman Act* claim alleging that their former employers had "engaged in a conspiracy to fix and suppress employee compensation." *123 F. Supp. 3d at 1178-79*. In support of their argument that their employers had fraudulently concealed the conspiracy, the plaintiffs alleged that they had "repeatedly asked Defendants about how compensation was determined and what steps Defendants were taking to retain and attract talented employees." Second Amended Complaint ¶ 183, *In re Animation Workers Antitrust Litig.*, No. 14-CV-04062-LHK (N.D. Cal. May 15, 2015), ECF No. 121. The Court found that this allegation, combined with allegations describing specific instances in which the plaintiffs asked their employers about compensation, were sufficient to show diligence. *See Animation Workers, 123 F. Supp. 3d at 1204-05*. Although Advertisers do not necessarily need to provide this level of detail, Advertisers **[**187]** must allege *some* facts which suggest that they "acted diligently in trying to uncover the facts" about Facebook's removal of public access to its APIs. *Hexcel, 681 F.3d at 1060*.

Because Advertisers have failed to allege any facts about diligence, the Court need not decide what level of allegations would suffice. However, Advertisers' failure to allege diligence is fatal to their fraudulent concealment argument. *Id.*

Thus, the Court GRANTS Facebook's motion to dismiss Consumers' and Advertisers' "Copy, Acquire, Kill" claims. However, because the Court finds that additional allegations may cure the deficiencies outlined above, amendment would not be futile. *Leadsinger, 512 F.3d at 532*. Additionally, neither Consumers nor Advertisers have acted in bad faith, and allowing leave to amend would not unduly prejudice Facebook or cause undue delay. *Id.* Accordingly, the Court grants Consumers and Advertisers leave to amend their "Copy, Acquire, Kill" claims.

[*825] D. The Court Denies Facebook's Motion to Dismiss Advertisers' GNBA Claims

Facebook concedes that Advertisers' GNBA claims are timely. Additionally, Facebook does not dispute Advertisers' allegations that the GNBA was an unreasonable restraint of trade under *Section 1 of the Sherman Act* and exclusionary conduct under **[**188]** *Section 2 of the Sherman Act*. Instead, Facebook argues that Advertisers have not adequately alleged that the GNBA caused them a cognizable antitrust injury. *See* Mot. at 31-34. For the reasons below, the Court rejects this argument.

The Court begins by discussing Advertisers' allegations regarding the GNBA. The Court then explains why Advertisers have adequately alleged causal antitrust injury.

1. The Google Network and Bidding Agreement

In addition to alleging that Facebook maintained monopoly power by strategically eliminating potential competitors, Advertisers allege that Facebook preserved its monopoly power by agreeing with Google not to enter each other's market. This agreement, which Facebook and Google signed in 2018, was called the Google Network Bidding Agreement ("GNBA").

Prior to signing the GNBA, Facebook had taken steps to improve its general advertising capabilities. In 2013, Facebook acquired an advertising program called Atlas. AC ¶ 347. In addition to serving advertisements, Atlas tracked whether a user who clicked on an advertisement eventually purchased a product as a result. *Id.* ¶ 339. Facebook used Atlas to create a robust tracking system which allowed Facebook to determine whether a **[**189]** Facebook user purchased a product at an offline retail store after seeing an advertisement for that product on Facebook. *Id.* ¶¶ 341, 352. After purchasing and implementing Atlas, Facebook acquired a real-time bidding service called LiveRail. *Id.* ¶ 355.

In 2014, Facebook announced a new advertising system called the Facebook Audience Network ("FAN"). *Id.* ¶ 326. FAN allowed advertisers to use Facebook's granular targeting strategies to advertise not just on Facebook but also in mobile applications. *Id.* ¶ 327. Initially, FAN only showed advertisements to users who logged into mobile applications with their Facebook accounts. *Id.* ¶ 334. However, in May 2016, Facebook extended FAN to track Facebook users even when they did not login with Facebook accounts and to show targeted advertisements to those users. *Id.* ¶ 335. Indeed, on April 16, 2018, Facebook revealed in documents provided to Congress that Facebook tracks its users even when they are not logged into Facebook based on: (1) social plugins, such as the Like and Share buttons; (2) Facebook Login, which allows users to use their Facebook account to log into another website or app; (3) Facebook Analytics; and (4) Facebook ads and measurement **[**190]** tools. *Id.* ¶ 366.

These steps positioned Facebook to compete with Google, which provides advertising services on websites across the internet. *Id.* ¶ 369. Google's Ad Manager ("GAM") service helps websites who wish to sell advertising space to find companies who want to place advertisements on those websites. *Id.* ¶ 371. Google uses GAM both to find direct purchasers for advertising space and to sell advertising space to advertising exchanges, "where marketers bid for the [advertising space] in real time." *Id.* Google also operates its own advertising exchange, which is called Google Ad Exchange. *Id.* ¶ 375. Google charges companies fees when they purchase advertising space through Google Ad Exchange. *Id.*

[*826] However, while Facebook was getting better at providing advertisements outside its core applications, Google was getting better at determining the identities of people who visited the websites with which Google worked to sell advertising. From the beginning, Google could obtain basic information about people who visited websites that contracted with GAM or Google Ad Exchange. *Id.* ¶ 378. For example, Google could obtain such a person's "IP address, device identification information, or browser **[**191]** information." *Id.* ¶ 378. Then, in January 2014, Google acquired an artificial intelligence company called DeepMind. *Id.* ¶ 384. This technology allowed Google to "make granular identity determinations" from the basic data that Google had always collected. *Id.* ¶ 378. For example, Google used this information to "study a [person's] decisions and preferences" and make recommendations on its Google Play Store. *Id.* ¶¶ 385-86.

In 2017, Facebook made an overt threat to Google's business. By that time, websites that wanted to sell advertising space had "beg[u]n to adopt a practice called 'header bidding,'" which allowed websites to send a "standardized" advertising space "to several exchanges" at once. *Id.* ¶¶ 391-92. This practice "threatened to cut Google out of the picture" because it obviated the need to go through Google to place advertising space on advertising exchanges. *Id.* ¶ 393. "In March 2017, Facebook publicly announced it would support header bidding." *Id.* ¶ 395.

Following Facebook's announcement, Google reached out to Facebook to broker a deal. *Id.* ¶ 398. Then, in September 2018, Facebook and Google reached the GNBA. *Id.* ¶ 400. Under this agreement, Facebook agreed to drop its support **[**192]** for header bidding. *Id.* ¶ 401. In return, Google agreed that it would: (1) provide Facebook with powerful tools to identify, target, and monetize Facebook's own users on the web and across third party mobile applications and (2) give Facebook the right to show ads to 90% of Facebook's users and twice the amount of time to bid on advertising to Facebook's users. *Id.* ¶¶ 18, 405. Because this arrangement would enable Facebook to identify Facebook users across the internet, Facebook would have more data on those users and could better target advertisements to them. *Id.* ¶ 406.

"Put simply," Advertisers allege, "Google and Facebook agreed to divide and segment markets, allowing Facebook to continue charging a significant price premium for its targeted advertising sold in the Social Advertising Market." *Id.* ¶ 411.

2. Advertisers Adequately Allege that the GNBA Caused Them Injury

To state a claim under either *Section 1* or *Section 2 of the Sherman Act*, a plaintiff must allege causal antitrust injury. *See* *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir. 2012)* ("In order to state a *Section 1* claim . . . plaintiffs must plead . . . . that they were harmed by the defendant's anti-competitive contract, combination, or conspiracy, and that this harm flowed from an 'anti-competitive aspect **[**193]** of the practice under scrutiny.'") (internal citation omitted); *SmileCare Dental, 88 F.3d at 783* ("In order to state a claim for monopolization under *Section 2 of the Sherman Act*, a plaintiff must prove . . . causal antitrust injury.") (internal quotation omitted). This requirement applies even if the plaintiff has alleged that the defendant's conduct is per se illegal. *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* ("[P]roof of a per se violation and of antitrust injury are distinct matters that must be shown independently.").

To plead causal antitrust injury, a plaintiff must allege that the defendant's unlawful conduct caused an injury "that **[*827]** flows" from the unlawful conduct and that is "the type the antitrust laws were intended to prevent." *Somers, 729 F.3d at 963*. Additionally, "the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market." *Id.* (quoting *Glen Holly, 343 F.3d at 1008*).

Because Advertisers allege that the GNBA allowed Facebook to maintain supracompetitive prices, Advertisers have adequately alleged a cognizable antitrust injury. Specifically, Advertisers allege that the GNBA prevented Google from "leverag[ing] its ability to identify and target Facebook users." AC ¶ 485. Thus, the GNBA "bolstered and reinforced **[**194]** Facebook's dominant position in the Social Advertising Market" and allowed Facebook "to maintain and raise prices with little or no competitive check." *Id.*

Indeed, Advertisers cite specific sources which show that Facebook's advertising prices "increased 122 percent" the year the GNBA was signed and "grew 90 percent" the year after the GNBA was signed. *Id.* ¶ 443. As this Court has explained, "charg[ing] Plaintiffs supracompetitive prices" is a "type of injur[y] that commonly satisf[ies] the antitrust standing requirement." *See Free FreeHand, 852 F. Supp. 2d at 1185*; *see also Glen Holly Ent., Inc. v. Tektronix, Inc., 352 F.3d 367, 374 (9th Cir. 2003)*; *Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1034 (9th Cir. 2001)* ("[T]he antitrust laws are only concerned with acts that harm 'allocative efficiency and raise[ ] the price of goods above their competitive level or diminish[ ] their quality.'" (quoting *Rebel Oil Co. v. ARCO, 51 F.3d 1421, 1433 (9th Cir. 1995)*)); *Abbyy USA Software House, Inc. v. Nuance Communs., Inc., No. 08-CV-01035, 2008 U.S. Dist. LEXIS 90308, 2008 WL 4830740, at *4 (N.D.Cal. Nov. 6, 2008)* (noting that direct purchasers of software would have antitrust standing stemming from injury of paying supracompetitive prices).

Additionally, Advertisers have adequately explained how Advertisers' injury "flow" from the GNBA. *Somers, 729 F.3d at 963*. Advertisers allege that, by 2018, Google had developed a way to determine the true identities of people who visited Google's partners' websites. *See* AC ¶¶ 377-86. Thus, Google was close to offering "a new, highly targeted form of advertising" **[**195]** that could compete with Facebook's social advertising business by providing companies with the opportunity to target people or groups with specific traits and interests. *Id.* ¶¶ 379-80. However, under the GNBA, Google agreed that, on Google's partners' websites, "Facebook would receive the right to show ads to 90% of the users it recognized as its own" and that, for the remaining 10%, Facebook would receive extra time to place bids. *Id.* ¶ 405. According to Advertisers, the primary effect of this agreement was to make it nearly impossible for companies to show online advertisements to Facebook users without negotiating with Facebook, even when those people are not using Facebook or Facebook-affiliated applications. *Id.* ¶ 406. Thus, "Facebook's users remained uniquely Facebook's to advertise to" and, if Advertisers wanted to reach those users, Advertisers "had to pay Facebook (at a premium)." *Id.* ¶ 409. By providing this description, Advertisers have adequately "sketch[ed] the outline of [the injury to competition] with allegations of supporting factual detail."' *Brantley, 675 F.3d at 1198* (quoting *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 508 (9th Cir. 1989)*) (alteration in original).

Facebook's arguments to the contrary are unconvincing. Although Facebook cites *Intel Corporation v. Fortress Investment Group LLC, 511 F. Supp. 3d 1006 (N.D. **[*828]** Cal. 2021)*, to argue **[**196]** that Advertisers are required to "identify the competitive price," Mot. at 32, *Intel* imposes no such requirement. In *Intel*, the plaintiff brought a claim alleging that "companies who licensed [certain] patents from [the defendant] paid supracompetitive prices." *511 F. Supp. 3d at 1027*. However, because the terms of the relevant patent licenses were confidential, the plaintiff "provided no information" about the prices paid under the license agreements. *Id.* Accordingly, the court held that the plaintiff's allegations were too speculative to support an antitrust claim. *Id.*

In contrast to the *Intel* plaintiff, Advertisers have cited specific sources showing that Facebook's advertising prices "increased 122 percent" the year the GNBA was signed and "grew 90 percent" the year after the GNBA was signed. AC ¶ 433. Numerous courts have found similar allegations sufficient. For example, in *Free FreeHand*, the plaintiff supported its claim of supracompetitive prices by alleging that the defendant had raised its prices by 25% the year after committing the alleged antitrust violation. *See* First Amended Complaint ¶ 68, *Free FreeHand Corp. v. Adobe Systems Inc.*, No. 11-CV-02174-LHK (N.D. Cal. Jul. 20, 2011), ECF No. 19. This Court found that allegation **[**197]** sufficient to establish supracompetitive prices. *See* *Free FreeHand, 852 F. Supp. 2d at 1185*. Similarly, in *In re Magnesium Oxide Antitrust Litig., No. 10-CV-5943-DRD, 2011 U.S. Dist. LEXIS 121373, 2011 WL 5008090, at *6 (D.N.J. Oct. 20, 2011)*, the court found sufficient the plaintiffs' allegation "that they were 'injured by having paid more for [the product] than they otherwise would have paid.'" Thus, not only is there no authority for Facebook's argument that Advertisers must allege the "competitive price," there is ample authority showing that Advertisers' allegations regarding prices are sufficient.

Facebook also relies on *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, but that case is inapposite. In *Associated General Contractors*, a construction workers union brought antitrust claims on behalf of contractors and subcontractors who were members of the union. *Id. at 527-28*. The United States Supreme Court held that the union did not have standing to bring claims on behalf of its members. *Id. at 541*. Although the union alleged that it "suffered unspecified injuries in its 'business activities,'" the Court explained that it was "obvious that any such injuries were only an indirect result of whatever harm may have been suffered by 'certain' construction contractors and subcontractors." *Id. at 541-42*. Thus, *Associated General Contractors* merely provides that an entity that has no direct connection with an antitrust violator may not bring **[**198]** claims on behalf of entities who have suffered direct harm. By contrast, in the instant case, Advertisers allege that they are "consumer[s] of [Facebook's] goods or services" and have suffered direct harm because of the Facebook's anticompetitive acts. *See* *Somers, 729 F.3d at 963*. Facebook has not identified a case in which similarly situated plaintiffs have not been allowed to bring antitrust claims.

The remainder of Facebook's arguments involve complicated factual disputes. For example, Facebook argues that Advertisers' theory is implausible because there is no evidence that Google had the capability to peel customers away from Facebook. *See* Mot. at 33. However, this kind of factual dispute cannot be resolved at the pleading stage, and because Advertisers have "'raise[d] a reasonable expectation that discovery will reveal evidence of' an injury to competition," Advertisers' **[*829]** allegations regarding injury from the GNBA are sufficient. *Brantley, 675 F.3d at 1198* (citing *Twombly, 550 U.S. at 556*).

Accordingly, because Advertisers have adequately alleged causal antitrust injury, the Court DENIES Facebook's motion to dismiss Advertisers' GNBA claims.

E. The Court Grants Facebook's Motion to Dismiss Consumers' Unjust Enrichment Claim With Leave to Amend

In addition **[**199]** to alleging claims under the *Sherman Act*, Consumers allege a claim against Facebook for common law unjust enrichment. CC ¶¶ 308-17. Specifically, Consumers allege that Facebook obtained user data through "misrepresentations and deception" and that Facebook has made billions of dollars from selling this data. *Id.* ¶¶ 313-15.

However, as "this Court has repeatedly held, 'California does not recognize a separate cause of action for unjust enrichment.'" *Abuelhawa v. Santa Clara Univ., 529 F. Supp. 3d 1059, 2021 WL 1176689, at *9 (N.D. Cal. Mar. 29, 2021)* (quoting *Brodsky v. Apple Inc., 445 F. Supp. 3d 110, 132-33 (N.D. Cal. 2020)* (collecting California and federal cases)). California law is clear: "Unjust enrichment is not a cause of action." *De Havilland v. FX Networks, LLC, 21 Cal. App. 5th 845, 870, 230 Cal. Rptr. 3d 625 (Cal. Ct. App. 2018)* (quoting *Hill v. Roll Int'l Corp., 195 Cal. App. 4th 1295, 1307, 128 Cal. Rptr. 3d 109 (Cal. Ct. App. 2011)*). Thus, "courts have consistently dismissed stand-alone claims for unjust enrichment." *Brodsky, 445 F. Supp. 3d at 132*.

Accordingly, the Court GRANTS Facebook's motion to dismiss Consumers' Unjust Enrichment claim. Although the Court questions whether Consumers can cure the above deficiencies, the Court cannot conclude that amendment would be futile. *Leadsinger, 512 F.3d at 532*. Additionally, the Court cannot conclude that Consumers have acted in bad faith, or that allowing leave to amend would unduly prejudice Facebook or cause undue delay. *Id.* Therefore, the Court grants leave to amend.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART Facebook's **[**200]** motion to dismiss.

Specifically, the Court GRANTS with leave to amend Facebook's motion to dismiss the following claims:

- Consumers' "Copy, Acquire, Kill" claims;
- Advertisers' "Copy, Acquire, Kill" claims; and
- Consumers' Unjust Enrichment claim.

The Court DENIES Facebook's motion to dismiss the following claims:

- Consumers' data privacy claims; and
- Advertisers' GNBA claims.

Plaintiffs shall file any amended consolidated complaints within 45 days of this Order. Failure to do so, or failure to cure deficiencies identified herein or identified in the instant motion to dismiss, will result in dismissal of the deficient claims with prejudice. Plaintiffs may not add new causes of action or add new parties without stipulation or leave of the Court. Plaintiffs are directed to file a redlined complaint comparing the complaint to any amended complaint as an attachment to Plaintiffs' amended complaint.

IT IS SO ORDERED.

Dated: January 14, 2022

/s/ Lucy H. Koh

LUCY H. KOH

United States Circuit Judge*

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* Sitting by designation on the United States District Court for the Northern District of California.

Molina Healthcare, Inc. v. Celgene Corp.

United States District Court for the Northern District of California

January 18, 2022, Decided; January 18, 2022, Filed

Case No. 21-cv-05483-JCS

Reporter

2022 U.S. Dist. LEXIS 9022 *; 2022 WL 161894

MOLINA HEALTHCARE, INC., Plaintiff, v. CELGENE CORPORATION, et al., Defendants.

Prior History: *In re Thalomid & Revlimid Antitrust Litig., 2015 U.S. Dist. LEXIS 177541, 2015 WL 9589217 (D.N.J., Oct. 29, 2015)*

Core Terms

subsidiaries, unfair, removal, monopolization, cases, prong, citizenship, federal law, competitors, state court, diversity jurisdiction, federal court, federal issue, consumer, parties, district court, assigned, anti trust law, state law, assignor, courts, allegations, personal jurisdiction, federal question, violates, motion to dismiss, assignee, asserts, subject matter jurisdiction, state law claim

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Judges: JOSEPH C. SPERO, Chief United States Magistrate Judge.

Opinion by: JOSEPH C. SPERO

Opinion

ORDER GRANTING MOTION TO REMAND

Re: Dkt. No. 14

I. INTRODUCTION

This is one of many cases filed against Defendant **[*2]** Celgene Corporation and its parent Defendant Bristol-Myers Squibb Company ("BMS") regarding Celgene's[1] efforts to protect the market for two of its prescription drugs, Thalomid and Revlimid, from generic competitors. After opting out of an earlier class action and having been dismissed from a case in Minnesota, Plaintiff Molina Healthcare, Inc. ("Molina") brought this action in the California Superior Court for the County of San Francisco,[2] asserting claims under the laws of twenty-three states, including California's Unfair Competition Law (the "UCL"). Defendants removed the case to this Court and move to transfer to the District of New Jersey or dismiss for lack of personal jurisdiction. Molina moves to remand. The Court finds the matter suitable for resolution without oral argument and VACATES the hearing previously set for January 28, 2022. For the reasons discussed below, Molina's motion to remand is GRANTED. The Court does not reach Defendants motions.[3]

II. BACKGROUND

A. Allegations of the Complaint

Molina, a corporation registered in Delaware and headquartered in Long Beach, California is the parent company of a number of regional subsidiaries that provide health insurance, including **[*3]** subsidiaries with names indicating they are based in or focused on California, Florida, Illinois, Kentucky, Michigan, Mississippi, Missouri, New Mexico, New York, Ohio, Puerto Rico, South Carolina, Texas, Utah, Idaho, Virginia, Washington, and Wisconsin. Compl (dkt. 1-1) ¶ 14.[4] Those subsidiaries assigned Molina their claims arising from reimbursing plan members' purchases of Thalomid and Revlimid in Alabama, Arizona, Colorado, Florida, Georgia, Illinois, Kansas, Michigan, Missouri, Mississippi, North Carolina, New Mexico, New York, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Washington, Wisconsin, and—of particular note for the purpose of the present motions—California and New Jersey. *Id.* ¶¶ 14-15. They asserted proper venue in the California Superior Court, where this case was filed, based on purchases in San Francisco. *Id.* ¶ 21.

Molina contends that Celgene has used a number of different strategies to prevent competitors from developing and selling generic versions of Thalomid and Revlimid.[5] First, Molina alleges that Celgene misused the FDA's "REMS" program, a regulatory mechanism for ensuring the safe distribution of prescription drugs, to prevent generic **[*4]** competitors from obtaining samples of Thalomid and Revlimid, in violation of the *Food and Drug Administration Amendments Act of 2007* (the "FDAAA"). *Id.* ¶¶ 95-105.

According to Molina, Celgene pretextually cited FDA approval and other safety concerns to avoid selling samples, or in some cases refused sales without explanation, to potential generic competitors including Mylan (which later obtained a $62 million settlement from Celgene), *id.* ¶¶ 106-56, Exela, *id.* ¶¶ 166-71, Lannett (which later reached a confidential settlement with Celgene), *id.* ¶¶ 172-92, Dr. Reddy's, *id.* ¶¶ 193-99, Teva, *id.* ¶¶ 200-03, Watson, *id.* ¶¶

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[1] For simplicity, this order generally attributes the alleged conduct at issue to Celgene. Such references should not be construed as rejecting or otherwise addressing the contention that BMS can be held responsible for that conduct on a theory of agency or alter ego liability

[2] In state court, this action was assigned case number CGC-21-592178.

[3] The parties have consented to the jurisdiction of a magistrate judge for all purposes under *28 U.S.C. § 636(c)*.

[4] According to Celgene, each Molina subsidiary is incorporated and based in the state appearing in its name. Notice of Removal (dkt. 1) ¶ 9 n.5.

[5] Thalomid is a brand name for thalidomide, which caused severe birth defects when used as a sedative and anti-nausea medication in the 1950s and 1960s, but for which Celgene found new uses to treat multiple myeloma and a particular complication of leprosy. *See* Compl. ¶¶ 1-3. Revlimid is a brand name for lenalidomide, "a thalidomide analog" used to treat multiple myeloma and other specific conditions. *Id.* ¶ 3.

204-09, and Sandoz, *id.* ¶¶ 210-15. Molina alleges that Celgene also used exclusive contracts with its suppliers and other anticompetitive tactics to prevent generic competitors from entering the market. *Id.* ¶¶ 224-39.

Molina further alleges that Celgene obtained a number of patents through repeated fraud on the U.S. Patent and Trademark Office, *id.* ¶¶ 240-323, by pursuing sham patent litigation against competitors and obtaining anticompetitive settlement agreements, *id.* ¶¶ 331-439, and by filing baseless citizen petitions to the FDA, *id.* ¶¶ 324-30.

Molina contends that as a result of that conduct, Celgene has maintained **[*5]** monopoly power in the market for Thalomid and Revlimid, resulting in Molina's subsidiaries paying higher reimbursement prices when their plan members purchase those drugs. *See id.* ¶¶ 440-66.

Molina's first claim is for "Monopolization and Monopolistic Scheme" in violation of California's UCL, as well as similar statutes of Arizona, Florida, Illinois, Michigan, Mississippi, New Mexico, New York, North Carolina, Oregon, Utah, Vermont, and Wisconsin. *Id.* ¶¶ 467-73. Molina's second claim is for attempted monopolization in violation of the laws of the same states (except Vermont). *Id.* ¶¶ 474-79. Its third claim is for unfair and deceptive trade practices in violation of California's UCL and the laws of Arizona, Colorado, Florida, Illinois, Kansas, Michigan, Mississippi, Missouri, New Mexico, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Utah, and Wisconsin. *Id.* ¶¶ 480-83. Molina's fourth and final claim is for unjust enrichment under the laws of Alabama, Arizona, California, Colorado, Florida, Georgia, Illinois, Kansas, Michigan, Missouri, Mississippi, North Carolina, New Jersey, New Mexico, New York, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Washington, **[*6]** and Wisconsin. *Id.* ¶¶ 484-95. Molina seeks monetary relief as well as a declaration that Celgene's conduct at issue is unlawful. *See id.* at 99 (prayer for relief).

B. Notice of Removal

Defendants removed to this Court after being served with Molina's complaint. Notice of Removal (dkt. 1) ¶ 6. Defendants assert that this Court has federal question jurisdiction under *28 U.S.C. § 1331* because Molina's claims for monopolization and attempted monopolization under the UCL necessarily turn on violations of the federal *Sherman Act*, *id.* ¶ 13, and because its claims implicate a number of issues of federal law pertaining to prescription drug regulation and the prosecution and enforcement of patents, *id.* ¶ 14. Defendants also assert that the Court has diversity jurisdiction under *28 U.S.C. § 1332(a)(1)*, arguing that Molina (which shares Delaware citizenship with Celgene and BMS) is not itself a real party in interest because its claims are based solely on its subsidiaries' injuries and were collusively assigned to evade jurisdiction, that Molina's New York subsidiary (which shares New York citizenship with BMS) is not a proper party because it has no connection to California, and that BMS is fraudulently joined as a defendant because Molina has **[*7]** alleged no wrongdoing by BMS. *Id.* ¶¶ 18-21.

C. Prior and Ongoing Litigation in New Jersey

Mylan sued Celgene under the *Sherman Act* and New Jersey law in the District of New Jersey in 2014, in a case assigned to the Honorable Esther Salas, who ruled on a motion to dismiss and a motion for summary judgment. *See Mylan Pharms., Inc. v. Celgene Corp., No. CV 14-2094 ES, 2014 U.S. Dist. LEXIS 182222, 2014 WL 12810322 (D.N.J. Dec. 23, 2014)* (granting in part and denying in part a motion to dismiss); *Mylan Pharms. Inc. v. Celgene Corp., No. CV 14-2094 (ES)(MAH), 2018 U.S. Dist. LEXIS 242826, 2018 WL 11299447 (D.N.J. Oct. 3, 2018)* (granting in part and denying in part a motion for summary judgment). Mylan and Celgene settled in 2019. *Mylan Pharms. v. Celgene Corp.*, No. CV 14-2094, ECF Doc. No. 425 (D.N.J. Aug. 9, 2019).

Also in 2014, indirect purchasers of Thalomid and Revlimid sued Celgene under state and federal antitrust and unfair competition law in the District of New Jersey in a case assigned to the Honorable Madeline Cox Arleo, which reached a class settlement in 2020 after Judge Arleo denied without prejudice a motion for class certification in 2018. *In re Thalomid & Revlimid Antitrust Litig., No. CV 14-6997, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118 (D.N.J. Oct. 30, 2018)* (denying class certification); *In re Thalomid & Revlimid Antitrust Litig.*, No. CV 14-6997, ECF

Doc. No. 325 (D.N.J. Oct. 2, 2020) (granting final approval of class settlement). Molina, among other health insurance companies, opted out of that class.

Several cases filed by health insurers that opted out **[*8]** of the class action before Judge Arleo are now pending before Judge Salas. The first of those, filed by Humana Inc. in 2019 in the District of New Jersey, features a complaint largely identical to Molina's complaint here (although it also asserts federal claims), and currently has a motion to dismiss under submission. *Humana Inc. v. Celgene Corp.*, No. 2:19-cv-07532-ES-MAH (D.N.J.); Greenblum Decl. (dkt. 19) Ex. C.

In March of 2020, United HealthCare Services, Inc. filed a nearly identical complaint in the District of Minnesota, which that court transferred to the District of New Jersey later that year. *United HealthCare Servs. v. Celgene Corp., No. CV 20-686 (DSD/ECW), 2020 U.S. Dist. LEXIS 226940, 2020 WL 7074626 (D. Minn. Dec. 3, 2020)* (subsequently assigned case number 2:20-cv-18531-ES-MAH in the District of New Jersey). In June of 2021, Judge Salas administratively terminated a motion to dismiss in that case pending resolution of the motion to dismiss in *Humana*.

Molina and other insurers including BCBSM, Inc. (d/b/a Blue Cross Blue Shield of Minnesota) filed a nearly identical complaint in Minnesota state court in August of 2020. Greenblum Decl. Ex. E. After Celgene removed to the District of Minnesota, that court dismissed Molina (the only non-diverse plaintiff) for lack of personal jurisdiction over its claims and **[*9]** transferred the case to New Jersey. *BCBSM, Inc. v. Celgene Corp., No. 20-cv-02071 (SRN/ECW), 2021 U.S. Dist. LEXIS 52785, 2021 WL 1087662 (D. Minn. Mar. 22, 2021)* (subsequently assigned case number 2:21-cv-06668-ES-MAH in the District of New Jersey). Other insurers filed nearly identical complaints in the District of Columbia and the Eastern District of Pennsylvania, but stipulated to transfer those cases to New Jersey after the transfer motions were decided in *UnitedHealthcare* and *BCBSM. See generally Blue Cross & Blue Shield Assoc. v. Celgene Corp.*, No. 2:21-cv-10187-ES-MAH (D.N.J.); *Cigna Corp. v. Celgene Corp.*, No. 2:21-cv-11686-ES-MAH (D.N.J.).

The parties in *BCBSM, Blue Cross*, and *Cigna* have stipulated to extend Celgene's deadline to respond to those complaints pending resolution of the motions to dismiss in *Humana* and *UnitedHealthcare*.

From 2007 through 2018, Celgene filed a number of patent infringement cases against various potential competitors in the District of New Jersey, assigned to the Honorable Susan Wigenton. *See, e.g., Celgene Corp. v. Barr Labs., Inc.*, No. 07-cv-00286-SDW-MCA (D.N.J.); *see generally* Mot. to Transfer (dkt. 18) at 5 (listing cases). Here, Molina relies on those purportedly sham cases as one basis for liability. The *Barr Laboratories* case also included antitrust counterclaims **[*10]** that substantially overlap with Molina's allegations here.

D. The Parties' Arguments

1. Motion to Transfer

Defendants move to transfer the case to the District of New Jersey, arguing that transfer is appropriate to resolve first, leaving the remaining motions for the District of New Jersey to resolve. *See* Mot. to Transfer (dkt. 18) at 2, 17-19. Molina argues that courts generally consider subject matter jurisdiction, including motions to remand, before turning to other issues, and this case does not warrant an exception. Opp'n to Transfer (dkt. 29) at 5-10. Defendants respond that to the Court is not required to address remand before transfer, and that the circumstances of the case favor transferring it to New Jersey first to allow that court to consider whether to remand. Reply re Transfer (dkt. 36) at 12-15.

According to Defendants, the pending related cases by other parties that opted out of the *In re Thalomid & Revlimid* class action strongly favor transfer of this case to be heard by the same court. Mot. to Transfer at 9, 11-13. They also argue that most relevant witnesses are in or near New Jersey, there is no significant nexus between this forum and Molina's claims, and Molina's **[*11]** choice of forum is entitled to minimal deference because it is not a resident of this district and initially sought to pursue its claims elsewhere. *Id.* at 9-10, 13-15. Molina does not dispute that the District of New Jersey would be one of many appropriate venues if the case fell within federal subject matter jurisdiction (which Molina disputes), but argues that its choice of forum is entitled to deference, that both Molina and Celgene have offices in this district, that transfer would merely shift burdens from Defendants to Molina, and that Defendants have not sufficiently supported their position that most relevant witnesses are located in or near New Jersey. Opp'n to Transfer at 11-16 & n.5. Molina contends that the District of New Jersey has a more crowded docket than this Court, and that although there are several related cases in New Jersey, the fact that they are assigned to a handful of different judges and the existence of other related cases in other courts undermine Defendants' argument that transfer would promote efficiency or avoid inconsistent judgment. *Id.* at 17-18. Molina argues that counsel could ensure that the cases are coordinated even if tried in different forums. **[*12]** *Id.* at 18. Molina also argues that this Court has more familiarity with the law applicable to its California claims, and asserts—incorrectly—that it brings no claim under New Jersey state law. *Id.* at 18-19; *cf*. Compl. ¶ 492 (asserting a claim for unjust enrichment under the law of New Jersey, among other states).

2. Motion to Remand

Molina moves to remand because it "asserts only state law claims and there is not complete diversity between the parties." Mot. to Remand (dkt 14) at 1. Molina argues that its references to federal law do not make its state law claims effectively federal claims. *Id.* at 6-8. It contends that its UCL claims do not turn on federal law because it can prevail on the "unfair" prong of that statute without showing a violation of any other law, *id.* at 8-9, and that its request for declaratory judgment implicates only state law, *id.* at 9-10. Even if its claims implicated federal law, it argues that no federal issue is either actually disputed or substantial. *Id.* at 10-11. Molina contends that allowing Defendants' removal of this case to stand would disrupt the balance of responsibility between state and federal courts. *Id.* at 12.

Defendants argue that Molina's UCL **[*13]** claims for monopolization necessarily raise disputed and substantial issues of federal law because such a theory requires showing a violation of the *Sherman Act*, Opp'n to Remand (dkt. 24) at 7-14, and that Molina's prayer for declaratory relief that the alleged conduct is unlawful necessarily raises federal issues because Molina has alleged violations of federal law, *id.* at 14-18. Defendants clarify in their opposition brief that they do not assert federal question jurisdiction based on complete preemption of state law, but instead based on federal questions necessarily raised by Molina's claims under state law. Opp'n to Remand at 7 n.2.

Turning to Defendants' assertion of diversity jurisdiction, Molina argues that it is the real party in interest because its subsidiaries irrevocably and completely assigned their interests to Molina, and courts have recognized such complete assignments as destroying diversity jurisdiction even where the assignors retained a financial interest in the outcome of litigation. Mot. to Remand at 12-14. Since Molina shares Delaware citizenship with both Celgene and BMS, accepting Molina as the real party in interest would defeat diversity jurisdiction. *See id.* at 14. **[*14]** Defendants respond that the Court should disregard Molina's subsidiaries' assignments as collusive and intended to manipulate jurisdiction. Opp'n to Remand at 19-22. Molina contends that the authority on which Defendants rely for that proposition applies only to assignments to *create* diversity jurisdiction, partial rather than complete assignments, or cases initially filed in federal court. Reply re Remand (dkt. 35) at 10-13.

Molina argues that even if the Court considers its subsidiaries to be the real parties in interest, there is not complete diversity of citizenship because its New York subsidiary shares New York citizenship with BMS, and Defendants cannot show that BMS was fraudulently joined because a state court might hold BMS liable for its subsidiary Celgene's conduct under a theory of agency. Mot. to Remand at 14-15. Molina contends that any question of personal jurisdiction as to the New York subsidiary's claims should be reserved for after this Court determines subject matter jurisdiction, and thus should be left for the state court to decide after remand, because the personal jurisdiction issue is complex and would not resolve the case as a whole. Mot. to Remand at 16-18. **[*15]** Defendants argue that the complaint as written includes no allegations or claims against BMS, and that the California court clearly lacks personal jurisdiction as to the New York subsidiary's claims. Opp'n to Remand at 22-25. Molina responds that the test for fraudulent joinder is not whether its complaint states a viable claim, but instead whether Molina's inability to do so is sufficiently clear that it would not be entitled to leave to amend, and argues that Defendants have not met their burden under that standard. Reply re Remand at 13-14.

3. Motion to Dismiss

Defendants move to dismiss all claims against them for lack of personal jurisdiction, tailoring separate arguments to: (1) claims under the laws of states besides California, Mot. to Dismiss (dkt. 22) at 6-8; (2) California claims against Celgene, *id.* at 9-16; and (3) claims against BMS, *id.* at 16-18. Molina opposes dismissal, or in the alternative seeks leave to conduct jurisdictional discovery. *See generally* Opp'n to Dismissal (dkt. 32). Because the Court does not reach this motion, this order does not address the parties' arguments in detail.

III. ANALYSIS

A. Legal Standard for Remand

Federal courts have limited subject matter **[*16]** jurisdiction, and may only hear cases falling within their jurisdiction. Generally, a defendant may remove a civil action filed in state court if the action could have been filed originally in federal court. *28 U.S.C. § 1441*. The removal statutes are construed restrictively so as to limit removal jurisdiction. *Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09, 61 S. Ct. 868, 85 L. Ed. 1214 (1941)*. The Ninth Circuit recognizes a "strong presumption against removal." *Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)* (citation and internal quotation marks omitted). Any doubts as to removability should generally be resolved in favor of remand. *Matheson v. Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir. 2003)*. The defendant bears the burden of showing that removal is proper. *Valdez v. Allstate Ins. Co., 372 F.3d 1115, 1117 (9th Cir. 2004)*.

B. Legal Standard for Transfer Under *§ 1404(a)*

A case may be transferred "[f]or the convenience of parties and witnesses, in the interests of justice," to "any other district or division where it might have been brought." *28 U.S.C. § 1404(a)*. There are two prongs to this analysis. First, the transferee district must be a district where the case could have originally been filed, meaning the court has jurisdiction and venue is proper. *Wireless Consumers Alliance, Inc. v. T-Mobile USA, Inc., No. 03-3711 (MHP), 2003 U.S. Dist. LEXIS 26802, 2003 WL 22387598, at *1 (N.D. Cal. Oct. 14, 2003)*. The moving party bears the burden to prove this first step. *Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 279 (9th Cir. 1979)*. If the first prong is satisfied, the court decides whether to grant or deny a motion to transfer, balancing "the plaintiff's interest to freely choose a litigation **[*17]** forum against the aggregate considerations of convenience of the defendants and witnesses and the interests of justice." *Wireless Consumers, 2003 U.S. Dist. LEXIS 26802, 2003 WL 22387598, at *1*; *28 U.S.C. § 1404(a)*. Some factors a court may consider include:

> (1) plaintiff's choice of forum; (2) convenience of the parties; (3) convenience of the witnesses; (4) ease of access to the evidence; (5) familiarity of each forum with the applicable law; (6) feasibility of consolidation with other claims; (7) any local interest in the controversy; and (8) the relative court congestion and time of trial in each forum.

*Royal Queentex Enters. v. Sara Lee Corp., No. C-99-4787 MJJ, 2000 U.S. Dist. LEXIS 10139, 2000 WL 246599, at *2 (N.D. Cal. Mar. 1, 2000)* (citing *Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986)*). The specific factors that are relevant may vary depending on the "particular case." *See* *Jones v. GNC Franchising, Inc., 211 F.3d 495, 498-99 (9th Cir. 2000)* (listing "example[s]" of factors "the court may consider" in a contract case).

C. The Court Has Discretion to Transfer Without Resolving Jurisdiction

The parties dispute whether this Court must address subject matter jurisdiction and Molina's motion to remand before deciding Defendants' motion to transfer.

The Court is aware of no binding authority specifically addressing whether a district court may decide a motion to transfer under *§ 1404(a)* before resolving a motion to remand. Addressing the related context of *forum non conveniens*, the Supreme Court has held that because dismissal **[*18]** under that doctrine does not adjudicate the merits of a case, a "district court therefore may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 432, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007)*. "'[J]urisdiction is vital only if the court proposes to issue a judgment on the merits.'" *Id. at 431* (quoting *Intec USA, LLC v. Engle, 467 F.3d 1038, 1041 (7th Cir. 2006)*) (alteration in original). Although the more typical course is to address jurisdiction first, "where subject-matter or personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course." *Id. at 436*.

Molina quotes *Potter v. Hughes, 546 F.3d 1051 (9th Cir. 2008)*, for the proposition that "'*[o]nly where* the other issue itself creates the jurisdictional issue . . . or the resolution of the issue is clear while the jurisdictional issue is difficult . . . is it appropriate for the court to proceed without confirming jurisdiction.'" Opp'n to Transfer at 6 (quoting *Potter, 546 F.3d at 1061* (Ikuta, J., dissenting)) (ellipses and emphasis added in Molina's brief). Molina neglects to note that the quotation at issue comes from a dissent, and that the precedential decision **[*19]** by the majority not only chose to reach other threshold issues without resolving jurisdiction, but expressly disagreed with the dissent's treatment of *Sinochem* as describing the *only* circumstances where other issues may be decided before jurisdiction. *Potter, 546 F.3d at 1056 n.2*. Regardless, assuming for the sake of argument that it is an accurate statement of law, the dissent's framing of the issue still leaves room to determine other threshold issues first where they are clear and the issue of jurisdiction is not.

It is true that "[m]ost courts, when faced with concurrent motions to remand and transfer, resolve the motion to remand prior to, and/or to the exclusion of, the motion to transfer." *Pac. Inv. Mgmt. Co. LLC v. Am. Int'l Grp., Inc., No. SA CV 15-0687-DOC, 2015 U.S. Dist. LEXIS 75355, 2015 WL 3631833, at *4 (C.D. Cal. June 10, 2015)*. Under the reasoning of *Sinochem*, however, courts are not *required* to do so if the circumstances of a particular case warrant a different approach, because transfer to a different district "does not entail any assumption by the court of substantive 'law-declaring power.'" *Sinochem, 549 U.S. at 433* (quoting *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)*). To the extent district court decisions or pre-*Sinochem* authority suggests otherwise, this Court respectfully disagrees that a rule requiring determination of subject matter jurisdiction before considering a motion to transfer is consistent with that decision of **[*20]** the Supreme Court. *See, e.g., Vu v. Ortho-McNeil Pharm., Inc., 602 F. Supp. 2d 1151, 1153 (N.D. Cal. 2009)* (quoting *Bookout v. Beck, 354 F.2d 823, 825 (9th Cir. 1965)*, for the rule that "jurisdiction must be first found over the subject matter and the person before one reaches venue")).

D. Here, Jurisdiction Should Be Resolved Before Transfer

Although a court may in appropriate circumstances transfer a case before resolving a challenge to subject matter jurisdiction, this is not such a case.

In the context of cases removed from state court and potentially related to multidistrict litigation under *28 U.S.C. § 1407*, some courts considering whether to defer a motion to remand to the transferee court "(1) 'give preliminary scrutiny to the motion to remand'; (2) assess whether 'the jurisdictional issue appears factually or legally difficult'; and (3) consider whether the 'jurisdictional issue is both difficult and similar or identical to those in cases transferred or likely to be transferred.'" *Ernyes-Kofler v. Sanofi S.A., No. 5:16-cv-07307-EJD, 2017 U.S. Dist. LEXIS 29954, 2017 WL 813506, at *1 (N.D. Cal. Mar. 2, 2017)* (quoting *Meyers v. Bayer AG, 143 F. Supp. 2d 1044, 1049 (E.D. Wis. 2001)*). This standard is generally consistent with *Sinochem*'s framing of circumstances where addressing transfer before jurisdiction may be permissible, and by also considering whether the same issues are presented in other related cases, takes into account whether the transferee court is better positioned to address the jurisdictional issue **[*21]** as compared to the court first presented with it.

While the jurisdictional issues presented in Molina's motion to remand are somewhat complex, Defendants have not shown that the District of New Jersey faces the same jurisdictional issues in other related cases. Of the cases most closely related to this one, the lead case there (*Humana*), where a motion to dismiss is currently pending, includes a federal claim and thus does not require the District of New Jersey to consider the disputes the parties have raised here regarding subject matter jurisdiction. Nor would the District of New Jersey's greater familiarity generally with similar claims against Celgene necessarily place it in a better position to determine the key issues for remand in this case—whether Molina (which is not currently a party to any related case in New Jersey) is the real party in interest for the claims its subsidiaries assigned it, whether a UCL claim based on attempted monopolization gives rise to federal question jurisdiction by necessarily incorporating federal law, and whether a request for declaratory relief that conduct is unlawful under state law necessarily raises federal issues where a complaint includes **[*22]** alleged violations of federal law. The Court therefore proceeds to resolve Molina's motion to remand.

E. Defendants Have Not Established Federal Question Jurisdiction

The general test for federal jurisdiction on removal "makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)*. But even where a plaintiff asserts only state law claims, "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton, 568 U.S. 251, 258, 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013)*. That exception for state claims that necessarily raise federal issues applies only "[w]here all four of these requirements are met." *Id.*

The Court's analysis here begins and ends with the first element of the *Gunn* test: whether a federal issue is "necessarily raised" by Molina's complaint. "When a claim can be supported by alternative and independent theories—one of which is a state law theory and one of which is a federal law theory—federal question jurisdiction does not attach because federal law is not a necessary element of the claim." **[*23]** *Rains v. Criterion Sys., Inc., 80 F.3d 339, 346 (9th Cir. 1996)*. Defendants have not shown that Molina's complaint necessarily raises any federal issue, either based on Molina's claims under the UCL or based on its prayer for declaratory relief.

1. Molina's UCL Claims Do Not Establish Jurisdiction

Defendants' first argument for federal question jurisdiction is based on Molina's claims under the UCL.

As a starting point, the parties dispute whether Molina's UCL claims are under the "unlawful" or "unfair" prong of that statute. Defendants note that Molina has asserted three claims invoking the UCL (as well as statutes of other states): one for "Monopolization and Monopolistic Scheme under State Law," Compl. ¶¶ 467-73; one for "Attempted Monopolization Under State Law," *id.* ¶¶ 474-79; and one of "Unfair and Deceptive Trade Practices Under State Law," *id.* ¶¶ 480-83. Defendants also note that Molina's monopolization claim asserts that Celgene "unlawfully extended its monopoly power." *Id.* ¶ 466. Nevertheless, the Court is not persuaded that any of Molina's UCL claims necessarily invoke the "unlawful" prong.

The complaint does not specifically assert that Celgene's conduct violated the UCL *because* it was unlawful under some other law. It asserts that Celgene **[*24]** violated the UCL because Celgene monopolized the market and artificially inflated prices, *id.* ¶ 469, because Celgene attempted to monopolize and caused harm to Molina through those efforts, *id.* ¶¶ 475, 478; and because Celgene's conduct was otherwise unfair and deceptive, *id.* ¶ 481. The reference to Celgene "unlawfully extending its monopoly power" does not compel a conclusion that any separate unlawfulness of the conduct is the basis for the state claims Molina asserts, but instead could be read merely as characterizing the conduct as unlawful *because* it violates those state statutes, including the UCL. Accordingly, to the extent that Molina's allegations of efforts to monopolize the market for certain pharmaceuticals could support a claim under the "unfair" prong of the UCL, the complaint could be read as asserting such a claim rather than (or in the alternative to) a claim under the "unlawful" prong. Taking into account precedent that any "doubt regarding the right to removal" will support remand, *Matheson, 319 F.3d at 1090*, and that a federal theory presented in the alternative to theories based on state law is not "necessarily raised," *Rains, 80 F.3d at 346*, the Court concludes that so long the conduct described in each of **[*25]** Molina's claims could support a claim under the "unfair" prong (and not necessarily the "unlawful" prong) of the UCL, the complaint should be construed as such for the purpose of determining whether it necessarily raises a federal issue.

When brought by a *competitor*, a claim under the "unfair" prong of the UCL must "be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 186-87, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. In other words, the plaintiff must prove "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id. at 187*. But whether that requirement applies to claims brought by consumers, rather than competitors, is a question that remains "in flux." *Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 735 (9th Cir. 2007)*; *see also* *Hauck v. Advanced Micro Devices, Inc., 816 F. App'x 39, 43 (9th Cir. 2020)* (citing *Lozano*). Some courts require a consumer plaintiff (like a competitor plaintiff) to meet the *Cel-Tech* standard of a direct connection to a particular legislatively declared antitrust policy, while other courts continue to allow consumer plaintiffs to use the balancing test described in *South Bay Chevrolet v. General Motors Acceptance Corp., 72 Cal. App. 4th 861, 85 Cal. Rptr. 2d 301 (1999)*, which *Cel-Tech* rejected for competitor plaintiffs. **[*26]** *See* *Lozano, 504 F.3d at 735-36* (describing that split of authority). When the Ninth Circuit has affirmed dismissal of consumers' claims under the unfairness prong of the UCL, it has declined to resolve the issue, holding that dismissal was appropriate under either test based on the facts of the cases before it. *Hauck, 816 F. App'x at 43*; *Hodsdon v. Mars, Inc., 891 F.3d 857, 866 (9th Cir. 2018)*; *Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1170 (9th Cir. 2012)*.

In a recent case, the Ninth Circuit described the standard as follows:

> Under the UCL's unfairness prong, courts consider either: (1) whether the challenged conduct is "tethered to any underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of an ***antitrust law***," (*Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1366, 108 Cal. Rptr. 3d 682 (2010)*); (2) whether the practice is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," *Morgan v. AT&T Wireless Servs., Inc., 177 Cal. App. 4th 1235, 1254, 99 Cal. Rptr. 3d 768 (2009)*; or (3) whether the practice's impact on the victim outweighs "the reasons, justifications and motives of the alleged wrongdoer." *Id.*

Doe v. CVS Pharmacy, Inc., 982 F.3d 1204, 1214-15 (9th Cir. 2020), *cert. dismissed*, *142 S. Ct. 480, 211 L. Ed. 2d 291 (2021)*.

The parties here have not addressed the distinction of whether *Cel-Tech* is limited to claims by competitors. Molina alleges that its harm stemmed from its subsidiaries paying higher reimbursement prices when their plan members purchase Celgene's drugs. *See* Compl. ¶¶ 440-66. While **[*27]** perhaps not neatly fitting either category, Molina is more similarly situated to a consumer of Celgene's product than to a competitor of Celgene.[6] Since Molina and Celgene are not competitors, no clear authority limits Molina's unfairness claim under the UCL to actual or threatened violations of the antitrust laws. Molina might be able to prevail by showing Celgene's alleged conduct to monopolize and inflate the price of medication for serious medical conditions was "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," or by showing that its harms outweighed any legitimate motive. *See* *Doe, 982 F.2d at 1214-15*. It is therefore possible for Molina to prevail under the "unfair" prong without showing a violation of the *Sherman Act*, and Molina's UCL claims can reasonably be understood as asserted under that prong of the statute.

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[6] The Ninth Circuit has held where the defendant is not itself a competitor of the plaintiff, but the plaintiff's claims are based on conduct by the defendant that unfairly favors the plaintiff's competitors, the case still involves the sort of "business-competitor" claims governed by *Cel-Tech*.*Levitt v. Yelp! Inc., 765 F.3d 1123, 1136 (9th Cir. 2014)*. This is not such a case.

Celgene is correct that some district courts have held that a claim under the "unfair" prong based on unilateral monopolization necessarily raises federal issues sufficient to invoke federal question jurisdiction, because California's primary antitrust statute, the Cartwright Act, addresses only coordinated conduct by multiple actors, not unilateral conduct. *See Rosenman v. Facebook Inc., No. 21-cv-02108-LHK, 2021 U.S. Dist. LEXIS 163171, 2021 WL 3829549, at *5 (N.D. Cal. Aug. 27, 2021)*; **[*28]** *Cent. Valley Med. Grp., Inc. v. Indep. Physician Assocs. Med. Grp., Inc., No. 1:19-cv-00404-LJO-SKO, 2019 U.S. Dist. LEXIS 100265, 2019 WL 2491328, at *3 (E.D. Cal. June 14, 2019)*; *In re: Nat'l Football Leagues Sunday Ticket Antitrust Litig., No. CV 15-09996-BRO (JEMx), 2016 U.S. Dist. LEXIS 41639, 2016 WL 1192642, at *5 (C.D. Cal. Mar. 28, 2016)*).[7]

In the first of those cases, *Sunday Ticket*, a plaintiff asserted various state law claims, including a UCL claim, stemming from DirecTV's alleged monopolization of out-of-market NFL broadcasts. *2016 U.S. Dist. LEXIS 41639, 2016 WL 1192642, at *1*. The district court held that the plaintiff's UCL unfairness claim (among other claims) necessarily asserted a violation of the *Sherman Act* because the claim "relie[d] on Defendants' alleged 'abuse of its monopoly position' and charging 'supra-competitive prices'"—unilateral conduct that implicated the *Sherman Act* but not the Cartwright Act. *2016 U.S. Dist. LEXIS 41639, [WL] at *5*. The court recognized that even under *Cel-Tech* the UCL's unfairness prong might in appropriate cases encompass claims that do not rise to the level of an actual or incipient violation of ***antitrust law***, but held because the that the claim at issue was based on monopolization, it necessarily incorporated the *Sherman Act*. *2016 U.S. Dist. LEXIS 41639, [WL] at *5* (distinguishing *PeopleBrowsr, Inc. v. Twitter, Inc., No. C-12-6120 EMC, 2013 U.S. Dist. LEXIS 31786, 2013 WL 843032, at *4 (N.D. Cal. Mar. 6, 2013)*). Although the plaintiff in *Sunday Ticket* was a consumer, the court did not address the unsettled question of whether *Cel-Tech* governed his claims. *See id.*

In *Central Valley Medical*, the plaintiff specifically alleged that the defendant's conduct "offend[ed] the policies of free competition and free trade and commerce set forth in, inter alia, the federal **[*29]** *Sherman Act*, *Clayton Act*, *Federal Trade Commission Act*, *15 USC § 12 et seq*; *15 USC §§ 45 et seq.*" *2019 U.S. Dist. LEXIS 100265, 2019 WL 2491328, at *3* (quoting the complaint). The plaintiff did not allege or argue that any violation of "policies tethered to California-specific constitutional, statutory, or regulatory provisions" could support its UCL claim. *Id.* Applying *Cel-Tech*—appropriately, since the parties in that case were competitors of each other, *2019 U.S. Dist. LEXIS 100265, [WL] at *1*—the court held that the "unfair" claim must be tethered to a legislative policy. *2019 U.S. Dist. LEXIS 100265, [WL] at *5*.[8] Since the plaintiff asserted only federal policies as a basis for such tethering, the court held that the claim necessarily raised a federal issue. *See 2019 U.S. Dist. LEXIS 100265, [WL] at *3-6*.

As for the recent *Rosenman* decision, although the plaintiff there was a consumer rather than competitor of the defendant, the court applied *Cel-Tech* without addressing the lingering uncertainty regarding its application outside of the competitor context. *2021 U.S. Dist. LEXIS 163171, 2021 WL 3829549, at *2, *3*. The court acknowledged that even *Cel-Tech* does not always require a violation of some other ***antitrust law***, *2021 U.S. Dist. LEXIS 163171, [WL] at *3*, but followed *Sunday Ticket* in holding that "where a plaintiff's UCL unfair prong claim relies on a defendant's alleged abuse of its monopoly position, that claim requires establishing **[*30]** a violation of federal

[7] In an earlier case, Judge Alsup held that a plaintiff's claim under the *unlawful* prong of the UCL necessarily raised a federal issue because the plaintiff asserted no underlying violations of law except as to federal antitrust laws. *Nat'l Credit Reporting Ass'n v. Experian Info. Sols., Inc., No. C04-01661 WHA, 2004 U.S. Dist. LEXIS 17303, 2004 WL 1888769, at *4 (N.D. Cal. July 21, 2004)*. The plaintiff argued that its UCL claim implicated only the unfair and fraudulent prongs of that statute, not the unlawful prong, but Judge Alsup rejected that argument as inconsistent with the claims asserted in the complaint. *Id.* Here, as discussed above, Molina's complaint does not clearly assert a claim under the "unlawful" prong.

[8] The *Central Valley Medical* court acknowledged, but did not address, the language of *Cel-Tech* indicating that the conduct at issue must be "'tethered to some legislatively declared policy *or proof of some actual or threatened impact on competition*.'" *See Cent. Valley Med., 2019 U.S. Dist. LEXIS 100265, 2019 WL 2491328, at *3* (quoting *Cel-Tech, 20 Cal. 4th at 186-87*) (emphasis added). The court's decision suggests that the plaintiff did not argue that it could prevail by showing proof of actual or threatened harm to competition rather than by tethering its claim to legislative policy. *See 2019 U.S. Dist. LEXIS 100265, [WL] at *5*.

antitrust law . . . because no California statute deals expressly with monopolization or attempted monopolization," *2021 U.S. Dist. LEXIS 163171, [WL] at *4* (cleaned up).[9]

All of these cases were decided under the *Cel-Tech* standard. In *Central Valley Medical*, the parties were competitors, and *Cel-Tech* indisputably applied. In *Sunday Ticket* and *Rosenman*, the courts did not consider the question of whether *Cel-Tech* applied to consumer clams. As discussed above, the Ninth Circuit has recognized multiple tests beyond *Cel-Tech* as potentially valid for such claims. *Doe, 982 F.3d at 1214-15*. The Court therefore does not find *Sunday Ticket, Central Valley Medical*, and *Rosenman* persuasive as to whether a *consumer's* claim under the unfair prong of the UCL necessarily raises federal issues by virtue of alleging monopolization or attempted monopolization.

As discussed above, looking beyond *Cel-Tech*, Molina could potentially prevail by showing that Celgene's alleged monopolization or attempted monopolization of the market for certain medications was "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," or that its harm to victims outweighed any valid justification. *Doe, 982 F.3d at 1214-15*. In *Lawrence v. Provident Savings Bank*, the Central District of California addressed the unsettled **[*31]** test for unfair conduct claims brought by consumers, and held that even where a plaintiff alleged unlawful conduct as one predicate for his UCL claim, the case did not necessarily raise federal issues because the plaintiff also alleged unfair conduct and could prevail on the *South Bay* balancing test without reference to federal law. *Lawrence, No. 5:16-cv-00352-SVW-MRW, 2016 U.S. Dist. LEXIS 68300, 2016 WL 2979194, at *3 (C.D. Cal. May 23, 2016)*. In *Moralez v. Kern Schools Federal Credit Union*, the Eastern District of California reached the same conclusion. *No. 1:15-cv-01444-DAD, 2016 U.S. Dist. LEXIS 63175, 2016 WL 2756427, at *4 (E.D. Cal. May 12, 2016)* ("Indeed, under the tethering test discussed above, plaintiff appears to state a claim based on federal law alone. But, as the Ninth Circuit has concluded, the test for unfairness is broader and the court must determine whether plaintiff has stated a UCL claim when assessed under the balancing test. *Lozano, 504 F.3d at 736*."). The complaints in those cases included language more closely tracking the *South Bay* balancing test than Molina has here, but when Molina has not specifically asserted either that its UCL claim is based on a *Sherman Act* violation or that it is based on the balancing test, inferring the former at the expense of the latter would contravene the rule that any doubt as to jurisdiction must be resolved in favor of remand.

Even **[*32]** if *Cel-Tech* applied here, it left open the possibility that a plaintiff could prevail by showing "proof of some actual or threatened impact on competition," or in other words, that the conduct at issue "otherwise significantly threatens or harms competition," without necessarily showing actual or incipient violation of a specific legislatively declared policy. *Cel-Tech, 20 Cal. 4th at 186-87*. In *PeopleBrowsr*, where *Cel-Tech* applied because the parties were competitors, Judge Chen held not only that the case should be remanded because the plaintiff could prevail by showing "conduct that 'significantly threatens or harms competition,' regardless of whether it represents an actual or incipient violation of an ***antitrust law***," but also that the plaintiff was entitled to its attorneys' fees and costs in moving to remand because the defendant failed to cite any case supporting its "novel legal theory that an 'unfair act' sub-claim asserting solely a state law claim based on facts that *could* also give rise to a federal claim is alone sufficient to confer on this Court federal question jurisdiction." *2013 U.S. Dist. LEXIS 31786, 2013 WL 843032, at *4*.[10]

Neither *Sunday Ticket* and *Rosenman* on the one hand, nor *PeopleBrowsr* on the other, provides a wholly satisfactory treatment of whether an "unfair" claim under **[*33]** *Cel-Tech* necessarily raises a federal issue if it is based on allegations of monopolization. The former cases did not meaningfully address the "otherwise significantly

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[9] *Rosenman* quotes *Dimidowich v. Bell & Howell, 803 F.2d 1473, 1478 (9th Cir. 1986)*, for the statement that "[n]o California statute deals expressly with monopolization or attempted monopolization." That case considered whether the plaintiff could proceed on a Cartwright Act claim for monopolization or attempted monopolization when that statute was the only authority the plaintiff pleaded for the claim. *803 F.2d at 1478*. It did not consider whether such conduct could be considered "unfair" for the purpose of the UCL.

[10] At the time, *Sunday Ticket* and *Rosenman* were not yet available to lend some support to the defendant's position, distinguishing that case from the present one at least with respect to the reasonableness of Defendants' arguments.

threatens or harms competition" portion of *Cel-Tech*. The latter predated a trend of district courts "dismiss[ing] competitors' claims under this prong of the statute where plaintiffs fail to identify any unusual aspect of the alleged conduct that would make that conduct something that violates the 'policy and spirit' of the antitrust laws without violating the actual laws themselves, comparable to the *Cel-Tech* defendant's privileged status as one of two holders of a lucrative government-licensed duopoly." *See* *Facebook, Inc. v. BrandTotal Ltd., No. 20-cv-07182-JCS, 2021 U.S. Dist. LEXIS 165209, 2021 WL 3885981, at *6 (N.D. Cal. Aug. 31, 2021)* (cleaned up).[11] Regardless, *Lawrence* and *Moralez* are more persuasive in the context of a consumer claim, because they acknowledge that *Cel-Tech* may not even apply to such a claim.

Molina has not specifically asserted a violation of the *Sherman Act* as the basis for its UCL claims. It may be that the monopolization and attempted monopolization that Molina has alleged, if actionable under the alternative paths to an "unfair" claim that do not require tethering to a specific statute, would likely also violate the *Sherman Act*. But so what? A court would not inevitably **[*34]** need to address that question in order to consider whether the conduct is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," or "whether the practice's impact on the victim outweighs the reasons, justifications and motives of the alleged wrongdoer." *Doe, 982 F.3d at 1214-15*. Even if it were logically necessary that any monopolistic conduct that met those tests would also violate the *Sherman Act*, that would not mean the court addressing the claim had any need to *consider* the *Sherman Act*. The Court therefore concludes that no federal issue is necessarily raised by Molina's UCL claims.

Moreover, even assuming for the sake of argument that Molina's UCL claims required conduct that violated some other antitrust statutes, Molina has asserted that Celgene violated a host of other states' antitrust and consumer protection statute, at least some of which encompass claims for monopolization. *See, e.g.,* *Pasco Indus., Inc. v. Talco Recycling, Inc., 195 Ariz. 50, 57, 985 P.2d 535, (Ct. App. 1998)* (holding that *Arizona Revised Statutes section 44-1403*, one of the statutes on which Molina bases its claims here, "prohibits monopolistic behavior by individual persons or entities—in other words, unilateral activity"). The parties have not addressed whether a violation of one of those statutes could support a claim under the "unlawful" prong **[*35]** of the UCL, or a claim under the "unfair" prong based on an actual or incipient violation of the letter or spirit of a foreign state's ***antitrust law***.

"Unlawful" practices are defined broadly for the purpose of the UCL, encompassing conduct '"forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made."' *In re Pomona Valley Med. Grp., Inc., 476 F.3d 665, 674 (9th Cir. 2007)* (quoting *Saunders v. Superior Court, 27 Cal. App. 4th 832, 33 Cal. Rptr. 2d 438, 441 (1994)*). "Virtually any law or regulation—federal or state, statutory or common law—can serve as a predicate for an 'unlawful' prong violation." *Candelore v. Tinder, Inc., 19 Cal. App. 5th 1138, 1155, 228 Cal. Rptr. 3d 336 (2018)* (cleaned up). The Ninth Circuit has suggested, albeit in dicta in a nonprecedential decision, that violations of foreign states' laws could support a UCL claim. *Speyer v. Avis Rent A Car Sys., Inc., 242 F. App'x 474, 474-75 (9th Cir. 2007)*. A handful of district court decisions have held that a plaintiff may *not* bring a UCL claim based on a violation of foreign law, but they are not binding on this Court and cite no California authority so holding, at least so long as the violation has some connection to California. *Hilton v. Apple Inc., No. CV 13-7674 GAF (AJWx), 2014 U.S. Dist. LEXIS 184769, 2014 WL 10435005, at *3 (C.D. Cal. Apr. 18, 2014)*; *Van Slyke v. Cap. One Bank, No. C 07-00671 WHA, 2007 U.S. Dist. LEXIS 82690, 2007 WL 3343943, at *14 (N.D. Cal. Nov. 7, 2007)*. Since Defendants have not addressed whether the alleged violations of other states' antitrust laws could support Molina's claims without need to consider any question of federal law, and any doubts must be resolved in favor of remand, Defendants have **[*36]** not met their burden to establish federal question jurisdiction based on Molina's UCL claims.[12]

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[11] *See also* *Creative Mobile Techs., LLC v. Flywheel Software, Inc., No. 16-cv-02560-SI, 2017 U.S. Dist. LEXIS 24173, 2017 WL 679496, at *6 (N.D. Cal. Feb. 21, 2017)*; *Synopsys, Inc. v. ATopTech, Inc., No. C 13-2965 MMC, 2015 U.S. Dist. LEXIS 104763, 2015 WL 4719048, at *10 (N.D. Cal. Aug. 7, 2015)*.

[12] The Court declines to reach the question of whether, even if Molina's claims required some connection to federal or California ***antitrust law***, Molina's allegations of improper settlement agreements and exclusive supply contracts describe non-unilateral conduct sufficient to bring its monopolization claims with the scope of the Cartwright Act.

One California appellate decision cited by Defendants also warrants a brief discussion. Defendants describe *Chavez v. Whirlpool Corp., 93 Cal. App. 4th 363, 113 Cal. Rptr. 2d 175 (2001)*, as "holding that [a] UCL unfair prong claim premised on conduct 'alleged to be "unfair" because it unreasonably restrains competition' rises and falls with [the] status of such conduct 'under the antitrust laws.'" Opp'n to Remand at 11 (quoting *Chavez, 93 Cal. App. 4th at 375*). That case actually held "that conduct alleged to be 'unfair' because it unreasonably restrains competition and harms consumers, such as the resale price maintenance agreement alleged here, is not 'unfair' if the conduct is *deemed reasonable and condoned* under the antitrust laws." *Chavez, 93 Cal. App. 4th at 375* (emphasis added). The court affirmed dismissal of a claim under the UCL "unfair" prong based on its holding that the conduct alleged was permissible under the Cartwright Act, based on specific rights of the defendant recognized by existing precedent. *See id. at 373-75*. As Judge Chen held in *PeopleBrowsr*, the holding of *Chavez* was based on a "safe harbor" doctrine that "operates, in essence, as a federal defense to the 'unfair act' claim." *PeopleBrowsr, 2013 U.S. Dist. LEXIS 31786, 2013 WL 843032, at *3*. With the exception of complete federal preemption, which **[*37]** Defendants have explicitly declined to assert here, it has long been "settled law that a case may *not* be removed to federal court on the basis of a federal defense." *Caterpillar, 482 U.S. at 393*. Accordingly, *Chavez* provides no support for Defendants' removal of this case.

For the reasons discussed above, the Court holds that Molina's UCL claims do not necessarily raise any federal issue. The Court therefore need not reach the parties' arguments as to whether any such issue is substantial or disputed, or whether hearing this case would disrupt the balance between state and federal courts.

2. Molina's Request for Declaratory Judgment Does Not Establish Jurisdiction

Defendants also argue that Molina's request for declaratory relief necessarily raises a federal issue because it would require a court to determine that Defendants' conduct violated a plethora of federal laws regarding patents and pharmaceutical regulations cited in Molina's complaint. Opp'n to Remand at 14-15. As Molina notes in its briefs, it does not assert a separate *claim* for declaratory judgment, but instead seeks such relief as a remedy under its various state law claims. Mot. to Remand at 9; Reply re Remand at 8. The prayer at issue seeks judgment "[d]eclaring **[*38]** the acts alleged herein to be unlawful under the state statutes set forth above, and the common law of unjust enrichment of the states and territories [sic[13]] set forth above." Compl. at 99.

Defendants are correct that Molina's complaint alleges numerous violations of federal law. *See, e.g.*, Compl. ¶ 100 (asserting that "Celgene's improper use of the REMS program as a shield to refuse to provide samples is contrary to FDAAA," specifically, *21 U.S.C. § 355-1(f)(8)*); *id.* ¶ 246 (alleging that Celgene breached its duty of disclosure to the USPTO); *id.* ¶ 331 (alleging sham patent litigation). But "merely naming a federal statute in a complaint will not confer federal jurisdiction if the only relief the plaintiff actually wants is based on state rather than federal law." *Saturday Evening Post Co. v. Rumbleseat Press, Inc., 816 F.2d 1191, 1195 (7th Cir. 1987)*, *abrogation on other grounds recognized by Glickenhaus & Co. v. Household Int'l, Inc., 787 F.3d 408, 426 (7th Cir. 2015)*. Defendants have not shown that Molina would be required to prove such federal violations as a necessary element of any of its state law claims, including to obtain declaratory relief that the *conduct* at issue violates state law. Granted, if Celgene acted in accordance with federal law, that might immunize some of the conduct at issue from Molina's claims, but the possibility of that sort of federal **[*39]** defense, even if apparent from Molina's allegations, is not a basis for federal jurisdiction. *See Caterpillar, 482 U.S. at 393*; *PeopleBrowsr, 2013 U.S. Dist. LEXIS 31786, 2013 WL 843032, at *3*. While courts have recognized an exception to that rule for complete federal preemption, Defendants specifically disclaim that theory of jurisdiction here. Opp'n to Remand at 7 n.2.

The only case Defendants cite finding federal question jurisdiction based on a prayer for relief is *Wullschleger v. Royal Canin U.S.A., Inc., 953 F.3d 519, 522 (8th Cir. 2020)*, where the plaintiffs sought a declaration specifically that the defendant violated federal law and an injunction against further violations. The relief requested in that case included "[f]inding, adjudging, and decreeing that Defendants have engaged in the violations of law alleged in this Petition" (which included violations of federal law) and "enjoining Defendants to comply with all *federal* and Missouri

[13] No territories are listed in Molina's claim for unjust enrichment. *See* Compl. ¶ 492.

provisions applicable to the manufacture of such drugs." *Wullschleger v. Royal Canin U.S.A., Inc.*, No. 4:19-cv-00235-GAF, ECF Doc. No. 1-1 (Petition) ¶¶ 136, 138 (W.D. Mo. Mar. 26, 2019) (emphasis added).

Defendants raise potentially valid concerns that some of the conduct at issue in Molina's complaint, such as ongoing federal patent litigation, might fall outside of a state court's power to declare unlawful. **[*40]** But the state court is capable of considering such arguments and respecting the limits of its jurisdiction, and such limits do not give rise to a necessary federal issue—except perhaps a federal defense, which is insufficient confer jurisdiction. As another district court has explained:

> While it is clear that a state court is barred from abridging a litigant's right to avail itself of a federal forum, *Felter*[14] does not speak to a right of removal when a state court is requested to do so. . . . Although the defendants herein might move the state court, in reliance upon *Felter*, to dismiss the over broad portions of the prayer for relief seeking to limit their recourse to the federal courts, that potential for dismissal as a matter of law does not lead one ineluctably to the conclusion that removal jurisdiction is likewise appropriate.

*W. Va. ex rel. McGraw v. BlueHippo Funding, LLC, No. CV 2:07-0220, 2007 U.S. Dist. LEXIS 116631, 2007 WL 9718440, at *6-7 (S.D.W. Va. July 23, 2007)*. That some relief Molina seeks might not be available in state court does not in itself grant Defendants the right to remove the case to a federal court potentially more capable of entering broader judgment against them.

With the possible exception of federal defenses, which do not give rise to jurisdiction under *§ 1331*, Defendants have not met their burden to **[*41]** show that Molina's prayer for declaratory relief on its state law claims necessarily raises any issue of federal law. Since, as discussed above, Defendants also have not shown a necessary federal issue embedded in Molina's UCL claims, Defendants have not shown removal to be proper based on federal question jurisdiction.

F. Defendants Have Not Established Complete Diversity of Citizenship

To establish diversity jurisdiction under *28 U.S.C. § 1332(a)*, a removing defendant must show that there is complete diversity of the parties—i.e., no defendant is a citizen of the same state as any plaintiff—and that the amount in controversy exceeds $75,000. *See Caterpillar Inc. v. Lewis, 519 U.S. 61, 68, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996)*. Here, the parties do not dispute that Molina shares Delaware citizenship with both Celgene and BMS.

Defendants contend that the Court should treat Molina's subsidiaries' assignment of their claims to Molina as a sham to avoid federal jurisdiction, disregard Molina's citizenship, look instead to the citizenship of the subsidiaries, and either disregard BMS's citizenship based on fraudulent joinder or disregard Molina's New York subsidiary's citizenship because this court and the California state court lack personal jurisdiction over Defendants for the purpose **[*42]** of that entity's claims.

Beginning with the question of whether to disregard Molina's citizenship, courts are skeptical of assignments to manipulate jurisdiction, particularly between related entities. *See, e.g., Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A., 20 F.3d 987, 991-92 (9th Cir. 1994)* (considering an assignment that purported to create rather than destroy diversity jurisdiction). District courts lack jurisdiction where "any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." *28 U.S.C. § 1359*. "[T]here is no similar statute prohibiting collusive assignments in order to defeat jurisdiction." *Go Computer Inc. v. Microsoft Corp., No. C 05-03356 JSW, 2005 U.S. Dist. LEXIS 31404, 2005 WL 3113068, at *2 (N.D. Cal. Nov. 21, 2005)*. Nevertheless, in *Attorneys Trust v. Videotape Computer Products, 93 F.3d 593 (9th Cir. 1996)*, the Ninth Circuit held that courts may, in at least some circumstances, disregard assignments that would destroy jurisdiction, noting

[14] *Gen. Atomic Co. v. Felter, 434 U.S. 12, 98 S. Ct. 76, 54 L. Ed. 2d 199 (1977)*.

that "the informing principles are much the same" when an assignment is intended to destroy diversity of citizenship as when it is intended to create diversity. *93 F.3d at 595*.

The *Attorneys Trust* court noted that a "complete" assignment will usually, but not always, be considered valid:

> Broadly speaking, if an assignment is entire, not partial, there is a very good chance that it will be found to be proper. . . .
>
> While motive can often be important, if the assignment is truly absolute and **[*43]** complete, motive often recedes into almost nothing. . . . However, even when there is a complete assignment, collusion may be found. That is most likely to be where there is an excellent opportunity for manipulation, as in transfers between corporations and their subsidiaries or transfers to a shell corporation.

93 F.3d at 596 (citations omitted). There, the plaintiff assignee had been assigned an account for collection and filed suit in federal court, purportedly on behalf of the co-plaintiff assignor, and invoked the assignor's citizenship as grounds for diversity jurisdiction under *§ 1332(a)*. *See* *id. at 594, 599*. The assignee "was to proceed in the attempt to collect the alleged debt and was to receive 12 percent for its trouble." *Id. at 594*. After an adverse result, the plaintiffs argued that although they had invoked the jurisdiction of the district court, they were wrong to do so because the assignee's California citizenship (which it shared with the defendant) should have been considered, and that the judgment was therefore void. *See* *id. at 594*. The Ninth Circuit held that the assignment should be disregarded in determining jurisdiction, and the judgment should therefore stand, for reasons including: the assignee "had no prior interest **[*44]** in the claim, and the assignment was timed to coincide with the commencement of litigation; the assignee gave no consideration other than its own collection work for a contingent fee, which could have been effectuated without an assignment; because 88% was to go to [the assignor], the assignment was partial, and, ultimately, the same counsel represented both [the assignor and assignee]." *Id. at 599*. The opinion also noted that the assignor had been identified as the plaintiff in the district court. *Id.*

In reaching that conclusion, the Ninth Circuit acknowledged "older Supreme Court decisions regarding removal" from the 1880s, where "the Court refused to allow removal of an action filed in state court after a diversity-destroying colorable assignment was made, even if it was for collection only," based on reticence "to interfere with state court jurisdiction," lack of any statutory authority, and litigants' ability to resolve any question of the real parties in interest in state court. *Id. at 598-99* (citing, *e.g.,* *Provident Sav. Life Assur. Soc'y v. Ford, 114 U.S. 635, 5 S. Ct. 1104, 29 L. Ed. 261 (1885)*). In *Provident*, the Supreme Court held that even where "a colorable assignment has been made to deprive the United States court of jurisdiction," it is "not a ground of removing that cause into the federal **[*45]** court," but at most perhaps grounds for a defense in state court based on failure to sue in the name of the real party in interest or for fraudulently manipulating jurisdiction. *114 U.S. at 640-41*.

The Ninth Circuit noted Fifth Circuit authority calling into question that century-old precedent regarding removal, but declined to rely on any doubts as to its validity, instead limiting its holding to cases filed in the first instance in a federal court. *Id. at 599, 600* (citing *Grassi v. Ciba-Geigy, Ltd., 894 F.2d 181, 182-85 (5th Cir. 1990)*). That Fifth Circuit case, while noting that some of "the basic propositions for which *Provident* and its progeny stand have been abandoned," acknowledged that "the Supreme Court has not had formal occasion to reexamine that ruling" and thus "*Provident* remains as precedent," such that "whether the Supreme Court was incorrect in its decision in *Provident* [is] a matter of academic interest only." *Grassi, 894 F.2d at 184*. That court distinguished the case before it on the basis that the assignment was partial rather than complete, and declined to extend *Provident*'s rule to cover partial assignments. *Id. at 185*.

Molina relies on subsequent decisions from this district that have declined to apply *Attorneys Trust* to look past assignments when considering diversity jurisdiction in the context of removal, at least where an assignment is **[*46]** complete and the assignor is not itself a party to the case. *See* *Charles Schwab Corp. v. Banc of Am. Sec. LLC, No. 10-cv-03489-LHK, 2011 U.S. Dist. LEXIS 29530, 2011 WL 864978, at *3-4 (N.D. Cal. Mar. 11, 2011)*; *Go Computer Inc. v. Microsoft Corp., 2005 U.S. Dist. LEXIS 31404, 2005 WL 3113068, at *2*.

In *Go Computer*, Judge White noted that both the Ninth Circuit in *Attorneys Trust* and the Fifth Circuit in *Grassi* declined to hold that the nineteenth-century Supreme Court precedent like *Provident* regarding assignments and removal and had been overturned, instead distinguishing the facts before them—because the case was initially filed in federal court in *Attorneys Trust*, and because the assignment in *Grassi* was partial rather than complete. *Go Computer Inc. v. Microsoft Corp., No. C 05-03356 JSW, 2005 U.S. Dist. LEXIS 31404, 2005 WL 3113068, at *2 (N.D. Cal. Nov. 21, 2005)*. He determined that "[a]lthough the value of the consideration [the assignor] was given for the assignment may vary depending upon the value of any potential recovery . . . the claims were assigned in their entirety to [the assignees], thus ending the Court's inquiry." *2005 U.S. Dist. LEXIS 31404, [WL] at *3*. Judge White concluded that *Provident* remained binding, and that since the assignment in the case before him was complete and presented in the context of removal, that precedent required remand. *2005 U.S. Dist. LEXIS 31404, [WL] at *2-3*.

In reaching a similar conclusion that the assignment was "complete" in *Charles Schwab* despite the assignee having agreed to remit ninety-seven percent of any recovery to the assignor, *2011 U.S. Dist. LEXIS 29530, 2011 WL 864978, at *3*, Judge Koh relied on relatively recent Supreme Court precedent holding **[*47]** that assignment of "all 'rights, title and interest' in claim" constituted assignment "lock, stock, and barrel" sufficient to confer Article III standing, even where the parties agreed by contract that the assignee would remit all proceeds of litigation to the assignor, and the assignor would pay the assignee a fee. *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 272, 286, 291, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008)*. Judge Koh concluded that since the complete assignment of claims meant that "no other party (including [the assignor]) has standing to bring the claims" asserted, and since on removal it was not the plaintiff's burden to show that its assignment was proper, the defendant had not established diversity jurisdiction and the case should be remanded. *Charles Schwab, 2011 U.S. Dist. LEXIS 29530, 2011 WL 864978, at *4*. She noted that *Go Computer* addressed "a factual situation very similar to the one presented" in *Charles Schwab*, and distinguished *Attorneys Trust* as "limited to the unusual case where the party attacking diversity jurisdiction initially filed suit in federal court." *Id.*

Here, there is little evidence of the nature of the Molina entities' assignments beyond their express terms. The relevant portions read as follows:

> 2. For good and valuable consideration received, [each subsidiary] hereby irrevocably assigns all rights, titles, ownership, and interests in the Claims to MHI [i.e., **[*48]** Molina]. MHI shall maintain sole discretion in prosecuting such claims and managing and controlling the litigation and all strategy and negotiations related thereto, including with respect to (but not limited to) any settlement, dismissal, or other resolution of the claim.
> 3. In consideration for such assignment from [the subsidiary], MHI shall calculate and remit the net recovery, if any, after attorney's fees, litigation expenses and court costs, with respect to [the subsidiary's] claims to [the subsidiary], subject to any applicable inter-or intra-company agreements and / or other legal requirements.

Kim Dec. (dkt. 15) Ex. A.

Under the terms of these assignments, Molina's subsidiaries have assigned their claims in full to Molina, such that the subsidiaries could no longer bring those claims themselves, and they have not sought to do so by appearing as parties in this case. *Cf. Grassi, 894 F.2d at 185* ("[T]he assignor who makes a fractional assignment remains a party to the action, whose presence enables him to take better advantage of whatever local bias may exist."). These terms are not materially different from the assignments in *Charles Schwab* and *Go Computer*. As in those cases, the assignment is complete, and *Provident* compels remand **[*49]** regardless of the motive behind the assignment[15] or the subsidies' interest in the outcome.

Defendants contend that the assignments are invalid for lack of consideration, because by agreeing to remit all proceeds to the subsidiaries except as needed to cover its costs, Molina itself receives no gain for its efforts to

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[15] Molina notes that it has used virtually identical assignments in other cases to consolidate its subsidiaries' claims with one entity even where the assignment had no effect on jurisdiction for a federal claim filed in federal court, thus calling into question whether the assignments here were made solely to defeat jurisdiction. In any event, Molina's motive is not relevant to the outcome, and the Court need not resolve it.

prosecute the case. Regardless of whether that argument is correct as a matter of contract law, the Supreme Court has rejected it as a basis for remand. *Provident, 114 U.S. at 641* ("We know of no instance where the want of consideration in a transfer, or a colorable transfer, of a right of action from a person against whom the defendant would have a right of removal to a person against whom he would not have such a right, has been held a good ground for removing a cause from a state to a federal court.").

Defendants cite a single district court decision disregarding an assignment that would have destroyed diversity jurisdiction in the context of removal and remand: *Overrated Prods. v. Universal Music Grp., No. CV 19-2899-RSWL-RAO, 2019 U.S. Dist. LEXIS 216107, 2019 WL 6729718 (C.D. Cal. July 31, 2019)*. There, after members of a band receiving an adverse ruling in a related federal case against a record company regarding royalties for recordings, the producer of the recordings created a California corporation, Overrated Products, and **[*50]** assigned it the rights to royalties that had previously been held by a different company, whose citizenship would have given rise to diversity jurisdiction. *See* *2019 U.S. Dist. LEXIS 216107, 2019 WL 6729718, at *1-2*. The new California corporation sued the record company, which removed, arguing that the corporation was a sham and that as the real party in interest, the producer's Florida citizenship established diversity jurisdiction. *2019 U.S. Dist. LEXIS 216107, [WL] at *2*. The district court initially remanded, holding that the record company had not shown the plaintiff corporation to be a sham, but after additional evidence came to light through state court proceedings, the record company removed again, and the district court declined to remand a second time. *See* *2019 U.S. Dist. LEXIS 216107, [WL] at *2-3*. Citing *Attorneys Trust* as authority for extending *28 U.S.C. § 1359* to disregard collusive assignment that purport to destroy (as opposed to only create) diversity jurisdiction, the district court held not only that the assignment was collusive, but also that the plaintiff corporation was itself a sham. *See* *2019 U.S. Dist. LEXIS 216107, [WL] at *5-7*. The court did not address *Attorney Trust*'s express limitation to cases initially filed in federal court,[16] or the precedential value of the Supreme Court's decision in *Provident*.

The facts of that case are distinguishable, in that Defendants have **[*51]** not argued here that Molina is a sham corporation in its entirety, and instead attack only the validity of the assignments. To the extent *Overrated Products* could be read as supporting a broader rule that *Attorneys Trust* permits looking past collusive assignments in cases filed in state court and removed, it is not persuasive in that it failed to consider that decision's limitation to cases filed in federal court, the Supreme Court precedent of *Provident*, or *Charles Schwab* and *Go Computer*'s holdings that complete assignments can never be pierced for removal. While constraining *Attorneys Trust* to its express limitation creates different standards for the validity of assignments depending on where a case was filed, that outcome is not only compelled by *Provident*, but also consistent with the Ninth Circuit's "strong presumption against removal." *See* *Gaus, 980 F.2d at 566*.

The Court therefore holds that Molina's citizenship is the relevant consideration for diversity jurisdiction, and that its Delaware citizenship—which it shares with both defendants—precludes a finding of complete diversity necessary for jurisdiction under *1332(a)*.

Even if that were not so, the case would be subject to remand based on the shared New York citizenship of BMS and Molina's New York subsidiary. Defendants argue that BMS is fraudulently **[*52]** joined since Molina's complaint only alleges conduct by its subsidiary Celgene, and in fact demands judgment only against Celgene, and that the California court lacks personal jurisdiction over Defendants with respect to claims by the New York subsidiary.

"[F]raudulently joined defendants will not defeat removal on diversity grounds." *Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998)*. "The term 'fraudulent joinder' is a term of art, used for removal purposes, and does not connote any intent to deceive on the part of plaintiff or his counsel." *Plute v. Roadway Package Sys., Inc., 141 F. Supp. 2d 1005, 1008 n.2 (N.D. Cal. 2001)*. "Joinder of a non-diverse defendant is deemed fraudulent, and the

[16] The same court's earlier decision granting a motion to remand after the first removal acknowledged that "courts have declined to extend *Attorneys Trust* where, as here, the action was filed in state court, the alleged real party in interest . . . is not a party to the action, and the assignment was total." *Overrated Prods. v. Universal Music Grp., No. CV 17-09267-RSWL-RAO, 2018 U.S. Dist. LEXIS 33855, 2018 WL 1136881, at *2 (C.D. Cal. Mar. 1, 2018)*. In denying remand the second time, however, the court did not acknowledge those limitations. *2019 U.S. Dist. LEXIS 216107, 2019 WL 6729718, at *3*.

defendant's presence in the lawsuit is ignored for purposes of determining diversity, if the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state," such that there is no possibility a state court would find a valid claim against the non-diverse defendants, and any deficiency could not be cured by amendment. *Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1067 (9th Cir. 2001)*; *see* *GranCare, LLC v. Thrower ex rel. Mills, 889 F.3d 543, 549-50 (9th Cir. 2018)*. At least one court has applied the same test to a purportedly fraudulently joined plaintiff, which would seem to apply to Defendants' argument that Molina's New York subsidiary should be disregarded. *Tahoe Keys Marina & Yacht Club, LLC v. Merkelback, No. 2:12-CV-02582-GEB-AC, 2013 U.S. Dist. LEXIS 7910, 2013 WL 221510, at *1 (E.D. Cal. Jan. 18, 2013)*. **[*53]**

Here, Defendants are correct that the complaint does not state a claim against BMS, but they have not shown that Molina could not cure that deficiency by amendment to include allegations of conduct by BMS or grounds for alter ego liability. Assuming for the sake of argument they are correct as to a lack of personal jurisdiction for claims by the New York subsidiary, any such deficiency there could also potentially be cured by amendment to allege a stronger connection to California for that entity's claims.

That said, the New York subsidiary is not a party to the case, and as discussed above, it is Molina's citizenship that matters. The New York connection would be relevant only if Defendants were correct that the Court may disregard the assignment, which they are not. Based on Molina's shared Delaware citizenship with both Celgene and BMS, the Court lacks diversity jurisdiction under *§ 1332(a)*.

IV. CONCLUSION

For the reasons discussed above, Molina's motion to remand is GRANTED. The Clerk shall remand the case to the California Superior Court for the County of San Francisco and close the file in this Court. Lacking subject matter jurisdiction, **[*54]** the Court does not reach Defendants' motion to transfer and motion to dismiss. Defendants may renew any arguments for dismissal that they wish to pursue before the state court.

IT IS SO ORDERED.

Dated: January 18, 2022

/s/ Joseph C. Spero

JOSEPH C. SPERO

Chief Magistrate Judge

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City of Miami v. Eli Lilly & Co.

United States District Court for the Southern District of Florida

January 21, 2022, Decided; January 21, 2022, Entered on Docket

Civil Action No. 21-22636-Civ-Scola

Reporter
2022 U.S. Dist. LEXIS 11696 *; 2022 WL 198028

City of Miami, Plaintiff, v. Eli Lilly and Co. and others, Defendants.

Core Terms

Manufacturer, alleges, prices, negotiations, antitrust, conspiracy, rebates, insulin, medications, unjust enrichment, increased price, courts, money had and received, civil conspiracy, misrepresentations, oligopolists, price-fixing, motion to dismiss, health plan, purchaser, market share, formulary, consumer, statute of limitations, placement, compete, factors, chain, cause of action, give rise

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Judges: Robert N. Scola, Jr., United States District Judge.

Opinion by: Robert N. Scola, Jr.

Opinion

Order

This matter is before the Court on the Defendants' motion to dismiss. (ECF No. 60.) The Plaintiff (the "City") filed an opposition (ECF No. 70), and the Defendants filed a reply in support of their motion (ECF No. 79). After careful consideration of the briefs and the relevant legal authorities, the Court **grants in part and denies in part** the Defendants' motion. (**ECF No. 60**.)

1. Background

Over the past few decades, the price of a life-saving drug has risen from approximately $20 to as much as $700. (ECF No. 44 at ¶ 5.) Tracing this astronomical rise in price, the City's amended complaint alleges a price-fixing conspiracy involving fifteen entities that either manufacture insulin and other diabetes medications[1] or manage and negotiate certain pharmacy benefits. (ECF No. 44.) In **[*5]** particular, the City sues Defendants Eli Lilly, Novo Nordisk, and Sanofi (the "Manufacturer Defendants") and CVS Caremark, Express Scripts, OptumRx, and Aetna Rx (the "PBM Defendants").[2]

The Court will start with a brief summary of the general distribution chain. Manufacturers create insulin and other medications, which are then sold to wholesalers. (*Id.* at ¶ 189.) Wholesalers sell to pharmacies and other retail businesses, who then sell to consumers, many of whom have a health plan. (*Id.*) The price paid at each stop on the distribution chain varies, in part because of entities called pharmacy benefit managers ("PBMs"), like CVS Caremark, Express Scripts, OptumRx, and Aetna Rx. (*Id.* at ¶¶ 190, 193.) These entities, a somewhat recent phenomena, state that they manage drug benefits for health plans—such as the City's—and work to lower the price of drugs for those health plans. (*Id.* at ¶¶ 14, 69, 89, 108, 122, 166, 204.) These entities negotiate the "formulary

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[1] The medications at issue include Humulin N, Humilin R, Humalog, Trulicity, Basaglar, Lantus, Toujeo, Soliqua, Apidra, Novolin R, Novolin N, Novolog, Levemir, Tresiba, Victoza, and Ozempic. (ECF No. 44 at 5 n.9.)

[2] Undefined terms shall have the meaning set out in the Amended Complaint. (ECF No. 44.)

placement" for each drug—in essence, they negotiate what medications will be offered by their health plan clients and covered by insurance. (*Id.* at ¶¶ 3, 14, 224.) These negotiations go in many directions—PBMs negotiate with manufacturers **[*6]** regarding the formulary placement for each manufacturer's medications, they negotiate what health plans will pay for each medication, and they negotiate the price that each pharmacy will receive for this medication. (*Id.* at ¶¶ 194, 199, 201.)

This lawsuit, in large part, focuses on one aspect of these negotiations—rebates paid from the Manufacturer Defendants to the PBM Defendants. In general, medications that are covered by insurance will be utilized at higher rates, putting the PBM Defendants in a powerful negotiating position as a gatekeeper between manufacturers and consumers. (*Id.* at ¶¶ 13, 215, 225.) The PBM Defendants represent that they negotiate lower drug prices for their clients, but insulin prices have not decreased while rebate payments to the PBM Defendants have increased. (*See id.* at ¶¶ 248, 279-287.) Indeed, the Manufacturer Defendants have begun offering increasingly larger rebates (or as the City refers to these payments—kickbacks) to the PBM Defendants in an effort to receive better formulary placements for their diabetes medications. (*Id.* at ¶¶ 16, 199); (ECF No. 70 at 25.) And to negotiate higher rebates, the Manufacturer Defendants raised the prices of their medications. **[*7]** (*Id.* at ¶ 229.) Health plans end up paying a price that is the "reported price," or "Average Wholesale Price," less a discount negotiated by the PBM Defendants—the discount is less than the rebate received by the PBMs. (*Id.* at ¶¶ 195, 261.) The PBM Defendants then reimburse pharmacies a lower price for the medication. (*Id.* at ¶ 256.)

The City alleges a vast conspiracy among and between the Manufacturer Defendants and the PBM Defendants to raise the price of diabetes medications. As evidence of this conspiracy, the City alleges that the medications at issue have not meaningfully changed in the last decade, if not the last 100 years.[3] (*Id.* at ¶¶ 8, 159.) Notwithstanding the lack of advancement, the price of each has increased in a substantially uniform manner. (*Id.* at ¶¶ 177-82.) These price increases occurred despite opacity in the pricing system, in which the rebates, fees, and other payments between the Manufacturer Defendants and the PBM Defendants are not disclosed. (*Id.* at ¶¶ 191, 231.)

Moreover, the City points to price data as evidence of increasing rebate payments to the PBM Defendants. While payments to the PBM Defendants are not disclosed, there is an increasing discrepancy between **[*8]** the Manufacturer Defendants' reported prices (which include rebates and have dramatically increased) and their "net prices" (which are post rebate and have largely been steady). (*Id.* at ¶¶ 248-52.)

As a result of this conspiracy, the City alleges that it pays more in health care costs related to diabetes care. The City provides health benefits to certain individuals as a self-funded health plan. (*Id.* at ¶¶ 272-74.) The City has received services from "one or more" PBM Defendants, yet the City's healthcare costs have risen, despite representations that the PBM Defendants were working to reduce costs. (*Id.* at ¶¶ 277-80, 302, 304, 357.)

2. Legal Standard

When considering a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*, the Court must accept all of the complaint's allegations as true, construing them in the light most favorable to the plaintiff. *See* *Pielage v. McConnell, 516 F.3d 1282, 1284 (11th Cir. 2008)*. Under *Federal Rule of Civil Procedure 8*, a pleading need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. The plaintiff must nevertheless articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable **[*9]** inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory

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[3] The City alleges that while the medications at issue have gone largely unchanged, the Manufacturer Defendants engage in "evergreening" their patents—i.e., filing new patent applications for minor changes—and thereby preserve patent protections and minimize new competition. (ECF No. 44 at ¶¶ 310-11.)

statements, do not suffice." *Id.* Thus, a pleading that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" will not survive dismissal. *See id.*

In applying the Supreme Court's directives in *Twombly* and *Iqbal*, the Eleventh Circuit has provided the following guidance to the district courts:

> In considering a motion to dismiss, a court should 1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. Further, courts may infer from the factual allegations in the complaint obvious alternative explanation[s], which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer.

Kivisto v. Miller, Canfield, Paddock & Stone, PLC, 413 F. App'x 136, 138 (11th Cir. 2011) (citations omitted). These precepts apply to all civil actions, regardless of the cause of action alleged. *See id.*

Where a cause of action sounds in fraud, however, *Federal Rule of Civil Procedure 9(b)* must be satisfied in addition to the more relaxed **[*10]** standard of *Rule 8*. Under *Rule 9(b)*, "a party must state with particularity the circumstances constituting fraud or mistake," although "conditions of a person's mind," such as malice, intent, and knowledge, may be alleged generally. *Fed. R. Civ. P. 9(b)*. "The 'particularity' requirement serves an important purpose in fraud actions by alerting defendants to the precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior." *W. Coast Roofing & Waterproofing, Inc. v. Johns Manville, Inc., 287 F. App'x 81, 86 (11th Cir. 2008)* (citations omitted). "When a plaintiff does not specifically plead the minimum elements of their allegation, it enables them to learn the complaint's bare essentials through discovery and may needlessly harm a defendant's goodwill and reputation by bringing a suit that is, at best, missing some of its core underpinnings, and, at worst, [grounded on] baseless allegations used to extract settlements." *U.S. ex rel. Clausen v. Lab. Corp. of Am., Inc., 290 F.3d 1301, 1313 n.24 (11th Cir. 2002)*. Thus, the Rule's "particularity" requirement is not satisfied by "conclusory allegations that certain statements were fraudulent; it requires that a complaint plead facts giving rise to an inference of fraud." *W. Coast Roofing & Waterproofing, 287 F. App'x at 86*. To meet this standard, the complaint needs to identify the precise statements, documents, or misrepresentations made; the **[*11]** time and place of, and the persons responsible for, the alleged statements; the content and manner in which the statements misled the plaintiff; and what the defendant gained through the alleged fraud. *See id.*

With these standards in mind, the Court turns to the City's amended complaint to see whether its claims are sufficiently alleged to withstand dismissal.

3. Analysis

The City brings five claims against all Defendants, alleging causes of action under (1) the *Florida Antitrust Act*, (2) common law fraud, (3) money had and received, (4) unjust enrichment, and (5) civil conspiracy. The Defendants seek to dismiss all claims. The Court holds that the City has met its pleading burden as to the PBM Defendants for all counts except common law fraud. The Court finds that the City only met its pleading burden as to the Manufacturer Defendants for its claims under the Florida Antitrust Act and Civil Conspiracy. The Court will address the parties' argument for each claim.

A. Florida Antitrust Act

At its root, the City alleges a price-fixing conspiracy between and among the Manufacturer Defendants and the PBM Defendants to artificially raise prices of insulin and other diabetes medications in order **[*12]** to facilitate the negotiation of large rebates in exchange for preferential formulary placement. (ECF No. 44 at ¶ 330.) The Defendants argue that this claim must be dismissed, as the City is an indirect purchaser of insulin, the City failed to state a claim, and the City failed to allege a hub-and-spoke conspiracy. (ECF No. 60 at 12-22.) The Court will address these arguments in turn.

1. Indirect Purchaser

Before reaching the legal sufficiency of the City's price-fixing claim, the Defendants argue that the City has no standing to bring such a claim as the City does not purchase insulin from the Manufacturer Defendants. The indirect purchaser rule provides that "purchasers who are two or more steps removed from the [antitrust] violator in a distribution chain may not sue." *Apple Inc. v. Pepper, 139 S.Ct. 1514, 1520, 203 L. Ed. 2d 802 (2019)* (discussing *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*).[4] The Supreme Court has identified multiple rationales for this rule, namely: "(1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants." *Apple, 139 S.Ct. at 1524*.

The Defendants argue that the City is an indirect purchaser of insulin. Tracing the distribution chain laid out above, the Defendants contend **[*13]** that the City is not a wholesaler or pharmacy, or even a consumer, that purchases insulin at its inflated price; rather, the City, in its capacity as a self-funded health plan, reimburses others for the medications at a rate that is potentially passed through multiple non-defendant intermediaries. (ECF No. 60 at 12-14); (*see* ECF No. 44 at ¶ 194.) However, the City argues that it is a direct purchaser, as it paid an unnamed PBM Defendant and received services from "one or more" PBM Defendants. (*Id.* at ¶¶ 277, 357.) The City contends that it is of no moment that it does not purchase medication from the Manufacturer Defendants, as it made purchases from at least one of the PBM Defendants, who are within the alleged price-fixing conspiracy.

The indirect purchaser doctrine is a judicial rule of statutory standing, meant to determine whether the plaintiff has adequately alleged an antitrust injury. *See In re Zantac (Ranitidine) Prods. Liab. Litig., MDL No. 2924, 546 F. Supp. 3d 1216, 2021 U.S. Dist. LEXIS 122580, 2021 WL 2685640, at *4 (S.D. Fla. June 30, 2021)* (Rosenberg, J.); *see also Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1448 (11th Cir. 1991)* ("Antitrust standing is best understood in a general sense as a search for the proper plaintiff to enforce the antitrust laws[.]"). While it is a "bright-line rule," applying the rule is not as simple as merely following the flow of money in a distribution chain. **[*14]** *See Apple Inc., 139 S.Ct. at 1523-24*. Rather, courts look to the alleged antitrust conduct and whether the plaintiff alleged an injury resulting from that conduct. *See id.* ("If the [antitrust defendant's] unlawful monopolistic conduct caused a consumer to pay [the defendant] a higher-than-competitive price, the consumer is entitled to sue[.]"). Therefore, the Court must determine whether the City sufficiently alleged that it was an "[1] immediate buyer [2] from [an] alleged antitrust violator[]." *See id. at 1521*.

The Court holds that the City met its pleading burden. Here, the City alleges that it paid a PBM Defendant for insulin (ECF No. 44 at ¶ 357), which is sufficient at this stage. Contrary to the Defendants' arguments, this allegation is not necessarily inconsistent with the City's allegation that it also contracts with insurance companies which then contract with PBMs. (*Id.* at ¶ 276.) The exact nature of the City's relationship to the PBM Defendants is largely a factual question that cannot be resolved on a motion to dismiss.

Moreover, the Defendants' argument that the City is an indirect purchaser as it did not pay the inflated reported price—which is allegedly paid by wholesalers—is unavailing. The Defendants point to **[*15]** *MSP Recovery*, which dismissed similar claims brought against the Manufacturer Defendants and which held that "the chain of distribution alleged in this matter is fatal" as the plaintiff there did not pay the inflated price directly. (ECF No. 60 at 14 (discussing *MSP Recovery Claims, Series, LLC v. Sanofi Aventis U.S. LLC, No. 3:18-cv-2211, 2019 U.S. Dist. LEXIS 54086, 2019 WL 1418129, at *16 (D.N.J. Mar. 29, 2019)*).) However, here, unlike in *MSP Recovery*, the City also sued the PBM Defendants, to which the City made payments. (*See* ECF No. 44 at ¶ 357); *see MSP Recovery, 2019 U.S. Dist. LEXIS 54086, 2019 WL 1418129, at *3*. Moreover, the court in *MSP Recovery* did not have the benefit of the Supreme Court's decision in *Apple Inc.*, which, as discussed above, focused on the alleged antitrust conduct rather than the chain of distribution. *See Apple Inc., 139 S.Ct. at 1523-24*. Here, the City alleges that the

[4] Florida courts have held that the indirect purchaser rule applies to the Florida Antitrust Act. *See Mack v. Bristol-Myers Squibb Co., 673 So.2d 100, 103 (Fla. Dist. Ct. App. 1996)*; *cf. Fla. Stat. § 542.32*. The City does not contend otherwise, and therefore the Court will apply the indirect purchaser rule to the Florida Antitrust Act.

Defendants agreed to large rebates, increased the reported price of insulin, and then overcharged health plans based on the inflated reported price. (*See* ECF No. 44 at ¶ 256.) At this stage, that is sufficient.

Last, the Defendants complain that the City did not identify the exact PBM Defendant to which it made payments. (ECF No. 60 at 13 n.5.) The City's failure to do so is not fatal. Courts will disregard generalized allegations where they fail to give notice to the defendants of the claims **[*16]** against them. *See Pierson v. Orlando Reg'l Healthcare Sys., Inc., 619 F. Supp. 2d 1260, 1274 (M.D. Fla. 2009)*. But allegations concerning statutory standing are different—such allegations are not primarily intended to apprise defendants of the claims against them, but rather to assure courts that jurisdiction exists. *Cf. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)* (noting that jurisdiction involves the courts' "statutory or constitutional power to adjudicate the case") (emphasis omitted). Therefore, "'at the pleading stage, general factual allegations . . . may suffice'" to establish statutory standing. *Cf. DiMaio, 520 F.3d at 1301* (quoting *Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*). For this reason, the City's general allegation that it purchased insulin from a PBM Defendant suffices, and the City alleged that it was an "immediate buyer from [an] alleged antitrust violator[]." *See Apple Inc., 139 S.Ct. at 1521*.

2. Failure to State a Claim

Next, the Defendants argue that the City has failed to state a claim for violation of the Florida Antitrust Act. To state a claim for price fixing, a plaintiff must allege facts that "suggest 'an agreement or conspiracy[.]'"[5] *See Auto. Alignment & Body Serv., Inc. v. State Farm Mut. Auto. Ins. Co., 953 F.3d 707, 726 (11th Cir. 2020)* (quoting *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co., 917 F.3d 1249, 1262 (11th Cir. 2019)*). The agreement may be "tacit or express," but the "crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement[.]" *See Auto. Alignment, 953 F.3d at 726* (quoting *Twombly, 550 U.S. at 553*). To plead such an agreement, a plaintiff may **[*17]** allege either (1) "[d]irect evidence" of such an agreement or (2) "circumstantial evidence" of a conspiracy. *See United Am. Corp. v. Bitmain Inc., 530 F. Supp. 3d 1241, 1258 (S.D. Fla. 2021)* (McAliley, Mag. J.). When alleging circumstantial evidence of an agreement, tacit or express, a plaintiff must do more than merely plead "parallel conduct" among the alleged conspiracy members. *See Auto. Alignment, 953 F.3d at 726*. Rather, a plaintiff must allege additional "plus factors" that make "parallel conduct 'more probative of conspiracy than of conscious parallelism.'" *See id.* (quoting *Quality Auto, 917 F.3d at 1262*). Plus factors can include: (1) price uniformity where market conditions would otherwise "ordinarily result in divergent pricing"; (2) actions contrary to economic self-interest; and (3) an opportunity to exchange information that would otherwise be undisclosed. *See Quality Auto, 917 F.3d at 1263-70*; *Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1301 (11th Cir. 2003)*. These plus factors need not prove a conspiracy but need only "tend to exclude the possibility of independent action." *Williamson Oil, 346 F.3d at 1301* (quoting *City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 571 n.35 (11th Cir. 1998)*).

Here, the City does not allege direct evidence of a conspiracy but relies on circumstantial evidence. Primarily, the City points to price increases that occurred in tandem and argues that there was no economic justification or self-interested rationale for such increases. (ECF No. 70 at 27-28.) The Defendants argue **[*18]** that this circumstantial evidence does not suffice, as the Manufacturer and PBM Defendants engage in individual rebate negotiations and as parallel price increases alone cannot state a claim for a price-fixing conspiracy. (ECF No. 60 at 16-19.) The Court will discuss the City's allegations concerning rebate negotiations and additional plus factors, although first the Court will briefly discuss the relevant market.

a. Relevant Market

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[5] Courts look to the federal antitrust laws when evaluating claims brought under the Florida Antitrust Act. *See All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc., 135 F.3d 740, 745 n.11 (11th Cir. 1998)* ("Federal and Florida antitrust laws are analyzed under the same rules and case law.").

Before looking to the City's alleged circumstantial evidence, the Court will conduct a brief inquiry into the nature of the relevant market, as alleged. Some knowledge of the market is important because courts must review the alleged antitrust behavior against "rational and competitive business strategy" driven by the relevant market. *See* Quality Auto, 917 F.3d at 1266-67 (quoting Twombly, 550 U.S. at 554). The demand for insulin and related medications is "highly inelastic," meaning that changes in price largely do not affect consumer demand. (ECF No. 44 at ¶ 354.) Moreover, the market is an oligopoly, in which 99% of insulin is manufactured by the Manufacturer Defendants. (*Id.*) And, as alleged, there is little-to-no difference between the vast majority of insulin products. (*See id.* at ¶ 157.) A market run by **[*19]** oligopolists and distinguished by inelastic demand for undifferentiated products is likely highly unresponsive to consumer preference. The City also alleges that demand for each of the Manufacturer Defendants' medications is driven by the PBM Defendants, who act as gatekeepers between the manufacturers, insurance and health plans, and consumers. (*Id.* at ¶¶ 13, 224, 317, 349.) The PBM Defendants, who account for approximately 75% of the PBM industry, negotiate with the Manufacturer Defendants and represent that they negotiate to bring costs down for their clients. (*Id.* at ¶¶ 211, 280, 283, 301.) In a competitive market, the PBM Defendants would compete with each other for both clients and cheaper medications. (*Id.* at ¶¶ 211, 227, 369, 371.)

b. Rebate Negotiations

Turning to the City's allegations concerning the Defendants' rebate negotiations, the Court holds that these allegations do not render the City's price-fixing conspiracy claim less suggestive. The Defendants argue the alleged fact that the Defendants engage in individual negotiations for ever-larger rebates demonstrates the lack of parallel, anticompetitive conduct. (ECF No. 60 at 16-17.) However, price-fixing agreements can **[*20]** take many forms—the general unifying principle is only that the agreement "directly affects price[.]" *See* Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1569 (11th Cir. 1991); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940) (holding that a price fixing agreement is one with "the purpose and . . . the effect of raising, depressing, fixing, pegging, or stabilizing the price" of a good or service). The fact that the Defendants allegedly engage in individual rebate negotiations alone does not make the alleged conspiracy to fix the reported price of insulin less suggestive.[6] Therefore, the Court denies this basis to dismiss the City's price-fixing claim.

c. Plus Factors

Next, the Court holds that the City has done more than allege mere parallel price increases. As discussed above, a plaintiff must allege "plus factors" in support of a price-fixing conspiracy; a plaintiff may not rely solely on allegations of parallel conduct or conscious parallelism in prices. *See* Auto. Alignment, 953 F.3d at 726; Quality Auto, 917 F.3d at 1264. Of course, the City need not establish the *existence* of an agreement at this stage, but it must only plead allegations that support an inference of an agreement. *See* Twombly, 550 U.S. at 556 (requiring "plausible grounds to infer an agreement" at the motion-to-dismiss stage). The City sufficiently alleges plus factors with its allegations of parallel price increases **[*21]** to nudge its claim to plausibility.

The City alleges that the parallel price increases are contrary to the Defendants' self-interest and that the market would expect to see insulin prices diverge. (ECF No. 44 at ¶¶ 227, 344.) According to the City, as insulin is a largely undifferentiated product, manufacturers in a competitive market would have to compete on price. (*See* ECF No. 44 at ¶ 333); *see also* In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 658 (7th Cir. 2002) (Posner, J.) (noting that where "the product is uniform . . . competition would be expected"). And where costs fall, which the City alleges here, one would expect prices to fall as well. (ECF No. 44 at ¶ 33.) And where manufacturers compete on

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[6] Moreover, these rebate negotiations are a core component of the City's alleged conspiracy. The City argues that these rebates are kickbacks in exchange for preferential formulary placement. (ECF No. 70 at 25); *cf.* Feaz v. Wells Fargo Bank, N.A., 745 F.3d 1098, 1111 (11th Cir. 2014) ("The defining characteristic of a kickback is divided loyalties.") (quoting Cohen v. Am. Sec. Ins. Co., 735 F.3d 601, 611 (7th Cir. 2013)). A kickback is still illegal even if firms agree to individually bid for it.

price, one would expect to see prices diverge, not converge. (*See id.* at ¶ 300.) Last, the City alleges that in a competitive market, lower insulin prices would follow negotiations by competitive PBMs. (*See id.* at ¶ 369.) The opposite has happened here.

The Defendants argue that this is merely an example of oligopolistic price leadership, which was explained in *Quality Auto. See Quality Auto, 917 F.3d at 1264-65*. Courts have largely found price leadership within concentrated industries to be rational—absent an anticompetitive agreement—when such behavior on price results in increased **[*22]** profit and maintenance of market share. *See id.* (explaining that oligopolists are not likely to reduce price and may instead follow price increases, as doing so will maximize industry profits while maintaining market share); *Williamson Oil, 346 F.3d at 1299* ("[C]onscious parallelism is the practice of interdependent pricing in an oligopolistic market by competitor firms that realize that attempts to cut prices usually reduce revenue without increasing any firm's market share, but that simple price leadership in such a market can readily increase all competitors' revenues.") (quoting *City of Tuscaloosa, 158 F.3d at 570*). In essence, commentators generally find that rational oligopolists follow price increases as it can be profit-maximizing, whereas anticompetitive oligopolists abide by an anticompetitive agreement, which "typically requires firms to do things that are not independently profit-maximizing but that maximize profits only if other participants adhere to the agreement." *See* Areeda and Hovenkamp, ***Antitrust Law*** ¶ 1432(b) n.20 (2017).

Here, the City has plausibly alleged that the Defendants have engaged in practices contrary to rational, competitive self-interest and that price uniformity has converged rather than diverged. First, the City alleges **[*23]** that the oligopolistic Manufacturer Defendants have raised prices without a corresponding increase in the net price (reported price minus rebates and other fees paid to the PBM Defendants). (ECF No. 44 at ¶¶ 186, 228, 249-52.) This suggests that the majority of the price increases have gone into rebates and other payments to the PBM Defendants while net prices remain stable. (*See id.*) Moreover, this suggests that the Manufacturer Defendants have only seen a modest rise in profit following the price increase, a rise that could be threatened by losing market share in rebate negotiations. (*See id.* at ¶¶ 224-25, 227-28.) Following a price increase when there is a concomitant risk of losing market share in subsequent negotiations is plausibly against the Manufacturer Defendants' self-interest, unless the risk of loss of market share is tempered by an anticompetitive agreement. *See* Areeda and Hovenkamp, ***Antitrust Law*** ¶ 1432(b) n.20; *see Quality Auto, 917 F.3d at 1264-65* (explaining that a rational oligopolist follows a price increase if the price increase would maximize industry profits and maintain some promise of stable market shares for each). Therefore, the City has plausibly alleged that the Manufacturer Defendants **[*24]** did not act self-interested in pursuit of profit-maximization, but rather that they agreed to raise prices and maintain market share.

Second, the City has alleged that the PBM Defendants have reaped the benefits of the price increases without negotiating insulin prices down or competing for clients. (*See* ECF No. 44 at ¶¶ 227, 348.) Therefore, despite the PBM Defendants' purported competitive interest in negotiating a reduction in prices, prices have risen. (*See id.* at ¶¶ 227, 371); *see also City of Tuscaloosa, 158 F.3d at 572-73* (holding that competitive oligopolists would likely compete for clients while costs were stable and prices rose).

In total, the City alleges a market where the Manufacturer Defendants do not compete for consumers on price, as one could expect in a market of undifferentiated products. And the City has plausibly alleged that the Manufacturer Defendants do not independently follow price leadership to maximize profits and maintain market share, as one could expect in an oligopoly. Moreover, the City alleges that the PBM Defendants do not compete for clients and for lower prices, as one would expect from oligopolist gatekeepers. Rather, the City alleges that the Manufacturer Defendants compete for formulary **[*25]** placement by increasing prices and bidding up rebates and that the PBM Defendants sell formulary placements in exchange for higher rebates rather than lower prices. (*See* ECF No. 44 at ¶ 330.) Therefore, the City has sufficiently alleged that parallel price increases may not have been enacted in response to legitimate, rational oligopolistic price leadership.[7]

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[7] In a bullet-point list in its response, the City identifies several additional plus factors. (ECF No. 70 at 27-29.) As the City does not tie these plus factors to allegations in the amended complaint, it is unclear whether the City is contending that each of these factors apply in this case. This ambiguity is heightened as several of these plus factors are merely generalized statements of

3. Hub-and-Spoke Conspiracy

Last, the Defendants argue that the City's price-fixing claim fails as the City does not allege a separate agreement among the PBM Defendants to fix prices. The Defendants characterize the City's alleged conspiracy as a hub-and-spoke conspiracy, in which the hub—the Manufacturer Defendants—conspired with themselves and the various spokes—the PBM Defendants—to illegally raise the price of insulin. (ECF No. 60 at 21.) The Defendants argue that a hub-and-spoke conspiracy requires an agreement among the spokes. (*Id.* (citing *In re K-Dur Antitrust Litig., No. 01-cv-1652, 2016 U.S. Dist. LEXIS 22982, 2016 WL 755623, at *18 (D.N.J. Feb. 25, 2016)*.)

However, as the Defendants point out, all that is required is that the spokes must be "aware of each other and of their common aim." *See nFinanSe, Inc. v. Interactive Commc'ns Int'l, No. 1:11-cv-3728-AT, 2012 U.S. Dist. LEXIS 203106, 2012 WL 13009231, at *8 (N.D. Ga. July 24, 2012)* (quoting *United States v. Seher, 562 F.3d 1344, 1367 (11th Cir. 2009)*). While, as the Defendants argue, the spokes create their own formularies and conduct their own rebate negotiations, the City has alleged **[*26]** that the PBM Defendants, which account for approximately 75% of the relevant PBM market, are aware of each other and have an alleged common aim to maximize profits and increase prices through formulary placement negotiations. (*See generally* ECF No. 44 at ¶¶ 13-15, 211, 215, 307, 338, 342.)

For the reasons set out above, the Court **denies** the Defendants' motion to dismiss the City's price-fixing conspiracy claim.

B. Common Law Fraud

The Defendants also seek to dismiss the City's common-law fraud claim, in which the City alleges that the Defendants misrepresented or concealed the cost and related rebates of the medications at issue. (*See* ECF No. 44 at ¶ 368.) To state a claim for fraud, a party must allege "an intentional material misrepresentation upon which the other party relies to his [or her] detriment." *See Sun Life Assur. Co. of Can. v. Imperial Premium Fin., LLC, 904 F.3d 1197, 1222 (11th Cir. 2018)* (quoting *Lance v. Wade, 457 So.2d 1008, 1011 (1984)*). Moreover, a claim for fraud must be stated with particularity under *Rule 9(b)*; therefore, a plaintiff must allege "(1) the precise statements, documents, or misrepresentations made; (2) the time, place and person responsible for the statement; (3) the content and manner in which these statements misled [it]; and (4) what the defendants gained by the alleged fraud." *Wilding v. DNC Servs. Corp., 941 F.3d 1116, 1127 (11th Cir. 2019)*.

Turning **[*27]** first to the Manufacturer Defendants, the Defendants primarily argue that the City has not alleged any misrepresentations by the Manufacturer Defendants on which it relied. (ECF No. 60 at 22-23.) Courts have held that the publishing of artificially inflated prices constitutes a fraudulent statement. *See Harris Cnty., Tex. v. Eli Lilly and Co., No. H-19-4994, 2020 U.S. Dist. LEXIS 179199, 2020 WL 5803483, at *16 (S.D. Tex. Sept. 29, 2020)*; *MSP Recovery Claims, Series, LLC v. Sanofi Aventis U.S. LLC, No. 3:18-cv-2211, 2019 U.S. Dist. LEXIS 54086, 2019 WL 1418129, at *19 (D.N.J. Mar. 29, 2019)*. As the City alleges that the Manufacturer Defendants published such artificially inflated prices,[8] (*see* ECF No. 44 at ¶¶ 287, 374), the City has adequately alleged that the Manufacturer Defendants made a material misrepresentation.

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legal principles, not all of which are applicable at this stage. Nonetheless, the Court holds that the plus factors identified above are sufficient to suggest a plausible agreement at the motion-to-dismiss stage.

[8] The Defendants argue that federal law prohibits including rebates in a list price for pharmaceutical products. (ECF No. 60 at 23 (discussing *42 U.S.C. § 1395w-3a(c)(6)(B)* (in relevant part, defining "wholesale acquisition cost" of a pharmaceutical product as "not including prompt pay or other discounts, rebates or reductions in price")).) However, the City's claim is that the Manufacturer Defendants inflated the price of insulin and other medications through the use of fraudulent rebates that served as kickbacks to the PBM Defendants. The Manufacturer Defendants cannot use *Section 1395w-3a(c)(6)(B)* to avoid the City's allegations of wrongdoing.

Next, the City also compiled a number of representations in which the PBM Defendants state that they worked for the benefit of health plans to lower the cost of insulin. (*See* ECF No. 44 at ¶¶ 279-287.) The Defendants argue that these statements amount to no more than puffery. (ECF No. 60 at 24.) Puffery refers to those statements that are "just too boosterish to justify reasonable reliance" and are usually composed of "exaggerated opinion," as opposed to factual misrepresentation. *See* *Carvelli v. Ocwen Fin. Corp., 934 F.3d 1307, 1318-19 (11th Cir. 2019)*. The PBM Defendants do not explain in what ways the statements that the City identified are **[*28]** puffery; rather, the alleged misrepresentations state that the PBM Defendants use the formularies to obtain the cheapest price for their clients. (*See* ECF No. 44 at ¶¶ 283, 285-87.) Such statements do not amount to mere opinion or nonquantifiable and vague claims. Therefore, such claims are not puffery and are actionable alleged misrepresentations.

However, the City has not adequately pled reliance. While the City alleged a number of misrepresentations, the City has not pointed, with the required particularity, to how the City relied on each. *See* *Mizzaro v. Home Depot, Inc., 544 F.3d 1230, 1237 (11th Cir. 2008)* (holding that a plaintiff must plead "the who, what, when, where, and how" under *Rule 9(b)*). The misrepresentations at issue largely concern statements made by various Defendants related to efforts to realize cost savings and health and safety outcomes for the PBM Defendants' clients. (*See* ECF No. 70 at 32.) As discussed above, the City's relationship to the Defendants is unclear. The City does not identify the Defendants with which it contracts, but the City could not detrimentally rely on a Defendant's representations concerning cost-savings or work performed for clients if the City was not a client of that Defendant. *See* *Ambrosia Coal & Constr. Co. v. Pages Morales, 482 F.3d 1309, 1317 (11th Cir. 2007)* (holding that *Rule 9(b)* requires **[*29]** "specific allegations with respect to each defendant"); *GEICO Gen. Ins. Co. v. Hoy, 136 So.3d 647, 651 (Fla. Dist. Ct. App. 2013)* (holding that detrimental reliance is where one "has been placed in a worse position that he or she would have been absent the fraud").

Absent more particularized allegations concerning in what ways the City detrimentally relied on misrepresentations by each Defendant, the Court finds that the City has not adequately alleged fraud. Therefore, the Court **grants** the Defendants' motion to dismiss the City's claim for common law fraud.

C. Unjust Enrichment and Money Had and Received

In Counts Three and Four, the City pleads claims for unjust enrichment and money had and received. Under Florida law, these claims have the same elements; a plaintiff must allege that "(1) [they] conferred a benefit on the defendant; (2) the defendant voluntarily accepted and retained that benefit; and (3) the circumstances are such that it would be inequitable for the defendant[] to retain it without paying the value thereof." *See* *Virgilio v. Ryland Grp., Inc., 680 F.3d 1329, 1337 (11th Cir. 2012)*; *see also* *Hakim-Daccach v. Knauf Int'l GmbH, No. 17-20495-Civ, 2017 U.S. Dist. LEXIS 193058, 2017 WL 5634629, at *7 (S.D. Fla. Nov. 22, 2017)* (Scola, J.) ("Under Florida law, the elements of a claim for money had and received and unjust enrichment are the same.").

Florida law requires that the plaintiff "directly confer" a benefit in order to state a claim **[*30]** for unjust enrichment and money had and received. *See* *Kopel v. Kopel, 229 So.3d 812, 818 (Fla. 2017)* ("[T]o prevail on an unjust enrichment claim, the plaintiff must directly confer a benefit to the defendant."). Here, the City does not allege that it directly conferred a benefit on the Manufacturer Defendants; rather, the City alleges that it contracted with insurance companies and the PBM Defendants, which then had separate relationships with the Manufacturer Defendants. (ECF No. 44 at ¶¶ 193, 276-77, 357.) Therefore, the City does not state a claim for Counts Three and Four against the Manufacturer Defendants. *See* *Belin v. Health Ins. Innovations, Inc., No. 19-61430-Civ, 2019 U.S. Dist. LEXIS 183600, 2019 WL 9575236, at *12 (S.D. Fla. Oct. 22, 2019)* (Seltzer, Mag. J.) (dismissing a claim for unjust enrichment as the plaintiff only directly conferred a benefit on a corporate subsidiary and not the corporate parent).

However, the City states a claim for unjust enrichment and money had and received as to the PBM Defendants. As discussed above, the City alleges that it paid money to and received services from some of the PBM Defendants. (*See* ECF No. 44 at ¶¶ 277, 357.) While the City does not identify specifically the nature of these payments and services, a claim for unjust enrichment and money had and received is "an equitable action and is less restricted and **[*31]** fettered by technical rules and formalities than any other form of action." *See United States v. Jefferson Elec. Mfg. Co., 291 U.S. 386, 402-03, 54 S. Ct. 443, 78 L. Ed. 859, 78 Ct. Cl. 846, 1934-1 C.B. 393 (1934)*. At the motion-to-dismiss stage, the City has adequately pled that the PBM Defendants received a benefit from the City and that it would be inequitable for the PBM Defendants to retain that benefit.

The Defendants argue that these claims, even if sufficiently pled, cannot be asserted against the PBM Defendants because contractual remedies control. *See Diamond "S" Dev. Corp. v. Mercantile Bank, 989 So.2d 696, 697 (Fla. Dist. Ct. App. 2008)* (holding that a claim for unjust enrichment "was precluded by the existence of an express contract between the parties concerning the same subject matter"). The Defendants point to alleged contracts that "guarantee[] [the City] all or some portion of the 'rebates'" received by the PBM Defendants. (ECF No. 60 at 31 (citing ECF No. 44 at ¶ 260).) However, the City alleges that the benefits conferred on the PBM Defendants are more than just the rebates; rather, the benefits include all payments retained by the PBM Defendants. (ECF No. 44 at ¶¶ 261, 379-380.)

In all, the Court **grants in part and denies in part** the Defendants' motion to dismiss the unjust enrichment and money had and received claims. The Court dismisses the claims for unjust enrichment and money **[*32]** had and received only as to the Manufacturer Defendants. These claims against the PBM Defendants were sufficiently pled and may proceed.

D. Civil Conspiracy

In Count Five, the City alleges civil conspiracy against all Defendants, contending that each conspired to violate the Florida Antitrust Act and to commit the torts of fraud, unjust enrichment, and money had and received. (ECF No. 44 at ¶ 393.) To state a claim for civil conspiracy, a plaintiff must allege "(1) an agreement between two or more parties; (2) to do an unlawful act or to do a lawful act by unlawful means; (3) the doing of some overt act in pursuance of the conspiracy; and (4) damage to plaintiff as a result of the acts done under the conspiracy." *Honig v. Kornfeld, 339 F. Supp. 3d 1323, 1345 (S.D. Fla. 2018)* (Middlebrooks, J.).

The Defendants argue that the civil conspiracy claim must be dismissed as the City failed to plead an agreement to commit an underlying independent tort. (ECF No. 60 at 31.) As the Court held that the City sufficiently alleged a claim under the Florida Antitrust Act, the Court also holds that the City adequately pled a civil conspiracy to violate the Florida Antitrust Act. Therefore, the Court **denies** the Defendants' motion to dismiss the civil conspiracy **[*33]** claim.

E. Statute of Limitations

The Defendants argue that each of the City's claims are time-barred by the applicable statutes of limitations. (ECF No. 60 at 32-36.) The City argues that various tolling doctrines apply so as to render its claims timely. (ECF No. 70 at 36-37.) At the outset, the Court notes that, in general, courts are hesitant to bar a claim under the applicable statute of limitations at the motion-to-dismiss stage. *See Spadaro v. City of Miramar, 855 F. Supp. 2d 1317, 1328 (S.D. Fla. 2012)* (Cohn, J.) ("Generally, whether a claim is barred by the statute of limitations should be raised as an affirmative defense in the answer rather than in a motion to dismiss.") (citing *Cabral v. City of Miami Beach, 76 So.3d 324, 326 (Fla. Dist. Ct. App. 2011)*). Therefore, courts will only dismiss a claim if "facts on the face of the pleadings show that the statute of limitations bars the action." *See id.* The Court will discuss the statute of limitations and any applicable tolling doctrine for each remaining claim.

1. Florida Antitrust Act

Claims brought under the Florida Antitrust Act must be brought within four years of accrual. *See Fla. Stat. § 542.26(1)*. The Defendants argue that the City's claims under the Act are time-barred to the extent that the City seeks to recover for payments made prior to June 16, 2017, or four years before the start of **[*34]** this suit. (ECF

No. 60 at 33.) However, courts recognize the "continuing violations" doctrine under the Florida Antitrust Act and hold that such claims are not time-barred if brought within four years "after the defendant commits (1) an overt act in furtherance of the antitrust conspiracy or (2) an act that by its very nature constitutes a 'continuing antitrust violation.'" *See* *Maralago Cay Homeowners Assoc., Inc. v. MHC Op. Ltd. P'ship, No. 21-80049-CV, 2021 U.S. Dist. LEXIS 248397, 2021 WL 6135181, at *4 (S.D. Fla. Aug. 5, 2021)* (Middlebrooks, J.) (quoting *Morton's Mkt., Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823, 827-28 (11th Cir. 1999)*). Courts have held that "ongoing sales or the collection of payments over time" constitutes a continuing antitrust violation. *See id.* (quoting *Bray v. Bank of Am. Corp., 784 F. App'x 738, 741 (11th Cir. 2019)*). The City has alleged continuing payments for the medications at issue, and therefore the City has adequately alleged a continuing violation. (*See* ECF No. 44 at ¶ 304.) Therefore, the City's claim under the Florida Antitrust Act is not time-barred.

2. Money Had and Received, Unjust Enrichment, and Civil Conspiracy

The City's claims for money had and received, unjust enrichment, and civil conspiracy are subject to a four-year statute of limitations. *See* *Fla. Stat. § 95.11(3)(p)*. The Defendants argue that the general rule for accrual of claims applies here—that a common-law claim accrues when the plaintiff is first injured. (ECF No. 60 at 33.) However, the City argues **[*35]** that the discovery rule applies to these claims as well. (ECF No. 70 at 36-37.) The discovery rule provides that claims accrue when "the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence." *See* *Fla. Stat. § 95.031(2)(a)*; *see also Butler Univ. v. Bahssin, 892 So.2d 1087, 1091 & n.3 (Fla. Dist. Ct. App. 2004)* (referring to this as the "discovery rule" or the "delayed discovery doctrine").

As relevant here, the discovery rule applies to all claims "founded upon fraud," which Florida courts have interpreted to include all claims grounded in fraudulent activity. *See* *Fla. Stat. § 95.031(2)(a)*; *Tejera v. Lincoln Lending Servs., LLC, 271 So.3d 97, 102-03 (Fla. Dist. Ct. App. 2019)* (holding that a civil conspiracy claim involving allegations of fraudulent activity was a claim "founded upon fraud"). Here, the City's remaining claims are all based on the City's underlying allegations of fraudulent antitrust behavior. (*See* ECF No. 44 at ¶¶ 383, 388, 393.) Therefore, the Court will apply the delayed discovery rule to the City's remaining claims.

The Defendants argue that the City should have discovered the facts giving rise to its claims on February 2, 2017, when a lawsuit alleging similar claims was filed against some of the Defendants in New Jersey. (ECF No. 60 at 32.) However, the Defendants do not cite any cases to support the proposition **[*36]** that a plaintiff should have discovered the facts giving rise to their claim merely because a similar lawsuit was filed in another jurisdiction. The Defendants do not argue that this New Jersey-based litigation was widely publicized; therefore, the Court is left to assume that the Defendants argue that reasonable diligence means plaintiffs must trawl court filings across the country for suits involving different plaintiffs with claims that may involve similar facts. Without any authority in support, the Court will not apply such a stringent understanding of reasonable diligence. Rather, the City has adequately pled that it could not have earlier discovered facts giving rise to its fraudulent-antitrust-based claims because of the opacity of the Defendants' pricing methods and the Defendants' refusal to disclose net prices. (*See* ECF No. 44 at ¶ 320.) The Court holds that the City has adequately alleged that its remaining claims are not barred by the statute of limitations.

4. Conclusion

For the reasons set out above, the Court **grants in part and denies in part** the Defendants' motion to dismiss. (**ECF No. 60**.) In particular, the Court **grants** the motion as to the common law fraud claim as **[*37]** well as the claims of money had and received and unjust enrichment as to the Manufacturer Defendants. The Court grants the motion on these claims **without leave to amend**. A request for leave to amend must be made by motion, which the City has not done. *See* *Newton v. Duke Energy Fla., LLC, 895 F.3d 1270, 1277 (11th Cir. 2018)* (holding that a request for leave to amend "has not been raised properly" unless made by motion). The Court **denies** the motion in all other respect.

Done and ordered in Miami, Florida, on January 21, 2022.

/s/ Robert N. Scola, Jr.

Robert N. Scola, Jr.

United States District Judge

[In re Dealer Mgmt. Sys. Antitrust Litig.]

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

January 21, 2022, Decided; January 21, 2022, Filed

Case No. 18-cv-864

Reporter

581 F. Supp. 3d 1029 *; 2022 U.S. Dist. LEXIS 11261 **; 2022 WL 199274

IN RE DEALER MANAGEMENT SYSTEMS ANTITRUST LITIGATION, MDL 2817. This document relates to: ALL CASES

Prior History: *[Authenticom, Inc. v. CDK Global, LLC (In re Dealer Mgmt. Sys. Antitrust Litig.), 313 F. Supp. 3d 931, 2018 U.S. Dist. LEXIS 80937, 2018 WL 2193236 (N.D. Ill., May 14, 2018)]*

Core Terms

damages, dealers, Defendants', prices, conspiracy, vendors, calculate, antitrust, providers, queries, factors, opines, prompt, integration, dealership, methodology, overcharges, unilateral, estimate, Profile, switching, third-party, reasons, technological, costs, alleged conspiracy, Plaintiffs', reliability, blocking, summary judgment

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Judges: Robert M. Dow, Jr., United States District Judge.

Opinion by: Robert M. Dow, Jr.

Opinion

[*1041] MEMORANDUM OPINION AND ORDER

Pursuant to *Federal Rule of Evidence 702* and the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, the parties have moved to exclude or limit the testimony of ten proposed expert witnesses: Edward M. Stroz [859]; Gordon Klein [863]; Daniel L. Rubinfeld [867]; Dr. Kevin Murphy [873]; Dr. Mark Israel [877]; Catharine Lawton [879]; Dr. Michael A. Williams [881]; Allan Stejskal [883]; Nancy Miracle [885]; and **[*1042]** Brian Halpin [887]. For the following reasons, the motions to exclude Williams [881] and Stejskal [883] are granted in part and denied in part. The motions to exclude Klein [863], Rubinfeld [867], Murphy [873], Israel [877], Lawton [879], and Halpin [887] are denied. The motion to exclude Miracle [885] is granted in part, denied in part, and deferred in part. The motion to exclude Stroz [859] is denied in part and deferred in part. As noted in the minute entry issued today, the parties will be given an opportunity to (a) review this comprehensive opinion, (b) submit supplemental briefs on how, if at all, these rulings affect the briefing and proper disposition **[**21]** of the pending summary judgment motions, and (c) advise the Court on any other pertinent developments of which they believe the Court should be aware. The Court will then prepare and issue a second, comprehensive opinion disposing of the summary judgment motions in due course.

I. Background

The background of this MDL has been set forth in multiple opinions, knowledge of which is assumed here. See, e.g., [176], [425], [504], [505], [506], [507], [749], [857]. The Court briefly recounts this background here, to provide context for its analysis of the parties' *Daubert* motions.

A. The DMS Market

A data management system ("DMS") is software that automobile dealers use to help manage their businesses, including accounting, sales, inventory, service, customer information, and human resources functions. Dealers typically store a substantial portion of their data within their DMSs. Virtually every franchised new car dealership in the United States now uses a DMS. Defendants CDK Global, Inc. ("CDK") and The Reynolds and Reynolds Company ("Reynolds") both provide DMSs to auto dealerships throughout the United States. CDK and Reynolds each have significant market power in the DMS market. Together, they control **[**22]** approximately 75% of the United States market by number of dealers and approximately 90% when measured by number of vehicles sold.

B. The DIS Market

To effectively run their dealerships, dealers engage third-party software application providers—also known as "vendors"—to provide services such as inventory management, customer relationship management, warranty services, repair orders, and electronic vehicle registration and titling. Vendors need to access and use data located on dealers' DMSs in order to provide their services to dealers. Vendors generally obtain access by engaging data integrators, which provide data integration services ("DIS") to vendors for a fee. Data integrators (also called "DIS providers") collect and standardize data stored on DMSs. Their DIS services allow vendors to access dealer data and extract, organize, and integrate it into a usable format. They may also provide value-enhancing services, such as putting data from different DMSs into a uniform format and correcting data errors.

CDK and Reynolds each offer data integration to vendors. CDK's DIS is called Third Party Access ("3PA") and Reynolds' is called the Reynolds Certified Interface ("RCI"). 3PA and RCI **[**23]** only provide DIS for Defendants' respective DMSs. There are also independent third-party data integrators—including Plaintiffs Authenticom, Inc. ("Authenticom") and Loop LLC ("Autoloop"), among others—that offer DIS to vendors. CDK owns two third-party data integrators: Digital Motorworks, Inc. ("DMI") and IntegraLink.

C. The Challenged Agreements

Historically, CDK and Reynolds had "open" DMSs, meaning that they did not **[*1043]** take steps to prevent their dealer clients from authorizing third-party access to the dealers' data. Over time, Reynolds began to "close" its DMS by selectively blocking third-party data integrators from accessing dealer data stored on the Reynolds DMS. As Reynolds allegedly reduced competition for DIS through its blocking activities, Reynolds increased the fees it charged for data integration through its own RCI product. CDK, by contrast, marketed its DMS as an "open" system.

Various Plaintiffs (which are specifically identified where relevant in this opinion) allege that by the summer of 2013, Reynolds was taking aggressive action to prevent independent DIS providers from serving dealers who obtained their DMSs from Reynolds. This hampered CDK's ability to provide DIS **[**24]** to those dealers. Around September 2013, CDK allegedly abruptly stopped trying to compete with Reynolds by emphasizing CDK's "openness"—*i.e.*, the ease with which independent App vendors can access data in the dealer's DMS using any DIS service they choose (subject to dealer approval), and the cost of doing so. Plaintiffs posit that this was due to an agreement between Reynolds and CDK to drive independent DIS providers from the market by, among other things, agreeing to a common marketing message on "data security" to condition the market to accept that pretext for excluding independent DIS providers. In return, Plaintiffs allege, Reynolds allowed CDK access to Reynolds' platform.

In February 2015, CDK and Reynolds entered into three written agreements: (1) the Data Exchange Agreement or "Wind Down" Agreement; (2) the 3PA Agreement; and (3) the RCI Agreement. In the Data Exchange Agreement, CDK agreed to wind down its data integration business on the Reynolds DMS, with Reynolds promising not to block CDK's access to the Reynolds system during the wind-down period (approximately 5 years). During that period, Reynolds agreed that CDK could continue to extract dealer data just as it had **[**25]** before, using login credentials provided by dealers. As for other independent data integrators, CDK and Reynolds each agreed not to take any steps to assist any person that it reasonably believed to have plans to access or integrate with the other party's DMS.

The other two written agreements, the 3PA Agreement and the RCI Agreement (collectively referred to as the Data Integration Agreements) provided CDK and Reynolds with reciprocal access to each other's DIS programs. Pursuant to the agreements, Reynolds received five free years of 3PA access. Reynolds also agreed to access CDK's DMS exclusively through 3PA and not to contract with any third parties to access the system. The agreements also provided that CDK and Reynolds would deny data integrators access to each other's DMSs.

In addition to written agreements, senior executives from the two Defendants also allegedly agreed to restrict access to dealer data and "destroy" data integrators like Authenticom. Plaintiffs allege that, by eliminating competition for data integration services, CDK and Reynolds have seized control over dealer data and thwarted dealers' ability to control access to and the usage of their data. As a result, **[**26]** vendors have no choice but to access dealer data through CDK's and Reynolds' own DISs, at much greater cost than they would incur if they purchased services from independent data integrators. Plaintiffs allege that shortly after CDK and Reynolds entered into the Data Exchange Agreement, CDK began renegotiating contracts with vendors for 3PA access and requiring vendors to use 3PA exclusively for all of their dealer-customers on CDK DMSs.

[*1044] D. The EVR Market

Since 1992, CDK and Reynolds have also been parties to a joint venture that wholly owns Defendant Computerized Vehicle Registration, Inc. a/k/a CDK Vehicle Registration, Inc. ("CVR"). CDK owns 80% of CVR, while Reynolds owns 20%. CVR, like Plaintiff Motor Vehicle Software Corporation ("MVSC"), is a provider of electronic vehicle registration and titling services ("EVR"). EVR providers partner with state governments to issue the physical registration, license plates, and titles for vehicles sold at car dealerships. In order to process the registration and title with a state, EVR providers require basic information about the car sale, including the vehicle, buyer, and financing details. That data is stored on a dealership's DMS.

Plaintiff **[**27]** MVSC alleges that in January 2014, and possibly earlier, CDK and Reynolds entered into a horizontal agreement to block MVSC from participating in their third-party access programs (3PA and RCA). In addition to blocking MVSC from participating in their 3PA and RCI programs, CDK and Reynolds have allegedly cut off MVSC's ability to access car sales data through intermediaries. According to MVSC, CDK and Reynolds have intimidated dealers by threatening that they will be in breach of their DMS contracts if they provide MVSC with data from their DMSs.

E. Procedural Matters

Based on these facts, the parties have brought a variety of claims and counterclaims, which have been consolidated in this MDL. Some of the claims have been dismissed, while others have been resolved through settlement. The parties have engaged in extensive discovery and filed cross-motions for summary judgment, which are currently pending. See [777], [949], [954], [963], [964], [967], [970], [976]. Also pending are several motions by Defendants to bar certain claims and theories that, according to Defendants, were not timely disclosed. See [773], [787].

The claims that remain active include: Authenticom's claims against **[**28]** CDK and Reynolds for horizontal conspiracy and exclusive dealing in violation of *Sherman Act § 1*, monopolization in violation of *Sherman Act § 2*, and tortious interference; Autoloop's claims against CDK for horizontal conspiracy and exclusive dealing in violation of *Sherman Act § 1*, monopolization in violation of *Sherman Act § 2*, and parallel Florida state law claims; the proposed Dealership Class's claims against CDK for conspiracy and exclusive dealing in violation of *Sherman Act §§ 1* and *2* and related state antitrust and consumer protection laws; MVSC's claims against Reynolds for conspiracy in violation of *Sherman Act §§ 1* and *2* and related California and Illinois state law laws; and Reynolds and CDK's counterclaims against various Plaintiffs for breach of contract, violations of the *Computer Fraud and Abuse Act ("CFAA")*, the Digital Millennium Copyright Act ("DMCA"), and the *Defend Trade Secrets Act ("DTSA")*, and related Wisconsin and California state law claims.

II. *Daubert* Standard

Rule 702 and *Daubert* provide the legal framework for the admissibility of expert testimony. See *Bielskis v. Louisville Ladder, Inc., 663 F.3d 887, 893-94 (7th Cir. 2011)*; *United States v. Pansier, 576 F.3d 726, 737 (7th Cir. 2009)*. *Rule 702* requires that the district judge act as a "'gate-keeper' who determines whether proffered expert testimony is reliable and relevant before accepting a witness as an expert." *Winters v. Fru-Con Inc., 498 F.3d 734, 741 (7th Cir. 2007)* (quoting *Autotech Tech. Ltd. Partnership v. Automationdirect.com, 471 F.3d 745, 749 (7th Cir. 2006)* (internal quotation marks **[**29]** omitted)); see also *Kumho Tire Co., Ltd. v. Carmichael, **[*1045]** 526 U.S. 137, 147-49, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*; *Daubert, 509 U.S. at 589*.

Under *Federal Rule of Evidence 702*, "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." *Fed. R. Evid. 702*; see also *Ortiz v. City of Chicago, 656 F.3d 523, 536 (7th Cir. 2011)*. *Rule 702* and *Daubert* require the district court to engage in a three-step analysis before admitting expert testimony. The court must determine (1) "whether the witness is qualified"; (2) "whether the expert's methodology is scientifically reliable"; and (3) "whether the testimony will 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Myers v. Ill. Cent. R.R. Co., 629 F.3d 639, 644 (7th Cir. 2010)* (quoting *Ervin v. Johnson & Johnson, Inc., 492 F.3d 901, 904 (7th Cir. 2007)*). The proponent of the expert bears the burden of demonstrating, by a preponderance of the evidence, that "the expert's testimony would satisfy the *Daubert* standard." *Lewis v. CITGO Petroleum Corp., 561 F.3d 698, 705 (7th Cir. 2009)* (citing *Fed. R. Evid. 702* advisory committee's note (2000 Amends.)). District judges possess considerable discretion **[**30]** in dealing with expert testimony. *Carroll v. Otis Elevator Co., 896 F.2d 210, 212 (7th Cir. 1990)*; see also *General Electric Co. v. Joiner, 522 U.S. 136, 141-43, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)* (holding that abuse of discretion standard applies in reviewing district court rulings on admissibility of proposed *Rule 702* opinion testimony).

A witness is qualified as an expert if she has sufficient "knowledge, skill, experience, training, or education" relating to the subject matter of her testimony. *Demouchette v. Dart, 2012 U.S. Dist. LEXIS 177324, 2012 WL 6568232, at *3 (N.D. Ill. Dec. 14, 2012)* (quoting *Fed. R. Evid. 702*). "Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony." *Gayton v. McCoy, 593 F.3d 610, 616 (7th Cir. 2010)* (quoting *Carroll, 896 F.2d at 212*).

As to reliability, the Court must ensure that a proposed expert's methodology is "scientifically valid," *Daubert, 509 U.S. at 592-93*, and that her conclusions are "based on sufficient facts or data," *Fed. R. Evid. 702(b)*. "The non-exclusive list of *Daubert* reliability factors for scientific evidence includes whether or not the theory or technique has been (1) tested, (2) subjected to peer review and publication, (3) analyzed for known or potential error rate, and/or is (4) generally accepted within the specific scientific field." *Lapsley v. Xtek, Inc., 689 F.3d 802, 810 (7th Cir. 2012)* (citing *Daubert, 509 U.S. at 593-94*). But this "list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Kumho Tire, 526 U.S. at 141* (internal **[**31]** quotation marks omitted).

"Rule 702's requirement that expert opinions be supported by 'sufficient facts or data' means 'that the expert considered sufficient data to employ the methodology.'" Manpower, Inc. v. Insurance Co. of Pennsylvania, 732 F.3d 796, 808 (7th Cir. 2013) (quoting Stollings v. Ryobi Technologies, Inc., 725 F.3d 753, 766 (7th **[*1046]** Cir. 2013)). "For example, if an expert seeks to testify about an average gross sales price but is going to base the testimony on sales to only a single customer, a court would appropriately exclude the testimony because a single observation does not provide a sufficient basis for calculating an average." Stollings, 725 F.3d at 766. Whether an expert "selected the best data set to use, however, is a question for the jury, not the judge." Manpower, 732 F.3d at 809; see also A.H. v. Illinois High School Ass'n, 263 F. Supp. 3d 705, 714 (N.D. Ill. 2017) (observing that "the 'sufficient facts or data' requirement is a somewhat Gordian one—an expert must take into account all of those facts which are necessary to support [her] findings, not just some of them, and [she] cannot conveniently disregard contrary evidence, but a party cannot disqualify the other side's expert simply by disputing the facts upon which [she] relied" (internal quotation marks and citation omitted)). Assuming there is "a rational connection between the data and the opinion," the "expert's reliance on faulty information is a matter to be explored on cross-examination; **[**32]** it does not go to admissibility." Manpower, 732 F.3d at 809 (citing Walker v. Soo Line R.R. Co., 208 F.3d 581, 589 (7th Cir. 2000)). "Our system relies on cross-examination to alert the jury to the difference between good data and speculation." Schultz v. Akzo Nobel Paints, LLC, 721 F.3d 426, 432 (7th Cir. 2013).

"[T]he law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." Kumho Tire, 526 U.S. at 142; see also Pansier, 576 F.3d at 737; Lewis, 561 F.3d at 704-05. At bottom, the Court's goal is "to assure that experts employ the same 'intellectual rigor' in their courtroom testimony as would be employed by an expert in the relevant field." Jenkins v. Bartlett, 487 F.3d 482, 489 (7th Cir. 2007) (quoting Kumho Tire, 526 U.S. at 152). Its "focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." Daubert, 509 U.S. at 595. Nonetheless, as the Supreme Court has recognized, "conclusions and methodology are not entirely distinct from one another," and while "[t]rained experts commonly extrapolate from existing data[,] ... nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." General Electric, 522 U.S. at 146. "'An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.'" Wendler & Ezra, P.C. v. Am. Int'l Grp., Inc., 521 F.3d 790, 791-92 (7th Cir. 2008) (quoting Mid-State Fertilizer Co. v. Exch. Nat'l Bank, 877 F.2d 1333, 1339 (7th Cir. 1989)). In short, "[i]t is critical under Rule 702 that there be a **[**33]** link between the facts or data the expert has worked with and the conclusion the expert's testimony is intended to support." United States v. Mamah, 332 F.3d 475, 478 (7th Cir. 2003). Where that link is missing, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." General Electric, 522 U.S. at 146.

Finally, the requirement that evidence or testimony assist the trier of fact to understand the evidence or to determine a fact in issue "goes primarily to relevance." Daubert, 509 U.S. at 591. "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, nonhelpful." *Id.* (internal quotation marks and citation omitted); see also Cage v. City of Chicago, 979 F. Supp. 2d 787, 804 (N.D. Ill. 2013).

[*1047] III. Plaintiffs' Antitrust Claims

A. Legal Framework

The primary claims in this case arise under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Before turning to the parties' specific challenges to the experts who address the Sherman Act claims, the Court finds it useful to outline the legal requirements for such claims, the unique way that summary judgment is applied to them, and the interaction and differences between summary judgment and Daubert analyses in the antitrust context.

Section 1 of the Sherman Act "is designed to prevent businesses from entering into collusive agreements." Omnicare, Inc. v. UnitedHealth Group, Inc., 629 F.3d 697, 705 (7th Cir. 2011). It prohibits "[e]very contract, combination ... or conspiracy, **[**34]** in restraint of trade or commerce," 15 U.S.C. § 1, "though courts have long restricted its reach to agreements that unreasonably restrain trade." *Omnicare, 629 F.3d at 705* (citing *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*). "To prevail under *§ 1* under any theory, plaintiffs generally must prove three things: (1) that defendants had a contract, combination, or conspiracy ('an agreement'); (2) that as a result, trade in the relevant market was unreasonably restrained; and (3) that they were injured." *Id.*; see also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993)*.

Allegations concerning the existence of an agreement "'usually take one of two forms: (1) direct allegations of an agreement, like an admission by a defendant that the parties conspired; or (2) more often, circumstantial allegations of an agreement, which are claimed facts that collectively give rise to a plausible inference that an agreement existed.'" *Always Towing & Recovery, Inc. v. City of Milwaukee, 2 F.4th 695, 703 (7th Cir. 2021)* (quoting *Alarm Detection Sys., Inc. v. Village of Schaumburg, 930 F.3d 812, 827 (7th Cir. 2019)*). "The task before any plaintiff is thus to find and produce evidence that reveals coordination or agreement[.]" *Kleen Prods. LLC v. Ga.-Pac. LLC, 910 F.3d 927, 936 (7th Cir. 2018)*. "To show concerted action, antitrust plaintiffs must produce evidence that would allow a jury to infer that the alleged conspirators 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Omnicare, 629 F.3d at 705* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*). Put another way, "the circumstances of the **[**35]** case must reveal 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" *Id.* (quoting *American Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575, (1946)*). "More evidence is required the less plausible the charge of collusive conduct." *In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 661 (7th Cir. 2002)*.

At the summary judgment stage—the next step in this case—the plaintiff's "'offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently.'" *Kleen Products, 910 F.3d at 934* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*); see also *Matsushita, 475 U.S. at 588*; *Miles Distributors, Inc. v. Specialty Constr. Brands, Inc., 476 F.3d 442, 449 (7th Cir. 2007)* ("When a plaintiff attempts to defeat summary judgment by highlighting circumstantial evidence of a conspiracy, some of the evidence must tend to exclude the possibility that the alleged conspirators **[*1048]** acted independently rather than in concert."). "[A]n antitrust plaintiff, like all others, is entitled to try to meet that burden with either direct or circumstantial evidence." *Kleen Products, 910 F.3d at 934*; see also *In re Text Messaging Antitrust Litigation, 630 F.3d 622, 628-29 (7th Cir. 2010)*; *Miles Distributors, 476 F.3d at 449*). Of course, determining whether an unlawful arrangement exists is "much easier if there [is] a smoking gun," such as an admission by an insider, "buried in [the often] voluminous record." *Omnicare, 629 F.3d at 706*; see also *In re Plasma-Derivative Therapies Antitrust Litigation, 764 F. Supp. 2d 991, 998 (N.D. Ill. 2011)*; cf. *High Fructose Corn Syrup Antitrust Litigation, 295 F.3d at 654* ("admission by the defendants that they agreed to fix their prices is all the proof a plaintiff needs"). But more typically, the plaintiff's evidence will be inferential **[**36]** and "of two types—economic evidence suggesting that the defendants were not in fact competing, and noneconomic evidence suggesting that they were not competing because they had agreed not to compete." *Id. at 655*. "While no single piece of information may win the day, the whole may be greater than the sum of its parts in tending to exclude the possibility of conscious parallelism." *Kleen Products, 910 F.3d at 934*.

In contrast to *Section 1* of the *Sherman Act*, *Section 2* "covers both concerted and independent action, but only if that action 'monopolize[s],' or 'threatens actual monopolization,' a category that is narrower than restraint of trade." *American Needle, Inc. v. National Football League, 560 U.S. 183, 190, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* (quoting *15 U.S.C. § 2* and *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*). "'Monopoly power is the power to control prices or exclude competition.'" *Braman v. The CME Group, Inc., 149 F. Supp. 3d 874, 896 (N.D. Ill. 2015)* (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*). "To state a claim for monopolization under *Section 2*, a plaintiff must allege that that defendant engaged in predatory or anticompetitive conduct." *In re Dealer Management Systems Antitrust Litigation, 362 F.Supp.3d 477, 497-98 (N.D. Ill. 2019)* (citing *Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 854 (7th Cir. 2011)*). "Where defendant has engaged in unlawful restraint of trade that would independently violate *Section 1* ... , it is well established that it also violates *Section 2* if it acquires or maintains a monopoly by means of that restraint of trade." Id. at 498 (quoting Gumwood HP Shopping v. Simon Prop. Group, Inc., 2013 U.S. Dist. LEXIS 92133, 2013 WL 3214983, at *7 (N.D. Ind. Mar. 13, 2013)).

To recover under the antitrust laws, a plaintiff "must prove that [its] damages were caused by the *unlawful* acts of the defendant." **[**37]** MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1161 (7th Cir. 1983) (citing 15 U.S.C. § 15; emphasis in MCI); cf. Omnicare, 629 F.3d at 705 ("section 4 of the Clayton Act, 15 U.S.C. § 15, provides a private cause of action for the enforcement of § 1 [of the Sherman Act]"). "This is the essence of 'antitrust injury'"—*i.e.*, "'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' actions unlawful.'" MCI, 708 F.2d at 1161 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)). In other words, "[i]f a plaintiff has suffered financial loss from the *lawful* activities of a competitor, then no damages may be recovered under the antitrust laws." *Id.*

Once causation of damages has been established, "[c]alculating damages presents a separate challenge." In re Sulfuric **[*1049]** Acid Antitrust Litigation, 743 F. Supp. 2d 827, 866 (N.D. Ill. 2010). "'Damages calculations in antitrust cases seek to compare plaintiffs' actual experience in the real world with what the plaintiffs' experience would have been, 'but for' the antitrust violation.'" In re Rail Freight Fuel Surcharge Antitrust Litigation, 292 F. Supp. 3d 14, 56 (D.D.C. 2017) (quoting In re Pool Prods. Distribution Mkt. Antitrust Litigation, 166 F. Supp. 3d 654, 678 (E.D. La. 2016)); see also Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 395 (7th Cir. 1993). "[T]he *amount* of damages may be determined by a just and reasonable estimate as long as the jury verdict is not the product of speculation or guess work." MCI, 708 F.2d at 1161 (emphasis in MCI); see also In re Sulfuric Acid Antitrust Litig., 446 F. Supp. 2d at 924; Fontana Aviation, Inc. v. Beech Aircraft Corp., 432 F.2d 1080, 1087 (7th Cir. 1970) ("Once there is sufficient evidence of the fact of damage to go to the jury, the assessment of the amount is largely a matter of the jury's consideration of all the evidence." (citing Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264, 66 S. Ct. 574, 90 L. Ed. 652 (1946))).

The Supreme Court "has **[**38]** been willing to accept a degree of uncertainty in the calculation of damages" in antitrust cases and, therefore, "strict proof of what damages have been caused by which acts has not been required." MCI, 708 F.2d at 1161 (citing Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544 (1931)). "Not requiring strict disaggregation of damages among the various unlawful acts of the defendant serves to prevent a defendant from profiting from his own wrongdoing and makes sense when damages arise from a series of unlawful acts intertwined with one another." *Id.* (citing Bigelow, 327 U.S. at 264-65); see also J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 565-67, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 745 F.2d 441, 448 (7th Cir. 1984); Sulfuric Acid Antitrust Litigation, 446 F. Supp. 2d at 924. "It is essential, however, that damages reflect only the losses directly attributable to *unlawful* competition." MCI, 708 F.2d at 1161 (emphasis in MCI). Plaintiffs must "prove in a reasonable manner the link between the injury suffered and the *illegal* practices of the defendant." *Id.*

Assessing the reliability of experts' economic testimony in the antitrust context presents some unique challenges, as "[t]he Daubert rules were not developed with either antitrust or economics in mind." Phillip E. Areeda & Herbert Hovenkamp, ***ANTITRUST LAW***: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 309a, at 4 (4th & 5th eds. 2015-2021) ("Areeda & Hovenkamp"). "Daubert itself is based on a fairly traditional concept of the scientific **[**39]** method in which investigation proceeds by the formation of a hypothesis, the development of experiments that 'test' the hypothesis, with the durability of the hypothesis increasing and decreasing as tests are repeated"—a concept that "works well for natural and physical sciences," but "is not particularly well suited to economics." *Id.*; see also *id.* at 2 ("economics' criteria for testability ... sometimes fall short of the criteria stated for other sciences"). Antitrust courts have generally "responded to questionable or novel economic testimony by being fairly reluctant to exclude it under Daubert rules," while at the same time "scrutiniz[ing] admitted testimony carefully and often harshly under summary judgment rules." *Id.*

"The cumulative nature of expert and non-expert testimony generally makes summary judgment rather than Daubert exclusion a much more practical vehicle in **[*1050]** antitrust cases, at least in the majority of circumstances where the basic competency of the expert or her methodology is not in issue." Areeda & Hovenkamp

¶ 309c2, at 16. For instance, when an expert opines on whether certain conduct is indicative of collusion, if the challenged testimony "is left in, then the judge considering **[**40]** a motion for summary judgment can look at *all* parts of the record: the economist's testimony showing that the structural conditions, the incentives, or the conduct make a certain agreement plausible or likely; and the testimony of other witnesses concerning whether such an agreement actually occurred." *Id.* "In this process, the court almost always takes into account doubts about the credibility, relevance, or robustness of what the expert had to say." *Id.* Another topic that may be more appropriately left for summary judgment is disaggregation of damages—for instance, where a defendant challenges a damages expert on the basis that she is unable "to show what portion of [the] plaintiff's loss resulted from unlawful conduct." *Id.* at 17. "Assuming that the economist is using acceptable criteria," in many cases "the correct resolution is not exclusion of the testimony under *Daubert* but rather a summary judgment grant because the expert's testimony has not been able to isolate those elements of the plaintiff's damage that were caused by the antitrust violation." *Id.* With these principles in mind, the Court turns to the parties' *Daubert* challenges concerning expert testimony on the *Sherman Act* claims.

B. Economics Experts

[41] 1. Israel [877] — Authenticom, Autoloop, and MVSC's expert on antitrust collusion, damages**

Defendants move to exclude certain opinions of Dr. Mark Israel. See [889-1] (report). Israel has a Ph.D. in economics from Stanford University. He specializes in the economics of industrial organization. He has taught courses at Stanford and the Kellogg School of Management, Northwestern University, concerning business strategy, industrial organization economics, and econometrics. Since 2006, Israel has worked at Compass Lexecon, an economic consulting firm, where his work has focused on the application of economic theory and econometric methods to competitive analysis of the impact of mergers, antitrust issues including a wide variety of singlefirm and multi-firm conduct, class certification, and damages estimation.

Israel has been retained by Plaintiffs Authenticom, AutoLoop, and MVSC to analyze the economic impact of Defendants' alleged unlawful conduct. More particularly, Israel was asked to: (1) analyze the relevant markets in which the alleged conduct occurred; (2) assess the extent of Defendants' market power in those relevant markets; (3) provide an economic analysis of whether and how Defendants' **[**42]** alleged conduct was jointly profitable for Defendants and harmful to competition in the relevant markets; and (4) quantify the impact of that alleged conduct on competition, competitors, and customers in the relevant markets, including a calculation of the damages suffered by vendors. Israel also responds to certain arguments raised by Defendants' economic experts. His "fundamental conclusion," which he elaborates in a 195-page report [889-1], a 160-page reply report [889-2], and deposition testimony [889-3], is as follows: "CDK's and Reynolds' actions have harmed competitors, competition, and consumers in DIS markets and App markets and have harmed competition and consumers in the DMS market. ... [T]he mechanism of this harm was the joint blocking of independent DIS providers from accessing the CDK and Reynolds DMSs, which effectively monopolized CDK's and Reynolds' respective DIS markets, thus leading to **[*1051]** higher DIS prices and higher DIS costs to App vendors, thereby also harming competition in App markets." [889-1] at 10. Israel estimates damages from overcharges due to DIS price elevation, forced switching to CDK or Reynolds' DIS services, and in total. See *id.* at 129-33.

a. Collusion [43]**

Defendants first challenge Israel's opinions concerning collusion by criticizing what they label his testimony on "openness." Israel takes the position that Defendants' actions are indicative of collusion. He explains that for many years Defendants competed on DMS "openness," which is "the ease with which independent App vendors can access data in the dealer's DMS using any DIS service they choose (subject to dealer approval), and the cost of doing so." [1001] at 9. Before Defendants' alleged collusive agreements, Reynolds was less "open" than CDK, because it more vigorously blocked independent DIS providers. CDK competed for customers on the basis that its dealers were free to use independent DIS providers on its platform, which caused Reynolds to lose sales to CDK. Israel recounts that in July 2013, Reynolds began taking more aggressive action to prevent independent DIS providers from serving Reynolds dealers, which hampered CDK's data integration services on Reynolds' DMSs. In September 2013, CDK abruptly stopped competing with Reynolds on the basis of "openness." Among other things, CDK and Reynolds allegedly agreed to convey a common message on data security. In return, Reynolds **[**44]** allowed CDK access to its platform. Israel explains how, based on the framework to which Defendants agreed in 2013, they reached formal agreements aligning their data access policies by February 2015, "setting the stage for CDK's blocking of independent DIS providers." *Id.* at 10 (citing [889-1] at 98). Israel summarizes Defendants' shared strategic goal of eliminating competition from independent DIS providers and the evidence that they explicitly agreed to cooperate in doing so. See [889-1] at 96-97.

Defendants move to exclude Israel's opinion that CDK and Reynolds agreed to eliminate competition on "openness" on the basis that the opinion is "hopelessly vague" and therefore unreliable and unhelpful to the factfinder. [878] at 7. Defendants maintain that "[b]y refusing to provide any firm sense of what an agreement as to 'openness' entails, Dr. Israel can (and does) count any fact he wants as evidence in support of his theory." *Id.* at 11. Defendants further argue that the vagueness of Israel's opinion makes it impossible to test its accuracy.

The Court is not convinced that Israel's opinions are too vague to be reliable or helpful to a jury. As Plaintiffs emphasize, even informal agreements **[**45]** can violate the *Sherman Act*. "[A] conspiracy" that violates *Section 1 of the Sherman Act* can be found not only from "a meeting of minds" in the sense contract law might require, but also if "the conspirators had a unity of purpose or a common design and understanding." *American Tobacco, 328 U.S. at 810*. "[E]ven a wink and a nod" may reveal coordination or agreement. *Kleen Products, 910 F.3d at 936*. Plaintiffs' and Israel's theory is that the evidence shows that CDK agreed to stop criticizing Reynolds' blocking policies in the DMS market; Reynolds agreed to favor CDK's DIS provider; and the parties agreed to adopt a common marketing message with respect to data security and to cooperate in targeting independent DIS providers. See [889-1] at 92-101. Defendants' own experts also use the term "openness" and have been able to describe and respond to Israel's opinions. To the extent that Defendants question the sufficiency of the basis for Israel's opinion, that can be "explore[d] on cross examination **[*1052]** and argument for the benefit of the trier of fact." *In re Disposable Contact Lens Antitrust Litigation, 329 F.R.D. 336, 372 (M.D. Fla. 2018)*.

Defendants' next argument is that Israel applied no reliable methodology to conclude that, absent a conspiracy, CDK and Reynolds acting unilaterally would not have secured their systems in the same manner in which they allegedly colluded. **[**46]** While Israel theorized that CDK would not have acted unilaterally to reduce "openness" because doing so would have risked losing too many DMS customers, he did not test that theory by evaluating the anticipated losses to CDK from unilateral closure or comparing them to the gains, including unilateral increases in 3PA prices or increased security. Defendants further maintain that Israel's interpretation of documents on this topic is not expert analysis because he did not apply any specialized economic knowledge to his interpretation and is no more competent that then average juror in interpreting the evidence.

The Court agrees with Plaintiffs that this is an insufficient basis to exclude Israel's testimony. The general consensus in the case law is that "economic experts may testify as to 'whether certain conduct is indicative of collusion,' or 'consistent' with a conspiracy." *Rail Freight Fuel Surcharge Antitrust Litigation, 292 F. Supp. 3d at 52* (quoting *In re Processed Egg Products Antitrust Litigation, 81 F. Supp. 3d 412, 420 (E.D. Pa. 2015)*, and *In re Urethane Antitrust Litigation, 2012 U.S. Dist. LEXIS 181506, 2012 WL 6681783, at *3 (D. Kan. Dec. 21, 2012)*); see also *Disposable Contact Lens Antitrust Litigation, 329 F.R.D. at 372-73* (recognizing that courts "regularly admit expert testimony that certain conduct or evidence is 'consistent with a finding that Defendants engaged in a conspiracy to fix prices'" and collecting cases (quoting *In re Delta/Airtrain Baggage Fee Antitrust Litigation, 245 F. Supp. 3d 1343, 1359 (N.D. Ga. 2017)*); *In re Titanium Dioxide Antitrust Litigation, 2013 U.S. Dist. LEXIS 62394, 2013 WL 1855980, at *4 (D. Md. May 1, 2013)* (same). "Such testimony necessarily involves consideration of the defendants' **[**47]** conduct in the case." *Rail Freight Fuel Surcharge Antitrust Litigation, 292 F. Supp. 3d at 52*. For instance, an expert might testify that an alleged arrangement "furthered [Defendants'] collusive interest, but was inconsistent with Defendants pursuing their independent, unilateral self-interest," *id.* as that is "precisely the type of inquiry an economist can be expected to make using his expertise." *Processed Egg Products Antitrust Litigation, 81*

F. Supp. 3d at 424; see also Urethane Antitrust Litigation, 2012 U.S. Dist. LEXIS 181506, 2012 WL 6681783, at *3 (rejecting argument that expert's opinion "that particular events, assuming they occurred, are consistent with a conspiracy" was "not helpful to a jury because it is not based on an economic analysis and thus is not sufficiently scientific or technical as required under Fed. R. Evid. 702," because "structure-conduct-performance analysis by an economist is well-accepted in this field" and it may "be helpful to a jury for an expert to put events into an economic context"). In short, to the extent that an expert, "after reviewing the documentary record, opines as to whether defendants' behavior is consistent with collusion, this is permissible expert opinion." Rail Freight Fuel Surcharge Antitrust Litigation, 292 F. Supp. 3d at 52.

To avoid summary judgment, Plaintiffs will need to come forward with evidence of conspiracy that "tend[s] to rule out the possibility that the defendants were acting independently.'" Kleen Products, 910 F.3d at 934. Plaintiffs are "entitled **[**48]** to try to meet that burden with either direct or circumstantial evidence," or both. *Id.* As courts have found sufficient in other **[*1053]** antitrust cases, Israel's testimony synthesizes the economic and non-economic evidence and opines that it supports the conclusion that Defendants' conduct was not equally consistent with their permissible independent interests as it was with improper activity. See Rail Freight Fuel Surcharge Antitrust Litigation, 292 F. Supp. 3d at 52. Defendants' own experts (Bresnahan and Whinston) performed similar evaluations of the record and offer opinions that the documents do not support a hypothesis of unlawful collusion. Defendants do not identify any case law requiring Israel to use a formal model quantifying the relative gains from unilateral versus conspiratorial conduct; nor do they identify any model that Israel could have, but did not, use instead. The sufficiency of the evidence relied on by Israel will be left to a battle of the experts.

In a related argument, Defendants contend that Israel's conclusion that their behavior was more consistent with conspiratorial rather that unilateral conduct fails to consider obvious alternative explanations. According to Defendants, Israel failed to consider that DMS switching patterns may **[**49]** have changed (*i.e.* Reynolds' loss of customers to CDK decreased from 2013 on) due to: 1) other changes in the competitive landscape, like the rise of Dealertrack and Auto/Mate as substantial DMS competitors; or 2) the possibility that dealers who preferred open system had already left Reynolds, which had been engaging in "blocking" for years by 2013. Defendants also argue that Israel failed to consider other reasons why Defendants agreed to a "wind-down" concerning DMI's access to Reynolds' DMS. Defendants emphasize that the wind-down avoided disruptions to their customers and that Reynolds used wind-downs with other parties, too.

Plaintiffs respond that Israel did not improperly ignore competition from DMS competitors in evaluating switching data. They explain that the fact that dealers continued to leave Reynolds for other DMS providers—which continued to compete on the basis of greater openness—at undiminished rates but not for CDK "reinforces the conclusion that CDK stepped back its efforts to win that business." [1001] at 20. Plaintiffs also point out that Defendants have no hard evidence that dealers that wanted independent DIS services had already switched from Reynolds to CDK **[**50]** before 2013. As to alternative reasons for Defendants' wind-down agreement, Plaintiff respond that the possibility that Reynolds had non-collusive reasons to negotiate a wind-down with CDK does nothing to undermine Dr. Israel's point: doing so also served the objectives Defendants pursued through collusion. As the foregoing discussion indicates, Israel and Defendants both make arguments that provide "a rational connection between the data and the opinion." Manpower, 732 F.3d at 809. Therefore, they are properly addressed through cross-examination, not *Daubert* motions.

b. Damages

In the portion of his analysis measuring the impact of Defendants' alleged collusion on DIS prices, Israel examined DIS prices from January 1, 2013 to the first part of 2019, measuring price for each combination of application, DIS, and DMS on an average revenue per unit basis. Each data point reflects what a vendor pays for DIS, from a given DIS provider servicing dealers using a given DMS, in a given month.

In their *Daubert* motion, Defendants argue that Israel's pricing analysis and damages regression cannot help the jury because they do not model actual RCI prices or pricing conduct. Rather, Israel relies on 3PA and RCI "average monthly recurring **[**51]** DIS prices per rooftop." Defendants contend that this results in a "composition effects" error because, by using average **[*1054]** revenue per unit, Israel shows RCI price increases in situations where prices remained the same but demand for more expensive RCI products increased. Citing *Blue Cross & Blue Shield of Wisconsin v. Marshfield Clinic, 152 F.3d 588, 594 (7th Cir. 1998)*, Defendants assert that "[t]he Seventh Circuit has rejected an expert's pricing analysis based on similar methodological errors." [878] at 24.

In his reply report, Israel explains why, in his opinion, it would be inappropriate to use RCI's listed prices—*i.e.*, "panel data"—rather than data reflecting actual sales, as Reynolds' expert Bresnahan proposed in part of his report. According to Israel, Bresnahan's proposal was "highly unusual," because in Israel's experience, "the goal where possible is always to base prices on actual invoice data, which tell you how many units (here of a given package) are sold." [889-2] at 95. Israel posits that "[t]he reason this is superior can be seen in all of Professor Bresnahan's figures that use the panel data": "Each of these figures are based on unweighted average prices (*i.e.*, per rooftop per month) across packages, meaning that a package that was sold to just a few rooftops **[**52]** for just a few months would count the same as the largest Apps in the analysis." *Id.* at 95-96. Israel also points out that Bresnahan and CDK's damages expert, Murphy, used the same RCI sales data that Israel used when they "turn[ed] to actual regression analysis of the DIS prices." *Id.* at 96. Plaintiffs acknowledge that while a "composition effects" error may hypothetically be possible, Defendants' experts have not shown that using different data would have produced a materially different result.

Defendants' criticisms of Israel's pricing analysis and damages regression concern "how the selection of data inputs affect the merits of the conclusions produced by an accepted methodology," and thus go to the weight rather than the admissibility of Israel's damages opinion. *Manpower, 732 F.3d at 808*. The parties have advanced competing expert opinions concerning the best inputs to use to calculate damages attributable to DIS price increases. At this gatekeeping stage of the case, it would be inappropriate for the Court to "evaluate the quality of an expert's data, inputs, or conclusions." *Batty v. Zimmer, Inc. (In re Zimmer Nexgen Knee Implant Prods. Liab. Litig.), 2015 U.S. Dist. LEXIS 77475, 2015 WL 3669933, at *25 (N.D. Ill. June 12, 2015)*. Defendants' citation to *Marshfield Clinic* does not convince the Court otherwise. In that case, the Seventh Circuit was reviewing the district **[**53]** court's grant of summary judgment, not a ruling on a *Daubert* challenge. The court of appeals held that damages in a market division case against a medical clinic could not be based on an expert report comparing per-patient (rather than per-service) prices that the clinic charged during the period it engaged in market division with prices charged during the same period by medical service providers in different regions. *152 F.3d at 594*. The court reasoned that the calculation failed to correct for other factors that affected the clinic's prices—most notably, the fact that the "record disclose[d]" that "all there is to the higher average price per patient" charged by the clinic was that the clinic had "referred to it patients who are sicker than average and so require longer treatment." *Id.* Here, by contrast, Defendants have not developed a record suggesting that a hypothetical composition effects error has skewed Israel's calculations in any material way.

Defendants' next criticism of Israel's damages analysis is that he did not assume the proper "but-for" world—that is, what Plaintiffs' experience would have been, 'but for' the antitrust violation.'" *Rail Freight Fuel Surcharge Antitrust Litigation, 292 F. Supp. 3d at 56*. In particular, Defendants argue that Israel improperly **[**54]** attributed **[*1055]** all of 3PA's and RCI's price increases after September 2013 to unlawful conduct even though, as he opines in his report, CDK and Reynolds had the unilateral power to raise their prices at least to some extent. Defendants maintain that Israel's model needed to, but did not, account for CDK and Reynolds' lawful ability to raise prices unilaterally and that this failure renders his damages model inadmissible. After all, Defendants contend, "Israel cannot rest his conspiracy opinions on the premise that firms will always maximize profits and simultaneously account for no possibility of unilateral price increases by either CDK or Reynolds over a several year period." [878] at 27.

Plaintiffs respond that because Israel's model "identifies as overcharges the departure from the trends predicted by Defendants' historical pricing behavior—which was oligopolistic, not conspiratorial—facilitated by the conspiratorial exercise of joint market power, the model effectively grants Defendants the estimated expected effects of individual market power." [1001] at 26. In particular, Israel used a "difference-in-differences" (or "DiD") regression econometric model designed to "measure the effect **[**55]** of CDK's and Reynolds' conduct by comparing their DIS prices [to] the prices of a control group, consisting of independent DIS providers, over the same time period." [889-1] at 120-21. Israel also used "time and cross-sectional fixed effects to control for factors that affect DIS prices." *Id.* at 121, n.289. He then "test[ed] whether CDK's and Reynolds' conduct increased DIS prices for 3PA and RCI by more than the increase in prices in the benchmark group during the initial-conspiracy and post-February 2015 periods." *Id.* at 121-22. According to Israel, "[b]y comparing the change in prices charged in the affected group to the changes in prices charged in the benchmark group," he "isolate[d] the effect of the CDK and Reynolds' agreement to block their DMSs from other factors affecting DIS prices over time or across DMS=App combinations." *Id.* at 122. Israel also considered other methods of testing collusion's impact, including one that substituted CDK's and Reynolds' own pre-conduct prices as the relevant baseline and one that used industry control variables. According to Israel, all of the models he used showed the "same fundamental trends: first Reynolds, and then CDK, were able to sustain **[**56]** massive price increases." [1001] at 25. As for Defendants' argument that Israel cannot both assume that firms always act to maximize their profits and fail to account for Defendants' lawful ability to raise prices unilaterally, Plaintiffs respond that this logic just "confirms that, pre-collusion, [Defendants] were exercising what market power they each had, all else equal." *Id.* at 25-26.

Both sides offer seemingly reasonable arguments, supported by testimony from well qualified and respected economists, concerning why their construction of the but-for world is appropriate. (The opinions of CDK's rebuttal expert, Dr. Murphy, are discussed below.) Their competing arguments highlight the extent to which they disagree on the underlying facts, their relevance, and the inferences that should be drawn from them. The experts on both sides have asserted at least some factual basis for their views of the appropriate "but for" world. And both offer a "rational connection between the data and the opinion." *Manpower, 732 F.3d at 809*. *Daubert* does not empower the Court to decide whether either expert "selected the best data set to use." *Id.* This is a question for the factfinder—unless the material facts are undisputed and there **[**57]** is only one reasonable inference to be drawn from them, entitling one party to summary judgment. Cf. *Story Parchment, 282 U.S. at 562* (where the evidence was sufficient to allow "the jury to find that [defendants'] **[*1056]** price cutting and the resulting lower prices were directly attributable to the[ir] unlawful combination," it was error for the lower court to assume that defendants' "acts would have been the same if they had been acting independently of one another, with the same resulting curtailment of prices"). Perhaps the framework of summary judgment will allow the Court to resolve the parties' arguments concerning the appropriate but-for world; perhaps it will not. Regardless, all of the parties' arguments go beyond the proper scope of *Daubert*. See *Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990, 1003 (9th Cir. 1986)* (concluding that "[i]t was for the jury to consider [plaintiff's] arguments about the [differences between the yardstick and the but-for world] on the validity of comparison and to adjust its damage award accordingly"). *In re Prograf Antitrust Litig., 2014 U.S. Dist. LEXIS 180899, 2014 WL 7641156, at *3 (D. Mass. Dec. 23, 2014)* (recognizing that "[c]ourts have been reluctant to determine comparability before trial"); *Cason-Merenda v. Detroit Med. Ctr., No. 06-15601, 2013 U.S. Dist. LEXIS 57077, 2013 WL 1721651, at *12 (E.D. Mich. Apr. 22, 2013)* (concluding that comparability issues were "another 'battle of the experts' that is not appropriate for resolution in the context of a *Rule 702* motion to exclude an expert's **[**58]** testimony").

Defendants also criticize how Israel defined the relevant antitrust market for dealer data integration services. Defining the market involves identifying which firms/products compete most closely with one another. Israel explains that once a market is defined, "the market shares of the identified participants and a measure of concentration (often the Herfindahl-Hirschman Index or "HHI") can be calculated, which can be a helpful piece in assessing the existence and extent of market power." [889-1] at 30. According to Israel, economists generally define relevant antitrust markets using the "hypothetical monopolist test" to identify the competing products that constrain a firm's behavior. This test works as follows: It "starts with a proposed relevant market—a small set of products that are particularly close competitors—and considers whether a hypothetical monopolist over all those products could raise prices without losing so many customers as to make that price increase unprofitable. If a hypothetical monopolist over all of the products in the proposed relevant market would find it profitable to impose a small but significant and nontransitory increase in price ('SSNIP,' **[**59]** often taken to be a five percent increase in price over the competitive level)—because too few customers would turn to other products outside of the proposed market to defeat the price increase by making it unprofitable—then that set of products constitutes a relevant product market. If a hypothetical monopolist would not find it profitable to impose a SSNIP—because too many customers would turn to other products outside of the proposed market—then the proposed relevant market is too narrow, and a broader set of substitute products is considered. The market definition exercise proceeds by adding products until a large enough set of products is included so that a SSNIP by the hypothetical monopolist would be profitable." *Id.* at 31. Applying the hypothetical monopolist test, Israel arrived at one market for the sale of a DMS to franchise car dealers within the United States; two distinct aftermarkets for the sale of DIS—one to vendors serving CDK dealers, and a second to vendors serving Reynolds' dealers; and distinct aftermarkets for the sale of applications (or "apps") to dealers, which are distinguished both by DMS and by functionality.

Defendants maintain that Israel's definition **[**60]** of the DIS market is flawed because it excluded Dynamic Reporting—a DMS reporting tool offered by Reynolds and used by third parties to obtain data from a **[*1057]** DMS. In arguing that Dynamic Reporting should have been included, Defendants rely on testimony from one of their own experts, Stejskal, and on Israel's acknowledgment that vendors such as MVSC have used Dynamic Reporting "to '[e]ffectively' build their own integration." [878] at 30. Defendants also criticize Israel for failing to distinguish between DIS providers that offer "basic extraction," rather than "complex integration." *Id.* In Defendants' view, these are not functional equivalents because, for example, no third-party data extractor (like Authenticom) could reliably provide "real-time" or "write-back" to vendors, especially on the Reynolds DMS. *Id.*

The Court agrees with Plaintiffs that the proper treatment of particular DIS providers is a battle of the experts that should be left to the factfinder, as there is evidence in the record supporting both sides' positions. Israel explains that he excluded Dynamic Reporting from his DIS market definition based on testimony by vendors and Authenticom's CEO that, in his view, make clear **[**61]** that "automated extraction" of data from a DMS "is far superior to tools" like Dynamic Reporting "that rely on manual actions." [1001] at 29. As to the basic/complex distinction, Plaintiffs point out that the evidence is mixed on independent DIS providers' ability to provide real-time and writeback services. Both parties' opinions are based on data, which can be interpreted in different ways. It is up to the factfinder to evaluate the quality and relative persuasiveness of that data. See *Batty v. Zimmer, Inc. (In re Zimmer Nexgen Knee Implant Prods. Liab. Litig.), 2015 U.S. Dist. LEXIS 77475, 2015 WL 3669933, at *25*; *Sumotext Corp. v. Zoove, Inc., 2020 U.S. Dist. LEXIS 17253, 2020 WL 533006, at *11-12 (N.D. Cal. Feb. 3, 2020)* (denying exclusion of expert's market definition as unreliable for "fail[ing] to substantiate his conclusions under the SSNIP test using empirical analysis" where his "opinions ha[d] a foundation in qualitative data such as employee testimony, third-party industry analyses, and media coverage").

Finally, Reynolds seeks to exclude Israel's purported opinion concerning the economic feasibility of Reynolds' RCI pricing proposal to MVSC. However, MVSC does not offer Israel to testify in that manner, see [1001] at 30, making this portion of the *Daubert* motion moot.

2. Williams [881] — Dealer Plaintiffs' expert on antitrust collusion, damages

In motion [881], CDK moves to exclude the opinions of Dr. Michael Williams. **[**62]** See [889-7] (report). Williams has a B.A. degree in economics from the University of California, Santa Barbara, and received his M.A. and Ph.D. degrees in economics from the University of Chicago. He is currently a Director at Competition Economics, LLC, specializing in analyses involving antitrust, industrial organization, and regulation. Williams has published articles in a number of academic journals and provided testimony in numerous federal and state courts and administrative bodies.

The Dealership Plaintiffs retained Williams to analyze whether "well-accepted methodologies" and "common evidence" exist from which a fact-finder could (1) determine that Defendants conspired to restrain competition and (2) quantify damages. [889-7] at 7-8.

a. Collusion

Defendants argue that Williams' opinions concerning whether the evidence is consistent with the existence of a conspiracy should be excluded because he fails to analyze "the question at the heart of the case"—which, according to Defendants, is "whether Plaintiffs can muster evidence that 'tends to exclude the possibility that' CDK and Reynolds 'acted independently' in deciding to secure their respective DMSs." [882] at 16 (quoting *Matsushita, **[*1058]** 475 U.S. at 588*). **[**63]** Defendants contend that Williams did not attempt to determine whether the conduct he observed could be explained by CDK's and Reynolds' independent, non-conspiratorial incentives, particularly enhanced system security; an ability to charge higher DIS prices; and reduced legal/reputational risk from system breaches. *Id.* at 17-18.

The Court is not convinced that this these arguments present grounds for excluding Williams' opinion. As Plaintiffs point out, *Matsushita* sets a summary judgment standard for cases in which an antitrust plaintiff relies solely on circumstantial evidence to prove the existence of a collusive arrangement in violation of *Sherman Act § 1*. The parties dispute whether Defendants rely solely on circumstantial evidence or also have evidence that would qualify as "direct" under relevant precedent. See, e.g., *Tichy v. Hyatt Hotels Corp., 376 F. Supp. 3d 821, 834 (N.D. Ill. 2019)* (explaining that "[d]irect evidence is 'explicit and requires no inferences to establish the proposition or conclusion being asserted'") (quoting *High Fructose Corn Syrup Antitrust Litigation, 295 F.3d at 661*). The Court finds it unnecessary and premature to resolve that dispute in the context of a *Daubert* motion, as the arguments are not developed and the parties cross-reference their summary judgment motions, which remain pending and will be decided in **[**64]** a subsequent opinion. For purposes of *Daubert*, Williams' testimony need not, standing alone, be sufficient to satisfy *Matsushita*. To be admissible, it suffices that the expert's testimony would "assist the trier of fact to understand the evidence or to determine a fact in issue." *Daubert, 509 U.S. at 591* (quoting *Fed. R. Evid. 702(a)*). Thus, an economist may testify about factors supporting a finding of conspiracy, regardless of whether any of those factors (alone or in combination) "tend to exclude" the possibility of independent action sufficient to defeat summary judgment. *Kleen Prods. LLC v. Int'l Paper, 2017 U.S. Dist. LEXIS 83321, 2017 WL 2362567, at *14 (N.D. Ill. May 31, 2017)* ("Whether [expert] has drawn a reasonable conclusion based on his analysis and actually made a prima facie case for conspiracy is a matter to be examined at summary judgment, and whether he has made a persuasive case is a matter left to the jury.").

In any event, Williams' report does consider whether there were independent, non-conspiratorial incentives for Defendants' behavior. But instead of viewing the evidence in the same manner as Defendants, Williams concludes that Defendants engaged in a number of actions contrary to their independent self-interests but-for the existence of a conspiracy. See [889-7] at 65 *et seq.* For instance, Williams opines that Defendants' explanation **[**65]** that their exclusionary conduct and price increases were necessary to protect data security was pretextual. See *id.* at 74-76.

Defendants also move to exclude Williams on the basis that he "is not 'any more competent than the average juror' at the 'interpretation of correspondence and other evidence'" going to the existence of a conspiracy. [882] at 18. The Court rejects this argument for the same reasons explained in relation to Israel. Testimony that an alleged arrangement "furthered [Defendants'] collusive interest, but was inconsistent with Defendants pursuing their independent, unilateral self-interest," *Rail Freight Fuel Surcharge Antitrust Litigation, 292 F. Supp. 3d at 52*, is "precisely the type of inquiry an economist can be expected to make using his expertise." *Processed Egg Products Antitrust Litigation, 81 F. Supp. 3d at 424*.

Defendants also challenge as unreliable Williams' analysis of seven "plus factors" that allegedly tend to exclude the **[*1059]** inference that CDK acted unilaterally. Where, as here, defendants deny a conspiracy on the basis that they were acting independently, "Courts have allowed plaintiffs to proceed by presenting evidence that there is some 'plus factor' which reduces the probability of independent action." *Alexander v. Phoenix Bond & Indem. Co., 149 F. Supp. 2d 989, 1000 (N.D. Ill. 2001)*. As an initial matter, Defendants question the use of this approach at all, emphasizing **[**66]** that "[i]t has been nearly three decades since the Seventh Circuit has used the phrase "plus factors" in an antitrust case." [882] at 18 (citing *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37, 51 (7th Cir. 1992)*). However, the Court finds nothing inherently wrong with using a "plus factors" analysis. It appears to be fairly common in this district to refer to "plus factors" in analyzing *Sherman Act § 1* claims. See, e.g., *Tichy, 376 F. Supp. 3d at 834* ("In considering whether Plaintiff's allegations are sufficient [to support finding of an agreement based on circumstantial evidence], the court asks whether Plaintiff has sufficiently alleged (1) parallel conduct and (2) additional factual circumstances, or 'plus factors,' indicating an agreement."); *Plasma-Derivative Protein Therapies Antitrust Litigation, 764 F. Supp. 2d at 998* ("A court faced with a dispositive motion will examine the evidence as follows. First, the court will look for evidence of interdependence or, put another way, that the defendants have an economic motive to behave in concert. Second, the court looks to all the evidence suggesting agreement, or 'plus factors,' which can be in the form of economic or non-economic evidence."); *In re Broiler Chicken Antitrust Litigation, 290 F. Supp. 3d 772, 797-801 (N.D. Ill. 2017)* (discussing "plus factors" identified by plaintiffs in support of *Sherman Act* claim); *Washington County Health Care Authority, Inc. v. Baxter Int'l Inc., 328 F. Supp. 3d 824, 840-44 (N.D. Ill. 2018)* (same); *In re Local TV Adver. Antitrust Litig., 2020 U.S. Dist. LEXIS 208215, 2020 WL 6557665, at *9-10 (N.D. Ill. Nov. 6, 2020)* (same); *Standard Iron Works v. ArcelorMittal, 639 F. Supp. 2d 877, 896 (N.D. Ill. 2009)* (*Sherman Act § 1* case using term "plus factor").

The Seventh Circuit also continues to analyze **[**67]** "plus factors" that may support an inference of conspiracy, even if it has not recently referred to them as such. See, e.g., *Omnicare, 629 F.3d at 709* ("Information exchange can help support an inference of a price-fixing agreement[.]"); *Kleen Products, 910 F.3d at 936* (a firm's "abrupt change in business practices ... might support an inference of conspiracy"). A plus-factor analysis provides a way to organize circumstantial evidence that, in the plaintiff's view, reduces the probability that defendants were acting independently. Williams does not claim that this is a "rigid framework" that must be applied in a particular way, as Defendants suggest. [1030] at 11; see also [889-7] at 76 & n.242 ("I understand that 'courts emphasize that these plus factors should not be viewed in a vacuum but rather should be considered in their entirety as the backdrop against which the alleged behavior takes place.'" (quoting ABA Section of ***Antitrust Law***, ***ANTITRUST LAW*** DEVELOPMENTS, 7th ed., p. 11 (2012))).

Defendants also challenge the reliability of Williams' opinions concerning the seven plus factors that he identifies. Defendants characterize the opinions, overall, as a "superficial and unreliable analysis" that is "fundamentally unhelpful to a jury." **[**68]** [1030] at 11. Citing *Valspar Corp. v. E.I. Du Pont De Nemours & Co., 152 F. Supp. 3d 234, 244 (D. Del. 2016)*, *aff'd*, *873 F.3d 185, 201 (3d Cir. 2017)*, Defendants claim that "Courts have rejected Dr. Williams's liability opinions in cases where he relied on similarly conclusory statements and 'plus factor' analysis rather than genuine economic **[*1060]** expertise." [1030] at 11. *Valspar*, however, was decided on a summary judgment motion; it did not involve *Daubert* issues or suggest that Williams' "plus factor" analysis was not sufficiently relevant or helpful to satisfy *Rule 702*. Rather, the *Valspar* court concluded based on the full summary judgment record in a price-fixing case that evidence the defendants increased the frequency of their price increase announcements was insufficient to create an inference of conspiracy. *152 F. Supp. 3d at 245-53*. More generally, courts considering "plus-factor" analyses in the context of *Daubert* have allowed such testimony, as "[a]n expert's analysis of plus factors focusing on market conditions and firm behavior finds its roots in the extensive antitrust literature." *Titanium Dioxide Antitrust Litigation, 2013 U.S. Dist. LEXIS 62394, 2013 WL 1855980, at *12* (citing scholarly literature, "including the work of Richard A. Posner, Joseph E. Harrington, and W. Kip Viscusi, as well as the Handbook of Antitrust Economics"); see also, e.g., *Fleischman v. Albany Medical Center, 728 F. Supp. 2d 130, 159-60 (N.D.N.Y. 2010)* (identifying a number of "plus factors" as "relevant to the determination of whether circumstantial **[**69]** evidence points to a conspiracy," including "1) a motive to conspire, which can be evidence that the industry is susceptible to price-fixing; (2) noncompetitive behavior, *i.e.*, evidence that the defendants acted contrary to their economic self interest; and (3) evidence of a traditional conspiracy, such as a high level of inter-firm communications that would suggest that the defendants consciously agreed not to compete").

The Court now turns to the seven specific "plus factors" identified by Williams. Overall, Defendants' criticisms of Williams' report—including whether he characterizes particular emails and other pieces of evidence in the same manner as Defendants, or takes into consideration each and every justification Defendants assert for taking particular actions, see [1030] at 11-12—are ones suited for cross-examination, not reasons to exclude Williams' "plus factor" analysis either in full or in part.

In his first plus-factor, Williams opines based on his price analysis that Defendants' actual DMS and DIS prices exceed but-for prices. Defendants argue that the fact that prices are elevated says nothing about whether Reynolds and CDK actually conspired, because Williams recognizes **[**70]** that each Defendant had unilateral power to increase prices without a conspiracy. Plaintiffs respond that Williams' use of a pre-conspiracy benchmark period controls for the impact of nonconspiratorial supply-and-demand factors, including any unilateral market power that CDK or Reynolds may have had. This is a battle of the experts issue that should be explored in cross-examination. Defendants also criticize Williams for quoting from an article that uses the term "super-plus factor" to refer to such pricing evidence. However, Williams does not himself use the term "super-plus factor" and Plaintiffs express no intention of eliciting the use of this term from their witnesses at trial. To the extent that Defendants are worried about this use of terminology, they are free to raise the issue before trial in a motion *in limine*.

Defendants group Williams' second and third plus factors, which are that Defendants' communications and monitoring of one another reflect actions against their self-interests but-for the existence of a conspiracy, and that these information exchanges occurred at high levels in the structural hierarchy of Defendants' firms. For instance, in September 2013, Defendants **[**71]** allegedly spoke of "'forg[ing] a common perspective' on market messaging regarding data security to 'speak with similar voices to the industry,'" [889-7] at **[*1061]** 68, and in December 2014 strategized to "collaborate" on market messaging promoting that it is a "positive outcome" to wind down "unapproved integration," *id.* at 70.

Without going into all of the specific examples provided by Williams, see [889-7] at 67-71, Defendants contend that their communications "have a clear and obvious legitimate business purpose—namely, the negotiation and execution of the February 2015 agreements," [882] at 20. Defendants also maintain that "simply identifying communications between 'high level executives' of two firms does not support an inference of conspiracy." *Id.* at 22. However, "a high level of inter-firm communications that would suggest that the defendants consciously agreed not to compete" has been recognized as a relevant plus-factor. *Fleischman, 728 F. Supp. 2d at 159-60*; see also *Re/Max Int'l v. Realty One, Inc., 173 F.3d 995, 1009 (6th Cir. 1999)* (one "important factor[] to evaluate" in determining whether circumstantial evidence tends to exclude the possibility of independent conduct is "whether the defendants have exchanged or have had the opportunity to exchange information relative to the **[**72]** alleged conspiracy"); *In re Plywood Antitrust Litigation, 655 F.2d 627, 634 (5th Cir. 1981)* (concluding that defendants' parallel pricing conduct plus numerous items of direct evidence of communication between high-level personnel on pricing policy adequately support the jury's verdict for plaintiffs on *Sherman Act § 1* claim).

Defendants group Williams' fourth and fifth plus factors, which are the Data Exchange (or "Wind Down") Agreement and the Reciprocal Data Integration Agreements. Defendants' criticism boils down to disagreement with Williams' opinion that, absent a conspiracy, the agreements would be contrary to Defendants' independent self-interests and Defendants would have competing in the market for DIS service used to access data on Reynolds' DMS. Defendants also argue that Williams is not qualified to offer opinions about the agreements because at his deposition he did not know specifically what the agreements prohibit or allow. See [882] at 23. Williams appropriately did not opine on the legal effect of the agreements. But as an expert in economics, he is qualified to assess whether the level of cooperation embodied in the agreements was anticompetitive and against Defendants' unilateral self-interests. See *Allen v. Dairy Farmers of America, Inc., 2013 U.S. Dist. LEXIS 182157, 2013 WL 6909953, at *11 (D. Vt. Dec. 31, 2013)* (expert may testify about "economic incentives **[**73]** of the various participants" in the conspiracy based on "the contractual relationships between the participants, Defendants' internal documents," pricing structure, and other evidence).

Williams' sixth plus factor is "actions indicating efforts to enforce" the conspiracy—in particular, Defendants' alleged agreement that all written communications about the Data Exchange Agreement, including to vendors, must follow pre-approved templates and should be limited. See [889-7] at 72-73. Defendants argue that these communications were not "enforcement" activities but rather were necessary to effectuate the wind-down. This is another matter of interpretation that should be explored during cross-examination.

The final plus-factor Williams identifies is that Defendants allegedly offered pretextual explanations for their conduct and price increases. Williams focuses on CDK's announcement in June 2015 that it was launching a "SecurityFirst" initiative. Williams points to evidence that, internally, CDK "acknowledged that the 'objective' of the Secure the DMS initiative was 'to prevent and/or severely inhibit non-approved access to DMS, forcing vendors **[*1062]** into the 3PA or other CDK approved access programs **[**74]** and capture additional revenue opportunities.'" [889-7] at 74. Defendants, citing *Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc., 582 F.2d 1068, 1070 (7th Cir. 1978)*, claim that pretextual statements are not plus-factors. But *Lamb* was decided at summary judgment and merely held that pretextual reasons for the defendants' allegedly collusive conduct—standing alone—would not suffice to prove the existence of a conspiracy. See *id.* ("even if Lamb's could show that Universal's announced business reasons were not legitimate, such showing would not satisfy Lamb's burden of establishing the existence of the conspiracy element essential to its prima facie antitrust case"). Defendants' alleged pretextual reasons for their agreement is just one piece of evidence going to whether Defendants conspired.

Finally, Defendants challenge Williams' opinions that the DMS and DIS markets are "highly concentrated" and that there are "substantial antitrust barriers to entry" in the DMS market. Defendants argue that this analysis is unhelpful to a jury because "structural evidence does not 'tend to exclude the possibility of independent action." [882] at 25 (quoting *Kleen Products, 910 F.3d at 935*). The Court agrees with Plaintiffs that this opinion should not be excluded because it may "help the jury to understand the economic **[**75]** characteristics of the DMS market and why they tend[] to make that market relatively more conducive to the formation and maintenance of a conspiracy even if, standing alone, they do not answer the ultimate question of whether Defendants conspired." [992] at 28 (internal quotation marks and citation omitted).

b. Damages

i. *Illinois Brick*

Williams assumes for purposes of his damages calculation that Defendants' alleged conspiracy caused the Dealership Class both "direct" and "indirect" damages. He calculates both using the same methodology—multiplying an "Overcharge to Vendors" by a "Pass-Through Rate." The "Vendors" in this scenario are DIS providers that (1) purchase certified integration from CDK and RCI through their 3PA and RCI programs, respectively; and (2) sell DIS services to members of the Dealership Class. Williams concludes that direct and indirect damages are exactly the same, slightly over $339 million. See [889-7] at 91, 99. This total is composed of approximately $202 million in "overcharges of fees for Reynolds' RCI Program" and $137 million in "overcharges of fees for CDK's 3PA Program." *Id.* at 99.

Defendants argue that Williams' opinion on "direct" damages must be excluded **[**76]** because it ignores the Court's ruling at the motion to dismiss stage that, under *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, the Dealership Class could not recover their portion of Defendants' alleged overcharges for DIS. In that ruling [507], the Court explained that under *Illinois Brick*, "a federal antitrust plaintiff may not seek damages based on alleged supracompetitive prices passed through by a purchaser earlier in the distribution chain." *Id. at 19*. The Court concluded that Plaintiffs' exclusive dealing claim based on vendor contracts and their *Section 2* monopoly claim were barred by *Illinois Brick*, because those claims sought to "recover alleged supracompetitive prices passed through to vendors" that paid those prices in the DIS market. *Id. at 21*. "Furthermore," the Court held, "to the extent that Plaintiffs seek to bring a horizontal conspiracy claim based on agreements to restrain competition in the DIS market, Plaintiffs' horizontal conspiracy claim fails under *Illinois Brick* and Plaintiffs may not **[*1063]** proceed under that theory." *Id.* That claim would be "derivative of more direct injuries to participants or direct consumers in the DIS market," which the Dealer Plaintiffs "implicitly recognize[d] would be barred by *Illinois Brick." Id.* at 20. However, the Court declined to dismiss the **[**77]** horizontal conspiracy claim to the extent that it was "based on alleged anticompetitive conduct in the DMS market," rather than the DIS market, "as Plaintiffs allege[d] that its DMS lost functionality and is worth less as a result of CDK's agreements with Reynolds." *Id.*

Defendants argue that Williams' direct damages analysis runs afoul of the Court's motion to dismiss ruling and must be excluded because, "where plaintiffs seek 'direct' damages using the same formula employed 'to calculate their "overcharge" damages,' *Illinois Brick* bars their claims 'notwithstanding the fact that the plaintiffs label these damages' as something else." [882] at 8 (quoting *Drug Mart Pharm. Corp. v. Am. Home Prods. Corp., 2002 U.S. Dist. LEXIS 19954, 2002 WL 31528625, at *8 (E.D.N.Y. Aug. 21, 2002)*). The Dealership Plaintiffs respond that *Illinois Brick* does not apply to them because they are direct purchasers of Defendants' DMSs. They contend that it simply does not matter that Williams "referenced passed-on DIS charges" when calculating direct damages. [992] at 11. "By manipulating DMS interfaces to block data integrators," the Dealers maintain, "Defendants caused dealers' injury—including reductions in the value and functionality of their DMSs." *Id.* at 10. The Dealers explain that they care about "the total value of use in their DMS choice" and "consider **[**78]** data integrator fees when choosing among DMSs." *Id.*

The Court finds Defendants' interpretation of *Illinois Brick* more persuasive and therefore grants their *Daubert* motion to the extent that Williams includes in his analysis "supracompetitive prices passed through vendors" to the Dealers as direct damages incurred by the Dealers on their *Sherman Act § 1* conspiracy claim. [507] at 19. This opinion is contrary to *Illinois Brick* and to the Court's motion to dismiss ruling. "Expert opinions that are contrary to law are inadmissible." *Loeffel Steel Prods. v. Delta Brands, Inc., 387 F. Supp. 2d 794, 806 (N.D. Ill. 2005)*; see also *Luxco, Inc. v. Jim Beam Brands Co., 2016 U.S. Dist. LEXIS 119615, 2016 WL 4611385, at *5 (N.D. Ill. Sept. 6, 2016)*; *System Development Integration, LLC v. Computer Sciences Corp., 886 F. Supp. 2d 873 (N.D. Ill. 2012)* (expert testimony on subcontractor's economic loss was inadmissible where it included lost opportunity costs that were not a proper component of damages under Illinois law).

In *Illinois Brick*, the plaintiffs (the State of Illinois and local governmental entities) purchased finished buildings made with "concrete block [priced] $3 million higher by reason of [a] price-fixing conspiracy" between concrete block manufacturers. *431 U.S. at 727*. (The manufacturers sold to masonry contractors, which in turn sold to general contractors, from whom plaintiffs purchased the block in the form of masonry structures. *Id. at 726*.) The Supreme Court held that only the overcharged direct purchaser, and not others in the chain of manufacture or distribution, **[**79]** were entitled to sue for antitrust damages under the *Clayton Act*. See *id. at 728-29*. The Court applied the rule equally to plaintiffs and defendants: defendants could not use a passon theory as a defense to damages, just as plaintiffs could not use a pass-on theory to obtain damages. See *id. at 724-26*. The Court recognized that a "one-sided" rule would "substantially increases the possibility of inconsistent adjudications and therefore of unwarranted multiple liability for the defendant by presuming that one plaintiff (the direct purchaser) is entitled **[*1064]** to full recovery while preventing the defendant from using that presumption against the other plaintiff." *Id. at 730*. The Court was "unwilling to 'open the door to duplicative recoveries.'" *Id. at 731* (quoting *Hawaii v. Standard Oil Co., 405 U.S. 251, 264, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)*).

The Court recognizes that the Dealers, unlike the purchases in *Illinois Brick*, have a direct contractual relationship with Defendants, from whom they purchase DMSs. But the bottom line remains that the Dealers may not recover under federal law for the overcharges that vendors allegedly passed on to them after purchasing services from Defendants' RCI and 3PA programs in the DIS market. If the vendors had not passed on Defendants' alleged RCI/3PA overcharges to the Dealers, then—according to Williams' **[**80]** report, at least—Defendants' alleged conspiracy would have had no measurable impact on the value or functionality of the DMSs that the Dealers purchased from Defendants. Illustrating this point, the overcharges allegedly passed through to the Dealers are the same injury claimed by vendors, including Plaintiffs Authenticom and Autoloop. Their expert, Israel, calculates damages in the same manner as Williams, estimating damages from overcharges due to DIS price elevation. Authorizing the Dealers to pursue the same overcharges as the vendors runs the same risk of duplicate recoveries that concerned the *Illinois Brick* Court. *431 U.S. at 731*. It would also apply in a one-sided manner, allowing both the Dealers and the vendors to pursue overcharges against Defendants but not allowing Defendants to raise vendors' pass-through of overcharges as a defense to their claims.

The Seventh Circuit's analysis in *In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599 (7th Cir. 1997)*, *abrogated on other grounds by* *Rivet v. Regions Bank of La., 522 U.S. 470, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998)*, is instructive. In that case, pharmacies brought suit against drug manufacturers for an alleged price-fixing conspiracy in violation of *§ 1 of the Sherman Act*, based on the manufacturers' practice of giving discounts only to hospitals and other favored classes of customers. The pharmacies purchased **[**81]** the drugs through wholesalers, which alleged passed on overcharges that they incurred "by virtue of the price-fixing conspiracy." *Id. at 606*. The court held that *Illinois Brick* barred the pharmacies from complaining about the manufacturers overcharging wholesalers, even if "every cent" of the overcharge was passed on to the pharmacies. See *id.* The Court noted that it could "imagine the ... case reconfigured in a way" that took it "out of the orbit" of *Illinois Brick*, if the manufacturers' consistent rejection of the pharmacies' request to purchase discounted drugs as "buying groups" constituted "a refusal to enter into direct contractual relations with certain retailers" that could be "successfully challenged as a boycott." *Id.* Then, "the *Illinois Brick* rule, which is a rule concerning overcharges, would fall away" and the "plaintiffs would be permitted to prove up whatever damages they could show had flowed from the boycott, *provided they weren't seeking to recover overcharges*, for that would entail to very incidence analysis that *Illinois Brick* bars." *Id.* (emphasis added). However, that was "precisely what th[e] [pharmacies were] seeking," which the court predicted "may be why the plaintiffs have not cast their case in the boycott mold." *Id.* The **[**82]** Dealers, like the pharmacies, seek through Williams' opinion to recover overcharges that vendors paid for DIS—not damages flowing from any allegedly anticompetitive conduct in the DMS market. This is the same "incidence analysis that **[*1065]** *Illinois Brick* bars." *Id.*; see also *Drug Mart, 2002 U.S. Dist. LEXIS 19954, 2002 WL 31528625, at *7-8* (retail purchasers of prescription drugs from wholesalers were barred by *Illinois Brick* from asserting price discrimination claim against drug manufacturers; although claim was characterized as one for lost profits as result of manufacturers' refusal to sell to them directly; pharmacies were in fact indirect purchasers seeking to recover price overcharges).

The Supreme Court's recent decision in *Apple, Inc. v. Pepper, 139 S. Ct. 1514, 203 L. Ed. 2d 802 (U.S. 2019)*, does not affect this conclusion. In *Apple*, the Court held that "iPhone owners [who] purchase apps directly from the retailer Apple, who is the alleged antitrust violator," and "pay the alleged overcharges directly to Apple," were the "proper plaintiffs" under *Illinois Brick* "to maintain [an] antitrust suit." *Id. at 1521*. The Court rejected Apple's theory that *Illinois Brick* "allows consumers to sue only the party who sets the retail price, whether or not that party sells the good or service directly to the complaining party." *Id.* Unlike the *Apple* plaintiffs, the Dealers do not purchase DIS directly **[**83]** from, or pay alleged overcharges directly to, CDK or Reynolds. While "*Apple* confirms that *Illinois Brick* is a bright-line rule allocating the right to sue to direct purchasers alone," *Marion Healthcare, LLC v. Becton Dickinson & Company, 952 F.3d 832, 840 (7th Cir. 2020)*, the Dealers are direct purchasers of Defendants' DMSs—not DISs. Thus, the arrangement through which the Dealer Plaintiffs participate in the DIS market mirrors Judge Wood's classic explanation of the rule of *Illinois Brick*, quoted with approval by Justice Kavanaugh in *Apple*: "'if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A.'" *Apple, 139 S. Ct. at 1521* (quoting *Loeb Indus. v. Sumitomo Corp., 306 F.3d 469, 481-82 (7th Cir. 2002)*). Here, Defendants are in the "A" position; non-party vendors are in the "B" position; Dealers are in the "C" position. Under *Illinois Brick* and *Apple*, Dealers can sue Defendants and seek to recover damages as direct purchasers of DMS but cannot—at least under federal law—claim damages stemming from an "overcharge" passed "down a chain of distribution." *Apple, 139 S. Ct. at 1525*. While it is true that "CDK may not gerrymander its way *out of this lawsuit* merely because of the damage calculation method," [992] at 11-12 (emphasis added), it is equally true that Dealers cannot gerrymander into their damages claim overcharges that they did not directly pay for services they did not directly purchase, see **[**84]** [1030] at 6-7. The upshot is that the Court grants Defendants' motion to exclude Williams' opinion to the extent that it includes overcharges passed on to the Dealers as an element of damages under the *Sherman Act*. However, the Court expresses no opinion at this time as to whether Williams can offer the same opinion in support of a claim for damages under the antitrust laws of one or more states, as the parties have not adequately briefed that issue. Therefore, the Court grants Defendants' motion to exclude Williams' opinion concerning the direct damages that the Dealers are allegedly owed under the *Sherman Act*.[1]

[*1066] ii. Other damages arguments

Apart from their *Illinois Brick* challenge to Williams' direct damages model, Defendants challenge both his direct and indirect damages models on the basis of reliability. To calculate damages, Williams (like Israel) uses a difference-in-differences regression model. According to the Dealers, the model controls for supply and demand factors, including legal, unilateral conduct on the part of suppliers. The model is intended to estimate the effects of anticompetitive conduct using changes between the benchmark period and the damages period in an outcome variable (in this case, monthly **[**85]** DIS fees) for a treatment group (CDK and Reynolds) and control group (Authenticom and SIS). According to Williams, changes in Authenticom's and SIS's monthly DIS fees between the

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[1] Defendants do not claim that a ruling in their favor on the *Illinois Brick* argument makes a ruling on their other damages arguments unnecessary. The Court assumes that it does not; at a minimum, there are still state-law antitrust claims pending that may proceed on an indirect damages theory. See [507] at 26 ("many states expressly have rejected *Illinois Brick*'s bar on indirect purchaser claims by enacting 'repealer statutes' abrogating the Supreme Court's prohibition on indirect-purchaser actions as articulated in Illinois Brick" (quoting *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litigation, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at *6 (N.D. Ill. June 29, 2015)*).

benchmark and damages periods should provide the counterfactual estimate of how CDK's and Reynolds' monthly DIS fees would have changed but-for the alleged conspiracy.

Defendants argue that the damages model is unreliable for multiple reasons. First, Defendants contend that Williams fails to justify his damages model's "key" assumption—that Defendants' DIS prices moved in "parallel" with an assumed competitive benchmark prior to the start of the alleged conspiracy period in September 2013. Williams made this assumption by "eyeballing" price charts, even though granular price data was available. Defendants assert that this does not satisfy *Daubert*, especially since Williams admits that he failed to consider a significant non-parallel increase in Reynolds' pricing in August 2013, before the alleged conspiracy period began. In response, the Dealers maintain that Williams used the standard, accepted, peer-reviewed method for determining whether prices are parallel in the benchmark period in a DiD regression analysis—a **[**86]** visual examination of the data. They explain that the "common trends assumption can be investigated using data on multiple periods, where a visual examination of the trends between the treatment group and the control group (to test the parallel paths assumption) is used." [992] at 16.

The Dealers provide several examples from the economics literature, but very little analysis. Their first example, an excerpt from an econometrics book, does not discuss the subject; rather, it is about the relationship between clustering (correlation within a group of observations) and a model's statistical precision. See [989-4]. The other examples consist of, as Defendants characterize them, "dense technical papers with no pincites." [1030] at 7, n.2. Pincites, searchable PDFs, and additional analysis from the Dealers all would have been helpful. Nonetheless, these sources do suggest that in a DiD regression analysis, visual examination is used to compare the paths of the test group and control group prior to and after the event/activity being studied. See [989-6] at 7 (study with charts showing DiD estimates for opioid overdose mortality for non-Hispanic white adults in study examining association **[**87]** between U.S. automotive assembly plant closures and opioid overdose mortality); [989-7] at 4, 13 (study using DiD analysis to examine expansion of a mine's demand for local inputs on local living standards and compare households located close to the mine to households farther away; chart shows until 2001 real income followed similar trends in both locations, then diverged and showed a relative increase in areas located closer to the mine); [987-8] at 19-21 (using DiD analysis to study whether trade liberalization may have fostered per capital income convergence among liberalizers relative to the control group of the rest of the world and drawing "overall message" from visual tables that trade liberalization did not generate any significant, systematic **[*1067]** convergence). Regardless, Defendants fail to explain what more they believe is required or how the examination of more granular price data would have affected Williams' analysis. Further, Williams adequately took into consideration Reynolds' "non-parallel" increase in pricing in August 2013, the month before the "beginning" of the alleged conspiracy period in September 2013. Williams points to evidence that CDK and Reynolds "engaged in **[**88]** anticompetitive communications in the period June 2013 through August 2013, and knew the cooperation was in place." [992] at 16 & n.4. To the extent that Williams relied on "faulty information," this is "a matter to be explored on cross-examination, it does not go to admissibility." *Manpower, 732 F.3d at 809*.

Defendants also argue that Williams' damages opinion should be excluded because it does not assume the proper "but-for" world. As they argued in their motion to exclude Israel, Defendants take the position that Williams erred by attributing all of CDK and Reynolds' 3PA and RCI price increases to unlawful conduct even though, in his opinion, CDK and Reynolds "had the power to raise prices to some extent in the but-for world with no unlawful conduct." [992] at 13. Since Williams "necessarily implies that in the absence of conspiracy a rational firm would have exercised its power to raise prices by some amount," he should not have assumed that the entirety of any measured price increase after September 2013 was attributable to the alleged conspiracy. *Id.* Accordingly, Defendants conclude, "his damages model does not attempt to isolate damages attributable to the alleged conspiracy, meaning his opinions cannot **[**89]** assist the jury." *Id.* at 14 (citing *MCI, 708 F.2d at 1162*).

The Dealers respond that Williams' analysis did consider whether Defendants' conduct could be explained by unilateral motivations. His DiD regression analysis controls for the impact of non-conspiratorial supply-and-demand factors, including any unilateral market power that CDK or Reynolds may have had. Williams also analyzed and disagreed with the arguments offered by CDK's experts (Murphy and Whinston) that even in the absence of a conspiracy, CDK would have closed its DMS and raised its 3PA prices. The Court finds this argument inappropriate for resolution on *Daubert* motions, for the same reasons explained above in relation to Israel.

Finally, Defendants argue that Williams's damages model is unreliable because it incorporates damages from alleged exclusive-dealing provisions that the Court dismissed under *Illinois Brick*. According to Defendants, "[a] damages model agnostic to the defendant's liability— which produces the same result whether or not some of the plaintiff's claims fail on the merits— is inherently unreliable and consequently inadmissible." [882] at 15 (citing *Marshfield Clinic, 152 F.3d at 593*). The Dealers respond that "a claim, as opposed to the conduct, may disappear for reasons **[**90]** other than a determination that such an antitrust claim constitutes legal conduct." [992] at 15. "Simply because a claim in a conspiracy has been dismissed at the initial litigation phase does not convert defendants' conduct (in this case, exclusive dealing contracts) into lawful action." *Id.* (citing *Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226, 1243 (7th Cir. 1982)*). The Court declines to exclude Williams on this basis. If Defendants are able to make a convincing showing at summary judgment that the Dealers will be unable "isolate those elements of the plaintiff's damage that were caused by" unlawful conduct, then they may be entitled to judgment in their favor at that time. See Areeda & Hovenkamp ¶ 309c2, at 17. The Court also notes that, even if it accepts **[*1068]** Defendants' argument, there are many state law antitrust claims still pending, *Illinois Brick* does not apply in many states, and it is therefore unclear what relevance Williams' opinion may have despite the dismissal of the federal exclusive dealings claims.

3. Murphy [873] — CDK's expert rebutting Israel and Williams

In motion [873], the Dealer Class and AutoLoop seek to exclude certain opinions of Dr. Kevin Murphy. Murphy holds a doctorate in economics from the University of Chicago and is the George J. Stigler **[**91]** Professor of Economics in the Booth School of Business and the Department of Economics at the University of Chicago, teaching graduate level courses in microeconomics, price theory, empirical labor economics, and the economics of public policy issues. He has authored or co-authored more than 65 articles in a variety of areas in economics and is a Fellow of the Econometric Society and a member of the American Academy of Arts and Sciences. Murphy is also a Senior Consultant at Charles River Associates ("CRA"), a consulting firm that specializes in the application of economics to law and regulatory matters. He has submitted expert reports in numerous cases and testified in various federal courts and before the U.S. Senate and state regulatory agencies.

Murphy was retained by CDK to review damages analyses submitted on behalf of the Dealer Class and the Vendor Class. Murphy does "not specifically address liability" in his report. [875-11] at 8. Instead, he opines on whether Israel and Williams "have demonstrated with proper economic analysis and empirical evidence that the two putative classes suffered antitrust injury and damages." *Id.* He summarizes his opinions as follows, *id.* at 8-9: **[**92]**

- Plaintiffs' experts improperly attribute essentially all the changes in CDK's and Reynolds' prices for integration with their respective DMSs during the claimed damages periods to the alleged conspiracy, because they ignore the unilateral reasons for changes in policies and pricing by these DMS providers.
- Neither Israel nor Williams provides a proper analysis of economic damages because both assume an improper but-for world and consequent pricing that does not reflect how Defendants would have acted independent of any alleged conspiracy.
- CDK had business reasons, unrelated to reducing competition, for securing its DMS against unauthorized access by third-party data integrators that were unrelated to reducing competition. The impact of doing so on prices charged by 3PA program without the challenged agreements is the proper but-for world from which to calculate economic damages, if any, suffered by Plaintiffs due to the challenged 2015 agreements.

- Neither Israel nor Williams offers a damages analysis specific to claimed anticompetitive injury resulting from CDK's unilateral conduct, even though both claim that CDK possessed "unilateral" market power that enabled it to increase prices **[**93]** for its 3PA program by securing its DMS from unauthorized third-party access. Their implicit assumption that CDK could have accomplished the same goals unilaterally and had an incentive to do so means that damages associated with the alleged conspiracy are either zero or substantially smaller than they have estimated, even accepting their methodologies.

[*1069] Murphy also opines that Israel and Williams' empirical quantifications of damages contain numerous flaws that lead to substantial overestimates of damages, as well as that Williams' passthrough analysis is conceptually and empirically flawed.

Plaintiffs argue that Murphy's opinions should be excluded for three primary reasons. First, Plaintiffs argue that Murphy's opinions are prohibited by the Supreme Court's decision in *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544 (1931)*. According to Plaintiffs, Murphy's report "assumes the existence of an unlawful conspiracy that harmed MDL Plaintiffs" and, "[f]rom that starting assumption," opines that "CDK would have engaged in the same conduct — blocking third-party integrators and raising 3PA prices — absent that conspiracy." [875] at 15. Plaintiffs assert that Murphy's argument is "no different from the reasoning *Story Parchment* held 'must be rejected as unsound.'" **[**94]** [875] at 15 (quoting *Story Parchment, 282 U.S. at 562*).

Story Parchment involved an alleged conspiracy between three companies to monopolize trade in vegetable parchment, exclude petitioner from the market, and destroy petitioner's business. The jury returned a verdict in petitioner's favor, which was vacated by the appellate court and remanded to the trial court "with directions to enter judgment for respondents upon the ground that petitioner had not sustained the burden of proving that it had suffered recoverable damages." *282 U.S. at 560*. The Supreme Court "rejected as unsound" the appellate court's assumption that respondents' "acts would have been the same if they had been acting independently of one another, with the same resulting curtailment of prices," which the appellate court used to justify vacating the jury's verdict. *282 U.S. at 562*. The appellate court's assumption was "unsound" because the trial record contained sufficient evidence for the jury to conclude that respondents' conspiracy caused petitioner's antitrust injury. In particular, the record contained "evidence from which the jury reasonably could have found that, in pursuance of the conspiracy, respondents sold their goods below the point of fair profit, and finally below the cost of **[**95]** production; that petitioner had an efficient plant and sales organization, and was producing a quality of paper superior to that produced by either of the three [defendant] companies; and that current prices ... were higher during a period antedating the unlawful combination and price cutting in pursuance of it than afterward." *Id. at 561*. The Supreme Court recognized that "[i]t does not necessarily follow, of course, that these higher prices would have continued except for the conspiracy, but it is fair to say that the natural and probable effect of the combination and price cutting would be to destroy normal prices; and there was evidence of the prices received by petitioner before the cut prices were put into operation, and those received after, showing actual and substantial reductions, and evidence from which the probable amount of the loss could be approximated." *Id.* In sum, "[u]pon a consideration of the evidence," the Court was of the "opinion that it was open to the jury to find that the price cutting and the resulting lower prices were directly attributable to the unlawful combination." *Id.*

As to damages, the Court rejected the appellate court's view "that the verdict of the jury ... **[**96]** was based upon mere speculation and conjecture" "in so far as it included damages for" the "difference between the amounts actually realized by petitioner and what would have been realized by it from sales at reasonable prices except for the unlawful acts of the respondents." *Id. at 562*. While it was "true that there was uncertainty as to the extent **[*1070]** of the damage," "there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount." *Id.* The Court explained that "[t]he rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." *Id.*

Story Parchment does not preclude Murphy's criticism of Israel and Williams' opinions concerning the appropriate "but-for" world. Nor does the line of cases which, according to Plaintiffs, has "uniformly ... held that where an antitrust plaintiff 'can show damages caused by [a defendant's] antitrust violation, the fact that [the defendant] **[**97]** might have caused the same damages by a lawful' means 'is irrelevant.'" [875] at 14 (quoting *Lee-Moore Oil Co. v. Union Oil Co., 599 F.2d 1299, 1302 (4th Cir. 1979)*; *Gelboim v. Bank of Am. Corp., 823 F.3d 759, 777 n.15 (2d Cir. 2016)*). Rather, *Story Parchment* cautions against taking away from the factfinder the determination of how defendants would have acted but-for the alleged conspiracy and what damages are attributable to the conspiracy. Contrary to Plaintiffs' argument otherwise, Murphy does not assume the alleged conspiracy "harmed MDL Plaintiffs," [875] at 15, or concede that Plaintiffs "can show [any] damages," *id.* at 14. He assumes "that the Court finds that [the 2015] agreements are illegal, by which [he] mean[s] that the Court concludes that it was illegal for CDK and Reynolds to coordinate and enter into formal contracts memorializing the obligations and benefits of those agreements." [875-11] at 32. But he disputes that Israel's or Williams' analyses prove that the alleged conspiracy caused Plaintiffs any antitrust injury. See generally *Greater Rockford Energy and Technology Corp. v. Shell Oil Co., 998 F.2d 391, 395 (7th Cir. 1993)* ("In establishing antitrust injury, courts must first delineate the *type* of interests protected by the antitrust laws, and second, must determine whether the violation was the cause-in-fact of the injury: that 'but for' the violation, the injury would not have occurred" (quoting *MCI, 708 F.2d at 1161*). As **[**98]** Defendants put it, "Murphy does not posit a hypothetical world where Plaintiffs' damages might have or could have been caused by lawful action; he simply points out that Plaintiffs' experts' own affirmative opinions"—which according to Murphy "conflate unilateral and conspiracy damages—infer a but-for world that tends to negate any damages on Plaintiffs' conspiracy claim." [991] at 16-17; see also [875-11] at 29 (Murphy explaining that "[a] more reasonable assumption in specifying a but-for world where the assumed coordination with Reynolds did not occur is that CDK would have undertaken the same conduct with substantially the same impact on integration prices as it did in the actual world"). For the same reasons explained above in relation to Israel's opinion, it is up to the factfinder to decide which expert's "but for" world is the more convincing one in consideration of the facts in the record.

Plaintiffs' second argument for excluding Murphy's opinion is that there are multiple "improper, speculative assumptions underlying his but-for world." [875] at 22. As with Defendants' similar criticisms of Plaintiffs' experts, the Court is not convinced that any of the alleged flaws are **[**99]** so serious as to warrant exclusion of Murphy's opinion. For instance, Plaintiffs argue that Murphy failed to engage in economic analysis to show that it would have been in CDK's unilateral interest to engage in the same blocking conduct absent the alleged conspiracy, or to analyze **[*1071]** CDK's profitability. However, according to Defendants, Murphy did not ignore these issues but simply found them insignificant in comparison to the strong financial incentive that CDK had to secure its DMS, which he summarizes in his report and discussed at his deposition. See [991] at 12-13. Plaintiffs have not shown that their experts performed such an analysis, either. Plaintiffs also argue that Murphy ignores the evidence that CDK only decided to "secure" its DMS in July 2014 after extensive discussions with Reynolds, and only 'locked down" its DMS in February 2015 after entering into written contracts with Reynolds. But Murphy does acknowledge the agreements, and concludes that there is nothing in them that "would prevent CDK and Reynolds from competing strongly with each other, or that commits either one to prevent thirdparty DIS providers from accessing its own or the other's DMS." [875-11] at 35. Murphy **[**100]** and Plaintiffs' experts simply take different views on the significance of the written agreements.

Plaintiffs further contend that Murphy had no basis for opining that in the but-for world, CDK would have "secured" its DMS and doubled its 3PA prices in September 2013. But according to Defendants, this mischaracterizes Murphy's opinion on the timing of the hypothetical price increase. To the extent that there is any inconsistency between the timing set out in his report and in his deposition testimony, this is a matter to explore in cross-examination.

The third and final major criticism of Murphy's opinions—which is advanced by the Dealers only—is that his pass-through regression analysis and criticism of Williams' pass-through regression analysis should be excluded because he assumes facts not present in this case. Williams calculated an average pass-through of the alleged 3PA and RCI overcharges based on a sample of pricing data from 13 apps for which vendors included a line item for "DMS fees" (or similar) on their invoices to dealers. Many vendors did not include such line-items, and were not considered by Williams. Williams found a high level of variation in the pass-through rates **[**101]** in the itemized invoices, with some vendors passing on just a small fraction of the alleged overcharge and other "passing on" DMS fees that were substantially larger than the alleged overcharge. Murphy criticized this approach on the basis that dealers care about the overall price for their apps, rather than how the prices are broken down on their invoices, and have an incentive to portray price increases as increases in their underlying input costs. Murphy therefore found it appropriate to calculate an average pass-through rate differently, looking to how overall app prices changed when vendors' DIS costs changed. However, as Plaintiffs point out, this method has its flaws as well, because app prices are affected by demand and cost factors other than data integration fees charged by data integrators to vendors. It is also possible, and Defendants point to at least some evidence in the record supporting this theory, that vendors may have reduced app prices to offset increases in DIS fees passed on to dealers. See [991] at 24. Neither expert's methodology is flawless, but both at minimum offer a "rational connection between the data and the opinion." *Manpower, 732 F.3d at 809*. This topic is also better left **[**102]** to the trier of fact. See generally *Wipf v. Kowalski, 519 F.3d 380, 385 (7th Cir. 2008)* ("Especially in a case of dueling experts, ... it is left to the trier of fact, not the reviewing court, to decide how to weigh the competing expert testimony.").

4. Lawton [879] and Rubinfeld [867] - Authenticom's lost profits damages expert and Defendants' rebuttal expert, respectively

Motions [879] and [867] both seek to exclude expert opinions concerning Authenticom's **[*1072]** lost profits damages; the latter motion also addresses a number of opinions relating to Defendants' counterclaims, which are addressed below. In motion [879], Defendants move to exclude the opinion of Authenticom's damages expert, Catharine Lawton. See [889-4] (Lawton's expert report). In motion [867], Plaintiffs move to exclude the opinion of the defense expert who rebuts Lawton's opinion, Professor Rubinfeld. See [871-1] (Rubinfeld's rebuttal expert report).

Lawton is a Managing Director at Berkeley Research Group, which provides consulting services on a variety of financial and economic issues. She holds a bachelor of science degree in finance and economics. In her report, Lawton assumes that the factfinder will determine liability in Authenticom's favor. She describes in detail **[**103]** the evidence in the record concerning the background of the DMS industry and Defendants' positions within it; Authenticom's financial performance before and during Defendants' alleged anticompetitive conduct; and the link between Defendants' alleged anticompetitive conduct and harm to Authenticom.

Lawton then attempts to quantify Authenticom's damages using a "yardstick" methodology. Her "yardstick" compares Authenticom's volume of sales to dealerships that use CDK and Reynolds DMSs (its "other connections") with its volume of sales to dealerships that use DMSs other than CDK or Reynolds (its "CDK/Reynolds connections"). It presumes, in essence, that but-for Defendants' alleged illegal conduct, Authenticom's sales to the two groups of dealers would have moved in tandem. She explains that this is an appropriate yardstick because: 1) Authenticom sells the same products at the same (or similar) prices to both categories of dealers; 2) both groups of dealers use DIS providers like Authenticom in a similar manner; and 3) there is a correlation between her yardstick and Authenticom's CDK/Reynolds connections from the period prior to the alleged conspiracy. Lawton also considered whether any **[**104]** adjustments to the yardstick should be made to account for market factors that influenced the yardstick but would not have occurred in a but-for world. She adjusted her estimate of damages downward to account for the possibility that the alleged conspiracy caused some dealers to switch away from CDK and Reynolds to other DMSs. She adjusted the yardstick by using Authenticom's historical growth rates rather than its observed growth rates after February 2018 to account for the fact that Defendants' conduct allegedly forced Authenticom to lay off about 60 percent of its staff in February 2018. Finally, Lawton performed several "reasonableness checks" to ensure that her damages estimate aligned with available contemporaneous economic data. She concluded that her estimates were in line with the internal valuations of Authenticom made by CDK and CDK's investment consultant. She concludes based on her yardstick model that Authenticom's damages from the alleged anticompetitive conduct range between $88.9 million and $107.1 million based on damages starting in March 2015.

Rubinfeld is the Robert L. Bridges Professor of Law and Professor of Economics Emeritus at the University of California, **[**105]** Berkeley and Professor of Law at New York University. Among other qualifications, he has served as Deputy Assistant Attorney General in the Antitrust Division at the U.S. Department of Justice from June 1997 through December 1998; authored two textbooks, Microeconomics and Econometric Models and Economic Forecasts (both with Robert Pindyck); and written several academic articles that focus on damages methodology. Rubinfeld was retained by Defendants to review and assess Lawton's damages analysis and, to **[*1073]** the extent necessary, provide where feasible an alternative estimation of damages.

Rubinfeld opines that Lawton's methodology is flawed because she does not clearly articulate a "but-for" world. Rubinfeld contends that as a result of Lawton's commingling of distinct claims of misconduct—(1) an alleged conspiracy between CDK and Reynolds to block hostile integrators; (2) the allegedly unlawful 2015 Agreements themselves; and (3) the allegedly unlawful exclusive dealing provisions in CDK's and Reynolds' contracts with vendors—her model is incapable of disaggregating damages should a jury find some, but not all, of these alleged practices to be unlawful. Rubinfeld further argues that even **[**106]** if a jury concludes that all of these acts are unlawful, Lawton's damages model is flawed because she fails to identify a realistic butfor world that takes into account the alleged economic reality that, absent any collusive behavior, Reynolds and CDK would have had strong unilateral incentives to secure their DMSs. In addition, Rubinfeld identifies a number of alleged conceptual flaws and methodological errors that, he contends, make Lawton's damages estimates unreliable and unsupportable.

Defendants move to exclude Lawton, while Authenticom moves to exclude Rubinfeld. Several of the parties' criticisms are overlapping and therefore the Court considers them together where possible.

Defendants' first argument for excluding Lawton is that the "yardstick" she chose is not reasonably comparable to the impacted market because it includes thousands of connections that were improperly classified as "other connections. More particularly, Defendants maintain that thousands of connections that Lawton classified as "other connections" should have been classified as "CDK/Reynolds connections"; that Lawton included connections to software application vendors that are not DMSs; and that Lawton should **[**107]** not have included connections to its own inventory management application, Carpod, or connections to "independent" dealers. Lawton and Authenticom respond to each of these criticisms in some detail. See [999] at 17-23. Authenticom, in turn, moves to exclude Rubinfeld's criticism of Lawton on the basis that his critiques of the connections that she included in her yardstick "rely on an insufficient factual basis," [871] at 19, as demonstrated by Rubinfeld's alleged inability to adequately explain his criticisms when he was deposed, see *id.* at 20-22. The Court does not find it useful to go into the details of these arguments because the parties' criticisms all are "really about the correctness of [the experts'] conclusions, not the reliability of [their] methodology." *In re Fluidmaster, Inc., Water Connector Components Prods. Liab. Litig., 2017 U.S. Dist. LEXIS 48792, 2017 WL 1196990, at *22 (N.D. Ill. Mar. 31, 2017)*. As both sides acknowledge, the yardstick approach is a well-established methodology; the parties therefore "cannot complain that the methodology itself is unreliable." Areeda & Hovenkamp, ¶ 399b, at 2. Rather, their criticisms concern "how the selection of data inputs affect the merits of the conclusions produced by an accepted methodology," and therefore are properly handled through cross-examination and "left to the jury" for ultimately resolution. **[**108]** *Manpower, 732 F.3d at 808*; see also *Batty v. Zimmer, Inc. (In re Zimmer Nexgen Knee Implant Prods. Liab. Litig.), 2015 U.S. Dist. LEXIS 77475, 2015 WL 3669933, at *25* ("*Rule 702* does not permit 'the district court to choose between * * * two [competing] studies at the gatekeeping stage' or evaluate the quality of an expert's data, inputs, or conclusions."). As Rubinfeld's alleged correction of Lawton's inputs demonstrates, these are not issues that bear on the reliability of Lawton's methodology or the sufficiency of the available facts or data.

[*1074] Defendants' next argument is that Lawton's "yardstick" was inflated by the alleged anticompetitive conduct because, according to Authenticom's theory of the case, "competition for DMS polling connections has decreased as a result of Defendants' alleged conduct" by forcing other competitors out of business. [880] at 22. Defendants claim that "[c]ourts frequently exclude damages models ... where a but-for-world assumes little competition in a 'supposedly much more attractive environment.'" *Id.* (quoting *Southern Pac. Communications Co. v. American Tel. & Tel. Co., 556 F. Supp. 825, 1077-78 (D.D.C. 1982)*). Assuming this is correct, Defendants have not pointed to concrete evidence that competition to Authenticom for "other connections" has, in fact, decreased substantially since the beginning of the alleged conspiracy. Defendants do not concede this and according to Lawton's report, while a number of DIS **[**109]** providers have exited the market, several others continue to offer DIS today—especially to customers that do not depend on CDK and Reynolds DMSs. Defendants and Rubinfeld also do not suggest what adjustments should have been, but were not, made to Lawton's yardstick. More fundamentally, "[a]rguments about what factors an expert should have controlled for in conducting a yardstick analysis generally go to the weight, rather than the admissibility, of the expert's testimony." *Tawfilis v. Allergan, Inc., 2017 U.S. Dist. LEXIS 122974, 2017 WL 3084275, at *6 (C.D. Cal. June 26, 2017)*; see also *In re Prograf Antitrust Litig., 2014 U.S. Dist. LEXIS 180899, 2014 WL 7641156, at *3* ("Courts have been reluctant to determine comparability before trial." (collecting cases)).

Defendants also make several arguments concerning Lawton's alleged failure to account for the impact that Defendants' lawful, independent actions had on Authenticom's ability to compete in the DIS market. Defendants contend that Lawton failed to adjust her yardstick to take into account certain blocking activities that Reynolds engaged in prior to the start of the alleged conspiracy in September 2013. Relatedly, Defendants argue that Lawton's opinions must be excluded because her damages model fails to isolate damages caused by alleged illegal conduct. According to Defendants, "Lawton concedes that she has included **[**110]** damages in her calculation (which she cannot disaggregate) that were caused by actions Defendants took unilaterally and lawfully before the conspiracy and that they would have continued to take regardless of the conspiracy." [880] at 25. Authenticom disputes, however, whether Reynolds' blocking activities would have continued after September 2013 in the absence of a conspiracy. According to Authenticom, the costs that Reynolds' unilateral blocking efforts from June to August 2013 imposed on Reynolds were among the reasons that Reynolds sought to conspire with CDK. That is, competition from CDK constrained Reynolds' efforts to close its DMS; the conspiracy allegedly eliminated this competitive constraint. On the flip side, Authenticom argues that Rubinfeld should be excluded because at his deposition he "conceded basic facts showing that the conduct of Defendants prior to the conspiracy differed significantly from their conduct after they conspired—and admitted that he had done nothing to account for them." [871] at 17.

As the Court determined above with regard to Israel, the parties' competing arguments on what the "but for" world should look like go beyond the scope of *Daubert*. As Rubinfeld **[**111]** put it at his deposition, "any business decision has pluses and minuses," [871] at 17—leaving ample room for disagreement concerning what actions Defendants could or would have undertaken independently "but for" the alleged conspiracy. These arguments may be explored during cross-examination (assuming neither side is able to convince the court that it is entitled to summary judgment).

[*1075] Defendants' next criticism of Lawton is that she allegedly manipulated Authenticom's profit margins to increase damages. In particular, Defendants contend that Lawton inappropriately categorized Authenticom's development costs as "fixed" rather than "variable." Lawton explains that she classified development costs as she did after speaking with Authenticom's controller, who told her that development costs related to the development of Authenticom products such as DealerVault and did not vary with incremental volume. Defendants also criticize Lawton for cherry-picking the profit margin her analysis assumed based solely on what would produce a higher damages figure. However, Lawton explains why the margin she projected was equal to whichever of two figures was higher—the weighted average of the variable **[**112]** margin for the prior 12 months, or the margins Authenticom actually achieved. Lawton reasons that, "if Authenticom was able to increase its margins despite the negative impacts of the Defendants' alleged anticompetitive conduct on its margins, then those actual margins represent the best estimate of the but-for margins rather than the pre-damages period margins." [999] at 29. Both of Defendants' criticisms raise "battle of the experts" issues that should be resolved through cross-examination, not *Daubert* motions.

Finally, Defendants argue that "three hundred pages of 'factual' advocacy" in Lawton's opinion should be excluded" because they constitute an "improper advocacy-inspired interpretation of evidence." [880] at 29. Defendants do not point to any particular portions of the report that they find to be objectionable. The Court will not exclude any portion of Lawton's report on this ground as it was appropriate—and indeed necessary—for Lawton to disclose the factual basis for her opinions. *Lapsley v. Xtek, Inc., 689 F.3d 802, 810 (7th Cir. 2012)* ("of course, an expert who plans to testify to an opinion must make the basis of that opinion available for evaluation by the court and opposing parties"); *Fed. R. Civ. P. 26(a)(2)(B)(iii)* (requiring expert report to include "the facts **[**113]** or data considered by the witness" in forming her opinions).

The Court now turns to Authenticom's remaining grounds for excluding Rubinfeld's opinions rebutting Lawton. As alluded to above, Authenticom criticizes Rubinfeld for being unable to recall the details of all his opinions during his deposition, which Authenticom suggests is due to Rubinfeld's overreliance on his staff. The Court does not find these sufficient reasons to exclude his opinions. Defendants point out that "Rubinfeld was transparent about his process, pursuant to which he wrote much of the first draft of his reports," supervised his staff, and "thoroughly reviewed portions drafted by his assistants." [994] at 14; see also *Dura Automotive Systems of Indiana, Inc. v. CTS*

Corp., 285 F.3d 609, 612 (7th Cir. 2002) ("An expert witness is permitted to use assistants in formulating his expert opinion, and normally they need not themselves testify."); *Zollicoffer v. Gold Standard Baking, Inc., 335 F.R.D. 126, 149 (N.D. Ill. 2020)* ("Experts can rely on assistants to formulate an opinion, and can rely on an assistant's work within a certain discipline without being an expert in that discipline themselves[.]" (internal citations omitted)). There is no suggestion that Rubinfeld's assistants "exercise[d] professional judgment that is beyond [his] ken." *Dura Automotive, 285 F.3d at 613*. To the extent that Rubinfeld is unable **[**114]** recall particular details of his opinions, or needs to reference his reports before answering, this might hurt the effectiveness of his testimony at trial but is not a sufficient reason to exclude him under *Daubert*.

[*1076] Authenticom also seeks to exclude Rubinfeld's criticism of Lawton's treatment of connections associated with two dealer groups, Lithia and Group 1, on the basis that he failed to disclose this opinion in his rebuttal report, even though at that time he had the data necessary to do so. Authenticom asserts that this testimony should be barred as untimely under *Federal Rules of Civil Procedure 26* and *37*. In response, Defendants represent that Rubinfeld's criticisms were included in his report, in which he showed that the Lithia and Group 1 connections should be categorized as "Non-'Franchise New Car DMSs'" (which should be included in Lawton's yardstick) rather than "Franchise New Car DMSs" (which should not be included). [994] at 21. Even if Rubinfeld had not disclosed this criticism in his report, the Court would not be inclined to exclude it, but rather would provide Authenticom with an opportunity to supplement Lawton's report. To the extent that Authenticom believes that supplementation is necessary, it is free **[**115]** to file an appropriate motion requesting leave to supplement.

For these reasons, the Court denies Defendants' motion to exclude Lawton's opinions [879] and also denies Plaintiff's motion to exclude the opinions of Rubinfeld that rebut Lawton [867]. To the extent that motion [867] addresses other topics and/or rebuts other experts, those issues are considered in the appropriate sections below.

5. Klein [863] - MVSC's expert on lost profits

In motion [863], Reynolds seeks to exclude the testimony of Plaintiff MVSC's damages expert, Gordon Klein ("Klein"). Klein is a certified public accountant ("CPA") and an attorney. He has been a faculty member of UCLA's Anderson School of Management since 1981, teaching a variety of courses, and was a faculty member of UCLA's school of law from 1987 to 2000. He has authored several books on managerial accounting, cost accounting, introductory accounting, and managerial finance. He has served as an expert witness in numerous cases concerning the measurement of lost profits; the measurement of variable, fixed, incremental and non-incremental costs; enterprise valuation, damages, and unjust enrichment. He also has experience as a derivatives trader and **[**116]** consultant in analyzing the business models, financial performance, and valuation of publicly traded and privately held companies and as an advisor to closely held businesses and entrepreneurs.

As recounted in the background section above, MVSC provides EVR (electronic vehicle titling and registration) software to auto dealers. CDK and Reynolds also provide EVR software to dealers through CVR—a joint venture that is 80% owned by CDK and 20% owned by Reynolds. MVSC alleges that CDK and Reynolds blocked MVSC's integration with their DMSs to prevent MVSC from expanding its business in four states: California, Illinois, Virginia, and Wisconsin. More particularly, MVSC alleges that Defendants (1) blocked its membership in CDK and Reynolds' respective third-party access programs; (2) blocked its automated access to data through third-party integrators such as Authenticom; and (3) marketed CVR's status as the EVR provider with "certified" integration to the CDK and Reynolds DMSs through third-party access programs (whereas MVSC was not "certified"). MVSC refers to this generally as Reynolds' and CDK's "interference."

According to MVSC, without DMS integration, its EVR services were slower, **[**117]** required manual entry of data or another workaround, and inhibited MVSC's ability to offer "real-time" registration and titling services, which allow consumers to receive their registration and license plates at the **[*1077]** time of sale. The absence of automated real-time data access allegedly put MVSC at a competitive disadvantage, particularly in states such as Illinois and Virginia that require EVR transactions to be completed at the point of sale. While MVSC has developed certain manual "workarounds," it remains at a competitive disadvantage because the workarounds require dealership employees to expend time and effort in performing manual tasks and learning workaround procedures. Manual workarounds also increase the risk of errors and developing them imposes substantial financial costs of MVSC. MVSC and CDK reached a settlement in October 2019. Since that time, MVSC has had access to CKD's DMS as an approved partner in the 3PA program.

MVSC retained Klein to determine the damages that MVSC has allegedly sustained due to Defendants' interference. See [865-7] at 6 (Klein's report). Klein opines that, as a result of the interference, MVSC has sustained lost profits in four geographic markets: **[**118]** the states of California, Illinois and Virginia (where MVSC currently does business) and Wisconsin (where MVSC has taken steps to enter the EVR market, but has not been authorized to provide service). Klein asserts that his focus on four states only is conservative because, absent Defendants' interference, "it is quite likely that MVSC would have entered additional states, not just Wisconsin." *Id.* at 7.

MVSC began competing in California in 2008 and currently processes approximately 60% of all new vehicle dealership EVR transactions in that state. MVSC began efforts to enter the Illinois market in 2013 and in 2015 was formally authorized by the state of Illinois to "develop an EVR solution." [865-7] at 12. In Virginia, MVSC became an approved EVR vendor in 2014. MVSC has taken steps to enter the Wisconsin EVR market since 2014, but as yet has not been approved by the state to offer EVR services. Klein identifies two primary reasons for attributing this failure to Defendants' interference: First, the interference allegedly has diverted financial and management resources away from expansion efforts toward the costly and time-consuming projects of responding to the interference and developing **[**119]** workarounds to gain access to data. Second, Klein infers that the interference has reduced state regulatory agencies' confidence in MVSC's ability to provide services to the market.

Klein estimates that, but for Defendants' interference, MVSC would have obtained between 60% and 70% of the market share in each of the four states. Klein also considered the possibility that MVSC's damages were attributable to factors unrelated to Defendants' interference (including inadequacy of MVSC's products or services, regulatory barriers in Wisconsin, inability to roll out a product quickly enough, and lack of current availability beyond a few states) and concluded that these factors were insignificant. Based "principally on [his] analysis of MVSC's rapid growth in California prior to the onset of the [i]nterference and based on MVSC's success in Oregon, a state in which MVSC was not impeded by" interference, Klein concludes that interference "has been, at the very least, a substantial factor in causing MVSC's damages." [865-7] at 7. Taking into account incremental costs saved, Klein calculated lost profits as the difference between (a) profits that would have been earned in the absence of interference; **[**120]** and (b) actual profits earned.

Reynolds seeks to exclude Klein's testimony on several grounds. First, Reynolds argues that Klein "fails to disaggregate harm to MVSC caused by an alleged unlawful conspiracy between Reynolds, CDK and CVR from harm caused by each defendant's unilateral conduct which would **[*1078]** still exist in the but-for world." [865] at 13. However, in its opening brief, Reynolds does not identify any particular lawful "unilateral conduct" that it believes caused MVSC's damages. In its reply, Reynolds asserts that Klein "fails to take into account, for example, state budget constraints that impact MVSC's prospects of being approved to provide EVR services; the nature of EVR competition in a particular state; and the price and quality of MVSC's EVR services in a particular state." [1039] at 7. Generally, arguments raised for the first time in a reply brief are waived, due to the lack of opportunity for the other side to respond. See *O'Neal v. Reilly, 961 F.3d 973, 974 (7th Cir. 2020)* ("[W]e have repeatedly recognized that district courts are entitled to treat an argument raised for the first time in a reply brief as waived."); *Narducci v. Moore, 572 F.3d 313, 324 (7th Cir. 2009)* ("[T]he district court is entitled to find that an argument raised for the first time in a reply brief **[**121]** is forfeited."). Regardless, Reynolds does not identify anything in the record suggesting that the factors it mentions in passing do, in fact, contribute to MVSC's alleged lack of ability to compete in the four identified markets. Reynolds' cursory reference to other market forces that may be at place is not enough to convince the Court that exclusion under *Daubert* is required. Cf. *Mitsui Sumitomo Ins. Co. v. Moore Transp., Inc., 500 F. Supp. 2d 942, 950-51 (N.D. Ill. 2007)* (perfunctory, undeveloped, and skeletal arguments are waived).

Neither of two main cases on which Reynolds' argument relies, *MCI, 708 F.2d 1081*, or *Marshfield Clinic, 152 F.3d 588*, was decided in the context of a *Daubert* motion. In *MCI*, the court of appeals reversed, in part, a jury verdict in the plaintiff's favor in an antitrust action brought under *§ 4 of the Clayton Act*. In that case, the complaint contained twenty-two counts. The district court granted summary judgment for the defendant on seven counts, the jury found for the defendant on five of the remaining fifteen, and the court of appeals set aside the jury's verdict in the plaintiff's favor on several others. The plaintiff's damages study, however, assumed that all twenty-two of the defendant's charged acts were illegal, and its lost profits study did "not establish any variation in the outcome depending on which acts of **[**122]** [the defendant] were held to be legal and which illegal." *Id. at 1163*. This left the jury "with no way to adjust the amount of damages to reflect lawful competition," *id.*, and required the case to be "remanded for a proper determination of damages," *id. at 1160*. Here, there has been no determination that any of the conduct on which Klein's damages analysis relies is "lawful." While *MCI* suggests reasons why Defendants could potentially be entitled to summary judgment or a directed verdict—or even that additional work might needed to make "a proper determination of damages"—it does not warrant excluding Klein on the basis of failure to comply with *Daubert*.

In *Marshfield Clinic*, a jury found in the plaintiff's favor in an antitrust case arising out of allegations that the defendant, the dominant provider of medical services in part of Wisconsin, illegally monopolized the provision of certain medical services in its region, enabling it to increase its prices for those services above competitive levels to the detriment of the insurer plaintiff. The appellate court threw out the jury's verdict on all but one claim, for division of markets, and remanded for a new trial limited to damages on that claims. Following remand and additional discovery, **[**123]** the district court granted summary judgment to the defendant on the basis that the plaintiff had produced no evidence that it suffered any injury as a result of the sole remaining claim. See *Marshfield Clinic, 152 F.3d at 590-91*. In affirming the district **[*1079]** court's judgment, the appellate court reviewed multiple reports by the plaintiff's two economic experts, as well as "some nonexpert evidence of damages," and also found that the plaintiff "waived the right to seek damages on the basis of its opponent's expert reports"—which showed that the plaintiff suffered some damages, but much less than the plaintiff's experts calculated. *Id. at 593-95*. Writing for the panel, Judge Posner characterized plaintiffs' two experts reports as "worthless" because they "fail[ed] to correct for salient factors, not attributable to the defendant's misconduct, that may have caused the harm of which the plaintiff is complaining do not provide a rational basis for a judgment." *Id. at 593*. Significantly, "[a]s far as the record disclose[d]," the defendant charged a "higher average price per patient" than other Wisconsin providers of medical services due to "differences in the treatment mix," rather than the defendant's unlawful division of markets. *Id. at 593-94*. In this case, by **[**124]** contrast, Defendants' *Daubert* briefing does not identify, let alone provide a comprehensive assessment of the full record concerning, any lawful causes of MVSC's alleged damages. It would be premature to exclude Klein without having a fuller picture of the EVR market and the panoply of relevant evidence.

In a related argument, Reynolds contends that Klein "applied no expert methodology at all" to opine that Defendants' alleged interference was the primary factor that caused MVSC's harm. [865] at 16. Of course, an expert may not rely solely on his *ipse dixit*; however, that is not what Klein has done, even if there is room for debate about whether he considered all potential causes of MVSC's antitrust injury or gave them their appropriate weight. Reynolds' criticisms suggest that Klein's assumptions are "vulnerable," but not so speculative or lacking in basis as to be inadmissible. *Stollings, 725 F.3d at 768*. To the extent that Reynolds believes that Klein "makes unfounded or incorrect assumptions, [it] remains free to address those deficiencies through vigorous cross-examination." *Africano v. Atrium Med. Corp., 561 F. Supp. 3d 772, 2021 U.S. Dist. LEXIS 178575, 2021 WL 4264237, at *4 (N.D. Ill. Sept. 20, 2021)*.

For the California part of his analysis, Klein analyzed MVSC's growth rate "before and after" the interference, which is a "generally accepted **[**125]** method[] for proving antitrust damages." *Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 793 (6th Cir. 2002)* (citing *Eleven Line, Inc. v. N. Texas State Soccer Ass'n, Inc., 213 F.3d 198, 207 (5th Cir. 2000)*). He also relied on direct record evidence that California dealers had declined to purchase MVSC's services because of interference. Reynolds criticizes this part of his analysis, on the basis that Klein relies on account information provided by MVSC's COO, Joe Nemelka, concerning why certain dealers declined to do business with MVSC. Nemelka provided a sworn declaration explaining that certain dealers had cited MVSC's lack of "certified" access to data or automated access as a primary or significant reason for leaving MVSC or deciding not to use MVSC. Klein also reviewed other records, such as emails, that were consistent with Nemelka's declaration. Despite Reynolds' claim that this was improper, an expert does not run afoul of *Daubert* by relying on representations provided by a client. "[I]t is proper for counsel to furnish factual assumptions to experts as long as the factual assumptions are supported by the record." *Artunduaga v. Univ. of Chi. Med. Ctr., 2016 U.S. Dist. LEXIS 176402, 2016 WL 7384432, at *5 (N.D. Ill. Dec. 21, 2016)*; see also *Williams v. Illinois, 567 U.S. 50, 69, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012)* ("Modern rules of evidence continue to permit experts to express opinions based on facts about which they lack personal knowledge[.]"); *Tuf Racing Products, Inc. v.* **[*1080]** *American Suzuki Motor Corp., 223 F.3d 585, 591 (7th Cir. 2000)* (CPA could calculate discounted present value of client's lost future earnings **[**126]** using financial information furnished by client and assumptions given to him by counsel). That Reynolds may be able to point to some contrary evidence does not change the Court's conclusion, as "[e]xperts routinely base their opinions on assumptions that are necessarily at odds with their adversary's view of the evidence." *Richman v. Sheahan, 415 F.Supp.2d 929, 942 (N.D. Ill. 2006)*. To the extent that Klein allegedly "reli[ed] on faulty information," this is "a matter to be explored on cross-examination; it does not go to admissibility." *Manpower, 732 F.3d at 809*.

As to all four states, Klein's conclusion that interference was a substantial factor in causing MVSC's damages relied in part on MVSC's rapid growth in California prior to the onset of the interference and MVSC's success in Oregon—a state in which MVSC was not impeded by interference. [865-7] at 7. Klein also explained why he rejected other potential causal factors based on his experience in business plan development and related areas. First, he considered that MVSC may have offered an inferior product but discounted that possibility due to evidence of dealers' satisfaction with MVSC's product and MVSC's track record of success in other states. Second, Klein explained that MVSC's damages could not be attributed **[**127]** to the length of time taken to develop manual workarounds because that development was resource-intensive, still left MVSC with a subpar method for accessing data on the DMS, and in any case, was only necessary because of the interference. Third, he rejected the possibility that MVSC's low market share in some states could be attributed to its lack of national scale because MVSC was able to obtain 60 percent market share in California without national scale. There is "a link between the facts [and] data" Klein has "worked with and the conclusions [his] testimony is intended to support," which satisfies *Daubert*. *Mamah, 332 F.3d at 478*. "Our system relies on cross-examination to alert the jury to the difference between good data and speculation." *Schultz, 721 F.3d at 432*.

Finally, the Court considers whether Klein adequately considered other potential causes of MVSC's failure to obtain any market share in Wisconsin. In his report, Klein reasoned that MVSC's delayed entry into Wisconsin could not be attributed to regulatory barriers unrelated to the conspiracy both because MVSC had been able to receive approval from other state regulators and because the difficulty that MVSC has had in receiving regulatory approval in Wisconsin is **[**128]** due in substantial part to MVSC's lack of automated or certified data integration to Defendants' DMS. At his deposition, Klein was confronted with correspondence from the Wisconsin Department of Transportation, dated February 2017, indicating that MVSC's application had been rejected because it was not accepting any new vendors into its EVR program. MVSC had not provided this correspondence to Klein (or Reynolds) and Klein did not consider it in his report. See [865] at 22-23 & n.11; [865-2] at 38-41. "Ignoring relevant data is not a scientifically valid method." *Kljajic v. Whirlpool Corp., 2017 U.S. Dist. LEXIS 70784, 2017 WL 1862640, at *15 (N.D. Ill. May 9, 2017)*. However, the Court cannot say that is what Klein has done here, even though it is a close call. As Klein pointed out during his deposition, the February 2017 letter does not state that Wisconsin was closed to other EVR providers at all times relevant to Klein's analysis and is only part of the record concerning this topic. Klein also considered evidence in the record indicating that Wisconsin was "very interested" in MVSC's 2014 application to be an EVR provider, and considered but rejected that application. [1009] at 24-25; **[*1081]** see also [1009-7] at 3; [866-12]. MVSC maintains that it will prove at trial that "the rejection **[**129]** was due in substantial part to the interference as demonstrated by CVR using the fruits of that interference—MVSC's lack of integration—in presentations to Wisconsin regulators." [1009] at 25. Reynolds offers its own experts, Rubinfeld and Bresnahan, to criticize Klein's opinion. The Court finds it appropriate to leave the resolution of the competing experts' testimony to the factfinder. See *Wipf, 519 F.3d at 385* ("Especially in a case of dueling experts, ... it is left to the trier of fact, not the reviewing court, to decide how to weigh the competing expert testimony.").

C. Other Experts

1. Stejskal [883] — Authenticom, Autoloop, MVSC, and the Dealers' expert on DMS switching costs and third-party data integrator security

In motion [883], CDK and Reynolds seek to exclude certain opinions of Allan Stejskal ("Stejskal"), who was retained by Authenticom, MVSC, the Vendor Class, and the Dealership Class ("Plaintiffs") to opine on several facets of the automotive industry, including the DMS market, third-party vendor applications, and access to dealer data and data integration service providers. See [889-12] (Stejskal's report).

Stejskal has over 25 years of experience in the automotive retail industry. From **[**130]** 1995 to 2000, Stejskal was a Vice President of CDK, which was then called ADP Dealer Services, where he ran CDK's nascent e-commerce division. From 2007 to 2014, Stejskal was an executive at Dealertrack, which is the nation's third-largest DMS provider behind CDK and Reynolds. Among other roles, Stejskal was the General Manager running Dealertrack's DMS business from 2010 to 2012. He created Dealertrack's OpenTrack certified data integration program, which allows third parties to access dealer data stored on the Dealertrack DMS. From 2017 to 2018, Stejskal was CEO for an international DMS company, Incadea, which is CDK's primary competitor in Europe and South America. On the dealer side of the automotive industry, Stejskal has served two stints as a senior executive at AutoNation, the largest auto dealership in the United States, most recently from 2006 to 2007. In that role, he was responsible for AutoNation's relationship with DMS companies and oversaw the DMS conversion process when AutoNation acquired new stores. Also from 2006 to 2007, Stejskal founded and was President of Secure Access ("OSA"), an industry coalition that advocated for dealer control over dealer data. During that **[**131]** time, he developed data security guidelines to help dealers safeguard their data.

Motion [883] concerns two of the topics covered by Stejskal's expert report—DMS switching and third-party data integrator security.[2] In the section of his opinion concerning DMS switching, Stejskal identifies reasons why a dealership's decision to switch DMSs is "not taken lightly," which is a hurdle for DMS vendors to overcome when seeking new customers. See [889-12] at 19-24, ¶¶ 40-48. A decision to switch to a new DMS comes with both "hard" and "soft" costs. Hard costs include things like hardware, setup, training, and data conversion from the old system. Soft costs include time devoted to system configuration, training, "go-live" data conversion, impact to customer satisfaction, employee turnover, and lost sales and productivity during the ramp-up time after the dealership "goes live" on the new DMS.

[*1082] Defendants argue that Stejskal's opinions on DMS switching should be excluded because they are based on anecdotes and speculation, rather than any expert methodology. He has not analyzed data concerning switching costs and admits he performed no quantitative analysis concerning DMS switching frequency. At **[**132]** bottom, Defendants argue, Stejskal's opinion is just an observation that switching entails some costs, which would be obvious to a layperson.

Under *Rule 702*, an expert may be deemed qualified "by ... experience," as well as "knowledge, skill, ... training or education." *Fed. R. Evid. 702*; see also *Africano, 2021 U.S. Dist. LEXIS 178575, 2021 WL 4264237, at *3*. "This is a "liberal standard; the expert need only have some 'specialized knowledge that would assist the trier of fact.'" *Id.* (quoting *Wilson v. City of Chicago, 6 F.3d 1233, 1238 (7th Cir. 1993)*). Expert witness testimony need not "be 'scientific' (natural scientific or social scientific) in character." *Tuf Racing Products, 223 F.3d at 591* (quoting *Kumho Tire, 526 U.S. at 150*). "The principle of *Daubert* is merely that if an expert witness is to offer an opinion based on science, it must be real science, not junk science." *Id.* In short, "[a]nyone with relevant expertise enabling him to offer responsible opinion testimony helpful to judge or jury may qualify as an expert witness." *Id.* "An expert's testimony is not unreliable simply because it is founded on his experience rather than on data[.]" *Metavante Corp. v. Emigrant Sav. Bank, 619 F.3d 748, 761 (7th Cir. 2010)*; see also *Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 484 (7th Cir. 2020)* (district court erred by excluding expert opinion that drew significantly on expertise to add context and supporting information); *Toney v. Quality Resources, Inc., 323 F.R.D. 567, 578-79 (N.D. Ill. 2018)*.

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[2] Defendants do not dispute Stejskal's qualifications or his opinions concerning the DMS market, third party software applications, or data integration services.

Applying these principles, the Court concludes that Defendants' motion to exclude Stejskal's opinions on **[**133]** DMS switching should be granted in part and denied in part. The Court agrees with Plaintiffs that Stejskal's testimony concerning various ways that DMS switching may be difficult and disruptive for dealers will be helpful to lay jurors. Although they might already understand at a very high level that switching comes with some costs, they would lack familiarity with the inner workers of automotive dealerships and specific disruptions that may come with switching DMS providers. Stejskal's experience has given him familiarity with the types of hard and soft "costs" that may be associated with switching DMSs. On the dealer side, his role at AutoNation required him to oversee the DMS conversion process when AutoNation acquired new stores. He also spent more than a decade working for DMS providers, including CDK (then ADP Dealer Services) and Dealertrack, where he was responsible for running the nation's third largest DMS business. This experience "enabl[es] him to offer responsible opinion testimony" about the general types of hard and soft costs that dealers may face in the DMS conversion process. *Tuf Racing Products, 223 F.3d at 591*; see also, e.g., *National Jockey Club v. Ganassi, 740 F. Supp. 2d 950, 964 (N.D. Ill. 2010)* (banking industry expert was qualified to testify as to banking practices **[**134]** in lawsuit involving breach of a personal guarantee obligation under a lease, where he had extensive experience in relevant aspects of the banking industry); *James Hamlin & Co. PC v. Czarnecki & Schlenker, LLC, 2021 U.S. Dist. LEXIS 200355, 2021 WL 4845780, at *10-11 (E.D. Wis. Oct. 18, 2021)* (person with 25 years of experience in acquiring 20 accounting firms could testify as expert in action alleging breach of asset purchase agreement by describing for jury what he knew about successfully acquiring accounting **[*1083]** firms, such as retaining clients and billing; although views of witness were not "methodology," he did not propose to testify to scientific principles that could be tested empirically and his ideas could be grounded in accepted experience in his field).

However, Stejskal will not be allowed to opine as to how frequently switching costs dissuade dealers from changing DMS vendors. Plaintiffs acknowledge that Stejskal did not analyze data or perform a quantitative analysis on switching frequency. Therefore, any opinion he might provide on switching frequency would be "connected to existing data only by the *ipse dixit* of the expert," which *Daubert* and the Rules of Evidence do not allow. *General Electric, 522 U.S. at 146*. Plaintiffs suggest that this is not the intent of Stejskal's testimony and point out that "Stejskal never said switching DMS providers **[**135]** is impossible or 'not a viable option.'" [996] at 11. But at least one portion of his report could be read as supplying "a bottom line" on how switching costs affect switching frequency. *Wendler & Ezra, 521 F.3d at 791-92*. In particular, Stejskal writes that "[t]he prospect of going through the 'trough of despair'" (his colorful term for the DMS conversion process) "is *frequently* enough to dissuade a dealership from making a switch or even going through the competitive bid process." [889-12] at 23, ¶ 47 (emphasis added). In the accompanying footnote, Stejskal includes a parenthetical citing to deposition testimony of Paul Whitworth that "CDK only lost 1.4% of its dealership customers in 2018, despite 'massive cuts to their customer service' and a marketing push by Dealertrack." *Id.*, n.67. Without performing his own quantitative analysis or analyzing the data provided by others in the litigation, Stejskal has no basis for opining whether dealerships "frequently" or "infrequently" switch DMSs or for associating any particular switching percentages with the generalized "costs" that he outlines. Therefore, at trial, he will be prohibited from drawing such connections.

The second topic at issue in motion [883] is third-party **[**136]** data integrator security. Defendants challenge two of Stejskal's opinions on this topic. First, Stejskal states that in his experience, dealerships take the protection of personally identifiable information ("PII") in written and electronic form "seriously" and "make it a point to train their staffs accordingly." [889-12] at 39. Apart from his own experience in the industry he cites to the deposition of Mark Johnson, a dealership IT director who explained online training modules that employees must complete, and the deposition of Whitworth, who opined that "I think our industry, as with so many industries, by and large does a good job in providing suitable protections for data." *Id.*, n.106.

The Court agrees with Defendants that this opinion fails to satisfy *Daubert* and, therefore, it will be excluded. Stejskal is not an expert in cybersecurity and he has worked for only one dealer group, Auto Nation. His report provides no basis for concluding that he has knowledge concerning how seriously automotive dealers, as an industry, are about cybersecurity or what training, if any, they provide for their staff. Even if Stejskal were qualified to offer his opinion, his report provides "nothing but **[**137]** a bottom line," which "supplies nothing of value to the judicial process." *Wendler & Ezra, 521 F.3d at 791-92*. Stejskal's citation to Whitworth's equally conclusory testimony and Johnson's testimony about the training provided at one dealership does not save his opinion; there is "simply too great an analytical gap between the data and the opinion proffered." *General Electric, 522 U.S. at 146*.

[*1084] Stejskal's second opinion concerning third-party data integrator security is that "[t]here is nothing inherently insecure about dealers choosing to work with third-party data integrators." [889-12] at 39, ¶ 81. In support, he states that "the OSA 'Automotive Retail Data Security Guidelines' explicitly included the ability of dealers to provide third parties of their choosing with User IDs and passwords." *Id.* He concludes that, "[i]n my 20-plus years in the automotive retail market, I am not aware of any data breaches caused by companies like Authenticom and DMI providing data integration services using this method." *Id.*

The Court will exclude this opinion under *Daubert*, as well. Beyond being quite vague (what does "not inherently insecure" mean?; is the PII actually secure, or not?), it does not appear to be tied to any relevant data or experience. The OSA "Guidelines" **[**138]** on which Stejskal relies were developed nearly 15 years ago, during the two-year period when Stejskal was President of OSA. The Guidelines were a "set of operating principles," [889-12] at 36, ¶ 75, which, as Defendants point out, do not discuss the technical aspects of data integration and were never ratified by any formal body. Plaintiffs, claiming that this "misses the point," argue that "the Guidelines provide an appropriate basis of support for Mr. Stejskal's expert opinion because they reflect that a prominent coalition of over 50 industry stakeholders, including CDK ..., studied this issue and concluded that dealers should be entitled to use independent data integrators." [996] at 17. This may be, but it tells the Court nothing about whether the use of third-party data integrators presents any cybersecurity risks, what those risks might be, whether dealers or their third-party data integrators typically take steps to ensure the protection of data, or what steps they take. Finally, without any evidence that a significant proportion of dealers have adopted the Guidelines' suggested "method" of providing third parties with User IDs and passwords, it is simply irrelevant that Stejskal **[**139]** is "not aware of any data breaches caused by companies like Authenticom and DMI providing data integration services using this method." [889-12] at 39, ¶ 81.

2. Stroz [859] — CDK's expert on cybersecurity and APIs

CDK offers Edward Stroz as an expert in cybersecurity. He has more than 35 years of investigative experience, first as a Special Agent for the Federal Bureau of Investigation and then in the private sector. He is the founder and Co-President of Stroz Friedberg, which is now a division of Aon. Stroz Friedberg is an international investigations, intelligence, security, and risk management firm, which assists clients with matters including digital forensic preservation and analysis, security consulting, data breach investigations, fraud investigations, theft of trade secrets, and monitorships. Stroz offers opinions on security concerns faced by DMS providers and security issues posed by hostile DMS access. He also attempts to quantity the number of times that CDK's security measures have been evaded—a topic that is relevant to the calculation of CDK and Reynolds' damages for their DCMA counterclaims, which are discussed further below.

Stroz opines, among other things, that the **[**140]** development of custom application programming interfaces ("APIs") that third-party integrators could use to access the DMS "[would] not adequately address the security concerns from hostile access." [998-2] at 40. Plaintiffs argue that this opinion should be excluded because Stroz's report offers no evidence to support his opinion; he performed no analysis to determine whether APIs could address Defendants' security concerns or what burden **[*1085]** APIs would place on Defendants; and he did not assess the use of APIs by other DMS providers. All of these criticisms go to the weight, not the admissibility, of Stroz's opinions. In his reply report, Stroz lays out a number of reasons why, from Defendants' perspective, APIs would not be an adequate solution. He explains that creating APIs for data brokers like Authenticom would not provide any transparency or accountability as to the actual end-users of the data, because neither CDK nor Reynolds have visibility into which vendors receive which data from Authenticom. This would undermine the reporting tools and information that CDK and Reynolds provide to dealers that are designed to provide transparency into who actually has access to data maintained **[**141]** in their licensed DMS. Stroz also points out that developing custom APIs would require Defendants to expend substantial resources. These efforts would be superfluous because they would duplicate functionality that third-party software vendors are already offered through 3PA and RCI. If Plaintiffs disagree with Stroz's analysis, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means" of presenting their position to the jury. *Daubert, 509 U.S. at 596*.

3. Halpin [887] — Authenticom, Autoloop, and MVSC's expert concerning Cottrell's notes

In motion [887], CDK and Reynolds seek to exclude the expert report and testimony of Brian Halpin, who was retained by Plaintiffs to opine on the authenticity of a Microsoft Word document authored by Authenticom's CEO, Stephen Cottrell. The document on which Halpin opines consists of notes Cottrell made on April 4, 2016, allegedly documenting a conversation he had a day earlier with CDK executive Dan McCray ("McCray"). According to Cottrell and his notes, McCray referenced an agreement between the major DMS companies to effectively lock Authenticom and other third parties out of **[**142]** the market. McCray also allegedly made a profane threat to "destroy" Authenticom. In his expert report, Halpin concludes that the notes' "internal file metadata" reflect that the document "was created on April 4, 2016 at 10:41:00 AM" and "has not been changed since it was last saved on April 4, 2016 at 11:20:00 AM." [889-15] at 13.

Defendants seek to exclude Halpin's opinion on the ground that it is not relevant to any fact at issue and therefore would not be helpful to the jury. Although Defendants dispute that the notes accurately reflect what Cottrell and McCray discussed, they do not dispute when the notes were created or whether they were subsequently modified. Defendants maintain that Halpin's report is not relevant and therefore would not be helpful to a jury because there "are no claims or defenses by any of the parties that rely upon the timing or modification of" the notes. [888] at 5. In addition, Defendants assert, their offer to stipulate that the notes were created on April 4, 2016 and have not since been edited "renders ... Halpin's proposed testimony undeniably improper." *Id.* at 6. Defendants further argue that Halpin's testimony should be excluded because its potential **[**143]** prejudicial effect "far outweighs" its probative value. *Id.* at 8.

The Court denies motion [887] without prejudice to Defendants' ability to challenge Halpin's testimony through motions *in limine* in advance of trial. As noted above, step three of the *Daubert* analysis requires the Court to determine "whether the testimony will 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Myers, 629 F.3d at 644* (quoting *Ervin, 492 F.3d at 904*). "Expert testimony must be relevant and factually linked to the case in order to **[*1086]** meet *Rule 702*'s 'helpfulness' requirement." *Mason v. City of Chicago, 631 F. Supp. 2d 1052, 1059 (N.D. Ill. 2009)* (quoting *United States v. Gallardo, 497 F.3d 727, 733 (7th Cir. 2007)*). Halpin's proposed testimony satisfies that standard. Despite Defendants' assertion that none of Plaintiffs' claims rely on when Halpin's notes were created or whether they were later modified, those issues could be relevant to the jury's assessment of whether Cottrell's recollection of the April 3, 2016 conversation is accurate. A jury may find it probative that the notes were taken less than a day after the conversation when, arguably, it was fresh in Halpin's mind and litigation was not yet contemplated.

Defendants argue, based on *In re Brand Name Prescription Drugs Antitrust Litig., 186 F.3d at 786*, that "expert testimony should be excluded where it 'mainly concern[s] a matter not in issue' and can 'be[] removed **[**144]** as an issue at trial by a stipulation of the parties'—precisely as Defendants tried to do here." [888] at 6. But the Court does not read *Brand Name Prescription Drugs* to encourage using *Daubert* in the manner Defendants propose. During the eight-week trial in that case, "[t]he defendants spent days cross-examining" one of the plaintiffs' principal expert witnesses and "ultimately persuaded the district judge to exclude most of his testimony under ... *Daubert*" and grant judgment as a matter of law in their favor. *Brand Name Prescription Drugs, 186 F.3d at 786*. But "what was objectionable about [the expert's] evidence," Judge Posner observed, "actually had nothing to do with *Daubert*; it was that the evidence mainly concerned a matter not in issue." *Id.* The subject of the expert's opinion "should have been removed as an issue at trial by a stipulation of the parties." *Id.*

Here, the Court agrees with Defendants that it would make little sense to waste a jury's time on expert testimony concerning matters to which Defendants are willing to stipulate. Of course, Plaintiffs cannot be forced to stipulate, as a stipulation is "a contract between two parties to agree that a certain fact is true." *United States v. Barnes, 602*

F.3d 790, 796 (7th Cir. 2010); see also United States v. Swiatek, 819 F.2d 721, 731 n.4 (7th Cir. 1987) ("It may be true that the introduction of this evidence was not essential, but . **[**145]** . . [a] party may insist on proving a fact even when there has been an offer to stipulate."). But that does not mean that Defendants are without recourse if Plaintiffs refuse to accept a reasonable stipulation that will streamline and shorten the trial. "Concerns about trial efficiency may fit under various Rule 403 headings: confusion of the issues, undue delay, waste of time, and needless presentation of cumulative evidence." Thompson v. City of Chicago, 722 F.3d 963, 971 (7th Cir. 2013); see also MCI, 708 F.2d at 1171 ("Litigants are not entitled to burden the court with an unending stream of cumulative evidence."). This rule gives the trial judge "considerable latitude even with admittedly relevant evidence in rejecting that which is cumulative, and in requiring that which is to be brought to the jury's attention to be done so in a manner least likely to confuse that body," so long as a party is not "effectively prevented from presenting his or her case." Thompson, 722 F.3d at 971.

Defendants make a number of Rule 403 arguments, which the Court finds unnecessary to resolve until closer to trial. At that point, the parties will have a better understanding of the full universe of witnesses, evidence, and issues that they intend to introduce. The parties will not have limitless time to present their cases **[**146]** and therefore will need to make strategic decisions about how to try the case most efficiently. To the extent they still cannot agree on whether Halpin will testify, the trial judge will be in position to employ "the balancing **[*1087]** process contemplated by" Rule 403, which "is best undertaken at the trial itself." Adams v. Ameritech Servs., Inc., 231 F.3d 414, 428 (7th Cir. 2000).

IV. Defendants' Counterclaims

For ease of reference, in discussing CDK and Reynolds' counterclaims, the Court will continue to refer to CDK and Reynolds as "Defendants" and the Counter-Defendants as "Plaintiffs."

A. Stroz [859] — CDK's expert on damages for DMCA Violations

Congress enacted the DMCA in 1998 "to strengthen copyright protection in the digital age." Universal City Studios, Inc. v. Corley, 273 F.3d 429, 435 (2d Cir. 2001); see also Navistar, Inc. v. New Baltimore Garage, Inc., 2012 U.S. Dist. LEXIS 134369, 2012 WL 4338816, at *3 (N.D. Ill. Sept. 20, 2012). Section 1201 of the DMCA addresses liability for circumventing systems that protect copyrights. See 17 U.S.C. § 1201. It provides that "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title." *Id.* § 1201(a)(1)(A). The DMCA defines "circumvent a technological measure" to mean "descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner." *Id.* at § 1201(a)(3)(A). The term to "circumvent protection **[**147]** afforded by a technological measure" is defined to mean "avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure." *Id.* at § 1201(b)(2)(A).

In their DMCA counterclaims against Authenticom, CDK and Reynolds allege that dealers are contractually prohibited from granting data integrators like Authenticom access to their DMS. See generally [225] (Reynolds' counterclaims); [299] (CDK's counterclaims). Neither CDK nor Reynolds authorizes such access. Instead, they have instituted various technological measures designed to block data integrators, such as CAPTCHA prompts and a "YES/NO" prompt, which are described in more detail below. They also have disabled user accounts that they believe to be associated with allegedly unauthorized third parties, such as Authenticom. Reynolds alleges that since at least 2009, Authenticom has repeatedly violated the DMCA's anti-circumvention provision, 17 U.S.C. § 1201(a)(1)(A), by bypassing these technological measures to access Reynolds' DMS.

As discussed above, CDK offers Edward Stroz as an expert in cybersecurity. In addition to assessing the extent to which "hostile" access to DMSs poses security risks—a topic addressed in the previous section of this order—Stroz **[**148]** was retained to quantify the number of times that certain Plaintiffs engaged in allegedly unlawful conduct related to accessing DMSs. More particularly, Stroz opines on how often, allegedly in violation of the

DCMA, Authenticom bypassed three CDK security measures: (1) the "YES/NO" prompt; (2) CAPTCHA prompts; and (3) the disabling of user accounts associated with unauthorized third parties.

1. The Yes/No prompt

In June 2016, CDK deployed a prompt on Authenticom accounts that required users to "enter YES to confirm that you are an authorized dealer employee" or to "[e]nter NO to exit this program." [995] at 11. Beginning on June 15, 2016, Authenticom deployed an automated script to respond "YES" and access the DMS. CDK withdrew the prompt on most Authenticom accounts by July 19, 2016. *Id.* Stroz attempted to calculate the number of times that Authenticom used automated means to answer the Yes/No prompt in the 34 days between June 15 and July 19, 2016. CDK had data logs for 98 accounts across 42 DMS servers for the full 34-day period **[*1088]** at issue. Stroz identified these accounts as Authenticom accounts because they met the following criteria: (1) they were used by Authenticom; (2) they used **[**149]** automated means to access the CDK DMS; (3) they were active during the same 34-day window; and (4) CDK decided to deploy the YES/NO prompt against them. Stroz looked at the 98 accounts for the full 34-day period at issue and determined that a total of 22,901 successful Authenticom responses (100% of the successful responses) were automated. There were an average of 7.4 successful responses per day per account.

CDK did not have data for the full set of 2,750 accounts, over 1,300 servers, which it determined to be Authenticom accounts meeting the same four criteria just described. Authenticom also did not provide Defendants with any more information about its YES/NO responses. See [995] at 16. Stroz therefore attempted to extrapolate his findings concerning the 98 accounts to the full set of 2,750 accounts. He determined the average number of accounts that answered a login attempt on each day during the 34-day period (464.5). He multiplied this number by the 98-account subset's average number of successful responses per day per account (7.4), yielding a total of 116,868 automated responses for the 34-day period.

Plaintiffs do not challenge the process Stroz used to determine number of **[**150]** YES/NO responses for the 98 accounts. However, they maintain that Stroz's extrapolation to the full set of accounts was unreliable because he has not demonstrated that the 98 accounts are representative of the full set of 2,750 accounts. Plaintiffs argue that there is reason to question the representativeness of Stroz's sample because "90% of the 91 accounts in his sample were active on 13 of the 14 days in the sample, whereas 90% of the over 2,000 accounts to which he extrapolates the sample were only active on (at most) a single day." [861] at 13. CDK responds that "the data showing the broader population of users who received the prompt did not even purport to show the intensity of access by those users. And to the extent there was any variation in that intensity, the 42-server sample also reflected it." [995] at 17 & n.8. The sample contained a broad distribution of users with a variety of user intensities: from those that averaged less than 1 access per day, to those that accessed on average about 51 times per day. See [998-2] at 54 & n.232.

The Court finds it a close call as to whether the uncertainty of Stroz's extrapolation warrants exclusion under *Daubert*. Although "damages cannot **[**151]** be based on pure speculation or guesswork," they "also need not be proven with the certainty of calculus." *BE & K Constr. Co. v. Will & Grundy Counties Bldg. Trades Council, 156 F.3d 756, 770 (7th Cir. 1998)*; see also *Phoenix Bond & Indem. Co. v. Bridge, 911 F. Supp. 2d 661, 675 (N.D. Ill. 2012)*. And "[w]hen a defendant's wrong makes it difficult for the plaintiff to prove damages, all reasonable doubts about the amount of damages are resolved in the plaintiff's favor." *Id.* CDK's alleged damages stem from Plaintiffs' surreptitious use of technology to avoid the "YES/NO" prompts. The Court therefore begins with the proposition that Plaintiffs should "not benefit from" any "uncertainty [they] created." *Id.*; see also *Mid-America Tablewares v. Mogi Trading Co., 100 F.3d 1353, 1365 (7th Cir. 1996)* ("Speculation has its place in estimating damages, and doubts should be resolved against the wrongdoer.").

That said, the Seventh Circuit has cautioned that a "non-random sample might undermine the reliability of the statistics." *Chavez v. Ill. State Police, 251 F.3d 612, 643 (7th Cir. 2001)* (civil rights **[*1089]** case in which plaintiffs' expert used statistical sampling to determine racial breakdown of motorists stopped by police). Nonetheless, the Court is not convinced that Stroz's extrapolation must be excluded based on the case law cited by Plaintiffs, in which experts could have examined, but apparently ignored, fuller, more detailed data in favor of "convenience" sampling or cherry-picking to achieve more favorable **[**152]** results. See, e.g., *Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 774-75 (7th Cir. 2013)* (in *Fair Labor Standards Act ("FLSA")* case, rejecting plaintiffs class counsel's proposal to extrapolate from experience of small, unrepresentative sample of 42 proffered class members to that of 2341 to avoid "2341 separate hearings" on damages for hours plaintiffs worked but did not report on time sheets, where "[t]he unreported time for each employee could be reconstructed from memory, inferred from the particulars of the jobs the technicians did, or estimated in other ways"); *American Honda Motor Co., Inc. v. Allen, 600 F.3d 813, 818-19 (7th Cir. 2010)* (expert who tested one vehicle and extrapolated findings to whole fleet of vehicles produced over seven-year period did not offer reliable testimony; he "was not being as thorough as he might otherwise be due to Plaintiffs' reluctance to pay for more testing"); *Farmer v. DirectSat USA, LLC, 2013 U.S. Dist. LEXIS 39912, 2013 WL 1195651, at *4-7 (N.D. Ill. Mar. 22, 2013)* (in FLSA case, excluding expert opinion concerning number of unpaid hours worked by class members where expert relied on 3 months of GPS data from 30 class members' vans, 7 depositions, and timesheets from 4 class members to extrapolate to 500 employees over 16 months—rather than GPS data for 500 employees over the whole 16-month period—where record showed there were large seasonal fluctuations in hours worked, GPS data was questionable, and sample may have been **[**153]** cherry-picked by plaintiffs' counsel); *Allgood v. GMC, 2006 U.S. Dist. LEXIS 70764, 2006 WL 2669337, at *10-11 (S.D. Ind. Sept.18, 2006)* (excluding proposed expert who estimated plaintiffs' risk of developing cancer, where his risk assessment was "performed by using only a limited number of the available samples, and those that would tend to magnify greatly the risk calculation" and he "failed to offer any scientific justification for his sample selection choices"). Rather, Stroz used *all* of the data available to him, which was confined to 98 accounts, to extrapolate to the full set of 2,750 accounts. He proceeded in this manner because this was the data that CDK had, and Plaintiffs never provided any additional data. Plaintiffs do not explain what additional analysis Stroz could or should have done with the limited data available to him to ensure that the accounts he examined in detail were representative of the larger universe of accounts. See [861-7] at 54 (Stroz explaining in reply report that Authenticom's rebuttal witness, Dr. O'Brien, "points to no available data, and I am aware of none, that would allow any further assessment of representativeness").

"*Rule 702* [ ] does not condition admissibility on ... a complete and flaw-free set of data." *Lees v. Carthage Coll., 714 F.3d 516, 524-25 (7th Cir. 2013)* (internal quotation marks omitted). **[**154]** "The critical inquiry" in assessing an expert's extrapolation from existing data "is whether there is a connection between the data employed and the opinion offered." *General Electric, 522 U.S. at 146*. This is not an instance where there is "no rational connection between the data used and the conclusion arrived at." *Kleen Products, 2017 U.S. Dist. LEXIS 83321, 2017 WL 2362567, at *9*. Stroz explains the basis for his belief that the subset of accounts he examined was representative of the larger group of accounts, including that all of the accounts met the same four criteria for being identified as Authenticom **[*1090]** accounts (used by Authenticom; used automated means to access the CDK DMS; were active during the 34-day window; and CDK decided to deploy the YES/NO prompt against them). Stroz's method of extrapolation also apparently took into consideration and excluded accounts for which no access attempts were made on a particular day, since his calculation was based on the average number of accounts that answered a login attempt on each day during the 34-day period (464.5 of the 2,750 total accounts).

What is not clear, however, is whether it was reasonable to assume 7.4 logins per day for the active accounts in the larger group. Neither side assesses this factual issue in any detail. **[**155]** Plaintiffs claim that "[o]ther evidence indicates CDK targeted accounts with more frequent DMS access for more frequent interruption," [1048] at 6. But the larger group of accounts that Stroz considered, like the smaller subset, included only accounts that CDK decided to deploy the YES/NO prompt against. In other words, all of the accounts that Stroz considered were ones that Defendants targeted for interruption with the YES/NO prompts. Plaintiffs' rebuttal expert, Daniel O'Brien, also acknowledged that it is possible that the full set of users who received the prompt accessed the DMS with the same frequency as those in the smaller set. Given the limited information available to Stroz, and the rational connection between the available data and the conclusions he reached, the Court finds on balance that it should be left to a jury to assess whether it was reasonable for Stroz to assume 7.4 logins per day for the active accounts in the larger group. Plaintiffs are "free to use cross-examination to attack the assumption" of 7.4 logins per day and ask Stroz "how altering the assumption would affect his analysis." *Stollings, 725 F.3d at 766*. "A jury should be capable of understanding how the value of the estimate **[**156]** affected [Stroz's] conclusions." *Id. at 767*; see also *In re*

Fluidmaster, Inc., Water Connector Components Prods. Liab. Litig., 2017 U.S. Dist. LEXIS 48792, 2017 WL 1196990, at *30 (concluding that most of defendant's arguments concerning expert survey—including "the survey's small sample size, unrepresentative sample composition, [and] whether the results of conjoint studies can be adequately extrapolated to the retail setting...—go to weight, not admissibility").

In addition to challenging the reliability of Stroz's extrapolation, Plaintiffs argue that Stroz was not qualified to perform this analysis, which "required statistical expertise—including experience in designing statistical models, selecting samples, and measuring the standard error of estimates—that Mr. Stroz does not have." [861] at 10 (citing [861-5], Federal Judicial Center, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 241 (3d ed. 2011)). CDK responds that Stroz does not need to be a statistician to make the calculations he did. They explain that "[h]e was retained to assess the cybersecurity implications of hostile integration, and the more specific practices in question here (CAPTCHA and YES/NO prompt evasion; and use of the Profile Manager tool), which are at the heart of his general expertise in cybersecurity and forensic investigations, which in turn **[**157]** often require analysis of voluminous data." [995] at 15 n.6.

The reference manual on which Plaintiffs rely provides: "In some instances, the expert is faced with more information than is possible to process. ... If the expert elects to study a sample of the data, the expert needs to have carefully considered how the information will be used to ensure that the data sample is large enough and contains sufficient information. Usually, this requires that the expert has constructed a model of damages and a related sampling plan that includes an estimate of the sampling error. Unless the expert is a **[*1091]** trained statistician, the expert should seek outside help in designing the sampling plan." [861-5] at 25-26. This guidance does not appear to fit what Stroz did, as he was not "sampling" data that was too voluminous to process. He was looking at all the available data, and assessing whether any conclusions could be drawn about the accounts for which fuller information was not available. Plaintiffs do not question whether Stroz was qualified to analyze the 98 accounts and opine on how many times Authenticom evaded Defendants' YES/NO prompts. Plaintiffs focus only on Stroz's qualifications to extrapolate **[**158]** to the 2,750 accounts. They do not explain how an expert in statistics would be better suited to perform that analysis, given the limited data available and given the need for an expert to understand the relevant cybersecurity technology.

Plaintiffs argue further that Stroz's method of calculating Yes/No responses within the sample from the 42 servers does not fit the facts in the record. [861] at 17. But the argument about whether and when certain accounts should be counted is the kind of input to a calculation that goes to an opinion's weight, not its admissibility. *Manpower, 732 F.3d at 807*. Plaintiffs also challenge Stroz's reliance on CDK's tagging accounts as being associated with Authenticom, especially where CDK tagged an account as being associated with multiple vendors or with "unknown vendors." [861] at 18-19. But Stroz also relied on Authenticom's own records and admissions to identify Authenticom accounts, see [861-1] at 87-88, which supports a conclusion that Stroz's input was reliable. If Plaintiffs believe that CDK and Stroz have failed to provide sufficient evidence that certain accounts belonged to Authenticom, they can make those arguments to the jury and, if persuaded, the jury can discount **[**159]** or exclude altogether those accounts from its calculations.

2. Profile Manager

In late 2016, CDK began disabling Authenticom accounts. In response, Authenticom developed a software called Profile Manager, which accessed the DMS's Update User Profile ("UUP") function and automatically reactivated disabled accounts. Authenticom began using Profile Manager at dealerships around November 4, 2016. CDK deployed a security patch to stop Profile Manager on April 25, 2017. In discovery, Authenticom did not produce records of the number of times Profile Manager was launched or successfully re-enabled accounts between November 4, 2016 and April 25, 2017. Authenticom's 30(b)(6) witness also could not answer how often the program ran.

In his report, Stroz attempted to calculate damages based on the number of times that Authenticom launched Profile Manager during the relevant period. Stroz relied on emails from Authenticom indicating that it provided Profile Manager to 4 dealers by November 4, 2016, to at least 100 by January 26, 2017, to more than 200 by

February 8, 2017, and to more than 350 by April 17, 2017. Stroz assumed that between each of those dates, the number of dealers with Profile Manager **[**160]** remained constant (*e.g.*, he assumed that between November 4, 2016 and January 26, 2017, only 4 dealers had Profile Manager). He also reduced the number of dealers for a period in February based on information that Profile Manager service was interrupted, and he subtracted a number of dealers to whom the security patch applied before April 14, 2016.

To determine the number of times Profile Manager launched, Stroz looked for automated access to the UUP function and developed three factors to identify it: the account had a high ratio of access per hour; at least 70% of the accesses took less than 10 seconds; and at least 70% occurred **[*1092]** at 20 minutes after the hour (when Stroz observed that the automated accounts typically accessed the UUP function). He identified 52 accounts that met these three criteria. Stroz then reviewed 16 full days (and 2 partial days) of data regarding accounts accessing the UUP function from March 19-April 5, 2017; this data was provided by Defendants and was the only data available. The 52 accounts that Stroz identified logged in 12,449 times over the 16 full days, an average of 15 times per day. This was consistent with an Authenticom document indicating that Profile **[**161]** Manager was designed to run every hour from 7 a.m. to 10 p.m.—*i.e.*, 15 times per day. Stroz concluded that Profile Manager ran an average of 15 times per day. To calculate the number of times Profile Manager launched between November 4, 2016 and April 24, 2017, Stroz multiplied 15 times the number of dealers with Profile Manager for each day of the relevant period for a total of 64,770 launches.

Stroz also tried to calculate the number of times that Profile Manager re-enabled a disabled account. As of April 2016, CDK was disabling targeted accounts at least once per day, though sometimes more often. Stroz assumed that Profile Manager successfully re-enabled only one user account per day per dealer group, for a total of 4,318 re-enabled accounts over the relevant period.

In addition, Stroz ran his analysis for a particular dealer group, the Warrensburg Counter-Defendants, for a period of March 20, 2017 (the earliest date for which he had data) to August 21, 2019. He used a daily launch number of 11, rather than 15, because that was the dealer group's average during the 2-week sample period. Stroz calculated that the Warrensburg Counter-Defendants ran Profile Manager 9,735 times, which **[**162]** re-enabled a user account at least 36 times.

Plaintiffs challenge the reliability of Stroz's extrapolation from a 16-day sample in March and April 2017 to the entire four-and-a-half-month period (and longer for the Warrensburg Counter-Defendants). The core of the challenges to his extrapolation is the same as described in the prior section on the YES/NO prompts, and CDK's response is the same. The Court's resolution of this challenge is also essentially the same; in this section, the Court focuses on the arguments that are specific to Stroz's Profile Manager analysis.

As with his opinion concerning YES/NO prompts, Stroz was working with limited data. Authenticom allegedly developed the Profile Manager software to evade Defendants' disabling of accounts due to alleged unauthorized access, and it did not produce any records or a 30(b)(6) witness identifying the number of times it launched profile Manager or reactivated disabled accounts. As Authenticom's alleged actions (or inactions) have made it difficult for Defendants to prove damages, reasonable doubts about the amount of damages are properly resolved in Defendants' favor. See *BE & K, 156 F.3d at 770*; *Phoenix Bond, 911 F. Supp. 2d at 675*.

According to Plaintiffs, Stroz's calculations are unreliable **[**163]** because he has not demonstrated that the 16-day period he analyzed (March 19 to April 5, 2017) is representative of the full period (November 4, 2016 to April 25, 2017). In particular, Plaintiffs argue that it is not a reasonable assumption that Profile Manager was launched fifteen times per day per account for the whole period because the earliest there is even anecdotal evidence that the program was running automatically was February 13, 2017—over half-way through the whole period at issue. However, this argument relies on a single, unclear email that Plaintiffs do not adequately explain or support with an affidavit or other evidence **[*1093]** of when Profile Manager became capable of being run automatically. See [861-11] at 2-3. Plaintiffs also do not contest that when Profile Manager was running automatically, it was designed to do so 15 times per day. Nor do Plaintiffs dispute that Profile Manager was running 15 times per day during the 2-week period for which Defendants were able to obtain detailed data. While he did not have "a complete and flaw-free set of data" from which to work, *Lees, 714 F.3d at 524-25*, there was a rational connection between the data on which

Stroz relied and his calculations for the full **[**164]** time period. See *Kleen Products, 2017 U.S. Dist. LEXIS 83321, 2017 WL 2362567, at *9*. And while Plaintiffs criticize Stroz for allegedly failing to use reliable statistical methods like testing the representativeness of his "sample" or calculating a standard error, it does not explain how Stroz could have done so given the limitations in the data Authenticom provided.

Plaintiffs also challenge the reliability of Stroz's calculations on the grounds that he used a different number of average daily launches for the Warrensburg Counter-Defendants (11) than he used for other dealers who deployed Profile Manager (15). However, it was rational to use a daily launch number of 11, rather than 15, for this dealer group because that was the group's average during the 2-week sample period. Any relevant differences between the Warrensburg Counter-Defendants and other dealers can be explored through cross-examination.

3. CAPTCHA

In October 2017, CDK began using CAPTCHA prompts to "combat accounts associated with unauthorized third-parties" attempting to access the CDK DMS. [995] at 6. By requiring the user to enter obscured numbers and letters, a CAPTCHA prompt is designed to prevent automated access (*i.e.*, access by a computer rather than a human). Authenticom developed **[**165]** software to overcome the CAPTCHA prompts. Stroz attempted to determine the number of times that Authenticom circumvented CDK's CAPTCHA prompts. First, he developed four criteria to identify accounts that submitted automated responses: (1) the account submitted a blank answer to at least 80% of the prompts; (2) the account submitted a blank answer at least 95% of the times it faced particular fonts (with a minimum of 20 attempts); (3) the account successfully answered a prompt twice in under one second, or twice in under two seconds at least ten times; and (4) the account attempted to log in more than 300 times in a 24-hour period.

Stroz then attempted to identify accounts that were related to Authenticom. He began with a set of accounts that CDK tagged as belonging to Authenticom. He also tried to identify accounts based on the queries they sent to the DMS. Authenticom ran queries to the DMS in a particular database query language ("ENG"), and Stroz used documents that Authenticom produced to find ENG queries that it commonly ran on CDK's DMS. Stroz reviewed all ENG queries on particular dealer servers from March 13, 2016 to July 24, 2016 to determine which accounts ran ENG queries **[**166]** that Authenticom used. Stroz excluded from consideration any queries that appeared in Authenticom's documents but contained fewer than six output fields, on the grounds that they were too generic to identify an Authenticom-related account. That eliminated from consideration 8 of 60 queries. Stroz concluded that the other 52 queries were sufficiently distinctive to identify Authenticom accounts.

CDK's records of access to the DMS show 1,614 accounts that ran an ENG query associated with Authenticom, 98% of which CDK had also tagged as belonging to Authenticom. Stroz concluded that accounts running Authenticom-related queries **[*1094]** and tagged by CDK as belonging to Authenticom were Authenticom accounts, and he found 126 that had responded to CAPTCHA queries between October 2017 and January 5, 2018. Stroz found that those accounts gave 7,628 successful automated response to CAPTCHA prompts, including 1,256 times on behalf of the Continental Counter-Defendants.

Plaintiffs raise three objections to these opinions. First, Plaintiffs argue that Stroz lacks the expertise to give these opinions because he is not an expert in reading software code. But Plaintiffs do not explain why he needs to be one **[**167]** or why issues like automated responses to database security measures or review of database query logs are not within the scope of his cybersecurity and digital forensic analysis expertise.

Second, Plaintiffs challenge Stroz's methodology on the basis that he purportedly fails to explain how he concluded that the 52 ENG queries with six output fields or more were so distinctive that he could identify them as queries from Authenticom. However, his report explains how he came to this conclusion. He began with an Authenticom document that contained ENG queries that Authenticom commonly used. He then looked at CKD's logs of ENG queries and found the accounts that ran the ENG queries that Authenticom commonly used. He eliminated from consideration simpler ENG queries, a set of 8 with fewer than six output fields, because they were too generic to be used to identify Authenticom. That left 52 ENG queries. If that was an error, it was an error in Authenticom's favor, because it meant that Stroz's analysis pulled in fewer queries and fewer dealer accounts. *U.S. ex rel. Tyson v. Amerigroup Illinois, Inc., 488 F. Supp. 2d 719, 733-34 (N.D. Ill. 2007)* (expert's method was not unreliable when his choices in calculating damages provided a more conservative estimate, which benefited the objecting **[**168]** party); *cf. Kleen Products, 2017 U.S. Dist. LEXIS 83321, 2017 WL 2362567, at *10* (declining to exclude expert opinion because expert's choices were reasonable, "even if not the most conservative"). From those 52 queries, Stroz then identified the number of times those queries were run and the accounts that ran those queries, which Stroz concluded were Authenticom accounts.

He cross-referenced those accounts with a list of accounts that CDK had tagged as Authenticom-related, another move that Plaintiffs contest. But the overlap in the separately-compiled lists—98%—is a suggestion of reliability. Furthermore, CDK used the names of some accounts to tag them as Authenticom (such as "authcom," "dvault," and "dvault1"). [998-4] at 2. None of this is say that Stroz's conclusions are right or wrong, only that his report lays out a method and is supported by the evidence that CDK cites, and therefore should not be excluded on the basis Plaintiffs urge.

4. Grouping of DMCA violations by dealership group

Finally, Plaintiffs argue in several places in their motion that Stroz improperly groups together alleged DMCA violations by dealership, rather than breaking them out by individual dealers. CDK takes the position that the dealers in a group have joint and several **[**169]** liability and therefore it was unnecessary to break out the violations by individual dealer. The Court reserves ruling on this point until summary judgment.

B. Miracle [885] — Authenticom's expert on various issues

In motion [885], Defendants seek to exclude the testimony of Nancy Miracle, who was retained by Authenticom to opine on a number of subjects relating to Authenticom's efforts to obtain data from Defendants' **[*1095]** DMSs and Defendants' attempts to use technological means (including CAPTCHA and challenge questions) to hinder those efforts. Miracle is the president and senior partner of Digital Miracles, LLC, a company she founded that specializes in the evaluation and development of software products with particular emphasis on design-arounds, unusual problem solutions, software reverse engineering, code analysis, prior art/prior use evaluation, and litigation support. She has more than 50 years of expertise in the areas of systems design and analysis and has worked as a programmer and technical manager for a variety of small companies and start-ups. She has served as a litigation consultant for over 20 years.

Miracle's report contains a summary of her opinions. First, she opines that **[**170]** CAPTCHA is not a technological measure to "control access" as that term would be understood in the software design and cybersecurity field because, by design, all information needed to satisfy a CAPTCHA is provided on the face of the prompt itself; that providing the information called for by a prompt does not "circumvent" the prompt; and that the outdated and simplistic CAPTCHA technology used by Defendants was not "effective" even at preventing automated answers to the prompt. Second, she opines that Defendants' challenge questions are not considered technological access control measures in the software design and cybersecurity field for essentially the same reasons CAPTCHA is not such a measure. Third, Miracle opines that Defendants' measures to detect and disable passwords that dealers provided to Authenticom were not measures to "control access" as that term is understood in the field, because they do not require a user to provide information or perform some act that is in the user's possession and that indicates that the uses has authorization to obtain access. Fourth, Miracle opines that Authenticom's use of "profile manager" software to re-enable usernames that had been disabled **[**171]** did not involve "bypassing" or "decrypting" any technological measure that controlled access to CDK's DMS. Fifth, Miracle summarizes that Defendants' CAPTCHA and challenge questions did not "control access" to Defendants' executable program files; those prompts just appeared in the terminal displayed by Defendants' DMSs, which were not part of the executable file or otherwise committed to any fixed form.

Miracle's sixth opinion goes to whether Defendants' CAPTCHA mechanisms protect access to a work of "creative expression" in the ERA-IGNITE program. Miracle states that it is her understanding that the elements in the DMS display or user interface that appear after the CATCHA is solved are common, standard, and functional design elements (specifically, a progress indicator and popup window) that do not, in her opinion, constitute creative expression that is subject to copyright protection. Finally, Miracle provides a rebuttal to part of Stroz's report. She opines that Stroz's estimate of Authenticom's DMCA damages is not reliable because he incorrectly assumes that all queries designed by Authenticom were run by Authenticom, while in fact Authenticom shared its queries with third parties. **[**172]**

Defendants move to exclude Miracle on a number of bases, with their lead, threshold argument being that Miracle's opinions invade the province of the Court by purporting to define statutory terms—including "effectively controls access" and "circumvent a technological measure"—that are already defined in the DMCA. Defendants maintain that Miracle's definitions contradict the plain text of the DMCA and case law interpreting it, in addition to well-accepted technical standards.

[*1096] In response, Authenticom claims that Defendants misunderstand Miracle's report; she is not planning to tell the jury how to construe the DMCA, but rather "will offer testimony on factual issues that will aid the jury in determining whether the DMCA has been violated." [1007] at 11. More particularly, Authenticom asserts that Miracle may offer testimony on "four factual issues that the trier of fact may need to resolve if this Court does not grant Authenticom's motion for summary judgment." *Id.* at 10. These "factual issues" include: (1) whether Defendants' technological measures are capable of distinguishing between would-be users who have authority from Defendants and those who do not, which may be relevant to the **[**173]** jury's determination of whether those measures "effectively control access" within the meaning of the DMCA; (2) the technical means by which Authenticom responded to the Defendants' measures, which may be relevant to the jury's determination of whether Authenticom "circumvented" those measures within the meaning of the DMCA; (3) the process by which Authenticom's software "polled" (that is, accessed) Defendants' DMS, including when and whether that software encountered Defendants' technological measures, which may be relevant to the jury's determination of whether any copyrighted work was protected by the technological measures; and (4) Miracle's response to Stroz's efforts to count alleged DMCA violations.

The Court agrees with Defendants that Authenticom appears, at least in part, to be "backpedal[ing] from [Miracle's] opinions and recast[ing] them as 'testimony regarding technical facts." [1032] at 5. In her report, Miracle offers her own definitions of key terms that are already defined in the DMCA, asserts that her definitions are consistent with the DMCA's definitions, and then applies her definitions to conclude that Authenticom's actions did not violate the DMCA. In particular, **[**174]** Miracle asserts that, "[i]n the field of software design and cybersecurity, a technological measure is considered to 'control access' if it requires a user to provide information (or perform some act) that is in the user's possession and indicates that the user has the computer or network administrator's authorization to obtain access. The simplest and most common example is an administrator-provided or administrator-authorized password." [889-10] at 10-11. She claims that the "field's" understanding of "control access" is "consistent with" the DMCA's definition of 'effectively controls access to a work," *id.* at 11, and then goes on to opine why Defendants' CAPTCHA prompts, challenge questions, disabling of passwords, and activity monitoring are not measures to control access. Similarly, Miracle states that "[i]n the field of software design and cybersecurity, "[t]he terms used in the DMCA to define "circumvention" of a technological access measure also have well-accepted meanings in the software design and cybersecurity field." *Id.* at 11-12. That term is already defined by the DMCA. See *17 U.S.C. § 1201(a)(3)(B)* ("a technological measure 'effectively controls access to a work' if the measure, in the ordinary **[**175]** course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work"). Similarly, Miracle expands on the DMCA's definition of "circumvent a technological measure," *17 U.S.C. 1201(a)(3)(A)*, by offering her definitions of what "bypass" and "avoid" mean in the field of software design and cybersecurity. [889-10] at 12. Using these definitions, she states that "it is my opinion that Authenticom did not 'circumvent' the technological barriers that Defendants rely on for their DMCA claim." *Id.* at 12-13.

"Although experts may provide opinions as to the ultimate factual **[*1097]** issues in a case, they may not testify "as to legal conclusions that will determine the outcome of the case" under *Rule 702*." *Scottsdale Ins. Co. v. City of Waukegan, 689 F. Supp. 2d 1018, 1022 (N.D. Ill. 2010)* (citing *Pansier, 576 F.3d at 738*, *Good Shepherd Manor Found. v. City of Momence, 323 F.3d 557, 564 (7th Cir. 2003)*). Miracle's opinions, outlined above, "amount[] to an instruction on the law and application of the law to the facts," which "invades the province of both the jury and this Court." *Andersen v. City of Chicago, 454 F. Supp. 3d 808, 819 (N.D. Ill. 2020)*; see also *Securities & Exchange Comm'n v. Ferrone, 163 F. Supp. 3d 549, 563 (N.D. Ill. 2016)* "(an expert usually cannot testify about how a law should be interpreted or what it means"); *George v. Kraft Foods Global, Inc., 800 F. Supp. 2d 928, 932 (N.D. Ill. 2011)* ("Put simply, expert opinions that seek to define the meaning of statutes are disallowed under the Federal Rules of Evidence."); *Davis v. Duran, 277 F.R.D. 362, 371 (N.D. Ill. 2011)* (rejecting **[**176]** "plaintiff's position ... that since evidence concerning the use of deadly force is relevant, and because [plaintiff's proposed expert] is an expert in the use of force, he is qualified to give the opinion"; that "opinion would not be helpful, since under the Federal Rules of Evidence, it is the role of the judge, not the witness, to instruct the jury on the applicable principles of law"). Therefore, Defendants' motion to exclude Miracle is granted to the extent that her report "set[s] forth [what] she believes the relevant law to be" and "what the legal conclusion should be based on the law and facts that [s]he describes." *Old Republic Ins. Co. v. Ness, Motley, Loadholt, Richardson & Poole, 2006 U.S. Dist. LEXIS 92371, 2006 WL 3782994, at *2 (N.D. Ill. Dec. 21, 2006)*.

The Court still must consider, however, whether Miracle should be allowed to testify about the four "factual issues" that Authenticom identifies in its response brief. The Court will defer its ruling on the first two issues— (1) whether Defendants' technological measures are capable of distinguishing between would-be users who have authority from Defendants and those who do not, and (2) the technical means by which Authenticom responded to the Defendants' measures—until after it has ruled on the relevant summary judgment motions. The Court's decision may moot the **[**177]** proposed testimony in any number of ways. For instance, if the Court construes the DMCA in a manner that conflicts with Miracle's industry definitions of the same terms used in the DMCA (i.e., "effectively control access" and "circumvented"), her factual distinctions between what Authenticom did and what is allegedly allowed under the DMCA may have no relevance.

The Court will also defer ruling on the third issue—the process by which Authenticom's software "polled" Defendants' DMS and its relevance to whether any copyrighted work was protected by the technological measures—and instead give it due consideration when ruling on the parties' summary judgment motions. Miracle's proposed testimony is relevant solely to the issue of copyrightability of the work that Defendants allegedly protected by technological measures. As Authenticom concedes, see [1007] at 21, in the Seventh Circuit, "'copyrightability is always an issue of law,'" *Janky v. Lake County Convention & Visitors Bureau, 576 F.3d 356, 363 (7th Cir. 2009)* (quoting *Gaiman v. McFarlane, 360 F.3d 644, 648 (7th Cir. 2009)*), "which the court will decide." *Pivot Point Int'l, Inc. v. Charlene Products, Inc., 932 F. Supp. 220, 225 (N.D. Ill. 1996)*. In making this determination, "district courts may and do rely on expert testimony to distinguish between protected and unprotected material in a work for which copyright is claimed." *Team Play, Inc. v. Boyer, 391 F. Supp. 2d 695, 699 (N.D. Ill. 2005)*. When resolving the summary **[**178]** **[*1098]** judgment motions, Miracle's testimony will be "merely a factor to be weighed" by the Court, *id. at 700*, and the Court will disregard the testimony to the extent "it is unreliable" or otherwise fails to satisfy *Daubert*. *Robb v. Burlington Northern & Santa Fe. Ry. Co., 100 F. Supp. 2d 867, 872 (N.D. Ill. 2000)* (explaining that evidence that is inadmissible under *Daubert* cannot be used to oppose summary judgment).

Finally, the Court denies Defendants' motion to preclude Miracle from offering testimony to respond to Stroz's efforts to count alleged DMCA violations. As explained in the prior section, Stroz attempted to determine the number of times that Authenticom circumvented CDK's CAPTCHA prompts. Starting with a set of accounts that CDK tagged as belonging to Authenticom, Stroz used documents that Authenticom produced to find ENG queries that Authenticom commonly ran on CDK's DMS. Based on her experience in the industry, Miracle opines that the mere fact that a query was executed on CDK's DMS that resembled a query found in Authenticom documents does not mean that Authenticom was the entity that executed the query. She explains that software programmers share code with third parties for a wide variety of reasons, including efficiency. Defendants emphasize that Miracle did not investigate **[**179]** how often Authenticom shared queries, either generally or in regard to the specific queries at issue here. They argue that, without a way to quantify Authenticom's query sharing, Miracle cannot say whether the potential impact on Stroz's results was inconsequential or significant.

While the Court agrees with Defendants that Miracle cannot go beyond her report by attempting to quantify the impact that code-sharing may have had on the accuracy of Stroz's calculations, her testimony may nonetheless be helpful to the jury in understanding the potential shortcomings of Stroz's calculations. Her testimony on common practices in the industry would be a piece of Authenticom's larger defense, which might also include testimony from and documents authenticated by fact witnesses that have personal knowledge of Authenticom sharing queries. Defendants will be free during cross-examination to bring out the limitations of Miracle's opinion.

C. Rubinfeld [867] — CDK and Reynolds' expert on various issues

1. Trade secrets

CDK brings counterclaims against Authenticom for violation of the Defend Trade Secrets Act, *18 U.S.C. § 1836* and the Wisconsin Uniform Trade Secrets Act. Rubinfeld opines on the reasonable royalty CDK **[**180]** should allegedly be awarded on the trade secrets claim. In his report, he notes that there are several methods for determining reasonable royalties, including established royalties, hypothetical negotiations, the Association of International Certified Professional Accountants ("AICPA") analytical method, and discounted cash flow analysis. See [871-5] at 19-20. The method Rubinfeld chooses is to evaluate the hypothetical negotiation between a willing licensee and a willing licensor at the time of the infringement, which allows him "to derive a measure of the value of the intellectual property obtained from the intellectual property holder." *Id.*; see also *id.* at 32. He opines that the price CDK charges third-party vendors under its 3PA program is a reasonable estimate of the "royalty" or price CDK would have charged Authenticom for unauthorized access to its DMS. According to Rubinfeld, this price most closely approximates the results of a hypothetical negotiation between a willing licensee and willing licensor, since it is the result of actual **[*1099]** transactions between CDK and its 3PA customers.

Authenticom argues that this opinion should be excluded as "incoherent" because Rubinfeld does **[**181]** not clearly define the applicable "trade secret." Authenticom also contends that Rubinfeld's choice of 3PA prices as a benchmark "makes little sense" because he does not do a "rigorous comparison of CDK's 3PA customers to Authenticom, or of 3PA to the DMS access Authenticom required to provide independent integration services" or "address CDK's historical policy of permitting independent integration, or Authenticom's allegations that CDK's 3PA prices were inflated by the anticompetitive conduct at issue." [871] at 29.

None of these criticisms warrant exclusion of Rubinfeld's opinion, but rather are proper topics for cross-examination. A reasonable royalty analysis "necessarily involves an element of approximation and uncertainty." *Lucent Technologies, Inc. v. Gateway, Inc., 580 F.3d 1301, 1325 (Fed. Cir. 2009)* (internal quotation marks and citation omitted). The "hypothetical negotiation" approach chosen by Rubinfeld is a commonly used methodology for determining a reasonable royalty. See *Sunoco Partnership Marketing & Terminals L.P. v. U.S. Venture, Inc., 436 F. Supp. 3d 1099, 1128-29 (N.D. Ill. 2020)*. And, as CDK points out, when actual pricing data is available, it is "usually the best measure of a 'reasonable' royalty . . . because it removes the need to guess at the terms to which parties would hypothetically agree." *Monsanto Co. v. McFarling, 488 F.3d 973, 978-79 (Fed. Cir. 2007)*. In addition to applying a reasonable methodology, **[**182]** Rubinfeld took into account differences in quality between the 3PA integration provided by CDK, which includes real-time and bi-directional (writeback) access to the DMS, and the screen-scraping techniques used by Authenticom. Rubinfeld used the first decile of 3PA prices during the damages period—between $25 and $51 per month—to estimate a reasonable royalty. He explains that this price range aligns with basic, extract-only integration packages available through 3PA, which most closely resemble Authenticom's unauthorized data extractions. To the extent that Authenticom disputes Rubinfeld's assumptions, it can raise its criticisms through cross-examination.

2. CFAA

Finally, Rubinfeld opines on the damages Authenticom should owe CDK on its CFAA claim. As one alternative form of damages, he assessed the impairment to CDK's systems caused by Authenticom's unauthorized access and querying. He relied on testing by CDK performed in 2017 to measure the percentage of its server resources ("reality") consumed by Authenticom at four dealership groups, comprising 78 rooftops. This yielded 96 data points. He calculated an average consumption rate of 3.4%, which he apportioned as a percentage of **[**183]** CDK's server hosting fees for the DMSs regularly accessed by Authenticom during the damages period to calculate minimum impairment damages.

Rubinfeld also calculated system impairment costs incurred by Reynolds, but used a different methodology based on available information. Reynolds provided summaries of direct labor costs incurred during the damages period that were associated with detecting and disrupting unauthorized access to its DMS, which totaled $6,677,169. Rubinfeld allocated 17.3% of these costs ($1,155,550) to Authenticom as damages, representing the percentage of hostile access on the *CDK* DMS that CDK identified as Authenticom between July 2016 and November 2017. He used the percentage ascertained from CDK data because a **[*1100]** Reynolds-specific number was not available.

Plaintiffs argue that Rubinfeld's damages opinion should be excluded because it relies on "plainly unjustifiable extrapolation." [871] at 30. First, Plaintiffs maintain that it was unreasonable for Rubinfeld to use 17.3% as the multiplier for Reynolds' damages, since that percentage was based on data concerning Authenticom's access to *CDK's* DMS. Defendants counter that this was reasonable because "Reynolds did **[**184]** not have visibility as to what percentage of unauthorized access Authenticom represented, in part because Authenticom concealed its access from Reynolds by attempting to trick Reynolds' DMS and deleting evidence of the reports it ran off of Reynolds DMSs." [994] at 32. Defendants also assert that the CDK numbers are likely conservative for Reynolds because Reynolds had already stopped certain hostile integrators from accessing its DMSs. Therefore, Defendants posit, Authenticom likely represented a higher percentage of unauthorized access on Reynolds' DMS during the damages period. Second, Plaintiffs argue that Rubinfeld's calculation of CDK's avoidance damage should be excluded because Rubinfeld cannot and does not justify his "facially arbitrary sampling methodologies," which looked at a single day of data for four dealership groups. [871] at 30-31.

As Stroz did, Rubinstein used the limited available data to make a rough estimate of damages, since Authenticom's alleged actions at concealment made it impossible to obtain better data. "Speculation has its place in estimating damages, and doubts should be resolved against the wrongdoer." *Mid-America Tablewares, 100 F.3d at 1365*. Rubinstein explains why his estimate is likely **[**185]** conservative, which also weighs against finding that his opinion is too unreliable to be admissible. *Tyson, 488 F. Supp. 2d at 733-34*. Plaintiffs are "free to use cross-examination to attack the assumption" of 17.3% and ask Rubinfeld "how altering the assumption would affect his analysis." *Stollings, 725 F.3d at 766*. A jury should be capable of understanding this. Finally, Plaintiffs do not offer any reason to believe that the four dealership groups tested by CDK were significantly different from Authenticom's dealer customers as a whole or that Authenticom's queries were more frequent during the tested days than during other parts of the damages period. This is another topic that can be explored in cross-examination.

V. Conclusion

For these reasons, the motions to exclude Williams [881] and Stejskal [883] are granted in part and denied in part. The motions to exclude Klein [863], Rubinfeld [867], Murphy [873], Israel [877], Lawton [879], and Halpin [887] are denied. The motion to exclude Miracle [885] is granted in part, denied in part, and deferred in part. The motion to exclude Stroz [859] is denied in part and deferred in part. As indicated in today's minute entry, the parties will be given an opportunity to (a) review this comprehensive **[**186]** opinion, (b) submit supplemental briefs on how, if at all, these rulings affect the briefing and proper disposition of the pending summary judgment motions, and (c) advise the Court on any other pertinent developments of which they believe the Court should be aware. The Court will then prepare and issue a second, comprehensive opinion disposing of the summary judgment motions in due course.

Dated: January 21, 2022

/s/ Robert M. Dow, Jr.

Robert M. Dow, Jr.

United States District Judge

George & Co. LLC v. Target Corp.

United States District Court for the Eastern District of New York

January 27, 2022, Filed

21-CV-4254-DG-SJB

Reporter
2022 U.S. Dist. LEXIS 16090 *; 2022 WL 1407236

GEORGE & COMPANY LLC, Plaintiff, v. TARGET CORPORATION, and various JOHN DOES, JANE DOES, and ABC COMPANIES, Defendants.

Core Terms

marks, infringement, alleges, registered, secondary meaning, motion to dismiss, counterfeiting, photographs, trademark, products, quotations, abbreviation, tags, registration, advertising, consumer, factors, rebut, likelihood of confusion, trademark infringement, district court, sophistication, incontestable, similarity, imitation, display, cases, purchasers, discovery, in-store

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Judges: SANKET J. BULSARA, United States Magistrate Judge.

Opinion by: SANKET J. BULSARA

Opinion

REPORT & RECOMMENDATION

BULSARA, United States Magistrate Judge:

This report and recommendation resolves Defendant Target Corporation's ("Target") motion to dismiss Plaintiff George & Company LLC's ("George & Co.") Amended Complaint.[1] The Amended Complaint contains two claims against Target: (1) trademark infringement and counterfeiting under *section 32* of the Lanham Act,[2] and (2) false designation of origin, passing off, and unfair competition under *section 43* of the Lanham Act.[3] The suit involves the

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[1] George & Co. filed this case on October 20, 2020 in the Northern District of Illinois, and the Honorable Charles P. Kocoras granted Target's motion to transfer the case to this District. Mem. Op. dated July 14, 2021, Dkt. No. 31 at 13.

[2] First Am. Compl. dated Jan. 4, 2021 ("Am. Compl."), Dkt. No. 23 ¶¶ 40-49.

[3] *Id.* ¶¶ 50-55.

alleged infringement of various marks related to George & Co.'s game "Left, Center, Right." **[*2]** Target has moved to dismiss on a variety of grounds.[4] The Court concludes that dismissal is only appropriate as to the second claim.

STANDARD FOR MOTION TO DISMISS

"The purpose of a motion to dismiss for failure to state a claim under *Rule 12(b)(6)* is to test the legal sufficiency of [a] . . . claim[] for relief." *Amadei v. Nielsen, 348 F. Supp. 3d 145, 155 (E.D.N.Y. 2018)* (citing *Patane v. Clark, 508 F.3d 106, 112 (2d Cir. 2007)*). In deciding such a motion, the Court must "construe the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Palin v. N.Y. Times Co., 940 F.3d 804, 809 (2d Cir. 2019)* (quotations and alteration omitted); *Amadei, 348 F. Supp. 3d at 155* ("[W]hen reviewing a complaint on a motion to dismiss for failure to state a claim, the court must accept as true all allegations of fact in the complaint and draw all reasonable inferences in favor of [the non-moving party].").

Once the facts are construed in the light most favorable to the non-moving party—here, George & Co.—to avoid dismissal there must be sufficient facts that allege a plausible claim. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* ("To survive a motion to dismiss [pursuant to *Rule 12(b)(6)*], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.") (internal citation and quotations omitted). "[A] district **[*3]** court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference. Of course, it may also consider matters of which judicial notice may be taken under *Fed. R. Evid. 201*." *Kramer v. Time Warner Inc., 937 F.2d 767, 773 (2d Cir. 1991)*.

"Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal, 556 U.S. at 678*. A complaint must contain more than "naked assertion[s] devoid of further factual enhancement." *Id.* (citation and quotations omitted). In other words, a plausible claim contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*; *Fed. R. Civ. P. 8(a)(2)*. "Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly, 550 U.S. 554, 555 (2007)* (internal citations omitted). The determination of whether a party has alleged a plausible claim is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal, 556 U.S. at 679*; *see also Escamilla v. Young Shing Trading Co., No. 17-CV-652, 2018 U.S. Dist. LEXIS 3901, 2018 WL 1521858, at *2 (E.D.N.Y. Jan. 8, 2018)*, *report and recommendation adopted*, *2018 U.S. Dist. LEXIS 29972, 2018 WL 1033249, at *3 (Feb. 23, 2018)*.

FACTS[5]

This action is one of many George & Co. has filed in recent **[*4]** years regarding the trademarks for the dice game that it sells.[6] George & Co.'s "Left, Center, Right" "dice game is distributed and sold throughout the United States and abroad."[7]

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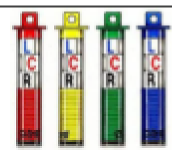
[4] Def. Target's Mot. to Dismiss dated Jan. 19, 2021 ("Mot. to Dismiss"), Dkt. No. 25.

[5] The facts, which the Court accepts as true for the purposes of considering a *Rule 12(b)(6)* motion to dismiss, *see Friedman v. Bloomberg L.P., 884 F.3d 83, 93 (2d Cir. 2017)*, are drawn from the Amended Complaint and its attached exhibits, unless otherwise noted.

[6] Am. Compl. ¶ 8 (containing photographs of formulations of the game).

[7] *Id.* ¶ 11.

This dispute arises from Target's sale of a competing version of the dice game.[8] Target previously sold George & Co.'s game in about 1,700 stores, but stopped doing so in 2011, and began selling a competing version in 2015.[9] George & Co. alleges that in doing so, Target unlawfully used its registered trademarks, the "LCR Marks."[10] The 13 LCR Marks are in the following table:[11]

Reg. No.	Reg. Date[12]	Trademark
2,802,321	Jan. 6, 2004	
2,989,658	Aug. 30, 2005	LCR
3,854,443	Sept. 28, 2010	PLAY LCR WITH CHIPS OR WHATEVER MAKES IT FUN FOR YOU
3,917,337	Feb. 8, 2011	LCR
3,917,401	Feb. 8, 2011	LCR
3,922,749	Feb. 22, 2011	PLAY LCR WITH CHIPS OR WHATEVER MAKES IT FUN FOR YOU
4,002,630	July 26, 2011	
4,006,384	Aug. 2, 2011	LCR
4,119,570	Mar. 27, 2012	
4,132,929	Apr. 24, 2012	LCR
4,201,291	Sept. 4, 2012	
4,229,002	Oct. 23, 2012	
4,419,874	Oct. 15, 2013	LCR WILD

[12]

George & Co. informed Target on February 4, 2015 that it was "using, without authorization, the LCR Marks to offer and sell . . . another version of" George & Co.'s game.[13] George & Co. alleged that this unauthorized use included use of these marks "on labeling and advertising including . . . in-store tags such as shelf talkers" at Target retail locations.[14] Target told George & Co. that it "removed LCR from the store scan . . . effective February 18, 2015."[15] And it also informed George & Co. that it would begin using a "new shelf price tag for the accused products which does not contain 'LCR.'"[16] George & Co. alleges that Target **[*5]** did not fully rid its stores of the LCR Marks, and provided two photographs taken in late July 2020 showing a "Target in-store scanner reading of the Inauthentic

[8] *Id.* ¶ 30. The Amended Complaint refers to the competing version as "Inauthentic Substitute Game," *id.*, which is a game made by Spin Master, as indicated in the correspondence attached to the Amended Complaint. *See* Email Correspondence dated Mar. 25, 2015 ("Mar. 25, 2015 Email"), attached as Ex. C to Am. Compl. at 3; Email Correspondence dated Apr. 3, 2015 ("Apr. 3, 2015 Email"), attached as Ex. D to Am. Compl. at 3.

[9] Am. Compl. ¶¶ 25, 27, 29-33.

[10] *Id.* ¶ 18.

[11] *Id.*; LCR Marks Registrations, attached as Ex. A to Am. Compl.

[12] *See id.*

[13] Am. Compl. ¶ 30.

[14] *Id.*

[15] *Id.* ¶ 31. (quoting Mar. 25, 2015 Email at 3).

[16] Apr. 3, 2015 Email at 1.

Substitute Game product listing" using the LCR Marks[17] and an "in-store tag" with the LCR mark hanging on a shelving rod.[18] George & Co. alleges that these tags are part of Target's continuing effort to sell the Inauthentic Substitute Game.[19]

These alleged uses by Target are the basis for the infringement and counterfeiting claim, Count I.[20] George & Co. alleges that Target's use of the LCR Marks was without permission, ongoing, and willful.[21] And this willful use of the LCR Marks "is likely to cause and is causing confusion, mistake, and deception as to the origin and quality of the Inauthentic Substitute Game among the general public," in violation of *15 U.S.C. § 1114*.[22] In support of Count II, the false designation and passing off claim, George & Co. alleges that Target's conduct causes "confusion, mistake, and deception," "as to the true origin and sponsorship of the Inauthentic Substitute Game,"[23] in violation of *15 U.S.C. § 1125*.[24] For both counts, George & Co. seeks damages, fees, and injunctive relief.[25]

On January 19, 2021, Target moved to dismiss **[*6]** the Amended Complaint for failure to state a claim, and in the alternative, requests that George & Co. be required to provide a more definite statement. George & Co. filed a response on February 10, 2021.[26] Following the transfer of this case to this District on July 29, 2021, Target filed a supplemental brief in support of its motion to dismiss on October 25, 2021.[27] That same day, George & Co. filed a supplemental opposition brief.[28] The Honorable Diane Gujarati referred the motion to the undersigned on December 15, 2021.

DISCUSSION

I. Trademark Infringement and Counterfeiting (Count I)

George & Co.'s first claim alleges trademark infringement and counterfeiting in violation of *15 U.S.C. § 1114*.[29] *Section 1114* governs two kinds of trademark claims: (1) a claim best described as "direct infringement of a registered mark," 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 25:26 (5th ed. 2021), namely the use of an infringing mark in interstate or foreign commerce in connection with the sale or distribution of goods or services (governed by *§ 1114(1)(a)*); and (2) a claim of infringement by printers and labelers, namely the reproduction, copying, or imitation of a registered mark on a label or sign in connection with **[*7]** the sale or advertising of goods or services (governed by *§ 1114(1)(b)*).

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[17] Am. Compl. ¶ 33; In-Store Scanner Photograph taken July 29, 2020 ("Scanner Photograph"), attached as Ex. E to Am. Compl.

[18] Am. Compl. ¶ 33; In-Store Tag Photograph taken July 31, 2020 ("Tag Photograph"), attached as Ex. F to Am. Compl.

[19] Am. Compl. ¶ 30.

[20] *Id.* ¶¶ 33, 41.

[21] *Id.* ¶¶ 45-47.

[22] *Id.* ¶ 46.

[23] *Id.* ¶¶ 52-53.

[24] *Id.* ¶ 54.

[25] Am. Compl. at 11-13.

[26] Pl.'s Response to Mot. to Dismiss dated Feb. 10, 2021 ("Pl.'s Response"), Dkt. No. 28.

[27] Def.'s Suppl. Br. In Supp. of Def.'s Mot. to Dismiss dated Oct. 25, 2021 ("Target Suppl."), Dkt. No. 52.

[28] Pl.'s Suppl. Mem. in Opp'n to Def.'s Mot. to Dismiss dated Oct. 25, 2021 ("George & Co. Suppl."), Dkt. No. 53.

[29] Count I also cites to *15 U.S.C. § 1116(d)*. That provision details the procedures for obtaining an *ex parte* order for seizure of goods and counterfeit marks, and additional remedies against counterfeiting.

As to which George & Co. is asserting, it never cites to a subsection of *§ 1114* and casually repeats the word "advertising" repeatedly in its papers and the Amended Complaint. (*E.g.*, Am. Compl. ¶¶ 41-42, 43). This is decidedly unhelpful to the Court. But the Court concludes that George & Co., even if it intended to, has not stated a claim under *§ 1114(1)(b)*. That is because to obtain monetary relief for such a violation, a defendant must have committed the prohibited acts of copying or imitation "with knowledge that such imitation is intended to be used to cause confusion." *15 U.S.C. § 1114(1)(b)*. That is, "the registrant must show not only that the infringer infringed, but that he did so with the deliberate intent to cause confusion, mistake or to deceive purchasers; in other words, to purposely palm off the infringer's goods as those of the infringed." *Everest & Jennings, Inc. v. E & J Mfg. Co., 263 F.2d 254, 262 (9th Cir. 1958)*; *see also* *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena, 433 F.2d 686, 707 (2d Cir. 1970)* (citing *Everest, 263 F.2d at 262*). The Amended Complaint contains no such allegation. The Court, therefore, only analyzes whether George & Co. has stated a direct infringement claim under *§ 1114(1)(a)*. *Cf.* *Chanel, Inc. v. RealReal, Inc., 449 F. Supp. 3d 422, 436 n. 13 (S.D.N.Y. 2020)* ("Because Plaintiff's second cause of action cites *15 U.S.C. § 1114(1)* generally, I construe Plaintiff's counterfeiting allegations to assert **[*8]** a trademark infringement claim based on the use of counterfeit goods under *section 32(1)(a)*.").[30]

Turning, therefore, to the direct infringement allegation, to state such a claim a plaintiff "must demonstrate that (1) it has a valid mark that is entitled to protection and that (2) the defendant's actions are likely to cause confusion with [that] mark." *Tiffany & Co. v. Costco Wholesale Corp., 971 F.3d 74, 84 (2d Cir. 2020)* (quotations omitted).

A. Validity of the LCR Marks

As to the first element, "[a] certificate of registration . . . [is] prima facie evidence of the validity of the registered mark, and creates a presumption that the mark is entitled to protection." *Solid 21, Inc. v. Jomashop Inc., No. 19-CV-1179, 2020 U.S. Dist. LEXIS 255464, 2020 WL 9816843, at *3 (E.D.N.Y. Nov. 30, 2020)* (alterations in original) (internal citation and quotations omitted) (citing *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 799 F.2d 867, 871 (2d Cir. 1986)*). "A registered mark becomes incontestable if it has been in continuous use for five consecutive years subsequent to its registration and is still in use." *Lopez v. Adidas Am., Inc., No. 19-CV-7631, 2020 U.S. Dist. LEXIS 88375, 2020 WL 2539116, at *8 (S.D.N.Y. May 19, 2020)* (quoting *Gruner + Jahr USA Pub., a Div. of Gruner + Jahr Printing & Pub. Co. v. Meredith Corp., 991 F.2d 1072, 1076 (2d Cir. 1993)*).

> If a mark [becomes] incontestable, its registration 'shall be conclusive evidence . . . of the registrant's exclusive right to use the registered mark in commerce[.]' . . . What this means is that a defendant in an infringement suit—where plaintiff has an incontestable mark because of five years' registration—may not succeed in a defense that declares the mark is entitled **[*9]** to no protection because it is descriptive.

Id. (first alteration in original) (quoting *Gruner + Jahr USA Pub., 991 F.2d at 1076-77*). George & Co. alleges it has owned the LCR Marks "with longstanding and prior use," and that the marks "have been extensively and continuously advertised and promoted to the public through various means." (Am. Compl. ¶¶ 18, 23). And as Target admits, the LCR Marks are incontestable: each is registered, and the most recent, No. 4,419,874, was registered on October 15, 2013. (*Supra* at 4-5). The LCR Marks are therefore valid incontestable marks. *Vox Amplification Ltd. v. Meussdorffer, No. CV 13-4922, 2014 U.S. Dist. LEXIS 21577, 2014 WL 558866, at *8 (E.D.N.Y. Feb. 11, 2014)* ("[W]hen considering an incontestable registered trademark, courts 'need not tarry with the first prong of the infringement test.'") (quoting *Savin Corp. v. Savin Grp., 391 F.3d 439, 456 (2d Cir. 2004)*), *report and recommendation adopted*, *50 F. Supp. 3d 355, 376 (E.D.N.Y. 2014)*.[31]

B. Likelihood of Confusion

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[30] And as for any claim for injunctive relief, none of the cases cited by George & Co. in opposition to the motion to dismiss address *section 1114(1)(b)*. Nor do they allege that Target is a printer which would fall within that subsection. The Court can, therefore, only conclude George & Co. is not seeking an injunction on the basis of *section 32(1)(b)*.

[31] Target argues George & Co. has not demonstrated ownership of the common law marks or unregistered marks the Amended Complaint makes brief reference to. Target Suppl. at 4-5; Mot. to Dismiss at 6; Am. Compl. ¶ 18. The argument is irrelevant. George & Co.'s claims are based on the LCR Marks, Am. Compl. ¶¶ 40-55, which are registered.

"With the first prong of the infringement inquiry presumptively satisfied, the principal question . . . is whether" Target's use of "LCR" "was likely to cause confusion" with any of George & Co.'s registered marks. *Tiffany & Co., 971 F.3d at 84*. This "crucial issue in an action for trademark infringement . . . is whether there is any likelihood that an appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed **[*10]** simply confused, as to the source of the goods in question." *Savin, 391 F.3d at 456* (alteration in original) (quoting *Mushroom Makers, Inc. v. R.G. Barry Corp., 580 F.2d 44, 47 (2d Cir. 1978)*).

"[L]ikelihood of confusion is a fact-intensive analysis that ordinarily does not lend itself to a motion to dismiss." *Van Praagh v. Gratton, 993 F. Supp. 2d 293, 303 (E.D.N.Y. 2014)* (quoting *The Name LLC v. Arias, No. 10 Civ. 3212, 2010 U.S. Dist. LEXIS 121413, 2010 WL 4642456, at *5 (S.D.N.Y. Nov. 16, 2010)*); *see also* *A.V.E.L.A., Inc. v. Est. of Marilyn Monroe, LLC, 131 F. Supp. 3d 196, 213 (S.D.N.Y. 2015)* ("[T]he question of whether a descriptive mark has acquired the secondary meaning necessary to be distinctive generally should not—and here cannot—be resolved on a motion to dismiss.").

The Court evaluates the likelihood of confusion

> using the test articulated in *Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492 (2d Cir. 1961)* ("*Polaroid*"), which balances the following eight factors: (1) the strength of the trademark; (2) the degree of similarity between the plaintiff's mark and the defendant's allegedly imitative use; (3) the proximity of the products and their competitiveness with each other; (4) the likelihood that the plaintiff will 'bridge the gap' by developing a product for sale in the defendant's market; (5) evidence of actual consumer confusion; (6) evidence that the defendant adopted the imitative term in bad faith; (7) the respective quality of the products; and (8) the sophistication of the relevant population of consumers.

Tiffany & Co., 971 F.3d at 84-85 (footnotes omitted). Under the *Polaroid* test, "a court should focus on the ultimate question **[*11]** of whether consumers are likely to be confused[,]" not whether more factors weigh in a party's favor. *Id. at 85* (quoting *Nabisco, Inc. v. Warner-Lambert Co., 220 F.3d 43, 46 (2d Cir. 2000)*). "The pertinence of individual factors varies with the facts of the particular case." *Guthrie Healthcare Sys. v. ContextMedia, Inc., 826 F.3d 27, 37 (2d Cir. 2016)*. "Nevertheless, 'it is incumbent upon the district judge to engage in a deliberate review of each factor, and, if a factor is inapplicable to a case, to explain why.'" *Solid 21, Inc., 2020 U.S. Dist. LEXIS 255464, 2020 WL 9816843, at *3* (quoting *Arrow Fastener Co. v. Stanley Works, 59 F.3d 384, 400 (2d Cir. 1995)*).

Target does not cite *Polaroid*, or go through the factors in any methodical or detailed manner. Some of the arguments that Target does make are pertinent to some of the factors; each is addressed in the appropriate context, where possible. In any event, none of Target's arguments have merit, and the Court concludes that George & Co. has established a likelihood of confusion.

i. Strength of the LCR Marks

"Marks are classified, in ascending order of strength[.]" *Star Indus., Inc. v. Bacardi & Co., 412 F.3d 373, 384-85 (2d Cir. 2005)* (quoting *TCPIP Holding Co. v. Haar Commc'ns, Inc., 244 F.3d 88, 93 (2d Cir. 2001)*). "Arrayed in an ascending order which roughly reflects their eligibility to trademark status and the degree of protection accorded, these classes are (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful." *Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976)* (Friendly J.). As such, "the law accords broad, muscular protection to marks that are arbitrary or fanciful in relation to the **[*12]** products on which they are used, and lesser protection, or no protection at all, to marks consisting of words that identify or describe the goods or their attributes." *Virgin Enters. Ltd. v. Nawab, 335 F.3d 141, 147 (2d Cir. 2003)*. Ultimately, this classification and the strength of a mark turns on "(1) the degree to which [the mark] is inherently distinctive; and (2) the degree to which it is distinctive in the marketplace," *Solid 21, Inc., 2020 U.S. Dist. LEXIS 255464, 2020 WL 9816843, at *4* (quoting *Car-Freshner Corp. v. Am. Covers, Inc., 980 F.3d 314, 329 (2d Cir. 2020)*), a concept known as "secondary meaning." "[S]econdary meaning . . . occurs when, 'in the minds of the public, the primary significance of a [mark] is to identify the source of the product rather than the product itself.'" *Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205, 211, 120 S. Ct. 1339, 146 L. Ed. 2d 182 (2000)* (quoting *Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 851 n.11, 102 S. Ct. 2182, 72 L. Ed. 2d 606 (1982)*).

"Determination of strength . . . begins with inquiry as to whether the mark has the inherent distinctiveness that would entitle it to protection in the absence of secondary meaning." *Star Indus., Inc., 412 F.3d at 384*. "Only suggestive and arbitrary or fanciful marks are inherently distinctive and, as a result, automatically protectable." *Giggle, Inc. v. netFocal, Inc., 856 F. Supp. 2d 625, 629 (S.D.N.Y. 2012)*. "Suggestive marks are those that . . . suggest a quality or qualities of the product through the use of 'imagination, thought and perception[.]'" *Star Indus., 412 F.3d at 385* (internal citation omitted) (quoting *Time, Inc. v. Petersen Publ'g Co., 173 F.3d 113, 118 (2d Cir. 1999)*). "Suggestive marks are eligible for protection without any proof of secondary meaning, since **[*13]** the connection between the mark and the source is presumed." *Thompson Med. Co. v. Pfizer Inc., 753 F.2d 208, 216 (2d Cir. 1985)*.

As with many things in the law, context matters. So, even if a mark does not have "inherent distinctiveness," it may have "acquired distinctiveness" based on the "mark's secondary meaning in the marketplace." *Giggle, Inc., 856 F. Supp. 2d at 631*; *Star Indus., 412 F.3d at 385* ("Descriptive marks . . . are protectable provided they have acquired secondary meaning . . . sometimes referred to as 'acquired distinctiveness.'"); *Thoip v. Walt Disney Co., 736 F. Supp. 2d 689, 703 (S.D.N.Y. 2010)* ("Descriptive marks are nonetheless protectable when they acquire secondary meaning.") (quotations omitted). Secondary meaning is determined based on a number of factors: "advertising expenditures; consumer studies linking the mark to a source; sales success; unsolicited media coverage of the product; attempts to plagiarize the mark; and length and exclusivity of the mark's use." *Thompson Med. Co., 753 F.2d at 217* (internal citations omitted).

Registered marks enjoy "a conclusive presumption of distinctiveness." *Savin, 391 F.3d at 457*. "Registration by the PTO without proof of secondary meaning creates the presumption that the mark is more than merely descriptive, and, thus, that the mark is inherently distinctive." *Lane Cap. Mgmt., Inc. v. Lane Cap. Mgmt., Inc., 192 F.3d 337, 345 (2d Cir. 1999)*. When the presumption applies, a defendant "bears the burden to rebut" it. *Id.*

George & Co. alleges that the **[*14]** LCR Marks are "well-known" to the public because of the sale of its dice game using those marks. (Am. Compl. ¶¶ 19-20). To achieve those sales, George & Co. has spent "significant resources advertising and promoting" its game using the LCR Marks, including at toy shows, retail store displays, and on the internet. (*Id.* ¶¶ 22-23). The sale of the game using these marks associates the game with George & Co. (*Id.* ¶¶ 20-24). And as noted, the LCR Marks are each incontestable registered marks.

These allegations are sufficient to establish that the LCR Marks—at this stage—fall into the stronger and more protectable "inherently distinctive" category, and are at least "moderately strong," if not slightly stronger. *See, e.g., Kohler Co. v. Bold Int'l FZCO, 422 F. Supp. 3d 681, 721 (E.D.N.Y. 2018)* ("In light of the Kohler BOLD Marks' barely moderate inherent strength and at least moderate strength in the marketplace, this Court concludes that plaintiff's marks are, for purposes of this motion, barely moderately strong."); *Shawarma Stackz LLC v. Jwad, No. 21-CV-01263, 2021 U.S. Dist. LEXIS 235397, 2021 WL 5827066, at *17 (S.D. Cal. Dec. 8, 2021)* ("SSL's Marks are likely to be found as suggestive, which are inherently distinctive and hold at least a moderate degree of strength.").

In response, Target argues that George & Co. cannot plausibly allege that the abbreviation "LCR" has acquired **[*15]** secondary meaning. (Target Suppl. at 3). This argument is misplaced for several reasons. For one thing, the abbreviation "LCR" is only one of the several marks that George & Co. alleges has been infringed.[32] For another, the concept of secondary meaning becomes pertinent from a pleading perspective only if there is nothing to establish inherent distinctiveness. *Star Indus., 412 F.3d at 384-85*. Said differently, Target's argument suggests that a failure to plead secondary meaning requires dismissal. But where the marks have a conclusive presumption of distinctiveness resulting from registration, secondary meaning need not be pled by the plaintiff. *Artisan Mfg. Corp. v. All Granite & Marble Corp., 559 F. Supp. 2d 442, 450 (S.D.N.Y. 2008)* ("A mark's strength can be shown by

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[32] Target could have reasonably argued that there is no connection between several of the LCR Marks, some of which are visual images and others which are phrases containing "LCR," and Target's alleged use—depicted in the photographs appended to the Amended Complaint, which only show Target using the label "LCR"—and such marks should be dismissed from the suit. But it did not.

its inherent distinctiveness, by proof that the mark has secondary meaning, or both."). Requiring a plaintiff to allege secondary meaning in the complaint would defeat the concept of a presumption.

To be sure, a defendant can rebut the presumption by showing the absence of secondary meaning, but the defendant bears that burden, and almost always attempts to make that rebuttal through evidence gathered at summary judgment. Resolution of the merits of the argument is nigh-impossible on a motion to dismiss. *See* *Blockchain Luxembourg S.A. v. Paymium, SAS, No. 18 Civ. 8612, 2019 U.S. Dist. LEXIS 133897, 2019 WL 4199902, at *6 (S.D.N.Y. Aug. 7, 2019)* ("'[D]etermining whether a **[*16]** descriptive mark has acquired secondary meaning is a fact-intensive inquiry' that requires the development of a robust evidentiary record. Accordingly, acquired distinctiveness through secondary meaning is a question of fact that this Court cannot decide on a *Rule 12(b)(6)* motion to dismiss.") (internal citation omitted) (quoting *A.V.E.L.A., Inc., 131 F. Supp. 3d at 212-13*).

Besides attempting to argue that George & Co. must plead secondary meaning, Target also tries to rebut the presumption by relying on two court decisions. This effort has no merit.

As an initial matter, Target provides no doctrinal basis on which this Court can rely on those decisions. This is no small matter. Target is essentially invoking collateral estoppel, contending that because George & Co. already lost the issue of secondary meaning and genericness in other litigation about its marks, its claims here must be dismissed. Target, of course, was not a party to either of the two cases it relies upon: *George & Co. LLC v. Imagination Ent. Ltd., 575 F.3d 383 (4th Cir. 2009)* and *George & Co., LLC v. Spin Master Corp., No. 19-CV-04391, 2020 U.S. Dist. LEXIS 223689, 2020 WL 7042665 (E.D.N.Y. Nov. 30, 2020)*. And as a third party, it would have to establish it is entitled to invoke nonmutual collateral estoppel, a doctrine governed by state law which Target does not brief or acknowledge.[33] *Warmin v. New York City Dep't of Educ., No. 16 CIV. 8044, 2018 U.S. Dist. LEXIS 47518, 2018 WL 1441382, at *8 (S.D.N.Y. Mar. 22, 2018)* ("[N]on-mutual collateral estoppel allows a defendant who was not a party to the **[*17]** previous litigation to rely on . . . collateral estoppel to bar . . . issues raised in subsequent litigation, assuming the issue was fully and fairly litigated in the first instance.") (quoting *Ranasinghe v. Kennell, No. 16 Civ. 2170, 2017 U.S. Dist. LEXIS 10512, 2017 WL 384357, at *3 (S.D.N.Y. Jan. 25, 2017)*). But what is fatal to the argument is that the issues decided and marks adjudicated in these two cases were not identical to those here.

As for what was litigated and decided in *George & Co. v. Imagination*, Target cites to a footnote where the Fourth Circuit said that "LCR is an abbreviation of the descriptive term LEFT CENTER RIGHT. LEFT CENTER RIGHT is a descriptive term." *575 F.3d at 395 n.12*; *see also* Target Suppl. at 3. Target inappropriately takes the footnote entirely out of context. The reason the Fourth Circuit added the footnote was because it "harbor[ed] doubt that the LCR mark is suggestive[.]" *Imagination, 575 F.3d at 395*. But it recognized that "[t]he district court concluded that the LCR mark was suggestive," and proceeded to *uphold* that finding.

> Under these circumstances, like the district court, we are constrained to conclude that the LCR mark is suggestive. We are obligated to defer to the determination of the USPTO, which constitutes *prima facie* evidence of whether a mark is descriptive or suggestive. . .. And although Imagination had an opportunity **[*18]** in the district court to rebut the presumption raised by the USPTO's determination, it declined to do so, instead conceding that the LCR mark is suggestive. Accordingly, even though LCR is an abbreviation for LEFT CENTER RIGHT and we harbor doubt that the LCR mark is suggestive, we are not at liberty to take issue with the district court's determination.

Id. In other words, the Fourth Circuit did not decide or find this issue against George & Co., but in its favor (while noting its disagreement). So for Target to say in its papers that this court "conclusively determined that the phrase Left Center Right is descriptive" and rely on the footnote for that assertion, is—to say the least—quite misleading. And it certainly is not a basis to invoke issue preclusion or find that the LCR Marks here are not entitled to the presumption of strength.

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[33] While in its brief it outlines the elements of collateral estoppel, Mot. to Dismiss at 8; Target Suppl. at 2, Target makes no mention of the non-mutuality, and engages in a cursory analysis of the elements of estoppel.

There is further reason not to do so. Of the 13 LCR Marks that are the subject of this suit, only two were registered at the time of the Fourth Circuit's decision in 2009. The remainder were registered after 2009. (*See* LCR Marks, *supra* at 4-5). Quite obviously, a determination by another court about marks not at issue here has no bearing on this litigation. **[*19]** And Target's assertion regarding the Fourth Circuit's statement that LCR "had not acquired secondary meaning" as of 2008, (Target Suppl. at 3 (quotations omitted)), bears little to no relevance to a litigation brought in 2021 in which Target seeks a dismissal as a matter of law. Perhaps the Fourth Circuit's finding is entitled to some evidentiary weight as a subsequent merits determination in this case (because 2 of the 13 marks are the same), but that is not a reason to apply estoppel here and find that as a matter of law, there is no secondary meaning for all 13 marks.

The other case, this time from this District, runs into similar problems. That case remains pending, and has not reached final judgment, so it itself cannot provide any kind of estoppel or preclusive effect in this case. *Spin Master Corp., 2020 U.S. Dist. LEXIS 223689, 2020 WL 7042665, at *8*; Dkt. Sheet, No. 19-CV-04391; *Purdy v. Zeldes, 337 F.3d 253, 258 (2d Cir. 2003)* ("a valid and final judgment on the merits" is a required element for collateral estoppel) (quotations and citation omitted). But again, Target leaves out the pivotal context and makes misleading presentations. In her decision, Judge Kovner found that George & Co. could not pursue its claims based on the marks "Left Center Right" but *could* proceed with the claims based **[*20]** on the marks "LCR," which are the marks in this case. *Spin Master Corp., 2020 U.S. Dist. LEXIS 223689, 2020 WL 7042665, at *9* ("The motion to dismiss plaintiff's trademark-related claims is accordingly granted as to the LEFT CENTER RIGHT and 'Tagline and Arrows' design marks, but denied as to plaintiff's remaining marks.") (internal citations omitted). And while Judge Kovner did use the Fourth Circuit's case to estop George & Co. from pursuing its "Left Center Right" infringement claims, *2020 U.S. Dist. LEXIS 223689, [WL] at *7—*8*, those were claims that the Fourth Circuit actually decided. As explained earlier, it did not decide issues that would permit estoppel in this case. At various points, Target uses these decisions to argue that the presumption of distinctiveness is rebutted. Given the inapplicability of the decisions, there has been no such rebuttal; and this is not surprising, since doing so on a motion to dismiss is almost impossible. *Lopez, 2020 U.S. Dist. LEXIS 88375, 2020 WL 2539116, at * 8—*9* (declining to analyze secondary meaning at motion to dismiss stage amid defendant's attempt to rebut presumption of distinctiveness without developed record); *Naples Screen Repair, LLC v. Arrow Handyman "LLC", No. 2:20-CV-844, 2021 WL 75124, at *2 (M.D. Fla. Jan. 9, 2021)* (declining to find presumption rebutted because a "motion to dismiss is not the proper vehicle to engage in a fact-specific analysis").

Target also uses the statements from these cases to make a **[*21]** free-standing dismissal argument that appears to be as follows: because the term "LCR" is necessarily an abbreviation for "Left Center Right," and because "Left Center Right" claims have been dismissed—either because the term is descriptive or has no secondary meaning—the LCR claims must also be dismissed. The problem with this syllogism is two-fold. First, to preclude or estop George & Co.—*i.e.*, to have a doctrinal basis in which to anchor the dismissal—some court must have actually decided that issue (that "LCR" necessarily is an abbreviation of "Left Center Right"). And no court has. As noted, the statement "LCR is an abbreviation of the descriptive term" from the Fourth Circuit's decision is the court's gloss on why it would have decided the issues differently from the district court, not how it actually ruled. Second, it does not necessarily follow that because Term A is an abbreviation for Term B, and because Term B is descriptive, that Term A is also descriptive. *Anheuser-Busch Inc. v. Stroh Brewery Co., 750 F.2d 631, 637 (8th Cir. 1984)* ("In no[] [case] is it stated as a matter of law that initials of generic or descriptive phrases are unprotectible."); 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 12:37 (5th ed. 2021) (collecting **[*22]** cases where abbreviations of generic terms are also found to be generic and cases where opposite conclusion was reached). So "LCR" could have meaning independent of whether "Left Center Right" does. Indeed, we know that the PTO has registered 11 different LCR Marks since the Fourth Circuit's decision. And we also know that Judge Kovner, in other litigation, permitted George & Co. to pursue infringement claims based on these same LCR Marks. Certainly, even if future evidence showed there is no secondary meaning, and as such, the abbreviation is as generic as the full phrase, or the presumption accorded to registered marks has otherwise been rebutted, the claims could be dismissed on those grounds. But to do so now, at the pleading stage, and rule as a matter of law, solely based on the Amended Complaint and the out-of-context statements from two opinions, is not possible.[34]

As a result, given the registration of the LCR Marks, and the failure to rebut their presumption of distinctiveness, the Court concludes that these marks are, at a minimum, moderately strong. *Lopez, 2020 U.S. Dist. LEXIS 88375, 2020 WL 2539116, at *9* ("The fact that the mark is incontestably registered and that Lopez has raised some allegations supporting strength under **[*23]** these criteria suffices for the moment. This factor favors Lopez and does not support dismissal.").

ii. Degree of Similarity

"The 'similarity of the marks test . . . attempts to discern whether the similarity of the marks is likely to cause confusion among potential customers.'" *E.A. Sween Co., Inc. v. A & M Deli Express Inc., 787 F. App'x 780, 783-84 (2d Cir. 2019)* (quoting *Malletier v. Burlington Coat Factory Warehouse Corp., 426 F.3d 532, 537 (2d Cir. 2005)*). "To apply this factor, courts must analyze the mark's overall impression on a consumer, considering the context in which the marks are displayed and the totality of factors that could cause confusion among prospective purchasers." *Malletier, 426 F.3d at 537* (quotations omitted). "[T]he law requires only confusing similarity, not identity." *Louis Vuitton Malletier v. Dooney & Bourke, Inc., 454 F.3d 108, 117 (2d Cir. 2006)*.

The photographs appended to the Amended Complaint suggest substantial similarity, if not identity, between the marks used by Target and some of the LCR Marks. Five of these marks protect the initials "LCR." This is the identical term on the two photographs. (*See* Scanner Photograph; Tag Photograph). The photographs show Target used "LCR", including on the shelves where it sold the competing game and on the screen where customers checked out. (*See* Scanner Photograph; Tag Photograph). Target does not address this factor; and given this plain identity between the protected marks and the marks **[*24]** used by Target, at this stage of the case, this factor favors George & Co. *See, e.g., Franklin v. X Gear 101, LLC, No. 17 Civ. 6452, 2018 U.S. Dist. LEXIS 122658, 2018 WL 3528731, at *12 (S.D.N.Y. July 23, 2018)* (allegation that "the defendants' mark is a substantial identical replication and copy of plaintiff's ORIGINAL WORK Logo. . . . establishes a significant degree of similarity between the marks" at motion to dismiss stage) (internal quotations and citation omitted), *report and recommendation adopted*, *2018 U.S. Dist. LEXIS 146641, 2018 WL 4103492, at *9 (Aug. 28, 2018)*; *Soter Techs., LLC v. IP Video Corp., 523 F. Supp. 3d 389, 405 (S.D.N.Y. 2021)* (finding factor favored plaintiff where defendant used the exact same term as plaintiff's mark for its website's domain name); *Planned Parenthood Fed'n of Am., Inc. v. Bucci, No. 97 CIV. 0629, 1997 U.S. Dist. LEXIS 3338, 1997 WL 133313, at *8 (S.D.N.Y. Mar. 24, 1997)* ("The two marks, 'Planned Parenthood' and 'plannedparenthood.com' are nearly identical . . . . The degree of similarity between the marks thus increases the likelihood of confusion[.]"), *aff'd*, *152 F.3d 920 (2d Cir. 1998)*.

iii. Proximity and Likelihood that George & Co. Will "Bridge the Gap"

"The proximity of the goods factor asks whether and to what extent the two products compete with each other." *Easy Spirit, LLC v. Skechers U.S.A., Inc., No. 19-CV-3299, 2021 U.S. Dist. LEXIS 220765, 2021 WL 5312647, at *9 (S.D.N.Y. Nov. 16, 2021)*. It "can apply to both the subject matter of the commerce in which the two parties engage and the geographic areas in which they operate." *Guthrie Healthcare Sys., 826 F.3d at 39*. The game sold by Target and the one sold by George & Co. (bearing the LCR Marks) are "sold through the same marketing channels, including the same retail stores," which **[*25]** weighs in favor of a finding of confusion. *Easy Spirit, LLC 2021 U.S. Dist. LEXIS 220765, 2021 WL 5312647, at *9*; *see also* *Solid 21, Inc., 2020 U.S. Dist. LEXIS 255464, 2020 WL 9816843, at *5* (finding that selling the same type of product in the United States weighed in favor of confusion on this factor). The Amended Complaint alleges that Target sold George & Co.'s game and then ceased doing so. (Am. Compl. ¶¶ 25, 27). Target acknowledges this: rather than selling George & Co.'s game, it is "instead selling a similar dice game distributed by Spin Master." (Mot. to Dismiss at 3).

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[34] Indeed "[e]ach of the cases cited by" Target—in both of its briefs for these arguments—"was decided not on a motion to dismiss, but on a motion for summary judgment or after trial based on a complete factual record," *Kaplan, Inc. v. Yun, 16 F. Supp. 3d 341, 348 (S.D.N.Y. 2014)*, or on a preliminary injunction. *See* Mot. to Dismiss at 5-6, 8-9; Target Suppl. at 3-4.

As for bridging the gap, "because the parties' products 'are already in competitive proximity, there is really no gap to bridge, and this factor is irrelevant to the *Polaroid* analysis in this case.'" *Solid 21, Inc., 2020 U.S. Dist. LEXIS 255464, 2020 WL 9816843, at *5* (quoting *Star Indus., 412 F.3d at 387*). This factor favors George & Co.

iv. Evidence of Actual Consumer Confusion

George & Co. has not identified any specific instances of actual confusion. This factor, therefore, favors Target, even at the pleading stage. But, it could not lead to outright dismissal of the claim, since the analysis under the *Polaroid* factors is holistic, and a plaintiff need only establish a likelihood of confusion to proceed with and prevail on an infringement claim. *See Lois Sportswear, U.S.A., Inc., 799 F.2d at 871, 875*.

v. Evidence that Target Adopted the LCR Marks in Bad Faith

"In analyzing whether a defendant has acted **[*26]** in bad faith, the question is whether the defendant attempted 'to exploit the good will and reputation of a senior user by adopting the mark with the intent to sow confusion between the two companies' products.'" *Tiffany & Co., 971 F.3d at 88* (quoting *Star Indus., 412 F.3d at 388*). "[W]here the allegedly infringing mark is identical to the registered mark, and its use began subsequent to the plaintiff's trade-mark registration, the defendant must carry the burden of explanation and persuasion." *Kiki Undies Corp. v. Promenade Hosiery Mills, Inc., 411 F.2d 1097, 1101 (2d Cir. 1969)*. "But '[p]rior knowledge of a senior user's trade mark does not necessarily give rise to an inference of bad faith and may [actually] be consistent with good faith.'" *Tiffany & Co., 971 F.3d at 88* (alterations in original) (quoting *The Sports Auth., Inc. v. Prime Hosp. Corp., 89 F.3d 955, 964 (2d Cir. 1996)*). "[T]he intent to compete by imitating the successful features of another's product is vastly different from the intent to deceive purchasers as to the source of [one's own] product." *Id.* (first alteration added) (quoting *Nora Beverages, Inc. v. Perrier Grp. of Am., Inc., 269 F.3d 114, 123 (2d Cir. 2001)*).

George & Co. alleges it informed Target of the unlawful use of the LCR Marks and that Target did not stop using them. (Am. Compl. ¶¶ 27-33). Email correspondence between employees of the parties, (Mar. 25, 2015 Email; Apr. 3, 2015 Email), runs in both directions. It confirms that Target was aware of the allegations, but also **[*27]** that it took steps to remove the allegedly unlawful uses of the LCR Marks from its stores. (Apr. 3, 2015 Email at 1, 3). And although George & Co.'s allegations of infringement post-date this remediation, the innocent explanation—the belief that the use of "LCR," an abbreviation, on an in-store tag and on a website is permissible use—is at least as powerful as that of willful improper use. Moreover, none of the correspondence between the parties previously identified such uses as potentially infringing. As such, this factor is neutral.

vi. Respective Quality of the Products

"This factor is primarily concerned with whether the senior user's reputation could be jeopardized by virtue of the fact that the junior user's product is of inferior quality." *Arrow Fastener Co., 59 F.3d at 398*. "When there is no difference in the quality of the products, the factor should thus be treated as neutral rather than as weighing in favor of the defendant." *Solid 21, Inc., 2020 U.S. Dist. LEXIS 255464, 2020 WL 9816843, at *7*. To the extent that the Amended Complaint addresses this factor, it does so only in the most cursory fashion. George & Co. alleges that its game is widely recognized, popular, and well-respected. (Am. Compl. ¶¶ 10-16). While it refers to the game sold by Target as the "Inauthentic Substitute **[*28]** Game," (*e.g., id.* ¶ 30), the Amended Complaint does not say whether the game is of a same or similar quality. It does acknowledge in its briefs that the "products were of similar quality," (George & Co. Suppl. at 3), citing to the similar price of the games, reflected in the photographs appended to the Amended Complaint. (*Id.* at 4; Scanner Photograph; Tag Photograph). Because of the acknowledgement of similar quality between the games, this factor is neutral. *E.g., Streetwise Maps, Inc. v. VanDam, Inc., 159 F.3d 739, 743 (2d Cir. 1998)* ("Factor (# 7)—the quality of defendant's product compared to plaintiff's—is neutral because—as the district court found and plaintiff concedes—both maps are of similar quality.").

vii. Sophistication of the Relevant Population of Consumers

"The sophistication factor recognizes that the likelihood of confusion between the products at issue depends in part on the sophistication of the relevant purchasers." *Cadbury Beverages, Inc. v. Cott Corp., 73 F.3d 474, 480 (2d Cir. 1996)* (quotations omitted). "[A]nalysis of consumer sophistication 'consider[s] the general impression of the ordinary purchaser, buying under the normally prevalent conditions of the market and giving the attention such purchasers usually give in buying that class of goods.'" *Tiffany & Co., 971 F.3d at 90* (quoting *Star Indus., 412 F.3d at 390*). The Amended Complaint contains no allegations **[*29]** touching on customer sophistication. "Where neither party presents direct evidence of consumer sophistication *vel non*, . . . a court may rely solely on indirect indications of sophistication, such as the nature of the product or its price." *Easy Spirit, LLC, 2021 U.S. Dist. LEXIS 220765, 2021 WL 5312647, at *19*. In its brief, George & Co. argues that both its game and the game Target sells "were relatively inexpensive" and that Target's game sold for $5.99. (George & Co. Suppl. at 3-4). With this limited information, it is impossible to make any evaluation of this factor, so it is neutral.

The balance of the factors—particularly the strength of the LCR Marks and the identity between George & Co.'s marks and Target's use—weighs in favor of finding likelihood of confusion.

As noted, Target does not address the *Polaroid* factors. It does make scattershot, miscellaneous arguments to argue that George & Co. cannot state a claim for infringement. None have merit at this stage of the litigation.

First, Target argues that George & Co. has failed to negate "the plausible, alternative explanation" that its use of the mark "LCR" was lawful, because it was merely an abbreviation of "Left, Center, Right," which is not protected. (Target Suppl. at 4). As an initial matter, the **[*30]** argument presumes that "LCR" is not protected (or protectable) and an abbreviation of a generic mark, as a matter of law, can never be infringing. But as explained earlier, this assumption is both legally flawed—no such principle exists in trademark law—and factually without merit here—given that George & Co. has come forward with at least five trademark registrations for "LCR." Furthermore, this argument turns the federal pleading standard on its head. A plaintiff is not required—as a matter of federal procedure or pursuant to substantive trademark law—to dispel, in a complaint, any innocent explanation for the defendant's conduct. Nor is it required to plead facts to demonstrate that the unlawful inference from conduct is stronger than the innocent inference.[35]

The cases that Target cites for this novel position do not support the argument. *Trump v. Vance, 977 F.3d 198, 213-14 (2d Cir. 2020)*, involves the breadth of a grand jury subpoena and is not even remotely pertinent. As for *Twombly* itself, Target takes the relevant quotation—"plausibly suggesting (not merely consistent with)," *550 U.S. at 557*—out of context, suggesting that the Supreme Court was referring to a need to plead "misconduct rather than lawful conduct." (Target Suppl. at 4). The full passage **[*31]** in *Twombly* is as follows:

> The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of *Rule 8(a)(2)* that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief." A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a *§ 1* claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory.

550 U.S. at 557. The passage is quite obviously talking about the requirements under the Sherman Act for stating a conspiracy claim. And in ***antitrust law***, a plaintiff may compile a series of facts that suggest parallel, not illegal, conduct. To push the complaint into the realm of conspiracy, additional factual allegations are necessary. But even in this antitrust context, the Supreme Court does not require that a plaintiff disprove an "obvious alternative explanation," (Target Suppl. at 4), in its pleading. The question is, and always has been, whether the plaintiff has stated enough facts to allege a plausible violation of the law. And, as applied here, whether **[*32]** George & Co. has plausibly alleged infringement. Given the existence of registered marks and the copying or use of those same

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[35] One common exception is the securities laws, where a plaintiff must plead facts that the inference of knowing misconduct, scienter, is at least as strong as the innocent explanation. *Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 324, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)* ("A complaint will survive . . . only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged."). But that exception exists by force of the Private Securities Litigation Reform Act, not the Federal Rules of Civil Procedure. No similar provision exists in the Lanham Act.

marks, it certainly has done so. It need not dispel innocent explanations. No case stands for such a novel reading of *Twombly*.

Second, Target argues that its use of any LCR Mark could not have been infringing. (Target Suppl. at 5 ("George appears to allege that these marks have been infringed solely because Target has used the letters 'LCR' on receipts, in-store scanners, and shelf tags, which is insufficient.")). But the cases it cites are decidedly unlike the present case. For example, in *Lopez v. Bonanza.com, Inc.*, the complaint was deficient because the plaintiff failed to actually allege that the defendant used his marks. *No. 17 CIV. 8493, 2019 U.S. Dist. LEXIS 170715, 2019 WL 5199431, at *10 (S.D.N.Y. Sept. 30, 2019)* ("Plaintiff does not contend that . . . . Defendants placed Plaintiff's marks on any clothing or other goods sold on their respective websites, e-commerce platforms or online marketplaces.") (quotations omitted). In contrast, George & Co. alleges precisely that—that the LCR Marks were used on Target's internal website and on its in-store scanner, (*see* Scanner Photograph), and on shelving, (*see* Tag Photograph), in order to sell another game, by **[*33]** associating it with George & Co.'s product. (Am. Compl. ¶¶ 33-49).[36] And such use may constitute infringement. *E.g., Menashe v. V Secret Catalogue, Inc., 409 F. Supp. 2d 412, 424 (S.D.N.Y. 2006)* ("Prominent use of a mark in a catalog with a picture and description of the product constitutes a display associated with goods and not mere advertising because of the 'point of sale' nature of the display."); *Cache, Inc. v. M.Z. Berger & Co., No. 99 CIV. 12320, 2001 U.S. Dist. LEXIS 226, 2001 WL 38283, at *7 n.6 (S.D.N.Y. Jan. 16, 2001)* ("Whether the display of the tags in close association of the tags with the watches is enough to constitute trademark use depends on consumer perception of the mark. Such a determination involves a factual inquiry[.]") (internal citation omitted); *Lands' End, Inc. v. Manback, 797 F. Supp. 511, 514 (E.D. Va. 1992)* ("The point of sale nature of this display, when combined with the prominent display of the alleged mark with the product, leads this court to conclude that this mark constitutes a display associated with the goods.").

In neither *Lopez* nor *Pub. Free Will Corp. v. Verizon Commc'ns Inc., No. 15-CV-6354, 2017 WL 1047330, at *4, 2017 U.S. Dist. LEXIS 39168 (E.D.N.Y. Mar. 17, 2017)* does the court conclude that use of marks in-store or on a website, as George & Co. alleges here, could not constitute trademark infringement.[37] And finally, in *Cree, Inc. v. Xiu Ping Chen*, the plaintiff's case centered around the use of its marks by defendants on products they sold. *No. 16-CV-1065, 2017 WL 3251580, at *9, 2017 U.S. Dist. LEXIS 119198 (E.D.N.Y. July 28, 2017)*. For one of the marks allegedly infringed **[*34]** upon, the plaintiff had not identified a version of the product with a mark on it, while for others he had. *Id.* But the court did not hold that use of marks on a website or in connection with retail sales—without seeing the mark on a product—could not be infringing. Here, George & Co. has put forth photographs that show use of its marks by Target in connection with the sale of game products. That is sufficient to establish, at the motion to dismiss stage, that Target sold or attempted to sell similar products by using George & Co.'s marks. And that states a claim for infringement. *See, e.g., id. at *7* (relying in part on photographs to deny motion to dismiss infringement claim because plaintiff "sufficiently alleged a likelihood of confusion").

As such, the Court concludes that George & Co. has sufficiently pled a claim for violation of *15 U.S.C. § 1114(1)(a)* to survive a motion to dismiss.

* * * *

Target argues that George & Co. has failed to plead a counterfeiting claim. George & Co. labels Count I as one for "counterfeiting," (Am. Compl. at 9), and cites to *15 U.S.C. § 1114* generally. The statute does prohibit counterfeiting, which is itself a form of infringement. *15 U.S.C. § 1114(1)(a)* (imposing liability on anyone who without consent uses a "counterfeit" **[*35]** of a registered mark). And the Amended Complaint makes allegations that sound in

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[36] Target's repeated argument that the Amended Complaint fails to allege how it used the trademarks is simply without merit. Mot. to Dismiss at 11. The Amended Complaint may group Target with other unidentified defendants—an issue discussed below—but the photographs and the factual allegations about the relationship between George & Co. and Target detail Target's conduct (and use of the LCR Marks).

[37] Nor do any of these cases stand for the proposition that such use could not constitute use in commerce. Target turns cases where a complaint has been found deficient into ones holding that as a matter of law, certain conduct is either innocent or cannot amount to infringement. But they quite clearly do not say such things.

counterfeiting—"Plaintiff's trademark infringement claims against Defendants are based on Defendants' unauthorized use . . . of counterfeit imitations of the federally-registered LCR Marks in connection with the . . . sale of infringing goods, including the Inauthentic Substitute Game." (Am. Compl. ¶ 41). The Amended Complaint appears to use the counterfeiting as one of the types of infringement that George & Co. is asserting, in addition to the direct use of the LCR Marks, as evidenced in the photographs attached to the Amended Complaint.

The arguments that Target makes to dismiss this part of the infringement claim are without merit. It contends that George & Co. only alleges that Target used the LCR Mark and "fails to even allege the counterfeit mark or product[.]" (Target Suppl. at 5). Target misreads the Amended Complaint. It alleges that Target used the LCR Marks in connection with the products it sold, including the Inauthentic Substitute Game. That is a form of counterfeiting. 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 25:10 (5th ed. 2021) ("Counterfeiting is the act of **[*36]** producing or selling a product with a sham trademark that is an intentional and calculated reproduction of the genuine trademark. A 'counterfeit mark' is a false mark that is identical with, or substantially indistinguishable from, the genuine mark."). That George & Co. alleges that Target sold a product through direct use of its marks—as opposed to a distorted or imitation, but not identical, mark—does not make it any less of a counterfeit claim. *See also* 15 U.S.C. § 1127 ("A 'counterfeit' is a spurious mark which is identical with, or substantially indistinguishable from, a registered mark.").[38]

Target's real cavil appears to be that George & Co. has not provided photos of the allegedly counterfeit product or the "Inauthentic Substitute Game." (Target Suppl. at 5-6). But it need not do so. As Target acknowledges, it knows—by virtue of the correspondence attached to the Amended Complaint—that the Inauthentic Substitute Game is a game produced by Spin Master. (Mot. to Dismiss at 3).[39]

II. False Designation of Origin, Passing Off, and Unfair Competition (Count II)

The Court concludes that this Count must be dismissed. George & Co.'s second claim is based on 15 U.S.C. § 1125(a), which "creates two distinct **[*37]** bases of liability: false association, § 1125(a)(1)(A), and false advertising, § 1125(a)(1)(B)." Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 122, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014). A claim for "false association" has different labels, including "false designation of origin," Parks LLC v. Tyson Foods, Inc, 863 F.3d 220, 226 (3d Cir. 2017), passing-off, and "reverse passing off," Silverstein v. Penguin Putnam, Inc., 522 F. Supp. 2d 579, 601 (S.D.N.Y. 2007). These are, in essence, different ways of alleging trademark infringement. These labels are what George & Co. used for its claims in the Amended Complaint. (Am. Compl. at 10 ("False Designation of Origin, Passing Off, and Unfair Competition"); *id.* ¶ 54 ("Defendants' false designation of origin . . .")). In its briefing, when arguing that its pleading "sufficiently pleads both causes of action," George & Co. cites to the two-step test for infringement—the existence of protectable marks and likelihood of confusion—that is used for infringement under § 1114(1)(a). (George & Co. Suppl. at 1-2; Pl.'s Response at 6). Indeed, the "[t]he *prima facie* case required for the two federal claims is the same." OffWhite Prods., LLC v. Off-White LLC, 480 F. Supp. 3d 558, 563 (S.D.N.Y. Aug. 20, 2020), *appeal dismissed*, 2021 WL 1247863 (2d Cir. Feb. 8, 2021).

The point is that George & Co. is not alleging a violation of § 1125(a)(1)(B) for "false advertising." It never uses the label or term "false advertising" in the Amended Complaint or either of its briefs. It has solely alleged a violation of § 1125(a)(1)(A). The problem is that § 1125(a)(1)(A) only applies to *unregistered* ***[*38]*** *marks. See* B & B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 144-45, 135 S. Ct. 1293, 191 L. Ed. 2d 222 (2015); Thompson Med. Co., 753 F.2d at 216; BBK Tobacco & Foods, LLP v. Galaxy VI Corp., 408 F. Supp. 3d 508, 520 (S.D.N.Y. 2019). The

[38] *Fischer v. Forrest* is of little assistance to Target's argument. There, the counterfeiting claim failed because the plaintiff's mark was easily distinguished from defendant's mark. No. 14 Civ. 1304, 2017 U.S. Dist. LEXIS 40597, 2017 WL 1063464, at *4 (S.D.N.Y. Mar. 21, 2017) (adopting report and recommendation) (affirming determination that phrases "Bee-Quick" and "Natural Honey Harvester" are "far from identical or substantially indistinguishable"). Again, George & Co. is alleging that Target engaged in counterfeiting by selling goods, made by a different manufacturer, which used the actual LCR Marks.

[39] This admission contradicts Target's later argument in the supplemental papers that George & Co. does not identify the game. Target Suppl. at 2.

Amended Complaint relies only on the LCR Marks, all of which are registered, in this Count. (Am. Compl. ¶¶ 51-53). And the Amended Complaint does not identify any unregistered marks, nor does George & Co. rely on any to assert its claims. (Pl.'s Response at 11 ("Plaintiff's asserted LCR marks are all registered trademarks")). Since *§ 1125(a)(1)(A)* does not apply to registered marks, this claim must be dismissed. *Cf. Lopresti v. Spectrum Press, Inc., No. 00 CIV. 2842, 2001 U.S. Dist. LEXIS 20247, 2001 WL 1568434, at *4 (S.D.N.Y. Dec. 5, 2001)* (dismissing *§ 1114(1)(a)* claim because plaintiff's mark was not registered).

III. Unidentified Defendants

Target argues that the claims against the fictitious John Does, Jane Does, and ABC Companies should be dismissed.

It is generally inappropriate to dismiss John Doe parties on the pleadings unless the primary claims against the identified defendant are also being dismissed or it is definitive that discovery will not lead to identification of the parties.

> When a plaintiff is ignorant as to the true identity of a defendant at the time of filing the complaint, most federal courts typically will allow the use of a fictitious name in the caption so long as it appears that the plaintiff will be able to obtain that information through the discovery process; should that not prove to **[*39]** be true, the action will be dismissed.

5A Alan Wright & Arthur R. Miller et al., *Federal Practice and Procedure* § 1321 (4th ed. 2021) (footnote omitted); *Wakefield v. Thompson, 177 F.3d 1160, 1163 (9th Cir. 1999)* ("[T]he district court erred in dismissing Wakefield's complaint against Doe simply because Wakefield was not aware of Doe's identity at the time he filed his complaint.").[40] And here, George & Co. indicates it will amend, and Target has not explained why discovery would not lead to identification of these individuals or entities.

Target makes a related argument about the "John Does," suggesting that George & Co. improperly engages in group pleading without differentiating between which acts were taken by Target as opposed to the John Does. It objects to the repeated invocation of "Defendants." (Mot. to Dismiss at 11; *see also* Target Suppl. at 2 n.3). And ultimately it uses this to argue the John Doe defendants should be dismissed. (Mot. to Dismiss at 11). This is a close question, because it is difficult to differentiate the conduct alleged done by Target as opposed to by the unnamed persons and entities. But that does not counsel in favor of dismissal now. The allegations about Target are clear and sufficient to state a claim, if only **[*40]** evidenced by the photographs, as discussed above. If and when George & Co. seeks to substitute in actual persons or entities as defendants, it presumably will also seek to amend to detail allegations about their respective conduct and differentiate it, if appropriate, from Target's. If it fails to do so (either amend or differentiate), then it would be appropriate to dismiss these defendants.[41] But it would be incorrect to do so now and not give George & Co. the ability to make the requisite showing.

IV. Motion for More Definite Statement

As an alternative to dismissal, Target asks the Court to order George & Co. "to provide a more definite statement" about a number of items: "which specific marks were allegedly infringed by which defendant" and how those marks

[40] A defendant could presumably also move to dismiss a John Doe defendant on the grounds that the allegations against him failed to state a claim; here those arguments are the same raised by Target on its own behalf. And as noted, they failed to warrant dismissal of the infringement claim.

[41] None of the cases cited by Target addresses the group pleading barrier in the context of the John Doe defendants. The notice problem attendant to group pleading when defendants are present is different from cases where they are unnamed and unknown, since in the former case parties are being forced to defend against a suit without knowledge or understanding of the specific allegation against them. And here, there may be a time where that is also the case, but it would be inconsistent with the liberal standard for amendment to preclude George & Co. from being given the opportunity to identify the John Does and differentiating their conduct.

were infringed, the Inauthentic Substitute Game, and the differentiation between the conduct of Target and those of the unidentified defendants. (Mot. to Dismiss at 12-13).

"For a more definite statement to be warranted, the complaint must be 'so excessively vague and ambiguous as to be unintelligible and as to prejudice the defendant seriously in attempting to answer it.'" *Kuklachev v. Gelfman, 600 F. Supp. 2d 437, 456 (E.D.N.Y. 2009)* (quoting *Kok v. First Unum Life Ins. Co., 154 F. Supp. 2d 777, 781-82 (S.D.N.Y. 2001)*). "The preferred course is to encourage the use **[*41]** of discovery to inform the defendant of the factual basis of the complaint." *Kuklachev, 600 F. Supp. 2d at 456*; *see also* *Stromillo v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 54 F.R.D. 396, 397 (E.D.N.Y. 1971)* ("The tendency under the Federal Rules is to discourage motions to compel more definite complaints and to encourage the use of discovery procedures to apprise the parties of the basis for the claims made in the pleadings.") (collecting cases). And "a *Rule 12(e)* motion should be denied if a complaint comports with the liberal pleading requirements of *Rule 8(a)*." *Home & Nature Inc. v. Sherman Specialty Co., 322 F. Supp. 2d 260, 265 (E.D.N.Y. 2004)*.

The items that Target is asking George & Co. to identify read like interrogatories. And such requests should be provided in discovery, if they have not already been. Because the Court finds that George & Co. has stated a claim for infringement, the proper course is to obtain this information through discovery, not a motion for more definite statement. *E.g., id. at 267* ("*Rule 12(e)* is not the proper vehicle to resolve problems of uncertainty arising due to want of specificity or lack of detail.") (denying *Rule 12(e)* motion where plaintiff stated claim for patent and copyright infringement).

CONCLUSION

For the reasons explained above, it is respectfully recommended that Target's motion to dismiss George & Co.'s Amended Complaint be denied as to Count I and granted as to Count II.

Any objections **[*42]** to the Report and Recommendation above must be filed with the Clerk of Court within 14 days of receipt of this report. Failure to file objections within the specified time waives the right to appeal any judgment or order entered by the District Court in reliance on this Report and Recommendation. *See* *28 U.S.C. § 636(b)(1)*; *Fed. R. Civ. P. 72(b)(2)*; *Caidor v. Onondaga Cnty., 517 F.3d 601, 604 (2d Cir. 2008)* ("[F]ailure to object timely to a magistrate [judge's] report operates as a waiver of any further judicial review of the magistrate [judge's] decision.") (quotations omitted).

SO ORDERED.

/s/ *Sanket J. Bulsara* 1/27/2022

SANKET J. BULSARA

United States Magistrate Judge

Brooklyn, New York

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Hill v. AQ Textiles LLC

United States District Court for the Middle District of North Carolina

January 27, 2022, Decided; January 27, 2022, Filed

1:19CV983

Reporter
582 F. Supp. 3d 297 *; 2022 U.S. Dist. LEXIS 15176 **; 2022 WL 252466

AMY HILL, et al., Plaintiffs, v. AQ TEXTILES LLC, and CREATIVE TEXTILE MILLS PVT. LTD, Defendants.

Prior History: *Hill v. AQ Textiles LLC, 2021 U.S. Dist. LEXIS 49987, 2021 WL 1026740 (M.D.N.C., Mar. 17, 2021)*

Core Terms

Plaintiffs', sheets, labeled, thread count, counts, Defendants', thread, futile, warranty, notice, written warranty, named plaintiff, promise, amended complaint, unjust enrichment, allegations, negligent misrepresentation claim, misrepresentation, cases, particularized, manufactured, consumer, Textiles, products, motion to amend, concrete, tested, motion to dismiss, claim for breach, implied warranty

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Judges: Loretta C. Biggs, United States District Judge.

Opinion by: Loretta C. Biggs

Opinion

[*304] MEMORANDUM OPINION AND ORDER

LORETTA C. BIGGS, District Judge.

Before the Court is a Motion to Amend First Amended Complaint filed by Plaintiffs. (ECF No. **[**2]** 36.) Plaintiffs seek relief from the Court's March 17, 2021, Order, (ECF No. 35), and leave to amend their First Amended

Complaint pursuant to *Rules 15(a)* and *60(b) of the Federal Rules of Civil Procedure*. (ECF Nos. 36; 37.) Defendants oppose the motion, arguing that (1) Plaintiffs have not met the requirements of *Rule 60(b)(6)*, and (2) Plaintiffs' **[*305]** proposed Second Amended Complaint ("PSAC") suffers from undue delay, prejudices Defendants, and is futile. (ECF No. 39.) For the reasons stated herein, Plaintiff's motion will be granted in part and denied in part.

I. BACKGROUND

Plaintiffs filed this class action on September 23, 2019, (ECF No. 1), and filed a First Amended Complaint ("FAC") on December 12, 2019, (ECF No. 15). According to the FAC, Plaintiffs Dominique Morrison, Sara Hawes, Cassandra Chiaraluce, and Jonathan Fontaine purchased bed linens labeled as having thread counts of 800 or more from retail stores in Missouri, California, New Hampshire, and Massachusetts.[1] (*Id.* ¶¶ 33, 37, 41, 45.) The sheets were manufactured by Defendant Creative Textile Mills Pvt. Ltd. ("Creative"), an Indian company, and imported and distributed by AQ Textiles LLC ("AQ"), a North Carolina corporation. (*Id.* ¶¶ 48, 50, 90) Plaintiffs alleged that Defendants represented **[**3]** the sheets to have higher thread counts than they actually had. (*Id.* ¶ 90.) More specifically, they claimed that Defendants ignored the "long-standing industry standards for calculating thread counts," (*id.* ¶ 84) and doubled or tripled "the true thread count" by counting plied yarns not as a single thread, but as the number of intertwined strands from which they are comprised, (*Id.* ¶ 76).

Plaintiffs sued on behalf of themselves and six classes to include consumers in California, Massachusetts, Missouri, New Hampshire, North Carolina, and the nation as a whole who purchased sheets that had lower thread counts than Defendants stated on the products' labels. (*Id.* ¶ 98.) The FAC alleged thirteen causes of action arising under the *Magnuson Moss Warranty Act ("MMWA")* (Count I); the Implied Warranty of Merchantability (Count II); an Express Warranty (Count III); common law Negligent Misrepresentation (Count IV); *Missouri's Merchandising Practices Act* (Count V); the North Carolina Unfair and Deceptive Trade Practices Act ("NCUDTPA") (Count VI); the *California Consumer Legal Remedies Act* (Count VII); the *California Unfair Competition Law* (Counts VIII, IX, & X); the *Massachusetts Consumer Protection Law* **[**4]** (Count XI); the *New Hampshire Consumer Protection Act* (Count XII); and common law Unjust Enrichment (Count XIII). (*Id.* at 24-52.)

Defendants moved to dismiss Plaintiffs' FAC for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)* on January 9, 2020. (ECF No. 18.) On September 25, 2020, Defendants additionally moved to dismiss the FAC for lack of subject-matter jurisdiction pursuant to *Fed. R. Civ. P. 12(b)(1)*. (ECF No. 29.)

On March 17, 2021, the Court dismissed Plaintiffs' claims. *Hill v. AQ Textiles LLC, No. 1:19CV983, 2021 U.S. Dist. LEXIS 49987, 2021 WL 1026740, at *3 (M.D.N.C. Mar. 17, 2021)*. The Court found *sua sponte* that Named Plaintiffs had not sufficiently alleged a concrete and particularized injury and, therefore, the Court lacked subject matter jurisdiction. *2021 U.S. Dist. LEXIS 49987, [WL] at *2-3*.

Plaintiffs filed the present motion on March 29, 2021, seeking relief from the Court's Order and leave to again amend their complaint. (ECF No. 36.) In their attached proposed Second Amended Complaint ("PSAC") (ECF No. 36-1), Plaintiffs do not allege any new causes of action but do allege additional facts and limit their **[*306]** proposed classes to include only those consumers who purchased bedding sheets (rather than those who purchased either "bedding or linen"). (*Compare* ECF Nos. 36-1 ¶ 115 *with* 15 ¶ 98.) The factual allegations in Plaintiffs' PSAC include the following: **[**5]**

Plaintiff Fontaine is a resident of Massachusetts. (ECF No. 36-1 ¶ 57.) He purchased Fairfield Square Essex Stay Fit brand queen-size sheets in or around October 2017 from a Macy's retail store in Massachusetts for $84.99 ($79.99 plus tax). (*Id.* ¶¶ 58, 60.) The sheets were manufactured by Defendant Creative and labeled and distributed by Defendant AQ. (*Id.* ¶ 58.) The sheets were labeled "1200 Thread Count." (*Id.*)

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[1] Plaintiff Amy Hill, also included in the FAC, was voluntarily dismissed from this action on February 8, 2020. (ECF No. 21.)

Plaintiff Hawes is a resident of California. (*Id.* ¶ 48.) She purchased a Somerset Collection brand queen-size sheet set from a Macy's retail store in California in or around May 2017 for $76.11 ($69.99 plus tax). (*Id.* ¶¶ 49, 52.) The sheets were manufactured by Defendant Creative and labeled and distributed by Defendant AQ. (*Id.* ¶ 49.) The sheets were labeled "900 Thread Count." (*Id.*)

Plaintiff Morrison is a resident of Missouri. (*Id.* ¶ 35.) She purchased Grande Estate 800TC Luxurious Sateen Weave sheets from a Ross store in Missouri. (*Id.* ¶ 36.) Plaintiffs estimate that she purchased the sheets for $40.00 in the fall of 2016 or early winter of 2017. (*Id.* ¶¶ 36, 37.) The sheets were manufactured by Defendant Creative and labeled and distributed by Defendant AQ. (*Id.* ¶ 38.) The **[**6]** sheets were represented to have 800 thread count. (*Id.* ¶¶ 39-41.)

Plaintiff Chiaraluce is a resident of Massachusetts. (*Id.* ¶ 53.) She purchased a Bradford Stay Fit brand queen-size sheet set from a Macy's retail store in New Hampshire in or around October 2017 for $69.99. (*Id.* ¶¶ 54, 56.) The sheets were manufactured by Defendant Creative and labeled and distributed by Defendant AQ. (*Id.* ¶ 54.) The sheets were labeled "800 Thread Count." (*Id.*)

After receiving complaints about sheets distributed by AQ, the Texas Department of Agriculture had the thread counts of three AQ products tested in November and December of 2017. (*Id.* ¶ 7.) These tests showed that the Fairfield Square Essex Stay Fit 1200 thread count sheets, the same brand purchased by Plaintiff Fontaine, had an actual thread count of 363 according to industry standards.[2] (*Id.*) Similar AQ sheets advertised at 1200 and 800 thread counts had actual counts of 441 and 293, respectively. (*Id.*)

Plaintiffs Hawes and Morrison then had their sheets independently tested. (*Id.* ¶¶ 12, 13.) Hawes's sheets, which were labeled "900 Thread Count," had an actual thread count of approximately 227 according to industry standards. (*Id.* ¶ 12.) Morrison's **[**7]** sheets, which were labeled "800 Thread Count," had an actual thread count of approximately 224 according to industry standards. (*Id.* ¶ 13.) Plaintiffs allege that they would not have purchased the sheets had they known that the sheets' thread counts were so much lower than represented. (*Id.* ¶¶ 21, 42, 113, 200.)

II. LEGAL STANDARD

Plaintiffs bring their motion pursuant to *Rules 60* and *15 of the Federal Rules of Civil Procedure* "for relief from the Court's Order and for leave to amend their First Amended Complaint." (ECF No. 36 at 1 (internal citations omitted).)

[*307] A. *Rule 60(b)*

Rule 60(b) of the Federal Rules of Civil Procedure provides that a court "may relieve a party . . . from a final judgment, order, or proceeding" in limited circumstances. *Fed. R. Civ. P. 60(b)(1)-(6)*. In the Fourth Circuit, a dismissal without prejudice is not considered a final order or judgment if "the plaintiff could save his action by merely amending his complaint." *Young v. Nickols, 413 F.3d 416, 418 (4th Cir. 2005)* (quoting *Domino Sugar Corp. v. Sugar Workers Local Union 392, 10 F.3d 1064, 1066-67 (4th Cir. 1993)*); *see* *Hui Kun Li v. Shuman, No. 5:14-CV-00030, 2015 U.S. Dist. LEXIS 91432, 2015 WL 4274167, at *2 (W.D. Va. July 14, 2015)* (finding that, for purposes of *Rule 60(b)* analysis, the court's dismissal without prejudice of ten counts did "not operate as a final judgment or order from which relief can be granted" where plaintiffs were permitted to amend their complaint). Such a dismissal is not a final order "unless the grounds for dismissal clearly indicate that 'no amendment [in the complaint] could **[**8]** cure the defects in the plaintiff's case.'" *Domino Sugar, 10 F.3d at 1067* (quoting *Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 463 (7th Cir. 1988)*).

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[2] Plaintiffs define this industry standard, adopted by the American Society for Testing Materials ("ASTM"), at length in the PSAC. (ECF No. 36-1 ¶¶ 83-88.)

Here, the Court's March 17, 2021, Order made no finding or determination that an amendment could not cure the defects in the FAC. On the contrary, the Court found that Plaintiffs failed to set forth specific facts demonstrating a concrete and particularized injury, such as facts establishing that Defendants sheets were of lower quality, higher prices, or lower thread count. *Hill, 2021 U.S. Dist. LEXIS 49987, 2021 WL 1026740, at *2-3*. Accordingly, the Court dismissed Plaintiffs' claims for lack of standing—a dismissal that "must be one without prejudice, because a court that lacks jurisdiction has no power to adjudicate and dispose of a claim on the merits." *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC, 713 F.3d 175, 185 (4th Cir. 2013)*. The Court's Order did not by its terms terminate the action or enter a judgment dismissing the action. Therefore, the Court finds that its previous Order was not a final judgment or order pursuant to *Rule 60(b)* and is instead an interlocutory order.[3] *See generally* *Am. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 514 (4th Cir. 2003)* ("*Rule 60(b)* does not govern relief from interlocutory orders."). As an interlocutory order, it is "subject to reopening at the discretion of the district judge," *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 12, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)*, at "any time prior to the entry of final judgment," *Am. Canoe, 326 F.3d at 515* (quoting *Fayetteville Investors v. Commercial Builders, Inc., 936 F.2d 1462, 1469 (4th Cir. 1991)*). The Court will therefore consider Plaintiffs' motion to amend **[**9]** pursuant to *Rule 15(a)* to determine if Plaintiffs PSAC could cure the defects reflected in the Court's March 17, 2021, Order.

B. *Rule 15(a)*

The determination of whether to grant or deny a motion to amend a pleading under *Rule 15(a)* lies within the sound discretion of the district court. *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*; *Deasy v. Hill, 833 F.2d 38, 40 **[*308]** (4th Cir. 1987)*. Under *Rule 15(a)*, courts should freely grant leave to amend a pleading "when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. "This liberal rule gives effect to the federal policy in favor of resolving cases on their merits instead of disposing of them on technicalities." *Laber v. Harvey, 438 F.3d 404, 426 (4th Cir. 2006)*. Indeed, motions to amend are "[s]o useful . . . and of such service in the efficient administration of justice that they ought to be allowed as a matter of course, unless some particular reason for disallowing them appears." *New Amsterdam Cas. Co. v Waller, 323 F.2d 20, 28-29 (4th Cir. 1963)*.

"[L]eave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." *Johnson v. Oroweat Foods Co., 785 F.2d 503, 509 (4th Cir. 1986)* (citing *Foman, 371 U.S. at 182*). A plaintiff's request to amend a complaint is futile if the proposed amended complaint could not satisfy the appropriate requirements of the Federal Rules of Civil Procedure and Article III. *See* *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc., 525 F.3d 370, 376 (4th Cir. 2008)*.

III. DISCUSSION

A. Plaintiffs' motion was not unduly delayed

Defendants **[**10]** first argue that Plaintiffs' motion should be denied for undue delay. (ECF No. 39 at 9-13.) A district court may deny a motion to amend where "the delay in amending, the late hour of the motion to amend, and the burdens it would impose on the opposing party" counsel denial. *Equal Rts. Ctr. v. Niles Bolton Assocs., 602 F.3d 597, 604 n.3 (4th Cir. 2010)* (citing *Smith v. Angelone, 111 F.3d 1126, 1135 (4th Cir. 1997)*; *see also* *Foman,*

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[3] Even if the Court's Order were construed to be a final judgment, *Rule 15(a)* would still govern Plaintiffs' motion. A court considering a post-judgment motion to amend a complaint "need not concern itself with [*Rule 60(b)*'s] legal standards." *Katyle v. Penn Nat. Gaming, Inc., 637 F.3d 462, 471 (4th Cir. 2011)*. Instead, "[t]he court need only ask whether the amendment should be granted, just as it would on a prejudgment motion to amend pursuant to *Fed. R. Civ. P. 15(a)*," i.e. "for prejudice, bad faith, or futility." *Id.*

371 U.S. at 182 ("In the absence of any apparent or declared reason—such as undue delay . . .—the leave sought should, as the rules require, be 'freely given.'")

Here, however, there was no apparent delay. Plaintiffs filed their motion just twelve days after the Court dismissed their claims for lack of Article III standing. This quick response suggests "diligence" and "dispels any inference of bad faith" or undue delay. *See* Laber, 438 F.3d at 428. Further, Plaintiffs' motion comes in response to this Court's *sua sponte* Article III ruling. Thus, while Plaintiffs may have "known this information [newly asserted in the PSAC] for years" as Defendants claim, (ECF No. 39 at 12), they only knew of the deficiencies in their FAC after the Court's Order. Thus, the Court does not find Plaintiffs' delay to be undue as to justify denying their motion.

B. Any prejudice to Defendants is minimal

Second, Defendants argue that they will be prejudiced **[**11]** if the Court grants Plaintiffs' motion. (ECF No. 39 at 13-14.) Prejudice is a particular concern in assessing post-judgment Rule 15(a) motions, they argue, since "the interest in finality that attaches to every judgment must of necessity weigh in the exercise of the district court's discretion." Laber, 438 F.3d at 433 (Wilkinson, J., concurring). After a court enters judgment for a defendant, "defendants have an interest in the finality of the judgment in their favor and would be prejudiced if they were unable to rely on such a judgment." Logar v. W. Va. Univ. Bd. of Governors, No. CIV.A. 1:10CV201, 2012 U.S. Dist. LEXIS 8926, 2012 WL 243692, at *8 (N.D. W. Va. Jan. 25, 2012), *aff'd*, 493 F. App'x 460 (4th Cir. 2012).

[*309] However, as the Court discussed in Part II.A, *supra*, no final judgment was entered in this case. Unlike in Logar, where plaintiffs' claims were dismissed on summary judgment, this Court dismissed Plaintiffs' claims for without prejudice for lack of standing. Further, Plaintiffs bring no new claims or theories for recovery in their PSAC, but instead merely allege additional facts in an attempt to establish an injury in fact. Thus, the Court finds that any prejudice to Defendants is minimal and outweighed by the Court's interests in judicial economy, disposing with the case on its merits, and avoiding the inefficiencies that could ensue were Plaintiffs to refile their case rather **[**12]** than reinstating this one.

C. Plaintiffs' PSAC is not futile

Finally, Defendants argue that Plaintiffs' PSAC is futile because (1) Plaintiffs' PSAC still does not allege a cognizable injury for purposes of standing under Article III, (2) Plaintiffs do not have standing to represent the purported class; and (3) Plaintiffs' PSAC would not survive a 12(b)(6) motion to dismiss.

i. Plaintiff's PSAC states a concrete and particularized injury

The jurisdiction of a federal court is limited to cases and controversies under Article III of the United States Constitution. U.S. Const. art. III, § 2. To establish constitutional standing, a plaintiff must plausibly allege that they have: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016). Plaintiffs bear the burden of establishing these elements. Lujan v. Defs. of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "Where, as here, a case is at the pleading stage, [Plaintiffs] must 'clearly . . . allege facts demonstrating' each element." Spokeo, 578 U.S. at 338 (quoting Warth v. Seldin, 422 U.S. 490, 518, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)).

To establish an injury-in-fact, a plaintiff "must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual and imminent, not conjectural or hypothetical.'" **[**13]** Id. at 339 (quoting Lujan, 504 U.S. at 560). The Supreme Court has held that when a party has "set forth no specific facts demonstrating" the alleged injury, such allegations "are necessarily conjectural." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 412, 420, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013) (finding that plaintiffs did not have standing when they "present[ed] no concrete evidence to substantiate their fears" and could "only speculate" as to whether an injury might have occurred or will occur in the future).

This Court dismissed Plaintiffs' FAC for lack of standing. *Hill, 2021 U.S. Dist. LEXIS 49987, 2021 WL 1026740, at *2-3*. Specifically, this Court found that Plaintiffs failed to set forth specific facts demonstrating (1) Defendants' sheets were of lower quality, softness, or comfort than sheets Plaintiffs deem to accurately display corresponding thread counts, (2) Plaintiffs paid more for Defendants sheets than they would have for comparable sheets, or (3) Defendants' sheets actually had thread counts that were lower than advertised. *Id.* Thus, Plaintiffs had failed to allege any concrete and particularized injury. *Id.*

Plaintiffs have rectified this shortcoming in their PSAC. Unlike in their earlier complaint, Plaintiffs specifically allege that Defendants' sheets have been tested by the Texas Department of Agriculture **[*310]** and a New York quality assurance and **[**14]** compliance textile testing lab and were determined to have much lower thread counts than Defendants claimed that they had. (*See* ECF No. 36-1 ¶ 7.) Plaintiffs additionally allege that the sheets purchased by Named Plaintiffs have also been independently tested, and that those tests revealed that the "true thread count" of each set of sheets is less than one-third the represented thread count. (*Id.* ¶¶ 10-13.) Thus, Plaintiffs' allegation that Defendants' sheets were misleadingly labeled is no longer conjecture but instead is rooted in specific factual allegations. Plaintiffs now have a concrete, particularized injury; namely, they expended money for products they "would not have purchased" if they had known of the lower thread count. (*Id.* ¶¶ 42, 113, 200, 336.) This is a tangible injury that was allegedly caused by Defendants' misrepresentation and can be redressed through money damages. *See* *Maya v. Centex Corp., 658 F.3d 1060, 1069 (9th Cir. 2011)* ("Plaintiffs claim that, as a result of defendants' actions, . . . they would not have purchased their homes had defendants made the disclosures allegedly required by law. . . . This is a quintessential injury-in-fact."); *see also* *Sierra Club v. Morton, 405 U.S. 727, 733, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972)* ("[P]alpable economic injuries have long been recognized as sufficient **[**15]** to lay the basis for standing").

ii. Plaintiffs have standing to represent the putative class members

Defendants next argue that Plaintiffs' motion is futile because, while Named Plaintiffs may have standing in their own right, they lack standing to represent the class. (ECF Nos. 39 at 18; *see* 30 at 5-18.) Citing cases from select district courts outside this circuit, Defendants contend that class members who bought different products from Named Plaintiffs have different injuries, and therefore cannot be represented by Named Plaintiffs under Article III. (ECF No. 30 at 6 (citing *Kisting v. Gregg Appliances, Inc., No. 16-CV-141, 2016 U.S. Dist. LEXIS 139788, 2016 WL 5875007, at *3 (E.D. Wis. Oct. 7, 2016)*).)

Defendants' position is inconsistent with Supreme Court and Fourth Circuit precedent. While "[t]he strictures of Article III standing are no less important in the context of class actions," *Baehr v. Creig Northrop Team, P.C., 953 F.3d 244, 252 (4th Cir.)*, *cert. denied*, *141 S. Ct. 373, 208 L. Ed. 2d 96 (2020)*, "[t]hat a suit may be a class action . . . adds nothing to the question of standing," *Lewis v. Casey, 518 U.S. 343, 357, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)*. The Fourth Circuit has consistently held that to assess standing in a class action suit, "we analyze standing based on the allegations of personal injury made by the named plaintiffs." *Baehr, 953 F.3d at 252* (quoting *Hutton v. Nat'l Bd. of Exam'rs in Optometry, Inc., 892 F.3d 613, 620 (4th Cir. 2018)*); *see* *Beck v. McDonald, 848 F.3d 262, 269 (4th Cir. 2017)*; *Doe v. Obama, 631 F.3d 157, 160 (4th Cir. 2011)*. If named plaintiffs lack standing, the class lacks standing. *Baehr, 953 F.3d at 252-53* ("A putative class thus cannot establish Article III standing without a sufficient **[**16]** allegation of harm to the named plaintiff in particular."). Once the named plaintiff has established standing, however, a case or controversy exists under Article III. *Id.*

This does not mean that Article III imposes no restrictions on class action suits. One such restriction is that "[e]very class member must have Article III standing in order to recover individual damages." *TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208, 210 L. Ed. 2d 568 (2021)*; *see also* *Allee v. Medrano, 416 U.S. 802, 829, 94 S. Ct. 2191, 40 L. Ed. 2d 566* **[*311]** *(1974)* (Berger, C.J., concurring in the result in part and dissenting in part) ("Standing cannot be acquired through the back door of a class action."). Another is that "standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion, 141 S. Ct. at 2208*. Finally, a class action may only challenge conduct that injured the named plaintiffs—named plaintiffs lack standing to challenge *conduct* that did not cause their injury. *See* *Blum v. Yaretsky, 457 U.S. 991, 999, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982)* (holding that an injured plaintiff has standing only to challenge putatively "injurious conduct of one kind" cannot litigate "conduct of another kind, although similar, to which he has not been subject") (citing *Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166-67, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972)*).

The present case, however, is not an unusual one that requires lengthy analysis. As discussed in detail above, Plaintiffs **[**17]** challenge Defendants' alleged practice of advertising their sheets at higher thread counts than the sheets actually possess. This practice allegedly caused Named Plaintiffs to suffer a concrete and particularized injury by inducing them to spend money they otherwise would not have spent. And this injury can be redressed by awarding monetary damages. As defined in Plaintiffs' PSAC, every member of the proposed classes suffered this same injury caused by this same conduct: each was induced to purchase sheets by allegedly inflated thread counts.[4] (ECF No. 36-1 ¶ 115.) The mere fact that the products purchased by class members had different names and were of different sizes is immaterial, since the alleged injury and challenged conduct is uniform across the classes.

The Court finds that Plaintiffs have sufficiently alleged facts to support standing and their motion is not futile for want thereof. To the extent Defendants argue that individual issues concerning product labels, types, and thread counts will predominate in this suit, or that Named Plaintiffs' claims are not typical of class members' claims, those arguments are properly raised at the class certification stage. *Van Buren v. Walmart, Inc., No. DKC 19-0911, 2020 U.S. Dist. LEXIS 38426, 2020 WL 1064823, at *3 (D. Md. Mar. 5, 2020)*, *aff'd*, *855 F. App'x 156 (4th Cir. 2021)*. Defendants **[**18]** may also continue to challenge Plaintiffs' standing in future stages of the litigation. *See* *TransUnion, 141 S. Ct. at 2208* ("Plaintiffs must maintain their personal interest in the dispute at all stages of litigation.").

iii. Plaintiffs' PSAC would survive a motion to dismiss

Finally, Defendants argue that Plaintiffs' motion is futile because it would not survive a *12(b)(6)* motion to dismiss for failure to state a claim. (ECF No. 39 at 18; *see* ECF Nos. 19; 25.)

A plaintiff's request to amend a complaint is futile if the proposed amended complaint could not satisfy the appropriate requirements of the Federal Rules of Civil Procedure, including *Rule 12(b)(6)*. *See* *Wilson, 525 F.3d at 376*. Under *Rule 12(b)(6)*, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). In considering whether a **[*312]** plaintiff has stated a claim, a court "must accept as true all of the factual allegations contained in the complaint," *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (per curiam), and all reasonable inferences must be drawn in the non-moving party's favor, *Ibarra v. United States, 120 F.3d 472, 474 (4th Cir. 1997)*.

Here, Defendants argue: (1) Plaintiffs' MMWA claim fails because advertised thread counts do not constitute written warranties; (2) Plaintiffs' breach of implied warranty claims fail because they **[**19]** have not alleged that the sheets were unfit for ordinary use; (3) Plaintiffs' breach express warranty claims fail because they did not give Defendants notice of the breach within a "reasonable" time; (4) Plaintiffs' fraud-based claims fail because they failed to plead the time, place, and contents of the alleged fraudulent representations with particularity against individual Defendants; (5) Plaintiffs' claims under *N.C. Gen. Stat. § 75-1.1* fail because they are beyond the scope of that law; (6) Plaintiffs' negligent misrepresentation claims are barred by the economic loss doctrine; (7) Plaintiffs' claims under Massachusetts Consumer Protection Act fail because they did not comply with the law's notice requirement; and (8) Plaintiffs' unjust enrichment claims are duplicative. (ECF No. 19 at 5-22.)

1. Magnuson-Moss Warranty Act ("MMWA") (Count I)

The MMWA provides plaintiffs with a remedy against a defendant who fails to comply with "a written warranty, implied warranty, or service contract." *15 U.S.C. § 2310(d)(1)*. A "written warranty" means:

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[4] While Plaintiffs' FAC included class members who purchased either bedding or linens, (ECF No. 15 ¶ 98), Plaintiffs appear in their PSAC to limit the classes to customers who purchased bedding sheets, (ECF No. 36-1 ¶ 115).

> any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship **[**20]** and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time.

§ 2301(6)(A). An "implied warranty" is defined as "an implied warranty arising under State law . . . in connection with the sale by a supplier of a consumer product." *§ 2301(7)*.

Courts generally distinguished between "written warranties" and mere "product descriptions." *See* *In re Lumber Liquidators Chinese-Manufactured Flooring Durability Mktg. & Sales Practice Litig., No. 1:16MD2743 (AJT/TRJ), 2017 U.S. Dist. LEXIS 105335, 2017 WL 2911681, at *17 (E.D. Va. July 7, 2017)*; *Perez v. Monster Inc., 149 F. Supp. 3d 1176, 1183 (N.D. Cal. 2016)*; *Bowling v. Johnson & Johnson, 65 F. Supp. 3d 371, 378 (S.D.N.Y. 2014)*; *Viggiano v. Hansen Nat. Corp., 944 F. Supp. 2d 877, 898 (C.D. Cal. 2013)*; *see also* *In re Shop-Vac Mktg. & Sales Pracs. Litig., 964 F. Supp. 2d 355, 361 (M.D. Pa. 2013)* (finding claims about a vacuum's horsepower and tank capacity did not constitute a written warranty); *cf.* *Dorsey v. Rockhard Labs., LLC, No. CV 13-07557 DDP RZX, 2014 U.S. Dist. LEXIS 132161, 2014 WL 4678969, at *9 (C.D. Cal. Sept. 19, 2014)* (finding that "Sexual Performance Enhancer for Men" and "Fast & Effective" were claims that "relate to the nature of the product and are not mere product descriptions"). Promises about a product's quality or character do not constitute a "written warranty" unless they promise "a specified level of performance over a specified period of time." *Hawes v. Macy's Inc., 346 F. Supp. 3d 1086, 1092 (S.D. Ohio 2018)*. This interpretation is consistent with the Federal Trade Commission's interpretation of the MMWA, which provides that that certain product representations, such as "energy efficiency ratings" and clothing "care labeling" are product descriptions rather than written warranties because "a written **[*313]** promise of a specified level **[**21]** of performance must relate to a specified period of time in order to be considered a 'written warranty.'" *16 C.F.R. § 700.3(a)*. "A product information disclosure without a specified time period to which the disclosure relates is therefore not a written warranty." *Id.*; *see* *Viggiano, 944 F. Supp. 2d at 898 n.45*; *Kelley v. Microsoft Corp., No. C07-0475MJP, 2007 U.S. Dist. LEXIS 66721, 2007 WL 2600841, at *5 (W.D. Wash. Sept. 10, 2007)*.

Two courts have previously determined that a thread count guarantee is a not a "written warranty." *See* *Hawes, 346 F. Supp. 3d at 1092*; *Beautiful Home Textiles (USA) v. Burlington Coat Factory Warehouse Corp., 2014 U.S. Dist. LEXIS 114010, 2014 WL 4054240, at *12 (S.D.N.Y. Aug. 15, 2014)*. "Even if thread count provides a certain character and quality over time," they held, "the thread count listed on the bedsheets does not list a specified level of performance over a specified period of time." *Hawes, 346 F. Supp. 3d at 1092*; *see* *Beautiful Home Textiles, 2014 U.S. Dist. LEXIS 114010, 2014 WL 4054240, at *12*.

Here, a promised thread count may guarantee a specified level of performance. Accepting all alleged facts as true and making all inferences in plaintiffs favor, thread count is considered by sellers and consumers alike as an objective measure of softness and comfort during sleep and may be the closest thing bedsheets have to an objective promise of performance. (*See* ECF No. 36-1 ¶ 19 n.1 ("[T]he higher the thread count, the denser & smoother the sheet will feel." (quoting Macy's, *Meet the Sheets*, https://www.macys.com/ce/splash/how-to-choose-bed-sheets/index (last visited Dec. 15, 2021))).) Even if this were true, **[**22]** however, Plaintiffs have not alleged that Defendants made any guarantees of performance over a specified period of time. Thus, the Court finds that Plaintiffs have not sufficiently alleged the existence of a "written warranty" under the MMWA.

On the other hand, Plaintiffs have stated a claim for breach of an implied warranty under state law, as determined in Section III.C.iii.2, *infra*. Thus, Plaintiffs have likewise stated a claim under the MMWA. *See* *Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1022 (9th Cir. 2008)* ("[T]his court's disposition of the state law warranty claims determines the disposition of the [MMWA] claims.").

Therefore, Plaintiffs' motion to amend will be granted as to their MMWA claims for breach of an implied warranty but denied as to any claim for breach of a written warranty under the MMWA.

2. Breach of implied warranty of merchantability (Count II)

Under the Uniform Commercial Code ("UCC"), "[g]oods to be merchantable must be at least such as . . . (e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform to any promises or affirmations of fact made on the container or label." *Mass. Gen. Laws ch. 106, § 2A-212(2)(e)-(f)*; *Mo. Rev. Stat. § 400.2A-212(2)(e)-(f)*; *N.C. Gen. Stat. § 25-2A-212(2)(e)-(f)*; *see* *Cal. Com. Code § 2314(2)(e)-(f)* (West); *N.H. Rev. Stat. Ann. § 382-A:2-314(e)-(f)* (West).[5] Courts in the relevant states have found breaches of the implied warranty of merchantability **[**23]** where cans of tuna were underfilled and weighed substantially less **[*314]** than stated on the label, *Hendricks v. StarKist Co., 30 F. Supp. 3d 917, 933 (N.D. Cal. 2014)*; where "all natural" almond milk contained artificial ingredients, *Vass v. Blue Diamond Growers, No. CV 14-13610-IT, 2015 U.S. Dist. LEXIS 175317, 2015 WL 9901715, at *9 (D. Mass. Aug. 11, 2015)*, *report and recommendation adopted*, *No. 14-CV-13610-IT, 2016 U.S. Dist. LEXIS 44739, 2016 WL 1275030 (D. Mass. Mar. 31, 2016)*; and where a deodorant can had an insufficient warning on its label, *Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344, 349-50 (N.C. Ct. App. 1979)*.

Here, Plaintiffs allege that Defendants' sheets were not adequately labeled and did not conform to the affirmations of fact made on the labels, in that the sheets did not have the thread counts promised on the labels. These allegations appear to fit squarely within the definitions of merchantable contained in Sections 2A-212(2)(e) and (f) of the UCC quoted above. Thus, Plaintiffs have stated claims of breach of the implied warranty of merchantability.

Defendants argue that *Hawes v. Macy's* is on point. (ECF Nos. 19 at 10-11 (citing *Hawes, 346 F. Supp. 3d at 1093*; 25 at 4-5). In *Hawes*, a parallel case in which Plaintiffs sued Macy's over the same sheets at issue in this case, the U.S. District Court for the Southern District of Ohio dismissed Plaintiffs' claims for breach of an implied warranty of merchantability. *Hawes, 346 F. Supp. 3d at 1093*. There, however, Plaintiffs argued that the sheets were "unfit for the ordinary purpose for which they are used." *Id.* The court therefore analyzed Plaintiffs' claims under UCC § 2A-212(2)(c), which **[**24]** requires products to "satisfy a minimum level of quality," and found the complaint lacking. *Id.* (citing *Birdsong v. Apple, Inc., 590 F.3d 955, 958 (9th Cir. 2009)*; *Hope v. Nissan N. Am., Inc., 353 S.W.3d 68, 90 (Mo. Ct. App. 2011)*). Here, Plaintiffs argue that Defendants' products do not satisfy UCC § 2A-212(2)(e) or (f). Thus, while the factual allegations in the two cases may be similar, Plaintiffs' divergent legal theories require the Court's analysis, and ultimate conclusion, to differ from the analysis and conclusion in *Hawes*.

Finally, Defendants argue that Named Plaintiff Hawes's implied warranty claim is barred because she failed to notify Defendants of the defect within one year of sale as required by California law. (ECF No. 19 at 11 n.8 (citing *Cal. Civ. Code § 1791.1*.)) However, "[t]here is nothing that suggests a requirement that the purchaser discover and report to the seller a *latent* defect within that time period." *Mexia v. Rinker Boat Co., 174 Cal. App. 4th 1297, 95 Cal. Rptr. 3d 285, 295-96 (Cal. Ct. App. 2009)* (emphasis added) (holding that interpreting the one-year provision as a statute of limitations would be inconsistent with the statute's "legislative intent to *expand* consumer protections and remedies"). Here, Plaintiffs have alleged that the sheets' actual thread count was unobservable to the naked eye and only discovered after independently tested by a textile expert. (ECF No. 36-1 ¶ 10, 244-45.) Thus, the Court finds that these **[**25]** allegations are sufficient to withstand a motion to dismiss on this claim.

Plaintiff's motion will be granted as to this claim.

3. Breach of an express warranty (Count III)

Under the UCC, claims for breach of express warranty must be brought "within a reasonable time after he or she discovers or should have discovered any breach." *Cal. Com. Code § 2607(3)(A)* (West); *see* *Mass. Gen. Laws ch. 106, § 2-607(3)(a)*; *Mo. Rev. Stat. § 400.2-607(3)(a)*; *N.H. Rev. Stat. Ann. § 382-A:2-607(3)(a)* (West); *N.C. Gen. Stat. § 25-2-607(3)(a)*. Whether the time between discovery and suit is "reasonable" is fact and case specific. **[*315]** In one case, three months was too long to wait; in another, three years was still reasonable. *Compare* *P & F*

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[5] The parties dispute which state's law governs Plaintiffs' implied warranty claims. (ECF Nos. 19 at 8-9; 24 at 5-7; 25 at 2-4.) However, neither party has identified an actual conflict of laws in this case. (*See* ECF Nos. 24 at 7-11 (arguing that Plaintiffs stated a claim under the UCC as adopted by each state); 25 at 4 ("Plaintiffs' breach-of-warranty claims must be dismissed regardless of which state's law applies.")). Thus, the Court need not reach the choice of law issue at this stage.

Construction Corp. v. Friend Lumber Corp., 31 Mass. App. Ct. 57, 575 N.E.2d 61, 64 (Mass. Ct. App. 1991) (finding that "three and one half months is not soon enough" where a construction company notified a door manufacturer of readily apparent flaws after payment was past due), *with* Maybank v. S. S. Kresge Co., 302 N.C. 129, 273 S.E.2d 681, 685 (N.C. 1981) ("While three years might conceivably be a per se unreasonable delay in a commercial context, differing considerations applicable in retail situations may mean that a delay of three years by a consumer in giving notice to a retail seller is within the bounds of a reasonable time.") For this reason, reasonable delay is generally a question of fact for the jury. *See* Gober v. Revlon, Inc., 317 F.2d 47, 52 (4th Cir. 1963) (applying California law); Delano Growers' Coop. Winery v. Supreme Wine Co., 393 Mass. 666, 473 N.E.2d 1066, 1072 (Mass. 1985); Rowe Int'l, Inc. v. J-B Enterprises, Inc., 647 F.2d 830, 833 (8th Cir. 1981) (applying Missouri law); Dudley v. Bus. Exp., Inc., 882 F. Supp. 199, 211 (D.N.H. 1994) (citing Russell v. First National Stores, Inc., 96 N.H. 471, 79 A.2d 573, 577 (N.H. 1951)); Maybank, 273 S.E.2d at 684 n.1.

Here, Named Plaintiffs each notified **[**26]** Defendants of the defects roughly two years after purchase. While the sheets' alleged defect was not readily apparent at the time of purchase, Plaintiffs have failed to allege when the defects were detected. Defendants are correct that "Plaintiffs should not be allowed to benefit from any ambiguity created by their own failure to disclose material facts." (ECF No. 25 at 6.) Nevertheless, the Court cannot find that Plaintiffs' delays were unreasonable as a matter of law so as to render their PSAC futile. Two years is within the range found reasonable by at least one state's supreme court in consumer transactions, and Defendants alleged concealment of the defect and other factors prevent this Court from determining that Plaintiffs' delays are unreasonable as a matter of law at this early stage in the litigation.

Thus, Plaintiffs' motion will be granted as to these claims.

4. Fraud based claims (Counts IV through XII)

"In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Rule 9(b) applies to any cause of action "that has the substance of fraud," not only those labelled as fraud claims. Bakery & Confectionary Union & Indus. Int'l Pension Fund v. Just Born II, Inc., 888 F.3d 696, 705 (4th Cir. 2018) (quoting Cozzarelli v. Inspire Pharms. Inc., 549 F.3d 618, 629 (4th Cir. 2008)). This heightened pleading standard **[**27]** requires the plaintiff to "at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Id.* (internal quotations omitted). "These facts are often referred to as the 'who, what, when, where, and how' of the alleged fraud.'" Wilson, 525 F.3d at 379 (quoting U.S. ex rel. Willard v. Humana Health Plan of Tex. Inc., 336 F.3d 375, 384 (5th Cir. 2003)). Rule 9(b) "serves several policy objectives," Topshelf Mgmt., Inc. v. Campbell-Ewald Co., 117 F. Supp. 3d 722, 725 (M.D.N.C. 2015), including "to provide defendants with fair notice of claims against them and the factual ground upon which they are based, forestall frivolous suits, prevent fraud actions in which all the facts are learned only following discovery, and protect defendants' goodwill and reputation," McCauley v. Home Loan Inv. Bank, F.S.B., 710 F.3d 551, 559 (4th Cir. **[*316]** 2013). Ultimately, the Rule's purpose is to satisfy the court "(1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts." Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999).

Defendants argue that nine of Plaintiffs' thirteen claims sound in fraud, and Plaintiffs do not dispute this characterization. (ECF Nos. 19 at 14; 24 at 13-16.) Defendants further argue that these claims were not plead with sufficient particularity because **[**28]** Plaintiffs (1) failed to identify which Defendant is responsible for the alleged misrepresentations, and (2) base too many allegations on "information and belief." (ECF No. 19 at 15-17.) Thus, Defendants argue, Plaintiffs' request to assert these claims in their PSAC is futile. (ECF No. 39 at 18.)

The Court, however, finds, that the PSAC does satisfy Rule 9(b). With respect to Defendants' first argument, Plaintiffs allege that the sheets in question "were imported and labeled by AQ Textiles," and that "AQ Textiles represented and sold them to consumers as if they were of the higher quality represented on the labels." (ECF No. 36-1 ¶¶ 38, 44.) With respect to Defendants' second argument, it appears that Plaintiffs' allegations are no longer based solely on information and belief. Instead, Plaintiffs have submitted prediscovery evidence, including the content of the alleged misrepresentations (the "what"), as attachments to the PSAC. (*Id.* at 87; *see id.* ¶ 51.) And the "when" and "where" are also based on prediscovery evidence, such as Named Plaintiffs' recollections of the times and places they purchased the sheets. (*See id.* ¶¶ 36, 49, 54, 58.) Finally, Plaintiffs allege that they gave AQ money **[**29]** in exchange for the sheets. (*Id.* ¶¶ 37, 52, 56, 60.) The Court is therefore satisfied that the allegations are supported by prediscovery evidence and put Defendants on notice of the particular circumstances for which they will need to prepare a defense for trial.

Plaintiffs' motion will be granted as to these claims except as otherwise addressed below.

5. N.C. Unfair and Deceptive Trade Practices Act (Count VI)

Defendants next argue that Plaintiffs' claims are beyond the scope of the *North Carolina Unfair and Deceptive Trade Practices Act ("NCUDTPA")*. (ECF No. 19 at 17-18.)

The NCUDTPA declares unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practice in or affecting commerce." *N.C. Gen. Stat. § 75-1.1(a)*. To state a claim, a plaintiff must allege (1) an unfair or deceptive act or practice; (2) in or affecting commerce; (3) which proximately caused injury to the plaintiff or his business." *Champion Pro Consulting Grp., Inc. v. Impact Sports Football, LLC, 845 F.3d 104, 109 (4th Cir. 2016)* (citing *Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 653 S.E.2d 393, 399 (N.C. 2007)*). The statute's plain language is broad in scope and applies to all acts or practices "in or affecting commerce," including "all business activities, however denominated." *§ 75-1.1(a)-(b)*. The General Assembly removed language limiting that scope to business "within this state" in **[**30]** 1977, indicating its desire to make the law "applicable 'to the full extent permissible under conflicts of law principles and the Constitution.'" *Hardee's Food Sys., Inc. v. Beardmore, No. 5:96-CV-508-BR(2), 1997 U.S. Dist. LEXIS 9671, 1997 WL 33825259, at *3 (E.D.N.C. June 6, 1997)* (quoting *American Rockwool, Inc. v. Owens-Corning Fiberglas Corp.,* ***[*317]*** *640 F. Supp. 1411, 1427 (E.D.N.C. 1986)*).

Relying on *The 'In' Porters, S.A. v. Hanes Printables, Inc., 663 F. Supp. 494 (M.D.N.C. 1987)*, Defendants argue that the NCUDTPA only reaches cases where the plaintiff has shown an in-state injury. (ECF No. 19 at 17-18.) In *'In' Porters*, a court in this District addressed "whether *section 75-1.1* is available to a foreign plaintiff suing a resident defendant over alleged foreign injuries having a negligible effect, if any, on North Carolina trade or commerce." *"In' Porters, 633 F. Supp. at 501*. Ultimately, the court held that the NCUDTPA could not reach the facts of that case. *Id. at 502-03*.

Since *'In' Porters*, other federal district courts in North Carolina have distinguished its holding. *See* *Hometown Pub., LLC v. Kidsville News!, Inc., No. 5:14-CV-00076-FL, 2014 U.S. Dist. LEXIS 179106, 2014 WL 7499450, at *3 (E.D.N.C. Oct. 3, 2014)*; *Verona v. U.S. Bancorp, No. 7:09-CV-057-BR, 2011 U.S. Dist. LEXIS 33160, 2011 WL 1252935, at *15 (E.D.N.C. Mar. 29, 2011)*; *Ada Liss Group v. Sara Lee Corp., No. 06CV610, 2010 U.S. Dist. LEXIS 59691, 2010 WL 3910433, *12 (M.D.N.C. April 27, 2010)*; *Hardee's, 1997 U.S. Dist. LEXIS 9671, 1997 WL 33825259, at *3*. These courts limit *'In' Porter* to cases concerning "exclusively foreign misconduct with damages to the plaintiff's exclusively foreign operations." *Verona, 2011 U.S. Dist. LEXIS 33160, 2011 WL 1252935, at *14*.

This Court likewise finds *'In' Porters* distinguishable. *'In' Porters*' narrow interpretation of the NCUDTPA was based on concerns about personal jurisdiction under North Carolina's long arm statute, consistency of the NCUDTPA with federal ***antitrust law***, and potential violations of the **[**31]** Commerce and *Due Process Clauses of the U.S. Constitution*. *"In' Porters, 633 F. Supp. at 501-02*. These concerns are not present in this case. There is no personal jurisdiction concern because Defendant AQ is a North Carolina corporation. *See* *N.C. Gen. Stat. 1-75.4(1)(c)*. Since Plaintiffs are U.S. residents, applying the NCUDTPA will also not create the concerning "anomaly" presented in *'In' Porters* that could allow state law to reach farther than federal law in regulating international trade. *See* *'In' Porters, 633 F. Supp. at 502 n. 8*.

Further, while statutes should be construed to avoid constitutional problems, *see* *Boumediene v. Bush, 553 U.S. 723, 787, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008)*, Defendants have not shown how applying the NCUDTPA in this case would violate the *Commerce Clause*. *See* *ITCO Corp. v. Michelin Tire Corp., Com. Div., 722 F.2d 42, 48 n. 9 (4th Cir. 1983)* ("Absent some reason to believe that the [NCUDTPA] is an attempt directly to regulate interstate commerce . . . we perceive no cause for constitutional concern."). Unlike in *'In' Porter*, Plaintiffs here invoke the NCUDTPA to regulate Defendant AQ's alleged mislabeling of their products—conduct that appears to have occurred in whole or in part at AQ's headquarters in North Carolina. (ECF No. 36-1 ¶¶ 25-28, 61.) Thus, this is not a case where state law "targets conduct that occurs entirely outside [North Carolina's] borders." *See* *Ass'n for Accessible Medicines v. Frosh, 887 F.3d 664, 671 (4th Cir. 2018)*; *see also* Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1029 (9th Cir. 2021) ("A state law is not impermissibly extraterritorial unless it directly regulates conduct **[**32]** that is wholly out of state.").

Lastly, Defendants have not shown how application of the NCUDTPA would violate the *Due Process Clause*. Application of state law may be unconstitutional if a lack of "significant contact or significant aggregation of contacts" between the state and case "creating state interests" renders application of the law "arbitrary" or "fundamentally unfair." *Allstate Ins. Co. v. Hague, 449 U.S. 302, 313,* ***[*318]*** *101 S. Ct. 633, 66 L. Ed. 2d 521 (1981)* (pl. opinion). Here, North Carolina has significant contacts with Defendant AQ in that AQ is a North Carolina corporation and engaged in allegedly proscribed conduct in North Carolina. *See* *id. at 314 n. 19* ("Numerous cases have applied the law of a jurisdiction other than the situs of the injury where there existed some other link between that jurisdiction and the occurrence."). Application of North Carolina law to a North Carolina corporation is not arbitrary or unfair. Consequently, the Court joins the cases cited above and interprets the NCUDTPA broadly to reach some cases where the injury occurred outside of North Carolina.

Defendants alternatively argue that Plaintiffs have failed to adequately allege that Defendants' misconduct occurred in North Carolina. Plaintiffs have alleged:

> 25. Defendant AQ Textiles is a North Carolina LLC with it **[**33]** principal place of business and registered offices located in Greensboro, North Carolina 27410.
> 26. Defendants' improper conduct set forth herein occurred in this District or was conceived of and executed from this District in whole or in part.
> 27. Defendants' decisions to engage in the improper conduct set forth herein were made in this District.
> 28. Further, Defendants' bedding sheets at issue were advertised, marketed, sold and/or distributed in this District.
> . . .
> 70. The sheets at issue were manufactured by Creative Textiles and imported, labeled, and sold by AQ Textiles. . . .

(ECF No. 36-1 ¶¶ 25-28, 70.) These allegations are sufficient to create the reasonable inference that Defendant AQ engaged in the alleged misconduct—labeling sheets with misleadingly high thread counts—in North Carolina.

Therefore, the Court finds that the facts of this case fall within the broad scope of the NCUDTPA. The Court makes no finding as to whether the NCUDTPA applies to this case under North Carolina's choice of law rules, as that issue has not been raised by Defendants nor briefed by the parties. Instead, the Court merely finds that *'In' Porter* does not render Plaintiffs' motion to assert NCUDTPA **[**34]** claims in their PSAC futile.

6. Negligent misrepresentation (Count IV) and economic loss

Defendants next argue that Plaintiffs' negligent misrepresentation claim is barred by the economic loss doctrine. (ECF No. 19 at 18-20.) Plaintiffs argue that their claims fall within an exception to the economic loss rule under North Carolina law. (ECF No. 24 at 18 (citing *Rountree v. Chowan Cty., 252 N.C. App. 155, 796 S.E.2d 827, 830 (N.C. Ct. App. 2017)*).) Defendants argue that North Carolina law does not apply to this case. (*See* ECF No. 25 at 10.)

A federal court sitting in diversity or exercising supplemental jurisdiction over state law claims must apply the substantive law of the forum state, including the form state's choice of law rules. Hitachi Credit Am. Corp. v. Signet Bank, 166 F.3d 614, 623-24 (4th Cir. 1999); *see* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941) (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)). North Carolina courts follow the First Restatement of Conflict of Laws in actions sounding in tort and apply the tort law of the state where the injury occurred. *See* SciGrip, Inc. v. Osae, 373 N.C. 409, 838 S.E.2d 334, 343 (N.C.

2020); Boudreau **[*319]** v. Baughman, 322 N.C. 331, 368 S.E.2d 849, 854 (N.C. 1988). Here, Defendants' alleged negligent misrepresentation caused injury where Plaintiffs purchased the sheets: California, Massachusetts, Missouri, and New Hampshire. Thus, Plaintiffs claims are governed by the substantive laws of these states. *See* SciGrip, 838 S.E.2d at 344 (noting that "the lex loci test can be difficult in some circumstances, including cases involving events that **[**35]** occur in and entities associated with multiple jurisdictions.").

All four states recognize the economic loss rule, which limits "remedies for economic loss sustained by reason of damage to or defects in products sold . . . to those under the warranty provisions of the UCC." Renaissance Leasing, LLC v. Vermeer Mfg. Co., 322 S.W.3d 112, 130-31 (Mo. 2010) (en banc); *see* Robinson Helicopter Co. v. Dana Corp., 34 Cal. 4th 979, 22 Cal. Rptr. 3d 352, 102 P.3d 268, 272 (Cal. 2004); Sebago, Inc. v. Beazer E., Inc., 18 F. Supp. 2d 70, 89 (D. Mass. 1998) (citing Jacobs v. Yamaha Motor Corp., U.S.A., 420 Mass. 323, 649 N.E.2d 758, 763 n.5 (Mass. 1995)); Wyle v. Lees, 162 N.H. 406, 33 A.3d 1187, 1190-91 (N.H. 2011). However, the states apply the rule differently to negligent misrepresentation claims. The Eighth Circuit predicted that "the Supreme Court of Missouri, if confronted with the issue, would hold that the economic loss doctrine bars negligent misrepresentation claims." Bruce Martin Constr. v. CTB, Inc., 735 F.3d 750, 752 (8th Cir. 2013) (citing Dannix Painting, LLC v. Sherwin-Williams Co., 732 F.3d 902, 904-05 (8th Cir. 2013)). In Massachusetts, on the other hand, "the economic-loss doctrine does not apply to claims of negligent misrepresentation." Stokes v. Wells Fargo Bank, N.A., 37 F. Supp. 3d 525, 535 n.6 (D. Mass. 2014); Passatempo v. McMenimen, 461 Mass. 279, 960 N.E.2d 275, 294 (Mass. 2012) ("[The economic loss doctrine] does not apply to 'pecuniary loss incurred as a result of an actionable misrepresentation.'" (quoting Nota Constr. Corp. v. Keyes Assocs. Inc., 45 Mass. App. Ct. 15, 694 N.E.2d 401 (Mass. Ct. App. 1998))); *see also* Softub, Inc. v. Mundial, Inc., 53 F. Supp. 3d 235, 260 (D. Mass. 2014) (allowing plaintiff's negligent misrepresentation claim against manufacturer for false promises that pump was suitable for installation in portable spa tubs).[6]

In the remaining two states, it appears that a negligent misrepresentation claim is barred if the misrepresentation constituted a breach of contract but is not barred if the misrepresentation **[**36]** was independent of the contract terms and instead induced contract formation. *Compare* Robinson Helicopter, 102 P.3d at 274 (allowing an intentional misrepresentation claim where defendant falsified certificates of performance, inducing plaintiff's purchase of its products), *and* Banks v. R.C. Bigelow, Inc., 536 F. Supp. 3d 640, 646 (C.D. Cal. 2021) (allowing a claim that alleged the label, "manufactured in the USA," was false and induced plaintiffs' purchase), *and* Wyle, 33 A.3d at 1192 (allowing a claim where defendant's misrepresentation that a property was licensed **[*320]** for immediate occupancy induced plaintiff's purchase), *with* Soil Retention Prods. v. Brentwood Indus., 521 F. Supp. 3d 929, 955 (S.D. Cal. 2021) (barring plaintiff's negligent misrepresentation claims that "allege nothing more than the product it purchased . . . did not live up to the expectations that had been created by Defendant's advertising"), *and* Wyle, 33 A.3d at 1192 (noting that economic loss rule bars claims that "merely relate to a breached promise to perform the terms of the contract or attempt to recharacterize a breach of contract claim as a negligent misrepresentation").

Here, Defendants' alleged misrepresentations go to the nature and performance of the sheets. Plaintiffs repeatedly allege that Defendants' thread count claims were not mere characterizations of the sheets, but product descriptions that created warranties. Thus, this is **[**37]** not a case where alleged promises are independent of the purchase, such as a promise that a product is properly licensed or "manufactured in the USA." In such a case, the plaintiff has received the correct product, but was persuaded to purchase the product by the defendant's misrepresentations. By contrast, Plaintiffs in this case allege they did not receive the products they purchased—luxury sheets with the

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[6] Defendants cite Sebago, Inc. v. Beazer E., Inc., 18 F. Supp. 2d 70 (D. Mass. 1998), which applied the economic loss rule to a negligent misrepresentation claim after finding in 1998 that "Massachusetts has not expressly decided whether the economic loss doctrine bars claims of negligent misrepresentation where the damages result from a defective product." Id. at 95. State courts have since repeated that negligent misrepresentation is categorically excepted from the economic loss rule, *see* Passatempo, 960 N.E.2d at 294, and the U.S. District Court in Massachusetts has allowed negligent misrepresentation claims related to defective products to proceed, Softub, 53 F. Supp. 3d at 260.

advertised thread counts. Thus, their California and New Hampshire negligent misrepresentation claims merely restate their breach of warranty claims and are barred by the economic loss doctrine.

Plaintiffs' motion will therefore be granted as to the negligent misrepresentation claims brought by Plaintiffs who allegedly suffered an injury in Massachusetts. Plaintiffs' request to assert remaining negligent misrepresentation claims will be denied as futile.

7. Massachusetts Consumer Protection Act ("MCPA") (Count XI)

Defendants next argue that Plaintiffs' request to assert MCPA claims in their PSAC is futile because Plaintiffs did not provide Defendants with sufficient notice. (ECF No. 19 at 20-21.)

The MCPA provides that "[a]t least thirty days prior to the filing of any such action, **[**38]** a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent." *Mass. Gen. Laws ch. 93A, § 9(3)*. "The statutory notice requirement is not merely a procedural nicety, but, rather, 'a prerequisite to suit.'" *Young v. Wells Fargo Bank, N.A., 828 F.3d 26, 34 (1st Cir. 2016)* (quoting *Entrialgo v. Twin City Dodge, Inc., 368 Mass. 812, 333 N.E.2d 202, 204 (Mass. 1975)*). The demand letter "is a prerequisite to suit and as a special element must be alleged and proved." *Baldassari v. Pub. Fin. Tr., 369 Mass. 33, 337 N.E.2d 701, 707 (Mass. 1975)*.

In the class action context, proper demand made by one plaintiff satisfies this requirement for "others similarly situated," so long as the letter (1) identifies him as the claimant, (2) reasonably describes the act or practice being challenged, and (3) reasonably describes his injury. *Id.* In *Bosque v. Wells Fargo Bank, N.A., 762 F. Supp. 2d 342 (D. Mass. 2011)*, the U.S. District Court for the District of Massachusetts held that one named plaintiff's demand put defendant on sufficient notice such that other named plaintiffs could join suit without issuing additional demands. *Id. at 354*.

"One function of the demand letter is to encourage negotiation and settlement by notifying prospective defendants of claims arising from allegedly unlawful **[*321]** conduct." *Casavant v. Norwegian Cruise Line, Ltd., 460 Mass. 500, 952 N.E.2d 908, 913 (Mass. 2011)* (internal quotations omitted); *see also* *Young, 828 F.3d at 34* ("The demand letter requirement puts **[**39]** the defendant on notice of the plaintiff's claim, thereby encouraging negotiation and settlement."). Notice of a plaintiff's claim satisfies this requirement only if it "describes the injuries in sufficient detail to permit the defendant reasonably to ascertain its exposure." *Richards v. Arteva Specialties S.A.R.L., 66 Mass. App. Ct. 726, 850 N.E.2d 1068, 1076 (Mass. Ct. App. 2006)* (internal quotation omitted). Thus, "[i]n order to qualify as a written demand under Chapter 93A, the letter must define the injury suffered and the relief sought and *refer to the nature of the claim as one under the consumer protection act*." *In re Bushay, 327 B.R. 695, 702 (B.A.P. 1st Cir. 2005)* (emphasis added), *aff'd*, *187 F. App'x 17 (1st Cir. 2006)*.

Here, Plaintiffs allege the following:

> 310. Plaintiff Morrison provided Defendants with notice of her and the Classes' claims by letter dated November 27, 2018.
> 311. Plaintiff Hawes provided Defendants with notice of her and the Classes' claims by letter on or around May 17, 2019.
> 312. Plaintiffs Chiaraluce and Fontaine provided Defendants with notice of their and the Classes' claims by letter on or around December 5, 2019.

(ECF No. 36-1 ¶¶ 310-312.) Plaintiffs first raised their MCPA claim in their FAC, filed on December 12, 2019. Thus, only Plaintiff Hawes's letter was mailed or delivered at least thirty days before Plaintiffs filed their MCPA claim. **[**40]** [7]

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[7] Plaintiffs do not argue that the untimeliness of Plaintiffs Chiaraluce's and Fontaine's demands have been cured by their PSAC, nor does the Court find that this amended complaint cures the defects. Plaintiffs had ample time between January 5, 2020—thirty days after Chiaraluce and Fontaine mailed their letter—and this Court's Order on March 17, 2021, to amend their complaint to cure this defect but failed to do so. After Plaintiffs' suit was dismissed by the Court, Defendants no longer had incentive to

Plaintiffs argue that Hawes's demand was sufficient to put Defendants on notice of other Plaintiffs' claims as well. (ECF No. 24 at 20.) However, Hawes is a citizen of California who purchased her sheets in California, and Plaintiffs have not alleged that Hawes or the sheets she purchased had any connection to Massachusetts. Thus, nothing in her demand letter would have put Defendants on notice that their alleged conduct may have violated the MCPA, nor could it have encouraged settlement of claims which Defendants did not know could be raised. Plaintiffs have therefore failed to allege that they submitted a timely demand for relief.

Accordingly, Plaintiffs' motion will be denied as to claims arising under the MCPA as futile.

8. Unjust enrichment (Count XIII)

Finally, Defendants argue that Plaintiffs cannot maintain unjust enrichment claims alongside their warranty claims. (ECF No. 19 at 21-22.)

It is true that the relevant states' laws do not permit recovery on an unjust enrichment theory when a valid contract governs the subject matter of the parties' dispute. *See* *Progeny Ventures, Inc. v. W. Union Fin. Servs., Inc., 752 F. Supp. 2d 1127, 1135 (C.D. Cal. 2010)* ("As a matter **[*322]** of [California] law, an unjust enrichment claim does not lie where the parties have an enforceable express contract."); **[**41]** *Tomasella v. Nestlé USA, Inc., 364 F. Supp. 3d 26, 37 (D. Mass. 2019)* ("[A] plaintiff who has an adequate remedy at law cannot maintain a parallel claim for unjust enrichment."); *Banner Iron Works, Inc. v. Amax Zinc Co., 621 F.2d 883, 889 (8th Cir. 1980)* (finding of a valid contract precludes recovery on a quantum meruit theory under Missouri law); *Clapp v. Goffstown Sch. Dist., 159 N.H. 206, 977 A.2d 1021, 1025 (N.H. 2009)* ("It is a well-established principle that the court ordinarily cannot allow recovery under a theory of unjust enrichment where there is a valid, express contract covering the subject matter at hand."); *Wireless Communs., Inc. v. Epicor Software Corp., No. 3:10CV556-DSC, 2011 U.S. Dist. LEXIS 2633, 2011 WL 90238, at *7 (W.D.N.C. Jan. 11, 2011)* ("If there is a contract between the parties, the contract governs the claim and the law will not imply a contract [under a theory of unjust enrichment].").

However, at this early stage of the litigation, Plaintiffs are permitted to pursue their unjust enrichment claims in the alternative. *Fed. R. Civ. P. 8(d)(2)* ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones."). "The fact that a plaintiff cannot simultaneously recover damages for both breach of an express contract and unjust enrichment does not preclude that plaintiff from pleading both theories in her complaint." *Owen v. GMC, No. 06-4067-CV-CNKL, 2006 U.S. Dist. LEXIS 70466, 2006 WL 2808632, at *2 (W.D. Mo. Sept. 28, 2006)*; *see, e.g.*, *Dorney v. Pindrop Sec., Inc., No. 15-CV-11505-ADB, 2015 U.S. Dist. LEXIS 129312, 2015 WL 5680333, at *6 (D. Mass. Sept. 25, 2015)* ("[T]he existence of statutory and contractual claims does not necessitate the dismissal of [plaintiff's] equitable quantum **[**42]** meruit/unjust enrichment claim."); *Performance Sales & Mktg., LLC v. Lowe's Cos., No. 5:07CV140, 2010 U.S. Dist. LEXIS 55522, 2010 WL 2294323, at *5 (W.D.N.C. June 4, 2010)* ("Until the existence of an express contract is proven, [a plaintiff] is allowed to plead quantum meruit and unjust enrichment as alternative theories of recovery.").

Plaintiffs' motion will therefore be granted for these claims.

CONCLUSION

The Court here concludes that its March 17, 2021, Order dismissing Plaintiffs' First Amended Complaint without prejudice was not a final judgment or order and was instead interlocutory. Therefore, the Court will instruct the Clerk to reinstate the case and need not vacate the former Order. The Court further concludes that Plaintiffs' proposed Second Amended Complaint does allege an injury in fact and cures the defect that led the Court to dismiss the First Amended Complaint. Plaintiffs' motion to amend their complaint would survive a motion to dismiss and is not futile, with the exception of their claims for Breach of a Written Warranty under the MMWA (Count I); for Negligent

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respond to the demand letter and settle the suit. Thus, the purposes of the demand requirement, including to encourage settlement and limit damages, are not served by allowing Plaintiffs to reassert their MCPA claims in their PSAC.

Misrepresentation brought by Plaintiffs Morrison, Hawes, and Chiaraluce, and the California, Missouri, New Hampshire, and North Carolina classes (Count IV); and for violations of the MCPA (Count XI). Finally, the Court concludes that the following **[**43]** Order advances the Court's interests in judicial economy, efficiency, and disposing with cases on their merits.

For the reasons stated herein, the Court enters the following:

ORDER

IT IS THEREFORE ORDERED that the Clerk of the United States District Court for the Middle District of North Carolina shall reinstate the case.

[*323] **IT IS FURTHER ORDERED** that Plaintiffs' Motion to Amend First Amended Complaint, (ECF No. 36), is GRANTED in part and DENIED in part as follows: Plaintiffs' motion to amend is DENIED as to any claim for breach of a written warranty under the MMWA (Count I); any negligent misrepresentation claims brought by Plaintiffs Morrison, Hawes, and Chiaraluce, and the California, Missouri, New Hampshire, and North Carolina classes (Count IV); and any claims arising under the MCPA (Count XI). Plaintiffs' motion will be GRANTED as to all other claims.

This, the 27th day of January 2022.

/s/ Loretta C. Biggs.

United States District Judge

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Witches Brew Tours LLC v. New Orleans Archdiocesan Cemeteries

United States District Court for the Eastern District of Louisiana

January 27, 2022, Decided; January 27, 2022, Filed

CIVIL ACTION NO. 21-2051 SECTION M (5)

Reporter
2022 U.S. Dist. LEXIS 14763 *; 2022 WL 252703

WITCHES BREW TOURS LLC VERSUS NEW ORLEANS ARCHDIOCESAN CEMETERIES, et al.

Prior History: *Witches Brew Tours LLC v. New Orleans Archdiocesan Cemeteries, 2021 U.S. Dist. LEXIS 215278 (E.D. La., Nov. 8, 2021)*

Core Terms

cemeteries, interstate commerce, preliminary injunction, tours, argues, Defendants', guides, subject-matter, antitrust, nexus, tourists, voucher, irreparable injury, motion to dismiss, out-of-state, irreparable harm, monetary damages, supplemented, injunction, visitors, tourism, movant, general public, Gulf, golf

LexisNexis® Headnotes

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Constitutional Law > ... > Case or Controversy > Standing > Elements

Evidence > Burdens of Proof > Allocation

Constitutional Law > ... > Case or Controversy > Standing > Third Party Standing

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN1[] **Standing, Burdens of Proof**

A plaintiff bears the burden of establishing standing as of the time suit was brought. The constitutional requirement of standing is three-pronged: the plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. The same requirements apply to an entity seeking to establish associational standing, which is derivative of the standing of the association's members, requiring that they have standing and that the interests the association seeks to protect be germane to its purpose.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Evidence > Burdens of Proof > Allocation

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] Judges, Discretionary Powers

A movant seeking a preliminary injunction must establish (1) a substantial likelihood that the movant will prevail on the merits; (2) a substantial threat the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant if the injunction is denied outweighs the potential harm to the non-movant if the injunction is granted; and (4) that granting the injunction will not disserve the public interest. A preliminary injunction is an extraordinary remedy which courts grant only if the movant has clearly carried the burden as to all four elements. A preliminary injunction may only be awarded upon a clear showing that the movant is entitled to such relief, and is never awarded as a matter of right but only within the sound discretion of the district court. Ultimately, granting a preliminary injunction is the exception rather than the rule.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

HN3[] Grounds for Injunctions, Irreparable Harm

An irreparable injury is one that cannot be undone by monetary damages or one for which monetary damages would be especially difficult to calculate. There is no irreparable injury where harm is financial and monetary compensation will make plaintiff whole if plaintiff prevailed. Thus, the possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. A plaintiff, therefore, must allege harm that cannot be obviated by monetary relief. A party sufficiently proves that monetary damages are not adequate when it brings forward evidence, in the form of affidavits, declarations, or any other support, that shows imminent harm that is difficult to quantify.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

HN4[] Grounds for Injunctions, Irreparable Harm

Exceptional economic harm may constitute irreparable injury where the existence of the business will likely cease, where bankruptcy is imminent, or where the plaintiff is unable to fund ongoing litigation.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

Evidence > Burdens of Proof > Allocation

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

HN5[] Subject Matter Jurisdiction, Jurisdiction Over Actions

Fed. R. Civ. P. 12(b)(1) permits a party to challenge a court's subject-matter jurisdiction. A claim is properly dismissed for lack of subject-matter jurisdiction when the court lacks the statutory authority or constitutional power to adjudicate the claim. The party asserting jurisdiction bears the burden of proving that subject-matter jurisdiction exists. Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. A motion to dismiss for lack of subject-matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claims entitling him to relief.

Civil Procedure > ... > Voluntary Dismissals > Court Order > Dismissal With Prejudice

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

HN6[] **Court Order, Dismissal With Prejudice**

If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action. *Fed. R. Civ. P. 12(h)(3)*. And, if a court dismisses pursuant to *Fed. R. Civ. P. 12(b)(1)*, it must do so without prejudice.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN7[] **Sherman Act, Claims**

A plaintiff bears the burden of proving that a court has subject-matter jurisdiction to hear an antitrust claim. As an antitrust claimant, a plaintiff has the burden of establishing that the alleged proscribed practices affect interstate commerce. Jurisdiction may not be invoked under the Sherman Act unless the relevant aspect of interstate commerce is identified; it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce. To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings. A complaint alleging a Sherman Act claim must allege some nexus between the defendants' conduct and interstate commerce. A plaintiff need not quantify the adverse impact of a defendant's alleged unlawful conduct, but merely show that there was some effect on interstate commerce. Even when business activities are purely local, if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Tests

HN8[] **Interstate Commerce, Prohibition of Commerce**

If thee allegations of defendant's interstate commerce are controverted the plaintiff must proceed to demonstrate by submission of evidence beyond the pleadings either that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN9[] **Standing, Requirements**

Tourism can be sufficient to establish an interstate commerce nexus for purposes of an antitrust claim.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN10[] **Amendment of Pleadings, Leave of Court**

Fed. R. Civ. P. 15 allows a court to grant leave to amend when justice so requires. *Fed. R. Civ. P. 15(a)(2)*. The U.S. Court of Appeals for the Fifth Circuit has recognized that in view of the consequences of dismissal on the complaint alone, and the pull to decide cases on the merits rather than on the sufficiency of the pleadings, district courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal.

Counsel: **[*1]** For Witches Brew Tours LLC, Plaintiff: David William Nance, LEAD ATTORNEY, David W. Nance Law Firm, LLC, New Orleans, LA.

Judges: BARRY W. ASHE, UNITED STATES DISTRICT JUDGE.

Opinion by: BARRY W. ASHE

Opinion

ORDER & REASONS

Before the Court are two motions. The first is an amended motion for preliminary injunction filed by plaintiff Association of Cemetery Tour Guides and Companies L3C d/b/a New Orleans Association of Cemetery Tour Guides and Companies ("ACTGC").[1] Defendant New Orleans Archdiocesan Cemeteries d/b/a New Orleans Catholic Cemeteries ("NOAC") responds in opposition.[2] ACTGC replies.[3] The second is a motion to dismiss pursuant to *Rule 12(b)(1) of the Federal Rules of Civil Procedure* filed by NOAC.[4] ACTGC responds in opposition.[5] NOAC replies.[6] The Court conducted a hearing on the motions on January 6, 2022.[7] ACTGC filed a post-hearing brief.[8] Having considered the parties' memoranda, the argument and representations made at the hearing, the record, and the applicable law, the Court issues this Order & Reasons.

I. BACKGROUND

This case concerns two of New Orleans' most storied cemeteries: St. Louis Cemetery Nos. 1 and 2 (individually, "No. 1" or "No. 2"; together, "Nos. 1 and 2").[9] Situated near the French Quarter, these final resting places of "the famous and forgotten" **[*2]** allegedly attract hundreds of thousands of visitors each year.[10] In 2015, NOAC closed

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[1] R. Docs. 2; 16.

[2] R. Doc. 18. Co-defendant Cemetery Tours NOLA, LLC ("CTN") adopted the opposition. R. Doc. 22.

[3] R. Doc. 30.

[4] R. Doc. 17. CTN adopted this motion. R. Doc. 22.

[5] R. Doc. 23.

[6] R. Doc. 28. CTN adopted this reply. R. Doc. 32.

[7] R. Doc. 33.

[8] R. Doc. 37.

[9] R. Doc. 16-2 at 2-3, 13.

No. 1 to all but "owning" families and visitors who were willing to pay a $20.00 fee.[11] Tour companies were also allowed entry conditioned upon payment of either $4,500.00 a year or $40.00 for each tour, with an additional dollar charge for each visitor on the tour, which would be remitted to NOAC.[12] In early 2020, however, due to the COVID-19 pandemic, NOAC closed both Nos. 1 and 2 to all but immediate family members of the interred.[13] As of November 2021, both cemeteries remained closed,[14] but the parties represented at the hearing that No. 1 was now open for tours.

At some point and through some process unknown to this Court, NOAC awarded a contract to CTN[15] to "manage tours in St. Louis Cemetery [No.] 1."[16] Afterwards, an email was circulated indicating that CTN would commence tours under new terms dictated by NOAC, including: (1) all tour narratives and routes must be approved by NOAC; (2) only tour guides from CTN are allowed to conduct tours; (3) local company tour guides may escort tour groups, but may not offer commentary; and (4) prices will **[*3]** be fixed at $25.00 for adults and $18.00 for tour wholesalers.[17] No evidence has been provided to the Court that CTN has ever conducted or is currently conducting these "exclusive" tours. Plaintiff ACTGC, an association of New Orleans cemetery tour guides and companies, alleges that its 67 members "stand to be excluded from visiting and providing their services in the public cemeteries Nos. 1 & 2 due to the recently announced business plan of defendants."[18] ACTGC says that "[n]either the general public nor [its] members care if NOAC wants to promote cemetery tour guides who willingly restrict their tours to the topics preferred by NOAC"; rather, ACTGC takes issue with "NOAC's attempt to exclude the general public, including tour guides unwilling to be controlled by NOAC, from public cemeteries" as a result of their alleged plan.[19]

This action was originally filed by now-terminated plaintiff Witches Brew Tours LLC ("WBT"),[20] which moved for a temporary restraining order ("TRO") and a preliminary injunction enjoining the implementation of the business plan of NOAC and CTN (together, "Defendants").[21] The Court denied WBT's motion for a TRO for failure to demonstrate irreparable injury.[22] Thereafter, **[*4]** ACTGC, an entity created only after WBT commenced this action,[23] replaced WBT as the sole plaintiff in the case.[24] ACTGC asserts five theories of liability against Defendants: (1) unlawful

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[10] R. Docs. 10 at 2, 9;16-2 at 13.

[11] R. Doc. 16-2 at 12, 14.

[12] *Id.* at 14.

[13] R. Docs. 10 at 9; 16-2 at 21.

[14] R. Doc. 16-2 at 17. *See also St. Louis Cemetery No. 1*, CEMETERY TOUR NEW ORLEANS, https://cemeterytourneworleans.com (last visited January 25, 2022).

[15] R. Doc. 18 at 1. The Court has virtually no details about this arrangement other than the mere fact that it exists. At the January 6, 2022 hearing, the parties represented, for the first time, that the agreement was made after CTN allegedly won a bid for the contract.

[16] R. Doc. 16-3 at 1.

[17] *Id.* at 1-2. The Court notes that from the complaint and the instant motions, it is unclear whether any of ACTGC's members received this email. Further, it is unclear whether No. 2 will remain closed, will reopen under the same plan in place for No. 1, or will reopen in accordance with some other procedure.

[18] R. Doc. 10 at 2.

[19] R. Doc. 23 at 24.

[20] R. Doc. 1.

[21] R. Doc. 2.

[22] R. Doc. 5 at 3.

[23] R. Doc. 17-1 at 3.

[24] R. Doc. 10.

price fixing, in violation of *15 U.S.C. § 1*;[25] (2) monopolization by means of unlawful market allocation or exclusion of competition, in violation of *15 U.S.C. § 2*;[26] (3) unlawful restraint of trade, in violation of *La. R.S. 51:122*;[27] (4) unfair and unreasonable monopoly, in violation of *La. R.S. 51:123*;[28] and (5) "unlawful exclusion of the general public from public religious cemeteries," in violation of general Louisiana cemetery law.[29]

II. PENDING MOTIONS

A. ACGTC's Motion for Preliminary Injunction

In its motion, ACGTC requests a preliminary injunction enjoining NOAC from "(a) granting CTN exclusive access to Nos. 1 and 2 for cemetery tours, (b) fixing the price of cemetery tours at NOAC cemeteries, (c) dictating the topics discussed during cemetery tours, and (d) continuing to unreasonably exclude the public from its public religious cemeteries."[30] "ACTGC and the general public will likely suffer irreparable injury and damages if NOAC and CTN commence their anticompetitive scheme," ACTGC asserts.[31] It argues that Defendants' exclusion **[*5]** of the nonpaying public and city-licensed tour guides violates 200 years of custom and the public's right to free and reasonable access to public cemeteries.[32] By keeping the cemeteries closed, "[ACGTC] continues to be deprived of access to Nos. 1 and 2 for tours and, therefore, a sizeable portion of [the] business income and livelihood of its licensed tour guides," it says.[33] Accordingly, ACGTC submits that, at this early stage in the litigation, NOAC should revert to its pre-pandemic plan of operation, enacted in 2015, wherein all relevant cemeteries were open, with NOAC receiving entry fees from touring companies bringing visitors into the cemeteries.[34]

In opposition, NOAC argues that ACGTC cannot prove the essential elements required for a preliminary injunction.[35] NOAC contends that, assuming ACGTC has standing and that the *Sherman Act*, as supplemented by the *Clayton Act*, applies, ACGTC cannot establish that NOAC has enacted an unreasonable restraint upon trade.[36]

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[25] *Id.* at 4-5.

[26] *Id.* at 5-6. Claims for unlawful market allocation are typically brought under *15 U.S.C. § 1*. *See, e.g., United Biologics, LLC v. Allergy & Asthma Network/Mothers of Asthmatics, Inc, 2019 U.S. Dist. LEXIS 27778, 2019 WL 830967, at *3 (W.D. Tex. Feb. 21, 2019)*; *Impax Lab'ys, Inc. v. Fed. Trade Comm'n, 994 F.3d 484, 493 (5th Cir.)*, *cert. denied*, ***142 S. Ct. 712, 142 S. Ct. 712, 211 L. Ed. 2d 400 (2021)***.

[27] R. Doc. 10 at 6-7.

[28] *Id.* at 7-8.

[29] *Id.* at 8-9. The Court notes that in ACGTC's most recent supplemental briefing, it clarifies that, should an amended complaint be necessary, it intends to bring a possessory action to replace the fifth cause of action presently listed in the complaint. R. Doc. 37 at 6.

[30] R. Doc. 16-2 at 17. In its complaint, however, ACTGC says it seeks a preliminary injunction prohibiting NOAC from "(a) treating any of its religious cemeteries as privately owned cemeteries and (b) reopening any of its cemeteries to only a single or small group of cemetery tourism industry participants." R. Doc. 10 at 10.

[31] R. Doc. 16-2 at 17.

[32] *Id.* at 1, 17

[33] *Id.* at 21.

[34] *Id.* at 17-18.

[35] R. Doc. 18 at 2.

[36] *Id.* at 2.

In addition, it argues that ACGTC's price-fixing and market-allocation claims are not cognizable because (1) the Act contemplates an antitrust scheme between competitors, which NOAC and CTN are not; and (2) ACGTC has failed to define the relevant **[*6]** market.[37] As a result, argues NOAC, the Court does not have subject-matter jurisdiction over either the federal or state-law claims.[38] NOAC argues further that ACGTC fails to establish a likelihood of success on the merits for its state-law claims because its characterizations of No. 1 as public property that confers certain rights to the public and of Louisiana custom are without merit.[39]

In reply, ACGTC reiterates that all of NOAC's cemeteries are public and, as a result, Defendants cannot legally exclude the nonpaying public or city-licensed tour guides.[40] Further, it argues that an injunction would cause no harm to Defendants, would curtail most of the harm to ACGTC's members and the general public, and would allow ACGTC to remit funds to NOAC to help with its cemetery needs, such as preventing vandalism.[41]

B. NOAC's Motion to Dismiss

In its motion, NOAC argues that ACTGC has no standing to bring this action and, therefore, this Court lacks subject-matter jurisdiction over ACTGC's claims.[42] First, NOAC argues that because ACTGC was not in existence at the time the action was initiated, it cannot have suffered any injury in fact or any invasion of a legally protected interest sufficient **[*7]** to confer standing.[43] Second, NOAC contends that ACTGC has failed to establish federal jurisdiction pursuant to the *Sherman Act*, as supplemented by the *Clayton Act*, because ACTGC failed to demonstrate that (1) NOAC's alleged conduct substantially and directly affects interstate commerce; (2) the restraints in place are unreasonable; (3) the cemetery tours constitute the kind of market to which the *Sherman Act*, as supplemented by the *Clayton Act*, applies; or (4) NOAC's decisions have had anticompetitive effects harmful to consumers.[44] Accordingly, NOAC concludes that because the Court cannot exercise original jurisdiction over ACTGC's federal claims or supplemental jurisdiction over ACTGC's state-law claims, the suit must be dismissed.[45]

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[37] *Id.* at 3-5.

[38] *Id.* at 5.

[39] *Id.* at 6-8, 11-12.

[40] R. Doc. 30 at 10.

[41] *Id.* at 6, 10.

[42] R. Doc. 17 at 1.

[43] R. Doc. 17-1 at 2-3. NOAC thus observes that this litigation was brought on November 5, 2021, and ACTGC filed its formation documents with the Louisiana Secretary of State on November 10, 2021. *Id.* at 3 (citing R. Doc. 17-2). So, NOAC raises the issue whether an entity that was created after an action was filed may have standing to sue as the sole plaintiff. This raises an additional issue whether the injuries of ACGTC's members are "fairly traceable." ***HN1***[] A plaintiff bears the burden of establishing standing as of the time suit was brought. *Carney v. Adams, 141 S. Ct. 493, 499, 208 L. Ed. 2d 305 (2020)* (citing *Lujan v. Defs. of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* (plaintiff bears the burden of proving standing), and *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 191, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)* (standing is assessed "at the time the action commences")). The constitutional requirement of standing is three-pronged: the plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016)* (citing *Lujan, 504 U.S. at 560-61*). The same requirements apply to an entity seeking to establish associational standing, which is "derivative of the standing of the association's members, requiring that they have standing and that the interests the association seeks to protect be germane to its purpose." *OCA-Greater Hous. v. Texas, 867 F.3d 604, 609-10 (5th Cir. 2017)*. It is unclear from the complaint whether the complained-of conduct is the 2020 cemetery closure or the alleged "anticompetitive scheme," and whether any allegedly resulting injury is fairly traceable to Defendants' conduct.

[44] R. Doc. 17-1 at 2, 2-5.

In opposition, ACTGC argues that it has sufficiently alleged standing.[46] ACTGC has associational standing, it contends, because it has brought this suit on behalf of its 67 members, even though it does not have standing on its own.[47] Further, ACTGC says that NOAC's attack on its statutory (*i.e.*, antitrust) standing is not jurisdictional, but instead an attack under *Rule 8 of the Federal Rules of Civil Procedure*.[48] It argues that it has asserted "uncontested facts" demonstrating Defendants' violation of ***antitrust law*** and, therefore, satisfies the **[*8]** statutory standing requirement.[49] Accordingly, argues ACTGC, the Court should deny NOAC's motion to dismiss or, in the alternative, grant ACTGC leave to amend its complaint to address any identified failings.[50]

In reply, NOAC argues that ACTGC has not established associational standing because it provides no support that an entity created after a complaint was filed and "solely for the purpose of soliciting clients for this litigation" can establish standing as of the time suit was first filed — especially when that entity replaced the sole plaintiff in the action.[51] And further, says NOAC, ACTGC has not established that the *Sherman Act*, as supplemented by the *Clayton Act*, applies because ACTGC avoided addressing the issue in its briefing altogether.[52]

III. LAW & ANALYSIS

A. Preliminary Injunction — no irreparable harm shown

HN2[] A movant seeking a preliminary injunction must establish (1) a substantial likelihood that the movant will prevail on the merits; (2) a substantial threat the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant if the injunction is denied outweighs the potential harm to the non-movant if the injunction is granted; and **[*9]** (4) that granting the injunction will not disserve the public interest. *Garcia v. Jones, 910 F.3d 188, 190 (5th Cir. 2018)*. "A preliminary injunction is an extraordinary remedy which courts grant only if the movant has clearly carried the burden as to all four elements." *Guy Carpenter & Co. v. Provenzale, 334 F.3d 459, 464 (5th Cir. 2003)*. A preliminary injunction "may only be awarded upon a clear showing that the [movant] is entitled to such relief," *Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)*, and is never awarded as a matter of right but only within the sound discretion of the district court. *Munaf v. Geren, 553 U.S. 674, 689-90, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008)*; *Miss. Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618, 621 (5th Cir. 1985)*. Ultimately, granting a preliminary injunction is "the exception rather than the rule." *Miss. Power & Light Co., 760 F.2d at 621*.

ACGTC has not carried its burden to show irreparable injury because there is simply no evidence of irreparable harm in the record. ***HN3***[] "An irreparable injury is one that cannot be undone by monetary damages or one for which monetary damages would be especially difficult to calculate." *Heil Trailer Int'l Co. v. Kula, 542 F. App'x 329, 335 (5th Cir. 2013)* (footnotes and quotation omitted); *see also* *Bluefield Water Ass'n, Inc. v. City of Starkville, 577 F.3d 250, 253 (5th Cir. 2009)* (concluding that there is no irreparable injury where harm is financial and monetary

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[45] *Id.* at 6.

[46] R. Doc. 23 at 5-6.

[47] *Id.* at 1, 5. Thus, ACTGC does not purport to have organizational standing to bring this action.

[48] *Id.* at 6.

[49] *Id.* at 6.

[50] *Id.* at 25.

[51] R. Doc. 30 at 2-3 (emphasis omitted).

[52] *Id.* at 3.

compensation will make plaintiff whole if plaintiff prevailed). Thus, "'[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable **[*10]** harm.'" *Dennis Melancon, Inc. v. City of New Orleans, 703 F.3d 262, 279 (5th Cir. 2012)* (quoting *Morgan v. Fletcher, 518 F.2d 236, 240 (5th Cir. 1975)*) (alteration in original omitted). A plaintiff, therefore, must allege harm that cannot be obviated by monetary relief. *Id. at 279-80*. "A party sufficiently proves that monetary damages are not adequate when it brings forward evidence, in the form of affidavits, declarations, or any other support, that shows imminent harm that is difficult to quantify." *ADT, LLC v. Capital Connect, Inc., 145 F. Supp. 3d 671, 697 (N.D. Tex. 2015)*.

HN4[] While exceptional economic harm may constitute irreparable injury where the existence of the business will likely cease, *see* *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A., 875 F.2d 1174, 1179 (5th Cir. 1989)*, where bankruptcy is imminent, *see* *Doran v. Salem Inn, Inc., 422 U.S. 922, 932, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975)*, or where the plaintiff is unable to fund ongoing litigation, *see* *Milsen Co. v. Southland Corp., 454 F.2d 363, 367 (7th Cir. 1971)*, ACGTC failed to present credible evidence of any of these circumstances. As noted, the record is devoid of any evidence whatsoever. Even though ACGTC was put on notice that the Court would conduct a hearing on the motion for preliminary injunction, ACGTC still failed to put on evidence at the hearing. With no evidence of irreparable harm to consider, the Court cannot grant a preliminary injunction.[53]

The absence of evidence does not aid an amended complaint that is already unclear as to what harm ACGTC claims its members suffered. Regardless, ACGTC offers no explanation as to why monetary damages would **[*11]** be an insufficient remedy. It is true that ACGTC professes in its complaint that it is not seeking monetary damages,[54] but it is ACGTC's burden in seeking injunctive relief to come forward with evidence that monetary damages cannot remedy the harm suffered. *See* *Dennis Melancon, Inc., 703 F.3d at 279-80*. ACGTC has not done so. Because ACGTC has failed to establish irreparable harm, the Court need not analyze the remaining three requisites for a preliminary injunction.

Accordingly, the motion for a preliminary injunction is DENIED.

B. Dismissal under *Rule 12(b)(1)* - no nexus to interstate commerce shown

HN5[] *Rule 12(b)(1) of the Federal Rules of Civil Procedure* permits a party to challenge a court's subject-matter jurisdiction. "[A] claim is 'properly dismissed for lack of subject-matter jurisdiction when the court lacks the statutory authority or constitutional power to adjudicate' the claim." *Griener v. United States, 900 F.3d 700, 703 (5th Cir. 2018)* (quoting *In re FEMA Trailer Formaldehyde Prods. Liab. Litig., 668 F.3d 281, 286 (5th Cir. 2012)*). The party asserting jurisdiction bears the burden of proving that subject-matter jurisdiction exists. *Id.* "Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001)*. "A motion **[*12]** to dismiss for lack of subject-matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claims entitling him to relief." *Sureshot Golf Ventures, Inc. v. Topgolf Int'l, Inc., 754 F. App'x 235, 235 (5th Cir. 2018)* (citing *Wagstaff v. U.S. Dep't of Educ., 509 F.3d 661, 663 (5th Cir. 2007)*).

HN6[] "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." *Fed. R. Civ. P. 12(h)(3)*. And, if a court dismisses pursuant to *Rule 12(b)(1)*, it must do so without prejudice. *Cox, Cox, Filo, Camel & Wilson, L.L.C. v. Sasol N. Am., Inc., 544 F. App'x 455, 456-57 (5th Cir. 2013)* ("[T]o

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[53] Not only did ACGTC fail to present evidence of irreparable harm, it also failed to explain how circumstances have changed since November 8, 2021, when this Court denied then-plaintiff WBT's motion for a TRO for want of irreparable harm. *See* R. Doc. 5.

[54] R. Doc. 10 at 1.

dismiss with prejudice under Rule 12(b)(1) is to disclaim jurisdiction and then exercise it. Our precedent does not sanction the practice ...."); *see also* OnPath Fed. Credit Union v. U.S. Dep't of Treasury, Cmty. Dev. Fin. Institutions Fund, 2020 U.S. Dist. LEXIS 176166, 2020 WL 5749166, at *2 (E.D. La. Sept. 25, 2020).

Defendants contend that the Court has no original or supplemental jurisdiction over ACGTC's claims because ACGTC "has failed to adequately state in [its] complaint the substantial and direct effect on interstate commerce, as required to bring a federal antitrust claim, which permits supplemental jurisdiction for the State law claims."[55] **HN7**[] A plaintiff bears the burden of proving that a court has subject-matter jurisdiction to hear an antitrust claim. *See* Ancar v. Sara Plasma, Inc., 964 F.2d 465, 469 (5th Cir. 1992) ("As an antitrust claimant, [a plaintiff] has the burden of establishing that the alleged proscribed practices affect interstate commerce."). "[J]urisdiction may not be invoked under [the Sherman Act] unless **[*13]** the relevant aspect of interstate commerce is identified; it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce. To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings ...." McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 242, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980); *see also* Gulf Coast Hotel-Motel Ass'n v. Miss. Gulf Coast Golf Course Ass'n, 658 F.3d 500, 504 (5th Cir. 2011) ("A complaint alleging a Sherman Act claim must allege some nexus between the defendants' conduct and interstate commerce."). A plaintiff need not quantify the adverse impact of a defendant's alleged unlawful conduct, but merely show that there was some effect on interstate commerce.[56] Gulf Coast, 658 F.3d at 505. "Even when business activities are purely local, if 'it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.'" Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 573, 117 S. Ct. 1590, 137 L. Ed. 2d 852 (1997) (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964)).

Defendants say that it is "unfathomable" that entry restrictions put in place at both Nos. 1 and 2 would either restrain trade in interstate commerce or have a substantial and direct effect on interstate commerce.[57] And ACGTC failed to brief the interstate commerce issue.[58] In response to the Court's questions at the January 6, 2022 hearing, however, ACGTC identified national and international tourism **[*14]** as the interstate commerce nexus. Yet, no evidence was presented in support of this assertion. **HN9**[] Tourism can be sufficient to establish an interstate commerce nexus for purposes of an antitrust claim. *See* Gibbs v. Babbitt, 214 F.3d 483, 492 (4th Cir. 2000) ("The relationship between red wolf takings and interstate commerce is quite direct — with no red wolves, there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts."). For example, in *Gulf Coast Hotel-Motel Association*, the Fifth Circuit concluded that the economic activity of "bringing out-of-state tourists to hotels to play gulf" was sufficient to establish the jurisdictional nexus to interstate commerce required for an antitrust claim. Gulf Coast, 658 F.3d at 505. The case concerned two competing programs for the sale of golf vouchers to be used at certain courses across the Mississippi Gulf Coast. Id. at 502.

The Gulf Coast court observed that the allegations in the complaint were "sparse," yet held they were sufficient to survive a motion to dismiss. Id. at 506. It noted, with approval, that the complaint alleged the out-of-state tourist connection in three separate paragraphs, which stated: (1) that out-of-state tourists purchased the plaintiff hotel association's vouchers; (2) that out-of-state **[*15]** tourists purchased the defendant golf course association's vouchers; and (3) that out-of-state tourists played on the defendants' golf courses. Id. at 502-03, 507. But the court

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[55] R. Doc. 17 at 1.

[56] **HN8**[] "[I]f these allegations are controverted [the plaintiff] must proceed to demonstrate by submission of evidence beyond the pleadings either that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce." McLain, 444 U.S. at 242 (citing Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 202, 95 S. Ct. 392, 42 L. Ed. 2d 378 (1974)). Here, Defendants have controverted the claimed interstate commerce nexus. Yet, ACGTC did not present any evidence of the interstate commerce nexus at the hearing.

[57] R. Doc. 17-1 at 5.

[58] *See* R. Doc. 23.

noted, with disapproval, that "[t]he complaint also allege[d], without further elaboration, that the voucher program affects interstate commerce." *Id. at 503*. "[T]he allegations in this complaint that [the defendants'] anticompetitive acts 'substantially affected interstate commerce' are not sufficient on their own," the court reasoned, but, when read as a whole, the complaint proved sufficient. *Id. at 506*. Because the complaint alleged "that voucher customers 'are comprised of out-of-state persons visiting the Mississippi Gulf Coast,' that the golf courses at issue are used by out-of-state visitors and that [the plaintiff's] vouchers are sold through hotels and motels to patrons of those lodgings," it concluded that it was reasonable to infer "that money was sent across state lines, that tourists were attracted to the Mississippi Gulf Coast by the voucher program, and that if the alleged conspiracy [among the competing association and its golf course members to prevent consumers from using the plaintiff's program] were successful, consumers would **[*16]** not have the option of the [plaintiff's] voucher program." *Id. at 507*. Accordingly, the court held that the effect of the defendants' conduct on interstate commerce was sufficient to support antitrust jurisdiction. *Id. at 507*.

Unlike the complaint at issue in *Gulf Coast*, ACGTC's complaint falls short of establishing an interstate commerce nexus. In its complaint, ACGTC intones, again and again, that No. 1 "receives up to 90% of the cemetery tourism business in New Orleans and up to 500,000 visitors each year."[59] ACGTC also states that the New Orleans cemetery tour industry "generates millions of dollars of tourism income each year for hundreds of directly and indirectly participating individuals and businesses from local, national, and international tourists."[60] While these allegations, if proven, may establish that tourists from around the globe visit No. 1, they do not tie Defendants' conduct to interstate commerce. *See* *Gulf Coast, 658 F.3d at 504* (concluding that a complaint must allege the nexus between defendants' conduct and interstate commerce). Instead, ACGTC's complaint, even when read as a whole, falls prey to the deficiency the *Gulf Coast* court identified in pleading at too general a level the interstate commerce nexus and, then, failing to **[*17]** link it to Defendants' allegedly injurious conduct. *See* *id. at 507*. Thus, ACGTC's generalized references to tourism in the complaint are not sufficient on their own to establish the interstate commerce nexus, and, as a result, fail to support subject-matter jurisdiction. Therefore, Defendants' motion to dismiss is GRANTED, but ACGTC will be given an opportunity to file a second amended complaint to cure the noted pleading deficiencies.[61]

IV. CONCLUSION

Accordingly, for the foregoing reasons,

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[59] R. Doc. 10 at 4, 5, 7, 8, 9.

[60] *Id.* at 2.

[61] In addition to the concerns discussed above, *supra* note 43, Defendants' motion to dismiss raises other questions the Court does not now answer but which ACGTC may want to address in its second amended complaint. Defendants contend that ACGTC has failed to establish antitrust standing. Standing to bring an antitrust claim requires a plaintiff to show: (1) "injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct"; (2) antitrust injury; and (3) "proper plaintiff status, which assures that other parties are not better situated to bring suit." *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. All., Inc., 123 F.3d 301, 305 (5th Cir. 1997)*. Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' act unlawful. The injury should reflect the anticompetitive **[*18]** effect either of the violation or of anticompetitive acts made possible by the violation." *Id.* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*). The "proper plaintiff" inquiry considers "(1) whether the plaintiff's injuries or their causal link to the defendant are speculative, (2) whether other parties have been more directly harmed, and (3) whether allowing this plaintiff to sue would risk multiple lawsuits, duplicative recoveries, or complex damage apportionment." *McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338, 1341 (5th Cir. 1988)*. ACGTC should ensure that its second amended complaint satisfies the requisites for antitrust standing.

Defendants also argue that ACGTC has failed to allege key elements of its antitrust claims. For example, Defendants highlight ACGTC's failure to define the relevant product and geographic market. ACGTC should ensure that its second amended complaint addresses these additional concerns.

IT IS ORDERED that ACGTC's amended motion for preliminary injunction (R. Doc. 16) is DENIED for failure to establish irreparable harm.[62]

IT IS FURTHER ORDERED that Defendants' motion to dismiss for lack of jurisdiction (R. Doc. 17) is GRANTED. ACGTC has fifteen (15) days from the date of this Order & Reasons to file a second amended complaint to cure the pleading deficiencies in the amended complaint noted herein.[63]

New Orleans, Louisiana, this 27th day of January, 2022.

/s/ Barry W. Ashe

BARRY W. ASHE

UNITED STATES DISTRICT JUDGE

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[62] As a housekeeping matter, IT IS FURTHER ORDERED that WBT's motion for temporary restraining order and preliminary injunction (R. Doc. 2) is DENIED as moot as WBT is no longer a party to the action.

[63] ***HN10***[] *Rule 15* allows a court to grant leave to amend "when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. The Fifth Circuit has recognized that "[i]n view of the consequences of dismissal on the complaint alone, and the pull to decide cases on the merits rather than on the sufficiency of the pleadings, district courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal." *Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002)*.

United States v. DaVita Inc.

United States District Court for the District of Colorado

January 28, 2022, Decided; January 28, 2022, Filed

Criminal Case No. 1:21-cr-00229-RBJ

Reporter

2022 U.S. Dist. LEXIS 16188 *; 2022 WL 266759

UNITED STATES OF AMERICA, Plaintiff, v. 1. DAVITA INC. 2. KENT THIRY, Defendants.

Subsequent History: Later proceeding at *United States v. Davita, Inc., 2022 U.S. Dist. LEXIS 49905, 2022 WL 833372 (D. Colo., Mar. 21, 2022)*

Motion granted by, in part, Motion denied by, in part *United States v. Davita Inc., 2022 U.S. Dist. LEXIS 76806 (D. Colo., Mar. 21, 2022)*

Later proceeding at *United States v. Davita Inc., 2022 U.S. Dist. LEXIS 54544 (D. Colo., Mar. 25, 2022)*

Core Terms

non-solicitation, allocate, horizontal, co-conspirator, employees, indictment, naked, no-hire, allegations, defendants', soliciting, conspiracy, procompetitive, new category, courts, senior employee, price fixing, competitors, terms of the agreement, motion to dismiss, anticompetitive, ancillary, customers, falls, per se violation, legal argument, rule of reason, inappropriate, Violations, compliance

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Judges: R. Brooke Jackson, Senior United States District Judge.

Opinion by: R. Brooke Jackson

Opinion

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

This case is before the Court on defendants' motion to dismiss, ECF No. 49, renewed at ECF No. 83. For the reasons stated below, the motions are DENIED.

I. FACTUAL BACKGROUND

This case arises from an alleged conspiracy between various companies and individuals who owned and operated outpatient medical facilities across the country. ECF No. 1 at ¶¶1-7. Count 1 alleges a conspiracy to allocate the market through an agreement not to solicit the senior employees of co-conspirators. *Id.* at ¶¶9-12. The agreement allegedly began as early as February 2012 and continued through July 2017. *Id.* at **[*3]** ¶9. The indictment explains how the agreement was reached (ECF No. 1 at ¶11(a)-(b)), enforced (¶11(c)-(f)), and followed (¶11(g)). Count 1 of the indictment alleges that "[t]he charged conspiracy consisted of a continuing agreement, understanding, and concert of action among DaVita, Thiry, and their co-conspirators, the substantial terms of which were that DaVita and [co-conspirator] SCA would allocate senior-level employees by not soliciting each other's senior level employees across the United States." ECF No. 1 at ¶10. Count 1 alleges that DaVita and its co-conspirators allegedly carried out the conspiracy by meeting to discuss the terms of the agreement (*id.* at ¶11(a)); instructing certain executives and employees to refrain from soliciting senior employees from co-conspirator companies (*id.* at ¶11(c)); monitoring compliance with the agreement by requiring senior employees to notify their current employer before seeking employment with a co-conspirator company (*id.* at ¶11(d)—(e)); taking steps to remedy any violations of the agreement (*id.* at ¶11(f)); and generally refraining from soliciting the senior employees of parties to the agreement (*id.* at ¶11(g)).

Count 2 makes substantially **[*4]** similar allegations, but as to all employees instead of just senior employees. Count 2 alleges a conspiracy to allocate the market through an agreement not to solicit *any* employees of the competitor companies. *Id.* at ¶¶17-18. This agreement allegedly began in April 2017 and continued until at least July 2019. *Id.* at ¶17. For Count 2, the government alleges that the co-conspirators carried out the conspiracy by meeting to discuss the terms of the agreement (*id.* at ¶19(a)); agreeing not to solicit the employees of co-conspirator companies and reassuring co-conspirator companies of the parties' commitment to the agreement (*id.* at ¶19(b), (c)); monitoring compliance with the agreement by requiring employees to notify their current employer before seeking employment with a co-conspirator company (*id.* at ¶19(d), (e)); and generally refraining from soliciting the employees of co-conspirator companies (*id.* at ¶19(f)).

The government filed a superseding indictment that added a third count. ECF No. 74. Count 3 alleges a conspiracy identical to Count 2 except that it was executed between DaVita and a different co-conspirator, Company C. *Id.* at ¶¶25-26. For Count 3, the government alleges that **[*5]** the co-conspirators carried out the conspiracy by meeting to discuss the terms of the agreement (*id.* at ¶27(a)); reaching an agreement and monitoring compliance, both internally and with the other co-conspirator (*id.* at ¶27(b)—(e)); requiring employees to notify their current employer before seeking employment with a co-conspirator company (*id.* at ¶27(f)); reporting violations of the agreement (*id.* at ¶27(g)); and generally refraining from soliciting the employees of co-conspirator companies (*id.* at ¶27(h)).[1]

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[1] Defendants renewed their joint motion to dismiss in light of the superseding indictment. ECF No. 83. They stated that because the superseding indictment's allegations regarding Count 3 "are substantially the same as the allegations in support of Counts 1 and 2," therefore Count 3 "fails as a matter of law for the same reasons that Counts 1 and 2 fail." *Id.* at p. 2. This opinion will therefore cite primarily to the briefing regarding dismissal of the original indictment.

The grand jury indicted defendants on violations of *Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1 (2004))*. Ultimately, defendants moved to dismiss for failure to state an offense under *Federal Rule of Criminal Procedure 12(b)(3)(B)(v)*. Oral argument was held on the motion on November 19, 2021.

II. STANDARD OF REVIEW

An indictment is tested "solely on the basis of the allegations made on its face, and such allegations are to be taken as true." *United States v. Qayyum, 451 F.3d 1214, 1218 (10th Cir. 2006)* (quoting *United States v. Reitmeyer, 356 F.3d 1313, 1316 (10th Cir.2004)*). "A court may always ask 'whether the allegations in the indictment, if true, are sufficient to establish a violation of the charged offence' and dismiss the indictment if its allegations fail that standard." *United States v. Pope, 613 F.3d 1255, 1260 (10th Cir. 2010)* (quoting *United States v. Todd, 446 F.3d 1062, 1068 (10th Cir.2006)*). An indictment "must be a plain, concise, and definite written statement of the essential facts constituting **[*6]** the offense charged." *Fed. R. Crim. P. 7(c)(1)*. When determining the sufficiency of an indictment, the question "is not whether the government has presented sufficient evidence to support the charge, but solely whether the allegations in the indictment, if true, are sufficient to establish a violation of the charged offense." *United States v. Todd, 446 F.3d 1062, 1068 (10th Cir. 2006)* (citations omitted).

III. LEGAL BACKGROUND

Violations of *Section 1* are analyzed under the rule of reason as a default. *United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1037 (N.D. Cal. 2013)* (citing II Phillip E. Areeda, Herbert Hovenkamp, Roger D. Blair & Christine Piette Durrance, ***Antitrust Law***, ¶ 305e at 68 (3d ed. 2007)). A rule-of-reason analysis requires the court to examine "a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*.

However, courts have found that the complex analysis required by the rule of reason is unnecessary for certain classes of restraints on trade that are so "manifestly anticompetitive" and "lacking any redeeming virtue" that they will almost always be illegal. *See* *eBay, 968 F.3d at 1037*. Such classes of restraints, which include price fixing, bid rigging, and horizontally allocating a market, are deemed per se unreasonable **[*7]** restraints on trade in violation of the *Sherman Act*. *See* *Diaz v. Farley, 15 F. Supp. 2d 1138, 1144 (D. Utah 1998)*, aff'd, *215 F.3d 1175 (10th Cir. 2000)*. Only after "considerable experience with certain business relationships" will courts classify them as per se violations of the *Sherman Act*. *United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*.

Even an agreement that falls into a traditional per se category will not receive per se treatment under the *Sherman Act* unless it is a "naked" rather than "ancillary" agreement. *See* *eBay, 968 F.3d at 1037*. "Naked" restraints have "no purpose except stifling competition." *Topco, 405 U.S. at 608*. Naked restraints contrast with those that are "ancillary to a legitimate procompetitive business purpose." *eBay, 968 F.3d at 1039* (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 100, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*).

Horizontal market allocation agreements are traditionally subject to per se treatment under *Section 1 of the Sherman Act*. *Topco, 405 U.S. at 608* (holding that the Court has "reiterated time and time again" that naked horizontal market allocation agreements have no purpose but to stifle competition). A horizontal market allocation agreement is an agreement between competitors at the same level of the market structure to allocate a market order to minimize competition. *Id.* This can be accomplished by dividing geographic territory between competitors, *id.*, by "allocate[ing] or divid[ing] customers between competitors," *United States v. Kemp & Assocs., Inc., 907 F.3d 1264, 1273 (10th Cir. 2018)*, or by allocating or dividing an employment market. *See* *eBay, 968 F.3d at 1038-39*. There is less **[*8]** precedent on per se treatment of horizontal market allocation agreements allocating employment markets, but that makes no difference. Even if there were no such history, anticompetitive practices in the labor market are equally pernicious—and are treated the same—as anticompetitive practices in markets for goods and services. *See* [Roman v. Cessna Aircraft Co., 55 F.3d 542, 544 (10th Cir. 1995)] ("[P]laintiffs whose opportunities in the employment market have been impaired by an anticompetitive agreement directed at them as a particular segment of employees have suffered an antitrust injury."); *see also* [Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, 236, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)] (The [Sherman Act] statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." (internal citations omitted)).

IV. ANALYSIS

A. Defendants' Argument that the Indictment Did Not Allege a Horizontal Market Allocation Agreement.

Defendants' argued, in their motion to dismiss and at oral argument, that the practice alleged in the indictment was not a horizontal market allocation agreement but instead a non-solicitation agreement. While the question of whether a non-solicitation **[*9]** agreement can be a horizontal market allocation agreement as a legal matter will be dealt with later, as a preliminary matter, I want to address the argument that the indictment did not allege a horizontal market allocation agreement.

If the indictment failed to allege a naked horizontal market allocation agreement at all, as defendants assert, the indictment would have failed to state an offense. However, the indictment does allege that the non-solicitation agreement allocated the market. Though the indictment does not use the phrase "horizontal market allocation agreement," it does allege the agreement was one. The indictment alleges in Count 1 that the co-conspirators entered an "agreement, understanding, and concert of action" to "allocate senior-level employees by not soliciting each other's senior-level employees across the United States." ECF No. 1 at ¶10. The allegation for Counts 2 and 3 are substantially similar. ECF No. 1 at ¶18 ("The charged conspiracy consisted of a continuing agreement, understanding, and concert of action among [defendants] and their co-conspirators, the substantial terms of which were that DAVITA and Company B *would allocate employees* by Company B's **[*10]** not soliciting DAVITA's employees." (emphasis added)); ECF No. 74 at ¶26 ("The charged conspiracy consisted of a continuing agreement . . . that DAVITA and Company B *would allocate employees* . . . ." (emphasis added)). These are clear allegations, for both counts, that the agreement entered was a horizontal market allocation agreement carried out by non-solicitation.

B. Defendants' Factual Argument

Defendants' next make the factual argument that the indictment does not contain sufficient facts to support its allegation that the non-solicitation agreement was a tool used by defendants to allocate the market.

Count 1 of the indictment alleges that "the charged conspiracy consisted of a continuing agreement, understanding, and concert of action among DaVita, Thiry, and their co-conspirators, the substantial terms of which were that DaVita and Company B would allocate employees by Company B's not soliciting DaVita's employees." ECF No. 1 at 6. Count 1 alleges that the co-conspirators carried out the conspiracy by meeting to discuss the terms of the agreement (*id.* at ¶11(a)); instructing employees not to solicit senior employees from co-conspirator companies (*id.* at ¶11(c)); monitoring compliance **[*11]** with the agreement (*id.* at ¶11(d)—(e)); taking steps to address violations of the agreement (*id.* at ¶11(f)); and not soliciting senior employees of co-conspirator companies (*id.* at ¶11(g)).

For Count 2, the government alleged that the co-conspirators carried out the conspiracy by meeting to discuss the terms of the agreement (*id.* at ¶19(a)); agreeing not to solicit the employees of co-conspirator companies and assuring co-conspirators of their commitment to the agreement (*id.* at ¶19(b), (c)); monitoring compliance with the agreement (*id.* at ¶19(d), (e)); and not soliciting the employees of co-conspirator companies (*id.* at ¶19(f)). Count 3 makes similar factual claims. ECF No. 73 at ¶27.

The indictment also alleges facts indicating that the agreement imposed additional burdens and restrictions on the parties' and their employees beyond a simple prohibition on solicitation. They allege that the agreement also required employees to tell their employers if they intended on seeking a job from a co-conspirator. *Id.* at ¶11(e).

These allegations support the claim that this was an agreement to allocate the market. They outline the ways that the agreement made it difficult for employees to move **[*12]** between co-conspirator companies to the point where the market was allocated. They support the allegation that the purpose and effect of the agreement was to allocate the market. At this stage, the indictment need only establish that if the allegations are true, they show a violation of the charged offense. *Todd, 446 F.3d at 1068*. For purposes of this motion, I must take these allegations as true. If true, these allegations are sufficient to state a per se violation of *Section 1 of the Sherman Act*—the government has alleged that defendants allocated the market.

C. Defendants' Legal Arguments

Defendants present three legal arguments that, as a matter of law, the alleged agreements cannot be subject to per se treatment. However, before I proceed to those arguments, I want to clarify an issue that comes up in each of those arguments.

There are potentially three steps in determining whether per se treatment for charged conduct is appropriate. The preliminary step is to determine if the conduct falls into a category that has been found to be subject to per se treatment. *See eBay, 968 F.3d at 1037*. A second potential step, if the conduct does not fall into such a category, is the consideration by the court of whether the creation of a new category of per **[*13]** se unreasonableness covering the conduct is appropriate. *See Northrop Corporation v. McDonnell Douglas Corporation, 705 F.2d 1030, 1050 (9th Cir. 1983)*. If the conduct is found to be in a traditional per se category or the court determines creation of a new category of per se treatment is appropriate, the court will proceed to the final step: the consideration of whether the practice was naked or ancillary. The court still cannot subject the conduct to per se treatment until it finds that the conduct was naked, i.e. it had "no purpose except stifling competition." *Topco, 405 U.S. at 608*.

Many of defendants' arguments mistake the legal standards that apply to one step for the legal standards of another, which was the cause of much confusion in the briefing and at oral argument. The standards used to determine the propriety of creation of a new category of per se unreasonableness or to determine if conduct is a naked restraint simply do not apply when determining if that conduct falls into an existing category subject to per se treatment. With that understanding, I will proceed through defendants' legal arguments that per se treatment is inappropriate for the conduct in this case.

1. Some Non-Solicitation Agreements Can be Properly Categorized as Horizontal Market Allocation Agreements.

Defendant's **[*14]** first argument is that non-solicitation agreements are not subject to per se treatment because the precedent does not show that they are. They argue that there are no cases holding non-solicitation agreements illegal, aside from one readily distinguishable case. The government responds that the non-solicitation agreement in this case is a horizontal market allocation agreement, and that such agreements have long been per se unreasonable under *Section 1 of the Sherman Act*.

Violations of *Section 1* are analyzed under the rule of reason as a default. *eBay, Inc., 968 F. Supp. 2d at 1037* (citing II Phillip E. Areeda, Herbert Hovenkamp, Roger D. Blair & Christine Piette Durrance, ***Antitrust Law***, ¶ 305e at 68 (3d ed. 2007)). Horizontal market allocation agreements are traditionally subject to per se treatment under *Section 1 of the Sherman Act*, meaning they need not be subjected to a rule-of-reason analysis. *Id. at 608* (holding that the Court has held "time and time again" that naked horizontal market allocation agreements have no purpose but to stifle competition).

Defendants are right that there are no cases perfectly analogous to this case. But that is the nature of *Section 1 of the Sherman Act*: as violators use new methods to suppress competition by allocating the market or fixing prices these new methods **[*15]** will have to be prosecuted for a first time.

One case, however, is sufficiently analogous to inform my analysis of the current case. In *United States v. Cooperative Theatres of Ohio, Inc. 845 F.2d 1367 (6th Cir. 1988)*, the government alleged that defendants engaged in horizontal market allocation by agreeing not to solicit the customers of horizontal competitors. *Id. at 1371*. Defendants in that case were corporations that served as middlemen between movie production companies and movie theaters, for whom they found and booked movies to be shown in each theater. *Id. at 1368*. Specifically, the parties to the agreement agreed they "would not attempt to become the booking agent for any theatre that was already served by [the other]." *Id. at 1371* (internal quotations omitted). The district court found the agreement alleged was a horizontal market allocation agreement subject to per se treatment. *Id. at 1370*.

On appeal, the defendants argued that the district court erred in applying the per se rule to the agreement because the agreement only prevented the competitors from "actively soliciting" each other's customers. *Id. at 1371*. The defendants argued that this agreement was a "no-solicitation agreement," rather than a horizontal market allocation agreement, and that this type of restraint on trade had never been challenged **[*16]** before, so a per se rule was inappropriate. *Id.* They cited *TopCo* for the proposition that per se treatment is inappropriate until there is considerable experience with the challenged practice. *Id.* Defendants in this case have raised the same arguments.

The Sixth Circuit rejected these arguments. It affirmed the requisite two-part finding that the non-solicitation agreement was both a horizontal market allocation agreement and a naked restraint on trade. *Id. at 1372* (holding that the agreement was "plainly a form of customer allocation and, hence, is the type of 'naked restraint' which triggers application of the per se rule of illegality"). It further found that the non-solicitation agreement alleged was "undeniably a type of customer allocation scheme which courts have often condemned in the past as a per se violation of the *Sherman Act*." *Id.*

Defendants here argue that there are two significant differences between the current case and *Cooperative Theatres*. First, in *Cooperative Theatres* the agreement was to allocate customers, and here the alleged agreement was to allocate employees. Second, the *Cooperative Theatres* defendants failed to raise any potential pro-competitive justifications for the agreement, while here the defendants have raised several possible procompetitive **[*17]** justifications.

On the first point, defendants cite *Northrop Corporation v. McDonnell Douglas Corporation* for the proposition that "in determining whether a practice is per se illegal, courts must go further than determining the general type of practice at issue and examine the business context." ECF No. 72 at 6 (internal quotations omitted). However, the court in *Northrop* only proceeded to the issue of differing business contexts *after* it had concluded that the practice was not a horizontal market allocation agreement, i.e., only after it determined that the practice did not fall into any existing category subject to per se treatment. *Northrop 705 F.2d at 1050*. The question of business context is only relevant in determining whether a novel practice should be considered a *new* category subject to per se treatment. That is not necessary here. I found above that the government sufficiently alleged that this non-solicitation agreement falls under the umbrella of an existing category subject to per se treatment: horizontal market allocation agreement. Because the Court need not create a new per se category to find the indictment survives defendants' motion to dismiss, the difference in business contexts are irrelevant.

On the second potential difference, the ostensible procompetitive **[*18]** benefits alleged here do not change the analysis at this stage of litigation. Whether a practice has procompetitive aspects is only relevant in two circumstances. First, a court will consider the procompetitive elements of a practice when determining if a practice is a naked restraint on trade. *See Paladin Assocs., Inc. v. Montana Power Co., 328 F.3d 1145, 1155 (9th Cir.2003)* (holding that "when a defendant advances plausible arguments that a practice enhances overall efficiency and makes markets more competitive," i.e. argues that the practice is ancillary rather than naked, "per se treatment is inappropriate, and the rule of reason applies"). Second, if a practice is deemed not to fall into a category that is traditionally subject to per se treatment, courts will consider the procompetitive qualities of that practice to determine if the practice should be its own, new category subject to per se treatment under *Section 1*. *See Northrop, 705 F.2d 1052* ("that a practice enhances overall efficiency and makes markets more competitive, per se treatment is inappropriate, and the rule of reason applies"); *see also United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220-21, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)* (holding that procompetitive justifications should not be considered when an alleged act falls into an existing per se category). The situation here does not fall into either of these **[*19]** categories. Here, defendants have chosen not to raise the argument that the agreement was ancillary to a procompetitive purpose in the instant motion, reserving their right to litigate that issue later. ECF No. 49 at n. 1. And I held above that this falls into the established category of horizontal market allocation; there is no need to determine if a new category subject to per se treatment should be created. This difference between *Cooperative Theatres* and this case is immaterial.

These two differences do not change the point made by the Sixth Circuit regarding non-solicitation agreements. The Sixth Circuit agreed that the district court had properly classified the non-solicitation agreement alleged as a horizontal market allocation agreement and therefore properly subjected it to per se treatment. *See* *Cooperative Theatres, 845 F.2d at 1372*. None of the differences between this case and *Cooperative Theatres* justify a departure from the outcome in *Cooperative Theatres*, at least for the purposes of this motion. *Cooperative Theatres* rebuts defendants' argument that non-solicitation agreements can never properly be subject to per se treatment.

Though *Cooperative Theatres* is the only case finding a pure non-solicitation agreement to be a potential violation of *Section 1*, it remains persuasive because of the unique nature of the *Sherman Act*—there **[*20]** will always have to be a first prosecution when there is a new method of allocating the market. *See* *Socony-Vacuum Oil Co., 310 U.S. at 223* (holding that, in the context of price fixing, "the machinery employed by a combination for price-fixing is immaterial"—the practice of price fixing remains subject to per se treatment even if carried out by an otherwise-lawful agreement with powerful procompetitive justifications). Even if there were *no* prior cases finding that a non-solicitation agreement had violated *Section 1*, that would not prevent me from finding that this non-solicitation agreement was sufficiently alleged to have allocated the market, and thus that per se treatment was appropriate.

However, other than the proposition that some non-solicitation agreements can be subject to per se treatment, it is of limited help in determining the outcome of this motion. The issue addressed by this order is whether *this* non-solicitation agreement has been sufficiently alleged to have allocated the market.

2. A New Category of Per Se Treatment Specific to Non-Solicitation Agreements is not Warranted.

Defendants' second argument in support of their contention that no non-solicitation agreements are per se unreasonable is that there is no precedent **[*21]** that would warrant this court finding that non-solicitation agreements should be made into a new category subject to per se treatment. ECF No. 49 at 10. I agree. For per se treatment to be warranted, a practice must be so "manifestly anticompetitive" and "lacking any redeeming virtue," that they will almost always be unreasonable. *See* *eBay, 968 F.3d at 1037*. It is only after considerable experience with certain business relationships that courts classify them as per se violations of the *Sherman Act*. *Topco Assocs., Inc., 405 U.S. at 607-08*.

There are no cases finding that non-solicitation agreements are so pernicious, in and of themselves, that they should be classified as per se unreasonable. The only case finding a pure non-solicitation agreement unreasonable, *Cooperative Theatres*, so found because the agreement fell under an existing category of per se treatment. *See* *Cooperative Theatres of Ohio, Inc., 845 F.2d at 1371*. The court did not find that the practice of entering non-solicitation agreements was pernicious. Rather, the problem was that the non-solicitation agreement in that case was a naked agreement to allocate the market. *Id. at 1371-73*. Even if non-solicitation agreements and no-hire agreements were to be lumped into the same category, a long judicial history is lacking. Those agreements have been held illegal where they are **[*22]** naked agreements to allocate the market. *See* *Kemp & Assocs., Inc., 907 F.3d at 1277*. Where they have been found not to allocate the market or to be ancillary, courts have not found no-hire agreements to be inherently anticompetitive. There is no long judicial experience that would justify creating a new category subject to per se treatment. However, as I have found above that the agreement at issue fell into an existing category of per se unreasonableness, this argument does not affect my disposition of the motion.

3. The Conflicting Precedent on Per Se Treatment of No-Hire Agreements.

Lastly, defendants argue that this non-solicitation agreement cannot be subject to per se treatment even if the specifics of the agreement make it a no-hire agreement. Defendants say this is because no-hire agreements have not conclusively been found subject to per se treatment themselves. However, this lack of uniformity on the per se unreasonableness for no-hire treatment makes perfect sense. Like non-solicitation agreements, no-hire agreements are not themselves so pernicious that they would almost always be unreasonable restraints on trade. But no-hire agreements that nakedly *allocate the market* are per se unreasonable because they would **[*23]** almost always be an unreasonable restraint on trade. Defendants are correct that no-hire agreements have not been made into their own category subject to per se treatment. However, those naked no-hire agreements that allocate the market have been considered per se unreasonable as horizontal market allocation agreements.

For example, in *Bogan v. Hodgkins* the Second Circuit held that the no-hire agreement, as alleged, was not a per se violation because it did not "fit into any of the established per se categories." *166 F.3d 509, 515 (2d. Cir. 1999)*. Though plaintiff alleged that the practice was a naked supplier allocation, the Second Circuit found that it was not—the record revealed no geographic or market allocation. *Id.* This no-hire agreement was not per se unreasonable because it was not a naked horizontal market allocation agreement.

On the other hand, where no-hire agreements have been found per se unreasonable, it has been because the court found that the agreement was (or was alleged to be, depending on the stage of litigation) a naked agreement to allocate the market. *See, e.g., eBay, 968 F.2d at 1039* (holding that the government adequately alleged that a no-hire agreement allocated the market and thus, if naked, would be subject **[*24]** to per se treatment); *United States v. Suntar Roofing, Inc., 897 F.2d 469, 473 (10th Cir. 1990)* (finding that the government had presented sufficient evidence at trial for a jury to find that defendants' no-hire agreement allocated the market). Defendants' argument that because not all no-hire agreements are per se unreasonable, therefore no no-hire agreement could ever be per se unreasonable does not correspond with the law.

D. A Legal Argument From the Government

There is one more legal argument I want to address. That argument is the government's apparent assertion that *all* non-solicitation agreements and *all* no-hire agreements are horizontal market allocation agreements and thus per se unreasonable. *See* ECF No. 67 at 6. I do not agree. As the precedents on no-hire agreement show, there are no-hire agreements that do not allocate the market, and I assume the same is true of non-solicitation agreements.

My conclusion regarding non-solicitation and no-hire agreements is much more limited than the government's argument. Here, the government has sufficiently alleged that defendants allocated the market with their non-solicitation agreement. It does not follow that every non-solicitation agreement or even every no-hire agreement would allocate the market and **[*25]** be subject to per se treatment. And as discussed in a prior section, my conclusion is also more limited than the defendants' argument on this point—I do not agree with defendants' contention that non-solicitation agreements are *never* properly subject to per se treatment as horizontal market allocation agreements. What I conclude is that if naked non-solicitation agreements or no-hire agreements allocate the market, they are per se unreasonable.

E. Defendants' Argument that Allowing this Case to Proceed Under a Per Se Theory Violates Their Due Process Rights

Defendants argue that application of a "per se rule to agreements like those alleged here for the first time would violate defendants' right to 'fair warning' under the *Due Process Clause*." ECF No. 49 at 14. Fair warning is the principle of due process that no person "shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."' *Bouie v. City of Columbia, 378 U.S. 347, 351, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964)* (quoting *United States v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, 98 L. Ed. 989 (1954)*). "Due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997)*.

This decision makes no novel construction of *Section 1 of the Sherman Act*. Horizontal market **[*26]** allocation agreements have long been held per se unreasonable. *See Topco Assocs., Inc., 405 U.S. at 608*. Non-solicitation agreements are a method of allocating the market that have rarely, if ever, been prosecuted. However, as discussed at length above, the conduct proscribed by *Section 1* is allocating the market, an action that defendants knew or should have known was illegal. The fact that defendants allegedly allocated the market in a novel way—by using a non-solicitation agreement—does not matter. Defendants had ample notice that entering a naked agreement to allocate the market would expose them to criminal liability, however they did it.

One more due process issue I want to address is the question of what happens after I deny this motion. At oral argument there was some confusion about whether the denial of this motion was essentially a finding that these defendants were guilty without a trial. *See* ECF No. 90 at 13-14. This is not the case for two reasons.

First, defendants have limited this motion to the question of whether non-solicitation agreements fall into a category subject to per se treatment. However, even after a practice is found to fall into a category traditionally subject to per se treatment, per se unreasonableness **[*27]** will not be applied unless the practice is also found to be a naked agreement, an agreement whose main purpose was stifling competition. *Topco, 405 U.S. at 608*. Defendants chose not to raise this issue in this motion but could choose to challenge the government's allegations that this was a naked agreement to escape a per se designation.

Second, at trial, the government will not merely need to show that the defendants entered the non-solicitation agreement and what the terms of the agreement were. It will have to prove beyond a reasonable doubt that defendants entered into an agreement with the purpose of allocating the market for senior executives (Count 1) and other employees (Counts 2 and 3). This understanding of the trial is confirmed by *United States v. Socony-Vacuum Oil Co.*, a criminal price fixing case, where the Supreme Court agreed with the district court's decision to instruct the jury that per se liability for price fixing was appropriate, but the government had to prove that certain business practices were undertaken in order to fix prices. *See* *310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*. The district court instructed the jury that it could only find defendants guilty "if you find that . . . the defendants and these other persons acting with them have knowingly engaged in **[*28]** a combination to raise or fix the price to be charged for gasoline to jobbers or consumers in the Mid-Western area as charged in the indictment." *United States v. Socony-Vacuum Oil Co., 105 F.2d 809, 832 (7th Cir. 1939)*, rev'd, *310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*. Similarly, here, the government will have to prove more than that defendants had entered into a non-solicitation agreement—it will have to prove that the defendants intended to allocate the market as charged in the indictment. This order, holding that the case can proceed under a per se theory, will not deprive defendants of their right to a full and fair jury trial.

ORDER

For the reasons above defendants' motion to dismiss, ECF No. 49, renewed at ECF No. 83, is DENIED.

DATED this 28th day of January, 2022.

BY THE COURT:

/s/ R. Brooke Jackson

R. Brooke Jackson

Senior United States Senior District Judge

Novartis Pharma AG v. Regeneron Pharms., Inc.

United States District Court for the Northern District of New York

January 31, 2022, Decided; January 31, 2022, Filed

1:20-CV-690 '631 Patent case; 1:21-CV-1066 Antitrust case

Reporter

582 F. Supp. 3d 26 *; 2022 U.S. Dist. LEXIS 17997 **; 2022 WL 289384

NOVARTIS PHARMA AG; NOVARTIS PHARMACEUTICALS CORPORATION; and NOVARTIS TECHNOLOGY LLC, Plaintiffs, -v- REGENERON PHARMACEUTICALS, INC., Defendant,REGENERON PHARMACEUTICALS, INC., Counter Claimant, -v- NOVARTIS PHARMA AG; NOVARTIS PHARMACEUTICALS CORPORATION; and NOVARTIS TECHNOLOGY LLC, Counter Defendants,REGENERON PHARMACEUTICALS, INC., Plaintiff, -v- NOVARTIS PHARMA AG; NOVARTIS TECHNOLOGY LLC; NOVARTIS PHARMACEUTICALS CORPORATION; and VETTER PHARMA INTERNATIONAL GMBH, Defendants.

Prior History: *Regeneron Pharms., Inc. v. Novartis Pharma AG, 2021 U.S. Dist. LEXIS 180054, 2021 WL 4311372 (S.D.N.Y., Sept. 21, 2021)*

Core Terms

patent, Antitrust, Pharmaceuticals, anti-VEGF, terms, tortious interference, antitrust claim, parties, vial, syringe, motion to dismiss, products, alleges, cases, interchangeability, inter partes, equitable estoppel, monopolization, prefilled, courts, inventor, words, statute of limitations, contributions, infringement, competitors, proceedings, simplified, consumers, discovery

LexisNexis® Headnotes

Patent Law > Infringement Actions > Claim Interpretation > Fact & Law Issues

Patent Law > Infringement Actions > Claim Interpretation > Scope of Claim

HN1[] **Claim Interpretation, Fact & Law Issues**

Claim construction is a question of law, the purpose of which is to determine what is covered by the patent's claims. That process is geared toward elaborating the normally terse claim language in order to understand and explain, but not to change, the scope of the claims.

Patent Law > Infringement Actions > Claim Interpretation > Scope of Claim

HN2[] **Claim Interpretation, Scope of Claim**

When faced with an actual dispute regarding the proper scope of a patent claim, the court must construe the allegedly infringed claim to determine its meaning and scope. But the converse is also true: a trial court need not construe claim terms whose meaning the parties do not dispute. At any rate, although a court may have the authority to adopt claim constructions which have not been proposed by either party, it should be hesitant to do so.

Patent Law > Infringement Actions > Claim Interpretation > Fact & Law Issues

HN3[] Claim Interpretation, Fact & Law Issues

It is duty of trial court to inform jurors of claim construction rulings on disputed terms, When the parties raise an actual dispute regarding the proper scope of claims, the court, not the jury, must resolve that dispute.

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

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

HN4[] Motions to Dismiss, Failure to State Claim

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. That factual matter may be drawn from the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint. The complaint is to be construed liberally, and all reasonable inferences must be drawn in the plaintiff's favor. If the complaint and its additional materials—when viewed through that pro-plaintiff lens—are not enough to raise the plaintiff's right to relief on a claim above the speculative level, that claim must be dismissed.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Patent Law > Anticipation & Novelty > New Uses & Nonanalogous Art

HN5[] Inequitable Conduct, Anticompetitive Conduct

A patentee has the exclusive right to manufacture, use, and sell his invention. The purpose behind granting a patent is to incentivize invention, investment, and disclosure by granting a statutory right to exclude other competitors. By a patent's very nature, then, the commercial advantage gained by new technology and its statutory protection by patent do not convert the possessor thereof into a prohibited monopolist.

Antitrust & Trade Law > Sherman Act > Defenses

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

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

HN6[] **Sherman Act, Defenses**

There are at least two ways that a patent holder can run afoul of ***antitrust law***. For the first, in Walker Process, the Supreme Court held that a plaintiff could bring an action under § 2 of the Sherman Act based on the alleged maintenance and enforcement of a fraudulently obtained patent. The gist of a claim is that an unlawful patent should be stripped of its usual immunity from antitrust liability. Whether a patentholder deserves to lose out on its monopolistic immunity is a question to be answered only under Federal Circuit law. However, questions of ***antitrust law*** beyond the alleged patent fraud are decided under the law of each regional circuit.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

HN7[] **Sherman Act, Claims**

There are two global elements to a Walker Process claim: (1) that the antitrust-defendant obtained the patent by knowing and willful fraud on the patent office and maintained and enforced the patent with knowledge of the fraudulent procurement; and (2) all other elements of a Sherman Act monopolization claim are also met.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

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

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

HN8[] **Attempts to Monopolize, Elements**

For an attempted monopolization claim under § 2 of the Sherman Act, the elements are: (1) predatory or anticompetitive conduct; (2) informed by a specific intent to monopolize; with (3) a dangerous probability of achieving monopoly power.

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN9[] **Antitrust & Trade Law, Federal Trade Commission Act**

The Supreme Court held in Federal Trade Commission v. Actavis, Inc. that a patentholder may, in certain circumstances, be held liable for using the patent to unreasonably restrain trade.

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

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

HN10[] **Relevant Market, Geographic Market Definition**

One essential element of all antitrust claims is the existence of a relevant geographic and product market subjected to the defendant's anticompetitive conduct.

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

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

HN11[] **Relevant Market, Product Market Definition**

To survive a motion to dismiss, a claimed product market must provide analysis of the interchangeability of use or the cross-elasticity of demand for products in the market while establishing a product market that strikes the court as plausible. Reasonable interchangeability of use or cross-elasticity of demand between the product itself and its substitutes determine the outer boundaries of a product market. (cleaned up).

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

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

HN12[] **Relevant Market, Product Market Definition**

Generally, defining a market involves a deeply fact-intensive inquiry, so courts are wary of granting a motion to dismiss based on a failure to adequately plead the relevant market. Even so, a plaintiff's definition of the product market that fails to reference the rule of reasonable interchangeability and cross-elasticity of demand or else clearly does not encompass all interchangeable substitute products is legally insufficient and may be dismissed even at the pre-answer stage.

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

HN13[] **Relevant Market, Product Market Definition**

Effectively, the rule of reasonable interchangeability means that a plaintiff's market definition must include all products reasonably interchangeable by consumers for the same purposes. The logic behind the rule is that the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level.

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

HN14[] **Relevant Market, Product Market Definition**

Although a plaintiff claiming an antitrust violation for medical products need not address every conceivable alternative to the products it claims make up the market, it must allege sufficient facts about other treatments to make its proposed product market plausible.

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

HN15[] **Relevant Market, Product Market Definition**

The law is clear that an inventor of new technology does not violate the antitrust laws merely because its patented product is favored by consumers.

Torts > ... > Contracts > Intentional Interference > Elements

HN16[] **Intentional Interference, Elements**

Under New York law, a claim for tortious interference charges a plaintiff with proving five elements: (1) a valid contract between the plaintiff and a third party; (2) about which the defendant knew; (3) defendant's intentional procurement of the third-party's breach of the contract without justification; (4) the contract was actually breached; and (5) damages. In establishing that the defendant caused the contract's breach, the plaintiff must prove that but-for the defendant's intervention, the contract would have been performed.

Governments > Legislation > Statute of Limitations > Time Limitations

HN17[] **Statute of Limitations, Time Limitations**

The statute of limitations for tortious interference claims is three years. N.Y. C.P.L.R. § 214(4). The clock begins to tick once the claim becomes enforceable, or when all elements of the tort can be truthfully alleged in a complaint.

Evidence > Burdens of Proof > Allocation

Governments > Legislation > Statute of Limitations > Equitable Estoppel

HN18[] **Burdens of Proof, Allocation**

Even if the statute of limitations has long since run, though, a defendant may be equitably estopped from invoking it as a defense if the plaintiff was induced by fraud, misrepresentations, or deception to refrain from filing a timely action. But the plaintiff bears the burden of establishing that it brought the claim within a reasonable time after the deception has come to light.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Torts > ... > Statute of Limitations > Tolling > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Tolling

HN19[] **Tolling of Statute of Limitations, Fraudulent Concealment**

Unlike federal law, New York state law does not differentiate between doctrines of fraudulent concealment (equitable tolling) and equitable estoppel.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Estoppel

Contracts Law > ... > Affirmative Defenses > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Equitable Estoppel

HN20[] **Affirmative Defenses, Estoppel**

It is worth keeping in mind that equitable estoppel is not a general remedy to punish secretive wrongdoing, but a corrective measure aimed at preventing a defendant from reaping the benefits of deceiving a potential plaintiff to head off a lawsuit. In other words, equitable estoppel is only appropriate where the plaintiff is prevented from filing an action within the applicable statute of limitations due to defendants' misconduct toward the potential plaintiff, not a community at large. In addition, the equitable estoppel doctrine is not available to a plaintiff who possesses timely knowledge sufficient to place him or her under a duty to make and ascertain all the relevant facts prior to the expiration of the applicable statute of limitations.

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

Governments > Legislation > Statute of Limitations > Pleadings & Proof

HN21[] **Motions to Dismiss, Failure to State Claim**

A statute of limitations defense may only be granted on a Fed. R. Civ. P. 12 motion if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief.

Governments > Legislation > Statute of Limitations > Time Limitations

HN22[] **Statute of Limitations, Time Limitations**

Under New York law, a claim asserted for the first time in an amended complaint relates back to the date of the initial complaint for the purposes of calculating the statute of limitations if the facts in the amended and initial complaints cover the same transaction or occurrence.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Estoppel

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Insurance Law > Claim, Contract & Practice Issues > Estoppel & Waiver > Equitable Estoppel

HN23[] **Affirmative Defenses, Estoppel**

Misconduct aimed at community at large cannot satisfy equitable estoppel.

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

Evidence > Burdens of Proof > Allocation

Governments > Courts > Authority to Adjudicate

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Stay

HN24[] Stays of Judgments, Multiple Claims & Parties

The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants. The party seeking the stay bears the burden of demonstrating that it is entitled to one.

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

HN25[] US Patent & Trademark Office Proceedings, Reexamination Proceedings

When a stay request is instigated by a pending Patent & Trademark Office proceeding digging into the validity of patents at issue in the lawsuit, courts generally consider three factors: (1) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether discovery is complete and whether a trial date has been set. Those factors are not exclusive, and the inquiry embraces the totality of the circumstances.

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

HN26[] US Patent & Trademark Office Proceedings, Reexamination Proceedings

As far as prejudice goes, courts typically consider an additional four sub-factors: (1) the timing of the review request; (2) the timing of the stay request; (3) the status of the external review; and (4) the relationship of the parties. However, when the parties are direct competitors, the stayed party is usually prejudiced.

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

HN27[] US Patent & Trademark Office Proceedings, Reexamination Proceedings

Courts routinely find stays of multiple years to be long enough to result in prejudice to the non-moving party.

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Judges: David N. Hurd, United States District Judge.

Opinion by: David N. Hurd

Opinion

[*32] DAVID N. HURD, United States District Judge

MEMORANDUM-DECISION and ORDER

I. INTRODUCTION

On June 19, 2020, pharmaceutical companies Novartis Pharma AG, Novartis Pharmaceuticals Corporation, and Novartis Technology LLC (together "Novartis") filed a complaint (the "'631 Patent case") in **[*33]** this district alleging patent infringement against rival Regeneron Pharmaceuticals, Inc. ("Regeneron"). Essentially, Novartis claims that it has a valid patent for syringes which come pre-filled with a certain medication used to treat degenerative eye disease. By extension, Novartis takes issue with Regeneron's introduction of a competing prefilled syringe—designed to treat the same disease—into the market notwithstanding its patent.

On July 17, 2020, Regeneron fired back with a complaint of its own, alleging four antitrust claims and an additional claim for tortious interference with a contract (the "Antitrust case"). In addition to Novartis, Regeneron also directed some of **[**3]** these claims at Vetter Pharma International GMHB, a pharmaceutical supply chain provider whose niche in the medical marketplace includes filling Novartis's—and formerly Regeneron's—syringes.

According to Regeneron, Vetter and Novartis conspired together to circumvent a binding contract giving Regeneron an ownership interest in any of Vetter's innovations. At the same time, Regeneron claims that Vetter and Novartis defrauded the Patent and Trademark Office ("PTO") to secure for Novartis a stranglehold on the market for prefilled syringes designed to treat degenerative eye disease.

There are three separate pending motions in these two cases. First, in the '631 Patent case, Novartis and Regeneron have submitted their opening claim construction briefs in advance of a potential hearing as contemplated by *Markman v. Westview Instruments, Inc., 517 U.S. 370, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996)*. Second, in the Antitrust case, Novartis and Vetter have both moved to dismiss Regeneron's complaint against them in its entirety under *Federal Rule of Civil Procedure ("Rule") 12(b)(6)*. And third, in both cases, Regeneron has moved for a stay in proceedings while the PTO conducts an *inter partes* review of the validity of Novartis's patent. All three motions, having been fully briefed, will now be decided on the submissions and without oral argument. **[**4]**

II. BACKGROUND

At their core, these two cases are about three different drugs: EYLEA, made by Regeneron, and LUCENTIS and BEOVU, both made by Novartis.[1] *Regeneron Pharms., Inc. v. Novartis Pharma AG*, 1:21-CV-1066, Dkt. 87 ("Antitrust Compl."), ¶ 5. All three drugs are designed to inhibit the body's production of vascular endothelial growth factor ("VEGF"), a naturally occurring protein that erodes vision if overproduced, and in particularly extreme cases can cause blindness. *Id.* ¶¶ 5-6.

EYLEA, LUCENTIS, and BEOVU each need to be injected directly into the eye regularly to do their job as "anti-VEGF" agents. Antitrust Compl. ¶ 6. Traditionally, like most injectable liquids, EYLEA, LUCENTIS, and BEOVU were transported in vials. *Id.* The physician would then have to pierce the vial with a syringe, draw some of the drug out, and inject it into the patient's eye. *Id.*

A. Developing the Prefilled Syringe

According to Regeneron, though, it came up with a better idea. Regeneron claims that in 2005, it and Vetter began working together to develop a prefilled **[*34]** syringe ("PFS") that contained EYLEA. Antitrust Compl. ¶¶ 2, 152. The theory went that a prefilled syringe would remove the intermediate step **[**5]** of drawing out the drug, reducing the risk of contamination and making the process safer. *Id.* ¶¶ 76-81. As part of their collaboration, Vetter helped Regeneron by filling its syringes during the testing phase for the EYLEA PFS. *Id.* ¶ 152.

In addition to filling the EYLEA PFS systems, though, Regeneron alleges that it and Vetter also worked together to develop and commercialize the EYLEA PFS. Antitrust Compl. ¶ 152. That collaboration was carried out under an agreement styled the EYLEA PFS Development Agreement (the "Development Agreement"). *Id.*

According to Regeneron, by the terms of the Development Agreement, Regeneron could claim ownership rights to "any inventions, improvements, enhancements, or alike made during the Term [of the agreement] and conceived or reduced to practice or generated by Regeneron and/or Vetter" relating to an anti-VEGF delivered to Vetter by Regeneron. Antitrust Compl. ¶ 153. The Development Agreement apparently bore fruit, because the Australian government approved EYLEA FPS in 2012. *Id.* ¶ 154.

In the meantime, Regeneron alleges that Novartis and Vetter were also working together to produce a PFS. Antitrust Compl. ¶ 155. That collaboration was similarly successful, **[**6]** and Novartis and Vetter eventually produced LUCENTIS PFS. *Id.* ¶ 141. According to Regeneron, several Vetter employees made "significant contributions" along the way. *Id.* Regeneron further alleges that those significant contributions involved the same anti-VEGF drug from which EYLEA is made. *Id.* ¶ 143.

But Novartis and Vetter's joint efforts did not go off entirely without a hitch. Apparently, on February 27, 2013, Vetter sent Novartis a letter objecting to certain patent applications that Novartis had filed in Germany and Australia. Antitrust Compl. ¶ 142. At bottom, Vetter objected that Novartis claimed credit for inventions and improvements allegedly made by Vetter personnel. *Id.*

Novartis and Vetter met to discuss the matter, and apparently came to a final agreement signed by both parties by October 2, 2013 (the "2013 Amendment"). Antitrust Compl. ¶¶ 145-46. By the terms of that agreement, Novartis agreed that Vetter significantly contributed to developing its PFS patent family. *Id.* ¶ 146. It must be said, though, that the 2013 Amendment specifically excludes crediting Vetter with contributing to "any [i]nvention." *Id.*

On January 25, 2013, Novartis filed a patent for the LUCENTIS PFS **[**7]** ("the '631 Patent"). Antitrust Compl. ¶ 143. The '631 Patent relates back to Novartis's German patent, and apparently claims the same subject matter. *Id.* ¶ 144. What Regeneron claims the '631 Patent does not do, however, is credit any Vetter employee as an inventor.

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[1] For the purposes of Novartis and Vetter's motions to dismiss under *Rule 12(b)(6)*, the Court takes the facts in Regeneron's complaint as true. The Court notes that in addition to the redacted First Amended Complaint on the docket, Regeneron has also filed a "clean" version of that document under seal. The Court has consulted the clean version where necessary but will cite to the official version.

Id. ¶ 147. To the extent any of them qualify, that poses a problem, because *35 U.S.C. § 116* requires that all inventors jointly file for a patent, unless a joint inventor refuses to join in the patent application or cannot be found.

The PTO issued the '631 Patent on December 29, 2015. Antitrust Compl. ¶ 147. Apparently, Novartis only planned on marketing LUCENTIS PFS outside the United States. *See Id.* ¶ 53. For the purposes of serving the United States ("U.S.") market, Novartis licensed the patent for the LUCENTIS PFS to a separate company, Genentech, Inc. ("Genentech"). *Id.* ¶¶ 53-54. Genentech then launched LUCENTIS PFS in the U.S. in early 2017. *Id.* ¶ 84. According to Regeneron, Novartis has a 33.3% ownership stake in Genentech's parent **[*35]** company, Roche. *Id.* And in any case, when BEOVU PFS—another anti-VEGF—is launched, Novartis appears to intend to market it in the U.S. *Id.* ¶ 2.

Summing up, according to Regeneron, Novartis got the jump on its efforts to market an anti-VEGF PFS. But **[**8]** in doing so, Novartis allegedly recruited Vetter's help. Regeneron claims that Novartis's overture towards Vetter violates its rights because any ideas by Vetter relating to EYLEA PSF were contractually Regeneron's property.

And because one of the drugs used in developing the LUCENTA PSF was functionally identical to EYLEA, Regeneron claims that Vetter's contributions to that patent qualified as relating to EYLEA PSF. From Regeneron's perspective, Novartis's exclusion of Vetter's assistance from the patent application was a calculated move to prevent the '631 Patent from becoming Regeneron's property by virtue of the Development Agreement. Antitrust Compl. ¶¶ 147-48.

B. Regeneron's Negotiations with Vetter

In the meantime, Regeneron claims that its experiences with Vetter took a sharp and downward turn once the 2013 Amendment was signed. According to Regeneron, in October 2013, the same month the agreement had taken effect, Vetter sent a sublicense demand to Regeneron. Antitrust Compl. ¶ 166. The letter claimed that the EYLEA PFS would be covered under Novartis's then-pending '631 Patent. *Id.* By extension, if Regeneron wanted to continue to try to market EYLEA PFS, it would have to agree to take out a sublicense **[**9]** from Vetter first. *Id.*

However, Vetter would only agree to offer a sublicense if Regeneron agreed to use Vetter exclusively to fill its EYLEA PFS products for the duration of the '631 Patent, a term of nearly twenty years. Antitrust Compl. ¶ 167. In addition, Vetter's proposed agreement required that Regeneron promise never to challenge the validity of the '631 Patent. *Id.* ¶ 170.

Previously, Vetter had filled EYLEA vials without any exclusivity requirement, so Regeneron claims that it was wary of the sudden pivot. Antitrust Compl. ¶ 167. On top of that, the lengthy duration of the exclusivity clause gave Regeneron pause. *Id.* Finally, Regeneron claims that it felt that Vetter and Novartis's agreement and general relationship with each other raised concerns on Regeneron's part that Vetter would prioritize Novartis's interests over its own. *Id.* ¶ 168.

For these reasons and more, Regeneron refused to sign the agreement. Antitrust Compl. ¶ 174. As a result, Vetter stopped filling EYLEA PFS. *Id.* ¶ 175. Regeneron then found a new supplier but claims that doing so required some alterations to EYLEA PFS's design and took a substantial toll on its time and resources. *Id.*

In 2017, Regeneron claims that it approached Vetter **[**10]** again to discuss working together. Antitrust Compl. ¶ 176. Vetter responded with the same offer it had extended in 2013. *Id.* Regeneron once again refused. *Id.*

C. Novartis's Patent Suit

Despite the '631 Patent, Regeneron released EYLEA PFS sometime around December of 2019. *Novartis Pharma AG v. Regeneron Pharms., Inc.*, 1:20-CV-690, Dkt. 70 ("Patent Compl."), ¶ 29.[2] From **[*36]** Novartis's perspective, that amounts to infringement, because the '631 Patent gives Novartis the exclusive right to market prefilled, sterilized syringes containing an anti-VEGF solution. *Id.* ¶ 15. And according to Novartis, the EYLEA PFS is precisely that. *Id.* ¶¶ 20-28 (describing attributes of EYLEA PFS that allegedly fall under terms of '631 Patent).

But based on Regeneron's version of events, there were some internal hoops Novartis needed to jump through before it could bring the infringement suit. Antitrust Compl. ¶ 186. Apparently, the 2013 Amendment contained a clause which gave Vetter the exclusive right to sublicense the '631 Patent. *Id.* ¶ 156. But on December 18, 2019—around the same time EYLEA PFS was hitting the market—the 2013 Amendment was itself amended (the "2019 Amendment"). *Id.* ¶ 186. By the terms of the new agreement, Novartis was given sole enforcement **[**11]** authority concerning the '631 Patent in exchange for a cut of all license income. *Id.*

On June 19, 2020, after the 2019 Amendment took effect, Novartis sued Regeneron for infringing the '631 Patent by marketing EYLEA PFS. *Novartis*, 1:20-CV-690, Dkt. 1. At the same time, Novartis filed a complaint with the United States International Trade Commission ("ITC") claiming infringement of the same patent. *Novartis*, 1:20-CV-690, Dkt. 27, p. 1.[3]

On July 28, 2020, Regeneron moved to stay Novartis's claim before this Court pending resolution of the ITC complaint. *Novartis*, 1:20-CV-690, Dkt. 27, p. 1. Novartis did not oppose, and the stay was granted on July 30, 2020. *Id.*

On April 8, 2021, Novartis voluntarily withdrew its ITC complaint to focus its efforts on this case. *Novartis*, 1:20-CV-690, Dkt. 38-1, pp. 3-6. The stay was then lifted on June 11, 2021. *Novartis*, 1:20-CV-690, Text Minute Entry Dated 6/11/2021.

D. <u>Regeneron's Antitrust Suit</u>

Regeneron was not sitting idle while Novartis's patent claim proceeded. On July 17, 2020, Regeneron filed the antitrust claim against both Novartis and Vetter. *Regeneron*, 1:21-CV-1066, Dkt. 1. Essentially, that complaint alleges that Novartis and Vetter conspired together to freeze Regeneron **[**12]** out of the market for anti-VEGF PFS products by forcing it into a long-term contract with Vetter and requiring it to respect the '631 Patent. *See generally id.*, *passim*. To make matters worse, Regeneron sees itself as the rightful owner of the '631 Patent based on the Development Agreement and accuses Novartis of arranging for Vetter's breach of that contract. In addition, Regeneron accuses Novartis of intentionally omitting information material to the '631 Patent relating to a prior art. Antitrust Compl. ¶¶ 219-22.

More specifically, Regeneron's complaint asserts five causes of action: (I) attempted monopolization through a scheme of patent fraud under *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)* for omitting prior arts in violation of *§ 2 of the Sherman Act*; (II) attempted monopolization in violation of *§ 2 of the Sherman Act* even without *Walker Process* fraud; (III) unreasonable restraint on trade in violation of *§ 1 of the Sherman Act*; (IV) attempted monopolization through *Walker Process* fraud for omitting the contributions of Vetter inventors in violation of *§ 2 of the Sherman Act*; and (V) tortious interference with a contract **[*37]** under New York state law.[4] Regeneron brings Count III against both Novartis and Vetter. For the remainder, Novartis alone is accused of wrongdoing.

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[2] The Court refers to the complaint in the '631 Patent case solely to provide context to the parties' disputes. In no way will this complaint be relied upon in reaching a decision on the present motion practice, especially Novartis and Vetter's *Rule 12(b)(6)* motions.

[3] Pagination corresponds with CM/ECF.

[4] The parties do not dispute that Regeneron's tortious interference claim comes under New York law.

E. The Present Motion Practice

Once the stays were lifted at the conclusion **[**13]** of the ITC proceedings, both cases continued. On October 15, 2021, Novartis and Vetter each moved to dismiss Regeneron's First Amended Complaint—the current operative pleading in the Antitrust case—for failure to state a claim. *Regeneron*, 1:21-CV-1066, Dkts. 184; 186.

But on November 5, 2021, Regeneron moved to stay both the '631 Patent case and the Antitrust case. *Novartis*, 1:20-CV-690, Dkt. 98; *Regeneron*, 1:21-CV-1066, Dkt. 216. Apparently, on April 16, 2021, while the ITC complaint was still pending, Regeneron had asked the PTO for an *inter partes* review to declare the '631 Patent invalid. *Novartis*, 1:20-CV-690, Dkt. 98-4, p. 85; *Regeneron*, 1:21-CV-1066 Dkt. 216-4, p. 85. On October 26, 2021, the PTO agreed. *Novartis*, 1:20-CV-690, Dkt. 98-3, p. 1; *Regeneron*, 1:21-CV-1066 Dkt. 216-3, p. 1. Thus, Regeneron argues that both cases should be stayed until the PTO has an opportunity to determine whether the '631 Patent is valid.

Finally, on December 23, 2021, Novartis and Regeneron both filed their *Markman* briefs in the '631 Patent case. *Novartis*, 1:20-CV-690, Dkts. 103; 104. This decision now follows to resolve all three pending motions.

III. DISCUSSION

The first step in untangling the knot these cases have worked themselves into is deciding **[**14]** which thread to pull on first. To that end, the only dispute concerning the '631 Patent's claim construction is whether there is actually a dispute in the first place. There is little harm in reaching that simple question first before considering a stay that would leave that dispute unaddressed. After that, should Novartis and Vetter's motions to dismiss have merit, the Antitrust case could be dismissed in its entirety, which would obviously moot the question of staying that case. Accordingly, the Court will turn to the motion to dismiss second, and only reach the motion to stay after considering both other active motions.

A. Claim Construction

HN1[] "Claim construction is a question of law, the purpose of which is to determine what is covered by the patent's claims." *Verint Sys. Inc. v. Red Box Recorders Ltd., 166 F. Supp. 3d 364, 374 (S.D.N.Y. 2016)* (citing *Markman, 517 U.S. at 384*. That process is geared toward "elaborating the normally terse claim language in order to understand and explain, but not to change, the scope of the claims." *Verint Sys., 166 F. Supp. 3d at 374* (cleaned up) (citing *Embrex, Inc. v. Serv. Eng'g Corp., 216 F.3d 1343, 1347 (Fed. Cir. 2000)*).

HN2[] "When faced with 'an actual dispute regarding the proper scope' of a patent claim, the court must construe the allegedly infringed claim to determine its meaning and scope." *PPC Broadband, Inc. v. Corning Optical Commc'ns RF, LLC, 2014 U.S. Dist. LEXIS 119226, 2014 WL 4199244, at *2 (N.D.N.Y. Aug. 21, 2014)*. But the converse is also true: "a trial court need not construe claim terms **[**15]** whose meaning the parties do not dispute." *Holmberg v. United States, 124 Fed. Cl. 610, 613 (2016)*.

[*38] At any rate, although a court "may have the authority to adopt claim constructions which have not been proposed by either party[, it] should be hesitant to do so." *Holmberg, 124 Fed. Cl. at 613* (citing *Yoon Ja Kim v. ConAgra Foods, Inc., 465 F.3d 1312, 1319 (Fed. Cir. 2006)*).

As required under Local Patent Rule for the Northern District of New York ("Local Patent Rule") 4.4, both Regeneron and Novartis submitted a joint claim construction setting out their agreed definitions of the terms of the

'631 Patent.[5] *Novartis*, 1:20-CV-690, Dkt. 100. In that document, Novartis agreed with Regeneron's construction of all terms. *See generally id.*, *passim*.

But Novartis's apparent consent does not, it seems, resolve the issue of claim construction on its own. According to Regeneron, Novartis intends to sandbag it and the Court by making arguments at trial contrary to the terms upon which the parties agreed. Specifically, Regeneron claims that Novartis has not disavowed an intent to argue that a syringe is "terminally sterilized" only if it has been: (1) subjected to stability testing; and (2) protected from further contact after the sterilizing agent has been applied and stability testing conducted.

The problem, it seems, is that the proposed construction of **[**16]** "terminally sterilized" makes no mention of those two additional requirements. In Regeneron's opinion, the only solution is for the Court to take the further step of precluding Novartis from arguing that anything more is required for a syringe to be "terminally sterilized" than what is described in the proposed claim construction.

Regeneron is mistaken. After all, if the proposed construction would foreclose Novartis's argument, then the Court's adoption of that construction would give Regeneron the relief it is requesting without further tampering. On the other hand, the Court can think of only two possible reasons that adopting the proposed claim would *not* foreclose that line of argument.

First, it may be that the construction of the claim has nothing to do with Novartis's argument, in which case it would be an overreach for the Court to hamstring Novartis at the claim construction stage. Or second, it may be that Regeneron could have requested a more favorable construction of the claim and failed to do so. In that case, Regeneron is asking the Court to take the disfavored step of adopting a construction without a proposal simply to cover for its own tactical misstep. *Holmberg, 124 Fed. Cl. at 613* (holding that **[**17]** courts should be hesitant to adopt claim constructions not proposed by parties). Under none of those circumstances would the Court be moved to produce its own more restrictive version of the proposed claim construction as Regeneron requests.

Neither is the Court persuaded by Regeneron's argument that the Court is obliged to go looking for disputes that do not appear on the face of the *Markman* briefing. In support of that argument, Regeneron relies on *PPC Broadband, 2014 U.S. Dist. LEXIS 119226, 2014 WL 4199244* and *Defenshield, Inc. v. First Choice Armor & Equipment, Inc., 2013 U.S. Dist. LEXIS 134684, 2013 WL 5323752 (N.D.N.Y. Sept. 20, 2013)*.

[*39] Both of those cases refer to a court's obligation to resolve disputes in claim construction. *See PPC Broadband, 2014 U.S. Dist. LEXIS 119226, 2014 WL 4199244, at *2* (noting that court is obligated to resolve dispute in claim scope to prevent parties from impermissibly arguing claim construction to jury); *Defenshield, 2013 U.S. Dist. LEXIS 134684, 2013 WL 5323752, at *8-9* (deciding to construe claim despite potential for common meaning to prevent submitting claim construction question to jury).

HN3[] But the purpose for that obligation lies in making sure that the jury isn't tasked with trying to sort out the definition of a claim when that should be up to the Court. *See Sulzer Textil A.G. v. Picanol N.V., 358 F.3d 1356, 1359 (Fed. Cir. 2004)* (explaining that it is duty of trial court to inform jurors of claim construction rulings on disputed terms); *see also O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co., Ltd., 521 F.3d 1351, 1360 (Fed. Cir. 2008)* ("When the parties raise an actual dispute regarding the proper scope of [ ] claims, the **[**18]** court, not the jury, must resolve that dispute.").

There is no danger of that in this case because the Court *is* construing the claim Regeneron argues to be disputed. In fact, the Court is construing it in precisely the manner that Regeneron requested. The jury will thus be instructed

[5] Both parties would also file short responsive claim construction briefs on January 24, 2022. *Novartis*, 1:20-CV-690, Dkts. 109; 111. In Regeneron's brief, it requested leave to file a reply brief in the event that Novartis filed a responsive brief, because Novartis's initial submission was decidedly barebones. However, because Novartis's responsive brief only dealt with Regeneron's arguments and continues to disavow any true dispute of the claim construction, permitting Regeneron to file a reply brief would be a waste of time and effort that this Court will not indulge.

on the '631 Patent's claims in accordance with Regeneron's proposed construction, and the Court need not—and will not—devise its own construction beyond what Regeneron requested. *See, e.g.*, *Holmberg, 124 Fed. Cl. at 613*. The Court thus adopts the proposed claim construction in its entirety and will not require a *Markman* hearing.

B. Novartis's Motion to Dismiss

Having settled the matter of claim construction, the Court turns to Novartis and Vetter's *Rule 12(b)(6)* motions to dismiss the Antitrust case. ***HN4***[] To survive a motion to dismiss under that Rule, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. That factual matter may be drawn from "the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010)*.

Importantly, "the complaint is to be construed liberally, and all reasonable inferences must be drawn in the **[**19]** plaintiff's favor." *Ginsburg v. City of Ithaca, 839 F. Supp. 2d 537, 540 (N.D.N.Y. 2012)* (citing *Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002)*). If the complaint and its additional materials—when viewed through that pro-plaintiff lens—are not enough to raise the plaintiff's right to relief on a claim above the speculative level, that claim must be dismissed. *See* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

1. Antitrust Claims

HN5[] "A patentee has the exclusive right to manufacture, use, and sell his invention." *In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 690 (2d Cir. 2009)* (citing *Zenith Radio Corp. v. Hazeltine Rsch., Inc., 395 U.S. 100, 135, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*). The purpose behind granting a patent is to incentivize "invention, investment, and disclosure" by granting a "statutory right to exclude" other competitors. *Abbott Labs. v. Brennan, 952 F.2d 1346, 1355 (Fed. Cir. 1991)*. By a patent's very nature, then, "[t]he commercial advantage gained by new technology and its statutory protection by patent do not convert the possessor thereof into a prohibited monopolist." *Id. at 1354*.

[*40] None of that is meant to say that a patent automatically forecloses liability for antitrust violations. ***HN6***[] Instead, there are at least two ways that a patent holder can run afoul of ***antitrust law***. For the first, "[i]n *Walker Process*, the Supreme Court held that a plaintiff could bring an action under *§ 2 of the Sherman Act* based on the alleged maintenance and enforcement of a fraudulently[ ] obtained patent." *TransWeb, LLC v. 3M Innovative Props. Co., 812 F.3d 1295, 1306 (Fed. Cir. 2016)* (citing *Walker Process, 382 U.S. at 173-74*).

The gist of a *Walker Process* claim is that an unlawful patent should be stripped of its usual immunity **[**20]** from antitrust liability. *See* *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068 (Fed. Cir. 1998)*. Whether a patentholder deserves to lose out on its monopolistic immunity is a question to be answered only under Federal Circuit law. *See id.* However, questions of ***antitrust law*** beyond the alleged patent fraud are decided under the law of each regional circuit. *Id.*

HN7[] There are two global elements to a *Walker Process* claim: (1) "that the antitrust-defendant obtained the patent by knowing and willful fraud on the patent office and maintained and enforced the patent with knowledge of the fraudulent procurement;" and (2) all other elements of a *Sherman Act* monopolization claim are also met. *TransWeb, 812 F.3d at 1306*.

HN8[] For an attempted monopolization claim under *§ 2 of the Sherman Act*, like those that Regeneron brings against Novartis, the elements are: (1) predatory or anticompetitive conduct; (2) informed by a specific intent to monopolize; with (3) "a dangerous probability of achieving monopoly power." *New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 651 (2d Cir. 2015)*.

HN9[] As for the second means of establishing an antitrust violation even with patent protections in play, the Supreme Court held in *Federal Trade Commission v. Actavis, Inc.* that a patentholder may, in certain circumstances, be held liable for using the patent to unreasonably restrain trade. *570 U.S. 136, 147, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*.

HN10[] In any case, though, one essential **[**21]** element of all antitrust claims is the existence of a relevant geographic and product market subjected to the defendant's anticompetitive conduct. *Xerox Corp. v. Media Scis. Int'l, Inc., 511 F. Supp. 2d 372, 383 (S.D.N.Y. 2007)*. Novartis, Vetter, and Regeneron all agree that the relevant geographic market in this case is the United States, so that first requirement is met.

But the parties are decidedly less in agreement when it comes to defining the relevant product market. *HN11*[] To survive a motion to dismiss, a claimed product market must provide "analysis of the interchangeability of use or the cross-elasticity of demand" for products in the market while establishing a product market that strikes the court as plausible. *Chapman v. N.Y. State Div. for Youth, 546 F.3d 230, 237 (2d Cir. 2008)* (citation omitted). Reasonable interchangeability of use or cross-elasticity of demand between the product itself and its substitutes determine "the outer boundaries of a product market." *Id.* (cleaned up).

HN12[] Generally, defining a market involves "a deeply fact-intensive inquiry," so courts are wary of granting a motion to dismiss based on a failure to adequately plead the relevant market. *Chapman, 546 F.3d at 238*. Even so, a plaintiff's definition of the product market that fails to reference the rule of reasonable interchangeability **[*41]** and cross-elasticity of demand or else clearly **[**22]** does not encompass all interchangeable substitute products is legally insufficient and may be dismissed even at the pre-answer stage. *Id.*

That marks the second reference to the rule of reasonable interchangeability, so this is a good time to define the term. *HN13*[] Effectively, the rule of reasonable interchangeability means that a plaintiff's market definition must include "all products reasonably interchangeable by consumers for the same purposes." *City of N.Y. v. Grp. Health Inc., 649 F.3d 151, 155 (2d Cir. 2011)* (internal citations and quotation marks omitted). The logic behind the rule is that "the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level." *Id.*

HN14[] Although a plaintiff claiming an antitrust violation for medical products need not address every conceivable alternative to the products it claims make up the market, "it must allege sufficient facts about other treatments to make its proposed product market plausible." *Bayer Schering Pharma AG v. Sandoz, Inc., 813 F. Supp. 2d 569, 578 (S.D.N.Y. 2011)* (citing *Rome Ambulatory Surgical Ctr., LLC v. Rome Mem'l Hosp. Inc., 349 F. Supp. 2d 389, 419 (N.D.N.Y. 2004)* (noting that "a court cannot accept the market boundaries offered by plaintiff without at least a theoretically rational explanation for excluding alternatives" (cleaned up))).

For Regeneron's part, it defines its proposed market as follows: "anti-VEGFs in prefilled **[**23]** syringes that are approved by the FDA for the treatment of certain ophthalmic diseases." Antitrust Compl. ¶ 191. Meanwhile, by the antitrust claim's own terms, the '631 Patent covers a PFS containing any anti-VEGFs. *Id.* ¶ 8.

In other words, the relevant market that Regeneron claims is identical to the protection afforded to Novartis by the '631 Patent. Strange as it may seem that the market should be limited to anti-VEGFs in a PFS when the same drug comes in a vial as well, Regeneron nevertheless tries to justify this more limited scope to the relevant market in three ways.

First, Regeneron argues that PFSs have performance-based advantages over their counterparts in vials because they are quicker, easier, and safer. Antitrust Compl. ¶¶ 196-97. Second, Regeneron also points out that manufacturing anti-VEGF vials requires different equipment than making a PFS. *Id.* ¶ 199. Third, Regeneron states that "a small, but significant, price increase in the PFS version would not cause physicians to substitute the vial version for PFS . . . ." *Id.* ¶ 200.

None of those three reasons plausibly justifies Regeneron's narrow market. From the outset, that there might be a difference in the equipment required to produce a PFS **[**24]** as opposed to a vial says nothing about whether a consumer would find a vial and PFS interchangeable. Antitrust Compl. ¶ 199; *see* Grp. Health Inc., 649 F.3d at 155 (explaining that inquiry into product market looks at interchangeability of products to consumer).

Additionally, Regeneron's other two bases for explaining away the interchangeability of vials and PFS packages fail because they would allow any patented product to be a unique market by itself. After all, most any patent will carry with it improvements to a product's efficacy. And that small boost in usefulness will often be valuable enough to merit some heightened costs. The resultant commercial advantage is a sacrifice that the law is willing to make to spur technical and technological advancement. Abbott Labs., 952 F.2d at 1355 **[*42]** (describing patent's right to exclude as incentive for innovation).

That commercial advantage evaporates if Regeneron's theory carries water. After all, if a patent allows its owner to exclude other firms from producing products covered by its terms, and an antitrust plaintiff can define a market so narrowly that the patent itself creates its own market, then plaintiffs could never fail to plead out an antitrust claim against a patent owner as long as they raised **[**25]** a colorable challenge to the patent's validity. In re DDAVP Direct, 585 F.3d at 690. In other words, if the Court accepts Regeneron's proposed market, then all patents would immediately confer complete monopoly power to the inventor.

The problem with that outcome is obvious as soon as Walker Process enters the equation. After all, if a plaintiff could simply limit the scope of the relevant product market to the scope of a patent, then each of the three elements of an attempted monopolization claim would be met as a matter of course. *See* New York ex rel. Schneiderman, 787 F.3d at 651. The patent would exclude other firms from participating in the market, which is the definition of anticompetitive conduct. *Id.* Similarly, the mere act of seeking the patent evinces a clear intent to monopolize because a patent is itself a lawful monopoly. *Id.* From there, the patent would not only establish a dangerous probability of monopoly power, but a certainty, because no other firm could compete with the patent holder. *Id.*

In short, defining the relevant product market as narrowly as Regeneron alleges would collapse the second prong of the Walker Process inquiry for every patented product. *See* TransWeb, 812 F.3d at 1306 (noting that Walker Process requires proof of patent fraud and every element of antitrust claim). By extension, every instance **[**26]** of patent fraud would give rise to an antitrust claim by definition. If that theory of an antitrust claim were viable, there would have been no need for the Supreme Court to carve out the Walker Process framework in the first place. Instead, it could simply have held that patent fraud is itself an antitrust violation.

HN15[] It did not. On the contrary, the law is clear that "an inventor of new technology [does not] violate the antitrust laws merely because its patented product is favored by consumers." Monsanto Co. v. McFarling, 302 F.3d 1291, 1298 (Fed. Cir. 2002). Accordingly, Regeneron has failed to meaningfully explain why anti-VEGF vials are not a reasonable substitute for an anti-VEGF PFS.

Of course, one can imagine a circumstance where the subject of a patent is so novel that there really is no fitting substitute, and the relevant product market would have to be constrained to the patented product. But Regeneron bore the burden of alleging that this case fits that bill. Chapman, 546 F.3d at 238 (noting that plaintiff has burden of establishing relevant product market). Instead of explaining why consumers would not be so free to choose between a vial or PFS delivery system for an anti-VEGF as to create a separate market, Regeneron merely explained that the PFS is, like all valuable **[**27]** patented products, at least marginally superior to the vial. Antitrust Compl. ¶¶ 196-200. That is not enough.[6]

[*43] By extension, Regeneron's proposed market fails. As a consequence, all four of Regeneron's antitrust claims must be dismissed. *See, e.g.,* Chapman, 546 F.3d at 238-39 (affirming motion to dismiss antitrust claims because

[6] Although the Court notes that Regeneron alleges that some 80% of anti-VEGF patients switched from vial to PFS once the latter option was introduced, that exodus at current price points does not suggest that if Novartis attempted to raise prices beyond a "small" discrepancy that those patients could not or would not simply switch back to their vials. Thus, Regeneron has still failed to allege that the availability of vials as an alternative would not constrain Novartis's ability to set prices as required to establish a product market. *See* Grp. Health, 649 F.3d at 155.

plaintiff's definition of relevant market was too narrow); *see also, e.g.,* *Bayer Schering, 813 F. Supp. 2d at 577-78* (dismissing antitrust claim for failure to plead sufficient facts to demonstrate unavailability of acceptable substitutes when pleadings did not foreclose possibility that two other drugs taken together could achieve same result as single drug plaintiff attempted to use to define market).

2. Tortious Interference with a Contract

However, disposing of Regeneron's antitrust claims says nothing about its state law claim for tortious interference with a contract. ***HN16***[] To that end, under New York law, a claim for tortious interference charges a plaintiff with proving five elements: (1) a valid contract between the plaintiff and a third party; (2) about which the defendant knew; (3) "defendant's intentional procurement of the third-party's breach of the contract without justification"; (4) the contract was actually breached; **[**28]** and (5) damages. *Rich v. Fox News Network, LLC, 939 F.3d 112, 126-27 (2d Cir. 2019)* (citing *Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413, 668 N.E.2d 1370, 1375, 646 N.Y.S.2d 76 (N.Y. 1996)*). In establishing that the defendant caused the contract's breach, the plaintiff must prove that but-for the defendant's intervention, the contract would have been performed. *Rich, 939 F.3d at 127*.

Novartis principally argues that Regeneron's tortious interference with a contract claim came only after the statute of limitations had run out. ***HN17***[] To that end, "the statute of limitations for tortious interference claims is three years." *Enzo Biochem, Inc. v. Amersham PLC, 981 F. Supp. 2d 217, 225 (S.D.N.Y. 2013)* (citing *N.Y. C.P.L.R. § 214(4)*). The clock begins to tick once the claim becomes enforceable, or "when all elements of the tort can be truthfully alleged in a complaint." *Enzo Biochem, 981 F. Supp. 2d at 225*.

HN18[] Even if the statute of limitations has long since run, though, a defendant may be equitably estopped from invoking it as a defense if the plaintiff was "induced by fraud, misrepresentations[,] or deception to refrain from filing a timely action."[7] *Weizmann Inst. of Sci. v. Neschis, 229 F. Supp. 2d 234, 252 (S.D.N.Y. 2002)* (citation omitted). But the plaintiff bears the burden of establishing that it brought the claim within a reasonable time after the deception has come to light. *Id.*

HN20[] Yet it is worth keeping in mind that equitable estoppel is not a general remedy to punish secretive wrongdoing, but a corrective measure aimed at preventing a defendant from reaping the benefits of deceiving **[**29]** a potential plaintiff to head off a lawsuit. *See* *Twersky v. Yeshiva Univ., 993 F. Supp. 2d 429, 442 (S.D.N.Y. 2014)*. In other words, equitable estoppel is only "appropriate where the plaintiff is prevented from filing an action within the applicable statute of limitations due to defendants' misconduct toward the potential plaintiff, not a community at large." *Id.* (internal citations and quotation marks omitted) (finding equitable estoppel unsupported **[*44]** where defendant made alleged misrepresentation to public, not specifically to plaintiff for purpose of preventing lawsuit).

In addition, "the equitable estoppel doctrine is not available to a plaintiff who possesses timely knowledge sufficient to place him or her under a duty to make and ascertain all the relevant facts prior to the expiration of the applicable statute of limitations." *Gonzales v. Nat'l Westminster Bank PLC, 847 F. Supp. 2d 567, 572 (S.D.N.Y. 2012)*.

HN21[] In any case, a statute of limitations defense may only be granted on a *Rule 12* motion if it "appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Ortiz v. Cornetta, 867 F.2d 146, 148 (2d Cir. 1989)* (citing *Abdul-Alim Amin v. Universal Life Ins. Co., 706 F.2d 638, 640 (5th Cir. 1983)*).

Although Regeneron provided a staunch defense for the timeliness of its antitrust claims, it spent not a single word defending its tortious interference claim. That oversight would justify dismissal **[**30]** on its own. *See* *In re Jumei Int'l Holding Ltd. Sec. Litig., 2017 U.S. Dist. LEXIS 3206, 2017 WL 95176, at *5 n.4 (S.D.N.Y. Jan. 10, 2017)* (noting

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[7] ***HN19***[] "Unlike federal law, . . . New York state law does not differentiate between doctrines of fraudulent concealment (equitable tolling) and equitable estoppel." *In re Fischer, 308 B.R. 631, 656 (E.D.N.Y. 2004)*.

that arguments not addressed in opposition briefing are conceded). But in the alternative, even if the Court were to read Regeneron's arguments so broadly as to reach its tortious interference claims as well as its antitrust claims, those arguments would still fail.

It is clear that the breach that Regeneron complains of involved Novartis's persuading Vetter to violate the Development Agreement by helping it develop LUCENTIS PFS. Antitrust Compl. ¶¶ 285-91. The culminating act that Regeneron argues amounted to a breach of the Development Agreement was the omission of Vetter employees from the list of inventors for the '631 Patent. *Id.* ¶ 290. But the '631 Patent issued in December of 2015. *Id.* ¶ 147.

In other words, the statute of limitations would have run out on Regeneron's tortious interference claims no later than December of 2018. Even if the Court assumes that Regeneron's tortious interference with a contract claim relates back to its initial complaint, the first antitrust complaint was not filed until July 17, 2020.[8] *Regeneron*, 1:21-CV-1066, Dkt. 1. That claim appears to be plainly untimely.

But Regeneron would stave off that seeming inevitability. By its logic, Novartis and Vetter **[**31]** embarked on a pattern of fraudulent concealment[9] that kept their **[*45]** wrongdoing hidden until December of 2020, when Regeneron received discovery cluing it in on the terms of the 2013 Amendment. Regeneron's position is that Novartis should be equitably estopped from arguing that the statute of limitations bars Regeneron's tortious interference with a contract claim.

However, several of its allegations make equitable estoppel impossible. Taking its allegations as true, Novartis and Vetter sought to deceive the PTO and the market at large by concealing Vetter's inventorship. Antitrust Compl. ¶ 147. This alleged public deception, even if it was carried out exactly as Regeneron claims, was not tailored to prevent Regeneron from bringing a suit, but instead attempted to secure an advantageous patent for Novartis. In other words, the PTO and every other medical supply company were just as much the targets of Novartis's alleged deception as was Regeneron. *See id.* ***HN23***[] Because a public deception cannot justify equitable estoppel, Regeneron's claims are not timely and must be dismissed. *See Twersky, 993 F. Supp. 2d at 442* (explaining that misconduct aimed at community at large cannot satisfy equitable estoppel).

In addition, Regeneron's **[**32]** own allegations establish that it had notice sufficient to call for further investigation into whether it had a tortious interference claim as early as 2013. *See Gonzales, 847 F. Supp. 2d at 572* (explaining that equitable estoppel is not available when plaintiff had access to information requiring it to investigate further into claim).

Also, Regeneron alleges that in 2013 Vetter suddenly pivoted from a mutually productive relationship to a demand that Regeneron work exclusively with Vetter. Antitrust Compl. ¶¶ 167-68. Vetter's new terms were also so conspicuously protective of Novartis's new patent for an anti-VEGF PFS that Regeneron felt uncomfortable agreeing to them because it believed Vetter would be more interested in protecting Novartis's interests than Regeneron's. *Id.*

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[8] ***HN22***[] Under New York law, a claim asserted for the first time in an amended complaint relates back to the date of the initial complaint for the purposes of calculating the statute of limitations if the facts in the amended and initial complaints cover the same "transaction or occurrence." *Smith v. Bank of N.Y. Mellon Corp., 2011 U.S. Dist. LEXIS 44018, 2011 WL 1642318, at *1 (S.D.N.Y. Apr. 25, 2011)*. Because the initial antitrust complaint also dealt with an alleged breach of the Development Agreement, Regeneron's tortious interference claims likely relate back to the filing of the initial antitrust complaint. However, since both complaints were filed well after 2018, the exercise of relating back is largely academic, so the Court will simply assume relation back for the purposes of the present motion practice.

[9] Because Regeneron exclusively defended the timeliness of its antitrust claims, it frames its arguments that the statute of limitations should be tolled as "fraudulent concealment" by Novartis and Vetter using the language employed in antitrust claims. *See Schenker AG v. Societe Air France, 102 F. Supp. 3d 418, 424 (E.D.N.Y. 2015)* (describing fraudulent concealment defense to statute of limitations in antitrust cases). For the purposes of the present hypothetical exercise the Court will assume that Regeneron also meant to argue for equitable estoppel under a theory of fraudulent concealment under state law.

But most damning of all, Regeneron alleges that Novartis should have known the rough outline of the Development Agreement between Regeneron and Vetter because similar agreements are so commonplace among pharmaceutical suppliers and developers when they work together to produce a drug. Antitrust Compl. ¶ 164. By the same logic, Regeneron should by its own allegations have drawn the inverse inference that Vetter and Novartis worked together on the **[**33]** LUCENTIS PFS given the apparent agreement between the two geared towards protecting Novartis's impending patent rights.

In other words, Regeneron cannot justify its own failure to dig into the details concerning Novartis and Vetter's relationship by clinging to common industry knowledge to support Novartis's awareness of the Development Agreement with one hand while pushing that knowledge away with the other once its own expected awareness gets put at issue.

Regeneron claims that one of the things that made it most suspicious of Vetter's renegotiated contract was its insistence on protecting the '631 Patent. Antitrust Compl. ¶ 170. And it also felt from the start that it could not trust that its needs would be prioritized given the apparently—and suddenly so—close relationship between Novartis and Vetter. *Id.* ¶ 168.

Regeneron knew as early as October of 2013 that Vetter had a sudden and powerful interest in protecting Novartis's '631 Patent and claims that similar collaborations on products often involve binding agreements. By extension, Regeneron had ample information to urge it to investigate further into Novartis and Vetter's relationship **[*46]** as early as 2013. It cannot now claim that Novartis and Vetter wrongfully **[**34]** deceived it when it failed to diligently ascertain whether it was harmed in the first place.

Regeneron's claim for tortious interference with a contract must, as a consequence, be dismissed as time-barred.[10] *See* Gonzales, 847 F. Supp. 2d at 572 (finding equitable estoppel unavailable at Rule 12(b)(6) stage where facts alleged in complaint put plaintiff unquestionably on notice that alleged wrongdoing was possible).

As a result, every claim in Regeneron's antitrust complaint must be dismissed. The only remaining question is whether that complaint's dismissal should be with prejudice or without. Because Regeneron is a counseled litigant that has already amended its complaint once, the Court sees no reason to grant it a third bite at the apple, especially when it has not even asked for one. *See, e.g.,* Marks v. Energy Materials Corp., 2015 U.S. Dist. LEXIS 75320, 2015 WL 3616973, at *10 (S.D.N.Y. June 9, 2015) (noting that dismissal with prejudice is appropriate where counseled plaintiff has already amended complaint once and failed to request leave to amend in response to motion to dismiss). Accordingly, the antitrust complaint must be dismissed with prejudice in its entirety.[11]

C. Regeneron's Motion to Stay

Finally, the Court turns to Regeneron's motion to stay the '631 Patent during the PTO's *inter partes* review of the '631 Patent's validity. ***HN24***[] On that score, "[t]he **[**35]** power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants." Rensselaer Polytechnic Inst. v. Apple Inc., 2014 U.S. Dist. LEXIS 5186, 2014 WL 201965, at *3 (N.D.N.Y. Jan. 15, 2014) (citing Landis v. N. Am., Co., 299 U.S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 (1936)). The party seeking the stay bears the burden of demonstrating that it is entitled to one. Rensselaer Polytechnic Inst., 2014 U.S. Dist. LEXIS 5186, 2014 WL 201965, at *3.

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[10] To whatever extent Regeneron intended to argue that the continuing violation doctrine would save the timeliness of its tortious interference claims, the Court notes that "[t]ortious interference with contract claims are not continuing torts, instead accruing when the defendant performs an action or inaction that constitutes interference." Tarazi v. Truehope Inc., 2017 U.S. Dist. LEXIS 120155, 2017 WL 5957665, at *19 (S.D.N.Y. July 28, 2017) (citation omitted). That theory thus cannot save Regeneron's tortious interference claims, either.

[11] By extension, Novartis's request for oral argument is denied as moot.

HN25[] When a stay request is instigated by a pending PTO proceeding digging into the validity of patents at issue in the lawsuit, courts generally consider three factors: "(1) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether discovery is complete and whether a trial date has been set." *Rensselaer Polytechnic Inst., 2014 U.S. Dist. LEXIS 5186, 2014 WL 201965, at *3* (citation omitted). Those factors are not exclusive, and the inquiry embraces the totality of the circumstances. *Id.*

Of those factors, there is some debate among lower courts as to which is the most important. *Compare, e.g., RetailMeNot, Inc. v. Honey Sci. LLC, 2020 U.S. Dist. LEXIS 11210, 2020 WL 373341, at *3 (D. Del. Jan. 23, 2020)* ("The most important factor bearing on whether to grant a stay is whether the stay is likely to simplify the issues at trial."); *British Telecommunications PLC v. IAC/InterActiveCorp, 2019 U.S. Dist. LEXIS 166651, 2019 WL 4740156, at *7 (D. Del. Sept. 27, 2019)* (same); *Intellectual Ventures* ***[*47]*** *II LLC v. BITCO Gen. Ins. Corp., 2016 U.S. Dist. LEXIS 79778, 2016 WL 4394485, at *3 (E.D. Tex. May 12, 2016)* (same), *with, e.g., InVue Sec. Prods. Inc. v. Vanguard Prods. Grp., Inc., 2019 U.S. Dist. LEXIS 142486, 2019 WL 3958272, at *1 (M.D. Fla. Aug. 22, 2019)* ("Prejudice against the non-movant is probably the most important factor **[**36]** to consider when determining whether a stay is appropriate."); *Puget BioVentures, LLC v. Med. Device Bus. Servs., Inc., 2017 U.S. Dist. LEXIS 221953, 2017 WL 6947786, at *2 (N.D. Ind. Sept. 22, 2017)* (same); *ADA Sols., Inc. v. Engineered Plastics, Inc., 826 F. Supp. 2d 348, 350 (D. Mass. 2011)* (same). In any case, there can be little doubt that simplification of the issues and prejudice to the opposing party are more important than the case's state of completion.

HN26[] As far as prejudice goes, courts typically consider an additional four sub-factors: (1) the timing of the review request; (2) the timing of the stay request; (3) the status of the external review; and (4) the relationship of the parties. *Wiesel v. Apple Inc., 2021 U.S. Dist. LEXIS 209450, 2021 WL 5038764, at *1 (E.D.N.Y. Oct. 29, 2021)*. However, when the parties are direct competitors, the stayed party is usually prejudiced. *Boston Sci. Corp. v. Cordis Corp., 777 F. Supp. 2d 783, 789 (D. Del. 2011)* ("Courts are generally reluctant to stay proceedings where the parties are direct competitors."); *see Nidec Cor. v. LG Innotek Co., Ltd., 2009 U.S. Dist. LEXIS 46123, 2009 WL 3673433, at *4 (E.D. Tex. Apr. 3, 2009)* (collecting cases for proposition that stay usually incurs prejudice when party opponents are direct competitors).

Regeneron's stay request presents the Court with a close question. The only certainty about where the relevant factors stack up in terms of priority is that the third factor of the extent discovery has been completed and whether trial has been set is of the least importance. And that factor is decidedly mixed. On the one hand, a trial date has yet to be set for the '631 Patent case. But on the other, the parties have **[**37]** agreed that the extensive discovery from the ITC review will carry over for the '631 Patent case before this Court. *Novartis*, 1:20-CV-690, Dkt. 101-9, p. 4.

Ultimately, though, the fact that the Court has just disposed of the issue of claim construction pushes the '631 Patent case forward. Also, the substantial discovery that has been wrapped up through the ITC review similarly suggests that this case is not quite so short in the tooth as Regeneron would like. Taken together, these facts cut against imposing the stay. *See Sunbeam Prods., Inc. v. Hamilton Beach Brands, Inc., 2010 U.S. Dist. LEXIS 45654, 2010 WL 1946262, at *3 (E.D. Va. May 10, 2010)* (explaining that case not being ready for trial does not cut in favor of stay so much as suggest that if stay is to be granted it is best to do so in early stages).

Which leaves the Court to consider the two more substantial factors: the extent to which a stay would simplify matters on the one hand and the resulting prejudice to Novartis on the other. On the first point, Regeneron argues that there is a chance that the '631 Patent will be struck down entirely, in which case there is neither need nor benefit to allowing the '631 Patent case to continue towards resolution. But Novartis counters that many of Regeneron's intended arguments in the '631 Patent case will not be available to it during the *inter partes* review. **[**38]** In fact, only its argument for obviousness will. As a result, if the '631 Patent survives the *inter partes* review, this case will not be simplified in any meaningful way.

Many courts in similar positions have held that even if it is possible that the issues will be simplified by a complete dismissal during an *inter partes* review, a stay is typically not warranted if there is a potential that only one issue among many will be resolved. *See* *Imax Corp. v. In-Three, Inc., 385 F. Supp. 2d 1030, 1032* **[*48]** *(C.D. Cal. 2005)*. The Court finds that logic persuasive, given the abundance of arguments Regeneron raises about the '631 Patent's invalidity, including their fraud challenge that formed the backbone of the Antitrust case. Accordingly, though some simplification may result from the PTO's review, this factor only slightly favors Regeneron.

By contrast, Novartis has amply demonstrated that prejudice to it is likely to result from a stay. For one thing, there can be no doubt that Novartis and Regeneron are direct competitors, which counsels strongly in favor of finding prejudice to Novartis. *Boston Sci. Corp., 777 F. Supp. 2d at 789*.

To refute that apparent prejudice, Regeneron points out that the board conducting the *inter partes* review owes the parties a final decision no later than October of 2022. *35 U.S.C. § 316(a)(11)*. But as Novartis correctly counters, **[**39]** the review board may extend the deadline to issue a decision another six months, to April of 2023. *Id.*

On top of that, Regeneron explicitly requests that the Court stay the '631 Patent case until any appeals of the *inter partes* review to the Federal Circuit have concluded. *37 C.F.R. § 90.3* (requiring that any appeals of PTO decision be taken to Federal Circuit). Given that court's heavy caseload, it would not come as a surprise for that process to take more than another year to come to an end. In total, then, a stay while the PTO examines the validity of the '631 Patent could tack on at least another two or three years to this case. ***HN27***[] Courts routinely find stays of multiple years to be long enough to result in prejudice to the non-moving party. *See, e.g.,* *ADA Sols., 826 F. Supp. 2d at 351* (finding prejudice when delay between competitors could stretch on for years).

In other words, upon careful review, though there is at least a chance that the issues in the '631 Patent case could be simplified if the Court sat until the PTO had its say, that possibility is not enough to outweigh the near-certainty of prejudice to Novartis if the stay is granted. All the more so when the bulk of the discovery in this case has already been completed. Regeneron's request for a stay must **[**40]** therefore be denied. *See, e.g.,* *ADA Sols., Inc. v. Engineered Plastics, Inc., 826 F. Supp. 2d at 350-52* (declining to grant stay where some issues would be clarified by stay and trial was in early stages but prejudice would result to patent plaintiff).

IV. CONCLUSION

These two cases are not without their complications, to say the least. Between the multiple competing claims, the various avenues of external review, and the three disparate yet roughly contemporaneous motions, the result was something of a quagmire. Nonetheless, at the close of the present motion practice, it is the Court's hope that a clearer path forward has opened. The definitions of all necessary terms for the '631 Patent have been set. The Antitrust case has been dismissed. And the '631 Patent case is proceeding forward towards its resolution. Whether that path will in fact turn out to be as clear as it seems is a question for another day. For now, there is nothing else to do but to let the parties to begin to walk it.

Therefore, it is

ORDERED that

1. Regeneron Pharmaceuticals, Inc.'s proposed claim construction is adopted in its entirety, and the Court affixes the meanings suggested by Regeneron Pharmaceuticals, Inc. to every disputed claim term;

2. Novartis Pharma AG, Novartis Pharmaceuticals Corporation, Novartis **[**41]** Technology LLC, and Vetter Pharma International GMBH's motion **[*49]** to dismiss Regeneron Pharmaceuticals, Inc.'s complaint in *Regeneron Pharmaceuticals, Inc. v. Novartis Pharma AG*, 1:21-CV-1066 is GRANTED;

3. Regeneron Pharmaceuticals, Inc.'s complaint in *Regeneron Pharmaceuticals, Inc. v. Novartis Pharma AG*, 1:21-CV-1066 is DISMISSED with prejudice;

4. The clerk of court is directed to enter judgment accordingly and close the case file for *Regeneron Pharmaceuticals, Inc. v. Novartis Pharma AG*, 1:21-CV-1066; and

5. Regeneron Pharmaceuticals, Inc.'s motion to stay proceedings in *Novartis Pharma AG v. Regeneron Pharmaceuticals, Inc.*, 1:20-CV-690 pending the Patent and Trademark Office's *inter partes* review of the validity of the '631 Patent is DENIED.

IT IS SO ORDERED.

Dated: January 31, 2022

Utica, New York.

/s/ David N. Hurd

David N. Hurd

U. S. District Judge

In re Foreign Exch. Benchmark Rates Antitrust Litig.

United States District Court for the Southern District of New York

February 1, 2022, Decided; February 1, 2022, Filed

13 Civ. 7789 (LGS)

Reporter

2022 U.S. Dist. LEXIS 18083 *; 2022 WL 294118

In re FOREIGN EXCHANGE BENCHMARK RATES ANTITRUST LITIGATION

Prior History: Simmtech Co. v. Barclays Bank PLC (In re Foreign Exch. Benchmark Rates Antitrust Litig.), 74 F. Supp. 3d 581, 2015 U.S. Dist. LEXIS 9826 (S.D.N.Y., Jan. 28, 2015)

Core Terms

trader, conspiracy, spreads, chat room, banks, responded, Defendants', widen, antitrust, currency, wider, competitors, prices, interdependence, conspirator, trading, participated, summary judgment, encouraged, alleged conspiracy, co-conspirators, quotation, global, pairs, common goal, sharing, venture, motive, marks, circumstantial evidence

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Judges: LORNA G. SCHOFIELD, UNITED STATES DISTRICT JUDGE.

Opinion by: LORNA G. SCHOFIELD

Opinion

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge:

This case concerns an alleged conspiracy, or conspiracies, among banks to fix prices in the foreign exchange ("FX") market. On September 3, 2019, a Rule 23(c)(4) class was certified on two issues: (1) the existence of a conspiracy to widen spreads in the FX spot market and (2) participation in the conspiracy by Defendants Credit Suisse Group AG, Credit Suisse AG and Credit Suisse Securities (USA) LLC (collectively, the "CS Defendants" or "Credit Suisse"). The CS Defendants move for summary judgment on the basis that there is no single conspiracy or that the CS Defendants did not participate in such a conspiracy. Plaintiffs cross-move for summary judgment on the basis **[*19]** that there is a conspiracy and the CS Defendants participated in it. For the reasons set forth below, both motions are denied.

In this action, Plaintiffs sued sixteen defendant banks, which are among the world's largest banks engaged in trading in the FX market. Fifteen of the sixteen banks have settled with Plaintiffs, paying over $2.31 billion, one of the largest antitrust settlements in the *Sherman Antitrust Act*'s 125-year history. The fifteen banks settled after filing motions to dismiss. In the case of each bank, the final order approving the settlement included a term barring claims for contribution or indemnification against the settling banks for any amounts awarded in this or any other action by way of settlement, judgment or otherwise.

With only Credit Suisse remaining, Plaintiffs moved to certify two Rule 23(b)(3) classes. Plaintiffs' motion was denied -- one class because of the lack of predominance, and the other class because of the absence of adequacy. *In re Foreign Exch. Benchmark Rates Antitrust Litig., 407 F. Supp. 3d 422, 430, 438 (S.D.N.Y. Sept. 3, 2019)*. Instead, a Rule 23(c)(4) class was certified. *Id. at 436*. The two issues certified, and the only issues that remain on a class basis, are: (1) the existence of a conspiracy to widen spreads in the FX spot market and (2) Credit Suisse's participation in the conspiracy. *Id.* The **[*20]** decision certifying the issues noted that "if the CS Defendants are found not to have joined any conspiracy, then all of the claims against it are resolved." *Id. at 437*.

The two certified issues have great financial significance because an adverse finding on both of these issues would mean that Credit Suisse is potentially liable for all of the wrongful conduct of the conspiracy, and thus Credit Suisse could be liable for all of the damages that have not already been paid through the settlements with the other banks.

See *New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1086 (2d Cir. 1988)* ("An amount recovered by a plaintiff from a coconspirator in settlement of the former's antitrust claims is not deductible from the amount of damages determined by the jury, though it may be deductible from the damages award after it has been trebled."); *In re Foreign Exch. Benchmark Rates Antitrust Litig., No. 13 Civ. 7789, 2016 U.S. Dist. LEXIS 128237, 2016 WL 5108131, at *7 (S.D.N.Y. Sept. 20, 2016)* (collecting cases discussing joint and several liability in the antitrust context).

Credit Suisse moves for summary judgment on the basis that there was no "single conspiracy" to widen spreads in the FX spot market. Tellingly, it does not directly argue that no conspiracy existed.

I. BACKGROUND

The following facts are drawn from the parties' submissions, including their Local Civil Rule 56.1 statements, are undisputed and provide an overview of the **[*21]** context of the parties' dispute.

Plaintiffs are over-the-counter ("OTC") purchasers of foreign exchange ("FX") spot, forward and/or swap trades who transacted directly with Defendants. Over-the-counter transactions involve counterparties who trade directly with each other without an intermediate exchange. CS Defendants participate in the FX market as dealers, market-makers or liquidity providers.

The FX market[1] is the largest and most actively traded financial market in the world. Between December 1, 2007, and December 31, 2013 (the "Class Period"), as much as $5.3 trillion per day was traded in the FX market worldwide. Trading occurs twenty-four hours per day and over 252 trading days per year. During the Class Period, FX trading by volume was primarily conducted OTC. Currencies are bought or sold in pairs.

Trading in the FX market occurs in two tiers: (1) the interdealer or interbank tier and (2) the dealer-to-customer tier. This case concerns the dealer-to-customer tier. In that tier, Defendants, large banks, acted as market makers or dealers. Market makers quote prices to customers at which they are willing to buy or sell a certain volume of a currency pair. For example, a customer **[*22]** contacts a salesperson at a market-making bank to request a price quote in a designated volume of a specific currency pair. The salesperson relays the request to an FX trader, who provides a two-way quote that includes the prices at which the trader is willing to buy the currency and sell the currency. The difference between the buy or ask price and the sell or offer price is the bid-ask spread.

In late 2006 and early 2007, FX traders who worked for different Defendants began using Bloomberg and Reuters chat rooms to communicate with each other. FX traders continued using chat rooms to communicate with traders at other banks through 2012 and 2013. FX traders discussed bid-ask spreads for various currency pairs in the chat rooms. Chat rooms could exist for years, and some traders communicated with other traders daily in the course of their employment. At least one trader, from Barclays, participated in five chat rooms, which provided him access to traders from ten other banks. Because individual traders participated in multiple chat rooms, eight chat rooms connected employees of all sixteen Defendant banks. At least some FX traders sometimes asked about the same spread simultaneously **[*23]** in different chat rooms. Some banks, including Credit Suisse, encouraged their employees to use interbank chat rooms and discuss bid-ask spreads in those chat rooms.

II. STANDARD

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[1] CS Defendants frequently refer to "FX markets" instead of the FX market in their Rule 56.1 statement. [Dkt. 1594-53 ¶¶ 39, 40]. However, CS Defendants provide no basis for viewing the FX market as a series of markets. The expert report the CS Defendants cite refers to "the FX Market" and in their Answer to the Third Consolidated Amended Class Action Complaint, CS Defendants refer to the "FX market" without denying the appropriateness of referring to it as a single market. CS Defendants dispute the use of the word "market." However, in their answer to the operative complaint and in their expert report, "market" is used. As a result, "market" is adopted here.

A. Summary Judgment

Summary judgment is proper where the record establishes that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A genuine dispute exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *accord* *Electra v. 59 Murray Enters., 987 F.3d 233, 248 (2d Cir. 2021)*. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Liberty Lobby, 477 U.S. at 248*; *accord* *Saleem v. Corp. Transp. Grp., 854 F.3d 131, 148 (2d Cir. 2017)*.

Courts must construe the evidence and draw all reasonable inferences in the non-moving party's favor. *Electra, 987 F.3d at 248*. When evaluating cross-motions for summary judgment, the Court reviews each party's motion on its own merits and draws all reasonable inferences against the party whose motion is under consideration. *Cayuga Nation v. Tanner, 6 F.4th 361, 2021 WL 3160077, at *8 (2d Cir. 2021)*. When the movant properly supports its motion with evidentiary materials, the opposing party must establish a genuine issue of fact by citing to particular parts of materials in the record. *Fed. R. Civ. P. 56(c)(1)(A)*.

B. *Sherman Act*

Section 1 of the Sherman Act provides, "Every contract, combination **[*24]** in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several [s]tates, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. An antitrust plaintiff must show: (1) "a combination or some form of concerted action between at least two legally distinct economic entities" and (2) "that the agreement constitute[s] an unreasonable restraint of trade either per se or under the rule of reason." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 542 (2d Cir. 1993)*. "Price-fixing agreements . . . fall into the category of arrangements that are per se unlawful." *In re Vitamin C Antitrust Litig., 8 F.4th 136, 147 (2d Cir. 2021)* (quoting *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*) (explaining that "certain types of anticompetitive conduct are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality" under the *Sherman Act*). "Independent action is not proscribed." *Meredith Corp. v. Sesac, LLC, 1 F. Supp. 3d 180, 201 (S.D.N.Y. 2014)* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*).

At the summary judgment stage, "to raise a genuine issue of material fact as to an antitrust conspiracy, the plaintiff must present direct or circumstantial evidence that 'tends to exclude the possibility that the alleged conspirators acted independently.'" *Anderson News, L.L.C. v. Am. Media, Inc., 899 F.3d 87, 98 (2d Cir. 2018)* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*). A plaintiff need not "disprove all nonconspiratorial explanations for the defendants' conduct; rather the evidence need be sufficient only to allow a reasonable **[*25]** fact finder to infer that the conspiratorial explanation is more likely than not." *Id.* (internal quotation marks omitted).

"Absent direct evidence of conspiracy, such as an admission by one of the defendants, antitrust plaintiffs must rely on circumstantial evidence to support their conspiracy claims." *Anderson News, L.L.C., 899 F.3d at 103*. "One powerful form of circumstantial evidence is parallel action—proof that defendants took identical actions within a time period suggestive of prearrangement." *Id. at 104*. Parallel action is not sufficient on its own to prove the existence of a conspiracy. *Id.* When parallel behavior is the basis of a *Sherman Act* claim, a plaintiff must show additional circumstances, referred to as "plus factors" to permit a factfinder to infer a conspiracy. *Id.* Plus factors include "traditional evidence of conspiracy," such as statements permitting an inference that defendants entered into an agreement and indirect evidence such as "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Id.* (internal quotation marks omitted); *see also United States v. Apple, Inc., 791 F.3d 290, 315 (2d Cir. 2015)* (discussing plus factors). **[*26]** "[D]efendants' conduct and communications must be evaluated in context and with the overall picture in mind." *Anderson News, L.L.C., 899 F.3d at 104* (internal quotation mark omitted).

To demonstrate the existence of a conspiracy, an "antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co., 465 U.S. at 764* (internal quotation marks and citation omitted); *accord* *Anderson News L.L.C., 899 F.3d at 97*. "Circumstances must reveal a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 183 (2d Cir. 2012)* (internal quotation marks omitted); *accord* *In re Keurig Green Mt. Singleserve Coffee Antitrust Litig., 383 F. Supp. 3d 187, 241-42 (S.D.N.Y. 2019)*.

"Whether the [plaintiff] has proved a single or multiple other independent conspiracies is a question of fact for a properly instructed jury." *United States v. Sureff, 15 F.3d 225, 229 (2d Cir. 1994)* (internal quotation marks omitted); *accord* *United States v. Freedman, No. 18 Crim. 217, 2019 U.S. Dist. LEXIS 122647, 2019 WL 3296967, at *2 (S.D.N.Y. July 23, 2019)*. Multiple conspiracies may be found when "the evidence shows separate networks operating independently of each other, but it is not warranted when the evidence shows that each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal." *United States v. Dawkins, 999 F.3d 767, 797 (2d Cir. 2021)* (internal quotation marks omitted) (finding no error in refusal to **[*27]** give a multiple conspiracy jury instruction). "Even schemes involving 'two or more phases or spheres of operation' may nevertheless amount to a single conspiracy, 'so long as there is sufficient proof of mutual dependence and assistance' among the conspirators." *United States v. Pena, 846 Fed. App'x 49, 51 (2d Cir. 2021)* (summary order) (quoting *United States v. Berger, 224 F.3d 107, 114-15 (2d Cir. 2000)* (considering overriding goal, overlap of leadership, and common participants as evidence that several schemes fell within same conspiracy)). "In determining whether a jury could have found a single conspiracy, courts generally examine three factors: (1) whether there was a common goal, (2) the nature of the scheme, and (3) the overlapping of participants in the various dealings." 1 Modern Federal Jury Instructions-Criminal P 19.01 (2021). Although the issue of a single versus multiple conspiracies arises more frequently in criminal cases, the same principles have been applied in civil antitrust cases to assess whether there are multiple conspiracies or a single conspiracy. *See, e.g.*, *Sitts v. Dairy Farmers of Am., Inc., 417 F. Supp. 3d 433, 467 (D. Vt. 2019)*; *In re Air Cargo Shipping Servs. Antitrust Litig., No. 06 MD 1175, 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at *37-38 (E.D.N.Y. Oct. 15, 2014)*, *report and recommendation adopted*, *2015 U.S. Dist. LEXIS 90402, 2015 WL 5093503 (E.D.N.Y. July 10, 2015)*.

In addition to showing that there is a conspiracy, a plaintiff must show that the defendant joined the conspiracy. To show that a defendant joined a conspiracy, a plaintiff "need **[*28]** not show that the defendant knew all of the details of the conspiracy, so long as [the defendant] knew of its general nature and extent." *In re Interest Rate Swaps Antitrust Litig., 261 F. Supp. 3d 460, 482 (S.D.N.Y. 2017)* (quoting *United States v. Huezo, 546 F.3d 174, 180 (2d Cir. 2008)*); *accord* *United States v. Khalupsky, 5 F.4th 279, 288 (2d Cir. 2021)*. A plaintiff need not show that the defendant knew the identities of all the other conspirators. *Id.* (internal quotation marks omitted).

III. DISCUSSION

A. Existence of a Conspiracy

Construing the evidence in favor of Plaintiffs on CS Defendants' motion, a reasonable jury could find that a single conspiracy existed to fix spreads in the FX market and that the supporting evidence tends to exclude the possibility that the alleged co-conspirators acted independently. Conversely, construing the evidence in favor of CS Defendants on Plaintiffs' motion, a reasonable jury could conclude that no single overarching conspiracy existed, and that only multiple smaller conspiracies existed. While significant uncontroverted evidence shows at least some conspiratorial activity in the FX market in which Credit Suisse participated, questions remain about the scope of the shared illegal goal and extent of the conspirators' mutual dependence and assistance. "If the evidence at trial supports an inference that there was more than one conspiracy, then, **[*29]** whether multiple conspiracies existed is a question of fact for the jury." *United States v. Vazquez, 113 F.3d 383, 386 (2d Cir. 1997)*; *accord* *Khalupsky, 5 F.4th at 288*.

1. Economic Plausibility

To survive summary judgment and "raise a genuine issue of material fact as to an antitrust conspiracy, the plaintiff must present direct or circumstantial evidence that 'tends to exclude the possibility that the alleged conspirators acted independently.'" *Anderson News, L.L.C., 899 F.3d at 98* (quoting *Matsushita Elec. Indus. Co., 475 U.S. at 588*); *accord* *DPWN Holdings Inc. v. United Air Lines, Inc., No. 11 Civ. 564, 2019 U.S. Dist. LEXIS 63202, 2019 WL 1515231, at *13 (E.D.N.Y. Feb. 21, 2019)*. The quality of evidence required to satisfy the "tends to exclude" standard "varies with the economic 'plausibility' of the alleged agreement." *Id. at 99*. "[W]here context reveals that the alleged agreement is one that simply makes no economic sense, the plaintiff must come forward with more persuasive evidence to support its claim than would otherwise be necessary." *Id.* (internal quotation marks omitted). "In a case where the alleged scheme is short-term and relatively simple in operation," a plaintiff's burden is lighter. *Apex Oil Co v. DiMauro, 822 F.2d 246, 253 (2d Cir. 1987)*.

Because "the quality of evidence required to satisfy *Matsushita's* 'tends to exclude' standard varies with the economic 'plausibility'" of an alleged agreement, it is important to analyze the alleged agreement at issue before weighing the evidence. *Anderson News L.L.C., 899 F.3d at 99*. For the reasons explained below, the alleged **[*30]** agreement makes economic sense, even though the concerted action took place over a nearly five-year period and involved a significant number of actors at sixteen banks.

Plaintiffs allege a horizontal price fixing scheme in which Defendants, who are frequently competing dealers in the FX spot market, conspired to fix the bid-ask spreads for fifty-two currency pairs in the foreign exchange market. By fixing the spreads, Defendants could keep the spread wide while buying low and selling high. Most dealers want wider spreads because wide spreads increase their probability of making money.

Plaintiffs' theory makes economic sense. Defendants had an incentive to fix spreads and keep them as wide as possible because wider spreads would enable them, as market makers, to increase the profitability of their trading activity in the FX market. Because spreads could remain stable for lengthy periods of time in normal market conditions and can correlate across trade size and sometimes across certain currency pairs, the wide spreads could have a lasting and reinforcing impact on the market.

CS Defendants do not specifically contest the economic plausibility of Plaintiffs' theory. CS Defendants argue **[*31]** that the number of currencies, the global 24/7 nature of trading and the speed at which liquidity conditions changed would require "an extraordinary level of coordination and monitoring" among traders at the sixteen Defendant banks. The number of currencies and the global 24/7 nature of trading are elements that add to the complexity of the agreement alleged by Plaintiff, but they do not directly make Plaintiffs' theory less economically plausible because Defendants' rational economic motive is the same regardless of the number of currencies impacted or the amount of time in which trading occurs. *See* *Anderson News, L.L.C., 899 F.3d at 102* (considering economic plausibility through the lens of defendants' "rational economic motive" to join the alleged conspiracy). The parties disagree about the speed at which the market changes. Plaintiffs offer chat transcripts in which traders point to spreads that remained stable for more than twelve months. CS Defendants offer testimony that pricing information could be stale some of the time and the market could be unpredictable "even in [the] next second." CS Defendants' evidence that prices sometimes changed rapidly does not preclude that, at other times, prices remained stable over **[*32]** months-long periods.

Because Plaintiffs advance a plausible economic theory behind the alleged conspiracy, this is not a situation where they must come forward with more persuasive evidence to support their claim than would otherwise be necessary. Plaintiffs' overall burden is not low, however, because the conspiracy alleged is vast and its impact is complex.

2. Evidence of a Conspiracy

a. Direct Evidence of a Conspiracy to Achieve a Common Goal

Chat transcripts between Credit Suisse and the other Defendants provide direct evidence of an agreement and common goal to widen spreads. This evidence also shows cooperative and parallel conduct to achieve that goal.

Plaintiffs identify a chat room in which traders from Goldman Sachs, Credit Suisse and RBS agreed, at the Credit Suisse trader's suggestion, to "sign a pact on spreads." The RBS trader previously suggested "agree[ing] on the same spreads [because] it [is] pointless otherwise and we keep cutting spreads more and more." The Credit Suisse trader later testified at a deposition that he had been joking about the pact in March 2007, but the record shows not only that the traders continued exchanging spread information after suggesting a **[*33]** pact, but also that he prodded the RBS trader to confirm his participation in the pact by asking "u in." Plaintiffs offer multiple examples of traders in that chat room encouraging each other to widen spreads and avoid tight spreads. So even if the pact was a joke, the evidence still shows the traders endeavoring to widen spreads with competing banks. The Credit Suisse trader asked a trader at Goldman Sachs for the "spread in 500 usdjpy." The Goldman Sachs trader responded that 25 is good but suggested showing a wider spread of 30. The Credit Suisse trader responded "ok." In another instance involving the New Zealand Dollar and U.S. Dollar, the RBS trader asked what the spread should be. The Credit Suisse trader said, "in [a] normal [market] 20" but, "at the mo" 28. The RBS trader responded, "ok ta."

Plaintiffs point to at least fourteen instances in chat transcripts of Credit Suisse traders encouraging others to use wider spreads or acceding to wider spreads at the request of other traders. (1) In March 2008, a trader from RBC asked about the spread for "200 eursek," a trader from Deutsche Bank suggested 175 to 200 pips and a Credit Suisse trader suggested it should be 200. (2) Later **[*34]** in the same chat room in September 2008, a Credit Suisse trader asked for the spread in "50 eurjpy," and when traders at other banks told him that it should be 8 or 8 to 10, he responded that 10 is fair. (3) A Bank of America trader in the same chat room in January 2009, when told that the spread in "30 usd nok" is 200, responded that "[you] know [I] am not going to be narrower" although he had worked it out as 115. (4) Also in January 2009, a trader from Credit Suisse told a trader from another bank that he showed the Euro-U.S. Dollar spread in 200 as 18, but he would actually be 20. On that same day in the same chat room, a trader from Goldman Sachs proclaimed, "the day of customers holding us to ransom over spreads is over." (5) In a different chat room in May 2010, a Credit Suisse trader asked, "how wide you guys make in 100usdmxn" because "all our mxn traders out we're clueless." (6) In another chat room in June 2010, a trader from Bank of America shared that he widened the British Pound U.S. dollar spread he offered, and a trader from Credit Suisse confirmed that the wider spread "is good." (7) In that same month, in response to suggested spreads for Euros to Swedish Krona and **[*35]** Norsk Krone, a Credit Suisse trader responded that he thought the spreads on his chart "were too tight" so he was "widening [them] now." (8) In September 2010, a Credit Suisse trader asked a Deutsche Bank trader if 50 and 100 "gbpnok prices" are "125 and 225," the Deutsche Bank trader said "its wider than u think" and the Credit Suisse trader responded that he'll "say 130 and 250." (9) In a discussion about the spread for "100 noksek" in December 2010, a Credit Suisse trader responded to a suggestion that the spread is 10 with "no chance" it is like "10-12 in 100." (10) In February 2011, when a Credit Suisse trader asked for a "normal morning spread in 25 eursek" and a trader from Deutsche Bank said "3040 . . . i'd show 40 then come in if u need," the Credit Suisse trader responded that he said 40. (11) In October 2011, a Credit Suisse trader asked, "how wide 75 eur, 4?" and was encouraged by traders from Société Générale and Bank of America to go with 5, to which he responded, "ok." (12) In March 2012, when asked if the spread in 200 Australian Dollars to U.S. Dollars is 12, a Credit Suisse trader responded it is a "bit wider, 14." (13) In April 2012 the "Yen Cartel" chat room, when **[*36]** asked if "400 usdjpy" is 14, a Credit Suisse trader responded it is "15 I think." (14) In August 2012, during a discussion about the Euro to Japanese Yen spread, a Credit Suisse trader said the spread is "too tight but it[']s what [customers] expect . . . unless we all decide to make wider, we have the power." A Morgan Stanley trader responded with a wider spread and the Credit Suisse trader responded "done," and a JP Morgan trader responded "[I] agree." Plaintiffs also identify numerous examples of traders at other banks encouraging traders to use wider spreads.

In 2012, as some banks began instructing their traders to close their permanent chat rooms that included traders from other banks, a trader from JP Morgan in the "Yen Cartel" chat room messaged a Credit Suisse and Bank of

America trader, "what the hell are u two planning, this chat is a compliance dream." The Credit Suisse trader wrote, "we are mearly [sic] sharing market information to get the best possible rates for our [customers] and the our [sic] banks," to which the Bank of America trader responded, "hahahah," and the JP Morgan trader responded, "ya sure."

A trader who pleaded guilty to a conspiracy for conduct in one **[*37]** chat room testified that he participated in similar conduct in a separate chat room called "Old Gits." He testified that his conduct in the chat room for which he pleaded guilty was "extremely explicit" in comparison. "Old Gits" included traders from HSBC, Barclays, Citi, Bank of America, Standard Chartered and Credit Suisse at various points in time. In the "Old Gits" chat room, the Credit Suisse trader told the other traders to "just both quote them wide and same that way they have no tight price." CS Defendants do not dispute that this is evidence of an FX trader encouraging others to exchange spreads to get on the same page with competitors.

Plaintiffs identify traders who testified to the practice of inquiring about spreads from competitors directly in response to requests for quotes from clients. For example, a Citibank trader who pleaded guilty to price-fixing charges testified that when clients called for a quote from multiple banks, participants in a chat room would convey what they were being asked and indicate the price they were showing to the client. A trader who worked at BNP and Barclays testified that the exchange of prices in chat rooms should not happen because banks **[*38]** are supposed to be independent and that exchanging spreads among competitors can affect the prices shown to clients. A trader from Morgan Stanley, immediately after discussing spreads, wrote, "can never be a bad thing colluding spreads."

Plaintiffs offer evidence that traders took action to enforce parallel conduct. For example, when a trader at Barclays heard that someone at HSBC was quoting a narrower spread than the Barclays trader, he reached out to traders at JP Morgan and RBS to check their spreads. The Barclays trader asked the RBS trader to check with someone at HSBC and, if the HSBC trader was quoting a narrower spread, tell them to stop. The RBS trader messaged the HSBC trader, who responded that he was not quoting the narrower spread. In another chat room, a different trader from HSBC warned traders from Standard Chartered, Bank of America and Citi not to show a certain narrow spread. Plaintiffs also present multiple examples of traders inquiring about spreads with competitors while stating that they need the spreads to come up with values for grids, which could be shown to customers as indicative spreads for normal market conditions.

CS Defendants' only suggestion that the **[*39]** sharing of pricing information is not part of a conspiracy is that traders shared "market color." CS Defendants do not submit a definition of market color but suggest that traders were not agreeing to fix spreads but merely talking about them. CS Defendants cite in their memorandum of law in support of their motion for Summary Judgment a "key industry guide to appropriate behavior in the FX markets." The portion of the guide they quote states, "The timely dissemination of Market Colour between Market Participants can contribute to an efficient, open, and transparent FX Market through the exchange of information on the general state of the market, views, and anonymised and aggregated [client order] flow information." Nothing in that guide suggests that real-time price spreads are considered market color to be shared. The guide refers to market color as information on "the general state of the market, views, and . . . aggregated flow information." Even if traders thought they were just sharing "market color" when they provided pricing information in exclusive chat rooms, CS Defendants, in their memoranda of law, do not point to any evidence suggesting that exchange was pro-competitive **[*40]** or consistent with any sort of independent action.

b. Circumstantial Evidence of a Conspiracy

Plaintiffs offer significant evidence of "plus factors" in support of finding a conspiracy (i.e., agreement) to widen spreads, including a high level of communication among the conspirators, conduct that was sometimes against the conspirators' economic self-interest, and invoking the *Fifth Amendment* privilege against self-incrimination.

One important plus factor is "evidence of a high level of interfirm communications." *Anderson News, L.L.C., 899 F.3d at 104*. Plaintiffs present a chart, based on chat logs, that displays more than 400 instances of interfirm communication regarding spreads for a variety of currency pairs. As discussed above, while many of these instances involved direct discussions of widening spreads, in hundreds of other conversations, traders at competing banks exchanged data about various currency bid-ask spreads. Plaintiffs also demonstrate that Credit Suisse was connected to all of the other Defendants through just four overlapping chat rooms in which traders exchanged information about spreads.

Plaintiffs point to significant evidence that permit an inference that Defendants entered into an agreement. Two chat rooms, including **[*41]** one with a Credit Suisse trader, had the word cartel in their names. Traders in multiple chat rooms discussed collusion and regulators' concerns that sharing spreads is collusion. A Credit Suisse trader testified that Credit Suisse encouraged him to use interbank chat rooms and talk about spreads in the FX market. The same trader worked at HSBC and Barclays, which also encouraged him to participate in chat rooms. Multiple traders testified that it was their belief that the exchange of spreads in chat rooms was a common practice in the FX market.

Plaintiffs provide evidence of traders' motives to widen spreads even though it is not always in their economic self-interest to do so. Wider spreads increase the likelihood that a trade will be profitable for dealers, like Defendants. One Credit Suisse trader encouraged traders from other banks to "just both quote them wide and same that way they have no tight price." Credit Suisse does not dispute that this motive exists and instead emphasizes that a common motive is insufficient on its own to establish a conspiracy. But a common motive does support a finding of a single conspiracy rather than multiple conspiracies. To undercut Plaintiffs' **[*42]** motive argument, CS Defendants point to evidence that widening spreads is against the economic self-interest of the banks, and that sometimes traders prefer a narrower spread, which would make a customer more likely to deal with them as opposed to a competitor. However, this argument concedes that efforts to widen spreads are not in the economic self-interest of Defendants, which is a plus factor that contributes to evidence that a conspiracy existed, *see* *Anderson News, L.L.C., 899 F.3d at 104*. Wider spreads may decrease the likelihood of making a single trade in one instance, but maintaining wider spreads with competitors could increase the likelihood of dealers profiting on each trade.

That three former Credit Suisse employees, as well as many other of the other Defendants' employees, asserted their *Fifth Amendment* privilege against self-incrimination contributes to the circumstantial evidence of a conspiracy. *See* *Baxter v. Palmigiano, 425 U.S. 308, 318, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976)* ("[T]he *Fifth Amendment* does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them . . . ."); *LiButti v. United States, 178 F.3d 114, 120 (2d Cir. 1999)* (holding that trial court did not abuse its discretion in drawing and relying on an adverse inference where other evidence also supported the inference); **[*43]** *Sausa v. Vill. of W. Hampton Dunes, No. 18 Civ. 3802, 2021 U.S. Dist. LEXIS 185801, 2021 WL 4443712, at *4 (E.D.N.Y. Sept. 28, 2021)*; *Amusement Indus. v. Stern, No. 7 Civ. 11586, 2016 U.S. Dist. LEXIS 106555, 2016 WL 4249965, at *7 (S.D.N.Y. Aug. 11, 2016)*, *report and recommendation adopted*, *2016 U.S. Dist. LEXIS 163036, 2016 WL 6820744 (S.D.N.Y. Nov. 10, 2016)*, *aff'd*, *721 F. App'x 9 (2d Cir. 2018)* (summary order). Three former Credit Suisse traders asserted their *Fifth Amendment* rights when asked whether Credit Suisse conspired on spreads with its competitors. CS Defendants challenge the admissibility of traders' invocations of the *Fifth Amendment* privilege but offer no argument in support of their challenge.

c. Single Versus Multiple Conspiracies

Plaintiffs provide sufficient evidence of a single conspiracy to survive the CS Defendants' motion for summary judgment, but facts in dispute preclude Plaintiffs from prevailing on their motion for summary judgment. In other words, a reasonable jury could find for either Plaintiffs or Defendants on the issue of whether there existed a single conspiracy, as Plaintiffs allege, or multiple conspiracies, as Defendants' argue, depending on the inferences that are drawn and the evidence that is credited.

To determine whether there was one overarching conspiracy to widen spreads, or multiple smaller conspiracies (for example, each chat room representing a separate conspiracy), the inquiry is what binds the alleged conspirators and their conduct together. As Defendants point out, parallel action is insufficient. *See* *Apex Oil, 822 F.2d at 252*

("[E]vidence **[*44]** of parallel conduct alone cannot suffice to prove an antitrust conspiracy."). Tweaking Defendants' example, it would be wrong to say that many drivers exceed the speed limit, use common means to do so and have a common goal for traffic to move more quickly and therefore are engaged in a single global conspiracy. Although a common goal is essential, and parallel conduct is probative, the evidence must provide something more to bind the participants and their conduct together to show a collective venture -- and hence an illegal conspiracy -- rather than independent unlawful conduct.

i. Overlapping Participants

Overlapping participants support a finding of a single conspiracy rather than multiple conspiracies. *See Berger, 224 F.3d at 114-15*. Here, the sixteen alleged co-conspirator banks all, through their agents, participated with each other in an interconnected network of chat rooms where they exchanged information related to spreads in the FX markets. Individual traders participated in multiple chat rooms, so that eight chat rooms connected employees of all sixteen Defendant banks. Credit Suisse overlapped with the fifteen other banks in just four multi-bank chat rooms. A single trader, from Barclays, participated **[*45]** in five chat rooms, which provided him access to traders from ten other banks. Some FX traders asked about the same spread simultaneously in different chat rooms. The participants shared information regarding different currency pairs at different times, but the record shows that each Defendant participated in the soliciting and provisioning of spreads in the FX market.

CS Defendants argue that there "is no legally cognizable theory under which hundreds of traders in dozens of exclusive chat rooms, who often undercut and competed even with other chat room members, can be connected into a single conspiracy." The argument is unpersuasive for three reasons. First, CS Defendants base this argument largely on the theory of hub-and-spoke conspiracies, which is not applicable to this case. Hub-and-spoke conspiracies involve "an entity at one level of the market structure, the 'hub,' coordinat[ing] an agreement among competitors at a different level, the 'spokes.'" *Apple, Inc., 791 F.3d at 314*. Plaintiffs do not allege a hub-and-spoke conspiracy. Instead, Plaintiffs contend that the co-conspirator banks all acted at the same level of the market structure and participated in a single horizontal conspiracy. Second, CS Defendants' **[*46]** argument ignores that the hundreds of FX traders each worked for one of sixteen Defendants and were agents of a Defendant when they entered chat rooms and shared information with traders at other banks. That all hundreds of FX traders did not convene or further the conspiracy and that no single chat room involved all Defendants does not preclude the existence of a single conspiracy. *See Khalupsky, 5 F.4th at 288*; *In re Interest Rate Swaps Antitrust Litig., 261 F. Supp. at 482*; *In re Elec. Books Antitrust Litig., 859 F. Supp. 2d 671, 690 (S.D.N.Y. 2012)* (holding that a defendant's involvement "in only a portion" of a conspiracy "does not undermine the existence of the conspiracy itself or [the defendant's] role as a participant"). Third, instances of price competition and examples of offered spreads narrower than the spreads discussed in chat rooms does not undermine the existence of an agreement and conduct aimed at widening spreads. *See Gelboim v. Bank of Am. Corp., 823 F.3d 759, 776 (2d Cir. 2016)* (recognizing a difference between the existence of a conspiracy and its efficacy and that an antitrust claim may be "based on the influence that a conspiracy exerts on the starting point for prices").

CS Defendants' contention that the invitation-only nature of chat rooms "refutes any notion of vast cooperation" is unavailing. That the Defendants shared pricing information only in small subgroups does not negate **[*47]** the scale of the information sharing among the Defendants or the number of connections between each of the Defendants. The venture is no less a collective one because actions were carried out in small part by different participants in the conspiracy. *See Khalupsky, 5 F.4th at 288* (recognizing that a defendant need not know all of the details of a conspiracy); *In re Elec. Books Antitrust Litig., 859 F. Supp. at 690* (holding that a defendant's involvement "in only a portion" of a conspiracy "does not undermine the existence of the conspiracy itself or [the defendant's] role as a participant").

ii. Cooperation in a Collective Venture

Plaintiffs have provided strong evidence to show that the sixteen co-conspirators cooperated in a collective venture directed to a common goal. The cooperative and collective nature of the scheme is shown through chat transcripts, in which traders working for Defendants referred to their activity as based on a "pact" and as a "cartel." Traders also frequently spoke about keeping the same spread, making the "cartel gold," getting on the "same page" and maintaining the "right" spread. Traders, including those at Credit Suisse, frequently encouraged other traders to adopt wider spreads. A few traders understood that there existed a "gentleman's **[*48]** agreement" not to undercut spreads agreed upon in chat rooms. At least some FX traders sometimes asked about the same spread simultaneously in different chat rooms. Here, the collective nature of the venture is apparent; CS Defendants and the alleged co-conspirators could not widen or stabilize spreads without mutual assistance and cooperation.

CS Defendants' argument about the implausibility of a global conspiracy rests on testimony that misconstrues the alleged conspiracy. CS Defendants point to testimony about the size of the market, the frequency of pricing changes and the volume of trading to contend the conspiracy alleged by Plaintiffs is implausible. But much of that testimony rests on a belief that Plaintiffs allege Defendants "pre-determined" spreads or "dominat[ed]" the market. The conspiracy alleged by Plaintiffs is more subtle than a venture to preset all prices and maintain them through complete market domination.

CS Defendants' contention that evidence in the chat rooms of traders competing to take business from one another prevents Plaintiffs from showing that Defendants knew they were engaged in a common venture directed at a common goal is unavailing. Competition may **[*49]** be evidence that the conspiracy existed but did not achieve its goal, or that there was no conspiracy; but evidence of competition does not preclude the existence of a conspiracy. *See* *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)* ("It is the 'contract, combination . . . or conspiracy in restraint of trade or commerce' which *§ 1* of the [Sherman] Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other."); *Gelboim, 823 F.3d at 776* ("*Socony-Vacuum* allows an antitrust claim based on the influence that a conspiracy exerts on the starting point for prices."); *Iowa Pub. Emps. Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc., 340 F. Supp. 3d 285, 320 (S.D.N.Y. 2018)* ("[T]he presence of some divergent conduct does not negate the allegations of other, parallel conduct.").

iii. Interdependence

Plaintiffs have provided strong evidence of mutual dependence, or interdependence between co-conspirators and their agents, though not necessarily between chatrooms. The strongest evidence of interdependence is that each Defendant relied on other Defendants to provide pricing information when asked in chat rooms and Defendants furnished such information in return when requested. *See* *United States v. Container Corp. of Am., 393 U.S. 333, 335, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969)* (holding that requests by a defendant from its competitor for information on pricing and competitors providing that information with the expectation **[*50]** that it would receive reciprocal information when it wanted was "sufficient to establish the combination or conspiracy, the initial ingredient of a violation of *§ 1 of the Sherman Act*"). In other words, sharing information to fix spreads, like sharing information to fix prices, is by its nature interdependent. Interdependence is also shown by traders' efforts to ensure that information regarding spreads is not used against the bank providing the information and traders' apologies for being slow to provide spread information when asked.

CS Defendants advance two unconvincing arguments against Plaintiffs' theory of interdependence. First, CS Defendants argue that it is not possible to square exclusivity of membership in chat rooms with interdependence. But, here, exclusivity was used to monitor the use of the information provided particularly because information about spreads could be used to undercut competitors and grow market share. Second, CS Defendants argue that Plaintiffs' theory of interdependence is overbroad because every participant in every industry would be interdependent if Plaintiffs' theory is credited. CS Defendants misconstrue Plaintiffs' theory to make this argument. Plaintiffs' **[*51]** theory of interdependence is that sharing nonpublic pricing information and expecting it in return creates an interdependence because of the risk that competitors will use the information to undercut the information provider. CS Defendants refer to the risk of being undercut as "simple economics," but ignore that Plaintiffs' theory rests on the initial step of trusting competitors with nonpublic information -- that mutual trust creates interdependence.

A more difficult question is whether and to what extent there was interdependence between or among chat rooms to support the inference of one global conspiracy versus multiple conspiracies comprised of each chat room. It is unclear from the parties' briefing what the relevant evidence shows, and it is not the Court's responsibility to go searching for this evidence. *See* *Amnesty Am. v. Town of W. Hartford, 288 F.3d 467, 470 (2d Cir. 2002)*; *725 Eatery Corp. v. City of New York, 408 F. Supp. 3d 424, 456 (S.D.N.Y. 2019)*. Nevertheless, mutual dependence is just one factor suggesting a single conspiracy, and the parallels and interconnections among the chatrooms discussed above may be sufficient to prove a single conspiracy, raising a question of fact for the jury.

d. Evidence as a Whole

Viewing the overall picture, Plaintiffs' evidence tends to exclude the possibility that the Defendant **[*52]** banks acted independently, but the parties dispute the material facts of the scope of the purported conspiracy. As Defendants argue, parallel conduct in the abstract is not enough to prove a conspiracy. But as Plaintiffs argue, the chatrooms and their participants here were all engaged in illegal conduct, unrestricted to any particular chatroom, currency pairs or traders. Those facts plus the others discussed above could support the inference of a global conspiracy or may be found to support only independent conspiracies. Ultimately, the weighing of inferences and conclusions to be drawn are for the finder of fact, precluding summary judgment for either Plaintiffs or Defendants.

CS Defendants argue that there was no participation in a single conspiracy because there was no "single document or testimony excerpt in which anyone acknowledges the existence of a single global conspiracy." They argue that "if a global conspiracy had existed, then certainly *one* of its hundreds of supposed participants, in millions of unguarded communications over a six-year period, would have said *something* about it." This argument is incorrect as a matter of law. "[I]t has long been settled that explicit **[*53]** agreement is not a necessary part of a *Sherman Act* conspiracy." *United States v. Gen. Motors Corp., 384 U.S. 127, 142-43, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*; *see also* *Brown v. Pro Football, 518 U.S. 231, 241, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996)* ("***Antitrust law*** also sometimes permits judges or juries to premise antitrust liability upon little more than uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable . . . ."). An agreement can be "tacit or express" and in most antitrust cases a "'smoking gun' can be hard to come by." *Gamm v. Sanderson Farms, Inc., 944 F.3d 455, 465 (2d Cir. 2019)*.

CS Defendants rely heavily on the decision in *Meredith Corp. v. Sesac, LLC, 1 F. Supp. 3d 180 (S.D.N.Y. 2014)*, to argue that Plaintiffs' claims are defective. CS Defendants' comparison of Plaintiffs' case to *Meredith* is misplaced. The plaintiffs in *Meredith* alleged a conspiracy between the defendant, a performing rights organization, and its 20,000 affiliates, individual musicians. *Meredith, 1 F Supp. 3d at 210*. There, the plaintiffs did not depose any of the 20,000 affiliates. *Id.* Here, Plaintiffs' claims are much more circumscribed, and Plaintiffs have offered strong evidence as to each of the purported co-conspirators.

B. Credit Suisse's Participation

Neither party is entitled to summary judgment on the issue of Credit Suisse's participation in the purported conspiracy because the scope of the conspiracy or conspiracies is disputed. The question of whether or not there was a single conspiracy **[*54]** or multiple conspiracies needs to be resolved before asking whether and what Credit Suisse joined. However, as discussed in detail above, there is uncontroverted evidence that Credit Suisse participated in at least some conspiratorial conduct in the FX market, and CS Defendants do not argue that, even if there was a conspiracy, they did not participate in it.

Credit Suisse erroneously argues that they could not have participated in a single global conspiracy because "there is no evidence suggesting that anyone was aware of . . . some enormous worldwide scheme." This argument attempts to inject a new requirement for the proof of a conspiracy -- that a conspirator understood the full scope of the conspiracy. The law of this Circuit is not so exacting. Instead, a conspirator need only know of a conspiracy's "general nature and extent" to have joined it. *Huezo, 546 F.3d at 180*. One need not have full knowledge of all the details of a conspiracy or its scope to be a member. *See Blumenthal v. United States, 332 U.S. 539, 557, 68 S. Ct. 248, 92 L. Ed. 154 (1947)* (recognizing that "[s]ecrecy and concealment are essential features of successful conspiracy" and that, as a result, "the law rightly gives room for allowing the conviction of those discovered . . . without requiring evidence of knowledge **[*55]** of all its details or of the participation of others"); *United States v. Yannotti, 541 F.3d 112, 122 (2d Cir. 2008)* ("It is well-settled that a conspirator need not be fully informed about his co-conspirators' specific criminal acts provided that he agreed to participate in the broader criminal conspiracy . . . ."); *Meredith, 1 F. Supp. 3d at 213* ("To be held a part of a conspiracy, a conspirator need not know all dimensions of the wrongful conduct taken in its furtherance."). Defendants cite *Monsanto Co. v. Spray-Rite Services Corporation, 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*, in support of their argument, but *Monsanto* provides that there must be a "conscious commitment to a common scheme," not that each conspirator must know the full scope of the conspiracy. *Id. at 764*.

IV. CONCLUSION

For the reasons stated above, CS Defendants' motion for summary judgment is DENIED and Plaintiffs' motion for summary judgment is DENIED. The Clerk of Court is respectfully directed to close the motions at Dkt. Nos. 1574 and 1580.

Dated: February 1, 2022

New York, New York

/s/ Lorna G. Schofield

LORNA G. SCHOFIELD

UNITED STATES DISTRICT JUDGE

End of Document

In re Bystolic Antitrust Litig.

United States District Court for the Southern District of New York

February 2, 2022, Decided; February 2, 2022, Filed

20-cv-5735 (LJL); No. 20-cv-10087; No. 20-cv-9793

Reporter
583 F. Supp. 3d 455 *; 2022 U.S. Dist. LEXIS 19334 **; 2022 WL 326702

IN RE BYSTOLIC ANTITRUST LITIGATION. This Document Relates To: All Direct Purchaser Actions. CVS Action (No. 20-cv-10087), Walgreen Action (No. 20-cv-9793). All End-Payor Actions

Prior History: *In re Bystolic Antitrust Litig., 2020 U.S. Dist. LEXIS 212738, 2020 WL 6700830 (S.D.N.Y., Nov. 12, 2020)*

Core Terms

generic, patent, manufacturer, Purchaser, settlement, allegations, brand, Plaintiffs', unjustified, settlement agreement, motion to dismiss, Defendants', anticompetitive, expiration, reverse-payment, antitrust, Retailer, products, litigation costs, term sheet, pleaded, anti trust law, parties, nebivolol, fair value, Complaints, side agreement, competitors, negotiate, terms

LexisNexis® Headnotes

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > Federal Food, Drug & Cosmetic Act

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Experimental Use & Testing

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food & Drugs Act

HN1[] **Deceptive Labeling & Packaging, Federal Food, Drug & Cosmetic Act**

Under the Federal Food, Drug, and Cosmetic Act (FDCA), manufacturers of a new drug must obtain approval from the U.S. Food and Drug Administration (FDA) by filing a New Drug Application (NDA). *21 U.S.C.S. §§ 301-392*. Among the information contained in an NDA is information on applicable patents. *§ 355(a)*, *(b)*.

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

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

HN2[] Motions to Dismiss, Failure to State Claim

To survive a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim upon which relief can be granted, a complaint must include sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A complaint must offer more than labels and conclusions, a formulaic recitation of the elements of a cause of action, or naked assertions devoid of further factual enhancement in order to survive dismissal. The ultimate question is whether a claim has facial plausibility, i.e., the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Determining whether a complaint states a plausible claim for relief will be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. Put another way, the plausibility requirement calls for enough fact to raise a reasonable expectation that discovery will reveal evidence supporting the claim.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN3[] Inequitable Conduct, Anticompetitive Conduct

In FTC v. Actavis, the Supreme Court held that antitrust cases premised on reverse-payment settlements of patent litigation—reverse because the settlement requires the patentee to pay the alleged infringer rather than the other way around—can sometimes violate the antitrust laws and must be evaluated under the rule of reason.

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

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Evidence > Burdens of Proof > Burden Shifting

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

HN4[] Per Se Rule Tests, Manifestly Anticompetitive Effects

The courts that have considered reverse-payment agreements have stated that, to trigger antitrust concern under Actavis, a settlement term must be (1) a payment that is (2) made in reverse—that is, from the patent holder to the alleged infringer—and is (3) large, and (4) unexplained. Because the existence and degree of any anticompetitive effects may vary depending on the particular settlement and the relevant industry, plaintiffs must show that the settlements are anticompetitive under the rule of reason analysis applied to other types of antitrust claims. Moreover, in the Second Circuit, the rule of reason analysis involves three steps: First, the plaintiff bears the initial burden of showing that the defendant's conduct had an actual adverse effect on competition as a whole in the relevant market. If plaintiff satisfies this burden, the burden then shifts to the defendant to offer evidence that its conduct had pro-competitive effects. If the defendant is able to offer such proof, the burden shifts back to plaintiff, who must prove that any legitimate competitive effects could have been achieved through less restrictive alternatives.

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

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

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN5[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

In a reverse payment case, a plaintiff can meet the pleading standard without describing in perfect detail the world without the reverse payment, calculating reliably the payment's exact size, or preempting every possible explanation for it. If a plaintiff plausibly alleges that an agreement's anticompetitive effects outweigh its procompetitive virtues, the district court must accept that allegation and allow the plaintiff to take discovery. If genuine issues of material fact remain, the rule-of-reason analysis is for the factfinder, not the court.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN6[] **Inequitable Conduct, Anticompetitive Conduct**

To plausibly allege an unjustified reverse payment, an antitrust plaintiff need only allege the absence of a convincing justification for the payment. Allegations that the value of the released patent litigation claims far exceeds any litigation costs the brand manufacturer avoided by settling are sufficient. All that need be alleged, at the motion-to-dismiss stage is that those saved litigation costs fail to explain the hundreds of millions of dollars of liability released by the brand manufacturer. Finely calibrated litigation cost estimates are unnecessary at this stage of the litigation.

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

HN7[] **Complaints, Requirements for Complaint**

Conduct that is equally consistent with a pro-competitive as with an anticompetitive justification is not sufficient to nudge plaintiffs' claims across the line from conceivable to plausible.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN8[] **Inequitable Conduct, Anticompetitive Conduct**

To determine what the plaintiff must plausibly allege at the outset of a lawsuit, the court usually asks what the plaintiff must prove in the trial at its end. Thus, to state a claim under Actavis, a plaintiff must allege more than a general statement simply asserting that a reverse payment is large and unjustified (or was made pursuant to a simultaneously executed side agreement) and that the generic manufacturer agreed not to enter the market before the patent expired. Rather, the plaintiff must plead facts that would support the claim that the reverse payment was "large" and "unjustified," i.e., that it was not simply possible that the defendants engaged in the anticompetitive conduct of paying the generic manufacturer to forego entering the market but that it was plausible.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN9[] **Inequitable Conduct, Anticompetitive Conduct**

A showing that a reverse payment is large can be established by factual allegations plausibly suggesting that the payment is larger than the payor's anticipated future litigation costs. Actavis specifically directs courts to consider the reverse payment's scale in comparison to the payor's anticipated future litigation costs—not relative to other figures such as the possible profits a generic manufacturer could make by entering the market for the brand-name drug or the brand manufacturer's profits on that drug. It is also not necessary that the plaintiff allege very precise and particularized estimates of actual anticipated litigation costs; such facts likely are in the exclusive possession of defendants and may require expert analysis.

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

HN10[] **Complaints, Requirements for Complaint**

A plaintiff must allege facts to plausibly suggest that the reverse payment is unjustified. An unjustified reverse payment is one that does not reflect traditional settlement considerations such as avoided litigation costs or fair value for services.

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

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

HN11[] **Motions to Dismiss, Failure to State Claim**

A plaintiff need not preempt every possible explanation for the reverse payment to survive a motion to dismiss, but a plaintiff must plead at least some facts of this nature to sufficiently allege an unjustified agreement.

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

HN12[] **Motions to Dismiss, Failure to State Claim**

A settlement agreement may be very simple or tremendously complex, and it may involve all manner of consideration; and if, when viewed holistically, it effects a large and unexplained net transfer of value from the patent-holder to the alleged patent-infringer, it may fairly be called a reverse-payment settlement. Where a plaintiff has plausibly pleaded that several agreements are connected, the Court must accept those allegations as true on a motion to dismiss.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN13[] **Inequitable Conduct, Anticompetitive Conduct**

Where there are multiple generic manufacturers, it does not follow that simply because a reverse-payment agreement with one Generic Defendant is anticompetitive, the brand manufacturer's agreements with every other Generic Defendant is anticompetitive. Likewise, the fact that one or more reverse-payment agreements a brand manufacturer has with a Generic Defendant is not large or is justified would not establish that no other reverse agreement is anticompetitive. A patent owner who legitimately secures an agreement with one or more potential generic competitors that would prevent the generic from entering the market may still enter an anticompetitive agreement with the remaining potential competitors.

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

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

HN14[ ] **Motions to Dismiss, Failure to State Claim**

Determining whether a complaint states a plausible claim for relief will be a context-specific task.

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN15[ ] **Multiple Defendants, Joint & Several Liability**

Under the doctrine of joint and several liability, if the tortious conduct of each of two or more persons is a legal cause of harm that cannot be apportioned, each is subject to liability for the entire harm, irrespective of whether their conduct is concurring or consecutive. The doctrine requires that each liable person engage in tortious conduct.

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

Evidence > Inferences & Presumptions > Inferences

HN16[ ] **Complaints, Requirements for Complaint**

The Second Circuit has held that a plaintiff may plead facts upon information and belief where the facts are peculiarly within the possession and control of the defendant, or where the belief is based on factual information that makes the inference of culpability plausible.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

Civil Procedure > ... > Settlement Agreements > Enforcement > Breach of Contract Actions

HN17[ ] **Types of Contracts, Settlement Agreements**

An allegation of an actionable reverse-payment settlement does not require an enforceable contract.

Civil Procedure > Pleading & Practice > Motion Practice > Content & Form

Civil Procedure > Pleading & Practice > Motion Practice > Opposing Memoranda

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

HN18[ ] **Motion Practice, Content & Form**

A complaint cannot be amended by the briefs in opposition to a motion to dismiss.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN19[ ] **Inequitable Conduct, Anticompetitive Conduct**

It is not enough that two parties entered into a new agreement at the same time as they settled the patent litigation for a reverse payment; the plaintiff must allege that there is something about that agreement other than its timing and the fact that it results in the generic manufacturer honoring a patent that supports the inference that it is anticompetitive.

Governments > Courts > Authority to Adjudicate

HN20[] **Courts, Authority to Adjudicate**

The Second Circuit has stated that although it traditionally treats personal jurisdiction as a threshold question to be addressed prior to consideration of the merits of a claim, that practice is prudential and does not reflect a restriction on the power of the courts to address legal issues. In cases involving multiple defendants—over some of whom the court indisputably has personal jurisdiction—in which all defendants collectively challenge the legal sufficiency of the plaintiff's cause of action, the court may address first the facial challenge to the underlying cause of action and, if it dismisses the claim in its entirety, decline to address the personal jurisdictional claims made by some defendants.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN21[] **Judges, Discretionary Powers**

It is within the Court's discretion to sua sponte grant leave to amend. The Second Circuit strongly favors liberal grant of an opportunity to replead after dismissal of a complaint under *Fed. R. Civ. P. 12(b)(6)*. The Court should freely give leave when justice so requires. *Fed. R. Civ. P. 15(a)(2)*. A district court has discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party, and the decision to grant leave to amend is within the sound discretion of the trial court.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN22[] **Standing, Clayton Act**

Under the United States Supreme Court's decision in Illinois Brick, indirect purchasers of products sold at supra-competitive prices lack standing to sue under federal antitrust statutes. However, under its later decision in California v. ARC Am. Corp., indirect purchasers may still bring suit under state antitrust laws, if a state permits such claims. Therefore, it is common in private antitrust litigation for two groups of purchasers, direct and indirect, to file separate cases arising out of the same nucleus of operative fact, but to allege different causes of action—direct purchasers under federal law and indirect purchasers under state laws.

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Judges: LEWIS J. LIMAN, United States District Judge.

Opinion by: LEWIS J. LIMAN

Opinion

[*462] OPINION AND ORDER

LEWIS J. LIMAN, United States District Judge:

This civil antitrust action alleges an illegal scheme to delay competition from generic versions of Bystolic (nebivolol hydrochloride), a prescription medication **[**3]** approved by the U.S. Food and Drug Administration to treat high blood pressure.

Plaintiffs are: a putative class of direct purchasers of Bystolic and generic versions of Bystolic ("Direct Purchaser Plaintiffs");[1] a putative class of indirect purchasers, **[*463]** including consumers, health insurers, and welfare plans, of Bystolic and generic versions of Bystolic ("End-Payor Plaintiffs");[2] and several retail chains that bring individual lawsuits as assignees of direct purchasers ("Retailer Plaintiffs")[3] (collectively, "Plaintiffs"). Defendants are

[1] Direct Purchaser Plaintiffs are J M Smith Corporation d/b/a Smith Drug Company and KPH Healthcare Services, Inc. a/k/a Kinney Drugs, Inc., on behalf of themselves and all others similarly situated.

[2] End Payor Plaintiffs are the Mayor and City Council of Baltimore ("City of Baltimore"), UFCW Local 1500 Welfare Fund ("Local 1500"), Teamsters Western Region & Local 177 Health Care Plan ("Local 177"), Fraternal Order of Police, Miami Lodge 20, Insurance Trust Fund ("FOP"), Law Enforcement Health Benefits, Inc. ("LEHB"), Teamsters Local No. 1150 Prescription Drug Benefit Plan ("Local 1150"), and Teamsters Local 237 Welfare Fund and Teamsters Local 237 Retirees' Benefit Fund ("Local 237"), on behalf of themselves and all others similarly situated.

[3] Retailer Plaintiffs are CVS Pharmacy, Inc., Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Walgreen Co., The Kroger Co., Albertsons Companies, Inc., and H-E-B, L.P. The first three plaintiffs are the plaintiffs in *CVS Pharmacy, Inc. et al v. AbbVie Inc.*

the manufacturers and marketers of Bystolic (collectively referred to as "Forest")[4] and their generic-drug competitors ("Generic Defendants")[5] (collectively, "Defendants"). Generic Defendants include Hetero, Torrent, Alkem, Indchemie, Glenmark, Amerigen, and Watson.

Plaintiffs allege that Forest agreed to pay Generic Defendants to drop their challenges to a Bystolic patent and to delay launching less expensive, competing generic versions of Bystolic for years. Direct Purchaser Plaintiffs bring a class action complaint ("Direct Purchaser Plaintiffs' **[**4]** Complaint" or "DPP Complaint") and Retailer Plaintiffs bring complaints ("Retailer Plaintiffs' Complaints") against Defendants, seeking damages under federal ***antitrust law***. Second Consolidated and Amended Class Action Complaint, Dkt. No. 250 ("DPP Compl."); Second Amended Complaint, *CVS Action*, 20-cv-10087 (S.D.N.Y.), ECF No. 35; Second Amended Complaint, *Walgreen Action*, 20-cv-9793 (S.D.N.Y.), ECF No. 34. End-Payor Plaintiffs bring a class action complaint ("End-Payor Plaintiffs' Complaint" or "EPP Complaint") against Defendants under state antitrust and consumer-protection laws and for injunctive relief under federal ***antitrust law***. End-Payor Plaintiffs' Consolidated Amended Class Action Complaint, Dkt. No. 251 ("EPP Compl.").

Pending before the Court are four related motions to dismiss. All Defendants move to dismiss Direct Purchaser and Retailer Plaintiffs' Complaints **[*464]** for failure to state a claim, Dkt. No. 267, and move to dismiss End-Payor Plaintiffs' Complaint for failure to state a claim, Dkt. No. 271, pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. Defendant Teva Israel also moves pursuant to *Federal Rule of Civil Procedure 12(b)(2)* to dismiss the claims against it for lack of personal jurisdiction. Dkt. No. 260. And a group of twenty-eight Defendants **[**5]** not at home in New York ("Nonresident Defendants")[6] move pursuant to *Federal Rule of Civil Procedure 12(b)(2)* to dismiss for lack of personal jurisdiction the End-Payor Complaint's ninety-nine non-New York, state-law claims. Dkt. No. 265.

BACKGROUND

On each of the four motions to dismiss, the Court accepts as true the allegations of the relevant complaints, and the documents incorporated by reference.[7]

I. Overview of the Alleged Scheme

From October 2012 through November 2013, Forest allegedly entered into a series of reverse-payment deals (also known as "pay for delay" deals) with Generic Defendants under which each Generic Defendant (1) agreed not to compete with Forest or enter the market with its generic version of Bystolic prior to September 17, 2021 (three

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et al ("*CVS Action*"), 20-cv-10087 (S.D.N.Y.), and the latter group of plaintiffs are the plaintiffs in *Walgreen Co. et al v. AbbVie Inc. et al* ("*Walgreen Action*"), 20-cv-9793 (S.D.N.Y.).

[4] "Forest" refers collectively to: Forest Laboratories, Inc., Forest Laboratories Holdings, Ltd., Forest Laboratories, LLC, and Forest Laboratories Ireland Ltd.; AbbVie, Inc. ("AbbVie"); and Allergan, Inc., Allergan Sales, LLC, and Allergan USA, Inc. (collectively, "Allergan").

[5] Generic Defendants are: Hetero USA Inc., Hetero Labs Ltd., and Hetero Drugs Ltd. (collectively, "Hetero"); Torrent Pharmaceuticals Ltd. and Torrent Pharma Inc. (collectively, "Torrent"); Ascend Laboratories, LLC and Alkem Laboratories Ltd. (collectively, "Alkem"); Indchemie Health Specialties Private Ltd. ("Indchemie"); Glenmark Generics Inc., USA, Glenmark Generics Ltd., Glenmark Pharmaceuticals Ltd., and Glenmark Pharmaceuticals S.A. (collectively, "Glenmark"); ANI Pharmaceuticals, Inc., Amerigen Pharmaceuticals, Inc., and Amerigen Pharmaceuticals, Ltd. (collectively, "Amerigen"); Teva Pharmaceuticals Industries Ltd. ("Teva Israel"); Watson Laboratories, Inc. (NV), Watson Laboratories, Inc. (DE), Watson Laboratories, Inc. (NY), Watson Laboratories, Inc. (CT), Watson Pharma, Inc., Watson Pharmaceuticals Inc., Actavis, Inc., and Teva Pharmaceuticals USA, Inc. (collectively with Teva Israel, "Watson").

[6] Nonresident Defendants include all Defendants except for Watson Laboratories, Inc. (NY), Forest Laboratories, Inc., and the latter's successors—Forest Laboratories, LLC and Allergan Sales, LLC.

[7] This opinion cites the DPP Complaint as the other plaintiffs' complaints are substantially identical.

months before patent expiration), unless another Generic Defendant entered that market earlier; and in exchange (2) received "side-deals" and cash payments from Forest. DPP Compl. ¶ 3.

Earlier, Forest had sued each Generic Defendant for patent infringement. *Id.* ¶ 4. Although Generic Defendants would have allegedly succeeded in the patent litigation, as Forest's claim was weak, and they would have been ready to launch their generic versions of Bystolic well before September **[**6]** 17, 2021, Generic Defendants agreed to side deals with Forest to end the patent fight. *Id.* ¶¶ 5-7. Each Generic Defendant agreed to stay off the market until September 17, 2021 in exchange for a share of Forest's monopoly profits in the form of reverse payments. *Id.* ¶¶ 6-7. In other words, but for these payments, Generic Defendants would have launched their generic products earlier and Plaintiffs would have paid substantially less for nebivolol hydrochloride, i.e., Bystolic. *Id.* ¶ 26. As a result, the entry of less expensive, generic versions of Bystolic was delayed, the price of nebivolol hydrochloride was fixed at the price of Bystolic, and 100% of the United States market for nebivolol hydrochloride was allocated to Forest until September 17, 2021. *Id.* ¶ 28.

These allegations are discussed in greater detail next.

II. Relevant Regulatory Framework for Generic Drugs

HN1[] Under the *Federal Food, Drug, and Cosmetic Act ("FDCA")*, manufacturers of a new drug must obtain approval from the U.S. Food and Drug Administration ("FDA") by filing a New Drug Application ("NDA"). *21 U.S.C. §§ 301-392*; DPP Compl. ¶ 93. Among the information contained in an NDA is information on applicable patents. *Id. § 355(a)*, *(b)*; DPP Compl. ¶ 93. **[**7]** When the FDA approves a drug manufacturer's NDA, the manufacturer may list certain patents in the "Approved Drug Products with Therapeutic Equivalence Evaluations" (known as the "Orange Book"). DPP Compl. ¶ 94. The listed patents are those that could reasonably be asserted against a generic manufacturer **[*465]** of the branded drug before the patents expire. *Id.*

Manufacturers of generic versions of a branded drug may receive FDA approval through a different pathway. The Hatch-Waxman Amendments, enacted in 1984, simplified the regulatory hurdles for prospective generic manufacturers by eliminating the need to file lengthy and costly NDAs. *See Drug Price Competition and Patent Term Restoration Act, Pub. L. No. 98-417, 98 Stat. 1585 (1984)*; DPP Compl. ¶ 96. Instead, a generic manufacturer may file an Abbreviated New Drug Application ("ANDA"). DPP Compl. ¶ 96. While an ANDA must show that the generic drug is therapeutically equivalent to the brand drug, it can rely on the scientific findings of safety and effectiveness included in the brand manufacturer's original NDA. *Id.* Generic drugs that are therapeutically equivalent to and are of the same dosage strength and form as their approved branded counterpart are assigned an "AB" rating **[**8]** by the FDA. *Id.*

For the FDA to approve an ANDA, a generic manufacturer must certify that the generic drug will not infringe any patents listed in the Orange Book. *Id.* ¶ 100. One of the four possible certifications is "that the patent for the brand drug is invalid or will not be infringed by the generic manufacturer's proposed product" (a "Paragraph IV certification"). *Id.*; *21 U.S.C. § 355(j)(2)(A)(vii)*. If a generic manufacturer files a Paragraph IV certification, it must notify the brand manufacturer, and the brand manufacturer can delay FDA approval of the ANDA by suing the generic manufacturer for patent infringement. DPP Compl. ¶ 101. If the brand manufacturer sues for patent infringement within forty-five days of receiving notice of the Paragraph IV certification, the FDA will not grant final approval of the ANDA until the earlier of (a) thirty months after the receipt of the Paragraph IV notice; or (b) a court decision that the patent is invalid or not infringed by the generic manufacturer's ANDA. *21 U.S.C. § 355(j)(5)(B)(iii)*; DPP Compl. ¶ 101. Thus, simply by filing suit, the brand manufacturer can forestall entry of the competitor drug for a period of time not to exceed thirty months.

To incentivize the manufacturing of generics, the **[**9]** Hatch-Waxman Amendments grants a 180-day exclusivity period to the first generic manufacturer that files a substantially complete ANDA with a Paragraph IV certification. DPP Compl. ¶ 103; *21 U.S.C. § 355(j)(5)(B)(iv)*, *(D)*. During this exclusivity period, the FDA may not grant final approval to any other generic manufacturer's ANDA for the same brand drug. *Id.* Where multiple generic companies are the first to file substantially complete ANDAs with Paragraph IV certifications, they may be eligible to share the 180-day exclusivity period. *Id.* ¶ 106; *21 U.S.C. § 355(j)(5)(B)(iv)*.

III. Implications of Competition from Generics and a Brand Manufacturer's Incentives to Delay Generic Entry

On average, generic versions of brand drugs are 50% to 80% less expensive than brand drugs when there are multiple generic competitors on the market for a given brand drug. DPP Compl. ¶ 107. Every state has adopted laws that either require or permit pharmacies to automatically substitute less-expensive AB-rated generic equivalents for brand prescriptions (unless the prescribing physician has affirmatively requested the brand). *Id.* ¶ 108. Once a generic equivalent enters the market, the generic quickly captures sales of the brand drug, often capturing 80% or more of **[**10]** the brand's sales within the first six months. *Id.* Once multiple generic competitors enter, the competitive process accelerates, and multiple generic sellers typically compete **[*466]** vigorously with one another for sales by driving prices down. *Id.* ¶ 109.

Generic competition enables purchasers of the drug to purchase substantially cheaper generics instead of the more expensive brand drug and to benefit from when the brand company lowers prices to compete with generics. *Id.* ¶ 110. Accordingly, when generic entry is delayed, purchasers are harmed by having to pay more than they otherwise would have to pay. *Id.* ¶ 111.

Competition from generic drugs is viewed by brand-drug companies as a grave financial threat. *Id.* ¶ 109. When exclusivity is lost and generic entry occurs, the brand manufacturer can expect a significant drop in profits. *Id.* ¶ 112. Brand manufacturers thus have financial incentives to delay generic entry. *Id.* ¶ 113. One way to delay generic entry is through the regulatory waiting period initiated in response to patent litigation, as discussed above. *Id.* Brand manufacturers thus frequently take aggressive positions in listing patents in the Orange Book and then bring patent lawsuits **[**11]** against any generic competitor that files an ANDA with a Paragraph IV certification. *Id.* These patent lawsuits are often litigated to delay generic entry rather than to enforce valid patents against infringing products. *Id.* If the brand manufacturer can keep the litigation going long enough, it can obtain for itself a thirty-month delay in the entry of the generic competitor.

Brand manufacturers also can forestall competition from a generic manufacturer of a generic product by entering into settlements to resolve the lawsuits in which the generic competitor drops its patent challenge and agrees to delay entry in exchange for a payment from the brand manufacturer. *Id.* ¶ 114. These settlements are sometimes called "pay-for-delay" or "reverse-payment agreements." *Id.* As regulatory and other scrutiny of such agreements has increased, brand manufacturers and generic competitors have allegedly entered into increasingly elaborate agreements in an attempt to mask the fundamentally anticompetitive character of their agreements. *Id.* ¶ 115.

IV. Forest's NDA for Bystolic and Generic Defendants' ANDAs for Generic Versions of Bystolic

As part of the NDA for Bystolic, Forest listed two patents for inclusion **[**12]** in the FDA's Orange Book: U.S. Patent No. 6,545,040 ("the '040 Patent") and U.S. Patent No. 5,759,580 ("the '580 Patent"). *Id.* ¶¶ 4, 124. The '040 Patent issued on April 8, 2003 and expired on December 17, 2021. *Id.* ¶ 125. The '580 Patent issued on June 2, 1998 and expired on June 2, 2015. *Id.* ¶ 124.

Bystolic qualified for a five-year marketing exclusivity period during which no ANDAs may be filed. *Id.* ¶ 101. This period is reduced to four years if, at the end of four years, an ANDA is filed with a Paragraph IV certification. *21 U.S.C. § 355(j)(5)(F)(ii)*; DPP Compl. ¶ 101. If the manufacturer of a branded drug sues within forty-five days of receiving the Paragraph IV certification, the approval waiting period is extended to the earlier of (a) 7.5 years after the original NDA's approval; or (b) a court decision that the patent is invalid or not infringed by the generic manufacturer's ANDA. DPP Compl. ¶ 101. In the interim, the FDA may only grant tentative approval and not final approval of the ANDA. *Id.*

In December 2011, the seven Generic Defendants filed ANDAs with the FDA containing Paragraph IV certifications regarding the Bystolic patents. *Id.* ¶¶ 4, 140. They were the first generic manufacturers to file substantially complete ANDAs with Paragraph IV certifications. *Id.* As such, Generic Defendants were eligible to potentially **[**13]** share the 180-day exclusivity period **[*467]** during which the FDA would not grant final approval to any other generic manufacturer's ANDA for generic Bystolic. *Id.* ¶ 141. In February 2012, Generic Defendants notified Forest of their Paragraph IV certifications. *Id.* ¶ 142. Forest then had forty-five days to sue for patent infringement.

V. Bystolic Patent Litigation and the Settlement Agreements and Side Agreements between Forest and Generic Defendants

On March 13, 2012, in response to the Paragraph IV certification notices, Forest filed a patent infringement lawsuit in the U.S. District Court for the District of Delaware against Generic Defendants Torrent, Watson, Amerigen, Glenmark, and Hetero. *Id.* ¶ 144; *see also Forest Laboratories, Inc. v. Torrent Pharms. Ltd. et al*, 12-cv-305 (D. Del. Mar. 13, 2012). Though some of the notices related to both the '040 and the '580 Patents, Forest only asserted the '040 Patent and declined to sue on the '580 Patent. DPP Compl. ¶¶ 124, 144.

The next day, on March 14, 2012, Forest filed a patent infringement lawsuit in the U.S. District Court for the Northern District of Illinois against Generic Defendants Indchemie and Alkem. *Id.* ¶ 145; *see also Forest Laboratories, Inc. v. Indchemie Health Specialties* ***[**14]*** *PVT. LTD. et al*, 12-cv-1855 (N.D. Ill. Mar. 14, 2012). Again, Forest only asserted the '040 Patent and declined to sue on the '580 Patent. DPP Compl. ¶ 145.

Pursuant to *28 U.S.C. § 1407*, the District of Delaware action was transferred to the Northern District of Illinois, and the two patent cases were consolidated into one action (the "Nebivolol Patent Litigation"). *See In re Nebivolol Patent ('040) Litig.*, 12-cv-5026 (N.D. Ill. June 12, 2012). These lawsuits automatically triggered stays so that the FDA could not grant final approval of Generic Defendants' ANDAs before June 18, 2015, absent an earlier favorable decision in the suits for Generic Defendants. DPP Compl. ¶ 4.

From October 2012 through November 2013, Forest entered into settlements and side deals with the seven Generic Defendants to resolve the Nebivolol Patent Litigation. *Id.* ¶¶ 3, 151. In their settlement agreements with Forest, each Generic Defendant agreed not to sell generic Bystolic until September 17, 2021, three months before the expiration of the '040 Patent, unless another Generic Defendant entered the market earlier. *Id.* ¶ 3. Each settlement agreement allegedly also had a side deal. *Id.* ¶ 8.

The DPP Complaint alleges that, in connection with a merger between **[**15]** Forest and Actavis in 2014, Forest's outside counsel sought to review "all of the Bystolic settlement and licensing agreements as well as the side agreements with those generic companies." *Id.* Forest's in-house counsel responded to outside counsel that Forest had entered into settlement agreements with Generic Defendants and that "[a]ll had side deals (one side was struck with Alkem, which is a related company with Indchemie)." *Id.* ¶¶ 8, 151. The merger agreement disclosed Forest's "material contracts," which were defined to include:

> any Contract involving the settlement of any action or threatened action (or series of related actions) (A) which will (x) involve payments after the date hereof of consideration in excess of $15,000,000 or (y) impose monitoring or reporting obligations to any other Person outside the ordinary course of business or (B) with respect to which material conditions precedent to the settlement have not been satisfied.

Id. ¶ 9. Forest listed the following agreements as material contracts in connection **[*468]** with the settlement of the Bystolic patent dispute:

- Hetero: "SETTLEMENT AGREEMENT between Forest Laboratories, Inc. and Forest Laboratories Holdings, Ltd., and Hetero **[**16]** USA Inc. and Hetero Labs Ltd. dated October 24, 2012 . . . together with the FINAL TERM SHEET between Hetero Drugs Ltd. and Forest Laboratories Ireland Ltd. dated October 5, 2012, in connection with the settlement of BYSTOLIC patent dispute." *Id.* ¶ 12.

- Torrent: "SETTLEMENT AGREEMENT between Forest Laboratories, Inc. and Forest Laboratories Holdings, Ltd., and Torrent Pharmaceuticals Ltd. and Torrent Pharma Inc. dated November 21, 2012 . . . together with the PATENT ASSIGNMENT AGREEMENT between Torrent Pharmaceuticals Ltd. and Forest Laboratories Holdings Ltd. dated November 21, 2012, in connection with the settlement of BYSTOLIC patent dispute." *Id.* ¶ 13.

- Alkem/Indchemie: "SETTLEMENT AGREEMENT between Forest Laboratories, Inc. and Forest Laboratories Holdings, Ltd., and Alkem Laboratories Ltd. dated November 27, 2012 . . . together with the TERM SHEET between Alkem Laboratories Ltd., Indchemie Health Specialties Private Ltd., and Forest Laboratories Ireland Ltd. dated November 28, 2012 in connection with the settlement of BYSTOLIC patent dispute. AMENDMENT NO. 1 TO SETTLEMENT AGREEMENT was executed on January 9, 2013 . . . . SETTLEMENT AGREEMENT between Forest Laboratories, Inc. **[**17]** and Forest Laboratories Holdings, Ltd., and Indchemie Health Specialties Private Ltd. dated November 27, 2012 . . . together with the TERM SHEET between Alkem Laboratories Ltd., Indchemie Health Specialties Private Ltd., and Forest Laboratories Ireland Ltd. dated November 28, 2012, in connection with the settlement of BYSTOLIC patent dispute." *Id.* ¶ 14.

- Glenmark: "SETTLEMENT AGREEMENT between Forest Laboratories, Inc. and Forest Laboratories Holdings, Ltd., and Glenmark Generics Inc., USA and Glenmark Generics Ltd. dated December 21, 2012 . . . together with the COLLABORATION AND OPTION AGREEMENT between Glenmark Pharmaceuticals S.A. and Forest Laboratories Holdings Ltd. dated December 21, 2012, in connection with the settlement of BYSTOLIC patent dispute." *Id.* ¶ 15.

- Amerigen: "SETTLEMENT AGREEMENT between Forest Laboratories, Inc. and Forest Laboratories Holdings, Ltd., and Amerigen Pharmaceuticals, Inc. and Amerigen Pharmaceuticals, Ltd. dated July 18, 2013 . . . together with the BINDING TERM SHEET COLLABORATION AGREEMENT between Forest Laboratories, Inc. and Amerigen Pharmaceuticals, Ltd. dated July 18, 2013, in connection with the settlement of BYSTOLIC patent dispute." *Id.* **[**18]** ¶ 16.

- Watson: "SETTLEMENT AGREEMENT between Forest Laboratories, Inc. and Forest Laboratories Holdings, Ltd., and Watson Laboratories, Inc. (NV), Watson Laboratories, Inc. (DE), Watson Laboratories, Inc. (NY), Watson Laboratories, Inc. (CT), Watson Pharma, Inc., and Actavis, Inc. dated November 6, 2013 . . . together with (a) the LETTER from Forest Laboratories, Inc. to **[*469]** Moksha8, Inc. dated November 1, 2013 and (b) TERMINATION AND RELEASE AGREEMENT between Actavis, Inc. and Moksha8, Inc. dated November 4, 2013, in connection with the settlement of BYSTOLIC patent dispute." *Id.* ¶ 17.

All of the settlement agreements with Generic Defendants provided licenses permitting them to launch their respective generic versions of Bystolic as of the date that is the later of (a) three calendar months prior to expiration of the '040 Patent, (b) the date of final FDA approval of the Generic Defendant's ANDA, or (c) earlier in certain circumstances. *Id.* ¶ 21. The earlier circumstances refer to the agreements' respective "contingent launch provisions" or "acceleration clauses," which permit a Generic Defendant to enter the market at the same time as any of its competitors if a competitor can enter the market earlier **[**19]** for some reason. *Id.* Unless an exception applied, the agreements allowed Forest to maintain monopoly profits and not face generic competitors until at least September 17, 2021, three months before patent expiration. *Id.* ¶ 23. Each of these settlement agreements and side agreements is discussed in greater detail below.

In light of the settlements, Forest avoided certain litigation costs. *Id.* ¶ 170. The DPP Complaint alleges that, according to the American Intellectual Property Law Association's 2013 Report of the Economic Survey, the median cost of patent litigation at that time for cases with more than $25 million at stake was $5-6 million. *Id.* It also alleges that, since the two separately filed patent cases were consolidated for proceedings in the Nebivolol Patent Litigation, Forest likely would have expended substantially less, in total, than it would have expended had the two patent cases involved a series of different and distinct patents and issues, or if they had proceeded independently of one another. *Id.* As a result, the DPP Complaint alleges that Forest's saved litigation costs with respect to each Generic Defendant were far less than $5-6 million. *Id.*

It is alleged that but **[**20]** for the agreements settling the patent litigation, Generic Defendants would have launched their generic products earlier at one of three possible times: (a) "at risk," meaning when a generic has received final approval from the FDA to market its product but while the patent litigation is continuing; (b) upon prevailing against Forest in the underlying patent litigation; or (c) via lawful settlement agreements providing for earlier negotiated entry dates unaffected by any induced delay. *Id.* ¶ 26. Under these scenarios, Plaintiffs would have paid substantially less for nebivolol hydrochloride, and Defendants' conduct delayed the entry of less expensive nebivolol hydrochloride, fixed the price of nebivolol hydrochloride, and allocated the whole United States market for nebivolol hydrochloride to Forest until three months before patent expiration. *Id.* ¶¶ 27-28.

PROCEDURAL HISTORY

This case involves two sets of lawsuits based on substantially identical facts. The first actions in this case were filed in July 2020. The first set of lawsuits are brought by Direct Purchaser Plaintiffs and Retailer Plaintiffs who bring claims for damages under federal ***antitrust law***. The second set of lawsuits **[**21]** are brought by End-Payor Plaintiffs under state antitrust and consumer-protection laws and for injunctive relief under federal ***antitrust law***. The Direct Purchaser Plaintiffs' actions were consolidated, the End-Payor Plaintiffs' actions were consolidated, and the two consolidated actions and the two Retailer Plaintiffs' actions were coordinated with one another under one docket to promote efficiency in managing and litigating the cases. Dkt. Nos. 50, 82, 86, 204; *CVS Action*, 20-cv-10087 **[*470]** (S.D.N.Y.), ECF No. 19; *Walgreen Action*, 20-cv-9793 (S.D.N.Y.), ECF No. 20. Though Defendants moved to transfer the cases to the District of New Jersey, Dkt. No. 79, the Court denied the motion to transfer venue, Dkt. No. 178. On December 3, 2020, Direct Purchaser Plaintiffs filed their Consolidated and Amended Class Action Complaint, Dkt. No. 111, and End-Payor Plaintiffs filed their Consolidated Class Action Complaint, Dkt. No. 113. On December 23, 2020, Retailer Plaintiffs filed their respective amended complaints. *CVS Action*, 20-cv-10087 (S.D.N.Y.), ECF No. 20; *Walgreen Action*, 20-cv-9793 (S.D.N.Y.), ECF No. 21. Thereafter, Nonresident Defendants moved to dismiss the End-Payor Plaintiffs' complaint **[**22]** for lack of personal jurisdiction, Dkt. No. 215; Teva Israel moved to dismiss all claims against it for lack of personal jurisdiction, Dkt. No. 218; Defendants moved to dismiss Direct Purchaser and Retailer Plaintiffs' complaints for failure to state a claim, Dkt. No. 223; and Defendants moved to dismiss End-Payor Plaintiffs' complaint for failure to state a claim, Dkt. No. 226. In response to Defendants' various motions to dismiss, all Plaintiffs elected to amend their complaints, Dkt. No. 240, and the Court denied the motions to dismiss without prejudice as moot, Dkt. No. 241.

On March 15, 2021, the operative amended complaints in this case were filed: the DPP Complaint, Dkt. No. 250; the Retailer Plaintiffs' Complaints, *CVS Action*, 20-cv-10087 (S.D.N.Y.), ECF No. 35; *Walgreen Action*, 20-cv-9793 (S.D.N.Y.), ECF No. 34; and the EPP Complaint, Dkt. No. 251. The Direct Purchaser and Retailer Plaintiffs' Complaints bring claims for violations of *Section 1 of the Sherman Act*, *15 U.S.C. § 1*, alleging agreements not to compete with brand and generic Bystolic between Forest and Generic Defendants, and claims for violations of *Section 2 of the Sherman Act*, *15 U.S.C. § 2*, alleging conspiracy to monopolize as to brand and generic Bystolic through agreements **[**23]** between Forest and Generic Defendants and alleging monopolization and monopolistic scheme against Forest. DPP Compl. ¶¶ 203-345; *CVS Action*, 20-cv-10087 (S.D.N.Y.), ECF No. 35 ¶¶ 182-307; *Walgreen Action*, 20-cv-9793 (S.D.N.Y.), ECF No. 34 ¶¶ 184-309. The EPP Complaint brings claims for monopolization and monopolistic scheme under various state antitrust laws against Forest; for conspiracy to monopolize under various state antitrust laws against all Defendants; for combination and conspiracy in restraint of trade under various state antitrust laws against all Defendants; for unfair or deceptive trade practices under various state consumer-protection laws against all Defendants; and for declaratory and injunctive relief against all Defendants under *Section 16 of the Clayton Act*, *15 U.S.C. § 26*, for all Defendants' violations of *Sections 1* and *2 of the Sherman Act*. EPP Compl. ¶¶ 290-457.

On April 23, 2021, Defendants moved to dismiss the Direct Purchaser and Retailer Plaintiffs' Complaints, Dkt. No. 267, and moved to dismiss End-Payor Plaintiffs' Complaint, Dkt. No. 271. That same day, Defendant Teva Israel moved pursuant to *Federal Rule of Civil Procedure 12(b)(2)* to dismiss the claims against it for lack of personal jurisdiction, Dkt. No. 260, and the Nonresident Defendants moved **[**24]** pursuant to *Federal Rule of Civil Procedure 12(b)(2)* to dismiss for lack of personal jurisdiction the EPP Complaint's ninety-nine non-New York, state-law claims, Dkt. No. 265. After the four motions to dismiss were fully briefed, the Court held oral argument on the motions on December 14, 2021.

DISCUSSION

I. Motion to Dismiss Direct Purchaser and Retailer Plaintiffs' Complaints

The Court turns first to Defendants' motion to dismiss the Direct Purchaser **[*471]** and Retailer Plaintiffs' Complaints for failure to state a claim. For brevity, in this section of the discussion, the Court's references to "Direct Purchaser Plaintiffs" and the "DPP Complaint" encompass Retailer Plaintiffs and Retailer Plaintiffs' Complaints, respectively.

Defendants argue that the settlement agreements and side agreements between Forest and each of the Generic Defendants are lawful, that the Direct Purchaser Plaintiffs' Complaint depends on improper generalized group pleading, that Direct Purchaser Plaintiffs' theories of causation fail as a matter of law and should be struck from the pleading, and that Direct Purchaser Plaintiffs' construction of the *Sherman Act* violates due process. Dkt. No. 269.

HN2[] To survive a motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim **[**25]** upon which relief can be granted, a complaint must include "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). A complaint must offer more than "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement" in order to survive dismissal. *Twombly, 550 U.S. at 555, 557*. The ultimate question is whether "[a] claim has facial plausibility, [i.e.,] the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*. "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id. at 679*. Put another way, the plausibility requirement "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence [supporting the claim]." *Twombly, 550 U.S. at 556*; *see also* *Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 46, 131 S. Ct. 1309, 179 L. Ed. 2d 398 (2011)*.[8]

A. Large and Unjustified Reverse Payments Under *FTC v. Actavis*

The theory of Direct Purchaser Plaintiffs' case relies heavily on *FTC v. Actavis, 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*. ***HN3***[] In *FTC v. Actavis*, the Supreme Court held that antitrust cases premised **[**26]** on reverse-payment settlements of patent litigation—"reverse" because the settlement requires the patentee to pay the alleged infringer rather than the other way around—can sometimes violate the antitrust laws and must be evaluated under the rule of reason. *Id. at 140, 159*. That case arose in a similar context as that alleged by Direct Purchaser Plaintiffs here.

In *FTC v. Actavis*, two generic drug manufacturers—Actavis, Inc. and Paddock Laboratories ("Paddock")—filed ANDAs for a generic drug modeled after the brand-name drug AndroGel, and the brand **[*472]** manufacturer Solvay Pharmaceuticals ("Solvay") initiated paragraph IV patent litigation against the two generic manufacturers

[8] Defendants argue that Direct Purchaser Plaintiffs' allegations that the side agreements were pretextual sound in fraud and therefore must be pleaded with particularity in accordance with *Federal Rule of Civil Procedure 9(b)*. Dkt. No. 269 at 16-17. The Court will not apply a heightened pleading standard. In *FTC v. Actavis*, when faced with similar allegations—that the "true point of the payments" from the brand manufacturer to the generics "was to compensate the generics for agreeing not to compete against [the brand-name drug] until 2015," *570 U.S. 136, 145, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*—the Supreme Court did not impose the heightened pleading standard of *Rule 9(b)*.

pursuant to the Hatch-Waxman regulatory framework. *Id.* at 144-45. A fourth manufacturer, Par Pharmaceutical ("Par"), did not file its own application but joined forces with Paddock. *Id.* Solvay settled the patent litigation with the generic manufacturers in 2006. *Id.* at 145. Under the terms of the settlement, Actavis agreed not to bring its generic product to market until a date in 2015, nine years after the date of the settlement but sixty-five months before the brand manufacturer's patent expired. *Id.* Actavis also agreed to promote AndroGel to **[**27]** urologists. *Id.* The other generic manufacturers made generally similar promises. *Id.* In exchange, the brand manufacturer agreed to pay millions of dollars to each generic manufacturer—$12 million in total to Paddock; $60 million in total to Par; and about $19 to $30 million annually for nine years to Actavis. *Id.*

The Federal Trade Commission ("FTC") sued the brand manufacturer and the three generic manufacturers for violating *Section 5 of the Federal Trade Commission Act*, *15 U.S.C. § 45*. The FTC's theory was that the parties had engaged in a thinly camouflaged agreement to restrain trade: The generic manufacturers had agreed to refrain from launching their own generic products to compete with AndroGel for nine years in exchange for a share of the brand manufacturer's monopoly profits. *Actavis, 570 U.S. at 145*. The implicit premise was that, but for the agreement, the generic manufacturers would have been able to launch their competing products earlier. Although the pharmaceutical companies argued that the payments compensated the generics for services promised to be performed, the FTC claimed that the payments compensated the generics for agreeing not to compete against AndroGel until 2015. *Id.* The district court dismissed the FTC's complaint for failing to **[**28]** set forth an ***antitrust law*** violation, and the Court of Appeals for the Eleventh Circuit affirmed. *Id. at 145-46*.

The Supreme Court reversed and held that the FTC's dismissed complaint alleged reverse-payment settlements that may violate the antitrust laws and that the FTC's lawsuit should have been allowed to proceed. *Id. at 141*. The *Actavis* Court noted that "[t]he FTC alleges that in substance, the plaintiff agreed to pay the defendants many millions of dollars to stay out of its market, even though the defendants did not have any claim that the plaintiff was liable to them for damages." *Id. at 147*. And the Supreme Court continued that "[t]hat form of settlement is unusual" and that "there is reason for concern that settlements taking this form tend to have significant adverse effects on competition." *Id. at 147-48*.

The *Actavis* Court based its conclusion on five sets of considerations. *Id. at 153*. First, reverse-payment settlements of patent litigation have "the potential for genuine adverse effects on competition." *Id.* (internal quotation marks omitted). A "payment in return for staying out of the market . . . simply keeps prices at patentee-set levels, potentially producing the full patent-related $500 million monopoly return while dividing that return **[**29]** between the challenged patentee and the patent challenger"—"[t]he patentee and the challenger gain; the consumer loses." *Id. at 154*. Where there are indications that the brand manufacturer pays a generic manufacturer a sum even larger than what the generic would gain in profits if it won the paragraph IV litigation and entered the market, "a payment of this size cannot in every case be supported by traditional settlement considerations." *Id.* "The payment may instead provide **[*473]** strong evidence that the patentee seeks to induce the generic challenger to abandon its claim with a share of its monopoly profits that would otherwise be lost in a competitive market." *Id.*

Second, the Supreme Court recognized that "these anticompetitive consequences will at least sometimes prove unjustified." *Id. at 156*. "[O]ffsetting or redeeming virtues are sometimes present." *Id.* The *Actavis* Court explained:

> The reverse payment, for example, may amount to no more than a rough approximation of the litigation expenses saved through the settlement. That payment may reflect compensation for other services that the generic has promised to perform—such as distributing the patented item or helping to develop a market for that item. There may be **[**30]** other justifications. Where a reverse payment reflects traditional settlement considerations, such as avoided litigation costs or fair value for services, there is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement. In such cases, the parties may have provided for a reverse payment without having sought or brought about the anticompetitive consequences we mentioned above.

Id. Yet, the Supreme Court continued, the possibility that a reverse payment may in some circumstances be supported by legitimate reasons "does not justify dismissing the FTC's complaint." *Id.* Rather "[a]n antitrust defendant may show in the antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason." *Id.*

Third, the Supreme Court reasoned that "where a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely possesses the power to bring that harm about in practice." *Id. at 157*. And "[a]t least, the size of the payment from a branded drug manufacturer to a prospective generic is itself **[**31]** a strong indicator of power—namely, the power to charge prices higher than the competitive level." *Id.*

Fourth, the *Actavis* Court set forth the reasons for why such an antitrust action would not be administratively infeasible. *Id.* "[I]t is normally not necessary to litigate patent validity to answer the antitrust question (unless, perhaps, to determine whether the patent litigation is a sham)." *Id.* (citation omitted). Rather:

> An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival. And that fact, in turn, suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market—the very anticompetitive consequence that underlies the claim of antitrust unlawfulness.

Id. In short, "the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself." *Id. at 158*.

The fifth and final consideration was that "the fact that a large, unjustified reverse payment risks antitrust liability does not **[**32]** prevent litigating parties from settling their lawsuit" in other ways. *Id.* For example, the brand manufacturer may "allow[] the generic manufacturer to enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point." *Id.* When a settlement includes a reverse payment, the relevant antitrust question is why. "If the basic reason is a desire to maintain and to share patent-generated **[*474]** monopoly profits, then, in the absence of some other justification, the antitrust laws are likely to forbid the arrangement." *Id.*

The *Actavis* Court thus summarized its discussion:

> [A] reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects; one who makes such a payment may be unable to explain and to justify it; such a firm or individual may well possess market power derived from the patent; a court, by examining the size of the payment, may well be able to assess its likely anticompetitive effects along with its potential justifications without litigating the validity of the patent; and parties may well find ways to settle patent disputes without the use of reverse payments.

Id. These considerations **[**33]** led the *Actavis* Court to conclude that such settlements should not be categorically shielded from antitrust scrutiny. *Id.*

At the same time, however, the Supreme Court also rejected the FTC's argument that reverse-payment settlements should be deemed "presumptively unlawful" and be reviewed "via a 'quick look' approach." *Id. at 158-59*. Under that approach, any agreement pursuant to which a generic manufacturer agreed to honor a patent and to refrain from entering the market prior to the patent's expiration would be presumptively unlawful if the generic received payment in exchange for that promise, and the burden would then shift to the parties to that agreement to provide a legitimate pro-competitive justification for it. A complaint based solely on those allegations would survive a motion to dismiss, and the defendants would have to prove that "any money that changed hands was for something other than a delay, such as the generic manufacturer's provision of property or services unrelated to the brand-name manufacturer's monopoly." Brief for the Petitioner at 37, *FTC v. Actavis, 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)* (No. 12-416) (internal quotation marks and citation omitted). The Supreme Court rejected the FTC's argument. *Actavis, 570 U.S. at 158-59*. It held that a quick-look approach **[**34]** "is appropriate only where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Id. at 159* (internal quotation marks omitted). The reverse-payment agreement did not fit into that category; it was not presumptively wrongful. *Id.* The Supreme Court reasoned that the anticompetitive nature of the agreement would depend on more particularized facts because "the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification." *Id.* "These complexities," including also the variance among industries in the "existence and degree of any anticompetitive consequence," justified application of the rule of reason. *Id.*

Since *Actavis*, the lower federal courts have struggled with the standards set forth by the Supreme Court.[9] *See, e.g.*, *In **[*475]** re Namenda Indirect Purchaser Antitrust Litig., 2021 U.S. Dist. LEXIS 110081, 2021 WL 2403727, at *11 (S.D.N.Y. June 11, 2021)* (describing the Supreme Court's *Actavis* decision as "an opinion that has long bedeviled district courts"); *In re Aggrenox Antitrust Litig., 94 F. Supp. 3d 224, 242 (D. Conn. 2015)* ("District courts applying *Actavis* have . **[**35]** . . had relatively little guidance on the question of what constitutes a 'large' and 'unjustified' reverse payment . . . ."); *In re Lipitor Antitrust Litig., 868 F.3d 231, 254 (3d Cir. 2017)* ("For its part, the Supreme Court in *Actavis* was deliberately opaque about the parameters of reverse payment antitrust claims."). The Second Circuit has not yet addressed what is sufficient to plead a large and unjustified reverse payment to overcome a motion to dismiss. ***HN4***[] The courts that have considered reverse-payment agreements have stated that, "[t]o trigger antitrust concern under *Actavis*, a settlement term must be '(1) a "payment" that is (2) made in "reverse"—that is, from the patent holder to the alleged infringer—and is [(3)] "large," and (4) "unexplained."'" *Sergeants Benevolent Ass'n Health & Welfare Fund v. Acta Vis, PLC, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at *13 (S.D.N.Y. Sept. 13, 2016)* (quoting *In re Actos End Payor Antitrust Litig., 2015 U.S. Dist. LEXIS 127748, 2015 WL 5610752, at *11 (S.D.N.Y. Sept. 22, 2015)*). "Because the existence and degree of any anticompetitive effects may vary depending on the particular settlement and the relevant industry, plaintiffs must show that the settlements are anticompetitive under the rule of reason analysis applied to other types of antitrust claims." *Id.* (internal quotation marks omitted). Moreover,

> [i]n this Circuit, [the rule of reason analysis] involves three steps: First, the plaintiff bears the initial burden of showing that the defendant's conduct had an actual **[**36]** adverse effect on competition as a whole in the relevant market. If plaintiff satisfies this burden, the burden then shifts to the defendant to offer evidence that its conduct had pro-competitive effects. If the defendant is able to offer such proof, the burden shifts back to plaintiff, who must prove that any legitimate competitive effects could have been achieved through less restrictive alternatives.

Id. (alterations adopted) (citing *Arkansas Carpenters Health & Welfare Fund v. Bayer AG, 604 F.3d 98, 104 (2d Cir. 2010)*).

However, those general statements beg the question what makes a payment "large" or "unjustified" and what facts must be alleged to plead a claim and open the doors to discovery. "In *Actavis*, the Court did not say what constitutes a 'large' or 'unjustified' reverse payment, but it instead instructed courts (1) to compare a payment to the payor's future litigation costs as a measure of scale to determine if it was 'large,' and (2) to consider whether a payment 'reflects traditional settlement considerations, such as avoided litigation costs or fair value for services' to determine if it was justified." *2016 U.S. Dist. LEXIS 128349, [WL] at *14*.

Courts in this Circuit have taken somewhat different approaches to those questions. For example, in *In re Actos End Payor Antitrust Litigation*, Judge Abrams **[**37]** concluded that "to meet their pleading burden as to whether the payments were 'large' and 'unjustified,' Plaintiffs must plausibly allege a factual basis for the Court to reasonably estimate the value of the settlement terms." *2015 U.S. Dist. LEXIS 127748, 2015 WL 5610752, at *19*. Judge Abrams continued, "Although **[*476]** Plaintiffs need not provide precise calculations at the pleading stage, here,

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[9] The challenge is compounded by some ambiguity within *Actavis* itself. In summarizing its holding, the Supreme Court stated, "a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects," and also stated, "one who makes *such* a payment may be unable to explain and justify it." *Id. at 158*. The *Actavis* Court elsewhere stated that where the plaintiff has alleged a large and unjustified payment, "[a]n antitrust defendant may show in the antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason." *Id. at 156*. It is not clear from the four corners of the opinion the circumstances where a reverse payment may be both large and unjustified and still able to be explained and justified by the defendant.

they do not even attempt to provide a factual basis for the 'tens' and 'hundreds of millions' of dollars allegedly paid by [the brand manufacturer]." *Id.* Accordingly, those "bare allegations" were "insufficient for the Court to make a reasonable estimate of the settlements' value and determine whether they constituted large and unjustified payments." *Id.; see also* *In re Opana ER Antitrust Litig., 2016 U.S. Dist. LEXIS 23319, 2016 WL 738596, at *8-9 (N.D. Ill. Feb. 25, 2016)* ("[I]n order to raise a right to relief above the speculative level, [plaintiffs] must provide some reliable foundation to show an estimated value of the reverse payment and how that estimate was calculated. Further, [plaintiffs'] allegation that the reverse payment was 'an amount far above any litigation costs saved by Endo (or Impax) by settling,' fails to calculate what those saved costs actually were. Without this information, it is impossible to determine whether the payment was 'large' **[**38]** or 'unjustified' in comparison to the avoided litigation costs and any other services provided from Impact to Endo." (citation omitted)).

In *In re Aggrenox Antitrust Litigation*, Judge Underhill acknowledged that, "among the stronger of the defendants' arguments" is the argument that "the plaintiffs have not attempted to assign dollar values with significant precision or very obvious methodological justification to the various provisions of the settlement." *94 F. Supp. 3d at 244*. But he ultimately concluded that such allegations were not necessary because "very precise and particularized estimates of fair value and anticipated litigation costs may require evidence in the exclusive possession of the defendants, as well as expert analysis, and . . . these issues are sufficiently factual to require discovery." *Id.* Judge Underhill could not "conclude simply from the absence of precise figure that the pleadings represent formulaic recitations of elements and allegations that fail to rise above the speculative." *Id. at 244-45*. Rather, the complaints made "specific allegations about the terms of the settlement and their relative value that are plausible on their face." *Id. at 245*. The plaintiffs had "alleged that the total payment [was] **[**39]** far greater than the fair value of the services falling under [a] Co-Promotion Agreement, and therefore constitute[d] a large and unjustifiable reverse payment, which they allege[d was] especially clear since payment [was] guaranteed even without the generation of additional sales." *Id. at 243*. They also "allege[d] that [the brand manufacturer] agreed not to launch its own 'authorized generic' during [the generic manufacturer's] 180-day exclusivity period under the *Hatch-Waxman Act*, which further enlarged the reverse payment by constituting an additional unexplained transfer of value to [the generic]." *Id. at 244*. "Whether the plaintiffs can substantiate those allegations may be an issue for summary judgment or trial, but for purposes of the motions to dismiss, [the court] must accept the allegations as true and draw all reasonable inferences in the plaintiffs' favor." *Id. at 245*.

Similarly, in *Sergeants Benevolent Association Health and Welfare Fund v. Acta Vis, PLC*, Judge McMahon determined that the questions of whether a reverse payment is large and unjustified represent "intrinsically fact-based determinations [that] cannot be made on a pre-answer motion to dismiss." *2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at *14*. There, the plaintiffs had alleged that, contemporaneously **[**40]** with the execution of each of the settlement agreements, the brand manufacturer made payments to cover the generic manufacturers' litigation costs and to provide other compensation for promoting the brand drug and also granted early-entry licenses, which allowed the generics to manufacture a generic version **[*477]** of the drug three months before patent expiration. *2016 U.S. Dist. LEXIS 128349, [WL] at *13-14*. Judge McMahon concluded that "[d]iscovery [was] needed to reveal whether the payments Forest made to the Generic Defendants were actually commensurate with the legal fees they expected to pay over the course of the ANDA A patent litigation, or constituted reasonable compensation for promoting brand-name Namenda IR to doctors and patients." *2016 U.S. Dist. LEXIS 128349, [WL] at *14*. The "[p]laintiffs [had] alleged that these payments exceeded reasonable costs and compensation." *Id.* And "without evidence related to what the Generic Defendants had already paid in legal fees and what they reasonably could be expected to continue paying if they had continued to litigate the patent infringement actions, the Court cannot say, as a matter of law, that the payments were not large and unjustified." *Id.* It appears that under Judge McMahon's approach, as well as under Judge Underhill's **[**41]** approach, a plaintiff need only plead the approximate amount of a payment and that it is large and unjustified in order to state a claim for relief under the general pleading standards of *Rule 8 of the Federal Rules of Civil Procedure*.

The Third Circuit has taken a similar approach. ***HN5***[] It has held that "[a] plaintiff can meet this pleading standard without describing in perfect detail the world without the reverse payment, calculating reliably the payment's exact size, or preempting every possible explanation for it." *Fed. Trade Comm'n v. AbbVie Inc, 976 F.3d 327, 356 (3d Cir. 2020)*; *see also* *In re Lipitor Antitrust Litig., 868 F.3d at 254*. "If a plaintiff plausibly alleges that an agreement's anticompetitive effects outweigh its procompetitive virtues, the district court must accept that allegation and allow the plaintiff to take discovery. If genuine issues of material fact remain, the rule-of-reason analysis is for the factfinder, not the court." *Fed. Trade Comm'n v. AbbVie Inc, 976 F.3d at 356*.

In describing the level of detail required to be pleaded for a reverse payment to be considered "large," the Third Circuit recounted the allegations in *Actavis* on the size of the reverse payment:

> There, the FTC alleged simply that a patentee "agreed to pay [a generic manufacturer] $10 million per year for six years," "agreed to pay [another generic manufacturer] $2 million per year for six years," and **[**42]** "projected that it would pay [a third generic manufacturer] about $19 million during the first year of its agreement, rising to over $30 million annually by the end of the deal."

In re Lipitor Antitrust Litig., 868 F.3d at 254-55 (alterations in original) (citations omitted). Further, "the FTC's complaint did not preemptively negate justifications for the reverse payments" and instead "simply alleged that the payments were meant to, and did, induce delay of likely successful patent challenges through the sharing of monopoly profits." *Id. at 255*. ***HN6***[] In other words, "[t]o plausibly allege an unjustified reverse payment, an antitrust plaintiff need only allege the absence of a convincing justification for the payment." *Id. at 256* (internal quotation marks omitted). Allegations that the value of the released patent litigation claims far exceeds any litigation costs the brand manufacturer avoided by settling are sufficient. *Id.* "[A]ll that need be alleged, at this juncture [i.e., the motion-to-dismiss stage], is that those [saved litigation] costs fail to explain the hundreds of millions of dollars of liability released by [the brand manufacturer]." *Id.* "[F]inely calibrated litigation cost estimates . . . are unnecessary at this stage of the litigation." *Id.*

[43]** In determining what must be pleaded to survive a motion to dismiss, the Court in the instant case takes additional guidance both from the Supreme Court's decision in *Twombly* and from the *Actavis* Court's **[*478]** rejection of the FTC's quick-look approach to reverse-payment settlements. The approach taken by those courts that have permitted complaints to go forward only on general allegations that a reverse payment is large and unjustified seems to be animated by a concern that applying the pleading standards too rigidly would permit many anticompetitive agreements to go unprosecuted and could render *Actavis* and the Sherman Act's protection against pay-for-delay agreements an empty promise: Clever competitors would shield their agreement from any review by characterizing those payments that are for delay as for consideration for some other service. Although some such characterizations might be accurate, a consumer who lacks information about the value of the service or the motivation for entering the agreement would have no means to challenge the competitors' characterization, obtain discovery, and ask a court to decide whether it was pretextual.

The Supreme Court addressed in *Twombly* the generalized concern that a requirement that a plaintiff plead facts to support a claim might result in some, and perhaps much, anticompetitive conduct going unredressed. The question there was whether allegations of parallel conduct along with the claim that the defendants entered into an agreement to restrain competition and to prevent competitive entry into each other's respective markets was sufficient to state a claim for relief and to require **[**44]** an answer and at least some minimal discovery. Justice Stevens' dissent reasoned that the alleged conduct was "entirely consistent with the *presence* of the illegal agreement alleged in the complaint," that plaintiffs were entitled to an answer at least "denying a charge that [defendants] in fact engaged in collective decisionmaking," and that any concerns that "[p]rivate antitrust litigation can be enormously expensive" can be addressed by "careful case management, including strict control of discovery." *Twombly, 550 U.S. at 573-74* (Stevens, J., dissenting). The Supreme Court majority answered that conduct that is consistent with and equally explicable by a pro-competitive justification—by each defendant acting in its own independent interest—and that raises only the possibility of anticompetitive conduct is not sufficient to state a claim and to subject the defendants to what it characterized as the "potentially enormous expense of discovery." *Id. at 559*; *see also id. at 556*. The *Twombly* Court was not oblivious to the fact that "in antitrust cases, . . . the proof is largely in the hands of the alleged conspirators," *id. at 586* (Stevens, J., dissenting) (internal quotation marks omitted) (quoting *Hospital Building Corp. v. Trustees of Rex Hospital, 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)*), and that its decision would allow certain anticompetitive **[**45]** conduct to go unpunished. It was just skeptical that careful case management could weed out unmeritorious claims; and the majority concluded that the cost to defendants and to the judicial system of "allowing a potentially massive factual controversy to proceed" outweighed the risk that some meritorious claims might be dismissed. *Id. at 558* (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528 n.17, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*).

The same concern—that wily defendants not be permitted to escape review and should be required to at least answer—also appears to have motivated the FTC's "quick-look" argument in *Actavis*. In its argument before the Supreme Court, the FTC recognized that a reverse-payment agreement was not necessarily anticompetitive and could be consistent with pro-competitive conduct. The FTC stated that an agreement might not be anticompetitive if "the payment was commensurate **[*479]** with the litigation costs that the brand-name manufacturer avoided by settling." Brief for the Petitioner at 38, *FTC v. Actavis, 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)* (No. 12-416). According to the FTC, it also might not be anticompetitive if "the parties could show that any money that changed hands was for something other than a delay, such as the generic manufacturer's provision of property or services unrelated to the brand-name manufacturer's **[**46]** monopoly." *Id.* at 37 (internal quotation marks and citation omitted). "Although there is no fixed formula for making that showing, and a court would need to consider the totality of the circumstances surrounding the agreement," *id.*, the FTC provided a list of relevant considerations for a court to consider, including:

> whether the payment reflected bona fide fair consideration for the property or services; whether other terms of the side transaction comported with industry standards; the existence of previous dealings between the parties on the subject matter of the side transaction; a history of demonstrated interest in or need for the property or services on the part of the brand-name manufacturer; and the course and content of the manufacturers' negotiations over the agreements.

Id. at 37-38. The FTC simply argued that it should be up to the defendants to prove those facts and that, if the plaintiff proved the existence of an agreement pursuant to which the generic manufacturer agreed not to enter the market before a patent expired and the brand manufacturer agreed to pay the generic money or consideration, the agreement should be presumed to be anticompetitive, thus shifting the burden to **[**47]** the defendants in a rule-of-reason analysis to offer a procompetitive justification. *Id.* at 33, 37.

The Supreme Court, however, rejected the FTC's proposed quick-look approach to such agreements, *see* *570 U.S. at 159*, and held instead that it is insufficient for a plaintiff to merely establish the existence of a reverse-payment agreement to shift the burden to the defendants to offer procompetitive reasons to justify it. The Supreme Court thus held that it was not up to the defendants to show evidence in the first instance that the agreement was consistent with pro-competitive conduct. Rather, it appears that the *Actavis* Court concluded that the plaintiffs must show the absence of one or more of the factors that would be consistent with a pro-competitive justification. If, for example, a payment from a brand manufacturer to a generic manufacturer would be pro-competitive (even if the generic manufacturer also agreed to honor a patent) because it was consistent with "previous dealings between the parties on the subject matter of the side transaction" or "a history of demonstrated interest in or need for the property or services on the part of the brand-name manufacturer," it would fall to the plaintiff in the first instance **[**48]** to allege facts suggesting the absence of any such pro-competitive justification. ***HN7***[] In the words of the *Twombly* Court, conduct that is equally consistent with a pro-competitive as with an anticompetitive justification is not sufficient to "nudge[] [plaintiffs'] claims across the line from conceivable to plausible." *550 U.S. at 570*.

HN8[] "[T]o determine what the plaintiff must plausibly allege at the outset of a lawsuit, [the court] usually ask[s] what the plaintiff must prove in the trial at its end." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1014, 206 L. Ed. 2d 356 (2020)*. It thus appears, and the Court holds, that to state a claim under *Actavis*, a plaintiff must allege more than a general statement simply asserting that a reverse payment is large and unjustified (or was made pursuant **[*480]** to a simultaneously executed side agreement) and that the generic manufacturer agreed not to enter the market before the patent expired. Such a standard would replicate at the pleading stage the "quick-look" approach the Supreme Court rejected at least for the trial stage. Rather, the plaintiff must plead *facts* that would support the claim that the reverse payment was "large" and "unjustified," i.e., that it was not simply possible that the defendants engaged in the anticompetitive conduct of paying the generic **[**49]** manufacturer to forego entering the market but that it was plausible.

HN9[] A showing that a reverse payment is "large" can be established by factual allegations plausibly suggesting that the payment is larger than the payor's anticipated future litigation costs. *See* Actavis, 570 U.S. at 159 (describing likelihood of reverse payment bringing about anticompetitive effects as dependent on payment's "scale in relation to the payor's anticipated future litigation costs"); Sergeants Benevolent Ass'n, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at *14; In re Opana ER Antitrust Litig., 162 F. Supp. 3d at 718; *cf.* In re Aggrenox Antitrust Litig., 94 F. Supp. 3d at 243 ("[P]ayments smaller than avoided litigation costs are presumptively not large and unexplained under Actavis, and represent a *de facto* safe harbor . . . ."). Actavis specifically directs courts to consider the reverse payment's scale in comparison to the payor's anticipated future litigation costs—not relative to other figures such as the possible profits a generic manufacturer could make by entering the market for the brand-name drug or the brand manufacturer's profits on that drug. *See* In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., 2015 U.S. Dist. LEXIS 125999, 2015 WL 5458570, at *9 (D. Mass. Sept. 16, 2015) ("Actavis specifically provided that an appropriate benchmark for the size of a reverse payment is 'its scale in relation to the payor's anticipated future litigation costs.'" (alteration adopted)). It is also not necessary that the plaintiff allege "very precise and particularized" **[**50]** estimates of actual anticipated litigation costs; such facts likely are in the exclusive possession of defendants and may require expert analysis. In re Aggrenox Antiturst Litig., 94 F. Supp. 3d at 244-45.

HN10[] In addition, a plaintiff must allege facts to plausibly suggest that the reverse payment is "unjustified." An unjustified reverse payment is one that does not reflect traditional settlement considerations such as avoided litigation costs or fair value for services. *See* Sergeants Benevolent Ass'n, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at *14; In re Opana ER Antitrust Litig., 162 F. Supp. 3d at 718. The FTC in Actavis mentioned both of these considerations in explaining what might justify a reverse payment. *See* Brief for the Petitioner at 37-38, FTC v. Actavis, 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013) (No. 12-416) (discussing payments that "reflect[] bona fide fair consideration for the property or services" or are "commensurate with the litigation costs that the brand-name manufacturer avoided by settling"). Thus, for example, if the payment on its face is for some services (and not for avoided litigation costs), the plaintiff might satisfy its pleading burden with facts showing the negative of what the FTC claimed would be evidence of a pro-competitive agreement—e.g., that the terms of the side transaction were not for fair value; that the terms did not comport with industry standards; that there were no previous dealings **[**51]** between the parties on the subject matter of the side transaction; that there was no history of demonstrated interest in or need for the property or services on the part of the brand-name manufacturer; or that the course and content of the manufacturers' negotiations **[*481]** over the agreements suggested that the purported justification for the agreement was pretextual and that the real reason for the payment was to preserve the brand manufacturer's monopoly. *See id.*; In re Lipitor Antitrust Litig., 868 F.3d at 256 ("To plausibly allege an unjustified reverse payment, an antitrust plaintiff need only allege the absence of a 'convincing justification' for the payment."). Allegations regarding these types of considerations are relevant to whether a reverse-payment agreement is "unjustified." HN11[] A plaintiff need not "preempt[] every possible explanation" for the reverse payment to survive a motion to dismiss, Fed. Trade Comm'n v. AbbVie Inc, 976 F.3d at 356, but a plaintiff must plead at least some facts of this nature to sufficiently allege an unjustified agreement.

With these principles in mind, the Court turns to the allegations of the DPP Complaint.

B. The Alleged Settlement Agreements and Side Agreements

In their motion to dismiss for failure to state a claim, Defendants argue that the **[**52]** settlement agreements and side agreements between Forest and each of the Generic Defendants are not unlawful reverse-payment agreements under *Actavis*. Dkt. No. 269 at 7-40. More specifically, Defendants argue that the settlement agreements, considered separately from the side agreements, include payments for avoided litigation costs and are not large and unexplained. *Id.* at 7-10. Further, they argue that it is not pleaded that the payments associated with the side agreements are related to the decision to settle or that they exceed the fair value of services rendered, are unexplained, or are large. *Id.* at 11-19.

Direct Purchaser Plaintiffs respond that the payments from the settlement agreements and the side agreements together represent large reverse payments and that they allege the payments exceed the fair market value of any goods or services agreed to be provided (though, they maintain, this latter allegation is not required at the pleading stage). Dkt. No. 285 at 15-22. They also argue that the payments are unexplained and that Defendants have the burden of justifying the reverse payments. *Id.* at 22-24.

The parties first debate whether the complaint plausibly alleges that the settlement **[**53]** agreements and side agreements are related to one another. The Court concludes that the complaint does so. ***HN12***[] "A settlement agreement may be very simple or tremendously complex, and it may involve all manner of consideration; and if, when viewed holistically, it effects a large and unexplained net transfer of value from the patent-holder to the alleged patent-infringer, it may fairly be called a reverse-payment settlement." *In re Aggrenox Antitrust Litig., 94 F. Supp. 3d at 243*. Where a plaintiff has plausibly pleaded that several agreements are connected, the Court must accept those allegations as true on a motion to dismiss. *See Fed. Trade Comm'n v. AbbVie Inc, 976 F.3d at 358* ("Here, the FTC plausibly alleged that AbbVie's settlement with Teva and the TriCor deal were linked. The Court had to accept that allegation as true."); *In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 752 (E.D. Pa. 2014)* ("[D]efendants may not improperly 'dismember' plaintiffs' Consolidated Amended Complaints by examining each of the three settlement agreements in isolation. Rather, the Licensing Agreement must be read in conjunction with the Co-Promotion and Manufacturing Agreements executed that same day." (citations omitted)); *In re Opana ER Antitrust Litig., 162 F. Supp. 3d at 718* (disagreeing with defendants' assessment of the components of a settlement "in piecemeal fashion" and instead stating that "[t]he Court must determine **[**54]** whether, **[*482]** when taken as a whole, the total payment" received under the agreements was large and unjustified).

Here, Direct Purchaser Plaintiffs have sufficiently and plausibly alleged that Forest admitted that each settlement agreement and each side agreement was connected to the settlement of the Bystolic patent dispute. The DPP Complaint does not simply assert the conclusion but instead alleges facts to support that conclusion. In particular, it alleges that outside counsel for Forest, in connection with work on the Forest-Actavis merger, asked for "all of the Bystolic settlement and licensing agreements as well as the side agreements with those generic companies" before counsel engaged in discussions with the FTC. DPP Compl. ¶ 8. Forest responded that it had "side deals" with all of the companies with whom it had settlement agreements. *Id.* ¶¶ 8, 151. In the Forest-Actavis merger agreement, Forest also allegedly listed all of the settlement agreements and the side agreements as material contracts in connection with the settlement of the Bystolic patent dispute. *Id.* ¶¶ 9-17. That allegation, and Forest's characterization of the agreements as "side deals," is sufficient at this stage **[**55]** to support the inference that they are related, particularly given that each of the side agreements was executed in close temporal proximity—sometimes on the same day—with the related settlement agreements.

The Court now turns to the agreements with each of the Generic Defendants to determine whether Direct Purchaser Plaintiffs sufficiently allege that such agreements (the settlement agreement and side deal read together) support the plausible inference of a large and unexplained reverse payment under *Actavis*. The Court analyzes Forest's agreements with each of the Generic Defendants separately by Generic Defendant. ***HN13***[] Where there are multiple generic manufacturers, it does not follow that simply because a reverse-payment agreement with one Generic Defendant is anticompetitive, the brand manufacturer's agreements with every other Generic Defendant is anticompetitive.[10] **[*483]** Likewise, the fact that one or more reverse-payment agreements a brand manufacturer

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[10] Relatedly, Direct Purchaser Plaintiffs argue that the contingent launch provision in each of the settlement agreements supports joint and several liability for all Defendants if one or more of them have been found liable for agreeing to an unlawful reverse payment. Dkt. No. 285 at 43-45, 44 n.19. To support this argument, Direct Purchaser Plaintiffs rely on tort principles and cite to *In re Modafinil Antitrust Litigation, 837 F.3d 238 (3d Cir. 2016)*. This argument is not sound. ***HN15***[] "Under the doctrine of joint and several liability, '[i]f the tortious conduct of each of two or more persons is a legal cause of harm that cannot be apportioned, each is subject to liability for the entire harm, irrespective of whether their conduct is concurring or consecutive.'" *Id. at 262 n.29* (alteration in original) (quoting *Restatement (Second) of Torts § 879* (1979)). The doctrine requires that each liable person engage in tortious conduct. By analogy, each defendant to be held jointly and severally liable must have engaged in anticompetitive conduct. But Direct Purchaser Plaintiffs seek to hold liable even those that have *not* agreed to an anticompetitive reverse-payment agreement by virtue of a contingent launch provision, which by itself has the effect of increasing competition if activated. Similarly, *In re Modafinil Antitrust Litigation* does not support Direct Purchaser Plaintiffs' conclusion. In that case, which involved similar allegations of reverse-settlement agreements, the defendants appealed the district court's class

has with a Generic Defendant is not large or is justified would not establish that no other reverse agreement is anticompetitive. A patent owner who legitimately secures an agreement with one or more potential generic competitors that would prevent **[**56]** the generic from entering the market may still enter an anticompetitive agreement with the remaining potential competitors. ***HN14***[] As the Supreme Court observed in *Iqbal*, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task." *Iqbal, 556 U.S. at 679*.

1. Hetero

Forest executed the settlement agreement with Hetero to resolve the patent litigation on October 24, 2012. DPP Compl. ¶ 153. In addition to releasing the claims, the agreement included a maximum payment of $200,000 for Forest's avoided litigation fees and Hetero's litigation fees. *Id.*; Dkt. No. 270-1. Hetero also received a license to sell generic Bystolic three months before the patent expired, i.e., September 2021, and agreed to not otherwise manufacture or market any generic equivalent of Bystolic prior to the expiration of the patent. Dkt. No. 270-1.

A few weeks earlier, on October 5, 2012, Forest and Hetero also executed a final term sheet for a supply agreement for [TEXT REDACTED BY THE COURT]. DPP Compl. ¶ 153. The final term sheet included a term requiring Forest to [TEXT REDACTED BY THE COURT] of the supply agreement to be entered into by the parties. Dkt. No. **[**57]** 270-2. Based on Forest's stated estimate of requirements for [TEXT REDACTED BY THE COURT], Forest would allegedly pay Hetero $[TEXT REDACTED BY THE COURT] million (before any price adjustments). DPP Compl. ¶ 153; Dkt. No. 270-2. The parties "agree[d] that their respective obligations contained in the 'Obligations' section of this term sheet are effective as of the Term Sheet Date." Dkt. No. 270-2. The Obligations section provides:

Following execution of this Term Sheet by both Parties:

- the Parties shall negotiate and enter into the Agreement, which shall contain the terms set forth in this Term Sheet and other terms and conditions that are typical for manufacturing and supply agreements of [TEXT REDACTED BY THE COURT];
- the Parties shall cooperate in good faith to obtain the FDA's approval [TEXT REDACTED BY THE COURT]; and
- Forest shall use good faith efforts to amend its current supply agreements with [TEXT REDACTED BY THE COURT]. Forest expects full cooperation from [TEXT REDACTED BY THE COURT] and that such amendment will be completed together with the completion of the Agreement.

Id.

Direct Purchaser Plaintiffs allege that, prior to the Hetero agreement, Forest had been able to obtain **[**58]** sufficient amount of [TEXT REDACTED BY THE COURT] without a supply agreement with Hetero, and that, on information and **[*484]** belief, Forest did not need such an agreement in October 2012. DPP Compl. ¶ 154. They also allege, on information and belief, that the payments under the supply agreement exceeded the fair value of any

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certification decision. One of the defendants' arguments was that predominance under *Rule 23(b)(3)* cannot be demonstrated because the plaintiffs' theory of liability must isolate the harm that each individual reverse-payment settlement agreement caused each individual class member under the doctrine of antitrust standing. *Id. at 261*. The defendants argued that the plaintiffs were attempting to circumvent the doctrine of antitrust standing by asserting the theory of joint and several liability. *Id. at 262*. The Third Circuit rejected the defendants' argument and determined that "because all four [generic manufacturers allegedly] entered into these reverse-payment settlement agreements and prevented a competitive market from forming, each contributed to the market-wide harm, and each can be held jointly and severally liable for such harm." *Id. at 266*. Putting aside that this discussion was in the context of a class certification decision, the Third Circuit's conclusion also explicitly relied on all four generic manufacturers allegedly entering into anticompetitive arrangements with the brand manufacturer. In other words, each entity to be held jointly and severally liable had entered into an anticompetitive agreement. By contrast, Direct Purchaser Plaintiffs here, solely based on the competition-increasing contingent launch provisions, attempt to hold liable even those Defendants who are not determined to be parties to anticompetitive reverse-settlement agreements.

products or services rendered by Hetero and that the agreement itself was a pretextual conduit of cash from Forest to induce Hetero to agree not to compete in the nebivolol market until September 2021. *Id.*

The alleged $[TEXT REDACTED BY THE COURT] million payment that Forest would make to Hetero under the terms of the final term sheet for the supply agreement is large under *Actavis* as it is well beyond any estimated or anticipated avoided litigation costs. The DPP Complaint alleges that Forest's saved litigation costs with respect to each Generic Defendant were far less than $5-6 million; but, even assuming the comparator to be an upper-bound figure of $5-6 million, the alleged reverse payment is large.

Though Direct Purchaser Plaintiffs plead a large reverse payment, they have failed to plead that it is unjustified and have thus not "nudged their claims across the line from **[**59]** conceivable to plausible." *Twombly, 550 U.S. at 570*. The allegations with respect to Hetero squarely raise the questions—also directly presented by the allegations regarding Forest's agreements with the other Generic Defendants—what kinds of allegations should be considered to be "labels and conclusions" or "naked assertion[s]" devoid of further factual enhancement under *Twombly, id. at 555, 557*, and to what extent a party can rely on "information and belief" allegations to satisfy its *Rule 8* pleading obligations to state an antitrust claim. ***HN16***[] The Second Circuit has held that a plaintiff may plead facts "upon information and belief where the facts are peculiarly within the possession and control of the defendant, or where the belief is based on factual information that makes the inference of culpability plausible." *Arista Recs., LLC v. Doe 3, 604 F.3d 110, 120 (2d Cir. 2010)* (internal quotation marks and citations omitted). The allegations that the payments pursuant to the [TEXT REDACTED BY THE COURT] supply agreement exceeded the fair value of any products delivered or services rendered by Hetero and that the agreement was a pretextual conduit of cash in exchange for an agreement not to compete, in isolation, are labels and conclusions. They could be asserted in every case in which there **[**60]** is a side agreement with a generic manufacturer who agrees to honor a patent. If those naked allegations were enough to require an answer and to shift the burden to the defendant to prove fair value and the absence of pretext, there would be nothing left of the Supreme Court's rejection of the per se rule in *Actavis*.

The only remaining allegation is that, on information and belief, Forest did not need a supply agreement with Hetero in October 2012 because Forest had been able to obtain sufficient amounts of [TEXT REDACTED BY THE COURT] from its existing supplier, [TEXT REDACTED BY THE COURT]. It is true that alleging facts regarding the lack of a history of demonstrated interest in or need for the property or service on the part of Forest could raise an inference that the reverse payment is unjustified. But Direct Purchaser Plaintiffs here do not allege such facts. Direct Purchaser Plaintiffs have not pleaded, for instance, that Forest had expressed no interest in entering into a new supply agreement, that Forest was content was its current arrangement with [TEXT REDACTED BY THE COURT] that Forest entered this new agreement suddenly and without standard negotiations, or any other facts suggesting **[**61]** something unusual in Forest's new supply agreement with Hetero. Instead, they merely plead, on information and belief, that Forest had no need for the supply agreement based on the allegation that Forest had been able to obtain **[*485]** sufficient [TEXT REDACTED BY THE COURT] in the absence of a new agreement with Hetero. However, the allegation of sufficient existing supply, alone, does not "make[] the inference of culpability plausible." *Arista Recs., 604 F.3d at 120*. Simply alleging that Forest had been acquiring [TEXT REDACTED BY THE COURT] from another source (i.e., [TEXT REDACTED BY THE COURT]) is insufficient to raise a plausible inference that Forest had no need for another source of supply or that the [TEXT REDACTED BY THE COURT] supply agreement with Hetero is unjustified. Indeed, the fact that Forest had sufficient [TEXT REDACTED BY THE COURT] could be entirely consistent with the opposite conclusion from the one offered by Direct Purchaser Plaintiffs—i.e., that Forest was in great need of another supplier. *Cf. Twombly, 550 U.S. at 554* (finding allegations "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy" insufficient to state an antitrust claim). Though Forest was **[**62]** obtaining sufficient [TEXT REDACTED BY THE COURT], there is nothing pleaded to indicate that Forest was not simultaneously expressing dissatisfaction with its arrangement with [TEXT REDACTED BY THE COURT] or actively seeking alternative or supplemental suppliers. Even after drawing all inferences in favor of the non-movant, as the Court must on a motion to dismiss, there is nothing about Forest's sufficient existing supply of [TEXT REDACTED BY THE COURT] alone that plausibly pleads an unjustified reverse payment.

Aside from these allegations, the DPP Complaint offers nothing to support why the reverse-payment agreement is unjustified. Direct Purchaser Plaintiffs do not offer any facts alleging, for example: that while Forest agreed to pay $[TEXT REDACTED BY THE COURT] million to Hetero for [TEXT REDACTED BY THE COURT], Forest could have obtained that same [TEXT REDACTED BY THE COURT] from another supplier at a significantly lower price; that the terms of Forest's [TEXT REDACTED BY THE COURT] agreement with Hetero were unusual when compared with industry standards; that Forest and Hetero had never had any previous dealings on supply agreements and that Forest had previously expressed **[**63]** no interest in entering into a supply agreement with Hetero; or that the course and content of Forest's negotiations with Hetero revealed a reason why the agreement would be unjustified. Factual allegations like these might plausibly support that the reverse payment is unjustified. But without further factual enhancement, Direct Purchaser Plaintiffs' allegations remain in "neutral territory" and fall short of stating a claim. *Twombly, 550 U.S. at 557*.

Direct Purchaser Plaintiffs offer several arguments against dismissing their claim with respect to Hetero, but none of these arguments cures their defective pleading. Direct Purchaser Plaintiffs first rebut Defendants' argument that it was a reasonable business decision for Forest to negotiate a possible [TEXT REDACTED BY THE COURT] supply agreement with Hetero, [TEXT REDACTED BY THE COURT], in order to reduce its dependence on [TEXT REDACTED BY THE COURT]. *See* Dkt. No. 285 at 27; *see also* Dkt. No. 269 at 21, 23. Direct Purchaser Plaintiffs are correct that these allegations are not in the DPP Complaint, and thus, the Court cannot credit them on a motion to dismiss. The Court does not rely on Defendants' contrary allegations in holding that Direct Purchaser Plaintiffs' **[**64]** have failed to state a claim. As discussed, the DPP Complaint itself does not provide the factual grounding sufficient to allege an unjustified reverse payment.

Direct Purchaser Plaintiffs are also correct in arguing that Defendants cannot obtain dismissal by asserting that the Hetero supply agreement represented a potential savings for [TEXT REDACTED BY THE COURT]. Dkt. No. 285 at 27. Defendants submit a copy of the [TEXT REDACTED BY THE COURT] agreement in connection with their motion to dismiss and argue that the terms of this agreement reveal that Forest would have received more favorable price terms under the supply **[*486]** agreement with Hetero than its existing agreement with [TEXT REDACTED BY THE COURT].[11] Dkt. No. 269 at 14, 23. In other words, Defendants argue that Forest had an "economically rational incentive" to enter in the supply agreement envisioned by the term sheet. *Id.* at 14. Defendants contend that the final term sheet with Hetero represents a potential savings in the purchase of [TEXT REDACTED BY THE COURT] because the term sheet shows that Forest would initially be paying [TEXT REDACTED BY THE COURT] while the [TEXT REDACTED BY THE COURT] agreement required Forest to pay **[**65]** up to a maximum of [TEXT REDACTED BY THE COURT]. *Id.* at 23. But the [TEXT REDACTED BY THE COURT] agreement contains a cap on what Forest would be required to pay; neither the agreement nor the DPP Complaint reveals what Forest actually paid or was expecting to pay [TEXT REDACTED BY THE COURT]. Without this information, Defendants' argument that the [TEXT REDACTED BY THE COURT] agreement on its face discredits any allegation of overpayment is without merit.

Direct Purchaser Plaintiffs are also correct that the unfinalized nature of the final term sheet does not stand as a barrier to stating a claim. Dkt. No. 285 at 28-29. Defendants highlight that the side deal was reflected only in a final term sheet but not in a finalized supply agreement. Dkt. No. 269 at 21-22. According to Defendants, the final term sheet merely described the terms of a potential supply agreement, which was contingent on the response of an unrelated third party ([TEXT REDACTED BY THE COURT]), FDA approval for use of Hetero's supply, and finalizing the agreement. *Id.* However, Defendants do not dispute that the term sheet created obligations on Forest (as well as on Hetero) and that those obligations had value. **[**66]** The term sheet obligated the parties to: (1) negotiate and enter into a finalized supply agreement containing the terms of the term sheet—including the [TEXT

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[11] As Direct Purchaser Plaintiffs refer to the [TEXT REDACTED BY THE COURT] agreement in the DPP Complaint and rely on its effect, the Court may consider it on a motion to dismiss. *See* *Broder v. Cablevision Sys. Corp., 418 F.3d 187, 196 (2d Cir. 2005)* ("Where a plaintiff has 'rel[ied] on the terms and effect of a document in drafting the complaint,' and that document is thus 'integral to the complaint,' [the court] may consider its contents even if it is not formally incorporated by reference." (alteration in original) (quoting *Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002)*)).

REDACTED BY THE COURT] pricing and quantity terms allegedly amounting to $[TEXT REDACTED BY THE COURT] million in payments from Forest to Hetero; (2) "cooperate in good faith to obtain the FDA's approval or deemed approval" for use of Hetero's [TEXT REDACTED BY THE COURT] in Bystolic; and (3) "use good faith efforts to amend its current supply agreements with [[TEXT REDACTED BY THE COURT]] to permit Forest to meet the Purchase Minimum." Dkt. No. 270-2. Thus, at a minimum, the final term sheet appears to constitute a preliminary agreement of the Type II variety, which "creates an 'obligation to negotiate the open issues in good faith in an attempt to reach the [ultimate contractual objective] within the agreed framework.'" *Brown v. Cara, 420 F.3d 148, 157 (2d Cir. 2005)* (alteration in original) (quoting *Tchrs. Ins. & Annuity Ass'n of Am. v. Trib. Co., 670 F. Supp. 491, 498 (S.D.N.Y. 1987)*). The final term sheet thus created an obligation to negotiate a finalized agreement, "which shall contain the terms set forth in this Term Sheet." Dkt. No. 270-2. ***HN17***[] "An allegation of an actionable reverse-payment settlement, however, does not require an enforceable contract." **[**67]** *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., 2015 U.S. Dist. LEXIS 125999, 2015 WL 5458570, at *9* (citing *Am. Tobacco Co. v. United States, 328 U.S. 781, 809, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*, for the proposition that "[n]o formal agreement is necessary to constitute an unlawful conspiracy"). Even if the term sheet here did not itself bind Forest to the ultimate contractual goal, it did obligate Forest to "negotiate and enter **[*487]** into a finalized supply agreement" that would include the [TEXT REDACTED BY THE COURT] pricing and quantity terms amounting to $[TEXT REDACTED BY THE COURT] million in payments from Forest to Hetero. The fact that final papers were not yet documented and signed does not itself prevent the agreement the parties did reach from being considered anticompetitive under *Actavis. See id.* (rejecting argument that lack of legal commitment and requirement that parties negotiate in good faith to reach a definitive licensing and partnership agreement is insufficient to state a claim under *Actavis*).

In any event, Direct Purchaser Plaintiffs cannot overcome their failure to plead that the large reverse payment is unjustified. For that reason, the Court holds that Direct Purchaser Plaintiffs have failed to state a claim with respect to the Hetero agreements.

2. Torrent

Forest's settlement agreement with Torrent was executed on November 21, 2012, and, in addition to **[**68]** releasing the claims, the agreement granted Torrent a license to sell generic Bystolic three months before patent expiration, i.e., September 2021; obligated Torrent to not otherwise manufacture or market any generic equivalent of Bystolic before the patent expired; and included a payment of up to $1 million from Forest to Torrent for Torrent's expended litigation fees and in partial consideration of Forest's saved legal fees. DPP Compl. ¶ 156; Dkt. No. 270-12. On the same day, Forest and Torrent executed a patent assignment agreement under which Forest agreed to purchase ten patents related to manufacturing nebivolol for a non-refundable, upfront payment of $[TEXT REDACTED BY THE COURT] million plus an additional $[TEXT REDACTED BY THE COURT] million in milestone payments, for a total of $[TEXT REDACTED BY THE COURT] million. DPP Compl. ¶ 156; Dkt. No. 270-13. Direct Purchaser Plaintiffs allege that the conditions of the milestone payments were not difficult to satisfy. DPP. Compl. ¶ 157. They also allege that, because Forest had manufactured and marketed nebivolol in the United States and other jurisdictions without licenses from Torrent, Forest already had all of the intellectual **[**69]** property that it needed to successfully manufacture and sell Bystolic, and thus the Torrent patents had little or no value to Forest. *Id.* ¶ 158. They allege, on information and belief, that Forest knew about Torrent's patents prior to the patent assignment agreement, and only executed the patent assignment agreement in exchange for Torrent's agreement to refrain from marketing generic Bystolic until September 2021. *Id.* They further allege, on information and belief, that the payments related to the patent assignment agreement exceeded the fair value of any products delivered or services rendered by Torrent and that the agreement itself was a pretextual conduit of cash from Forest to induce Torrent not to compete in the nebivolol market until September 2021. *Id.*

The alleged payment from Forest to Torrent under the patent assignment agreement represents a large reverse payment. In exchange for ten patents, the agreement allegedly provided for a $[TEXT REDACTED BY THE COURT] million payment and an additional $[TEXT REDACTED BY THE COURT] million in milestone payments, which were allegedly easy to achieve, for a total of $[TEXT REDACTED BY THE COURT] million—significantly larger than Forest's **[**70]** saved litigation costs, which are pleaded to be less than $5-6 million. This is so even assuming the saved litigation costs are in the range of $5-6 million. Defendants' arguments to the contrary are not persuasive. Defendants argue that the DPP Complaint does not allege that payments were actually made under the patent assignment agreement. Dkt. No. 269 at 32. But the thrust of the DPP Complaint's allegation is that Forest and Torrent entered into an **[*488]** agreement that binds Forest to make such payments to Torrent. Defendants also argue that the maximum possible payment of $[TEXT REDACTED BY THE COURT] million corresponds to $[TEXT REDACTED BY THE COURT] million per patent, which is not large. *Id.* But Defendants cite no authority supporting their methodology of dividing the total alleged payment into certain smaller units before determining whether a payment is large. Courts, in fact, favor reviewing the total payment received by a generic manufacturer under an agreement "as a whole" rather than reviewing the components of the agreement "in piecemeal fashion." *In re Opana ER Antitrust Litig., 162 F. Supp. 3d at 718*; *see* *In re Aggrenox Antitrust Litig., 94 F. Supp. 3d at 243* ("A settlement agreement may be very simple or tremendously complex, and it may involve all manner of consideration; and **[**71]** if, *when viewed holistically*, it effects a large and unexplained net transfer of value from the patent-holder to the alleged patent-infringer, it may fairly be called a reverse-payment settlement." (emphasis added)). Direct Purchaser Plaintiffs have therefore alleged enough to plead a large reverse payment under *Actavis*.

As with the DPP Complaint's allegations regarding the Hetero agreements, however, the allegations about the Torrent agreements fall short of the requirement that the allegedly large reverse payment be unexplained or unjustified. As with the Hetero agreements, the Court does not credit or rely upon the conclusory allegation here that the payments related to the patent assignment agreement exceeded the fair value of any products delivered or services rendered by Torrent and that the agreement was a pretextual conduit of cash from Forest to induce Torrent not to compete. Additionally, the allegation, pleaded on information and belief, that Forest only executed the patent assignment agreement in exchange for Torrent's agreement to refrain from marketing generic Bystolic until September 2021 is similarly conclusory. All that remains are the allegations that the Torrent patents **[**72]** had little or no value to Forest because Forest had been able to successfully manufacture and sell Bystolic without that intellectual property and that, on information and belief, Forest knew about Torrent's patents before executing the patent assignment agreement. But, for reasons analogous to the ones given above with respect to the Hetero allegations, these allegations cannot plausibly support that the large reverse payment is unjustified. It does not plausibly follow that, because Forest had been able to manufacture and sell Bystolic, the Torrent patents had little or no value to Forest; there is a missing link between the first statement and the conclusion of no value. If the DPP Complaint contained factual allegations to support that the Torrent patents had little or no value to Forest, the DPP Complaint would then speak to the absence of bona fide fair consideration for the patents and the lack of Forest's need for these patents, both of which suggest the existence of an unjustified reverse payment. But what is pleaded is deficient.

Again, Direct Purchaser Plaintiffs could have, for example, pleaded facts: independently estimating the value of the patents; explaining why this **[**73]** patent assignment agreement did not comport with industry standards; showing that there had not been any previous dealings or discussions between Forest and Torrent on these patents; demonstrating that Forest had previously expressed no interest in these patents; or describing negotiations that were out of the ordinary for such patent assignment agreements. Such facts might plausibly plead that the large reverse payment is unjustified here. In fact, in their memorandum of law opposing Defendants' motion, Direct Purchaser Plaintiffs argue that "having sold billions of dollars' worth **[*489]** of Bystolic without the use of Torrent's patents, it is not plausible that Forest would reformulate the product at the end of its lifecycle." Dkt. No. 285 at 30. This assertion—reflecting why the patent assignment agreement may depart from standard industry practice—gets closer to the type of factual allegations that might be sufficient to show that the agreement is unjustified. ***HN18***[] But the DPP Complaint does not contain this allegation, and "[i]t is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss." *Cambridge Cap. LLC v. Ruby Has LLC, 565 F. Supp. 3d 420, 2021 U.S. Dist. LEXIS 188635, 2021 WL 4481183, at *19 n.11 (S.D.N.Y. Sept. 30, 2021)* (alteration in original) (internal quotation marks omitted) **[**74]** (quoting *United States ex rel. Foreman v. AECOM, 454 F. Supp. 3d 254, 268 (S.D.N.Y. 2020)*); *see also* *Soules v. Connecticut, Dep't of Emergency Servs. & Pub. Prot., 882 F.3d 52, 56 (2d Cir. 2018)* ("Ordinarily, parties may not amend the pleadings through motion papers."). Thus, as pleaded, the DPP Complaint is lacking.

Direct Purchaser Plaintiffs argue that the Court may not rely on Defendants' narrative that such patent assignment agreements are "*de rigueur*" and that the patents covered a process that could be valuable to Forest and its customers. Dkt. No. 285 at 29-30. Direct Purchaser Plaintiffs are correct that such allegations by the movant are not included in the DPP Complaint and are thus not properly before the Court on a motion to dismiss. The Court does not credit Defendants' allegations in finding the DPP Complaint wanting. Rather, it falls short for not pleading facts regarding why the large reverse payment is unjustified.

The Court therefore holds that Direct Purchaser Plaintiffs have failed to state a claim with respect to the Torrent agreements.

3. Alkem/Indchemie

Forest executed settlement agreements with Alkem and Indchemie on November 27, 2012, which granted them licenses to sell generic Bystolic three months before patent expiration, i.e., September 2021, and obligated them to not otherwise manufacture or market any generic Bystolic before **[**75]** expiration of the patent. Dkt. Nos. 270-7, 270-8. The settlement agreement with Alkem also included a $1 million payment for a portion of Forest's avoided legal fees and Alkem's litigation fees. DPP Compl. ¶ 159; Dkt. No. 270-7. The next day, Forest and Alkem/Indchemie executed a term sheet pursuant to which Alkem/Indchemie agreed to supply Forest with two finished drug products—[TEXT REDACTED BY THE COURT]. DPP Compl. ¶ 159. Under the term sheet, Forest agreed to pay Alkem/Indchemie a total of at least $[TEXT REDACTED BY THE COURT] million, including:

- An upfront payment of $[TEXT REDACTED BY THE COURT] million [TEXT REDACTED BY THE COURT];
- Milestone payments up to $[TEXT REDACTED BY THE COURT] million, contingent upon the completion of certain steps in the development of each product, but with Forest required to pay any of the milestone payments if the completion of the corresponding milestone(s) was delayed by [TEXT REDACTED BY THE COURT];
- [TEXT REDACTED BY THE COURT];
- A commitment to purchase a minimum of [TEXT REDACTED BY THE COURT]; and
- A $[TEXT REDACTED BY THE COURT] million [TEXT REDACTED BY THE COURT].

Id.

At the time the term sheet was executed, Direct Purchaser Plaintiffs **[**76]** allege that Forest had not yet submitted its NDA for [TEXT REDACTED BY THE COURT] and that the NDA was not submitted until February 2014. *Id.* ¶ 160. They allege, on information and belief, that submission of the NDA in February 2014 would have triggered the delay provision **[*490]** and therefore required Forest to make the milestone payments to Alkem/Indchemie associated with Byvalson. *Id.* Direct Purchaser Plaintiffs also claim, on information and belief, that, prior to the term sheet, Forest had no need for a supply agreement for Bystolic and that Forest had expressed no interest in working with Alkem/Indchemie on [TEXT REDACTED BY THE COURT]. *Id.* ¶ 161. And they allege, again on information and belief, that the payments pursuant to the term sheet exceeded the fair value of any products delivered or services rendered by Alkem/Indchemie and that the agreement itself was a pretextual conduit of cash from Forest to induce Alkem/Indchemie not to compete in the nebivolol market until September 2021. *Id.*

With respect to the agreements between Forest and Alkem/Indchemie, the DPP Complaint does not state a claim under *Actavis*. While the pleading plausibly alleges a large reverse-payment agreement (the alleged **[**77]** $[TEXT REDACTED BY THE COURT] million reverse payment as compared to the pleaded less than $5-6 million in avoided litigation costs), it provides no factual support for the contention that the large reverse payment is unexplained or unjustified. The allegation—recited verbatim with respect to Forest's agreements with each of the Generic Defendants—that the payments under the term sheet exceeded the fair value of any products delivered or services rendered by Alkem/Indchemie is conclusory and a "label" insufficient alone to state a claim. Direct Purchaser Plaintiffs do allege that, prior to entering into the term sheet, Forest had no need for a supply agreement for [TEXT REDACTED BY THE COURT] and had not expressed an interest in working with Alkem/Indchemie on [TEXT REDACTED BY THE COURT]. DPP Compl. ¶¶ 160-161. But these allegations—which might be sufficient if supported by fact—are alleged only on information and belief. Direct Purchaser Plaintiffs assert no facts to support the claim that Forest had no need for additional products or services from Alkem and/or Indchemie to support anticipated market demand for [TEXT REDACTED BY THE COURT] products. *See Brodie v. Green Spot Foods, LLC, 503 F. Supp. 3d 1, 13 (S.D.N.Y. 2020)* ("When allegations are made **[**78]** upon information and belief, the plaintiff must support them by offering facts upon which that belief is founded."). Nor are the facts to support this claim in the exclusive possession of Defendants. They further do not allege facts to support that, prior to signing the settlement agreements and term sheet with Alkem/Indchemie, Forest had expressed no interest in an agreement with those companies. This cannot be enough to satisfy *Actavis*. ***HN19***[] It is not enough that two parties entered into a new agreement at the same time as they settled the patent litigation for a reverse payment; the plaintiff must allege that there is something about that agreement other than its timing and the fact that it results in the generic manufacturer honoring a patent that supports the inference that it is anticompetitive.

For these reasons, Defendants' motion to dismiss is granted with respect to the Alkem/Indchemie agreements for failure to state a claim.

4. Glenmark

Forest executed its settlement agreement with Glenmark on December 21, 2012, and the agreement included a payment of up to $1.2 million to Glenmark for a portion of Forest's avoided legal fees and Glenmark's litigation costs. DPP Compl. ¶ 163; Dkt. No. **[**79]** 270-14. The agreement also granted Glenmark a license to sell generic Bystolic three months before patent expiration, i.e., September 2021, and bound Glenmark to not otherwise manufacture or market any generic Bystolic before patent expiration. Dkt. No. 270-14. The same day that the settlement agreement was executed, Forest and Glenmark executed a collaboration and option agreement under **[*491]** which the two companies would jointly develop [TEXT REDACTED BY THE COURT] products for at least [TEXT REDACTED BY THE COURT] absent earlier termination and Forest would pay Glenmark $[TEXT REDACTED BY THE COURT] million in upfront and milestone payments. *Id.* The $[TEXT REDACTED BY THE COURT] million in payments included an upfront payment of $[TEXT REDACTED BY THE COURT] million, which consisted of:

- A $[TEXT REDACTED BY THE COURT] million [TEXT REDACTED BY THE COURT] and
- A $[TEXT REDACTED BY THE COURT] million [TEXT REDACTED BY THE COURT]

Id. The additional $[TEXT REDACTED BY THE COURT] million in payments included: $[TEXT REDACTED BY THE COURT] million [TEXT REDACTED BY THE COURT]; and $[TEXT REDACTED BY THE COURT] million [TEXT REDACTED BY THE COURT]. *Id.* All intellectual property developed by **[**80]** Glenmark in connection with [TEXT REDACTED BY THE COURT] remained exclusively with Glenmark except for Forest's option for a right of first negotiation of an exclusive license to use the technology. *Id.*

Direct Purchaser Plaintiffs further allege, on information and belief, that prior to executing the agreements, Forest had expressed no interest to Glenmark concerning Glenmark's development of [TEXT REDACTED BY THE COURT]. *Id.* ¶ 164. They also allege, on information and belief, the payments under the collaboration and option agreement exceeded the fair market value of any products delivered or services rendered by Glenmark. *Id.*

Direct Purchaser Plaintiffs' allegations regarding the Glenmark agreements suffer from the same deficiencies as their allegations regarding the Alkem/Indchemie agreements. Though they have plausibly alleged a large reverse payment—$[TEXT REDACTED BY THE COURT] million in payments as compared to the alleged less than $5-6 million in avoided legal fees—they have failed to offer any factual allegations for why the allegedly large reverse payment is unexplained or unjustified. First, as with the other agreements, the allegation that the payments under the collaboration **[**81]** and option agreement exceeded the fair value of Glenmark's products or services is simply a conclusory allegation that cannot support whether Direct Purchaser Plaintiffs have plausibly stated a claim under *Actavis*. Second, it is true that Direct Purchaser Plaintiffs allege, on information and belief, that Forest had previously expressed no interest in Glenmark's development of [TEXT REDACTED BY THE COURT] And factual allegations of this type relate to whether a reverse-payment agreement is unjustified because they shed light on whether there exists a history of demonstrated interest in or need for the property or services. *See supra* Section I.A. But, as discussed in relation to Alkem/Indchemie, *supra* Section I.B.3, all facts about Forest's interest in

Glenmark's development of [TEXT REDACTED BY THE COURT] are not within the exclusive possession of Defendants, and Direct Purchaser Plaintiffs have provided no factual basis for their belief that Forest had expressed no such interest prior to the agreement. Thus, this allegation pleaded on information and belief without any additional factual basis cannot plausibly support the claim that the reverse-payment agreement is unjustified.

For these **[**82]** reasons, Defendants' motion to dismiss is granted with respect to the Glenmark agreements for failure to state a claim.

5. Amerigen

The Forest-Amerigen settlement agreement was executed on July 18, 2013. DPP Compl. ¶ 165. Pursuant to the agreement, Amerigen was granted a license to sell generic Bystolic three months before patent expiration, i.e., September 2021, and agreed to not otherwise manufacture or market generic Bystolic before patent expiration. Dkt. No. 270-17. The agreement also included a payment of $2 million to Amerigen for a portion of Forest's saved litigation fees and Amerigen's litigation fees. DPP Compl. ¶ 165; Dkt No. 270-17. On the same day this settlement agreement **[*492]** was executed, Forest and Amerigen executed a binding term sheet collaboration agreement under which Forest agreed to invest in the development of eight Amerigen products. DPP Compl. ¶ 165. This agreement included a non-refundable, upfront payment of $[TEXT REDACTED BY THE COURT] million plus $[TEXT REDACTED BY THE COURT] million in milestone payments contingent upon certain product development and launch events. *Id.* The agreement also included an option for Forest to commercialize up to eight Amerigen **[**83]** products in Latin America and South America, which Amerigen had the right to supply to Forest for its manufacturing costs plus [TEXT REDACTED BY THE COURT], and on other customary and reasonable terms. *Id.*

Direct Purchaser Plaintiffs allege, on information and belief, that prior to executing the settlement and collaboration agreements, Forest had expressed no interest in Amerigen's products and that the payments under the collaboration agreement exceeded the fair value of any products delivered or services rendered by Amerigen. *Id.*

With respect to the Amerigen agreements, Direct Purchaser Plaintiffs fail to state a claim under *Actavis* for the same reasons they did not state a claim regarding the Alkem/Indchemie and Glenmark agreements. They again plausibly allege a large reverse payment—$[TEXT REDACTED BY THE COURT] million in payments as compared to the pleaded figure of less than $5-6 million in avoided legal fees—but they do not allege facts to support the claim that the large reverse-payment agreement is unjustified. Akin to their pleadings with respect to the Alkem/Indchemie and Glenmark agreements, Direct Purchaser Plaintiffs offer only conclusory allegations on information and belief **[**84]** that relate to whether there was bona fide fair consideration for the property or services and whether there was a history of demonstrated interest in or need for the property or services on the part of the brand manufacturer. Without factual allegations on these points, there are not enough factual allegations to plausibly state a claim of a large and unjustified reverse-payment agreement under *Actavis*.

For these reasons, Defendants' motion to dismiss is granted with respect to the Amerigen agreements for failure to state a claim.

6. Watson

Forest executed a settlement agreement with Watson on November 6, 2013; the agreement granted Watson a license to sell generic Bystolic three months before patent expiration, i.e., September 2021; obligated Watson to not otherwise manufacture or market generic Bystolic prior to patent expiration; and included a payment of up to $2 million to Watson in partial consideration of Forest's saved litigation fees and Watson's litigation fees. DPP Compl. ¶ 166; Dkt. No. 270-4. Shortly before this settlement agreement was executed, Forest and Watson entered into a series of agreements related to Moksha8, Inc. ("Moksha8"), a Brazilian startup drug manufacturer with **[**85]** which both Forest and Watson were involved in equity investment or financing transactions. DPP Compl. ¶ 166 & n.95. Under those agreements, Forest agreed to extend financing to Moksha8 despite Moksha8's failure to meet existing loan conditions; Watson's agreements with Moksha8 were terminated; Watson agreed to pay $[TEXT REDACTED BY THE COURT] million to Moksha8; and Watson received releases of potential claims by Moksha8. *Id.* ¶¶ 166-168.

More specifically, in a November 1, 2013 letter agreement, Forest agreed to make $[TEXT REDACTED BY THE COURT] million in loan amounts available to Moksha8. *Id.* ¶¶ 166-167. Forest was not obligated to make any loans or any other extensions of credit to Moksha8 because Moksha8 failed to meet certain **[*493]** loan conditions. *Id.* ¶ 167. But in exchange for a release, Forest agreed to make a portion of certain loans available to Moksha8. *Id.* Additionally, three days later, on November 4, 2013, Watson and Moksha8 executed a termination and release agreement. *Id.* ¶ 166. This agreement terminated certain contractual relationships between Watson and Moksha8 including, for example, [TEXT REDACTED BY THE COURT], and [TEXT REDACTED BY THE COURT]. *Id.* ¶¶ 166, 168. In **[**86]** exchange for Watson paying $[TEXT REDACTED BY THE COURT] million to Moksha8, the agreement also included mutual releases of claims arising out of these terminated agreements, as well as of claims in any way related to the transactions contemplated by an [TEXT REDACTED BY THE COURT]. *Id.*

Direct Purchaser Plaintiffs plead, on information and belief, that the value of these broad releases exceeded any consideration that Watson paid for the releases. *Id.* ¶ 166. They also allege, on information and belief, that the transactions in early November 2013 involving Forest, Watson, and Moksha8—including specifically Moksha8's release of all claims against Watson arising out of the [TEXT REDACTED BY THE COURT]—disguised significant payments from Forest to Watson through the Moksha8 venture that exceeded Watson's $[TEXT REDACTED BY THE COURT] million payment and the fair value of any other products delivered or services rendered by Watson in connection with those agreements. *Id.* ¶ 169.

As a threshold matter, the Court considers the settlement agreement, the Forest-Moksha8 letter agreement, and the Watson-Moksha8 termination and release agreement together. Defendants argue that there are no facts **[**87]** connecting Forest's loan to Moksha8 with the separate agreement entered between Moksha8 and Watson aside from rough temporal proximity. Dkt. No. 269 at 26. But there is more alleged than rough temporal proximity. As discussed, *see supra* Section I.B, the DPP Complaint alleges that Forest admitted that all of the settlement agreements related to the Bystolic litigation had side agreements and that, as part of an unrelated merger transaction, Forest listed these three agreements as material contracts in connection with settling the Bystolic patent dispute. DPP Compl. ¶¶ 17, 151.

Even considering these three agreements together, however, the Court determines that Direct Purchaser Plaintiffs have not sufficiently pleaded the existence of a reverse payment—that is, a payment from Forest to Watson. Forest allegedly extended to Moksha8 a "payment," i.e., something of value, in making loan funds available to Moksha8 even though Moksha8 did not meet certain loan criteria. *See* *In re Aggrenox Antitrust Litig., 94 F. Supp. 3d at 243* ("I must conclude that large and unjustified reverse payments that 'can bring with [them] the risk of significant anticompetitive effects' can bring those effects regardless of the particular form the transfer of value **[**88]** takes and thus are not limited to cash payments." (alteration in original) (citation omitted)); *In re Actos End Payor Antitrust Litig., 2015 U.S. Dist. LEXIS 127748, 2015 WL 5610752, at *13* ("The majority view [is] that *Actavis*'s holding is not limited to payments made in cash. This view is consistent with traditional understandings of the term 'payment,' which is defined in Black's Law Dictionary as the '[p]erformance of an obligation by the delivery of money *or some other valuable thing* accepted in partial or full discharge of the obligation.'" (alteration in original) (citations omitted)). But the complaint notably lacks factual allegations regarding how that transfer of value, or "payment," to Moksha8 was then conveyed to Watson, thereby constituting a reverse payment from Forest to Watson through intermediary Moksha8. The best Direct Purchaser Plaintiffs can do is plead, on information and belief, that Moksha8's release **[*494]** of all claims against Watson was more valuable than any consideration Watson paid for the releases. In other words, Direct Purchaser Plaintiffs appear to be alleging that the "payment" from Forest to Moksha8 was then passed on from Moksha8 to Watson through an imbalanced exchange of value in the termination and release agreement. They allege as much on information **[**89]** and belief; namely, they allege, on information and belief, that the transactions in early November 2013 involving Forest, Watson, and Moksha8 disguised significant payments from Forest to Watson through the Moksha8 venture that exceeded Watson's $[TEXT REDACTED BY THE COURT] million payment and the fair value of any other products delivered or services rendered by Watson in connection with those agreements. But these allegations are entirely conclusory and cannot serve to plausibly support Direct Purchaser Plaintiffs' claim. Indeed, the caveat in the conclusory allegation that the value of the releases exceeded Watson's $[TEXT REDACTED BY THE COURT] million payment highlights how Watson actually paid Moksha8 a sum of money as part of the agreement, which goes in the opposite direction from the alleged reverse payment from Forest through intermediary Moksha8 toward Watson. Aside from these conclusory allegations, there are no facts in the DPP Complaint to raise a plausible inference that the releases were relatively more valuable than the $[TEXT REDACTED BY THE COURT] million and other consideration rendered by Watson to Moksha8. For example, the DPP Complaint could have included facts **[**90]** describing the releases, explaining why the releases were valuable to Watson, and providing context to estimate their relative value even if precise estimates are not alleged. Absent facts of that nature or other facts, Direct Purchaser Plaintiffs are missing a link in their theory and have failed to plead the existence of a reverse payment from Forest to Watson.

Direct Purchaser Plaintiffs argue that Forest itself characterized the Moksha8 transaction as a side deal with Watson that involved the exchange of at least $15 million in connection with the Bystolic patent settlement. Dkt. No. 285 at 34. But Direct Purchaser Plaintiffs overread the scope of Forest's admission. It is true that, as part of an unrelated merger agreement, Forest disclosed its material contracts and listed the agreements involving Watson and Moksha8 as material contracts in connection with the settlement of the Bystolic patent dispute. "Material contracts" were defined to include:

> any Contract involving the settlement of any action or threatened action (or series of related actions) (A) which will (x) involve payments after the date hereof of consideration in excess of $15,000,000 or (y) impose monitoring or reporting **[**91]** obligations to any other Person outside the ordinary course of business or (B) with respect to which material conditions precedent to the settlement have not been satisfied.

DPP Compl. ¶ 9. Direct Purchaser Plaintiffs argue that inclusion in this list of material contracts indicates that the agreements involved payments in excess of $15 million. But with this interpretation, they mischaracterize the inclusion criteria and focus on only one of the three disjunctive criteria for disclosure as a material contract. The DPP Complaint does not plead any facts to plausibly tip the scales away from the other inclusion criteria in favor of the one indicating that the agreement involved payments over $15 million. As discussed, Forest's admission indicates that the various agreements are related to the settlement of the Bystolic litigation and that they should be considered together, as the Court has done. Forest's admission, however, does not automatically show that there was a payment in excess of $15 million from Forest to Watson.

[*495] For the reasons given, Defendants' motion to dismiss with respect to the Watson agreements is granted.

C. Defendants' Remaining Arguments

Since the Court dismisses Direct **[**92]** Purchaser Plaintiffs' claims as to all Defendants, the Court need not reach Defendants' remaining arguments for dismissal: that Direct Purchaser Plaintiffs improperly group the thirty-two Defendants into ten corporate families and fail to offer individual facts to support claims against a couple particular Defendants; that Direct Purchaser Plaintiffs' theories of causation fail as a matter of law; and that Direct Purchaser Plaintiffs' construction of the *Sherman Act*'s reach under *Actavis* violates Defendants' due process rights.

On causation, the Court notes only that Defendants do not provide an independent ground for dismissal. Direct Purchaser Plaintiffs allege three theories of causation—namely that but for the alleged reverse-payment agreements, Generic Defendants would have launched their less expensive generic versions of Bystolic earlier than September 17, 2021: (1) at risk during pendency of the Nebivolol Patent Litigation; (2) upon prevailing against Forest in the Nebivolol Patent Litigation; or (3) via lawful, procompetitive settlement agreements providing for earlier negotiated entry dates untainted by the delay caused by the unlawful reverse payments. DPP Compl. ¶ 174. Defendants argue that **[**93]** the first two theories are too speculative as a matter of law and that the at-risk launch theory fails to account for the regulatory bar on generic launch before June 2015. Dkt. No. 269 at 45-50. Defendants further argue that the third causation theory is precluded by the Hetero settlement because that settlement provides what the earliest entry date would be. *Id.* at 50-52. Putting aside Defendants' arguments with respect to the first two causation theories, the Court observes that Defendants' argument about Direct Purchaser Plaintiffs' third causation theory assumes that the agreements settling the litigation with Hetero involved a small and justified reverse payment. In other words, this argument relies on the allegations about Hetero failing to meet the *Actavis* standard and does not provide an independent ground of dismissal.

The Court also need not address defendant Teva Israel's motion to dismiss the DPP Complaint for lack of personal jurisdiction. ***HN20***[] The Second Circuit has stated that "[a]lthough we traditionally treat personal jurisdiction as a threshold question to be addressed prior to consideration of the merits of a claim, that practice is prudential and does not reflect a restriction **[**94]** on the power of the courts to address legal issues." *ONY, Inc. v. Cornerstone Therapeutics, Inc., 720 F.3d 490, 498 n.6 (2d Cir. 2013)* (citation omitted). In cases involving "multiple defendants—over some of whom the court indisputably has personal jurisdiction—in which all defendants collectively challenge the legal sufficiency of the plaintiff's cause of action, we may address first the facial challenge to the underlying cause of action and, if we dismiss the claim in its entirety, decline to address the personal jurisdictional claims made by some defendants." *Chevron Corp. v. Naranjo, 667 F.3d 232, 247 n.17 (2d Cir. 2012)*. Accordingly, having dismissed the claims in their entirety, the Court declines to address Teva Israel's arguments on personal jurisdiction. *See, e.g., Chen v. China Green Agric. Inc., 2021 U.S. Dist. LEXIS 189780, 2021 WL 4481045, at *4 (S.D.N.Y. Sept. 30, 2021)* ("Because the Court finds that the Amended Complaint does not make out a claim for which relief can be granted, and dismisses the case in its entirety, it does not address the personal jurisdiction arguments."); *Fratelli **[*496]** BVBA v. APM Music Servs., LLC, 2021 U.S. Dist. LEXIS 184494, 2021 WL 4429417, at *6 (S.D.N.Y. Sept. 27, 2021)* ("Because dismissal of the unjust enrichment claims terminates All Parts from this action, the Court does not address its argument for dismissal for lack of personal jurisdiction."); *Oklahoma L. Enf't Ret. Sys. v. Telefonaktiebolaget LM Ericsson, 2020 U.S. Dist. LEXIS 4918, 2020 WL 127546, at *9 (S.D.N.Y. Jan. 10, 2020)* ("The Court need not and does not reach Defendants' other arguments for dismissal, including their contention that the Court lacks personal jurisdiction over individual **[**95]** Defendant Mellander." (citing *ONY, 720 F.3d at 498 n.6*)); *LLM Bar Exam, LLC v. Barbri, Inc., 271 F. Supp. 3d 547, 574 n.8 (S.D.N.Y. 2017)*, *aff'd*, *922 F.3d 136 (2d Cir. 2019)* ("The Court plainly has personal jurisdiction over, for example, the New York Law Schools. Thus, even if the Court were to hold that it lacks personal jurisdiction over the Non-New York Law Schools, it would have to consider their merits arguments about the First Amended Complaint, which arguments are identical to those of the New York Law Schools. Instead of adopting that piecemeal approach, the Court will dismiss the First Amended Complaint as to all Defendants under *Rule 12(b)(6)*.").

* * *

The Court therefore dismisses Direct Purchaser Plaintiffs' Complaint and Retailer Plaintiffs' Complaints without prejudice. ***HN21***[] The Court is not aware of any request by Direct Purchaser or Retailer Plaintiffs to replead if their complaints are dismissed, but "[i]t is within the Court's discretion to *sua sponte* grant leave to amend." *Safe Step Walk in Tub Co. v. CKH Indus., Inc., 242 F. Supp. 3d 245, 271 (S.D.N.Y. 2017)*. The Second Circuit "strongly favors liberal grant of an opportunity to replead after dismissal of a complaint under *Rule 12(b)(6)*." *Porat v. Lincoln Towers Cmty. Ass'n, 464 F.3d 274, 276 (2d Cir. 2006)*. *Federal Rule of Civil Procedure 15(a)(2)* provides that the Court "should freely give leave when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. "A district court has discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing **[**96]** party," *McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200 (2d Cir. 2007)*, and "[t]he decision to grant leave to amend is within the sound discretion of the trial court," *Bay Harbour Mgmt., LLC v. Carothers, 474 F. Supp. 2d 501, 502 (S.D.N.Y. 2007)*. Because Direct Purchaser and Retailer Plaintiffs did not previously have the benefit of the Court's views, because the Court cannot say that any amendment would be futile, and because this Circuit favors an opportunity to replead after dismissal under *Rule 12(b)(6)*, the Court grants Direct Purchaser Plaintiffs and Retailer Plaintiffs leave to amend their complaints.

II. Motions Regarding End-Payor Plaintiffs' Complaint

The Court now turns to the motions to dismiss End-Payor Plaintiffs' Complaint. ***HN22***[] "Under the United States Supreme Court's decision in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 745-46, 97 S. Ct. 2061, 52 L. Ed. 2d 707*

(1977), indirect purchasers of products sold at supra-competitive prices lack standing to sue under federal antitrust statutes. However, under its later decision in *California v. ARC Am. Corp., 490 U.S. 93, 105-06, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*, indirect purchasers may still bring suit under state antitrust laws, if a state permits such claims." *Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, PLC, 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233, at *1 (S.D.N.Y. Dec. 26, 2018)*. "Therefore, it is common in private antitrust litigation for two groups of purchasers, direct and indirect, to file separate cases arising out of the same nucleus of operative fact, but to allege different causes of action—direct **[*497]** purchasers under federal law and indirect purchasers under **[**97]** state laws." *Id.* As a district court in this Circuit has observed, "[t]he problem for the indirect purchasers is that the indirect-purchaser rule of *Illinois Brick* blocks them from recovery under federal ***antitrust law***," and, therefore, "[i]n an effort to get in on the *Actavis* game, they attempt to build a Frankensteinian equivalent of *Actavis* to reach the very same conduct but without that formidable obstacle, by stitching together a hodge-podge of state-law claims." *In re Aggrenox Antitrust Litig., 94 F. Supp. 3d at 255*. End-Payor Plaintiffs have done just that here.

Based on the same factual allegations of the DPP Complaint, End-Payor Plaintiffs bring 101 state-law claims. In particular, End-Payor Plaintiffs allege: claims for monopolization and monopolistic scheme against Forest under the antitrust laws of twenty-three states; claims for conspiracy to monopolize against all Defendants under the antitrust laws of twenty-seven states; claims for combination and conspiracy in restraint of trade against all Defendants under the antitrust laws of twenty-seven states; and claims for unfair or deceptive trade practices against all Defendants under the consumer-protection laws of twenty-four states.[12] EPP Compl. ¶¶ 290-452.

Because the Court dismisses the federal antitrust **[**98]** claims, however, End-Payor Plaintiffs' claims under the antitrust laws of various states—based on the same factual allegations—fail too. *See, e.g., In re Tamoxifen Citrate Antitrust Litig., 277 F. Supp. 2d 121, 139 (E.D.N.Y. 2003)*, *aff'd*, *466 F.3d 187 (2d Cir. 2006)* ("[S]ince Plaintiffs fail to state a claim under the *Sherman Act*, and since the state ***antitrust law*** claims are based on the same allegations, those claims are also dismissed."); *In re Androgel Antitrust Litig. (No. II), 687 F. Supp. 2d 1371, 1382 (N.D. Ga. 2010)* ("Because the Plaintiffs' allegations do not state a plausible antitrust claim under federal law, the Indirect Purchasers also do not state a plausible antitrust claim under state law."). In a footnote in their opposition to Defendants' motion to dismiss, End-Payor Plaintiffs argue that it is "overstated" to say that *Actavis* controls the interpretation of all state antitrust laws. Dkt. No. 286 at 3 n.4. But End-Payor Plaintiffs have not explained the ways in which the various state antitrust laws differ from federal ***antitrust law*** and how those differences would apply to the facts alleged here. End-Payor Plaintiffs point to statements by the California Supreme Court indicating that the state's ***antitrust law*** may be broader than the *Sherman Act* and that federal ***antitrust law*** is instructive rather than conclusive when construing the state's ***antitrust law***. *Id.* But End-Payor Plaintiffs **[**99]** offer no argument that this broader state ***antitrust law*** reaches the conduct alleged here or that the other state antitrust laws under which they bring their claims are also broader than federal law and apply here. Indeed, for example, in bringing their claims for combination and conspiracy in restraint of trade against all Defendants, End-Payor Plaintiffs recount the same allegations as the DPP Complaint does and then merely list citations to the antitrust laws of twenty-seven states and the District of Columbia. EPP Compl. ¶ 334. They plead their other claims under the antitrust laws of various states in the same manner. But **[*498]** while they may "have *listed* claims under very many state laws, . . . they have not truly *pleaded* claims under those laws sufficient to show their entitlement to recovery under them, as required by *Rule 8*." *In re Aggrenox Antitrust Litig., 94 F. Supp. 3d at 255*.

The same can be said about End-Payor Plaintiffs' remaining twenty-four claims for unfair or deceptive trade practices under state consumer-protection laws. The fundamental deficiency with these claims is that they rely on the existence of anticompetitive conduct, which the Court has found insufficiently pleaded in the context of Direct Purchaser and Retailer Plaintiffs' **[**100]** federal antitrust claims. In their complaint, End-Payor Plaintiffs essentially attempt to rely on the factual foundation for federal antitrust claims—which in this case were found insufficient—and then "merely allege that those claims are also actionable under general consumer-protection laws." *In re Aggrenox*

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[12] End-Payor Plaintiffs withdrew their claim under the Virginia Consumer Protection Act. Dkt. No. 286 at 12 n.30. End-Payor Plaintiffs also bring a claim for injunctive relief under the federal antitrust laws. EPP Compl. ¶¶ 453-457. The Court dismisses the End-Payor Plaintiffs' claim under the federal antitrust laws for the same reasons it dismisses the DPP Complaint's federal antitrust claims.

Antitrust Litig., 94 F. Supp. 3d at 255. "But the plaintiffs cannot simply enumerate a long list of state-law claims for states where they might otherwise have no available antitrust recovery and rely on the defendants and the court to sort out whether or how those laws can act as surrogates for ***antitrust law***." *Id. at 255-56*. End-Payor Plaintiffs have not provided a basis on which these claims survive when federal antitrust claims based on the same factual foundation fail. *See In re Actos End Payor Antitrust Litig., 2015 U.S. Dist. LEXIS 127748, 2015 WL 5610752, at *28* ("Plaintiffs merely restate their antitrust allegations as separate consumer protection claims, providing no distinct factual basis for a violation of consumer protection law. This is insufficient to meet the *Rule 8* pleading standard under *Twombly* and *Iqbal*.").

For these reasons, Defendants' motion to dismiss End-Payor Plaintiffs' Complaint for failure to state a claim is granted without prejudice to repleading the state-law claims in light of the dismissal of the federal antitrust claims. **[**101]** Accordingly, the Court need not consider the arguments from Nonresident Defendants' motion to dismiss the End-Payor Plaintiffs' Complaint's ninety-nine non-New York, state-law claims for lack of personal jurisdiction and Teva Israel's motion to dismiss the claims against it for lack of personal jurisdiction. *See ONY, Inc., 720 F.3d at 498 n.6*; *Chevron Corp., 667 F.3d at 247 n.17*.

CONCLUSION

Defendants' motion to dismiss the Direct Purchaser and Retailer Plaintiffs' Complaints for failure to state a claim is GRANTED, and the Direct Purchaser and Retailer Plaintiffs' Complaints are DISMISSSED without prejudice to Direct Purchaser Plaintiffs and Retailer Plaintiffs filing amended complaints by February 22, 2022. Defendants' motion to dismiss the End-Payor Plaintiffs' Complaint for failure to state a claim is GRANTED, and the End-Payor Plaintiffs' Complaint is DISMISSED without prejudice to End-Payor Plaintiffs filing an amended complaint by February 22, 2022. Nonresident Defendants' motion to dismiss the End-Payor Plaintiffs' Complaint's ninety-nine non-New York, state-law claims for lack of personal jurisdiction and Teva Israel's motion to dismiss for lack of personal jurisdiction are DENIED without prejudice as moot.

The Clerk of Court is respectfully **[**102]** directed to close Dkt. Nos. 260, 265, 267, 271.

SO ORDERED.

Dated: February 2, 2022

New York, New York

/s/ Lewis J. Liman

LEWIS J. LIMAN

United States District Judge

Peterson v. Sutter Med. Found.

United States District Court for the Northern District of California

February 2, 2022, Decided; February 2, 2022, Filed

Case No. 3:21-cv-04908-WHO

Reporter
2022 U.S. Dist. LEXIS 19241 *; 2022 WL 316677

RALPH PETERSON, Plaintiff, v. SUTTER MEDICAL FOUNDATION, et al., Defendants.

Subsequent History: Dismissed by, in part, Motion denied by, in part, Motion granted by, in part, Motion granted by *Peterson v. Sutter Med. Found., 615 F. Supp. 3d 1097, 2022 U.S. Dist. LEXIS 131659, 2022 WL 2869531 (N.D. Cal., July 20, 2022)*

Costs and fees proceeding at, Motion granted by, in part, Request granted *Peterson v. Sutter Med. Found., 2023 U.S. Dist. LEXIS 139882, 2023 WL 5181634 (N.D. Cal., Aug. 10, 2023)*

Summary judgment granted by *Peterson v. Sutter Med. Found., 2023 U.S. Dist. LEXIS 181179 (N.D. Cal., Oct. 6, 2023)*

Core Terms

alleges, motion to dismiss, quotation, marks, tolled, state-law, leave to amend, Defendants', discovery rule, kickbacks, immunity, sovereign immunity, absolute immunity, accrual, patient, cause of action, statute of limitations, limitations period, antitrust claim, peer review, overt act, violations, antitrust, accrues, parties, suits, disciplinary, courts, discover, dismissal with prejudice

Counsel: **[*1]** For Ralph Peterson, Plaintiff: Marie C. Mirch, LEAD ATTORNEY, Mirch Law Firm, LLP, San Diego, CA; Kevin John mirch, Mirch Law Firm, United Sta, San Diego, CA.

For Sutter Bay Hospitals, dba Alta Bates Summit Medical Center, Neil Stollman, Rod Perry, Sutter Bay Medical Foundation, Philip Rich, Defendants: Michael David Abraham, LEAD ATTORNEY, Bartko, Zankel, Bunzel & Miller, San Francisco, CA.

For Kristina Lawson, Howard Krauss, Randy Hawkins, Richard Fantozzi, Hedy Chang, Dev Gnanedev, Ronald Lewis, Laurie Rose Lubiano, Asif Mahmood, Richard Thorp, Eserick Watkins, Felix Yip, Denise Pines, Michael Bishop, Evelyn "Gerrie" Schipske, Jamie Wright, Defendants: Ian Michael Ellis, California State Attorney General's Office, Oakland, CA.

For Sharon Levine, Defendant: Ian Michael Ellis, LEAD ATTORNEY, California State Attorney General's Office, Oakland, CA.

Judges: William H. Orrick, United States District Judge.

Opinion by: William H. Orrick

Opinion

ORDER ON MOTION TO DISMISS

Re: Dkt. Nos. 60, 61

Plaintiff Ralph Peterson is a medical doctor who alleges that various defendants associated with the Sutter network of healthcare facilities unlawfully steer away unprofitable procedures, give kickbacks to physicians who comply, and **[*2]** punish physicians who do not. He contends that the Medical Board of California ("MBC") facilitates these actives by using its disciplinary authority against physicians, like him, who will not comply. He also asserts that it discriminates against African American doctors like him. He alleges that, from 2009 to 2013, the defendants conspired to punish him through investigations and disciplinary proceedings. And in late 2019, he learned through public reporting that the California Attorney General had sued Sutter and entered into a confidential settlement with it regarding Sutter's anti-competitive behavior. Peterson brings numerous claims that fall into three groups: federal civil rights violations, federal antitrust violations, and violations of California state law.

The defendants move to dismiss. The MBC is shielded by sovereign immunity and it is dismissed with prejudice. The state-law claims against individual MBC members are likewise dismissed with prejudice. The federal civil rights claims against those individuals are dismissed as barred by sovereign immunity (in the defendants' official capacities) or absolute immunity (in their individual capacities), but Peterson has leave **[*3]** to amend to adequately plead that *Ex parte Young* applies or that absolute immunity does not apply. His federal antitrust claim is time-barred, but Peterson has leave to amend to allege that it should be delayed or tolled. The private parties' motion is granted with prejudice on a claim under the Health Care Quality Improvement Act ("HCQIA") because Peterson has not shown that it creates a private right of action.

Most remaining claims against the private parties are dismissed as time-barred, but Peterson has leave to amend to adequately allege that their statutes of limitations are delayed or tolled. And the motion to dismiss is denied when it comes to certain claims that he would not have had notice to bring until the California Attorney General's investigation was made public, because the discovery rule applies to toll the statute of limitation.

BACKGROUND

I. FACTUAL BACKGROUND

A. The Parties

Peterson is a medical doctor who was licensed to practice medicine in California. First Amended Complaint ("FAC") [Dkt. No. 47] ¶ 2. He has sued two groups of defendants.

The first I refer to collectively as the "Sutter Defendants." Sutter Bay Medical Foundation ("Sutter Bay") and Sutter Bay Hospitals **[*4]** d/b/a Alta Bates Summit Medical Center ("Alta Bates") are tax-exempt corporations doing business in Alameda County.[1] *Id.* ¶¶ 3-5. These entities are, collectively, "Sutter." Neil Stollman, Rod Perry, and Phillip Rich are licensed physicians who sat on Sutter's "peer review panels." *Id.* ¶¶ 7-9, 52. Rich also was president of Alta Bates's medical staff. *Id.* ¶ 9.

The second I refer to as the "MBC Defendants." Cathy Lozano was, during the events of this case, an employee investigator for the Medical Board of California ("MBC"), the agency that regulates the practice of medicine in California. *Id.* ¶ 11. Kristina Lawson was a "public member"—that is, a non-physician member—of the MBC from October 2015 onward; in 2020, she was elected its president. *Id.* ¶ 12.[2] Howard Krauss, Randy Hawkins, Dev

[1] Sutter East Bay Medical Foundation and Sutter East Bay Hospitals were named as defendants, but the FAC alleges that they merged into, respectively, Sutter Bay in 2017 and Alta Bates in 2018. FAC ¶¶ 3-4.

Gnanadev, Ronald Lewis, Richard Thorp, Felix Yip, Michael Bishop, Sharon Levine, and Asif Mahmood were physician members of the MBC. *Id.* ¶¶ 13-14, 17-18, 20-21, 23, 25-26. Richard Fantozzi was a physician member of the MBC and served as its secretary, vice president, and president at various times. *Id.* ¶ 15. Denise Pines was a physician member of the MBC and served as its secretary and president. *Id.* ¶ 24. **[*5]** Hedy Chang was a board member and its secretary from 2007 to 2011. *Id.* ¶ 16. Laurie Lubiano, Eserick Watkins, and Jamie Wright were public members of the MBC. *Id.* ¶¶ 19, 22, 28. Evelyn "Gerrie" Schipske was a board member and its secretary. *Id.* ¶ 27. Linda Wright is executive director of the MBC. *Id.* ¶ 29.

B. Sutter's Allegedly Unlawful Activities

Sutter owns and operates 24 hospitals with 53,000 employees. *Id.* ¶ 39. According to Peterson, it "monopolizes" healthcare and medicine in Northern California. *Id.* He alleges that Sutter uses "unlawful strategies" to maintain this monopoly, which he refers to as its "MediCal Strategy." *Id.* ¶ 40. He claims that it uses "medical discipline" by placing "cooperating or compliant physicians" and attorneys on peer review panels and the MBC. *Id.* ¶ 42. It allegedly uses these institutions to control physician referrals and acquisition of physician practices to "punish" physicians that do not "cooperate." *Id.* ¶ 41. This "cooperation," Peterson states, is that Sutter only performs profitable procedures and steers unprofitable procedural to county medical facilities. *Id.* ¶ 43. Sutter also allegedly manipulates charges and coding to increase revenue, **[*6]** performs unnecessary medical procedures, charges for unused materials, and takes other actions. *Id.* ¶ 51. Sutter then uses its revenue to pay kickbacks and acquire medical practices. *Id.* ¶ 44. Among other things, Peterson pleads that Stollman (who sits on a peer review panel) received kickbacks from Sutter. *Id.* ¶ 61.

C. Peterson's History with Sutter

Peterson, who is African American, has practiced medicine in California since 1983. *Id.* ¶¶ 55-57. He alleges that he serves Oakland's Indigent and . . . MediCal community." *Id.* ¶ 56. From 1999 to 2009, he had privileges at Alta Bates to perform endoscopies. *Id.* ¶ 58.

In February 2009, Stollman and Perry—who were members of Alta Bates's peer review board—ordered Peterson to "appear . . . without explanation." *Id.* ¶ 63. Peterson requested a hearing under the HCQIA and notice of the allegations against him. *Id.* ¶ 64. He claims that they never provided either. *Id.* Several days later, Perry ordered Peterson to "increase his 'call coverage'" (from context, how much he would cover for Sutter) or pay a fee. *Id.* ¶ 65. Peterson requested from Stollman to cover more calls, but Stollman allegedly refused to provide it "without payment of an unreasonable **[*7]** fee." *Id.* ¶ 67. In March 2009, Rich (also a member of the peer review panel) ordered Peterson to resign his privileges, but Peterson refused. *Id.* ¶¶ 68-69. In April 2009, he claims that his privileges were suspended without a complaint, investigation, or hearing. *Id.* ¶ 70. He claims that Alta Bates then "forced" him to resign his privileges under threat of MBC discipline. *Id.* ¶ 71. An adverse action report prepared by Sutter states that Peterson "resigned to avoid further investigation into various quality of care complaints." *Id.* ¶ 72. Several months later, Peterson opened an independent endoscopy facility. *Id.* ¶ 74.

D. First MBC Investigation

In November 2009, Peterson was notified that the MBC had opened an investigation into the allegations in the Sutter adverse action report. *Id.* ¶ 76. Soon after, a formal accusation was filed and Peterson was given a summary of the investigation. *Id.* ¶¶ 77-78. Peterson claims that the summary contained false and misleading statements. *Id.*

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[2] The MBC has 15 members: 13 appointed by the governor and confirmed by the Senate, one appointed by the Senate Committee on Rules and one appointed by the speaker of the Assembly. *See* ***Cal. Bus. & Prof. Code § 2001***. Seven of the MBC's members are public members—that is, members who are not licensed by the MBC. *Id.* ***§ 2007***. The remaining members must be licensed physicians or surgeons. *Id.*

¶ 78. In October 2010, Peterson was informed that a "medical consultant" determined the allegations were not "extreme enough to warrant pursuing administration action." *Id.* ¶ 80 (internal quotation marks omitted). **[*8]**

E. Second MBC Investigation and Patient Suit

In 2010, a longtime patient of Peterson's filed a complaint against Peterson that he calls "unfounded." *Id.* ¶¶ 81-87. Peterson alleges that Sutter "encouraged and participated in" filing that complaint. *Id.* ¶ 87. Peterson allegedly referred the patient to cardiologists but the patient did not come to the appointments. *Id.* ¶¶ 82-85. Instead, the patient eventually went to Sutter, which allegedly discharged her to "steer" her to a county healthcare facility. *Id.* ¶ 83. In 2009, the patient had a stroke and was treated by Sutter. *Id.* ¶¶ 85-86.

In 2011, the same MBC investigator that carried out the previous investigation looked into this complaint. *Id.* ¶ 88. According to Peterson, the MBC determined that Sutter had discovered an artery blockage in the patient but "failed, refused and/or neglected to treat her," steering her to a county medical facility. *Id.* ¶ 89. In October 2011, the MBC's executive director (Whitney) allegedly signed a formal accusation that, according to Peterson, "concealed Sutter's refusal and/or failure to diagnose, treat" the patient. *Id.* ¶ 90. Peterson asserts that a provider contract he had with Cigna was terminated due **[*9]** to "online accusations" from MBC. *Id.* ¶ 94. Later, a Health Net provider contract was terminated due to the existence of the MBC case. *Id.* ¶ 95. In 2013, Peterson was denied provider status with Hill Physicians Medical Group, Alta Bates, and Blue Shield of California; in 2014, he was denied provider status with Aetna. *Id.* ¶¶ 103, 110, 114, 118. According to him, the MBC refused to provide him a complete file on the investigation and its supporting evidence. *Id.* ¶ 97. In January 2013, Peterson attempted to testify in front of the MBC as a witness on behalf of another physician but was not allowed to do so. *Id.* ¶ 99.

In April 2013, the estate of the deceased patient sued Peterson in state court. *Id.* ¶ 104. Peterson claims that the case was "prompted, perpetuated and encouraged by Sutter, [the] peer review panel members and" the MBC for his alleged refusal to cooperate in Sutter's unlawful tactics. *Id.* ¶ 105. The court eventually entered judgment in Peterson's favor and dismissed the action with prejudice. *Id.* ¶ 113.

In July 2013, the MBC allegedly "determined that there were no quality of care issues" in treating Peterson's patient "but did not disclose that finding" to Peterson. *Id.* ¶ **[*10]** 111. Yet in December 2013, it found that Peterson had not maintained sufficient records about his treatment of the patient. *Id.* ¶ 115. He alleges that these accusations were fabricated. *Id.*

F. State-Court Suit

In November 2012, Peterson filed an action in California Superior Court against Perry and Stollman for allegedly "misusing the physician disciplinary process." *Id.* ¶ 98. The law firm Hanson & Bridgett is alleged to have represented Sutter, the peer review panel, and MBC. *Id.* ¶ 101. That is also the firm at which defendant Lawson, president of the MBC, is an attorney. *Id.* ¶ 12. Peterson claims that this representation was a conflict and was not disclosed to him. *Id.* ¶ 101. In May 2013, the court "issued a tentative order against" Peterson. *Id.* ¶ 107. The California Court of Appeal eventually dismissed Peterson's appeal (and the California Supreme Court denied review). *Id.* ¶¶ 122-23.[3]

G. California Attorney General Investigations and Suit

In 2013, the California Attorney General's Office was investigating Sutter about the use of kickbacks. *Id.* ¶ 102. Peterson also alleges that a separate investigation—apparently also by the California Attorney General—was conducted into MBC discrimination **[*11]** against African American and Hispanic doctors. *Id.*

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[3] The parties' unopposed requests for judicial notice of filings in the state-court action are GRANTED. *See* Dkt. Nos. 62, 67.

In March 2018, the California Attorney General sued Sutter for anti-competitive behavior. *Id.* ¶ 127. Sutter and the state eventually entered a confidential settlement that has been publicly reported to be worth more than $600 million, 10 years of monitoring, and a consent decree barring kickbacks. *Id.* ¶¶ 129-31, 133. According to Peterson, the Attorney General asserted that Sutter's physician referral program violated the law and that Sutter gave kickbacks. *Id.* ¶ 130.

The Sacramento Bee allegedly first publicly reported about the kickback lawsuit on November 4, 2019. *Id.* ¶ 129. The Attorney General's Office revealed the investigation two weeks later. *Id.* ¶ 130.

II. PROCEDURAL BACKGROUND

Peterson filed this suit in June 2021. Dkt. No. 1. He moved to enter default against many defendants, some of which the Clerk of Court entered and some of which the Clerk denied. Dkt. No. 24. Eventually, after the defendants appeared and moved to set aside their defaults, the parties agreed to moot those motions, withdraw the defaults, and permit Peterson to file the FAC. Dkt. No. 45.

As currently pleaded, the FAC contains 17 causes of action. The following **[*12]** are against all defendants: (1) violation of the *First Amendment*; (2) violation of constitutional due process; (3) discrimination against Peterson and his indigent patients under the Constitution, the HCQIA, Title VII, and other unspecified statutes; (4) failure to prevent discrimination and retaliation (presumably under the same sources); (5) retaliation in violation of the HCQIA; (7) violation of federal ***antitrust law***; (11) negligence; (12) intentional interference with contractual relationships; (13) business disparagement; (14) intentional infliction of emotional distress; (15) negligent infliction of emotional distress; (16) violation of California's Unfair Competition Law ("UCL"); and (17) violation of the Unruh Civil Rights Act. The following are against Sutter: (6) antitrust interference with business relationships and (8) breach of contract. Peterson also alleges a breach of contract claim (9) against the MBC. And he alleges a breach of the covenant of good faith and fair dealing (10) against Sutter and the MBC.

LEGAL STANDARD

I. MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

A motion to dismiss filed pursuant to *Federal Rule of Civil Procedure ("FRCP") 12(b)(1)* is a challenge to the court's subject matter jurisdiction. *See* *Fed. R. Civ. P. 12(b)(1)*. "Federal **[*13]** courts are courts of limited jurisdiction," and it is "presumed that a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. of Am., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)*. The party invoking the jurisdiction of the federal court bears the burden of establishing that the court has the requisite subject matter jurisdiction to grant the relief requested. *Id.*

A challenge pursuant to *Rule 12(b)(1)* may be facial or factual. *See* *White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000)*. In a facial attack, the jurisdictional challenge is confined to the allegations pled in the complaint. *See* *Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004)*. The challenger asserts that the allegations in the complaint are insufficient "on their face" to invoke federal jurisdiction. *See* *Safe Air Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)*. To resolve this challenge, the court assumes that the allegations in the complaint are true and draws all reasonable inference in favor of the party opposing dismissal. *See* *Wolfe, 392 F.3d at 362*.

"By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air, 373 F.3d at 1039*. To resolve this challenge, the court "need not presume the truthfulness of the plaintiff's allegations." *Id.* (citation omitted). Instead, the court "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." **[*14]** *Id.* (citations omitted). Once the moving party has made a factual challenge by offering affidavits or other evidence to dispute the allegations in the complaint, the party opposing the motion must "present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." *St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989)*; *see also* *Savage v. Glendale Union High Sch. Dist. No. 205, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003)*.

II. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Under *FRCP 12(b)(6)*, a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a *Rule 12(b)(6)* motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *See* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim is facially plausible when the plaintiff pleads facts that "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *See* *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citation omitted). There must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *See* *Twombly, 550 U.S. at 555, 570*.

In deciding whether the plaintiff has stated a claim upon which relief can **[*15]** be granted, the Court accepts the plaintiff's allegations as true and draws all reasonable inferences in favor of the plaintiff. *See* *Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)*. However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *See* *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)*.

If the court dismisses the complaint, it "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *See* *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)*. In making this determination, the court should consider factors such as "the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the proposed amendment." *See* *Moore v. Kayport Package Express, 885 F.2d 531, 538 (9th Cir. 1989)*.

DISCUSSION

I. MBC DEFENDANTS' MOTION TO DISMISS

The MBC Defendants' motion to dismiss states that it is brought by the State of California, through the MBC and the MBC Defendants. *See* MBC Defendants' Motion to Dismiss ("MBC Mot.") [Dkt. No. 60] 1. It seeks to dismiss all claims against those entities.

A. The State of California and MBC

The MBC Defendants move to dismiss the claims to the extent **[*16]** they are against the State of California or MBC based on their sovereign immunity. MBC Mot. 6-7.

i. State of California

The State of California has not been named as a defendant, none of the claims are brought against it, and Peterson's brief does not respond to the argument about it. Accordingly, there is no dispute between the parties on this point and the case cannot proceed against the State of California itself.

ii. MBC

The MBC is not named as a defendant and, as far as the record shows, has not been served with process. Despite this, two of the substantive claims in the FAC state that they are against it. *See* FAC ¶¶ 288-300 (breach-of-contract claim against MBC), 301-313 (bad-faith claim against Sutter and MBC). And MBC has appeared in this action, filed a *Rule 12* motion, and does not object on service-of-process or personal-jurisdiction grounds, so it has waived those challenges. *See Fed. R. Civ. P. 12(h)*. It also proceeds on "the understanding that MBC is an intended Defendant to this action," so I do as well. MBC Mot. 2 n.1.

I agree with MBC that it is shielded from liability by sovereign immunity. In general, "an unconsenting State is immune from suits brought in federal courts by her own citizens as well **[*17]** as by citizens of another state." *Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)* (internal quotation marks and citation omitted). That immunity includes suits against states' agencies and departments. *Id.* The Ninth Circuit has held that the MBC's predecessor board was an agency of the state for purposes of sovereign immunity. *Forster v. Cty. of Santa Barbara, 896 F.2d 1146, 1149 (9th Cir. 1990)*. The statute it relied on for that conclusion remains the same when it comes to MBC. *See id.*; *Cal. Bus. & Prof. Code § 2001*. Peterson's brief does not address MBC's argument that it is immune (for instance, to argue that the state consented to suit or that Congress abrogated its immunity).

Accordingly, MBC is immune from suit for the two state-law claims here. *See Pennhurst, 465 U.S. at 100* (explaining that immunity applies "regardless of the relief sought"); *see also Stanley v. Trustees of California State Univ., 433 F.3d 1129, 1134 (9th Cir. 2006)* (holding that the supplemental-jurisdiction statute does not abrogate sovereign immunity for state-law claims). The claims against the MBC are DISMISSED WITH PREJUDICE.

B. State-Law Claims Against the MBC Defendants

Peterson's brief clarifies that he sues the MBC Defendants in their official and individual capacities. *See* Opposition to the MBC Mot. ("MBC Oppo.") [Dkt. No. 68] 7. The MBC Defendants move to dismiss the claims for both types of liability. The MBC Defendants argue that all of Peterson's **[*18]** claims against them are barred by sovereign immunity. *See* MBC Mot. 7. In response, Peterson contends that the claims may proceed (1) to the extent they are against the MBC Defendants in their official capacities under *Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)*, and (2) to the extent they are in their individual capacities under *42 U.S.C. § 1983* ("*Section 1983*"). *See* MBC Oppo. 6-8.

I first address the claims brought under California state law. In general, a suit against a state official in her official capacity is a suit against the state for purposes of sovereign immunity. *Pennhurst, 465 U.S. at 102-103*. Under *Ex parte Young*, that immunity does not generally bar suits against state officials that challenge the constitutionality of their action and seek redress through prospective injunctive relief. *Id.* But Peterson's state-law claims do not challenge the constitutionality of the MBC Defendants' actions, they allege violations of California law. The Supreme Court has expressly held that the *Ex parte Young* exception does not apply to state-law claims. *Id. at 106*. Accordingly, the state-law claims cannot proceed against the MBC Defendants in their official capacities.

Section 1983 provides a cause of action against state officials "who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, **[*19]** or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *42 U.S.C. § 1983*. As the Supreme Court has explained, "the *Eleventh Amendment* does not erect a barrier against suits to impose individual and personal liability on state officials under *§ 1983*." *Hafer v. Melo, 502 U.S. 21, 30-31, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991)* (internal quotation marks and citation omitted). But Peterson's state-law claims are not cognizable under *Section 1983*, which only provides a cause of action to redress violations of *federal* law. *Lovell By & Through Lovell v. Poway Unified Sch. Dist., 90 F.3d*

367, 370 (9th Cir. 1996). The state-law claims cannot proceed against the MBC Defendants in their individual capacities on this basis either.[4]

Peterson offers no other ground to overcome the MBC Defendants' sovereign immunity for the state-law claims; he does not argue, for instance, that the state has waived sovereign immunity as a matter of state law. Accordingly, the state-law claims against the MBC Defendants are DISMISSED WITH PREJUDICE.[5]

C. Federal Claims Against the MBC Defendants

The MBC Defendants move to dismiss the claims based on federal law and the U.S. Constitution. *See* MBC Mot. 6-17.[6]

i. Official Capacity

First, the MBC Defendants argue that they **[*20]** are entitled to sovereign immunity to the extent the federal claims are against them in their official capacities. MBC Mot. 6-7. As noted above, suits against state officials in their official capacities are generally suits against the state and barred by sovereign immunity. *Pennhurst, 465 U.S. at 102-103*. And as noted, *Ex parte Young* creates an exception to that immunity for suits challenging the constitutionality of officials' actions and seeking prospective injunctive relief. *Id.*

Peterson has not adequately pleaded that this case falls into *Ex parte Young*'s ambit. "In determining whether the doctrine of *Ex parte Young* avoids an *Eleventh Amendment* bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. PSC, 535 U.S. 635, 645, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002)* (internal quotation marks and citations omitted). The typical example is a complaint that asks that officials be enjoined from violating federal law. *See id.* (collecting examples).

Here, the complaint is backward-looking. All of the causes of action are about discrete past events and seek monetary redress for Peterson's past injuries. There is no indication that the MBC Defendants are currently or are imminently going to carry out another **[*21]** alleged violation of federal law. Accordingly, *Ex parte Young* is inapplicable. *See id.* While the UCL claim *can* lead to prospective relief, it is not cognizable under *Ex parte Young* as a state-law claim. Future antitrust violations can lead to injunctive relief too, *see 15 U.S.C. § 26*, but that claim is dismissed on other grounds and, in any case, Peterson does not plead anything about future antitrust harm. Indeed, the complaint references injunctive relief exactly once: in asking that the defendants be enjoined under the UCL. *See* FAC at 54. In short, the complaint does not allege any "ongoing violation of federal law" or seek "relief properly characterized as prospective" to halt that violation. *Verizon, 535 U.S. at 645*. Peterson has leave to amend if he believes he can satisfy this requirement.

ii. Absolute Immunity

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[4] Peterson passingly asserts that the state-law claims are not barred by sovereign immunity because the FAC alleges that they acted unlawfully, acted outside the scope of their authority, and took ministerial actions. MBC Oppo. 8. While these types of allegations may affect whether an official is entitled to the separate protection of absolute immunity from *Section 1983* damages actions (discussed below), Peterson cites no authority for the position that they overcome *sovereign immunity*, and this positions would contradict its fundamental principles.

[5] Because the state-law claims are dismissed on this basis, there is no need to address the MBC Defendants' argument that they are also immune under state statute.

[6] For the reasons explained below, Peterson has not shown that the HCQIA creates a private right of action, so that claim is dismissed with prejudice on this basis.

The MBC Defendants argue that they are entitled to absolute immunity from damages liability. *See* MBC Mot. 9-10.

As a general matter, state executive officials "are absolutely immune from *§ 1983* suits if they perform 'special functions' which, because of their similarity to functions that would have been immune when Congress enacted *§ 1983*, deserve absolute protection from damages liability." *Buckwalter v. Nevada Bd. of Med. Examiners, 678 F.3d 737, 740 (9th Cir. 2012)*, *as amended* (June 8, 2012) (internal quotation marks and **[*22]** citations omitted). To determine whether the MBC Defendants are entitled to absolute immunity, I look to the "nature of the function performed, not the identity of the actor who performed it." *Id.* (internal quotation marks and citation omitted). Judges and prosecutors perform the "paradigmatic" functions entitled to absolute immunity. *Id.* Accordingly, courts examine whether the defendants' functions are "analogous" to those of a judge or prosecutor. *Id.* This immunity can extend to administrative proceedings. *Butz v. Economou, 438 U.S. 478, 517, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978)*.

The Ninth Circuit has repeatedly held that certain quasi-prosecutorial and quasi-judicial functions of the members of independent state medical boards are entitled to absolute immunity because they are "functionally comparable to judges." *See* *Buckwalter, 678 F.3d at 740*; *Mishler v. Clift, 191 F.3d 998, 1007 (9th Cir. 1999)*. Peterson does not dispute that the MBC shares all of the salient features that led the court to extend protection to other states' similar boards. But, as the Ninth Circuit has also explained, this holding alone does not settle the case because absolute immunity is assessed action-by-action. *Buckwalter, 678 F.3d at 740*. Accordingly, the question is whether the challenged actions are "judicial" or "closely associated with the judicial process." *Id.* (internal quotation **[*23]** marks and citation omitted).

Peterson argues that several types of alleged actions are not entitled to immunity: steering certain procedures to county medical facilities, kickbacks, medical billing fraud, threats of physician discipline, actual discipline, price fixing, bid ridding, discrimination, retaliation, Sutter controlling the disciplinary process, and "Due Process violations." MBC Oppo. 10.

Peterson's allegations and argument on this issue are not sufficient to state a claim that survives an immunity challenge. The relevant portion of Peterson's brief cites more than one-hundred paragraphs from the FAC with virtually no elaboration. *See id.* But he never attempts to show what behavior each MBC Defendant did to expose him to liability. The MBC Defendants sat on the board or were officers of it at different times, some of which appear not to be connected to the events of this case. The paragraphs that Peterson cites often refer to *Sutter's* actions, not the actions of MBC members. *See, e.g.*, FAC ¶ 43 ("As a result of its "MediCal Strategy", Sutter performed only profitable procedures, steering away unprofitable procedures to county medical facilities."). Indeed, Peterson's core theories **[*24]** about steering, kickbacks, billing fraud, and price fixing are that *Sutter* carried them out. Other allegations that Peterson cites simply refer vaguely to things that MBC *as an institution* did. *See, e.g., id.* ¶ 124 (alleging that MBC engages in race discrimination in the disciplinary process). Yet MBC cannot itself be held liable, and each MBC Defendant can only be held liable for his or her own actions, not actions attributed only generally to the agency. *Buckwalter, 678 F.3d at 737*. Further, at least some of this behavior, even if properly pleaded, appears to be shielded by absolute immunity, such as that involved in the disciplinary process—even if it were discriminatory. *See Mishler, 191 F.3d at 1008* ("There is no question that acts occurring during the disciplinary hearing process fall within the scope of absolute immunity."); *Cleavinger v. Saxner, 474 U.S. 193, 199-200, 106 S. Ct. 496, 88 L. Ed. 2d 507 (1985)* ("Such immunity applies however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." (internal quotation marks and citation omitted)).

As far as I can tell, and as far as Peterson argues in his brief, *see* MBC Oppo. 23, the only MBC Defendants about whom there are specific allegations are Lozano (the employee who investigated the accusations against **[*25]** Peterson) and Whitney (the executive director who signed the second accusation). *See* FAC ¶¶ 90, 169. But it is unclear which of the actual claims, if any, are premised on these allegations, as opposed to the actions of the MBC members; Peterson's brief does not clarify this. And while it is not entirely possible to determine because of the state of the allegations, there is a colorable argument that these acts are entitled to absolute immunity too. *See Mishler, 191 F.3d at 1008* (holding that "signing the disciplinary complaint under penalty of perjury is entitled to absolute immunity").

I will grant leave to amend so that Peterson can make clear which defendants took which alleged actions that allegedly violated specific rights. In drafting the amended complaint, Peterson hould be mindful of the principles of immunity discussed above.[7]

iii. Antitrust Claim

The MBC Defendants move to dismiss the antitrust claim against them.[8] *See* MBC Mot. 12-13.

1. State-Action Immunity

Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. To state a claim under the Act, a plaintiff must plead: "(1) a contract, combination or **[*26]** conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)*.

In *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, the Supreme Court established an exception to the *Sherman Act*: It does "not apply to anticompetitive restraints imposed by the States as an act of government." *City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 370, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)* (internal quotation marks and citation omitted). To determine whether a state's actions are immune from Sherman-Act liability, courts employ a two-step test: "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)* (internal quotation marks and citations omitted).

The MBC Defendants have not shown that the alleged antitrust violations here fall within *Parker*'s exception. Peterson alleges that the MBC Defendants engaged in anticompetitive behavior by using their authority to give unlawful preference to Sutter and punish physicians that did not adequately comply with its demands. *See* FAC ¶¶ 225-36. The MBC Defendants have pointed to no "clearly articulated and affirmatively expressed **[*27]** . . . state policy" in favor of that type of behavior. *Midcal, 445 U.S. at 105*. The MBC Defendants' argument is, instead, that "MBC investigatory, charging, and reprimand procedures which Plaintiff complains form part of the State's comprehensive disciplinary structure for its medical profession." MBC Mot. 13. That is correct, but that a state has generally given the MBC regulatory authority over this broad area does not mean that it has affirmatively chosen a policy of pursuing the *specific* alleged anti-competitive behavior at issue.

2. Statute of Limitations

The MBC Defendants also argue that the antitrust claim is time-barred.[9] As the parties agree, the statute of limitations on the antitrust claim is four years after the cause of action accrues. *See* *15 U.S.C. § 15b*. An antirust claim accrues "each time a plaintiff is injured by an act of the defendants." *Program Eng'g, Inc. v. Triangle Publications, Inc., 634 F.2d 1188, 1194 (9th Cir. 1980)*. A motion to dismiss based on a statute of limitations can only be granted when its running "is apparent on the face of the complaint." *Huynh v. Chase Manhattan Bank, 465 F.3d 992, 997 (9th Cir. 2006)* (internal quotation marks and citation omitted). The MBC Defendants argue that "[b]ecause Plaintiff's claims under the *Sherman Act* ran no later than sometime in 2017, his attempt to pursue those claims in this 2021 lawsuit are time barred." MBC **[*28]** Mot. 14. It contends that "the complaint lists the last overt

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[7] Because the state of the claims is unclear, I do not address the MBC Defendants' alternative argument that the claims are time-barred.

[8] The antitrust claim is not brought under *Section 1983*, so that statute's immunity doctrines do not apply.

[9] The Sutter Defendants also make this argument, and the reasons stated in this section apply equally to them.

act by MBC and its board members toward Plaintiff as occurring in 2013, when Plaintiff entered a stipulated settlement." *Id.*

Peterson first responds that the discovery rule postpones the running of the statute, because he did not know of the alleged anti-competitive behavior until late 2019, when the California Attorney General's investigation was publicized. MBC Oppo. 20. The problem for Peterson is that, in this Circuit, accrual of antitrust claims is governed by an injury rule, not the discovery rule. *See* *Beneficial Standard Life Ins. Co. v. Madariaga, 851 F.2d 271, 274 (9th Cir. 1988)*; *In re Animation Workers Antitrust Litig., 87 F. Supp. 3d 1195, 1209 (N.D. Cal. 2015)* (Koh, J.) (extensively surveying authorities). The Ninth Circuit has explicitly contrasted a discovery rule for accrual with the "accrual rule applicable to antitrust suits." *Beneficial Standard, 851 F.2d at 274-75*. Under that antitrust-specific rule, "the plaintiff's knowledge is generally irrelevant to accrual, which is determined according to the date on which injury occurs." *Id.* Peterson cites no contrary authority.

In the section of his brief on the antitrust claim's statute of limitations, Peterson relies solely on the discovery rule. *See* MBC Oppo. 20. Other sections of his brief do, however, refer to several other tolling doctrines. I will assume **[*29]** that he contends that those doctrines toll this claim as well.

One is the continuing violations doctrine. *Id.* 14-15. "***Antitrust law*** provides that, in the case of a 'continuing violation,' say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff." *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)* (internal quotation marks and citations omitted). "But the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period." *Id.*

Peterson has identified no overt act within the limitations period. The allegation he relies on is that "Sutter, its peer review panel and the "CMB's" [sic] unlawful conduct constitutes an ongoing anti-competitive restraint of trade." FAC ¶ 264. That allegation is threadbare and conclusory, so it fails to satisfy Peterson's burden to plead that the claim is tolled. The allegation, moreover, does not identify any injury to Peterson, but the continuing violation doctrine "is one in which the *plaintiff's interests* are repeatedly invaded and a cause of action arises each time *the plaintiff is* ***[*30]*** *injured*." *Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir. 1987)* (emphasis added). Peterson identifies no injury to him that occurred within the limitations period. Peterson also appears to rely on the allegation that he continues to suffer damages to his reputation and business, *see* FAC ¶ 341, but the doctrine only tolls the claim for continuing *violations*, not simply when the *harm happens to last* into the limitations period. *See* *Klehr, 521 U.S. at 189* (explaining that the doctrine requires a new "act" that "injures" the plaintiff).

Next is the fraudulent concealment doctrine. Antitrust statutes of limitations "may be tolled if the defendant fraudulently concealed the existence of a cause of action in such a way that the plaintiff, acting as a reasonable person, did not know of its existence." *Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1060 (9th Cir. 2012)*. Peterson must "plead facts showing that [the defendants] affirmatively misled [him], and that [he] had neither actual nor constructive knowledge of the facts giving rise to its claim despite [his] diligence in trying to uncover those facts." *Conmar Corp. v. Mitsui & Co. (U.S.A.), 858 F.2d 499, 502 (9th Cir. 1988)*. A plaintiff has constructive knowledge if he "had enough information to warrant an investigation which, if reasonably diligent, would have led to the discovery of the fraud." *Hexcel, 681 F.3d at 1060*. And the plaintiff must plead facts supporting its **[*31]** showing of diligence. *Id.* Because it sounds in fraud, fraudulent concealment must be pleaded with particularity under *FRCP 9(b)*. See *Vanella v. Ford Motor Co., No. 3:19-CV-07956-WHO, 2020 U.S. Dist. LEXIS 32151, 2020 WL 887975, at *5 (N.D. Cal. Feb. 24, 2020)*. That means that Peterson must plead with "particularity the circumstances constituting the fraud," and the allegations must "be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *See* *Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)* (citation omitted). "Averments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged." *Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1106 (9th Cir. 2003)* (citation omitted).

Peterson has failed to adequately allege that the doctrine applies. First, much of what he discusses is simply that he was never told the relevant information, but that is insufficient to constitute fraudulent concealment. *Conmar, 858 F.2d at 502*. Second, his pleading does not satisfy *Rule 9(b)*. He vaguely discusses that the Sutter Defendants hid their actions in closed meetings and by using attorney client privilege. *See* Opposition to the Sutter Mot. ("Sutter Oppo.") [Dkt. No. 66] 12-13. Even assuming that this would be sufficient to constitute fraudulent concealment, Peterson must plead the "who, **[*32]** what, when, where, and how" of these alleged acts. *Vess, 317 F.3d at 1106*. He has leave to amend to do so.

Another is the "overt act" doctrine from conspiracy law. But it does not toll the claim because, as explained above when discussing the continuing violation doctrine, Peterson has identified no overt act against him in the limitations period. *See* *People ex rel. Kennedy v. Beaumont Inv., Ltd., 111 Cal. App. 4th 102, 111, 3 Cal. Rptr. 3d 429 (2003)*, *as modified on denial of reh'g* (Sept. 9, 2003).

The final tolling doctrine referenced in Peterson's brief is equitable tolling. But the high bar for it is not met for largely the same reasons that fraudulent concealment is not: Peterson has not, as he must, pointed to some "extraordinary" external event beyond his control that prevented him from discovering this information. *See* *Menominee Indian Tribe of Wisconsin v. United States, 577 U.S. 250, 255, 136 S. Ct. 750, 193 L. Ed. 2d 652 (2016)*.

Because I cannot say that leave to amend is futile, Peterson has leave to amend if he wishes to more clearly plead why these doctrines apply.

D. MBC Defendants Conclusion

The State of California is not a party to this case. The MBC is dismissed with prejudice due to sovereign immunity. The state-law claims against the MBC Defendants are dismissed with prejudice due to sovereign immunity. The federal claims against the MBC Defendants are dismissed with leave to amend so that Peterson **[*33]** can adequately plead that *Ex parte Young* applies and that the MBC Defendants are not entitled to absolute immunity for damages. The antitrust claim is dismissed with leave to amend so that Peterson can plead that it is tolled.

II. SUTTER DEFENDANTS' MOTION TO DISMISS

The Sutter Defendants move to dismiss all of the claims against them as time-barred, barred by claim preclusion, and for failing to state a claim. *See* Sutter Defendants' Motion to Dismiss ("Sutter Mot.") [Dkt. No. 61].

A. Statute of Limitations on Federal Civil Rights Claims

As noted, a motion to dismiss based on a statute of limitations can only be granted when its running "is apparent on the face of the complaint." *Huynh, 465 F.3d at 997* (internal quotation marks and citation omitted). *Section 1983*, the basis for Peterson's federal civil rights claims, borrows the "personal injury statute of limitations of the state in which the cause of action arose." *Alameda Books, Inc. v. City of Los Angeles, 631 F.3d 1031, 1041 (9th Cir. 2011)*. As the parties agree, California's personal injury statute of limitations is two years from when the claim accrues. *See* Cal. Civ. P. Code § 335.1. But "federal law controls the question of when a claim *accrues*." *Johnson v. State of Cal., 207 F.3d 650, 653 (9th Cir. 2000)* (emphasis added). Absent a rule delaying accrual or tolling the statute, "a claim accrues when the plaintiff knows, or should know, **[*34]** of the injury which is the basis of the cause of action." *Id.*

The events that make up the core of this case occurred from 2009 to 2013, so the defendants argue that the claims are time-barred no matter which of them triggered the limitations period. Peterson relies on a number of doctrines to delay accrual or toll the statute. For the reasons that follow, I agree with him that it is not established on the face of the complaint that he did know or should have known of the facts underlying two of his federal civil rights claims until November 2019, when the kickbacks were made public. But I agree with the Sutter Defendants that the other two claims are time-barred.

Peterson frames the first of his arguments in terms of the discovery rule. The federal accrual standard is essentially the same as the discovery rule. *See* *Lukovsky v. City & Cty. of San Francisco, 535 F.3d 1044, 1048 (9th Cir. 2008)*. And California law's discovery rule (which some courts appear to have applied in *Section 1983* cases) is identical in substance: It "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." *Fox v. Ethicon Endo-Surgery, Inc., 35 Cal. 4th 797, 807, 27 Cal. Rptr. 3d 661, 110 P.3d 914 (2005)*. A reason to discover exists when the plaintiff has reason "at least to suspect a factual basis for its elements." *Id.* (internal quotation **[*35]** marks and citation omitted). Both rules require the plaintiff to adequately show his diligence. *See id.;* *Mangum v. Action Collection Serv., Inc., 575 F.3d 935, 940 (9th Cir. 2009)*.

Peterson's first claim alleges that the Sutter Defendants violated his *First Amendment* rights by "punishing" him with the peer review process when he "refused" to accept kickbacks. FAC ¶¶ 142-45. The second claim alleges that he was denied constitutional due process because the peer review and MBC accusation processes were tainted. *Id.* ¶¶ 153-88. The third claim alleges discrimination based on the fact that he his African American and, it seems, based on the "protected class" of his patients who were indigent or on MediCal. *Id.* ¶¶ 200-11. The fourth claim alleges failure to prevent discrimination and retaliation premised on this. *Id.* ¶¶ 214-24.

Peterson has plausibly alleged that the discovery rule saves the *First Amendment* and due process claims. He alleges that the Sutter Defendants maintained a *secret* policy of providing kickbacks to compliant doctors and punishing uncompliant ones. *See* Sutter Oppo. 11. He has adequately pleaded that he could not reasonably have discovered that information until it was made public in November 2019, when the previously confidential California Attorney General investigation **[*36]** was publicized. *See* *Lukovsky, 535 F.3d at 1048* (holding that a claim accrues when the plaintiff knows or has reason to know the "underlying facts" and the "cause" of the injury); *Bibeau v. Pac. Nw. Rsch. Found. Inc., 188 F.3d 1105, 1108 (9th Cir. 1999)*, opinion amended on denial of reh'g, *208 F.3d 831 (9th Cir. 2000)* ("[T]he statute only begins to run once a plaintiff has knowledge of the 'critical facts' of his injury, which are that he has been hurt and who has inflicted the injury." (emphasis added)). Because of the nature of the alleged violation here, "what [Peterson] knew and when [he] knew it are questions of fact." *Bibeau, 188 F.3d at 1108*.

The two discrimination-based claims are not saved by the discovery rule. The Ninth Circuit has expressly held that, in an employment discrimination case, the claim accrues when the plaintiff is subject to an adverse employment action, not when the plaintiff suspects it was discriminatory. *Lukovsky, 535 F.3d at 1050*. Though Peterson does not allege *employment* discrimination, he alleges discrimination in supervision by medical authorities. The Ninth Circuit's decision emphasized that the federal accrual standard applies across disparate case types. *Id. at 1049*. In fact, in an on-point case about discipline from a state medical board that alleged religious discrimination, the Ninth Circuit held that the claim accrued when the **[*37]** plaintiff was denied license reinstatement—that is, when the adverse action was taken. *Olsen v. Idaho State Bd. of Med., 363 F.3d 916, 927 (9th Cir. 2004)*. Accordingly, the discrimination claims accrued when Sutter took the allegedly unlawful acts.

Nor are the discrimination claims saved by the other miscellaneous doctrines that Peterson invokes. He has not shown any "continuing violation" because he has not pointed to a way he was discriminated against within the limitations period. *See* *Williams v. Owens-Illinois, Inc., 665 F.2d 918, 924 (9th Cir. 1982)*, *opinion modified on denial of reh'g*, *No. 79-4110, 1982 U.S. App. LEXIS 18481, 1982 WL 308873 (9th Cir. June 11, 1982)* (federal doctrine); *Aryeh v. Canon Bus. Sols., Inc., 55 Cal. 4th 1185, 1192, 151 Cal. Rptr. 3d 827, 292 P.3d 871 (2013)* (state doctrine). He cannot rely on equitable tolling because he has not shown that he diligently pursued investigating this issue after the allegedly discriminatory events, that any "extraordinary" external circumstance stood in the way of filing the claim, or that there is a "technical forfeiture" of his rights that would be unjust to enforce. *Menominee, 577 U.S. t 255* (federal standard); *Lantzy v. Centex Homes, 31 Cal. 4th 363, 370, 2 Cal. Rptr. 3d 655, 73 P.3d 517 (2003)*, *as modified* (Aug. 27, 2003) (state standard). He cannot rely on the fraudulent concealment doctrine because he does not allege an affirmative act that kept him from discovering the information, as opposed to merely not revealing it. *Grisham v. Philip Morris U.S.A., Inc., 40 Cal. 4th 623, 637, 54 Cal. Rptr. 3d 735, 151 P.3d 1151 (2007)*. And he cannot rely on the "overt act" doctrine from conspiracy liability because he alleges no "overt act" contributing **[*38]** to a civil conspiracy to discriminate that occurred within the limitations period. *Kennedy, 111 Cal. App. 4th at 111*.

I cannot say that it would be futile to grant leave to amend to plead that the discrimination claims are tolled. Peterson has leave to amend.

B. Statute of Limitations on Antitrust Claims

As discussed in section I.C.iii.2 above concerning the MBC Defendants, the federal antitrust claims are subject to a somewhat different analysis based on antitrust-specific accrual rules. And for the reasons explained there, the antitrust claims against the Sutter Defendants are also dismissed as time-barred.

C. Statute of Limitations on State-Law Claims

Each of Peterson's state-law claims has a specific statute of limitations, but the parties agree that they range between one and four years; because the challenged events ended in 2013 and the lawsuit was filed in 2021, neither has pointed to anything that turns on these differences. Instead, just as with the federal civil rights claims, the parties' dispute is whether accrual is delayed by the discovery rule or otherwise tolled. The heart of all of the state-law claims is that the Sutter Defendants' peer review process was unlawfully tainted by retaliatory animus and **[*39]** that the Sutter Defendants "used" the MBC discipline process to punish Peterson for not complying with their alleged kickback scheme.

Peterson first argues that the discovery rule saves the claims. As noted, California's discovery rule "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." *Fox, 35 Cal. 4th at 807*. Again, a reason to discover exists when the plaintiff has reason "at least to suspect a factual basis for [the cause of action's] elements." *Id.* (internal quotation marks and citation omitted).

For the reasons explained above, Peterson has adequately alleged that he could not reasonably have discovered the facts underlying and cause of *some* of these injuries earlier than when the California Attorney General investigation was made public. He was certainly aware of the actions taken that injured him, but it is plausible he did not and could not have known that those actions were part of a larger unlawful scheme—so he would not have been on notice to bring his action. In particular, he plausibly would not have been on notice sufficient to bring the breach of contract, breach of the covenant of good faith and fair dealing, negligence, intentional **[*40]** infliction of emotional distress ("IIED"), negligent infliction of emotional distress, and UCL claims. Having knowledge of the elements of those claims depends on having knowledge of the kickbacks. To take one example, Peterson alleges that the *violation* of the covenant of good faith and fair dealing was precisely that the treatment of him was pretextual and part of this scheme. To take another example, what is "outrageous" for purposes of the IIED claim, he alleges, is the secret rationale of the Sutter Defendants' actions.

Not all of the claims qualify under this doctrine. Knowing the facts underpinning the interference with contractual relationships and business disparagement claims does not depend on knowing the allegedly unlawful motivation. Put another way, Peterson had an entire claim for both of these when his professional prospects were allegedly harmed by the Sutter Defendants' actions. *See* *Fox, 35 Cal. 4th at 807*. He may not have known the internal motive for those actions, but that is not relevant because he was aware of all pertinent facts. In another vein, the Unruh Act claim does not survive because it is for discrimination. As explained above, the federal accrual standard *is* the discovery **[*41]** rule, and Ninth Circuit precedent holds that the discovery rule is satisfied when the adverse discriminatory event occurs, regardless of actual knowledge of discriminatory motive. Peterson has cited no contrary authority from the California courts applying their discovery rule differently.

I therefore turn to whether the grab-bag of tolling doctrines saves these three claims. They do not. The Unruh Act claim does not qualify for the same reasons the federal discrimination claims do not, as explained above. There, I applied California's doctrine (and the federal one) to each of the theories Peterson puts forward, but none save the discrimination claim. The interference with contractual relations and business disparagement claims also do not qualify. Even assuming that the continuing violation doctrine applies to claims like these, Peterson has pointed to no invasion of his rights of this kind within the limitations period that is part of a broader course of unlawful conduct. *See* Aryeh, 55 Cal. 4th at 1192. He cannot rely on equitable tolling because he had full knowledge of the basis of these claims since they accrued, as explained above; nothing turned on the newly discovered kickbacks. *See* Lantzy, 31 Cal. 4th at 370. Because he had **[*42]** full knowledge—not just constructive knowledge—at the time of injury, the fraudulent concealment doctrine has no role to play here. *See* Grisham, 40 Cal. 4th at 637. And again, he has not pointed to any "overt act" within the limitations period that is part of a civil conspiracy to commit these torts. Kennedy, 111 Cal. App. 4th at 111.

Again, I cannot rule out that there might be some allegation that saves the claims, so leave to amend is granted.

D. HCQIA Claim

The Sutter Defendants move to dismiss the claim for retaliation in violation of the HCQIA. *See* Sutter Mot. 10. As a general matter, the HCQIA establishes national standards for professional review of physicians. *See* 42 U.S.C. §§ 1101 et seq. The courts of appeals that have addressed the question have unanimously held that the HCQIA "does not create a private right of action against hospitals, physicians, or other entities involved in peer review activities for failure to comply with HCQIA standards." Rowell v. Valleycare Health Sys., No. C 10-02816 CRB, 2010 U.S. Dist. LEXIS 113213, 2010 WL 4236797, at *2 (N.D. Cal. Oct. 21, 2010) (collecting authorities). Peterson has pointed to no provision that explicitly creates a private right of action and does not argue that there is any indication that Congress implicitly intended to create one. *See* Scalia v. Emp. Sols. Staffing Grp., LLC, 951 F.3d 1097, 1103 (9th Cir. 2020) (discussing this private-right-of-action standard). **[*43]** Accordingly, Peterson has not shown that his claim is cognizable in a private civil suit.[10] It is DISMISSED WITH PREJUDICE against all defendants.

E. Claim Preclusion

In the alternative, the Sutter Defendants argue that all of these matters are subject to claim preclusion from the 2012 lawsuit that Peterson brought against Stollman and Perry. I address only the claims that survive the analysis so far: the First Amendment, due process, and specific state-law claims discussed above.

In a federal-question case like this, "federal courts participate in developing uniform federal rules of res judicata." Taylor v. Sturgell, 553 U.S. 880, 891, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008) (internal quotation marks, alteration, and citation omitted). "The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'" Id. at 892 In claim preclusion, "a final judgment forecloses successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *Id.* (internal quotation marks and citation omitted). To apply, there must be "(1) an identity of claims in the two actions; (2) a final judgment on the merits in the first action; and (3) identity or privity between the **[*44]** parties in the two actions." Frank v. United Airlines, Inc., 216 F.3d 845, 850 (9th Cir. 2000). "[I]dentity of claims exists when two suits arise from 'the same transactional nucleus of facts.'" Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 322 F.3d 1064, 1078 (9th Cir. 2003) (internal quotation marks and citation omitted).

The parties argue over several aspects of the doctrine, such as identity of the claims, whether the parties are in privity, and even whether the previous judgment was procured by fraud. The Sutter Defendants' argument that the claims are precluded fails for a more fundamental reason: Claim preclusion applies only to claims that were or *could have been* brought in the first action. *See, e.g.,* Frank, 216 F.3d at 850; Owens v. Kaiser Found. Health Plan, Inc.,

[10] The two state-court cases that Peterson cites do not hold or suggest that the HCQIA creates a private right of action for his claim. *See* Fahlen v. Sutter Cent. Valley Hosps., 58 Cal. 4th 655, 685, 168 Cal. Rptr. 3d 165, 318 P.3d 833 (2014); Clark v. Columbia/HCA Info. Servs., Inc., 117 Nev. 468, 480, 25 P.3d 215 (2001).

244 F.3d 708, 713 (9th Cir. 2001). Said otherwise, it only applies when the party had a "full and fair opportunity" to litigate the claim earlier. *Allen v. McCurry, 449 U.S. 90, 95, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980)* (internal quotation marks and citation omitted). But, as I have explained, at this point it is plausible that the claims I address here could not have been brought in the 2012 suit because a reasonable person would not have known he could bring them until late 2019 at the earliest.[11] As the Ninth Circuit has explained, "[t]he rule that a judgment is conclusive as to every matter that might have been litigated does not apply to new rights acquired pending the action which might have been, but which were not, **[*45]** required to be litigated." *Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist., 750 F.2d 731, 739 (9th Cir. 1984)* (internal quotation marks and citation omitted). Or as the Second Circuit put it, "[i]f significant new evidence is uncovered subsequent to the proceeding said to result in an estoppel of the present action, then it cannot be found that a party was afforded a full and fair opportunity to present his case in the absence of that evidence." *Khandhar v. Elfenbein, 943 F.2d 244, 249 (2d Cir. 1991)*. The claims are not precluded on the face of the complaint. This issue may be re-raised once the record is developed and it is established what Peterson knew (or should have known) and when he knew it.

F. UCL Standing

The Sutter Defendants argue that Peterson has not alleged that he possesses statutory standing under the UCL. To possess statutory standing, a party must have "suffered injury in fact and ha[ve] lost money or property as a result of the unfair competition." *Kwikset Corp. v. Superior Ct., 51 Cal. 4th 310, 322, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)* (internal quotation marks and citation omitted). The Sutter Defendants argue only that Peterson does not *allege* any losses, but the FAC alleges that his client pool was shrunk by the kickback scheme. FAC ¶ 371. While that allegation appears to be relatively speculative and perhaps will not be cognizable, it is an allegation of loss and so is sufficient to **[*46]** defeat the Sutter Defendants' cursory argument. Whether it is too speculative or attenuated can be answered at a later stage and has not been challenged today.

G. Sutter Defendants Conclusion

The claims for federal discrimination, violation of the Unruh Act, intentional interference with contractual relations, and business disparagement are dismissed with leave to amend. The motion to dismiss is otherwise denied.

CONCLUSION

The MBC Defendants' motion is GRANTED WITH PREJUDICE to the extent the FAC is against the State of California and the MBC and on the state-law claims against the MBC Defendants. It is GRANTED WITH LEAVE TO AMEND on the federal claims against the MBC Defendants. The Sutter Defendants' motion is GRANTED WITH PREJUDICE on the HCQIA claim. It is GRANTED WITH LEAVE TO AMEND on the federal discrimination, Unruh Act, intentional interference with contractual relations, and business disparagement claims. It is DENIED IN PART on the other claims.

IT IS SO ORDERED.

Dated: February 2, 2022

/s/ William H. Orrick

William H. Orrick

United States District Judge

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[11] There is no evidence that Peterson took discovery in the earlier suit that would have turned up this information.

Affiliated Foods, Inc. v. TriUnion Seafoods LLC (In re Packaged Seafood Prods. Antitrust Litig.)

United States District Court for the Southern District of California

February 7, 2022, Decided; February 7, 2022, Filed

Case No.: 15-MD-2670 DMS (MDD); 3:15-cv-02787-JLS-MDD; 3:15-cv-04667; 3:15-cv04187; 3:17-cv02487; 3:16-cv-02765; 3:16-cv00046; 3:16-cv-00047; 3:16-cv-00025; 3:16-cv00017-JLS-MDD; 3:18-cv-01014-JLS-MDD; 3:17-cv02145-JLS-MDD; 3:18-cv-02366-JLS-MDD; 3:16-cv00051-JLS-MDD; 3:16-cv-00264-JLS-MDD; 3:16-cv-00247-JLS-MDD; 3:17-cv0951-JLS-MDD; 3:17-cv1748-JLS-MDD; 13:6-cv-0398-JLSMDD; 3:17-cv0950-JLS-MDD; 3:17-cv1745-JLS-MDD; 3:17-cv-1744-JLS-MDD; 3:16-cv-01226 (JLS)

Reporter

2022 U.S. Dist. LEXIS 61593 *; 2022 WL 789177

IN RE: PACKAGED SEAFOOD PRODUCTS ANTITRUST LITIGATION. This Document Relates To: Affiliated Foods, Inc. v. TriUnion Seafoods LLC, et al., 3:15-cv-02787-JLS-MDD, Associated Food Stores, Inc. v. Tri-Union Seafoods, LLC, et al., 3:15-cv-04667, Associated Grocers of New England, Inc., et al v. Tri-Union Seafoods, LLC et al., 3:15-cv04187, Bashas' Inc., et al. v. Tri-Union Seafoods, LLC, et al., 3:17-cv02487, Fareway Stores Inc. et al v. TriUnion Seafoods, LLC et al., 3:16-cv-02765, Giant Eagle, Inc. v. Tri-Union Seafoods, LLC, et al., 3:16-cv00046, McLane Company, Inc. et al v. Tri-Union Seafoods, LLC et al., 3:16-cv-00047, Western Family Foods, Inc. v. Tri-Union Seafoods, LLC et al., 3:16-cv-00025, Winn-Dixie Stores, Inc. v. Bumble Bee Foods LLC, et al., 3:16-cv00017-JLS-MDD, Associated Wholesale Grocers, Inc. v. Bumble Bee Foods LLC, et al., 3:18-cv-01014-JLS-MDD, CVS Pharmacy, Inc. v. Bumble Bee Foods LLC, et al., 3:17-cv02145-JLS-MDD, SpartanNash Company v. TriUnion Seafoods, LLC, et al., 3:18-cv-02366-JLS-MDD, Kroger Co., et al. v. Bumble Bee Foods LLC, et al., 3:16-cv00051-JLS-MDD, Wegmans Food Markets, Inc. v. Bumble Bee Foods LLC, et al., 3:16-cv-00264-JLS-MDD, Publix Super Markets, Inc. et al. v. Bumble Bee Foods LLC, et al., 3:16-cv-00247-JLS-MDD, SuperValu Inc., et al. v. Bumble Bee Foods LLC, et al., 3:17-cv0951-JLS-MDD, Krasdale Foods, Inc. v. Bumble Bee Foods LLC, et al., 3:17-cv1748-JLS-MDD, Meijer, Inc. and Meijer Distribution, Inc. v. Bumble Bee Foods, et al., 13:6-cv-0398-JLSMDD, Super Store Industries v. Bumble Bee Foods LLC et al., 3:17-cv0950-JLS-MDD, Moran Foods, LLC v. Bumble Bee Foods LLC, et al., 3:17-cv1745-JLS-MDD, Dollar General Corporation, et al. v. Bumble Bee Foods LLC et al., 3:17-cv-1744-JLS-MDD, W. Lee Flowers & Co., Inc. v. Bumble Bee Foods, LLC; et al., 3:16-cv-01226 (JLS)

Prior History: *In re Packaged Seafood Prods. Antitrust Litig., 148 F. Supp. 3d 1375, 2015 U.S. Dist. LEXIS 166042 (J.P.M.L., Dec. 9, 2015)*

Core Terms

fraudulent concealment, summary judgment, Partial, Steel, statute of limitations, antitrust, give rise, indictment, diligence, tolled, downsizing, email, tuna, triable issue of fact, limitations period, antitrust claim, material fact, moving party, documents, nonmoving, genuine, notice, prices, constructive knowledge, federal claim, conspiracy, excite, summary judgment motion, affirmative act, state law claim

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For Starkist Company, Dongwon Industries Co. Ltd (3:16-cv-00398-JLS-MDD, 3:16-cv-00247-JLS-MDD), Defendants: Andrew J. Lee, Justin W. Bernick, LEAD ATTORNEYS, Hogan Lovells US LLP, Washington, DC; J. Robert Robertson, LEAD ATTORNEY, HOGAN LOVELLS US LLP, Washington, DC; Jeffrey Michael Goldman, Troutman Pepper Hamilton Sanders LLP, Irvine, CA.

For Thai Union Group PCL (3:16-cv-00398-JLS-MDD, 3:16-cv-00247-JLS-MDD), Defendant: Robert J Parks, LEAD ATTORNEY, Parks & Solar LLP, San Diego, CA.

For Publix Super Markets, Inc., Plaintiff (3:16-cv-00247-JLS-MDD): Alberto Rodriguez, David Germaine, Joseph Michael Vanek, LEAD ATTORNEYS, Sperling **[*3]** & Slater, P.C., Chicago, IL; Phillip Frederick Cramer, Sherrard Roe Voigt & Harbison PLC, Nashville, TN.

For Wakefern Food Corp., Plaintiff (3:16-cv-00247-JLS-MDD): Alberto Rodriguez, David Germaine, LEAD ATTORNEYS, Sperling & Slater, P.C., Chicago, IL; Phillip Frederick Cramer, Sherrard Roe Voigt & Harbison PLC, Nashville, TN.

For SuperValu Inc., Plaintiff (3:17-cv-00951-JLS-MDD): Alberto Rodriguez, David Germaine, Joseph Michael Vanek, LEAD ATTORNEYS, Sperling & Slater, P.C., Chicago, IL; Phillip Frederick Cramer, Sherrard Roe Voigt & Harbison PLC, Nashville, TN.

For Starkist Company, Dongwon Industries Co. Ltd. (3:17-cv-00951-JLS-MDD, 3:17-cv-00950-JLS-MDD), Defendants: Jeffrey Michael Goldman, Troutman Pepper Hamilton Sanders LLP, Irvine, CA.

For Super Store Industries, Plaintiff (3:17-cv-00950-JLS-MDD): Alberto Rodriguez, David Germaine, Joseph Michael Vanek, LEAD ATTORNEYS, Sperling & Slater, P.C., Chicago, IL; Phillip Frederick Cramer, Sherrard Roe Voigt & Harbison PLC, Nashville, TN.

For Dollar General Corporation, Dolgencorp, LLC, Plaintiffs (3:17-cv-01744-JLS-MDD): David Germaine, LEAD ATTORNEY, Sperling & Slater, P.C., Chicago, IL; Phillip Frederick Cramer, LEAD ATTORNEY, Sherrard **[*4]** Roe Voigt & Harbison PLC, Nashville, TN.

For Olean Wholesale Grocery Cooperative, Inc., on behalf of itself and all others similarly |, Plaintiff (3:15md2670): Bonny E Sweeney, Christopher L. Lebsock, LEAD ATTORNEYS, Hausfeld LLP, San Francisco, CA USA.

For Beverly Youngblood, on behalf of herself and all others similarly situated |, Plaintiff (3:15md2670): Susan Rogers Schwaiger, LEAD ATTORNEY, Nussbaum Law Group, P.C., New York, NY USA; Whitney E. Street, LEAD ATTORNEY, Hagens Berman Sobol & Shapiro LLP, Berkeley, CA USA.

For Pacific Groservice Inc., on behalf of itself and all others similarly situated | doing business as | PITCO Foods |, Plaintiff (3:15md2670): Barbara J. Hart, LEAD ATTORNEY, Grant & Eisenhofer, P.A., New York, NY USA; Bonny E Sweeney, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA USA.

For Capitol Hill Supermarket, on behalf of itselfand all others similarly situated |, A-1 Diner, on behalf of itself and others similarly situated |, Dutch Village Restaurant, on behalf of itself and all others similarly situated |, Thyme Cafe & Market, Inc., on behalf of itself and all others similarly situated |, Groucho's Deli of Five Points, LLC, Groucho's Deli of Raleigh, Sandee's **[*5]** Catering, Confetti's Ice Cream Shoppe, Plaintiffs (3:15md2670): Alec Blaine Finley , Jr, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Washington, DC USA.

For Louise Ann Davis Matthews, on behalf of herself and all others similarly |, Plaintiff (3:15md2670): Kimberly A. Kralowec, LEAD ATTORNEY, Kralowec Law, P.C., San Francisco, CA USA.

For JAMES WALNUM, on behalf of himself and all others similarly sitated |, Plaintiff (3:15md2670): Christopher T. Micheletti, LEAD ATTORNEY, Zelle LLP, Oakland, CA USA.

For Colin Moore, on behalf of himself and all others similarly situated |, Plaintiff (3:15md2670): Chad Saunders, LEAD ATTORNEY, Sundeen Salinas & Pyle, Oakland, CA USA; Kathleen Styles Rogers, Kimberly A. Kralowec, LEAD ATTORNEYS, Kralowec Law, P.C., San Francisco, CA USA.

For Jennifer A. Nelson, on behalf of herself and all others similarly situated |, Elizabeth Davis-Berg, on behalf of herself and all others similarly situated |, Laura Childs, on behalf of herself and all others similarly situated |, Nancy Stiller, on behalf of herself and all others similarly situated |, Bonnie Vanderlaan, on behalf of herself and all others similarly situated |, Kristin Millican, on behalf of herself and **[*6]** all others similarly situated |, Plaintiffs (3:15md2670): Betsy Carol Manifold, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Brittany Nicole DeJong, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz, San Diego, CA USA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL USA; Fred T Isquith , Jr., LEAD ATTORNEY, Zwerling, Schachter & Zwerling, LLP, New York, NY USA; Michelle L. Kranz, LEAD ATTORNEY, Zoll & Kranz, LLC, Toledo, OH USA; Nancy A. Kulesa, LEAD ATTORNEY, Levi & Korsinsky, LLP.

For Trepco Imports and Distribution LTD, on behalf of itself and all others similarly situated |, Plaintiff (3:15md2670): Abbas Kazerounian, LEAD ATTORNEY, Kazerouni Law Group, APC, Costa Mesa, CA USA; Bonny E Sweeney, Michael Lehmann, LEAD ATTORNEYS, Hausfeld LLP, San Francisco, CA USA; Jason S Hartley, LEAD ATTORNEY, Hartley LLP, San Diego, CA USA; Robert G. Eisler, LEAD ATTORNEY, PRO HAC VICE, Grant & Eisenhofer P.A., Wilmington, DE USA; Vincent J Esades, LEAD ATTORNEY, PRO HAC VICE, Heins Mills & Olson, P.L.C., Minneapolis, MN USA.

For Jinkyoung Moon, on behalf of themselves and all others similarly situated |, Clarissa Simon, on behalf **[*7]** of themselves and all others similarly situated |, Plaintiffs (3:15md2670): Robert J. Gralewski , Jr., LEAD ATTORNEY, Kirby McInerney LLP, San Diego, CA USA.

For Corey Norris, on behalf of themselves and all others similarly situated |, Plaintiff (3:15md2670): Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Christopher Van Le, LEAD ATTORNEY, PRO HAC VICE, Straus & Boies LLP, Fairfax, VA USA; Robert J. Gralewski , Jr., LEAD ATTORNEY, Kirby McInerney LLP, San Diego, CA USA; Timothy Battin, LEAD ATTORNEY, PRO HAC VICE, Straus & Boies, LLP, Fairfax, VA USA.

For Nigel Warren, on behalf of themselves and all others similarly situated |, Plaintiff (3:15md2670): Christopher Van Le, LEAD ATTORNEY, PRO HAC VICE, Straus & Boies LLP, Fairfax, VA USA; Robert J. Gralewski , Jr., LEAD ATTORNEY, Kirby McInerney LLP, San Diego, CA USA; Timothy Battin, LEAD ATTORNEY, PRO HAC VICE, Straus & Boies, LLP, Fairfax, VA USA; Rachele R Byrd, Betsy Carol Manifold, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA.

For Amy Joseph, individually and on behalf of all others similarly situated |, Plaintiff (3:15md2670): Betsy Carol Manifold, LEAD **[*8]** ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Gayle M. Blatt, LEAD ATTORNEY, Casey, Gerry, Schenk, Francavilla, Blatt & Penfield LLP, San Diego, CA USA; Thomas A. Zimmerman , Jr., LEAD ATTORNEY, Sharon A Harris, Zimmerman Law Offices, P.C., Chicago, IL USA.

For Steven M. Colberg, on behalf of themselves and all others similarly situated |, Plaintiff (3:15md2670): Christopher T. Micheletti, LEAD ATTORNEY, Zelle LLP, Oakland, CA USA; Dennis James Stewart, LEAD ATTORNEY, Gustafson Gluek PLLC, San Diego, CA USA.

For Michael Juetten, on behalf of themselves and all others similarly situated |, Carla Lown, on behalf of themselves and all others similarly situated |, Plaintiffs (3:15md2670): Betsy Carol Manifold, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Christopher T. Micheletti, LEAD ATTORNEY, Zelle LLP, Oakland, CA USA; Dennis James Stewart, LEAD ATTORNEY, Gustafson Gluek PLLC, San Diego, CA USA.

For Truyen Ton-Vuong, as an individual and on behalf of all others similarly situated, | also known as | David Ton |, Plaintiff (3:15md2670): Craig McKenzie Nicholas, LEAD ATTORNEY, Nicholas & Tomasevic, LLP, San Diego, CA USA. **[*9]**

For Dwayne Kennedy, on behalf of himself and all others similarly situated |, Plaintiff (3:15md2670): Dennis James Stewart, LEAD ATTORNEY, Gustafson Gluek PLLC, San Diego, CA USA; Stephen Ademi, LEAD ATTORNEY, Ademi & O'Reilly, LLP, Cudahy, WI USA; Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA.

For RICK MUSGRAVE, individually, and on behalf of himself and all others similarly situated |, Plaintiff (3:15md2670): Betsy Carol Manifold, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Gordon M Fauth , Jr., LEAD ATTORNEY, Litigation Law Group, Alameda, CA USA.

For Lisa Burr, an individual |, Plaintiff (3:15md2670): Alex M Tomasevic, LEAD ATTORNEY, Nicholas and Tomasevic LLP, San Diego, CA USA; Craig McKenzie Nicholas, LEAD ATTORNEY, Nicholas & Tomasevic, LLP, San Diego, CA USA; Dennis James Stewart, Kirk B Hulett, LEAD ATTORNEYS, Gustafson Gluek PLLC, San Diego, CA USA; Frederick William Kosmo , Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA USA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL USA.

For Larry Demonaco, an individual; and all others similarly situated **[*10]** |, Ellen Pinto, an individual; and all others similarly situated |, Robby Reed, an individual; and all others similarly situated |, Blair Hysni, an individual; and all others similarly situated |, Dennis Yelvington, an individual; and all others similarly situated |, Plaintiffs (3:15md2670): Alex M Tomasevic, LEAD ATTORNEY, Nicholas and Tomasevic LLP, San Diego, CA USA; Craig McKenzie Nicholas, LEAD ATTORNEY, Nicholas & Tomasevic, LLP, San Diego, CA USA; Dennis James Stewart, Kirk B Hulett, LEAD ATTORNEYS, Gustafson Gluek PLLC, San Diego, CA USA.

For Michael Buff, an individual; and all others similarly situated |, Plaintiff (3:15md2670): Alex M Tomasevic, LEAD ATTORNEY, Nicholas and Tomasevic LLP, San Diego, CA USA; Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Craig McKenzie Nicholas, LEAD ATTORNEY, Nicholas & Tomasevic, LLP, San Diego, CA USA; Dennis James Stewart, Kirk B Hulett, LEAD ATTORNEYS, Gustafson Gluek PLLC, San Diego, CA USA; Frederick William Kosmo , Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA USA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and **[*11]** Spector, Miami, FL USA.

For Kathy Durand Gore, on behalf of herself and all others similarly situated |, Plaintiff (3:15md2670): Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Kimberly A. Kralowec, LEAD ATTORNEY, Kralowec Law, P.C., San Francisco, CA USA.

For Thomas E. Willoughby III, on behalf of himself and all others similarly situated |, Mary Hudson, Christopher Todd, Plaintiffs (3:15md2670): Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL USA.

For Robert Fragoso, on Behalf of Themselves and All Others Similarly Situated |, Samuel Seidenburg, on Behalf of Themselves and All Others Similarly Situated |, Michael Coffey, on Behalf of Themselves and All Others Similarly Situated |, Jason Wilson, on Behalf of Themselves and All Others Similarly Situated |, Plaintiffs (3:15md2670): Timothy G. Blood, LEAD ATTORNEY, Blood Hurst & O'Reardon, LLP, San Diego, CA USA.

For Janelle Albarello, on Behalf of Themselves and All Others Similarly Situated |, Plaintiff (3:15md2670): Frederick **[*12]** William Kosmo , Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA USA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL USA; Timothy G. Blood, LEAD ATTORNEY, Blood Hurst & O'Reardon, LLP, San Diego, CA USA.

For Jade Canterbury, on behalf of herself and all others similarly situated |, Jade Canterbury, Plaintiffs (3:15md2670): Alyson Louise Oliver, LEAD ATTORNEY, PRO HAC VICE, Oliver Law Group P.C., Troy, MI USA; Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL USA.

For Nay Alidad, on behalf of herself and all others similarly situated |, Barbara Buenning, on behalf of herself and all others similarly situated |, Plaintiffs (3:15md2670): Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Daniel E. Gustafson, Daniel C. Hedlund, LEAD ATTORNEYS, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN USA; Dennis James Stewart, LEAD ATTORNEY, Gustafson Gluek PLLC, San Diego, CA USA; Frederick William Kosmo , Jr., LEAD **[*13]** ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA USA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL USA.

For Galyna Andrusyshyn, on behalf of herself and all others similarly situated |, Robert Benjamin, on behalf of himself and all others similarly situated |, Plaintiffs (3:15md2670): Daniel E. Gustafson, Daniel C. Hedlund, LEAD ATTORNEYS, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN USA; Dennis James Stewart, LEAD ATTORNEY, Gustafson Gluek PLLC, San Diego, CA USA; Frederick William Kosmo , Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA USA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL USA.

For Danielle Greenberg, on behalf of herself and all others similarly situated |, Sheryl Haley, on behalf of herself and all others similarly situated |, Gabrielle Kurdt, on behalf of herself and all others similarly situated |, Erica Pruess, on behalf of herself and all others similarly situated |, Seth Salenger, on behalf of himself and all others similarly situated |, Harold Stafford, on behalf of himseslf and all others similarly situated |, Plaintiffs **[*14]** (3:15md2670): Daniel E. Gustafson, Daniel C. Hedlund, LEAD ATTORNEYS, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN USA; Dennis James Stewart, LEAD ATTORNEY, Gustafson Gluek PLLC, San Diego, CA USA.

For Lisa Hall, on behalf of herself and all others similarly situated |, Tya Hughes, on behalf of herself and all others similarly situated |, Marissa Jacobus, on behalf of herself and all others similarly situated |, Plaintiffs (3:15md2670): Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Daniel E. Gustafson, Daniel C. Hedlund, LEAD ATTORNEYS, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN USA; Dennis James Stewart, LEAD ATTORNEY, Gustafson Gluek PLLC, San Diego, CA USA.

For Carl Lesher, on behalf of themselves and all others similarly situated |, Sarah Metivier Schadt, on behalf of themselves and all others similarly situated, |, Karren Fabian, on behalf of themselves and all others similarly situated, |, Plaintiffs (3:15md2670): Stuart George Gross, LEAD ATTORNEY, Gross & Klein, LLP, San Francisco, CA USA.

For Greg Stearns, on behalf of themselves and all others similarly situated, |, Plaintiff (3:15md2670): Betsy **[*15]** Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Stuart George Gross, LEAD ATTORNEY, Gross & Klein, LLP, San Francisco, CA USA.

For Melissa Bowman, on behalf of herself and all others similarly situated |, Plaintiff (3:15md2670): Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL USA; Francis A. Bottini, LEAD ATTORNEY, Bottini & Bottini, Inc., La Jolla, CA USA; Frederick William Kosmo , Jr., LEAD

ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA USA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL USA; Jayne Arnold Goldstein, LEAD ATTORNEY, Miller Shah LLP, Fort Lauderdale, FL USA.

For Vivek Dravid, on behalf of himself and all others similarly situated |, Plaintiff (3:15md2670): Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL USA; Francis A. Bottini, LEAD ATTORNEY, Bottini & Bottini, Inc., La Jolla, CA USA; Jayne Arnold Goldstein, LEAD ATTORNEY, Miller Shah LLP, Fort Lauderdale, FL **[*16]** USA; Rachele R Byrd, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA.

For Jody Cooper, on behalf of himself and all others similarly situated |, Danielle Johnson, on behalf of herself and all others similarly situated |, Herbert H. Kliegerman, on behalf of himself and all others similarly situated |, Beth Milliner, on behalf of herself and all others similarly situated |, Liza Milliner, on behalf of herself and all others similarly situated |, Jody Cooper, Vivek Dravid, Robert Etten, Plaintiffs (3:15md2670): Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL USA; Francis A. Bottini, LEAD ATTORNEY, Bottini & Bottini, Inc., La Jolla, CA USA; Jayne Arnold Goldstein, LEAD ATTORNEY, Miller Shah LLP, Fort Lauderdale, FL USA.

For Jeffrey Potvin, on Behalf of Himself and All Others Similarly Situated |, Plaintiff (3:15md2670): Paula R. Brown, Thomas Joseph O'Reardon , II, Timothy G. Blood, LEAD ATTORNEYS, Blood Hurst & O'Reardon, LLP, San Diego, CA USA; Peter G. Safirstein, LEAD ATTORNEY, PRO HAC VICE, Morgan & Morgan, **[*17]** New York, NY USA.

For Stephanie Gipson, on Behalf of Herself and All Others Similarly Situated |, Plaintiff (3:15md2670): Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Paula R. Brown, Thomas Joseph O'Reardon , II, Timothy G. Blood, LEAD ATTORNEYS, Blood Hurst & O'Reardon, LLP, San Diego, CA USA; Peter G. Safirstein, LEAD ATTORNEY, PRO HAC VICE, Morgan & Morgan, New York, NY USA.

For Barbara Lybarger, on behalf of herself and all others similarly situated |, Plaintiff (3:15md2670): Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Brittany Nicole DeJong, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz, San Diego, CA USA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL USA; Elizabeth C Pritzker, LEAD ATTORNEY, Pritzker Levine LLP, Oakland, CA USA; Fred Taylor Isquith , Sr., LEAD ATTORNEY, PRO HAC VICE, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY USA; Marisa C Livesay, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLP, San Diego, CA USA.

For Scott Caldwell, on behalf of himself and all others similarly **[*18]** situated |, Plaintiff (3:15md2670): Betsy Carol Manifold, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Christopher T. Micheletti, LEAD ATTORNEY, Zelle LLP, Oakland, CA USA; Frederick William Kosmo , Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA USA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL USA.

For Ramon Ruiz, On Behalf Of Himself and All Others Similarly Situated |, Plaintiff (3:15md2670): Dennis James Stewart, LEAD ATTORNEY, Gustafson Gluek PLLC, San Diego, CA USA.

For Harvesters Enterprises, LLC, on behalf of itself and all others similarly situated |, Plaintiff (3:15md2670): Alec Blaine Finley , Jr, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Washington, DC USA; Christian Hudson, Peter Gil-Montllor, LEAD ATTORNEYS, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY USA; David Malcolm McMullan , Jr, Katherine Barrett Riley, LEAD ATTORNEYS, BARRETT LAW GROUP, PA - Lexington, Lexington, MS USA; John W. Barrett, LEAD ATTORNEY, Barrett Law Group PA - Lexington, Lexington, MS USA; Joseph John DePalma, LEAD ATTORNEY, PRO HAC VICE, Lite DePalma Greenberg, LLC, Newark, NJ USA.

For Affiliated **[*19]** Foods, Inc., Plaintiff (3:15md2670): Elana Katcher, LEAD ATTORNEY, Kaplan Fox Kilsheimer, New York, NY USA; Frederick William Kosmo , Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA USA; Gregory K Arenson, LEAD ATTORNEY, Kaplan Fox and Kilsheimer LLP, New York, NY USA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL USA;

Johnny K Merritt, LEAD ATTORNEY, Mullin Hoard and Brown, Amarillo, TX USA; Justin B Farar, LEAD ATTORNEY, Kaplan Fox and Kilsheimer LLP, Los Angeles, CA USA; Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, Oakland, CA USA; Lawrence Kill, LEAD ATTORNEY, PRO HAC VICE, Anderson Kill P.C., New York, NY USA; Mario Man-Lung Choi, LEAD ATTORNEY, Donahue Fitzgerald LLP, Oakland, CA USA; Richard Lyle Coffman, LEAD ATTORNEY, PRO HAC VICE, The Coffman Law Firm, Beaumont, TX USA; Richard J Kilsheimer, LEAD ATTORNEY, Law Offices of Richard J Kilsheimer, New York, NY USA; Robert N Kaplan, LEAD ATTORNEY, PRO HAC VICE, Kaplan Kilsheimer and Fox, New York, NY USA; Timothy Clark Williams, LEAD ATTORNEY, Sprouse Shrader Smith PLLC, Amarillo, TX USA.

For PIGGLY WIGGLY ALABAMA DISTRIBUTING CO., INC., on **[*20]** Behalf of Itself and All Others Similarly Situated |, Plaintiff (3:15md2670): Bonny E Sweeney, Michael Lehmann, LEAD ATTORNEYS, Hausfeld LLP, San Francisco, CA USA; Louis Kessler, LEAD ATTORNEY, Kaplan Fox and Kilsteimer, San Francisco, CA USA; Solomon B Cera, Thomas C Bright, LEAD ATTORNEYS, Cera LLP, San Francisco, CA USA.

For Elizabeth Twitchell, on behalf of herself and all others similarly situated |, Tina Grant, on behalf of herself and all others similarly situated |, John Trent, on behalf of himself and all others similarly situated |, Brian Levy, on behalf of himself and all others similarly situated |, Sally Crnkovich, on behalf of herself and all others similarly situated |, Sterling King, on behalf of himself and all others similarly situated |, Evelyn Olive, on behalf of herself and all others similarly situated |, Sunde Daniels, on behalf of themselves and all others similarly situated |, Christopher Todd, on behalf of themselves and all others similarly situated |, Plaintiffs (3:15md2670): Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Brittany Nicole DeJong, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman **[*21]** & Herz, San Diego, CA USA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL USA; Fred Taylor Isquith , Sr., LEAD ATTORNEY, PRO HAC VICE, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY USA; Marisa C Livesay, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLP, San Diego, CA USA.

For Louise Adams, on behalf of herself and all others similarly situated |, Marc Blumstein, on behalf of himself and all others similarly situated |, Jessica Breitbach, on behalf of herself and all others similarly situated |, Paul Berger, on behalf of himself and all others similarly situated |, Plaintiffs (3:15md2670): Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Brittany Nicole DeJong, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz, San Diego, CA USA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL USA; Fred Taylor Isquith , Sr., LEAD ATTORNEY, PRO HAC VICE, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY USA; Frederick William Kosmo , Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA USA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC **[*22]** VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL USA; Marisa C Livesay, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLP, San Diego, CA USA.

For Barbara Blumstein, on behalf of herself and all others similarly situated |, Plaintiff (3:15md2670): Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL USA; Frederick William Kosmo , Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA USA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL USA.

For Mary Hudson, on behalf of herself and all others similarly situated |, Plaintiff (3:15md2670): Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Brittany Nicole DeJong, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz, San Diego, CA USA; Heidi Silton, LEAD ATTORNEY, PRO HAC VICE, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN USA; Marisa C Livesay, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLP, San Diego, CA USA.

For Diana Mey, **[*23]** on behalf of herself and all others similarly situated |, Plaintiff (3:15md2670): Betsy Carol Manifold, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Christopher T. Micheletti, LEAD ATTORNEY, Zelle LLP, Oakland, CA USA; Eric B. Snyder, LEAD ATTORNEY, Bailey and Glasser LLP, Charleston, WV USA.

For ASSOCIATED GROCERS OF NEW ENGLAND, INC., Associated Food Stores, Inc., ASSOCIATED GROCERS, INC., Plaintiffs (3:15md2670): Frederick William Kosmo , Jr., LEAD ATTORNEY, Wilson Turner Kosmo

LLP, San Diego, CA USA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL USA; Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, Oakland, CA USA; Mario Man-Lung Choi, LEAD ATTORNEY, Donahue Fitzgerald LLP, Oakland, CA USA.

For NORTH CENTRAL DISTRIBUTORS, LLC, CASH-WA DISTRIBUTING CO. OF KEARNEY, INC., URM STORES, INC., Western Family Foods, Inc., MCLANE COMPANY, INC., Meadowbrook Meat Company, Inc., Plaintiffs (3:15md2670): Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, Oakland, CA USA; Mario Man-Lung Choi, LEAD ATTORNEY, Donahue Fitzgerald LLP, Oakland, CA USA.

For Giant Eagle, Inc., Plaintiff (3:15md2670): **[*24]** Bernard Marcus, Brian Hill, Erin Gibson Allen, LEAD ATTORNEYS, Moira Cain-Mannix, LEAD ATTORNEY, PRO HAC VICE, Marcus & Shapira LLP, Pittsburgh, PA USA; Johnny K Merritt, LEAD ATTORNEY, Mullin Hoard and Brown, Amarillo, TX USA; Justin B Farar, LEAD ATTORNEY, Kaplan Fox and Kilsheimer LLP, Los Angeles, CA USA; Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, Oakland, CA USA; Lawrence Kill, LEAD ATTORNEY, PRO HAC VICE, Anderson Kill P.C., New York, NY USA; Mario Man-Lung Choi, LEAD ATTORNEY, Donahue Fitzgerald LLP, Oakland, CA USA; Matthew P McCahill, LEAD ATTORNEY, Kaplan Fox and Kilsheimer LLP, New York, NY USA; Richard Lyle Coffman, LEAD ATTORNEY, PRO HAC VICE, The Coffman Law Firm, Beaumont, TX USA; Robert N Kaplan, LEAD ATTORNEY, PRO HAC VICE, Kaplan Kilsheimer and Fox, New York, NY USA.

For BI-Lo Holding, LLC, Plaintiff (3:15md2670): Frederick William Kosmo , Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA USA; Harold Timothy Gillis, Nancy A. Johnson, LEAD ATTORNEYS, Gillis Way & Campbell, LLP, Jacksonville, FL USA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL USA; Patrick J. Ahern, LEAD ATTORNEY, **[*25]** Ahern and Associates, P.C., Chicago, IL USA.

For Winn-Dixie Stores, Inc, Plaintiff (3:15md2670): Harold Timothy Gillis, Nancy A. Johnson, LEAD ATTORNEYS, Gillis Way & Campbell, LLP, Jacksonville, FL USA; Patrick J. Ahern, LEAD ATTORNEY, Ahern and Associates, P.C., Chicago, IL USA.

For Janet Machin, On Behalf of Herself and All Others Similarly Situated |, Plaintiff (3:15md2670): Joseph John DePalma, LEAD ATTORNEY, PRO HAC VICE, Lite DePalma Greenberg, LLC, Newark, NJ USA; Marcus Neil Bozeman, Thomas P Thrash, LEAD ATTORNEYS, Thrash Law Firm, Little Rock, AR USA; Peter Gil-Montllor, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY USA.

For Debra L. Damske, Virginia Rakipi, Scott Dennis, on behalf of himself and all others similarly situated |, Plaintiffs (3:15md2670): Andrew Szot, LEAD ATTORNEY, PRO HAC VICE, Marvin Alan Miller, Matthew E Van Tine, LEAD ATTORNEYS, Miller Law LLC, Chicago, IL USA; Stephen Ademi, LEAD ATTORNEY, Ademi & O'Reilly, LLP, Cudahy, WI USA.

For Ken Dunlap, Plaintiff (3:15md2670): Andrew Szot, LEAD ATTORNEY, PRO HAC VICE, Marvin Alan Miller, Matthew E Van Tine, LEAD ATTORNEYS, Miller Law LLC, Chicago, IL USA; Stephen Ademi, LEAD ATTORNEY, Ademi & O'Reilly, **[*26]** LLP, Cudahy, WI USA; Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA.

For Barbara E. Olson, on behalf of themselves and all others similarly situated |, Casey Christensen, on behalf of himself and all others similarly situated |, Brian Depperschmidt, on behalf of himself and all others similarly situated |, Plaintiffs (3:15md2670): Andrew Szot, LEAD ATTORNEY, PRO HAC VICE, Marvin Alan Miller, Matthew E Van Tine, LEAD ATTORNEYS, Miller Law LLC, Chicago, IL USA; Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Stephen Ademi, LEAD ATTORNEY, Ademi & O'Reilly, LLP, Cudahy, WI USA.

For John Peychal, Plaintiff (3:15md2670): Andrew Szot, LEAD ATTORNEY, PRO HAC VICE, Marvin Alan Miller, Matthew E Van Tine, LEAD ATTORNEYS, Miller Law LLC, Chicago, IL USA; Betsy Carol Manifold, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Stephen Ademi, LEAD ATTORNEY, Ademi & O'Reilly, LLP, Cudahy, WI USA.

For Adam Buehrens, on behalf of himself and all others similarly situated |, Plaintiff (3:15md2670): Andrew Szot, LEAD ATTORNEY, PRO HAC VICE, Marvin Alan Miller, Matthew E Van Tine, LEAD ATTORNEYS, **[*27]** Miller

Law LLC, Chicago, IL USA; Frederick William Kosmo , Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA USA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL USA; Stephen Ademi, LEAD ATTORNEY, Ademi & O'Reilly, LLP, Cudahy, WI USA.

For Amy E Waterman, Plaintiff (3:15md2670): Andrew Szot, LEAD ATTORNEY, PRO HAC VICE, Marvin Alan Miller, Matthew E Van Tine, LEAD ATTORNEYS, Miller Law LLC, Chicago, IL USA.

For Associated Grocers of Florida, Inc., Plaintiff (3:15md2670): Bonny E Sweeney, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA USA; David Germaine, Joseph Michael Vanek, LEAD ATTORNEYS, Sperling & Slater, P.C., Chicago, IL USA; Frederick William Kosmo , Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA USA; Jalaine Garcia, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL USA.

For Benjamin Foods LLC, on behalf of itself and all others similarly situated |, Plaintiff (3:15md2670): Bonny E Sweeney, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA USA.

For Albertsons Companies, LLC, Plaintiff (3:15md2670): Alan Arnold, LEAD ATTORNEY, Law Offices of Alan Arnold, Woodland **[*28]** Hills, CA USA.

For LESGO PERSONAL CHEF LLC, Plaintiff (3:15md2670): Alec Blaine Finley , Jr, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Washington, DC USA; Christian Hudson, Peter Gil-Montllor, LEAD ATTORNEYS, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY USA; Dewitt M. Lovelace, LEAD ATTORNEY, PRO HAC VICE, Lovelace Law Firm, P.A., Miramar Beach, FL USA; Gary McKay Yarborough , Jr., LEAD ATTORNEY, PRO HAC VICE, Yarborough Law Firm, Bay Saint Louis, MS USA; John H. Donboli, LEAD ATTORNEY, Donboli Law Group, APC, San Diego, CA USA; Joseph John DePalma, LEAD ATTORNEY, PRO HAC VICE, Lite DePalma Greenberg, LLC, Newark, NJ USA.

For Kathy Vangemert, on behalf of herself and all others similarly situated |, Plaintiff (3:15md2670): Francis Onofrei Scarpulla, LEAD ATTORNEY, Patrick Bradford Clayton, Law Offices of Francis O. Scarpulla, San Francisco, CA USA; Amelia F. Burroughs, Janssen Malloy LLP, Eureka, CA USA; W Timothy Needham, Janssen Malloy Needham Morrison and Koshkin, Eureka, CA USA.

For Edy Yee, on behalf of herself and all others similarly situated |, Plaintiff (3:15md2670): Gerald Maltz, LEAD ATTORNEY, Haralson, Miller, Pitt, Feldman & McAnally, P.L.C., Tucson, AZ USA; Patrick Bradford **[*29]** Clayton, LEAD ATTORNEY, Francis Onofrei Scarpulla, Law Offices of Francis O. Scarpulla, San Francisco, CA USA.

For Laura Childs, Elizabeth Davis-Berg, Plaintiffs (3:15md2670): Rachele R Byrd, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA.

For Sunde Daniels, Plaintiff (3:15md2670): Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL USA; Rachele R Byrd, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA.

For Nancy Stiller, Bonnie Vanderlaan, Plaintiffs (3:15md2670): Betsy Carol Manifold, Rachele R Byrd, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA.

For Wegmans Food Markets, Inc., Plaintiff (3:15md2670): Linda Phyllis Nussbaum, Susan Rogers Schwaiger, LEAD ATTORNEYS, Nussbaum Law Group, P.C., New York, NY USA.

For John Gross & Company, on behalf of itself and all others similarly situated |, Plaintiff (3:15md2670): Allan Howard Steyer, Donald Scott Macrae, Jill M. Manning, LEAD ATTORNEYS, Sumee Oh, LEAD ATTORNEY, PRO HAC VICE, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA USA; Bonny E Sweeney, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA USA; Robert Gerard, **[*30]** LEAD ATTORNEY, Gerard and Associates, San Diego, CA USA.

For W Lee Flowers & Co Inc, Plaintiff (3:15md2670): Elizabeth Halligan Black, Manton McCutchen Grier, Robert Y. Knowlton, LEAD ATTORNEYS, Mary Cothonneau Eldridge, LEAD ATTORNEY, PRO HAC VICE, Haynsworth Sinkler Boyd, Columbia, SC USA.

For Amy Jackson, Katherine McMahon, Joelyna A. San Agustin, Rebecca Lee Simoens, Plaintiffs (3:15md2670): Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA.

For Jonathan Rizzo, David Ton, Plaintiffs (3:15md2670): Rachele R Byrd, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA.

For Brookshire Brothers, Inc., Brookshire Grocery Company, Certco, Inc., Bashas' Inc., Marc Glassman, Inc., 99 Cents Only Stores LLC, Plaintiffs (3:15md2670): Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, Oakland, CA USA.

For SIMON-HINDI, LLC, Plaintiff (3:15md2670): Alec Blaine Finley , Jr, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Washington, DC USA; John H. Donboli, LEAD ATTORNEY, Donboli Law Group, APC, San Diego, CA USA; Joseph John DePalma, LEAD ATTORNEY, PRO HAC VICE, Lite DePalma Greenberg, LLC, Newark, NJ USA; Peter Gil-Montllor, LEAD **[*31]** ATTORNEY, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY USA.

For FAREWAY STORES, INC., Plaintiff (3:15md2670): Justin B Farar, LEAD ATTORNEY, Kaplan Fox and Kilsheimer LLP, Los Angeles, CA USA; Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, Oakland, CA USA; Lawrence Kill, LEAD ATTORNEY, PRO HAC VICE, Anderson Kill P.C., New York, NY USA; Thomas D. Mauriello, LEAD ATTORNEY, Mauriello Law Firm APC, San Clemente, CA USA; Moira Cain-Mannix, PRO HAC VICE, Bernard Marcus, Erin Gibson Allen, Marcus & Shapira LLP, Pittsburgh, PA USA; Elana Katcher, Kaplan Fox Kilsheimer, New York, NY USA; Gregory K Arenson, Matthew P McCahill, Kaplan Fox and Kilsheimer LLP, New York, NY USA; Johnny K Merritt, Mullin Hoard and Brown, Amarillo, TX USA; Mario Man-Lung Choi, Donahue Fitzgerald LLP, Oakland, CA USA; Richard Lyle Coffman, PRO HAC VICE, The Coffman Law Firm, Beaumont, TX USA; Richard J Kilsheimer, Law Offices of Richard J Kilsheimer, New York, NY USA; Robert N Kaplan, PRO HAC VICE, Kaplan Kilsheimer and Fox, New York, NY USA.

For Woodman's Food Market, Inc., Plaintiff (3:15md2670): Justin B Farar, LEAD ATTORNEY, Kaplan Fox and Kilsheimer LLP, Los Angeles, CA USA; Laurence D King, LEAD ATTORNEY, **[*32]** Kaplan Fox and Kilsheimer, Oakland, CA USA; Lawrence Kill, LEAD ATTORNEY, PRO HAC VICE, Anderson Kill P.C., New York, NY USA; Mario Man-Lung Choi, LEAD ATTORNEY, Donahue Fitzgerald LLP, Oakland, CA USA; Thomas D. Mauriello, LEAD ATTORNEY, Mauriello Law Firm APC, San Clemente, CA USA; Moira Cain-Mannix, PRO HAC VICE, Bernard Marcus, Erin Gibson Allen, Marcus & Shapira LLP, Pittsburgh, PA USA; Elana Katcher, Kaplan Fox Kilsheimer, New York, NY USA; Gregory K Arenson, Matthew P McCahill, Kaplan Fox and Kilsheimer LLP, New York, NY USA; Johnny K Merritt, Mullin Hoard and Brown, Amarillo, TX USA; Richard Lyle Coffman, PRO HAC VICE, The Coffman Law Firm, Beaumont, TX USA; Richard J Kilsheimer, Law Offices of Richard J Kilsheimer, New York, NY USA; Robert N Kaplan, PRO HAC VICE, Kaplan Kilsheimer and Fox, New York, NY USA.

For Sam's East, Inc., Sam's West, Inc., Wal-Mart Stores East, LLC, Wal-Mart Stores East, LP, Wal-Mart Stores Texas, LLC, Plaintiffs (3:15md2670): Andrew King, LEAD ATTORNEY, Kutak Rock LLP, Little Rock, AR USA; Catriona M. Lavery, LEAD ATTORNEY, Allen Matkins Leck Gamble Mallory & Natsis LLP, Irvine, CA USA; Jess L. Askew , III, LEAD ATTORNEY, KUTAK ROCK LLP, Little Rock, **[*33]** AR USA; Marc M. Seltzer, LEAD ATTORNEY, Susman Godfrey, Los Angeles, CA USA; Neal S. Manne, LEAD ATTORNEY, Susman Godfrey L.L.P., Houston, TX USA.

For Wal-Mart Stores, Inc., Plaintiff (3:15md2670): Andrew King, LEAD ATTORNEY, Kutak Rock LLP, Little Rock, AR USA; Catriona M. Lavery, LEAD ATTORNEY, Allen Matkins Leck Gamble Mallory & Natsis LLP, Irvine, CA USA; Jess L. Askew , III, LEAD ATTORNEY, KUTAK ROCK LLP, Little Rock, AR USA; Marc M. Seltzer, LEAD ATTORNEY, Susman Godfrey, Los Angeles, CA USA; Neal S. Manne, LEAD ATTORNEY, Susman Godfrey L.L.P., Houston, TX USA; Ryan Caughey, Vineet Bhatia, LEAD ATTORNEYS, PRO HAC VICE, Susman Godfrey LLP, Houston, TX USA.

For Jessica Bartling, Gay Birnbaum, Sally Bredberg, Kim Craig, Brian Depperschmidt, Gloria Emery, Ana Gabriela Felix Garcia, John Frick, Kathleen Garner, Andrew Gorman, Edgardo Gutierrez, Zenda Johnston, Steven Kratky, Kathy Lingnofski, Laura Montoya, Kirsten Peck, John Pels, Valerie Peters, Elizabeth Perron, Audra Rickman, Erica C Rodriguez, Amber Sartori, Robert Skaff, Julie Wiese, Daniel Zwirlein, Plaintiffs (3:15md2670): Betsy Carol Manifold, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA.

For Rushin **[*34]** Gold, LLC, doing business as | The Gold Rush |, Plaintiff (3:15md2670): Alec Blaine Finley , Jr, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Washington, DC USA; Charles F Barrett, LEAD ATTORNEY, Neal & Harwell, PLC, Nashville, TN USA; Christian Hudson, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY USA; Joseph John DePalma, LEAD ATTORNEY, PRO HAC VICE, Lite DePalma Greenberg, LLC, Newark, NJ USA.

For Target Corporation, Plaintiff (3:15md2670): Andrew Z. Michaelson, LEAD ATTORNEY, PRO HAC VICE, King & Spalding LLP, New York, NY USA; Craig S Coleman, LEAD ATTORNEY, Faegre Baker Daniels LLP, Mpls, MN USA; David L. Zifkin, LEAD ATTORNEY, Boies, Schiller and Flexner LLP, Santa Monica, CA USA; Nathan Andrew Holcomb, LEAD ATTORNEY, PRO HAC VICE, Boies Schiller Flexner LLP, Armonk, NY USA; Scott E. Gant, PRO HAC VICE, Boies Schiller Flexner LLP, Washington, DC USA.

For Krasdale Foods, Inc., Plaintiff (3:15md2670): Linda Phyllis Nussbaum, LEAD ATTORNEY, Nussbaum Law Group, P.C., New York, NY USA.

For CVS Pharmacy, Inc., Plaintiff (3:15md2670): Anthony Thomas Greene, Brian Parker Miller, Michael H. Shanlever, Valarie C. Williams, LEAD ATTORNEYS, PRO HAC VICE, Alston & Bird LLP, Atlanta, **[*35]** GA USA; James Cash, LEAD ATTORNEY, PRO HAC VICE, Alston & Bird, LLP, Atlanta, GA USA; Lisa L Garcia, LEAD ATTORNEY, Alston & Bird LLP, Los Angeles, CA USA.

For Ahold U.S.A., Inc., Delhaize America, LLC, Plaintiffs (3:15md2670): Brandon S Floch, LEAD ATTORNEY, Marcus Neiman Rashbaum & Pineiro LLP, Miami, FL USA; Douglas H Patton, LEAD ATTORNEY, William Jay Blechman, LEAD ATTORNEY, PRO HAC VICE, Samuel J Randall, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL USA.

For Maquoketa Care Center, Francis T Enterprises, Erbert & Gerbert's, Inc., Janet Machen, Painted Plate Catering, GlowFisch Hospitality, Plaintiffs (3:15md2670): Alec Blaine Finley , Jr, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Washington, DC USA; Christian Hudson, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY USA.

For End Payer Plaintiffs, Plaintiff (3:15md2670): Elizabeth C Pritzker, LEAD ATTORNEY, Pritzker Levine LLP, Oakland, CA USA; Joseph C. Bourne, LEAD ATTORNEY, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN USA.

For Affiliated Foods Plaintiffs, Consol Plaintiff (3:15md2670): Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, Oakland, CA USA.

For United States Department of Justice, **[*36]** Intervenor Plaintiff (3:15md2670): Leslie A. Wulff, LEAD ATTORNEY, DOJ-Atr, San Francisco, CA USA; Manish Kumar, LEAD ATTORNEY, U.S. Department of Justice, San Francisco, CA USA.

For King Oscar, Inc., Defendant (3:15md2670): Erik Raven-Hansen, John Roberti, LEAD ATTORNEYS, PRO HAC VICE, Allen & Overy LLP, Washington, DC USA; John Terzaken, LEAD ATTORNEY, PRO HAC VICE, Simpson Thacher & Bartlett LLP, Washington, DC USA.

For Del Monte Foods Company, Defendant (3:15md2670): Barak Bassman, LEAD ATTORNEY, PRO HAC VICE, Philadelphia, PA USA; Barbara Sicalides, LEAD ATTORNEY, PRO HAC VICE, Troutman Pepper Hamilton Sanders LLP, Philadelphia, PA USA; Jeffrey Michael Goldman, LEAD ATTORNEY, Troutman Pepper Hamilton Sanders LLP, Irvine, CA USA.

For Francis T Enterprises, Defendant (3:15md2670): Alec Blaine Finley , Jr, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Washington, DC USA; Christian Hudson, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY USA.

For GlowFisch Hospitality, Defendant (3:15md2670): Christian Hudson, LEAD ATTORNEY, Cuneo Gilbert & LaDuca LLP, Brooklyn, NY USA.

For The Great Atlantic & Pacific Tea Company, C&S Wholesale Grocers, Inc., ThirdParty Plaintiffs (3:15md2670): William **[*37]** Jay Blechman, LEAD ATTORNEY, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL USA.

For Non-Party Costco Wholesale Corporation, Miscellaneous Party (3:15md2670): Eric P. Tuttle, LEAD ATTORNEY, Wilson Sonsini Goodrich & Rosati, P.C., Seattle, WA USA.

For Affiliated Foods, Inc., Plaintiff (3:15-cv-02787-DMS-MDD): Elana Katcher, PRO HAC VICE, Kaplan Fox Kilsheimer, New York, NY; Gregory K Arenson, Kaplan Fox and Kilsheimer LLP, New York, NY; Johnny K Merritt, Mullin Hoard and Brown, Amarillo, TX; Mario Man-Lung Choi, Donahue Fitzgerald LLP, Oakland, CA; Richard Lyle Coffman, PRO HAC VICE, The Coffman Law Firm, Beaumont, TX; Richard J Kilsheimer, PRO HAC VICE, Law Offices of Richard J Kilsheimer, New York, NY; Robert N Kaplan, PRO HAC VICE, Kaplan Kilsheimer and Fox, New York, NY; Timothy Clark Williams, PRO HAC VICE, Sprouse Shrader Smith PLLC, Amarillo, TX; Laurence D King, Kaplan Fox and Kilsheimer, Oakland, CA.

For Piggly Wiggly Alabama Distributing Co., Inc., Central Grocers, Inc., Associated Grocers of Florida, Inc., Petitioners (3:15-cv-02787-DMS-MDD): Solomon B Cera, LEAD ATTORNEY, Cera LLP, San Francisco, CA.

For Benjamin Foods LLC, Petitioner (3:15-cv-02787-DMS-MDD): **[*38]** John M Potter, Quinn Emanuel Urquhart Oliver and Sullivan, LLP, San Francisco, CA.

For Bumble Bee Foods LLC, formerly known as Bumble Bee Seafoods, LLC (3:15-cv-02787-DMS-MDD, 3:16-cv-00047-DMS-MDD, 3:16-cv-00046-DMS-MDD, 3:16-cv-00025-DMS-MDD), Defendant: Kenneth A. Gallo, Michelle Parikh, LEAD ATTORNEYS, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington DC, DC; William Baly Michael, LEAD ATTORNEY, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY.

For Starkist Co., Defendant (3:15-cv-02787-DMS-MDD): Andrew J. Lee, Justin W. Bernick, LEAD ATTORNEYS, Hogan Lovells US LLP, Washington, DC; J. Robert Robertson, LEAD ATTORNEY, HOGAN LOVELLS US LLP, Washington, DC.

For Associated Grocers of New England, Inc., North Central Distributors, LLC, Cash-Wa Distributing Co. of Kearney, Inc., URM Stores, Inc., Western Family Foods, Inc., Movants (3:15-cv-02787-DMS-MDD): Mario Man-Lung Choi, Donahue Fitzgerald LLP, Oakland, CA.

For Debra L. Damske, Ken Dunlap, John Peychal, Virginia Rakipi, Barbara E. Olson, Casey Christensen, Adam Buehrens, Brian Depperschmidt, Scott Dennis, Amy E Waterman, Movants (3:15-cv-02787-DMS-MDD): Marvin Alan Miller, Miller Law LLC, Chicago, IL.

For Associated **[*39]** Food Stores, Inc., McLane Company, Inc., Meadowbrook Meat Company, Inc., Movants (3:15-cv-02787-DMS-MDD): Mario Man-Lung Choi, LEAD ATTORNEY, Donahue Fitzgerald LLP, Oakland, CA.

For Giant Eagle, Inc., Movant (3:15-cv-02787-DMS-MDD): Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, Oakland, CA.

For Kathy Vangemert, Edy Yee, Movants (3:15-cv-02787-DMS-MDD): Francis Onofrei Scarpulla, Law Offices of Francis O. Scarpulla, San Francisco, CA.

For Moran Foods, LLC, doing business as Save-A-Lot, Plaintiff (3:17-cv-01745-DMS-MDD): David Germaine, LEAD ATTORNEY, Sperling & Slater, P.C., Chicago, IL.

For W Lee Flowers & Co Inc, Plaintiff (3:16-cv-01226-DMS-MDD): Elizabeth Halligan Black, Manton McCutchen Grier, Robert Y. Knowlton, LEAD ATTORNEYS, Mary Cothonneau Eldridge, LEAD ATTORNEY, PRO HAC VICE, Haynsworth Sinkler Boyd, Columbia, SC.

For Western Family Foods, Inc., Plaintiff (3:16-cv-00025-DMS-MDD): Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, Oakland, CA; Mario Man-Lung Choi, LEAD ATTORNEY, Donahue Fitzgerald LLP, Oakland, CA.

For Bashas' Inc., Marc Glassman, Inc., 99 Cents Only Stores LLC, Plaintiffs (3:17-cv-02487-DMS-MDD): Laurence D King, LEAD ATTORNEY, Kaplan Fox **[*40]** and Kilsheimer, Oakland, CA.

For FAREWAY STORES, INC., Woodman's Food Market, Inc., Petitioners (3:16-cv-02765-DMS-MDD): Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, Oakland, CA; Thomas D. Mauriello, LEAD ATTORNEY, Mauriello Law Firm APC, San Clemente, CA; Bernard Marcus, Erin Gibson Allen, Moira Cain-Mannix, Marcus & Shapira LLP, Pittsburgh, PA; Elana Katcher, Kaplan Fox Kilsheimer, New York, NY; Gregory K Arenson, Matthew P

McCahill, Kaplan Fox and Kilsheimer LLP, New York, NY; Johnny K Merritt, Mullin Hoard and Brown, Amarillo, TX; Mario Man-Lung Choi, Donahue Fitzgerald LLP, Oakland, CA; Richard Lyle Coffman, PRO HAC VICE, The Coffman Law Firm, Beaumont, TX; Richard J Kilsheimer, PRO HAC VICE, Law Offices of Richard J Kilsheimer, New York, NY; Robert N Kaplan, Kaplan Kilsheimer and Fox, New York, NY.

For Giant Eagle, Inc., Petitioner (3:16-cv-00046-DMS-MDD): Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, Oakland, CA; Bernard Marcus, Brian Hill, Erin Gibson Allen, Moira Cain-Mannix, Marcus & Shapira LLP, Pittsburgh, PA; Johnny K Merritt, Mullin Hoard and Brown, Amarillo, TX; Mario Man-Lung Choi, Donahue Fitzgerald LLP, Oakland, CA; Matthew P McCahill, Kaplan **[*41]** Fox and Kilsheimer LLP, New York, NY; Richard Lyle Coffman, PRO HAC VICE, The Coffman Law Firm, Beaumont, TX; Robert N Kaplan, Kaplan Kilsheimer and Fox, New York, NY.

For McLane Company, Inc., Meadowbrook Meat Company, Inc., Plaintiffs (3:16-cv-00047-DMS-MDD): Mario Man-Lung Choi, LEAD ATTORNEY, Donahue Fitzgerald LLP, Oakland, CA; Laurence D King, Kaplan Fox and Kilsheimer, Oakland, CA.

For Spartannash Company, Plaintiff (3:18-cv-02366-DMS-MDD): Laurence D King, LEAD ATTORNEY, Kaplan Fox and Kilsheimer, Oakland, CA; Mario Man-Lung Choi, LEAD ATTORNEY, Donahue Fitzgerald LLP, Oakland, CA.

For The Kroger Co., Albertsons Companies, LLC, Hy-Vee, Inc., H.E. Butt Grocery Company, Plaintiffs (3:16-cv-00051-DMS-MDD): Brandon S Floch, LEAD ATTORNEY, PRO HAC VICE, Marcus Neiman Rashbaum & Pineiro LLP, Miami, FL; Douglas H Patton, Richard Alan Arnold, Samuel J Randall, William Jay Blechman, LEAD ATTORNEYS, PRO HAC VICE, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL; Frederick William Kosmo , Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA.

For Ahold U.S.A., Inc., Plaintiff (3:16-cv-00051-DMS-MDD): Brandon S Floch, LEAD ATTORNEY, PRO HAC VICE, Marcus Neiman Rashbaum **[*42]** & Pineiro LLP, Miami, FL; Frederick William Kosmo , Jr., LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA; William Jay Blechman, LEAD ATTORNEY, PRO HAC VICE, Samuel J Randall, Kenny Nachwalter Seymour Arnold Critchlow and Spector, Miami, FL.

For Bumble Bee Foods LLC, Defendant (3:16-cv-00051-DMS-MDD): Kenneth A. Gallo, Michelle Parikh, LEAD ATTORNEYS, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington DC, DC; William Baly Michael, LEAD ATTORNEY, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY.

For Thai Union Group PCL, Defendant (3:16-cv-00051-DMS-MDD): Robert J Parks, LEAD ATTORNEY, Parks & Solar LLP, San Diego, CA.

For Krasdale Foods, Inc., Plaintiff (3:17-cv-01748-DMS-MDD): Linda Phyllis Nussbaum, LEAD ATTORNEY, Nussbaum Law Group, P.C., New York, NY.

Judges: Hon. Dana M. Sabraw, Chief United States District Judge.

Opinion by: Dana M. Sabraw

Opinion

ORDER DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DIRECT ACTION PLAINTIFFS ON STATUTE OF LIMITATIONS GROUNDS

(ECF No. 2010)

Pending before the Court in this multidistrict litigation is a partial motion for summary judgment against the Direct Action Plaintiffs ("DAPs"). Specifically, Defendants Bumble Bee Foods LLC ("Bumble Bee"), **[*43]** Lion Capital LLP, Lion Capital (Americas), Inc. and Big Catch Cayman LP, and Defendants StarKist Company ("StarKist") and its current and former owners Dongwon Industries Co., Ltd. ("DWI") and Del Monte Corporation, respectively, filed a motion for partial summary judgment against DAPs (Defs.' Mot. for Partial Summ. J., ECF No. 2010) on statute of limitation grounds. Liaison counsel for DAPs filed an opposition to the motion (DAPs' Opp'n to Defs.' Mot., ECF No. 2088), and some but not all of the Defendants filed a reply brief. (Reply Mem. of P. & A. in Further Supp. of Defs.' Mot., ECF No. 2188.)[1]

I.

BACKGROUND

The general background and history of this litigation is well documented and extensively discussed in prior orders. (ECF Nos. 2454, 2654.) For purposes of the present motion, the Court sets out the following facts:

On August 3, 2015, DAPs filed a complaint alleging an antitrust conspiracy by the three largest domestic tuna brands and their parent companies, including Defendants herein, to fix and maintain packaged tuna prices above competitive levels in violation of state and federal antitrust laws. Shortly thereafter, on August 24, 2015, **[*44]** groups of End Payer Plaintiffs ("EPPs") and Commercial Food Preparer Plaintiffs ("CFPs") filed a complaint alleging the same conspiracy. On December 9, 2015, these parallel civil actions based on the same conspiracy were consolidated in a multidistrict litigation for pretrial proceedings before this Court. DAPs seek relief in the form of compensatory damages, attorney's fees, costs, and interest.[2]

Defendants request summary judgment that claims outside the relevant statute of limitations (four years for federal antitrust claims and one to six years for state antitrust and consumer protection claims) are time-barred. (Defs.' Mot. for Partial Summ. J., ECF No. 2010.) DAPs oppose, arguing that this Court should apply the fraudulent concealment doctrine, *Am. Pipe & Const. Co. v. Utah (American Pipe), 414 U.S. 538 (1974)*, and the discovery rule to preserve and toll all claims. (DAPs' Opp'n to Defs.' Mot., ECF No. 2088.) The Court denies the motion because the evidence provided by DAPs raises genuine issues of material fact regarding whether Defendants engaged in fraudulent concealment of their anticompetitive activity, thus tolling the statutes of limitation.

II.

LEGAL STANDARD

Federal Rule of Civil Procedure 56 empowers the Court to **[*45]** enter summary judgment on factually unsupported claims or defenses. Summary judgment or adjudication of issues is appropriate if depositions, answers to

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[1] As previously noted in the Order Granting in Part and Denying in Part DAPs and EPPs' Mot. for Partial Summ. J. Against StarKist Co. Based on Guilty Pleas and Admis. in Parallel Criminal Proceedings (ECF No. 2654), Bumble Bee filed for bankruptcy protection. *See In re: Bumble Bee Parent, Inc. et al.*, Case No. 19-12502-LSS (Bankr. D. Del.). As a result, proceedings against Bumble Bee are currently stayed and all claims against it have been administratively closed. (ECF No. 2286.) Accordingly, this Order identifies Bumblebee only insofar as it was one of the original Moving Parties. In addition, Lion Capital LLP (a British private equity firm that purchased Bumble Bee in 2010) and Big Catch Cayman LP (a holding company that wholly owns Bumble Bee) have been dismissed pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (ECF No. 2270.) A motion for reconsideration is pending. (ECF No. 2285.) Lion Capital (Americas), a U.S. subsidiary of Lion Capital LLP, remains in the case. The Reply brief was therefore filed by Defendants StarKist, DWI, Del Monte and Lion Capital (Americas) and Specially Appearing Defendants Lion Capital LLP and Big Catch Cayman LP.

[2] For purposes of the present Order, the Fourth Amended Complaint filed on October 5, 2018, in *The Kroger Co., et al. v. Bumble Bee Foods LLC, et al.*, Case No. 16-cv-00051 (the "Kroger Complaint"), is in all material respects representative of the operative DAP amended complaints. (*See* ECF No. 492 at 2 n.2 (generally treating "DAP Kroger's Second Amended Complaint as a valid exemplar of all DAPs' Complaints")).

interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*, *(c)(1)*. A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The burden on the party moving for summary judgment depends on whether it bears the burden of proof at trial.

> When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.

C.A.R. Transp. Brokerage Co., Inc. v. Darden Rest., Inc., 213 F.3d 474, 480 (9th Cir. 2000); *see also* *Rookaird v. BNSF Ry. Co., 908 F.3d 451, 459 (9th Cir. 2018)* ("Where the moving party will have the burden of proof at trial, the movant must affirmatively demonstrate that no reasonable **[*46]** trier of fact could find other than for the moving party.").

On the other hand, if the moving party would *not* bear the burden at trial, it can meet its burden on summary judgment by "either of two methods:"

> produce affirmative evidence . . . negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may . . . meet its initial burden of production by showing—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.

Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc., 210 F.3d 1099, 1105-06 (9th Cir. 2000) (quoting *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*).

If the moving party carries its burden of production, the nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex, 477 U.S. at 324*. In this regard, the nonmoving party:

> must do more than simply show that there is some metaphysical doubt as to the material facts[, and] must come forward with specific facts showing that there is a genuine dispute for trial. Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

In ruling **[*47]** on a motion for summary judgment, "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan v. Cotton, 572 U.S. 650, 656, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014)*. "[A] judge's function at summary judgment is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* "[T]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id. at 651*; *see also* *id. at 657*. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson, 477 U.S. at 255*.

"The district court may limit its review to the documents submitted for the purpose of summary judgment and those parts of the record specifically referenced therein." *Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1030 (9th Cir. 2001)*. The court is not obligated "to scour the record in search of a genuine issue of triable fact." *Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996)*.

III.

DISCUSSION

As stated above, Defendants request the Court enter summary judgment in their favor because DAPs' claims are time-barred. The Court addresses DAPs' federal claims first, and then turns to the state law claims.

A. Federal Claims

Antitrust actions under the *Sherman Antitrust Act* are subject to a four-year statute of limitations. *15 U.S.C. § 15(b)*. Defendants contend **[*48]** DAPs injuries began as early as December 2007, therefore their federal claims, filed on August 3, 2015, are untimely. (Defs.' Mot. for Partial Summ. J., ECF No. 2010 at 7.) DAPs concede they filed their actions outside the four-year statute of limitations, but contend the limitations period was tolled by Defendants' fraudulent concealment. (DAPs' Opp'n to Defs.' Mot., ECF No. 2084 at 2.)[3]

To prove fraudulent concealment, the burden is on the plaintiff to establish that: "(1) the defendant took affirmative acts to mislead the plaintiff; (2) the plaintiff did not have 'actual or constructive knowledge of the facts giving rise to its claim'; and (3) the plaintiff acted diligently in trying to uncover the facts giving rise to its claim." *In re Animation Workers Antitrust Litig., 123 F. Supp. 3d 1175, 1194 (N.D. Cal. 2015)* (quoting *Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1060 (9th Cir. 2012)*). An application of the fraudulent concealment doctrine is necessarily a fact-based inquiry. *Conmar Corp. v. Mitsui & Co. (U.S.A.), 858 F.2d 499, 502 (9th Cir. 1988)*; *Goodman v. Dohmen, 777 F. App'x 895, 896 (9th Cir. 2019)*. Each element is addressed in turn.

1. Affirmative Acts to Mislead

To establish a fraudulent concealment defense, a plaintiff has the burden to illustrate that its lack of notice of its claim was directly attributable to affirmative conduct by the defendant. *Conmar, 858 F.2d at 505* ("A plaintiff alleging fraudulent concealment must establish that its failure to have notice **[*49]** of its claim was the result of affirmative conduct by the defendant."). Affirmative conduct that supports a finding of fraudulent concealment includes "public pretextual statements, alteration or destruction of documents, and evidence that employees used methods to communicat[e] sensitive information that would not leave a trail." *In re Korean Ramen Antitrust Litig., 281 F.Supp.3d 892, 905 (N.D. Cal. 2017)*. Case law in the Ninth Circuit dictates that "affirmative acts" must consist of more than passive concealment. *Conmar, 858 F.2d at 505*; *Rutledge v. Bos. Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978)*; *Volk v. D.A. Davidson & Co., 816 F.2d 1406, 1416 (9th Cir. 1987)* ("Appellees' silence or passive conduct does not constitute fraudulent concealment."). Affirmative acts need not be separate and apart from acts purported to be in furtherance of the conspiracy, but must be more than acts that "by nature are self-concealing." *Garrison v. Oracle Corp., 159 F. Supp. 3d 1044, 1076 (N.D. Cal. 2016)*; *Ryan v. Microsoft Corp., 147 F. Supp. 3d 868, 886 (N.D. Cal. 2015)*.

Here, DAPs provide evidence of several instances whereby Defendants did not merely commit to conveying public pretextual statements, but coordinated directly with competitors on messaging for the "rightsizing" initiative.[4] For instance, on April 11, 2008, Scott Cameron of Bumble Bee received a presentation from Del Monte outlining talking points and strategies regarding the initiative. (DAPs' Opp'n to Defs.' Mot., Ex. 9, ECF No. 2084.) On May 1, 2008, Cameron received a fax enclosing **[*50]** Chicken of the Sea's ("COSI") presentation materials to retailers. (DAPs' Opp'n to Defs.' Mot., Ex. 12, ECF No. 2084.) This exchange of proprietary business information allegedly resulted in StarKist, Bumblebee, and COSI echoing the same talking points—that can downsizing would prevent cost increases and that the high-price elasticity for packaged tuna lent itself to can downsizing and price increases. (DAPs' Opp'n to Defs.' Mot., Ex. 9-12, ECF No. 2084.)

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[3] The public redacted version of this briefing can be found at ECF No. 2088. The version cited here is the sealed brief.

[4] According to a presentation prepared by StarKist and Del Monte, the "rightsizing plan" was a proprietary and confidential initiative aimed at "enabling category growth the right way." (DAPs' Opp'n to Defs.' Mot., Ex. 9, ECF No. 2084.) The plan outlines that StarKist would "reduce select canned business net weight from 6.0oz to 5.0oz while increasing fish fill percentage by over 4.0pts." (*Id.*) It proceeds to outline all other modifications in can sizes, can weights, and fish fill in a variety of products. (*Id.*)

DAPs also provide evidence that on June 17, 2008, Bumble Bee received Del Monte's presentation deck which offered justifications for the price increases and can downsizing that were underway. (DAPs' Opp'n to Defs.' Mot., Ex. 13, ECF No. 2084.) Under the guise of "smoke and mirrors," (*id.*), as Bumble Bee's Kenneth Worsham put it, the three major players in the tuna market allegedly came forth and published remarkably similar justifications for these economic modifications:[5]

bang Del Monte[6] Chicken of the Sea[7] Bumble Bee[8]

Further, DAPs point to evidence suggesting that Defendants altered or destroyed documents. For example, upon receipt of competitively sensitive information from Bumble Bee, Stephen Hodge of StarKist wrote to his team **[*51]** to destroy the sensitive information. Specifically, Hodge wrote: "I wouldn't post this to an official DM/SK site. Probably something legally there we don't want to mess with. He can save it to a shared drive and we can let folks know where to find it ... leave it there for a couple of days and then get rid of it off the server." (DAPs' Opp'n to Defs.' Mot., Ex. 44, ECF No. 2084.)

DAPs also cite evidence that Defendants engaged in obfuscatory behavior to conceal their misconduct. That evidence consists of thousands of telephonic communications between high-level executives and consultants at Bumble Bee, StarKist, and COSI.[9] Other evidence reflects Defendants used private emails, and email addresses of family members, to avoid possible detection. (*See* DAPs' Opp'n to Defs.' Mot., 22-26, ECF No. 2084) (email communications concerning pricing information sent between private email addresses.) In one example, DAPs point to an email, presumably drafted by Hubert Tucker of COSI, where he receives StarKist's price increase letter and reminds himself to send COSI's letter to Bruce Bollmer of StarKist. Notably, the email is sent to Tucker's wife and the subject line reads, "I miss you! Come home!" **[*52]** (DAPs' Opp'n to Defs.' Mot., Ex. 27, ECF No. 2084; *see also id.*, Ex. 28-30) (emails Tucker sent or received on his wife's email account.)

DAPs further point to evidence of clandestine meetings between top executives from Bumble Bee and COSI. The evidence suggests that although top executives were to meet at Bumble Bee's office, the venue was changed to a restaurant where customers and lower-level Bumble Bee employees would not learn of the meeting. (DAPs' Opp'n to Defs.' Mot., Ex. 19-20, ECF No. 2084.) DAPs also point to Chris Lischewski's indictment where the United States offered, and a Grand Jury affirmed, that Lischewski and his co-conspirators, "employed measures to conceal their conduct, including, but not limited to, using code when referring to coconspirators, meeting at offsite locations to avoid detection, limiting distribution and discouraging retention of documents reflecting conspiratorial contacts, and providing misleading justifications for prices." (DAPs' Opp'n to Defs.' Mot., Ex. 21, ECF No. 2084.)

The foregoing evidence raises triable issues of fact regarding whether Defendants engaged in affirmative acts to mislead. Defendants do not directly rebut this evidence, but **[*53]** instead argue that the doctrine of fraudulent concealment does not apply because DAPs had actual or constructive knowledge by July 2008 of facts sufficient to excite suspicion and alert them to their antitrust claims at issue.

2. Actual or Constructive Knowledge

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[5] The following chart is a modified version of a chart which can be found in Pls.' Opp'n to Defs.' Mot. for Summ. J. on Statute of Limitations Grounds. (DAPs' Opp'n to Defs.' Mot. at 18, ECF No. 2084.) All modifications were made to make each quotation as complete as possible.

[6] All quotations from this column can be found at DAPs' Opp'n to Defs.' Mot., Ex. 14, ECF No. 2084.

[7] All quotations from this column can be found at DAPs' Opp'n to Defs.' Mot., Ex. 16, ECF No. 2084.

[8] All quotations from this column can be found at DAPs' Opp'n to Defs.' Mot., Ex. 17, ECF No. 2084.

[9] For example, there is evidence of numerous calls between and among Kenneth Worsham and Scott Cameron of Bumble Bee, Stephen Hodge and Robert Worsham (father of Ken) of StarKist, and Bruce Reynolds and Mike White of COSI, among others. (Pls.' Joint Statement of Undisputed Facts in Supp. of *Rule 56* Mots., Ex. 40, ECF No. 2003.)

DAPs carry the burden to establish that they did not have "actual or constructive knowledge of the facts giving rise to the claim." *Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1060 (9th Cir. 2012)*. However, to defeat Defendants' motion for summary judgment on statute of limitations grounds, DAPs need only demonstrate that triable issues of fact exist regarding whether they had knowledge of facts giving rise to their claims more than four years before filing the complaint at issue. Specifically, the doctrine of fraudulent concealment (and tolling of the statute of limitations) may be negated on summary judgment only if the defendant introduces uncontroverted evidence that "'irrefutably demonstrates that a plaintiff discovered or should have discovered [the cause of action] but failed to file a timely complaint.'" *Conmar, 858 F.2d at 502*. Thus, "[w]here a plaintiff's suspicions have been or should have been excited, there can be no fraudulent concealment where he 'could have then confirmed his earlier suspicion by **[*54]** a diligent pursuit' of further information.'" *Id. at 504* (citation omitted). However, as *Conmar* makes clear, proving that a plaintiff has knowledge of facts giving rise to its claim, is difficult to do on a motion for summary judgment. *Id.* (stating facts must "excite the inquiry of a reasonable person" and put plaintiff on inquiry notice of its claim to start the limitations period).

In *Conmar*, the Ninth Circuit considered whether an antitrust lawsuit filed by Conmar against Mitsui on July 21, 1986, "four years to the day" after Mitsui was criminally indicted on July 20, 1982, was barred by the four-year statute of limitations. *858 F.2d at 502*. Conmar, a "post-tension" concrete contractor, sued Mitsui for illegally importing and selling PC-strand (steel wire that is embedded in concrete and used to tension and strengthen it) at "illegally low prices" to a competitor, VSL Corp. ("VSL"), which allowed VSL to unfairly submit low bids for "post-tensioning jobs." *Id.at 501*. Mitsui argued that "prior to the filing of the indictment [against it], all the information it contained was in the public domain[,]" thus putting Conmar on notice of its antitrust claim outside the limitations period. *Id.* The information in the public domain at **[*55]** that time was extensive, and included widespread national news coverage (San Francisco Chronicle, The Los Angeles Times, The New York Times, Business Week and San Jose Mercury News), an earlier guilty plea by VSL for aiding and abetting Mitsui (January 1982), an indictment against another competitor of Conmar, Pacific Steel & Supply Co. ("Pacific Steel"), who was also complicit with Mitsui (June 30, 1981), a public unsealing of a federal agent's affidavit, which was the basis for a warrant to search Mitsui's San Francisco office (March 28, 1981), and a civil antitrust lawsuit filed by another concrete contractor against Pacific Steel and Matsui (July 1981) based on the indictment of Pacific Steel. Despite this wealth of information, the court in *Conmar* found there were triable issues of fact whether that "information ... was enough to put Conmar on notice of its antitrust claim and start the limitations period." *Id. at 502-504*.

In so holding, *Conmar* set out a demanding standard. It quickly dispensed with the argument that Conmar had actual knowledge of facts giving rise to its antitrust claim, noting that Conmar alleged Mitsui engaged in an "elaborate scheme of false documents and secret payments[,]" that Conmar's **[*56]** president, Lawrence Yegge, "had not read any of the newspaper articles nor known of Mitsui's legal troubles until sometime after the indictment[,]" and that Conmar "did not know that Mitsui supplied VSL with PC-strand." *858 F.2d at 502*. Given those disputed facts, the court defined the "central question [as] not whether Conmar had actual knowledge of its antitrust cause of action, but ... whether before [before the Mitsui indictment], it should have been alerted to facts that, following duly diligent inquiry, could have advised it of its claim." *Id.*

Addressing the central question, the *Conmar* court noted that, "[o]nly one San Francisco Chronicle article mentioned PC-strand, as did one Wall Street Journal article, which also mentioned that sales to VSL were being investigated." *Id. at 503*. The court also noted that while the federal agent's affidavit "detailed Mitsui's dumping of PC-strand, it contained no reference to VSL, and the news articles reporting it made no mention of VSL or PC-strand." *Id.* The court further noted that the "only mention of VSL's January 1982 guilty plea ... was in an article identified in an affidavit as a Wall Street Journal article, undated and unlocated as to page." *Id.* The court noted **[*57]** that the indictment against Pacific Steel on June 30, 1981, focused on a different steel product, "steel nails[,]" and not PC-strand. *Id.* Finally, the court noted that while a competitor of Conmar filed suit against Pacific Steel and Mitsui within a month of the Pacific Steel indictment, the suit was not publicized and would not in any event put Conmar on inquiry notice of its claim against Mitsui:

> Even if Conmar were charged with knowledge of [that lawsuit] because it was a matter of public record, that knowledge would not necessarily justify the filing of a complaint, and so the issue of whether the statute of limitations was tolled would be inappropriate for summary judgment.

Id. at 504.

It is apparent from the nature and quantity of information publicly available to Conmar that it should have known of some information about Mitsui and its steel products "dumping" scheme with VSL and Pacific Steel before Mitsui was indicted and outside the limitations period. Yet, the court stated that summary judgment is inappropriate "even where the defendant has demonstrated that the plaintiff should have known of *some* information arousing his inquiry." *Id. at 503-04* (citing *In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1171 (5th Cir. 1979)* (emphasis added). The "leap" from Conmar's **[*58]** knowledge of some information to charging it with inquiry notice of its antitrust claim and starting the limitations period involved factual issues for a trier of fact to decide. *See id. at 504*.

So it is here. The information that DAPs allegedly had or should have had is far less illuminating than the information available to the plaintiff in *Conmar*. Defendants argue the uncontroverted evidence in the record shows DAPs had knowledge of facts giving rise to their claims "no later than July 2008[,]" well before DAPs filed the complaint at issue on August 3, 2015. (Defs.' Mot. for Partial Summ. J. at 1, ECF No. 2012.) Defendants rely heavily on an allegation in DAPs' complaints. There, DAPs assert that downsizing would have made economic sense to the Defendants only if they had conspired with one another. (Defs.' Mot. for Partial Summ. J., ECF No. 2012 at 11; *Id.*, Ex. 1.)[10] Specifically, Defendants rely on the following allegation:

> [a]bsent an agreement among all three Defendants to reduce packaging size, it would have been against the individual interest of any one Defendant to make the shift for fear of losing market share as major customers were opposed to downsizing and threatened to drop any brand that **[*59]** made the switch in favor of a brand that did not make the switch.

(Defs.' Mot. for Partial Summ. J., Ex. 1, ECF No. 2012.)

Defendants contend that allegation constitutes a judicial admission. (Defs.' Mot. for Partial Summ. J. at 11, ECF No. 2012.) "Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them." *Am. Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226 (9th Cir. 1988)*. But this does not advance Defendants' motion, as triable issues of fact remain regarding *when* Defendants learned the facts underlying that allegation.

DAPs point out, and Defendants do not dispute, that "prior to receiving Defendants' grand jury production on March 30, 2017, no DAP made the [foregoing] allegation." (DAPs' Opp'n to Defs.' Mot. at 9, ECF No. 2084.) DAPs further note that only after receiving Defendants' grand jury productions on March 30, 2017, did they "amend[] their claims to allege that the 2008 can-downsizing was the result of collusion" (*Id.*). Based on information from those grand jury productions, DAPs amended their complaints to include "allegations detailing numerous specific communications between the Defendants that led to the can downsizing and that supported the **[*60]** allegation that Defendants recognized that the downsize would not succeed if they did not all make the change." (*Id.*) Notably, Defendants have not produced any evidence showing that any DAP was aware of that kind of information before March 2017.

Lastly, Defendants suggest it is irreconcilable for DAPs to allege they had no actual or constructive knowledge of claims when they concede they had access to supply and demand information throughout the length of the conspiracy.[11] Defendants point to admissions by DAPs that supply and demand data suggests that packaged tuna prices ought to have been dropping, instead of rising. Although this argument has some base-level appeal, it inequitably assigns the price change and can downsizing a greater weight than the information later adduced from discovery—such as the alleged means of concealment and each Defendant's involvement in the conspiracy. As this Court previously stated:

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[10] The public redacted version of this briefing can be found at ECF No. 2010. The version cited here is the sealed brief.

[11] DAPs allege that they "had neither actual nor constructive knowledge of the facts constituting their claims for relief" and that they "did not discover and could not have discovered through the exercise of reasonable diligence, the existence of the conspiracy alleged herein until at least July 2015." *See, e.g.*, Affiliated Foods Plaintiffs' Fourth Amended Complaint at ¶¶ 249-50 (ECF No. 1431); The Kroger Complaint at ¶ 179 (ECF No. 1422).

> Simply put, there is no reason a particular piece of information should have a fixed amount of relevance regardless of the context in which it is viewed. For example, a lone puzzle piece may, in isolation, give no further indication as to the larger picture into which it **[*61]** fits, and yet at the same time be an integral component of the final product once all corresponding pieces are assembled.

In re Packaged Seafood Prods. Antitrust Litig., 242 F.Supp.3d 1033, 1099 (S.D. Cal. 2017) (Sammartino, J.).

In this case, it is entirely possible DAPs had access to supply and demand information (a lone puzzle piece), which delivered no further indication to the larger picture into which it fits. When contextualized with later developing events such as a government investigation, extensive media coverage, and discovery in a federal court, the larger picture becomes more apparent. Accordingly, the Court finds DAPs have raised genuine issues of material fact concerning whether they had actual or constructive knowledge of facts giving rise to their present claims against Defendants before 2011. Defendants have failed to introduce evidence that irrefutably demonstrates that DAPs discovered or should have discovered their causes of action against Defendants but failed to timely file their complaints.

3. Due Diligence

The final element in the fraudulent concealment analysis is due diligence. A diligent examination of potential misconduct is only warranted under the doctrine of fraudulent concealment where, "facts exist that would excite the inquiry of **[*62]** a reasonable person." *Conmar, 858 F.2d at 504*. No due diligence analysis is required where "there is a genuine issue of material fact whether the facts publicly available were sufficient to excite [plaintiff's] inquiry." *Id. at 504-05*. Because there are triable issues of fact regarding whether the information available to DAPs was sufficient to excite inquiry, no due diligence need be demonstrated by DAPs to survive summary judgment. *Id.* While the Court need not address this factor, two points deserve mention.

First, Defendants identify DAPs as "sophisticated commercial actors" who employ "category managers" with expertise in their respective fields who are tasked with negotiating and understanding a respective portion of the market. (Defs.' Mot. for Partial Summ. J. at 14, ECF No. 2012.) Defendants argue that DAPs could have acted "diligently in trying to uncover the facts giving rise to [their] claims," given they had these resources at their disposal, yet failed "to verify the reasons" behind the tuna industry's parallel price increase. *Garrison v. Oracle Corp., 159 F. Supp. 3d 1044, 1073 (N.D. Cal. 2016)*. This argument ignores that the packaged tuna industry is an oligopolistic market where parallel pricing is an established economic norm. *In re Dynamic Random Access Memory Indirect Purchaser Litig., No. 4:18-CV-2518-JSW-KAW, 2020 U.S. Dist. LEXIS 249753, 2020 WL 8459279, at *4 (N.D. Cal. Nov. 24, 2020)*. Further, a defendant's public offering of **[*63]** a legitimate explanation for parallel pricing can be enough to show a dispute of material fact as to fraudulent concealment. *In re Titanium Dioxide Antitrust Litig., 959 F.Supp.2d 799, 831 (D. Md. 2013)*; *Sulfuric Acid Antitrust Litig., 743 F.Supp.2d 827, 855 (N.D. Ill. 2010)*; *In re Bulk Extruded Graphite Prod. Antitrust Litig., No. CIV 02-6030 WHW, 2007 U.S. Dist. LEXIS 25070, 2007 WL 1062979, at *3 (D.N.J. Apr. 4, 2007)*; *In re Atchison, Topeka & Santa Fe Ry. Co. v. Chevron U.S.A., Inc., No. 82 C 3034, 1988 U.S. Dist. LEXIS 3404, 1988 WL 37820, at *4 (N.D. Ill. Apr. 20, 1988)*; *United Nat. Recs., Inc. v. MCA, Inc., 609 F.Supp. 33, 38 (N.D. Ill. 1984)*. Here, evidence exists suggesting Defendants offered legitimate explanations for parallel pricing in the public domain. (DAPs' Opp'n to Defs.' Mot. at 18, ECF No. 2084.)

Second, DAPs' alleged failure to capture any illicit activities, even with the assistance of category managers and access to information such as raw material costs and comparisons to private label tuna information, suggests that reasonable diligence would not have resulted in different results. Indeed, the evidence reflects that Defendants utilized their sophistication and commercial power[12] to clandestinely communicate with their competitors and alter

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[12] According to Affiliated Foods Plaintiffs' Fourth Amended Complaint (Pls.' Fourth Am. Compl. for Violation of the Sherman Act, *15 U.S.C. § 1*, ECF No. 1431), "StarKist, Bumble Bee, and Chicken of the Sea sell Packaged Tuna in the United States. The United States Packaged Tuna industry generates annual sales of approximately $1.7 billion. Defendants dominated the United States market for Packaged Tuna throughout the Relevant Period, with a combined market share of 80-85%. Each Defendant's

the markets in such a way that would have averted detection by category managers. (DAPs' Opp'n to Defs.' Mot. at 20, ECF No. 2084; Pls.' Fourth Am. Compl. for Violation of the Sherman Act, 15 U.S.C. § 1 at 20, ECF No. 1431.) The evidence provided by DAPs raises triable issues of fact whether Defendants engaged in fraudulent concealment, thus tolling the limitations period on DAPs' federal claims. Accordingly, Defendants' motion for summary judgment on **[*64]** this ground is denied. In light of this finding, the Court declines to address tolling under *American Pipe* and the "discovery rule."

B. State Law Claims

Defendants also argue the Court should grant summary judgment in their favor on DAPs' state law claims because those claims are time-barred. Defendants focus specifically on DAPs' claims under the *Kansas Restraint of Trade Act, K.S.A. 60-501 et seq.* ("KRTA") and the *South Carolina Antitrust Act, S.C. Code § 39-3-10 et seq.* ("SCAA"). DAPs argue, *inter alia*, that the statutes of limitation on these claims have been tolled under the fraudulent concealment doctrine and *American Pipe*.

Given the Court's discussion above on the federal claims, the issue of the state law claims is easily resolved, as long as the doctrine of fraudulent concealment applies to these claims. Noting the absence of on-point authority from each of the respective states, the Court looks to how sister courts have applied the fraudulent concealment doctrine to these claims.

In *In re Vitamins Antitrust Litig.*, the United States District Court of the District of Columbia was tasked with applying the fraudulent concealment doctrine to the KRTA. *No. MISC99-197, 2000 U.S. Dist. LEXIS 11351, 2000 WL 1524912 (D.D.C. July 14, 2000)*. There, the court held that the doctrine of fraudulent concealment could be extended to toll the three-year statute of limitations governing **[*65]** a Kansas antitrust claim. *Id. at *3*. The district court acknowledged that "Kansas state courts have not directly addressed the application of fraudulent concealment under the Kansas Antitrust Statutes[.]" *Id.* However, the court analyzed the historical applications of the fraudulent concealment doctrine in Kansas state courts and how those applications have been loosened in recent years to apply to claims that do not sound in fraud. *Id. at *3-4*. Finding no Kansas authorities to the contrary and recognizing the loosening in Kansas law regarding the applicability of the fraudulent concealment doctrine, the *Vitamins* court applied fraudulent concealment to the KRTA claims. *Id.* This Court finds the reasoning in *Vitamins* persuasive, and adopts it. Under that reasoning, the doctrine of fraudulent concealment would apply to the claims under Kansas law. *O'Brien v. Leegin Creative Leather Prod., Inc., 294 Kan. 318, 352 (2012)*; *Seaboard Corp. v. Marsh Inc., 295 Kan. 384, 419, 284 P.3d 314 (2012)*.

Not unlike Kansas, South Carolina state courts have not directly addressed the applicability of the fraudulent concealment doctrine to the SCAA. Nevertheless, "South Carolina has long adhered to a policy of following federal precedents in matters relating to state trade regulation enforcement. The South Carolina Supreme Court has consistently relied on federal **[*66]** precedents in deciding cases under section 39-3-10." *In re Wiring Device Antitrust Litig., 498 F. Supp. 79, 87 (E.D.N.Y. 1980)* (citing *State v. Virginia-Carolina Chemical Co., 71 S.C. 544, 51 S.E. 455 (1905)*; *South Carolina Cotton Growers' Co-Op Ass'n v. English, 135 S.C. 19, 133 S.E. 542 (1926)*). Federal statutory frameworks provide, and South Carolina statutory frameworks do not contradict, that statutes of limitation are universally tolled until the plaintiff knew, or reasonably should have known, the facts giving rise to a cause of action. *Bailey v. Glover, 88 U.S. 342, 347, 22 L. Ed. 636 (1874)*; *United States v. CFW Const. Co., 649 F. Supp. 616, 619 (D.S.C. 1986)*; *In re Liquid Aluminum Sulfate Antitrust Litig., No. CV 16-MD-2687 (JLL), 2019 U.S. Dist. LEXIS 39364, 2019 WL 1125589, at *7 (D.N.J. Mar. 11, 2019)* ("[C]laims brought under South Carolina's state ***antitrust law*** will be interpreted the same as claims brought under federal ***antitrust law***."). As explained above on the federal claims, DAPs have raised triable issues of fact regarding fraudulent concealment. Because summary judgment is inappropriate under the circumstances, DAPs' SCAA claims survive. In light of this ruling, the Court declines to address the balance of Defendants' arguments regarding timeliness of DAPs' state law claims.

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share of the market is almost identical to what it was at the beginning of the Relevant Period: StarKist (40-44%); Bumble Bee (24-25%); and Chicken of the Sea (15-17%)." (*Id.* at ¶ 97-98.)

III.

CONCLUSION

For the foregoing reasons, Defendants' motion for partial summary judgment on statute of limitations grounds against DAPs is denied; DAPs and Defendants shall file unredacted versions of their briefs (ECF Nos. 2010, 2088) and related statements of undisputed facts, oppositions, exhibits, as well as the response thereto (ECF No. 2188); and they shall identify these documents on the docket **[*67]** as "unredacted" versions of their prior filings and in each instance reference the docket number of the previous "redacted" version.

IT IS SO ORDERED.

Dated: February 7, 2022

/s/ Dana M. Sabraw

Hon. Dana M. Sabraw, Chief Judge

United States District Court

Venture Inv. Group Vig v. V.

Superior Court of California, County of Los Angeles

February 15, 2022, Decided; February 15, 2022, Filed

20STCV43237.

Reporter

2022 Cal. Super. LEXIS 4021 *

VENTURE INVESTMENT GROUP (VIG), LLC, A DELAWARE LIMITED LIABILITY COMPANY, v. NOSTRA COSA REALTY & INVESTMENTS, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY, et al.

Core Terms

cause of action, unfair, parties, demurrer, loans, Deed, concealed, alleges, contractual, consumer, Foreclosure, leave to amend, disclose, Notice, courts, defendant's conduct, business practice, unjust enrichment, tentative ruling, restitution, suppressed, frustrate, recorded, tethered, fails

Counsel: **[*1]** For Plaintiff: Jason Stillman (via Audio) for Lane M. Nussbaum

For Defendant: Cayla K. Whitley (via Video)

Judges: Judge: Honorable Christopher K. Lui, Judicial Assistant: T. Le, Courtroom Assistant: S. Sato.

Opinion by: Christopher K. Lui

Opinion

APPEARANCES:

CSR: None

ERM: None

Deputy Sheriff: None

For Plaintiff(s): Jason Stillman (via Audio) for Lane M. Nussbaum

For Defendant(s): Cayla K. Whitley (via Video)

NATURE OF PROCEEDINGS: Hearing on Demurrer - without Motion to Strike to Plaintiff

Venture Investment Group, LLC's Complaint for Damages [Res. ID# 302986954780]; Case Management Conference

The matters are called for hearing.

The Court's tentative ruling is posted online for the parties/counsel to review.

The parties submit to the tentative ruling of the Court. The Court adopts its tentative ruling as the final order of the Court as follows:

Pursuant to *California Rule of Court 3.1308(a)(1)*, the Court does not desire oral argument on the demurrer. As required by *Rule 3.1308(a)(2)*, any party seeking oral argument should notify ALL OTHER PARTIES and the staff of Department 76 of their intent to appear and argue. Notice to Department 76 may be sent by email to smcdept76@lacourt.org. If notice of intention to appear is not given and the parties do not appear, the Court will adopt **[*2]** the tentative ruling as the final ruling.

Plaintiff alleges that it made a loan to Defendant Nostra for energy improvements to the property, secured by a deed of trust. Then almost immediately, Defendant obtained two Property Assessed Clean Energy (PACE) loans on the property for the same energy improvements on the same property, which loans became super priority liens on the property which superseded the deed of trust held by Plaintiff. Defendant Nostra defaulted on the loans and recorded a deed in lieu of foreclosure, conveying the property back to Plaintiff. However, the property was encumbered by the PACE liens, and when Plaintiff sold the property, it had to pay the PACE debt in full through the escrow proceeds.

Defendants Nostra Cosa Realty & Investment Group, LLC, Julie N. Medina, and Victor Hugo Quijano demur to the Complaint.

TENTATIVE RULING

Defendants Nostra Cosa Realty & Investment Group, LLC, Julie N. Medina, and Victor Hugo Quijano's demurrer to the Complaint is SUSTAINED with leave to amend as to the first, second, third, and fifth causes of action, and OVERRULED as to the fourth cause of action.

ANALYSIS

Demurrer

Request For Judicial Notice

Defendant requests that the Court **[*3]** take judicial notice of the following: (1) Deed in Lieu of Foreclosure recorded on April 15, 2020; (2) Deed of Reconveyance recorded on April 21, 2020.

Requests Nos. 1 and 2 are GRANTED. The Court may take judicial notice of recorded documents. (*Evans v. California Trailer Court, Inc. (1994) 28 Cal.App.4th 540, 549*, overruled on other grounds in *Black Sky Capital, LLC v. Cobb (2019) 7 Cal.5th 156, 165*; *Alfaro v. Community Housing Improvement System & Planning Assn., Inc. (2009) 171 Cal.App.4th 263, 274*).

Meet and Confer

The Declaration of Karl P. Schlecht reflects that the meet and confer requirement set forth in *CCP § 430.41* was satisfied.

Discussion

Although Plaintiff's Opposition may have been filed one day late, the Court will consider it on the merits, unless Defendants request more time to prepare the reply. If so, the Court will continue the hearing to permit Defendants such additional time.

Otherwise, the Court will proceed to address the merits of the demurrer.

1. First Cause of Action (Fraud).

Defendants argue that the Deed in Lieu of Foreclosure, which was recorded as part of a settlement, forecloses Plaintiff's fraud claim. (RJN Exhs. 1 and 2.) Defendants argue that the Deed in Lieu of Foreclosure explicitly states that the deed was given for fair and adequate consideration and satisfies all obligations. Defendants argue that this Deed in Lieu of Foreclosure, combined with the Deed of Reconveyance, shows that no **[*4]** fraud exists.

This argument is not persuasive. It is a question of fact as to whether this language in the Deed In Lieu of Foreclosure referred only to the contractual loan obligations between Plaintiff and Defendant, and did not address the two PACE loans on the property, which Plaintiff had to pay off in order to sell the property. (Complaint, ¶¶ 20, 21.) The fact that Plaintiff received title to the property back pursuant to the Deed of Reconveyance is consistent with Plaintiffs theory that it was forced to repay the two PACE loans, which were not both used for the same improvements to the property. (Complaint, ¶ 26.)

Defendants also argue that Plaintiff failed to provide any evidence of a written contract or promissory note that explicitly prohibited Defendants from taking out two PACE loans. However, on demurrer, Plaintiff need not produce any evidence, only allegations.

"To establish a claim for deceit based on intentional misrepresentation, the plaintiff must prove seven essential elements: (1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant **[*5]** made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff. (Citations omitted.)" (*Manderville v. PCG&S Group, Inc. (2007) 146 Cal.App.4th 1486, 1498* [italics omitted].)

Fraud causes of action must be pled with specificity. (*Hills Transportation Co. v. Southwest Forest Ind., Inc. (1968) 266 Cal.App.2d 702, 707*.) The complaint must allege facts as to '"how, when, where, to whom, and by what means the representations were tendered.'" (*Stansfield v. Starkey (1990) 220 Cal.App.3d 59, 73*.) "The requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written. (Citations omitted.)" (*Tarmann v. State Farm Mut. Auto. Ins. Co. (1991) 2 Cal.App.4th 153, 157*.)

Less specificity is required to plead fraud by concealment. (*Jones v. ConocoPhillips Co. (2011) 198 Cal.App.4th 1187, 1199*.) However, "[i]f a fraud claim is based upon failure to disclose, and 'the duty to disclose arises from the making of representations that were misleading or false, then those allegations should be described.' (Citation **[*6]** omitted.)" (*Morgan v. AT&T Wireless Services, Inc. (2009) 177 Cal.App.4th 1235, 1262*.)

[T]he elements of a cause of action for fraud based on concealment are: '"(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage. [Citation.]' [Citation.]" (Citation omitted.)

(*Kaldenbach v. Mutual of Omaha Life Ins. Co. (2009) 178 Cal.App.4th 830, 850*.)

"There are 'four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. [Citation.]' "(Citations omitted.) Where, as here, there is no fiduciary relationship, the duty to **[*7]** disclose generally presupposes a relationship grounded in "some sort of transaction between the parties. [Citations.] Thus, a duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement. [Citation.]" (Citation omitted.)

(OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp. (2007) 157 Cal.App.4th 835, 859.)

Here, as to the allegation that Defendant Nostra concealed that it never intended to pay back its loan with Plaintiff (Complaint, ¶ 28), the Deed In Lieu of Foreclosure may have extinguished Defendant's loan obligations and Plaintiff's claim for a deficiency s due to the failure to repay the loan. However, Plaintiff also alleges that Defendant Nostra concealed that it intended to place two PACE loans on the property when completing the mortgage loan with Plaintiff, both of which would be for paying for the same improvements. (Complaint, ¶¶ 23, 24.)

However, Plaintiff fails to allege any misrepresentations made by Nostra (or any other demurring Defendants) with specificity, as to exactly what was said, to whom, when and in what manner (orally or in writing), why such representation was known to be false when made, and Plaintiff's actual reliance **[*8]** on such representation, causing Plaintiff damage.

Further, as to a concealment theory, Plaintiff fails to pled why Defendant Nostra, as borrower, had a duty to Plaintiff, as lender, to disclose that it was applying for PACE loans as well.

As such, the demurrer to the first cause of action is SUSTAINED with leave to amend.

2. Second Cause of Action (Breach of The Implied Covenant of Good Faith and Fair Dealing).

Defendants argue that Plaintiff fails to plead a breach of contract claim or to attach a written agreement between the parties. As such, Defendants argue, there is no underlying contract required for a breach of implied covenant of good faith and fair dealing cause of action.

The elements of a breach of the implied covenant of good faith and fair dealing sounding in contract are: (1) the existence of a contractual relationship between the parties (Racine & Laramie, Ltd. v. Department of Parks & Recreation (1992) 11 Cal.App.4th 1026, 1031); (2) defendant was not expressly permitted by the contract to engage in the conduct which constitutes the alleged breach (Wolf v. Walt Disney Pictures & Television (2008) 162 Cal.App.4th 1107, 1120-1121); (3) defendant =subjectively lacked a good faith belief in the validity of the act or the act was intended to frustrate the common purpose of the agreement (Wolf, supra, 162 Cal.App.4th at 1123) or defendant's conduct was objectively unreasonable (**[*9]** Carma Developers, Inc. v. Marathon Development California, Inc. (1992) 2 Cal.4th 342, 372-73); (4) the act or conduct was contrary to the contract's express purposes or the parties' legitimate expectations as expressed in a specific contractual obligation (Carma Developers, supra, 2 Cal.4th at 373) or otherwise frustrates the other party's rights to express contractual benefits (Racine & Laramie, Ltd., supra, 11 Cal.App.4th at 1031-32; Pasadena Live v. City of Pasadena (2004) 114 Cal.App.4th 1089, 1094); and (5) resulting damages (Thompson Pacific Construction, Inc. v. City of Sunnyvale (2007) 155 Cal.App.4th 525, 541).

Here, the Complaint does not identify the actions Defendants undertook which were not expressly permitted by the subject contract, were undertaken without good faith belief in its validity, were intended to frustrate the common purpose of the agreement or were objectively unreasonable and were contrary to the express contractual purpose or the parties' legitimate expectations or otherwise frustrated the rights to express contractual benefits.

Although Plaintiff alleges that Defendants interfered with Plaintiffs rights to the Property by encumbering the property with fraudulent PACE loans from Co-Defendants Ygrene and Fortifi (Complaint, ¶ 31), Plaintiff fails to allege why Nostra's taking out of PACE loans frustrated the common purpose of the mortgage loan agreement between Plaintiff and Defendant Nostra (Id.) Under the facts pled in the Complaint Nostra, as borrower, breached the contractual obligation to **[*10]** repay the loan (Complaint, ¶ 31). However, a breach of implied covenant claim which merely duplicates a breach of contract claim is superfluous and may be dismissed. (Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 352-53.)

The demurrer to the second cause of action is SUSTAINED with leave to amend.

3. Third Cause of Action (Unjust Enrichment).

a. Re: Failure To State Facts Sufficient To Constitute A Cause of Action.

Defendant argues that unjust enrichment is not a valid cause of action under California law. This is correct and, moreover, there are no facts pled to support an alternative implied contract between Plaintiff and Defendant FortiFi.

"We find "there is no cause of action in California for unjust enrichment." (*Melchior v. New Line Productions, Inc. (2003) 106 Cal.App.4th 779, 793 [131 Cal. Rptr. 2d 347]*.)" (*Everett v. Mountains Recreation & Conservation Authority (2015) 239 Cal.App.4th 541, 553*.)

"Unjust enrichment is not a cause of action, however, or even a remedy, but rather ' " 'a general principle, underlying various legal doctrines and remedies' " .... [Citation.] It is synonymous with restitution.' " (*McBride v. Boughton (2004) 123 Cal.App.4th 379, 387 [20 Cal. Rptr. 3d 115]*.) Like the trial court, we will construe the cause of action as a quasi-contract claim seeking restitution.

"[A]n action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter." (*Lance Camper Manufacturing Corp. v. Republic Indemnity Co. (1996) 44 Cal.App.4th 194, 203 [51 Cal. Rptr. 2d 622]*.) However, "restitution may be **[*11]** awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason." (McBride v. Boughton, supra, 123 Cal.App.4th at p. 388.) Thus, a party to an express contract can assert a claim for restitution based on unjust enrichment by "alleg[ing in that cause of action] that the express contract is void or was rescinded." (Lance Camper Manufacturing Corp. v. Republic Indemnity Co. supra, at p. 203.) A claim for restitution is permitted even if the party inconsistently pleads a breach of contract claim that alleges the existence of an enforceable agreement. (*Klein v. Chevron U.S.A., Inc. (2012) 202 Cal.App.4th 1342, 1389 [137 Cal. Rptr. 3d 293]*.)

(*Rutherford Holdings, LLC v. Plaza Del Rey (2014) 223 Cal.App.4th 221, 231*.)

Here, the third cause of action does not allege why a contract between Plaintiff and Defendants was void or rescinded.

The demurrer to the third cause of action is SUSTAINED with leave to amend.

4. Fourth Cause of Action (Violation of *California Business and Professions Code § 17200*).

Defendants argue that this cause of action does not plead publicly relevant claims, and that Plaintiff fails to provide any sort of evidence that Defendants were not allowed to obtain more than one PACE loan.

As noted above, Plaintiff need not present any evidence in a pleading or to overcome a demurrer. The Complaint alleges that Defendants' scheme is unfair to Plaintiff and deceptive to the public because both of the PACE loans **[*12]** were recorded as assessments against the property, but the scope of the improvement was only listed in one of the assessment, so the public would be deceived into believing that upwards of $250,000 of PACE funded improvements existed on the property, when in fact only half of that amount was actually spent on the property as the improvement was only completed once. (Complaint, ¶ 40.)

Plaintiff does not allege that its concept of unfairness is tethered to a violation of a constitutional, statutory or regulatory provision, or proof of some actual or threatened impact on competition. (*Graham v. Bank of America, N.A. (2014) 226 Cal.App.4th 594, 612-13*.)

The standard for determining what business acts or practices are "'unfair'" under the UCL for consumer actions remains unsettled. (Citation omitted.) In Cel-Tech, the Supreme Court addressed the term "unfair" in the context of actions between competitors alleging anticompetitive practices, but it broadly criticized previous attempts to define "unfair" as "too amorphous" to provide guidance. (Cel-Tech, supra, 20 Cal.4th at pp. 184-185.) Previously, courts defined "unfair" as a practice that offends public policy or " 'is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers' " or required courts to " ' "weigh the utility **[*13]** of the defendant's conduct against the gravity of the harm to the alleged victim." ' " (*Id. at p. 184*.)

The Cel-Tech court concluded it must "require that any finding of unfairness to competitors under *section 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition" and, in actions challenging a direct competitor's unfair act, defined the term as "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (Cel-Tech, supra, 20 Cal.4th at pp. 186-187.)

Thereafter, the appellate courts split regarding the definition of "unfair" business practices in consumer action. We described this split in the case of *In re Ins. Installment Fee Cases (2012) 211 Cal.App.4th 1395, 1418 [150 Cal. Rptr. 3d 618]*:

"One line of cases applied a pre-Cel-Tech balancing test for determining whether a business practice is unfair, under which the court examines the practice's ' " 'impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim .... **[*14]** [Citations.]' … [A]n 'unfair' business practice occurs when that practice 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' " ' (Citation omitted)

"A second line of cases adopted the following test or factors for determining unfairness set forth in *section 5* of the Federal Trade Commission Act [*613] (*15 U.S.C. § 45(n)*: '(1) [t]he consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.' (Citation omitted.)

"A third line of cases, represented by *Gregory v. Albertson's, Inc. (2002) 104 Cal.App.4th 845 [128 Cal. Rptr. 2d 389]* (Gregory), applied a more rigorous test for unfairness in consumer UCL actions. The Gregory court disagreed with the balancing test applied by courts before Cel-Tech, stating: 'Cel-Tech … may signal a narrower interpretation of the prohibition of unfair acts or practices in all unfair competition actions and provides reason for caution in relying on the broad language in earlier decisions that the [Cel-Tech] court found to be "too amorphous." Moreover, where a claim of an unfair act or practice is predicated **[*15]** on public policy, we read Cel-Tech to require that the public policy which is a predicate to the action must be "tethered" to specific constitutional, statutory or regulatory provisions."'

This court has consistently followed the *Gregory v. Albertson's, Inc., supra, 104 Cal.App.4th 845]* line of cases and has held a plaintiff alleging an unfair business practice must show the "defendant's 'conduct is tethered to an[] underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of an ***antitrust law***.'" (Citation omitted.)

Without acknowledging these authorities, Graham relies on the pre-Cel-Tech definition of "unfair" by asserting the utility of defendant's conduct must be weighed against the gravity of the harm to the alleged victim. We decline Graham's invitation to apply this test.

Graham does not allege defendants' conduct related to his loan processing was unfair because he does not allege any statements about the appraisal or opinions about the possible future value of the home constitute conduct tethered to a violation of a constitutional, statutory or regulatory provision. (Citation omitted.) (*Graham v. Bank of America, N.A. (2014) 226 Cal.App.4th 594, 612-13*.)

As to Plaintiffs theory that the public is likely **[*16]** to be deceived into believing that there was twice as much PACE-funded improvements made to the property than were actually performed is a question of fact outside the scope of this demurrer. In other words, it is sufficient to plead a cause of action for fraudulent business practices by Defendant.

Historically, in order to state a cause of action under either the UCL or the FAL, case law only required a showing that "'members of the public [were] likely to be deceived.' [Citations.]" (Citation omitted.) Allegations of actual deception, reasonable reliance and damage were unnecessary. (Ibid.) The "likely to be deceived" standard was not altered by Proposition 64. (Citation omitted.)

(*Pfizer Inc. v. Superior Court (2010) 182 Cal.App.4th 622, 629-30*.)

The demurrer to the fourth cause of action is OVERRULED.

5. Fifth Cause of Action (Negligence).

"The elements of a cause of action for negligence are (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate [or legal] cause between the breach and (4) the plaintiff's injury. [Citation.]" (Citation omitted.) (*Phillips v. TLC Plumbing, Inc. (2009) 172 Cal.App.4th 1133, 1139*.) "The existence of a duty of care toward an interest of another worthy of legal protection is the essential prerequisite to a negligence cause of action, determined as a matter **[*17]** of law by the court. (*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 397 [11 Cal. Rptr. 2d 51, 834 P.2d 745]*.)" (*Software Design & Application v. Hoefer & Arnett (1996) 49 Cal.App.4th 472, 478*.)

Defendants argue that Plaintiff fails to plead that Defendants breached a duty by applying for more than on e PACE loan because there is no allegation that Plaintiff informed Defendants the initial loan was exclusive.

Plaintiff alleges that Defendant Nostra had a duty to act as a reasonable borrower, and breached that duty by applying for two PACE loans funding the same improvements for a property that was allegedly overencumbered already. (Complaint, ¶ 44.)

Plaintiff does not allege facts giving rise to a special relationship between Plaintiff and Defendant Nostra which would bring the alleged economic loss suffered by Plaintiff outside the rule that there is ordinarily no duty to prevent economic loss to third parties in one's own financial transactions. (*Lake Almanor Associates L.P. v. Huffman-Broadway Group, Inc. (2009) 178 Cal.App.4th 1194, 1205*.)

"The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion. [Citations.]" (*Bily v. Arthur Young & Co. (1992) 3 Cal.4th 370, 397 [11 Cal. Rptr. 2d 51, 834 P.2d 745]* (Bily).) Whether a duty exists is a question of law to be determined by the courts. (Ibid.) In the absence, as here, of a duty that arises by statute or contract, we assess whether the nature of **[*18]** the activity or the relationship of the parties gives rise to a duty. (*Ratcliff Architects v. Vanir Construction Management, Inc. (2001) 88 Cal.App.4th 595, 605 [106 Cal. Rptr. 2d 1]* (Ratcliff).) "Recognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law" (*Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 58 [77 Cal. Rptr. 2d 709, 960 P.2d 513]*), so courts are reluctant to impose duties to prevent purely economic harm to third parties (*Bily, at p. 403*; *Ratcliff, at p. 605*; Mission Oaks, supra, 65 Cal.App.4th at p. 725).

(*Lake Almanor Associates L.P. v. Huffman-Broadway Group, Inc. (2009) 178 Cal.App.4th 1194, 1205* (bold emphasis and underlining added).)

Plaintiff cites no case law whereby a borrower owes a duty of care to a lender in connection with other loans it takes out which are secured by the same property. Nor is the Court aware of any such authority.

As such, the demurrer to the fifth cause of action is SUSTAINED with leave to amend.

Plaintiff is given 30 days' leave to amend.

On the Court's own motion, the Case Management Conference scheduled for 02/15/2022 is continued to 04/20/2022 at 08:30 AM in Department 76 at Stanley Mosk Courthouse.

The parties may file a stipulation to request for the Court to set an Informal Discovery Conference (if necessary).

Notice is waived.

Harris Cnty. v. Eli Lilly & Co.

United States District Court for the Southern District of Texas, Houston Division

February 16, 2022, Decided; February 16, 2022, Filed, Entered

CIVIL ACTION H-19-4994

Reporter

2022 U.S. Dist. LEXIS 27715 *; 2022 WL 479943

HARRIS COUNTY, TEXAS, Plaintiff, v. ELI LILLY AND COMPANY et al., Defendants.

Core Terms

Manufacturer, alleges, prices, conspiracy, pharmacy, antitrust, purchaser, diabetes, medications, motion to dismiss, Insulin, co-conspirator, unjust enrichment, formulary, drugs, consumers, indirect, conspired, price-fixing, payors, inflated price, at-issue, civil conspiracy, courts, proximate causation, money-had-and-received, intermediaries, overcharge, rebates, amended complaint

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For Express Scripts Holding Company, Express Scripts, Inc., ESI Mail Pharmacy Services, Inc., Express Scripts Pharmacy, Inc., Defendants: Winstol Dean Carter, Jr, LEAD ATTORNEY, Morgan Lewis et al, Houston, TX; Jason R Scherr, Morgan Lewis et al, Washington, DC; Patrick Harvey, NW, Washington, DC; R Brendan Fee, Morgan, Lewis, & Bockius LLp, Philadelphia, PA.

For CVS Health Corporation, Caremark Rx, LLC, Caremark PCS Health, LLC, Caremark, LLC, Caremark Texas Mail Pharmacy, LLC, Aetna Rx Home Delivery, LLC, Aetna Pharmacy Management Services, LLC, Defendants: Carl Rowan Metz, Daniel M Dockery, LEAD ATTORNEYS, Williams & Connolly, LLP, Washington, DC; Larry Richard Veselka, LEAD ATTORNEY, Smyser Kaplan Veselka LLP, Houston, TX.

For Optum, Inc., Defendant: Andrew Hatchett, David Andrew Hatchett, LEAD ATTORNEYS, Alston & Bird LLP, Atlanta, GA; Emily McGowan, LEAD ATTORNEY, Brian D Boone, Alston & Bird LLP, Charlotte, NC; John Snyder, Alston & Bird LLP, Washington, DC; Justin Edward Vandenbout, Chamberlain Hrdlicka et al, Houston, TX.

For OptumRX Inc., Defendant: David Andrew Hatchett, LEAD ATTORNEY, Alston & Bird LLP, **[*3]** Atlanta, GA; Emily McGowan, LEAD ATTORNEY, Brian D Boone, Alston & Bird LLP, Charlotte, NC; John Snyder, Alston & Bird LLP, Washington, DC; Justin Edward Vandenbout, Chamberlain Hrdlicka et al, Houston, TX.

Judges: Gray H. Miller, Senior United States District Judge.

Opinion by: Gray H. Miller

Opinion

MEMORANDUM OPINION AND ORDER

Pending before the court is Defendant OptumRx Inc.'s ("OptumRx") motion to dismiss. Dkt. 148. Having considered the motion, response, reply, briefings on supplemental authority, and applicable law, the court is of the opinion that the motion should be GRANTED.

I. BACKGROUND

In its Fourth Amended Complaint (the "FAC"), the County alleges that a price-fixing conspiracy involving fifteen entities that either manufacture diabetes medications or manage and negotiate certain pharmacy benefits is behind the dramatic rise in drug costs. *See* Dkt. 127. In particular, the County sues Defendants Eli Lilly, Novo Nordisk, and Sanofi (the "Manufacturer Defendants") and CVS Caremark, Express Scripts, OptumRx, and Aetna Rx (the "PBM Defendants"). Though only OptumRx has thus far moved to dismiss the FAC, the court will briefly review the general contours of the price-fixing conspiracy allegedly behind the **[*4]** rising costs of diabetes medications and discuss the relationships between the Manufacturer Defendants and the PBM Defendants.

A. The Insulin Pricing Scheme

According to the FAC, Eli Lilly joins Novo Nordisk and Sanofi as the three principal companies that manufacture, promote, and distribute pharmaceutical drugs, including diabetes medications and various insulins. *Id.* 8 ¶ 2. Together, these Manufacturer Defendants produce the "vast majority" of diabetes medications on which approximately six million people across the country rely. *See id.* 7-8 ¶¶ 1-2. Though they only cost Manufacturer Defendants $5 to produce (and were marketed for $20 during the 1990s), today's insulins are priced between $300 and $700. *Id.* 8 ¶ 5. Since 2003, the reported price of certain insulins has far outpaced inflation; some have increased by more than 1000%. *Id.* 50 ¶ 234. By 2016, the average price per month of the four most popular types of insulin rose to $450. *Id.* ¶ 235. For one drug, Humulin R (500U/ML), Eli Lilly has raised the price from $165 to $1,784 since 1999. *Id.* ¶ 236. For another, Humalog, Eli Lilly has raised the reported price for a package of the medication from less than $200 to $663 since 2008. **[*5]** *Id.* 52 ¶ 237. The County alleges that Manufacturer Defendants have "in lockstep raised the reported prices of their respective diabetes drugs." *Id.* 8 ¶ 4, 56-61 ¶¶ 243-50.

The County also sues the PBM Defendants that "manage the pharmacy benefits for the vast majority of individuals in the United States" and "establish national formularies"—or lists of approved drugs for a given health plan—"that...set the baseline for which diabetes medications are covered by insurance and which are not." *Id.* 8 ¶ 3, 20 ¶ 78, 95 ¶ 420. The PBM Defendants "contract with payors" like the County. *Id.* 85 ¶ 367. A PBM develops the payor's drug formulary, processes claims, creates a network of retail pharmacies, sets the prices in coordination with the Manufacturers that the payor will pay for prescription drugs, and is paid by the payor to reimburse pharmacies for the drugs utilized by the payor's beneficiaries. *Id.* 63 ¶ 265. Harris County "relies on PBMs as administrative agents, for the alleged purposes of limiting administrative burden and controlling pharmaceutical drugs costs." *Id.* 92 ¶ 406.

The County alleges that together, Manufacturer Defendants and PBM Defendants conspired "to create a secret spread"—known **[*6]** as the Insulin Pricing Scheme—"between the reported price for diabetic treatments (on which Harris County's payments are based) and the true net price of those same drugs." *Id.* 10 ¶ 10. In that sense, the

"Insulin Pricing Scheme was designed to, and did, encourage others, including diabetics and payors...to advocate the use of [Manufacturer Defendants'] products and pay for those diabetes medications based on a fraudulently inflated price." *Id.* 121 ¶ 533.

At the heart of this conspiracy are what the County terms "Manufacturer Payments"— refunds (or kickbacks) in the form of "rebates, discounts, credits, concession fees, and the like that serve as a 'quid pro quo for formulary inclusion.'" *Id.* 11 ¶ 16. What payors and their health plans pay for a prescription drug is "directly tied to the reported price" that the Manufacturer Defendants and PBM Defendants have allegedly fixed. *See id.* ¶ 266, 62 ¶¶ 256-63. PBMs also contract with a network of retail pharmacies, which the PBMs pay after they dispense drugs to patients. *Id.* 64 ¶ 267. However, the amount PBMs pay to pharmacies is "not the same as the amount paid by the payor." *Id.* ¶ 268. Instead, payment is "negotiated...and not disclosed." **[*7]** *Id.* Sometimes, though, the PBM and the pharmacy operate as part of a larger whole, such as when the PBM owns a mail-order or specialty pharmacy. *See id.* ¶ 269. In those scenarios, the mail order pharmacy purchases and takes possession of the prescription drugs and directly supplies the drugs to patients by mail. *Id.* But, as a general matter, the PBMs "negotiate the price that payors pay for a prescription drug; they separately negotiate a different price that pharmacies receive for that same drug; and they also negotiate the amount the manufacturers pay back to the PBM for each drug sold." *Id.* ¶ 273.

Here is how the conspiracy between the Manufacturer Defendants and the PBM Defendants allegedly works: Manufacturer Defendants "artificially and willingly raise their reported prices" to gain formulary access "and then secretly refund a significant portion of that price back to PBM Defendants." *Id.* 11 ¶ 16. The PBM Defendants then grant formulary status based upon the highest inflated price and the largest refund amount. *Id.* ¶ 17. The Insulin Pricing Scheme enables Manufacturer Defendants "to buy their preferred formulary position—which significantly increases their revenue—without sacrificing **[*8]** their profit margins." *Id.* ¶ 18. At the same time, it enables PBM Defendants to profit from the inflated reported prices by retaining a significant percentage of the secret refund payments and "pocketing an additional pricing spread between what a payor pays the PBM for an insulin script based on the inflated price and a lower price that the PBM reimburses the pharmacy for the same drug." *Id.* 11-12 ¶ 19. The PBM Defendants also profit by using those same artificial prices in their own mail-order pharmacies and "charging pharmacies hidden fees based on the inflated price." *Id.*

According to the County, certain professional associations and conferences facilitate the conspiracy. For example, each Manufacturer Defendant is a member of the Pharmaceutical Research and Manufacturers of America ("PhRMA") and "has routinely communicated through PhRMA's meetings and platforms in furtherance of the alleged Insulin Pricing Scheme." *Id.* 68 ¶ 289. PBM and Manufacturer Defendants also use trade associations and industry conferences to "routinely communicate" with one another. *See id.* ¶ 291. One conference, the Pharmaceutical Care Management Association ("PCMA"), served as a central meeting place for **[*9]** the Insulin Pricing Scheme. *See id.* 69 ¶ 294. The current PCMA board includes executives from several PBM Defendants. *Id.* ¶ 293.

All PBM Defendants are "members" of the PCMA, and all Manufacturer Defendants are "affiliate members" of the organization. *Id.* ¶ 295. But the Manufacturer Defendants are more than just mere affiliate members. According to the County, they are "Presidential Sponsors" of the PCMA conferences. *Id.* ¶ 297. As "Presidential Sponsors," the Manufacturer Defendants hosted "private meeting rooms" that offered "excellent opportunities for...one-on-one interactions between PBM and pharma executives." *Id.* ¶ 298. During the PCMA's annual meetings and business forums, "representatives from each Manufacturer Defendant met privately with representatives from each PBM Defendant, as well as their co-conspirator Cigna Pharmacy Management." *Id.* ¶ 299, 69 ¶ 296. Prior to, and in preparation for, these meetings, the County alleges that "dedicated teams of executives from each Defendant would spend weeks preparing PCMA 'pre-reads' and reports," allegedly "demonstrat[ing] the deep involvement of each Defendant in the Insulin Pricing Scheme" and the "tangled web that gave rise to the **[*10]** scheme." *Id.* 69-70 ¶ 300. In addition, "all PCMA members...are invited to join...an invitation-only LinkedIn Group and online networking community," that provided the defendants with a "year-round, non-public online forum" enabling them to further their conspiracy. *Id.* ¶¶ 302-03.

From the County's perspective, these PCMA meetings are significant because "key at-issue lockstep price increases occurred shortly after [their conclusion]." *Id.* 70 ¶ 302. For example, on September 26 and 27, 2017, the

PCMA held its annual meeting where each of the Manufacturer Defendants hosted private rooms, and executives from both sets of defendants met throughout the conference. *Id.* 70-71 ¶ 304. Several days after the conference, on October 1, 2017, Sanofi increased the list prices for two medications, Lantus and Toujeo, by 3% and 5.4%, respectively. *Id.* A few weeks later, Novo Nordisk approved a 4% list price increase for its drugs to match the Sanofi increase. *Id.* Years earlier, in 2014, a few weeks after a PCMA conference, Novo Nordisk acted similarly by raising the list price of one of its medications, Levemir, several hours after Sanofi increased its list price. *Id.* 71 ¶ 305.

B. Harris County and Its [*11] Injury

Harris County is a body corporate and politic under the laws of the State of Texas. *Id.* 13 ¶ 30. The County's government serves nearly five million residents. *Id.* ¶ 31. As an employer, the County provides health benefits to approximately 38,000 employees, retirees, and their dependents (collectively, "Beneficiaries"). *Id.* 13-14 ¶ 31. Harris County reimburses its employees "for diabetes medications through their health plans" and purchases diabetes medications "to be administered directly in government-run facilities." *Id.* 61 ¶ 251. The County reimburses beneficiaries through its own self-funded health plan, meaning that it provides health benefits using its own funds, including those contributed by its Beneficiaries. *Id.* 91 ¶ 403. In addition, Harris County also purchases diabetes medications to administer directly to inmates in Harris County jails. *Id.* 13-41 ¶ 31, 92 ¶ 404, 162 ¶ 172.

Neither Harris County nor the employees it reimburses ostensibly purchases the at-issue drugs from the drug manufacturer themselves. That is because, as the County alleges, "[t]he prescription drug industry consists of a deliberately opaque network of entities engaged in multiple distribution and **[*12]** payment structures." *Id.* 62 ¶ 256. And, generally, the at-issue diabetes medications are "distributed from manufacturer to wholesaler, wholesaler to retail or mail-order pharmacy, and pharmacy to patient/consumer." *Id.* ¶ 257.

Nevertheless, the County contends that "[a]t different periods during the relevant time, each of the PBM Defendants *in coordination with their co-conspirators*, provided PBM services to [the County]." *Id.* 92 ¶ 407 (emphasis added). In terms of direct relationships, the County contends that, from 2003 to 2010, AetnaRx provided PBM services to Harris County. *Id.* ¶ 408. Following CVS Caremark and Aetna's 12-year contract related to PBM services, AetnaRx and CVS Caremark coordinated to provide PBM services to the County from January 2011 through March 2017. *Id.* These services included developing and offering formularies for the County's prescription plan, constructing and managing the County's pharmacy network, processing pharmacy claims, and providing mail-order pharmacy services to the County. *Id.* In providing those services, AetnaRx and CVS Caremark "set the amount the County paid for the at-issue drugs in coordination with the Manufacturer Defendants and utilize[ed] **[*13]** the false price generated by the Insulin Pricing Scheme." *Id.* ¶ 409. Moreover, "[i]n providing these PBM services to Harris County, Aetna RX and CVS Caremark also received payments for the at-issue drugs and, in turn, reimbursed the pharmacies that dispensed drugs to Harris County beneficiaries." *Id.* 93 ¶ 410. As a general matter, the County maintains that no other intermediary in the pharmaceutical supply chain "has control over or is responsible for the reported prices on which nearly all diabetics and payors, including Harris County's payments, are based other than those involved in the conspiracy." *See id.* 151 ¶ 664.

C. The County's Allegations Against OptumRx

OptumRx is named as a defendant in its capacity as a PBM and mail-order pharmacy.[1] *Id.* 36 ¶ 175. The County alleges that from March 2017 through 2019, OptumRx and Cigna Pharmacy Management worked in coordination to

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[1] From March 2017 through 2019, OptumRx managed the County's pharmacy network, which entailed processing pharmacy claims for prescriptions dispensed to Harris County's Beneficiaries and operated mail-order pharmacies that delivered prescription drugs to Harris County's Beneficiaries. Dkt. 127 at 92 ¶ 411. In OptumRx's capacity as a mail-order pharmacy, the County alleges that OptumRx "dispensed diabetes medications...nationwide and in Texas, including in Harris County." *Id.* 39 ¶ 189. The County does not allege that it directly purchased diabetes medications from OptumRx through its mail-order pharmacies. *See id.*

provide its PBM services. *Id.* 93 ¶ 411. Cigna is not named as a defendant in this case and it appears that the County only directly contracted with it, not OptumRx.[2] *See id.* ¶ 413.

While the County did not utilize any formularies developed by OptumRx, the latter's relationship with Cigna appears **[*14]** to date back to the days of its predecessor, Catamaran. A frequent attendee of the PCMA conferences, Catamaran "entered into a contract with Cigna to become Cigna's 'exclusive pharmacy benefit partner' in a strategic 10-year agreement to provide PBM services to the more than 8 million Cigna clients and members." *Id.* 37 ¶ 179, 70 ¶ 301. In its capacity as the PBM for Cigna's clients, "Catamaran negotiated with drug manufacturers on behalf of Cigna with respect to rebates and formulary placement." *Id.* 38 ¶ 180. OptumRx continued to provide pharmacy benefit services to Cigna's customers and members after it acquired Catamaran in 2015. *Id.* ¶ 181.

Harris County was one of Cigna's members and clients during the six years spanning 2013 and 2019 that OptumRx contracted with Cigna to provide PBM services. *Id.* ¶ 182. Due to its agreements with OptumRx, Cigna Pharmacy Management allegedly "utilized and profited from the specific false and inflated prices generated by the Insulin Pricing Scheme and has benefitted from OptumRx's at-issue conduct with regard to the at-issue drugs." *Id.*

Even more generally, the County alleges that OptumRx "coordinates" with Eli Lilly, Novo Nordisk, and Sanofi "regarding **[*15]** the price of the at-issue diabetes medications, as well as for the placements of these firms' diabetes medications on [Defendant] Express Script's national formularies." *Id.* 36 ¶ 176. It alleges that OptumRx had "express agreements with Defendants Novo Nordisk, Sanofi, and Eli Lilly related to the Manufacturer Payments paid by the Manufacturer Defendants to OptumRx, as well as agreements related to the Manufacturers' at-issue drugs sold through OptumRx's mail order pharmacies." *Id.* 39 ¶ 190. The Manufacturer Defendants' executive teams even allegedly met with executives from OptumRx and its parent company, UnitedHealth Group, "to discuss their coordinated efforts related to the at-issue drugs." *Id.* 36 ¶ 177.

D. Procedural History

This case is entering its third year of life. After the defendants removed Harris County's initial complaint to this court on December 23, 2019, the County filed its First Amended Complaint on January 31, 2021. Dkt. 20. In the First Amended Complaint, Harris County brought claims under the *federal Racketeer Influenced and Corrupt Organization Act ("RICO")* pursuant to *18 U.S.C. §§ 1962, et seq.*, the *Sherman Act* pursuant to *15 U.S.C. § 1, et seq.*, the *Texas Free Enterprise and Antitrust Act ("TFEAA")* pursuant to *Tex. Bus. & Com. Code Ann. §§ 15.01, et seq.*, the **[*16]** Texas Deceptive Trades Practices-Consumer Protection Act, common law fraud, money had and received, unjust enrichment, and civil conspiracy. *Id.* On April 14, 2020, both Manufacturer Defendants and PBM Defendants moved to dismiss. Dkts. 40, 41.

On September 29, 2020, the court issued a Memorandum Opinion and Order (the "September 2020 Order") granting in part and denying in part the defendants' motions to dismiss. Dkt. 66. Apart from dismissing the County's DTPA claim (which it also permitted the County to amend), the court denied the motions to dismiss. *See id.* at 36. With respect to the RICO claims, the court concluded that the indirect purchaser bar articulated in the Supreme Court's *Illinois Brick* decision did not preclude the County's claims because the County "allege[d] that it pa[id] the

[2] The County also alleges that following Cigna's merger with Express Scripts in December 2018 and Cigna Pharmacy Management's consolidation with Express Scripts, Express Scripts and Cigna Pharmacy Management worked in coordination to provide PBM services to Plaintiff Harris County. Dkt. 127 at 93 ¶ 412. These services included developing and offering formularies for the County's prescription plan, constructing and managing the County's pharmacy network, processing pharmacy claims, and providing mail-order pharmacy services to the County. *Id.* In providing these services to the Harris County, Express Scripts and Cigna Pharmacy Management set the amount the County paid for the at-issue drugs in coordination with the Manufacturer Defendants and utilizing the false price generated by the Insulin Pricing Scheme, received payments for the at-issue drugs and, in turn, reimbursed the pharmacies that dispensed drugs to Harris County beneficiaries. *Id.* ¶ 413. Cigna merged with defendant Express Scripts at an unstated date. *See id.* 66 ¶ 283.

PBM Defendants directly for the overcharges of the diabetes medications...not an intervening distributor or other link in the distribution chain." *Id.* at 29 (internal quotations omitted).[3]

On October 13, 2020, Harris County filed its Second Amended Complaint. Dkt. 68. The defendants collectively moved to dismiss the County's DTPA claims on November 20, 2020. Dkt. 76. The court denied their motion **[*17]** on March 25, 2021 (the "March 2021 Order"). Dkt. 82. The County amended its complaint again on July 27, 2021. Dkt. 110. Though several defendants answered the County's Third Amended Complaint, *see* Dkts. 111-15, the County moved for leave to file the instant Fourth Amended Complaint on August 25, 2021. Dkt. 118. The court granted the County's motion and the County subsequently filed its FAC on September 27, 2021. Dkts. 126, 127. OptumRx filed its motion to dismiss under *Rule 12(b)(6)* on October 18, 2021. Dkt. 148.

II. Legal Standard

A. *Rule 12(b)(6)*

"*Federal Rule of Civil Procedure 8(a)(2)* requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. At the pleading stage, the court must "accept all well-pleaded facts in the complaint as true and view the facts in the light most favorable to the plaintiff." *O'Daniel v. Indus. Serv. Sols., 922 F.3d 299, 304 (5th Cir. 2019)*. "Motions to dismiss are viewed with disfavor and are rarely granted." *Test Masters Educ. Servs., Inc. v. Singh, 428 F.3d 559, 570 (5th Cir. 2005)*. In considering a motion to dismiss, usually the court "may rely on only the complaint and its proper attachments." *Dorsey v. Portfolio Equities, Inc., 540 F.3d 333, 338 (5th Cir. 2008)*.

III. Analysis

The County brings eight claims against OptumRx. It alleges one claim each that OptumRx violated the federal RICO statute, *18 U.S.C. § 1962(c)*, for its participation in the Eli Lilly-PBM RICO enterprise, the Novo Nordisk-PBM **[*18]** RICO enterprise, and the Sanofi-PBM enterprise. Dkt. 127 at 110-11 ¶¶ 488-91, 124 ¶¶ 548-53, 139 ¶¶ 612-17. It also alleges OptumRx violated RICO, *18 U.S.C. §§ 1962(c)-(d)*, by facilitating the Insulin Pricing Scheme through its respective RICO enterprises. *Id.* 153 ¶¶ 676-85. Finally, it brings four state law claims for violations to the Texas Deceptive Trades Practices-Consumer Protection Act ("DTPA"), money-had-and-received; unjust enrichment; and civil conspiracy. *Id.* 155-68 ¶¶ 686-724. The court grants OptumRx's motion to dismiss for each claim.

A. RICO Standing

Antitrust standing principles apply equally to allegations of RICO violations. Dkt. 66 at 27-28. *See also* *Holmes v. Sec. Investor Protection Corp., 503 U.S. 258, 268-70, 112 S.Ct. 1311, 117 L. Ed. 2d 532 (1992)* ("We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in *§ 7 of the Sherman Act*, and later in the *Clayton Act's § 4*."); *McCarthy v.*

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[3] In concluding that the County "allege[d] that it pa[id] the PBM Defendants directly," the court cited the County's response to the defendants' motions to dismiss. *See* Dkt. 66 at 29 (citing Dkt. 48 at 13). That portion of the County's motion argued that "Harris County paid...the at-issue overcharges to the PBMs, not an intervening distributor or other link in the distribution chain." Dkt. 48 at 13. However, the Fifth Circuit has instructed that, with limited exception not applicable here, a "district court may not go outside the complaint" when deciding a *Rule 12(b)(6)* motion. *Scanlan v. Texas A&M Univ., 343 F.3d 533, 536 (5th Cir. 2003)*. The portion of the First Amended Complaint that lent the most support to the County's assertion that it directly paid the PBM defendants is found in paragraph 207, which explained that "[a] PBM develops the health plan's drug formulary...and is paid by the health plan for the drugs utilized by the health plan's beneficiaries." Dkt. 20 at 44 ¶ 207.

Recordex Serv., Inc., 80 F.3d 842, 855 (3d Cir. 1996) ("The precepts taught by *Illinois Brick* and *Utilicorp* apply to RICO claims, thereby denying RICO standing to indirect victims."); *Wooten v. Loshbough, 951 F.2d 768, 770 (7th Cir. 1991)*; *County of Oakland v. City of Detroit, 866 F.2d 839, 851 (6th Cir. 1989)*, *cert. denied*, *497 U.S. 1003, 110 S. Ct. 3235, 110 S. Ct. 3236, 111 L. Ed. 2d 747 (1990)*; *Terre Du Lac Ass'n v. Terre Du Lac, Inc., 772 F.2d 467, 473 (8th Cir. 1985)*, *cert. denied*, *475 U.S. 1082, 106 S. Ct. 1460, 106 S. Ct. 1461, 89 L. Ed. 2d 718 (1986)*. As it did previously, *see* Dkt. 66, the court looks to ***antitrust law*** to resolve whether the County has standing to bring its RICO claims against OptumRx.

Though broadly worded, the **[*19]** federal antitrust statutes are read against the backdrop of common law principles like proximate causation. *Associated Gen. Contractors of California, Inc. v. Carpenters, 459 U.S. 519, 529-33, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. Law students across the country tend to first encounter the principle of proximate causation in *Palsgraf v. Long Island Railroad Company*, the famous Court of Appeals of New York case where a rail commuter, in his attempt to catch a train, precipitated a series of unfortunate events ultimately resulting in an explosion that dislodged scales at the other end of the train platform, striking and injuring the plaintiff. *248 N.Y. 339, 341, 162 N.E. 99, 99 (1928)*. Under a proximate causation framework, an antitrust plaintiff's demonstration of a traceable injury is insufficient: it must also show that "the harm alleged has a sufficiently close connection to the conduct the statute prohibits." *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 133, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)*; *see also* *Sanger Ins. Agency v. HUB Int'l, Ltd., 802 F.3d 732, 737 n. 5 (5th Cir. 2015)*. Adherence to principles of proximate causation ensures that defendants are not responsible for the "remote consequences" of their conduct. *Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 490 n.8, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)* (quoting *Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533, 38 S. Ct. 186, 62 L. Ed. 451 (1918)*); *see* *Holmes, 503 U.S. at 268* (describing proximate causation as a judicial tool "used to limit a person's responsibility for the consequences of that person's own acts.").

In the context of antitrust litigation, this constraint operates both defensively and offensively. *Hanover Shoe*, for instance, instructs **[*20]** that an antitrust defendant may not avoid liability when the antitrust plaintiff "passed on" the inflated prices to its customers. *392 U.S. at 490-93*. Likewise, in *Illinois Brick Co. v. Illinois*, the Supreme Court limited antitrust actions to plaintiffs who are the direct purchasers of a price-fixed product. *431 U.S. 720, 737, 97 S.Ct. 2061, 52 L. Ed. 2d 707 (1977)*.

Because their holdings and logic govern here, the court finds it useful to review *Illinois Brick* and its progeny. In *Illinois Brick*, state and local governments brought price-fixing claims against manufacturers of concrete blocks. *431 U.S. at 724-27*. Though the plaintiffs had not purchased the blocks from the defendants, they argued that the price-fixing conspiracy harmed them because they had hired contractors who had directly contracted with the defendants and passed on part or all of the defendants' overcharges in setting their prices. *Id. at 726-27*.

The Court rejected this argument, reasoning that "allowing offensive but not defensive use of pass-on [damages] would create a serious risk of multiple liability for defendants," because both direct and indirect purchasers would be entitled to recover for the same overcharge. *Id. at 730*. The Court emphasized the practical and empirical difficulties with measuring pass-on damages that motivated **[*21]** its decision in *Hanover Shoe*, explaining that "apportion[ing] the recovery" in antitrust suits "among all potential plaintiffs that could have absorbed part of the overcharge . . . would add whole new dimensions of complexity" to antitrust litigation and "seriously undermine [its] effectiveness." *Id. at 737*.

The Court reiterated its desire to "avoid burdening [antitrust] actions with damages issues giving rise to the need for massive evidence and complicated theories" just five years later in *Blue Shield of Virginia v. McCready, 457 U.S. 465, 475 n. 11, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*. As *McCready* cautioned, that "[a]n antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy" was no reason to empower "every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages." *457 U.S. at 476*.

Those concerns guided the Court's holding in *California State Council of Carpenters* one year later. *459 U.S. at 544-45*. That case asked whether union plaintiffs had antitrust standing to bring allegations that a multiemployer association and its members coerced third parties and association members to enter business relationships with nonunion firms. *Id. at 520-21*. The Ninth Circuit reversed the district court's dismissal on the grounds that the union "was within the area of the economy **[*22]** endangered by a breakdown of competitive conditions" and that the defendants "specifically intended" to harm the union. *Id. at 525*. The County echoes some of these same concerns in its briefing, noting that it "has been damaged by the fraudulent scheme by paying for the at-issue drugs at...egregiously inflated prices" while defendants, including OptumRx, profited. *See* Dkt. 169 at 7. "That alone," the County declares, "should be dispositive on OptumRx's motion to dismiss." *Id.* But the *Carpenters* Court was unpersuaded by similar policy gestures. Instead, looking to principles of proximate causation, it concluded that only the "immediate victims of coercion by [the] defendants" could have a cause of action against them. *459 U.S. at 532, 541-42*.

The Supreme Court's embrace of *Illinois Brick*'s indirect purchaser bar has both paralleled its commitment to principles of proximate causation and evolved, somewhat, beyond them. Whereas the *Carpenters* Court described "the directness or indirectness of the asserted injury" as one of "[a] number of...factors [that] may be controlling," *459 U.S. at 538-41*, the Court would later describe the indirect purchaser bar as a "bright line" rule. Seven years after *Carpenters*, this fashioning of *Illinois Brick* as a bright-line rule animated **[*23]** the Court's refusal to create an exception to the indirect purchaser bar even when complicated damage calculations were not in issue. *See Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 204, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*. *UtiliCorp* featured a price-fixing conspiracy similar to the one here. *See id.* There, an investor-owned public utility purchased natural gas from a pipeline company for its own use and for commercial and residential resale. *Id. at 204*. The supposed antitrust violators consisted of a pipeline company and several gas-production companies that had together conspired to fix the price paid by the utilities. *Id.* The state petitioners asserted claims on behalf of the consumers themselves, as well as state agencies, municipalities, and other political subdivisions that had purchased gas from the defendants. *Id. at 205*. On appeal, the Tenth Circuit held that the state was not the proper plaintiff for its citizen-consumers who paid inflated prices for natural gas when the lawsuit already included the first actor to experience the overcharge: the public utilities. *Id. at 205-06*.

The Supreme Court agreed because the consumers represented by the state were indirect purchasers. *Id. at 207-08*. In rejecting the states' multifaceted challenges to the application of *Illinois Brick*'s logic to the facts on hand, the *UtiliCorp* Court **[*24]** was unmoved. To be sure, it acknowledged that "[t]he rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases." *497 U.S at 216*. Despite this, it concluded that "[t]he possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *Id. at 216*. In that vein, the Court explicitly cautioned lower courts from engaging in "an unwarranted and counterproductive exercise to litigate a series of exceptions" to *Illinois Brick*. *Id. at 217*.

The resulting "bright line" rule is straightforward: "if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator. And C may sue B if B is an antitrust violator." *Apple Inc. v. Pepper, 139 S. Ct. 1514, 1521, 203 L. Ed. 2d 802 (2019)* (citing *Loeb Industries, Inc. v. Sumitomo Corp., 306 F.3d 469, 481-482 (7th Cir. 2002)* (Wood, J.)). By this logic, if B does not sell to C, C cannot recover from B, even if B is an antitrust violator.[4] *See id.*

That is a formula the County cannot satisfy. The County does not allege that OptumRx directly provided it with PBM services. Rather, it alleges that OptumRx's predecessor, Catamaran, "entered into a contract with Cigna to become Cigna's exclusive pharmacy benefit partner...to provide PBM services to more than 8 million Cigna clients and **[*25]** members," including the County. Dkt. 127 at 37 ¶ 179. To be sure, OptumRx continued this arrangement after acquiring Catamaran. *Id.* 38 ¶ 181. But—because Cigna is the apparent intermediary—at no point does the County allege it directly paid OptumRx for its PBM services. *See id.* ¶ 182. Nor can the County surmount *Illinois*

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[4] Treatment of *Illinois Brick* as a bright-line rule does not represent a departure from the principle of proximate causation so much as it illustrates a tightening of the requisite causal nexus between the injury and injurious conduct. Indeed, as the Supreme Court has explained elsewhere, "[t]he proximate-cause inquiry is not easy to define, and over the years it has taken various forms." *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 133, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)*.

Brick insofar as it sues OptumRx in its capacity as a mail-order pharmacy. Though the County alleges that OptumRx "dispensed diabetes medications...nationwide and in Texas, including in Harris County," it fails to allege that it directly purchased diabetes medications from OptumRx. *Id.* 39 ¶ 189. Accordingly, and in keeping with *Illinois Brick*'s indirect purchaser bar, the court concludes that the County lacks standing to bring its RICO claims against OptumRx.

The County challenges this conclusion. It argues that *Illinois Brick* does not apply if the complaint alleges that a defendant participated in a RICO conspiracy and the plaintiff directly paid a co-conspirator. Dkt. 169 at 7-8. To use the *Apple* Court's language, the "co-conspirator exception" posits that C may sue A, even though A did not sell to C, because A worked with B and B sold to C. *See* *139 S. Ct. at 1521*. This court previously **[*26]** adopted this so-called "co-conspirator" exception in its September 2020 Order, concluding that the County had standing to bring claims against the Manufacturer Defendants from whom it did not directly purchase diabetes medications. Dkt. 66 at 32-34. Looking to that Order, the County seeks to apply the co-conspirator exception to an alleged horizontal conspiracy between OptumRx and the PBM Defendants, including Cigna, CVS Caremark, and AetnaRx—the three PBMs with whom it directly contracted for PBM services. *See* Dkt. 127 at 92-93 ¶¶ 407-10. Because OptumRx allegedly conspired with direct formulary servicers, the County contends that it should be held jointly and severally liable under basic notions of conspirator liability. *See* Dkt. 169 at 17; *see also* Dkt. 127 at 37-38 ¶¶ 179-80.

Though no Fifth Circuit case is on point, the County's position finds some support in certain courts of appeals. In *Paper Systems*, for instance, the Seventh Circuit concluded that:

> If [Defendant] Nippon Paper participated in a [cartel conspiracy] . . . then it is jointly and severally liable for the cartel's entire overcharge. That the plaintiffs did not buy from Nippon Paper directly, or at all, does not matter **[*27]** . . . It was improper to dismiss Nippon Paper as a defendant while its status as a member of the cartel remains to be determined.

Paper Sys. Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 634 (7th Cir. 2002). Were the court to follow *Paper Systems*, the legal issues would be narrowed to whether the County sufficiently alleged a horizontal conspiracy between OptumRx and CVS Caremark, AetnaRx, and Cigna—an issue the parties devote considerable attention to in their briefing. *See* Dkts. 148 at 17-18, 169 at 10-18, 173 at 2-3.

The co-conspirator exception was one of many that proliferated throughout the lower courts following *Illinois Brick*. The Ninth Circuit's 1984 decision in *State of Arizona v. Shamrock Foods Company* offered the first full articulation of the exception within the circuit courts.[5] *729 F.2d 1208, 1211 (9th Cir. 1984)*. In that case, consumers sued a dairy wholesaler for fixing the prices of dairy products sold through grocery stores and by home-delivery. *Id. at 1210*. Though the consumer plaintiffs initially omitted them from their suit, they modified their price-fixing theory to include both the dairy producers and the grocery stores, arguing that the producers conspired amongst themselves and with the stores to fix the price of products. *Id. at 1210-11*. In a "two-tier conspiracy," the Ninth Circuit concluded **[*28]** that *Illinois Brick*'s aim of avoiding complex damage computations was not frustrated because overcharges were "not passed on to the consumers through any other level of the distribution chain." *Id. at 1214*.

More recently, in *In re National Football League's Sunday Ticket Antitrust Litigation*, a divided Ninth Circuit panel relied on the co-conspirator exception to resolve a standing dispute when plaintiffs alleged injury from a multi-tiered conspiracy involving DirecTV and the NFL. *933 F.3d 1136, 1157 (9th Cir. 2019)*. Looking to the principles of proximate causation, that court concluded that "when co-conspirators have jointly committed the antitrust violation,

[5] From this court's research, the Seventh Circuit's decision in *Fontana Aviation, Inc. v. Cessna Aircraft Company* was the first amongst the Courts of Appeals to support suspending *Illinois Brick* in the context of multi-tiered price-fixing conspiracies. *See* *617 F.2d 478, 481 (7th Cir. 1980)*. In that case, a divided panel opined that it was "not satisfied that the *Illinois Brick* rule directly applies in circumstances where the manufacturer and the intermediary are both alleged to be co-conspirators in a common illegal enterprise resulting in intended injury to the buyer." *Id. at 481*. Before that, the co-conspirator exception's roots can be traced to *Gas-A-Tron of Ariz. v. Am. Oil Co., No. CIV 73-191-TUC-WCF, 1977 U.S. Dist. LEXIS 12513, 1977 WL 1519, at *2 (D. Ariz. Dec. 7, 1977)*.

a plaintiff who is the immediate purchaser from any of the conspirators is directly injured by the violation." *Id. at 1157*.[6]

Though it is still the law of the Ninth Circuit, other courts of appeals (or panels therein) have commented that "*UtiliCorp* implies that the only exceptions to the *Illinois Brick* doctrine are those stated in *Illinois Brick* itself"—and the co-conspirator exception is not one of them. *See In re Drugs Antitrust Litig., 123 F.3d 599, 605 (7th Cir. 1997)*, *abrogated on other grounds by Rivet v. Regions Bank of La., 522 U.S. 470, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1988)*. For its part, even before **[*29]** *UtiliCorp*, the Fifth Circuit declined to recognize the co-conspirator exception. *See In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1163 (5th Cir. 1979)* ("[W]e do not think that the reasoning of *Illinois Brick* permits recognizing the exception when, as here, the alleged co-conspirator middlemen are not named as parties defendant."). *See also Dickson v. Microsoft Corp., 309 F.3d 193, 215 (4th Cir. 2002)* (declining to resolve whether it would recognize a co-conspirator exception to *Illinois Brick*).

Apart from the Supreme Court's admonishment that courts not engage in the "unwarranted and counterproductive" creation of exceptions to *Illinois Brick, UtiliCorp, 497 U.S. at 217*, the court notes that the co-conspirator exception rests upon the rejection of *Hanover Shoe* and *Illinois Brick*'s core logic. Application of the direct purchaser rule in the context of a multi-tiered conspiracy would limit actions to the intermediary conspirators, the so-called middlemen. Holding the intermediaries liable for their own anticompetitive conduct ostensibly deters them from participating in vertical price-fixing conspiracies in the future. *See* Herbert Hovenkamp, *The Rationalization of Antitrust*, *116 Harv. L. Rev. 917, 941 (2003)* ("The other justification for the rule against indirect purchaser recovery is that focusing the entire damage action on the first purchaser in line *increases enforcement incentives* by concentrating **[*30]** relatively large amounts of damages on relatively few plaintiffs.") (emphasis added). But what of the manufacturers? In justifying exceptions to the *Illinois Brick* rule, some courts have determined that extending liability to the highest echelons of a price-fixing conspiracy "is another vital instrument for maximizing deterrence." *See Paper Sys., 281 F.3d at 633* (citing Lewis A. Kornhauser & Richard L. Revesz, *Sharing Damages Among Multiple Tortfeasors*, *98 Yale L. J. 831 (1989)*). Without extending liability to these bad actors in the context of a price-fixing conspiracy, consumers would have little recourse to address anticompetitive conduct originating at the top, leaving manufacturers to enjoy the fruits of their illegality while the intermediaries foot the bill. If that bill sufficiently deterred the intermediaries from participating in a multi-tiered-price-fixing-conspiracy, manufacturers could nevertheless still conspire amongst themselves to fix prices and be shielded from suit if the intermediaries refrained from suing and, instead, passed on the costs to consumers.

And, yet, that is the very scenario that the *Illinois Brick* Court sanctioned when it barred indirect purchasers from bringing antitrust claims. To boot, the Court **[*31]** explained that "allowing indirect purchasers to recover using pass-on theories...would transform treble-damages actions into massive multiparty litigations *involving many levels of distribution* and including large classes of ultimate consumers *remote from the defendant*." *See 431 U.S. at 740* (emphasis added). If the intermediaries who directly purchase price-fixed products do not sue the manufacturers, it is because the *Illinois Brick* Court's gamble "to identify the most efficient plaintiff for the overcharge in price-fixing cases" failed to pay off. *See* William H. Page, *The Scope of Liability for Antitrust Violations*, *37 Stan. L. Rev. 1445, 1488-90 (1985)*. That is not a doctrinal change this court can make. Thus, while the County initially persuaded the court of the co-conspirator exception's applicability and legality, a new amended complaint, and a close reading of the caselaw with fresh eyes reveals the exception's inconsistencies with the Supreme Court's holdings and express admonitions. *See UtiliCorp, 497 U.S. at 216-17*; *Illinois Brick, 431 U.S. at 740*.

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[6] The subsequent procedural developments in *Sunday Ticket* merit mention. Following the Ninth Circuit's decision, the National Football League appealed to the Supreme Court. Though the Court denied the League's petition for a writ of certiorari, Justice Kavanaugh issued a statement explaining that the interlocutory posture of the case counseled against further review. *See Nat'l Football League v. Ninth Inning, Inc., 141 S. Ct. 56, 57, 208 L. Ed. 2d 291 (2020)* (Kavanaugh, J., respecting the denial of certiorari). More importantly, Justice Kavanaugh opined that the *Sunday Ticket* "plaintiffs may not have antitrust standing to sue the NFL" because the Court's "case law 'authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers.'" *Id.* (citing *Apple Inc., 139 S.Ct. at 1520*) (emphasis original). In a concluding remark, Justice Kavanaugh offered that if the NFL did not "prevail at summary judgment or at trial," it could "raise those legal arguments again in a new petition for certiorari." *Id.*

Returning to *Paper Systems*—the Seventh Circuit decision upon which the County's liability theory is based—it joins the Ninth Circuit's *Shamrock* decision on the wrong side of *Illinois Brick*'s "bright line." As a different Ninth Circuit panel **[*32]** helpfully observed after *UtiliCorp, Paper Systems* "contradicts the Supreme Court's admonition not to 'carve out exceptions to the [direct purchaser] rule for particular types of markets.'" *In re ATM Fee Antitrust Litig., 686 F.3d 741, 755 n. 7 (9th Cir. 2012)* (quoting *UtiliCorp, 497 U.S. at 216*)). This court agrees. The County's strongest theory—that OptumRx engaged in a horizontal conspiracy to price-fix with the PBM defendants from whom the County directly paid—does not surmount *Illinois Brick*'s tall wall against indirect purchaser suits. Accordingly, OptumRx's motion to dismiss is GRANTED as to the County's antitrust and RICO claims.

B. The County's State Law Claims

OptumRx also moves to dismiss the County's DTPA, unjust enrichment, money-had-and-received, and civil conspiracy claims. Dkt. 127 at 155. OptumRx contends that the County's DTPA claim must be dismissed because the County no longer alleges that it conferred a direct benefit on OptumRx. Dkt. 148 at 7. The absence of a direct benefit is also, OptumRx argues, fatal to the County's unjust enrichment and money-had-and-received claims. *Id.* Finally, because the County's civil conspiracy claim derives from its underlying tort allegations, it must also be dismissed. *Id.* The County responds that these claims survive because **[*33]** it successfully alleged facts against OptumRx's co-conspirators and that OptumRx is liable under conspirator liability. *See* Dkt. 169 at 30-31.

1. DTPA Claims

The DTPA grants consumers a cause of action for false, misleading, or deceptive practices or acts. *Tex. Bus. & Com. Code Ann. § 17.50(a)(1)*; *Amstadt v. U.S. Brass Corp., 919 S.W.2d 644, 649 (Tex. 1996)*. Among other things, the DTPA prohibits "any unconscionable action or course of action," which it defines as "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." *Tex. Bus. & Com. Code Ann. §§ 17.45(5)*, *17.50(a)(3)*.

Two or more entities can be held liable for a conspiracy to violate the DTPA. *Laxson v. Giddens, 48 S.W.3d 408, 411 (Tex. App.—Waco 2001, pet. denied)*. *See also* *Off. Stanford Invs. Comm. v. Greenberg Traurig, LLP, No. 3:12-CV-4641-N, 2015 U.S. Dist. LEXIS 199175, 2015 WL 13741905, at *7 (N.D. Tex. Feb. 4, 2015)* ("Texas Courts have held generally that any agreement to undertake an unlawful act may support a claim for conspiracy.") However, because anticompetition allegations raised in a DTPA claim must "be harmonized with federal ***antitrust law***," the court must determine if the County's DTPA conspiracy claim is "virtually identical to [its] [RICO] allegations." *See* *Abbott Lab'ys, Inc. (Ross Lab'ys Div.) v. Segura, 907 S.W.2d 503, 505 (Tex. 1995)* (citing *Tex. Bus. & Com. Code Ann. § 15.04*).

OptumRx observes that the County no longer alleges an underlying DTPA violation against it because it "no longer alleges that it had a relationship with OptumRx." Dkt. 148 at 24. The County appears **[*34]** to concede this, but it argues that its DTPA claim against OptumRx may still proceed because it "has sufficiently alleged that OptumRx conspired with the other Defendants." Dkt. 169 at 31.[7]

In support of its claim that the Defendants conspired to violate the DTPA, the County alleges that "each of the PBM and Manufacturer Defendants, as well as their co-conspirator Cigna, agreed to and carried out acts in furtherance of the Insulin Pricing Scheme that artificially...inflated the price of diabetes medications." Dkt. 127 at 159 ¶ 694(a). The County alleges that CVS Caremark, Express Scripts, and OptumRx each "had express agreements" with the Defendant Manufacturers "related to the Manufacturer Payments paid by the Manufacturer Defendants." *Id.* 28 ¶¶ 123, 169, 190. It also alleges that some of the Manufacturer Defendants even "admitted" to the United States House of Representatives Committee on Energy and Commerce that "they agreed to and did participate in the

[7] The court previously denied the defendants' motion to dismiss on the County's DTPA claims in its March 2021 Order, concluding that the County plausibly pleaded underlying DTPA claims against all the defendants. Dkt. 82 at 13.

Insulin Pricing Scheme and that the rise of insulin prices was a direct result of the scheme." *Id.* 78 ¶ 339. For example, Novo Nordisk "directly admitted that 'as the manufacturer, we do set the [reported] price and have full accountability **[*35]** for those increases.'" *Id.* ¶ 340. Novo Nordisk reported that price increases were necessary for it to stay on the PBM's preferred formularies. *Id.* In addition, Novo Nordisk explained that:

> There is this perverse incentive and misaligned incentives (in the insulin pricing system) and this encouragement to keep [reported] prices high. And we've been participating in that system because the higher the [reported] price, the higher the rebate . . . There is a significant demand for rebates. We spent almost $18 billion in rebates in 2018 . . . If we eliminate all the rebates . . . we would be in jeopardy of losing [our formulary] positions.

Id. ¶ 341. Eli Lilly also allegedly admitted that "it raises reported prices as a *quid pro quo* for formulary positions," noting that "drug makers sharply raise reported prices without a corresponding increase in net price" because "PBMs demand higher rebates in exchange for including the drug on their preferred-drug lists." *Id.* ¶ 342. For their part, the "PBM Defendants also admitted at the April 2019 Congressional hearing that they grant preferred...formulary position because of higher rebates." *Id.* 79 ¶ 346.

By its own terms, the FAC reflects that these **[*36]** allegations, at bottom, refer to the same anticompetitive conduct raised in its RICO claims:

> In a competitive market such as this one unilateral price increases would result in loss of market share and removal from preferred positions on PBM Defendants' formularies. Thus, it would have been economically irrational for any one Manufacturer Defendant to raise its prices without assurance that its competitors would also increase prices and assurances from PBM Defendants that it would receive preferred formulary positions in exchange for these inflated prices.

Id. 160 ¶ 694e. *Compare* Dkt. 127 at 160 ¶¶ 694(e), 694(h)-(j), *with* Dkt. 127 at 111-51 ¶¶ 489-670.

The Texas Supreme Court's decision in *Segura* controls here. That case began on the state's allegations that manufacturers "conspired with each other to fix the wholesale price of infant formula and with [the American Academy of Pediatrics] to monopolize markets for infant formula and infant formula advertising." *Segura, 907 S.W.2d at 504*. The state initially raised these claims under Texas' ***antitrust law***, but a lower court dismissed them after concluding that the state was an indirect purchaser. *Id. at 504*. Infant formula consumers then intervened and "brought claims for damages **[*37]** against the manufacturers for the same conduct alleged by the state," including allegations that they implemented nearly identical price increases. *Id. at 504-05*. Rather than follow the state and bring their claims under the *Antitrust Act*, the intervenors alleged that the anticompetitive conspiracy violated the DTPA's prohibition against unconscionable conduct.[8] *Id. See also Tex. Bus. & Com. Code Ann. § 17.50(a)(3)*.

Though raised under the DTPA, the *Segura* Court observed that the intervenors' claims were "in essence antitrust claims." *907 S.W.2d at 507*. And, because the legislature required courts to harmonize Texas' ***antitrust law*** with federal ***antitrust law***, that court determined that *Illinois Brick*'s indirect purchaser bar applied to the intervenors' DTPA claims as they, too, had failed to show that they directly purchased the infant formula from the manufacturers. *Id. at 507*. Indeed, the court advised that it would "not interpret the DTPA in a manner that rewards creative pleading at the expense of consistent legal principles." *Id.*

Like in *Segura*, the County's conspiracy allegations "masquerade" as "consumer protection" claims despite mirroring "prohibited antitrust" claims under federal law. *See id. See also* Dkt. 127 at 159-63 ¶¶ 694-95. Just as *Illinois Brick* foreclosed **[*38]** the County's RICO claims against OptumRx, so, too, does it stand as a firewall against its DTPA conspiracy claims. So, for the County's anticompetition DTPA conspiracy claims against OptumRx to survive, there would have to be a co-conspirator exception to the indirect purchaser bar. For reasons already discussed, there is no co-conspirator exception recognized by the Fifth Circuit or the Supreme Court, and the

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[8] The manufacturers argued that "classic antitrust claims of price-fixing and monopolization" were not cognizable under the DTPA. *Segura, 907 S.W.2d at 504*. The *Segura* Court did not decide that issue.

exception recognized in other circuits is inconsistent with *Illinois Brick* and its progeny. Accordingly, the Court GRANTS OptumRx's motion to dismiss the County's DTPA claims.

2. Unjust enrichment, money-had-and-received, and civil conspiracy

The court now turns to the County's unjust enrichment, money-had-and-received, and civil conspiracy claims. "Unjust enrichment claims are based on quasi-contract." *Fortune Prod. Co. v. Conoco, Inc., 52 S.W.3d 671, 683 (Tex. 2000)*.[9] "The principal function of quasi-contract is generally said to be that of prevention of unjust enrichment." Calamari et al., The Law of Contracts, § 1-12 (3d ed. 1987). But when an express contract exists, "there can be no recovery under a quasi-contract theory."[10] *Fortune, 52 S.W.3d at 684*. As the Fifth Circuit has observed, "[g]ood reason supports that rule: quasi-contract actions *presuppose* no contract **[*39]** governs the dispute." *See* *Villarreal v. First Presidio Bank, 744 F. App'x 204, 206 (5th Cir. 2018)* (emphasis original); *MGA Ins. Co. v. Charles R. Chesnutt, P.C., 358 S.W.3d 808, 815 (Tex. App.—Dallas 2012, no pet.)* ("The quasi-contractual action for money had and received is a cause of action for a debt *not* evidenced by a written contract between the parties.") (emphasis added). Thus, as *§ 107* of the Restatement (First) of Restitution provides:

> A contracting party is entitled to receive from another contracting party what the other has promised and if the contract is between persons of full capacity and is not voidable, he is not entitled to receive more than this, unless the other has failed to perform. On the other hand, a person is not entitled to compensation on the ground of unjust enrichment if he received from the other that which it was agreed between them the other should give in return.

Restatement (First) of Restitution § 107(a)(1) (1937).

Other courts agree that this principle presents a high hurdle for plaintiffs alleging price-fixing claims to surmount. For example, in *In re Intel Corp. Microprocessor Antitrust Litigation*, the plaintiffs bought—and paid the purchase price for—computers whose microprocessors were artificially inflated. *496 F. Supp. 2d 404, 421 (D. Del. 2007)*. Like the County, the *Intel* plaintiffs did not allege that they did not receive the benefit of their bargain, but objected to the **[*40]** artificially inflated price that they paid. *Id. See also* *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 350 F. Supp. 2d 160, 210 (D. Me. 2004)* ("In any event, unjust enrichment ordinarily does not furnish a basis for liability where parties voluntarily have negotiated, entered into and fully performed their bargain, as consumers do in buying vehicles.").

In that respect, just as in *Intel*, the County's claims sound more in contract than in quasi-contract. In the FAC's own words, the PBM Defendants "contract with payors." Dkt. 127 at 85 ¶ 367. The Defendants "set[] prices for...diabetes medications marketed and sold" and that "payors, including [the County],...paid for diabetes medications based on fraudulently inflated prices." *Id.* 168 ¶¶ 720-21. Against OptumRx's co-defendants, the County paid its purchase price for PBM services, obtained them, and does not assert that it failed to receive the benefit of its bargain.

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[9] The court analyzes the County's unjust enrichment and money-had-and-received claims under the same rubric because "[a] cause of action for money had and received belongs conceptually to the doctrine of unjust enrichment." *Amoco Prod. Co. v. Smith, 946 S.W.2d 162, 164 (Tex. App. 1997, no writ)*.

[10] To be sure, there are some exceptions to this rule. A claim for restitution or unjust enrichment might still be made when, for instance, a defendant verbally contracted to sell a certain item at an agreed-upon price sells it and later denies his counterpart an interest in the proceeds of the sale. *See, e.g.,* *Staats v. Miller, 150 Tex. 581, 243 S.W.2d 686, 687-88 (1951)* (allowing restitution for excess money held by defendant after selling plaintiffs' cotton harvester pursuant to oral contract). Likewise, restitution might be available where a party overpays an agreed-upon rate. So, for instance, if A contracts to buy widgets from B for $65.00 and B then refuses to deliver the widgets unless A pays him $110.00, A may bring an unjust enrichment claim. *See, e.g.,* ***Bowers v. Missouri, Kan. & Tex. Ry. Co., 241 S.W. 509, 510-11 (Tex. App.—Texarkana 1922, no writ)*** (allowing restitution for freight charges paid in excess of rates specified in shipping contract); *Nat. Gas Pipeline Co. of Am. v. Harrington, 246 F.2d 915, 921 (5th Cir. 1957)* (agreeing that plaintiff was entitled to restitution where it paid, "involuntarily and under protest," in excess of contracted-for price). These exceptions do not apply here.

Generally, for these reasons, the court would just conclude that the County's unjust enrichment claim against OptumRx fails. However, it pauses to note the unique procedural background of this case. The County bases its unjust enrichment claim against OptumRx based on conspirator liability—that "OptumRx is responsible for all alleged acts done by any of **[*41]** the conspirators in furtherance of the Insulin Pricing Scheme." Dkt. 169 at 9. *See also* Dkt. 127 at 168 ¶¶ 726. The court previously found in its September 2020 Order that the County alleged stand-alone unjust enrichment claims against the defendants. *See* Dkt. 66 at 40. In that order, the court mistakenly concluded that because the County pleaded fraud—a bad act—and because allegations of a bad act were necessary to state a claim for unjust enrichment, the County had sufficiently pleaded its claim. *See id.* at 39-40. Alternatingly reticent to challenge and ready to embrace the court's prior order, both parties spill ink debating whether the County sufficiently alleged a conspiracy between OptumRx and its co-defendants. *See* *Off. Stanford Invs. Comm., 2015 U.S. Dist. LEXIS 199175, 2015 WL 13741905, at *7* (observing that conspirator liability may apply to torts). In the end, whether it did does not matter: allegations of the bad act are insufficient to move the County out of the realm of contract and into the domain of quasi-contract, and the unjust enrichment claims on which the County bases its conspiracy allegations cannot stand on their own. Accordingly, the court GRANTS OptumRx's motion to dismiss the County's unjust enrichment and money-had-and-received claims. **[*42]**

Finally, civil conspiracy is a derivative tort. *Agar Corp., Inc. v. Electro Circuits Int'l, LLC, 580 S.W.3d 136, 140-42 (Tex. 2019)*. Because the County's DTPA, unjust enrichment, and money-had-and-received claims fail, its civil conspiracy claim also fails. Accordingly, the court GRANTS OptumRx's motion to dismiss the County's civil conspiracy claim.

CONCLUSION

For the reasons outlined above, the Court rules as follows:

1. OptumRX's motion to dismiss is GRANTED for the County's RICO claims;
2. OptumRX's motion to dismiss is GRANTED for the County's Texas Deceptive Trades Practices-Consumer Protection Act claim;
3. OptumRX's motion to dismiss is GRANTED for the County's unjust enrichment claim;
4. OptumRX's motion to dismiss is GRANTED for the County's money-had-and-received claim; and
5. OptumRX's motion to dismiss is GRANTED for the County's civil conspiracy claim.
6. All claims are dismissed with prejudice.

Signed at Houston, Texas on February 16, 2022.

/s/ Gray H. Miller

Gray H. Miller

Senior United States District Judge

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In re Broiler Chicken Antitrust Litig.

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

February 16, 2022, Decided; February 16, 2022, Filed

Case No. 1:16-cv-08637

Reporter

2022 U.S. Dist. LEXIS 27824 *; 2022 WL 474179

IN RE BROILER CHICKEN ANTITRUST LITIGATION; This Document Relates To: All Actions

Prior History: *In re Broiler Chicken Antitrust Litig., 2017 U.S. Dist. LEXIS 73219 (N.D. Ill., Apr. 21, 2017)*

Core Terms

deposition, subpoena, discovery, documents, notice, motion to compel, Chicken

Counsel: **[*1]** For Maplevale Farms, Inc., individually and on behalf of all others similarly situated, Plaintiff: Stephen J. Teti, Brian D. Clark, W. Joseph Bruckner, LEAD ATTORNEYS, Kyle Pozan, Simeon Andrew Morbey, Steven Ellis Serdikoff, Lockridge Grindal Nauen P.l.l.p., Minneapolis, MN; Daniel Warshaw, LEAD ATTORNEY, PRO HAC VICE, Pearson, Simon & Warshaw LLP, Sherman Oaks, CA; Devon Paul Allard, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, P.C., Rochester, MI; Gabrielle Sliwka, LEAD ATTORNEY, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN; Guido Saveri, LEAD ATTORNEY, Saveri & Saveri, San Francisco, CA; Joseph C Kohn, LEAD ATTORNEY, PRO HAC VICE, Kohn, Swift & Graf, P.C., Philadelphia, PA; Naveed Abaie, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Robert John McLaughlin, Steven Alan Hart, LEAD ATTORNEYS, Hart McLaughlin & Eldridge, LLC, Chicago, IL; Stephen M Owen, LEAD ATTORNEY, PRO HAC VICE, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Veronica W Glaze, LEAD ATTORNEY, PRO HAC VICE, Pearson, Simon & Warshaw LLP, Sherman Oaks, CA; William Ernest Hoese, LEAD ATTORNEY, PRO HAC VICE, Kohn, Swift & Graf, Philadelphia, PA; Adam J Pessin, Bobby Pouya, **[*2]** PRO HAC VICE, Benjamin Michael Shrader, Blake Stubbs, Fine, Kaplan and Black, RPC, Philadelphia, PA; Breanna LE Van Engelen, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Bruce L Simon, PRO HAC VICE, Brian H Eldridge, Hart McLaughlin & Eldridge, LLC, Chicago, IL; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Clifford Harris Pearson, Eric Jeffrey Mont, Garrett D Blanchfield, Jr., PRO HAC VICE, Pearson, Simon & Warshaw LLP, Sherman Oaks, CA; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Jeffrey J. Corrigan, PRO HAC VICE, Jeffrey L. Spector, John Shannon Marrese, SPECTOR ROSEMAN & KODROFF, P.C., Philadelphia, PA; Jonathan M Jagher, Freed Kanner London & Millen, United Sta, Conshohocken, PA; Linda P. Nussbaum, PRO HAC VICE, Nussbaum Law Group, P.C., New York, NY; Mark Reinhardt, Reinhardt Wendorf & Blanchfield, St. Paul, MN; Mark A Wendorf, PRO HAC VICE, Reinhardt Wendorf & Blanchfield, E1250 First National Bank Bldg., St. Paul, MN; Matthew Dickinson Heaphy, Matthew Pearson, Michael H. Pearson, Neil J Swartzberg, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; RACHEL ELLEN KOPP, Richard **[*3]** Alexander Saveri, Roberta D. Liebenberg, Sarah Jane Van Culin, PRO HAC VICE, SPECTOR ROSEMAN & KODROFF, P.C., PHILADELPHIA, PA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Sharon S Almonrode, The Miller Law Firm, P.C., Rochester, MI; Thomas Jerome Nolan, PRO HAC VICE, Pearson, Simon & Warshaw, LLP, Sherman Oaks, CA.

For Daniel M. Percy, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Daniel J. Kurowski, Jeannie Y Evans, LEAD ATTORNEYS, Hagens Berman Sobol Shapiro LLP, Chicago, IL; John Barton Goplerud, LEAD ATTORNEY, PRO HAC VICE, Hudson Mallaney

Shindler & Anderson, P.c., West Des Moines, IA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Gloria J. Lathen, Jonas Dimas, Frank Coe, Lester Patterson, Dorothy Monahan, Pamela Tierney, Linda Cheslow, Natalie Wilbur, Plaintiffs: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, **[*4]** SIMON & WARSHAW, LLP, Sherman Oaks, CA; Daniel J. Kurowski, Jeannie Y Evans, LEAD ATTORNEYS, Hagens Berman Sobol Shapiro LLP, Chicago, IL; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For John Gross and Company, Inc., Plaintiff: Naveed Abaie, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steven Alan Hart, LEAD ATTORNEY, Hart McLaughlin & Eldridge, LLC, Chicago, IL; Alexander Dewitt Kullar, Allan Howard Steyer, D. Scott Macrae, PRO HAC VICE, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Bobby Pouya, Clifford Harris Pearson, Eric Jeffrey Mont, Matthew Pearson, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Devon Paul Allard, PRO HAC VICE, Douglas A Millen, The Miller Law Firm, P.C., Rochester, MI; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Jill M. Manning, **[*5]** PRO HAC VICE, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Franisco, CA; Kevin B Love, PRO HAC VICE, Criden & Love, P.A., South Miami, FL; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Michael Jerry Freed, Michael E. Moskovitz, Freed Kanner London & Millen, LLC, Bannockburn, IL; Neil J Swartzberg, PRO HAC VICE, Pearson Simon & Warshaw, LLP, San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; Rick A. Decker, Sarah Jane Van Culin, PRO HAC VICE, Robert J. Wozniak, The Miller Law Firm, P.C., Rochester, MI; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Simeon Andrew Morbey, Stephen M Owen, Steven A Kanner, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Veronica W Glaze, Pearson, Simon & Warshaw LLP, Sherman Oaks, CA.

For Fargo Stopping Center LLC, Sargent's, Plaintiffs: Adam J. Trott, Mark Francis Ram, Tamarah P Prevost, LEAD ATTORNEYS, Joseph M. Alioto, Jr., Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Adam John Zapala, LEAD ATTORNEY, Cotchett, Pitre & Mccarthy, Burlingame, CA; Alexander E. Barnett, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, LLP, New York, NY; Bobby Pouya, LEAD ATTORNEY, PRO **[*6]** HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Daniel E Gustafson, Daniel C Hedlund, LEAD ATTORNEYS, Brittany N. Resch, David A. Goodwin, Joshua J. Rissman, Michelle J. Looby, Gustafson Gluek PLLC, Minneapolis, MN; Joyce Chang, LEAD ATTORNEY, PRO HAC VICE, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Brian Douglas Penny, Penny, PRO HAC VICE, Goldman Scarlato & Penny, Eight Tower Bridge, Conshohocken, PA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Dianne M Nast, NastLaw LLC, Philadelphia, PA; Matthew Dickinson Heaphy, PRO HAC VICE, Kenneth A. Wexler, Melinda J. Morales, Wexler Boley & Elgersma LLP, Chicago, IL; Richard Michael Hagstrom, Hellmuth & Johnson, PLLC, Edina, MN; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Dorothy Monohan, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC **[*7]** VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Bodega Brew Pub, Inc., Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Timothy D Battin, LEAD ATTORNEY, PRO HAC VICE, Straus & Boies, LLP, Fairfax, VA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Christopher Le, Nathan Cihlar, PRO HAC VICE, Straus & Boies, LLP, Fairfax, VA; Daniel Zemans, Law Offices of Daniel Zemans, LLC, Chicago, IL; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Christopher G Glover, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Carl V. Malmstrom, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Fred T Isquith, Wolf Haldenstein Adler Freeman & Herz Llp, New York, NY; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Christopher Vallaro, **[*8]** Abraham Drucker, Ilana Harwayne-Gidansky, Sabrina Majernik, Christopher Nelson, Amy Veaner, Plaintiffs: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Carl V. Malmstrom, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Fred T Isquith, Wolf Haldenstein Adler Freeman & Herz Llp, New York, NY; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Barters International LLC, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Lisa M. Sriken, LEAD ATTORNEY, PRO HAC VICE, Bernstein Liebhard LLP, New York, NY; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; Shana Scarlett, PRO HAC VICE, Hagens **[*9]** Berman Sobol Shapiro LLP, Berkeley, CA; Steven Alan Hart, Hart McLaughlin & Eldridge, LLC, Chicago, IL.

For William E. Stack, Cheryl Brenchley, Matthew Hayward, Wayne Deshotel, Carmen Ocasio, Vern Gardner, Jonathan Glover, Margo Stack, Plaintiffs: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Terry Rose Saunders, The Saunders Law Firm, Chicago, IL.

For Cedar Farms Co., Inc., Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Thomas Cusack Cronin, Cronin & Co., Ltd., Chicago, **[*10]** IL; Steven Alan Hart, Hart McLaughlin & Eldridge, LLC, Chicago, IL.

For Ferraro Foods, Inc., Ferraro Foods of North Carolina, LLC, Plaintiffs: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Jessica Noel Servais, PRO HAC VICE, Vincent J Esades, Heins Mills & Olson, P.l.c., Minneapolis, MN; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Steven Alan Hart, Hart McLaughlin & Eldridge, LLC, Chicago, IL..

For Joe Christiana Food Distributors, Inc., Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Noah Axler, Axler **[*11]** Goldich Llc, Philidelphia, PA; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Steven Alan Hart, Hart McLaughlin & Eldridge, LLC, Chicago, IL.

For Sullott Corporation, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Kevin S Landau, PRO HAC VICE, Taus Cebulash & Landau LLP, New York, NY; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Tracy Newman, Marilyn Stangeland, Vern Peter Gardner, David Weidner, Alison Pauk, Leslie Weidner, Plaintiffs: Alison Deich, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington DC, DC; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Greenwood Village, CO; Louis Robert Katz, Zachary Ian Krowitz, LEAD ATTORNEYS, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, **[*12]** Fifth Floor, Washington, DC; Matthew W. Ruan, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, New York, NY; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Benjamin D. Brown, PRO HAC VICE, Kit A. Pierson, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Brent W. Johnson, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Daniel H. Silverman, Cohen Milstein Sellers & Toll, PLLC, Chicago, IL; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA..

For Jennifer Wallace, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; J Gerard Stranch, IV, PRO HAC VICE, Branstetter, Stranch & Jennings, PLLC, Nashville, TN; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC **[*13]** VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Christopher Gilbert, Plaintiff: Alison Deich, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington DC, DC; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Louis Robert Katz, Zachary Ian Krowitz, LEAD ATTORNEYS, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Fifth Floor, Washington, DC; Matthew W. Ruan, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, New York, NY; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Benjamin D. Brown, PRO HAC VICE, Kit A. Pierson, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Brent W. Johnson, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Christopher J. Cormier, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Greenwood Village, CO; Daniel H. Silverman, Cohen Milstein Sellers & Toll, PLLC, Chicago, IL; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Alpine **[*14]** Special Treatment Center, Inc., Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Robert J Gralewski, Jr., PRO HAC VICE, Kirby McInerney LLP, San Diego, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Indirect Purchaser Plaintiffs, Plaintiff: Adam John Zapala, LEAD ATTORNEY, Cotchett, Pitre & Mccarthy, Burlingame, CA; Randall Weill, LEAD ATTORNEY, PRO HAC VICE, Preti, Flaherty, Beliveau & Pachios, LLP, Portland, ME; Daniel C Hedlund, Gustafson Gluek PLLC, Minneapolis, MN.

For Piggly Wiggly Alabama Distributing Co., Inc., Plaintiff: Eric Richard Lifvendahl, LEAD ATTORNEY, L&G Law Group LLP, Chicago, IL; Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Matthew Powers McCahill, LEAD ATTORNEY, Kaplan Fox & Kilsheimer LLP, New York, NY; Matthew P. Mccahill, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer Llp, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer **[*15]** & Fox LLP, New York, NY; Solomon B Cera, LEAD ATTORNEY, Cera LLP, San Francisco, CA; Charles Andrew Dirksen, PRO HAC VICE, Cera LLP, Boston, MA; Richard Lyle Coffman, The Coffman Law Firm, Houston, TX.

For Affiliated Foods, Inc.'s Plaintiffs, Plaintiff: Charles Andrew Dirksen, LEAD ATTORNEY, Cera LLP, Boston, MA; Eric Richard Lifvendahl, LEAD ATTORNEY, L&G Law Group LLP, Chicago, IL; Jeffrey Philip Campisi, LEAD

ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Rick A. Decker, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, P.C., Rochester, MI; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY; Solomon B Cera, LEAD ATTORNEY, Cera LLP, San Francisco, CA.

Plaintiffs in 1: 16-cv-08637, Plaintiff, Pro se.

For Sysco Corporation, Plaintiff: Colleen Ann Harrison, LEAD ATTORNEY, PRO HAC VICE, Boies Schiller Flexner LLP, Hanover, NH; Jonathan M. Shaw, PRO HAC VICE, Boies, Schiller & Flexner Llp, Washington, DC; Ryan Thomas McAllister, Boies Schiller Flexner LLP, Albany, NY; Scott Gant, Boies Schiller Flexner LLP, Washington, DC.

For US Foods, Inc., Plaintiff: Colleen Ann Harrison, LEAD ATTORNEY, PRO HAC VICE, Boies Schiller Flexner LLP, Hanover, **[*16]** NH; Scott Gant, LEAD ATTORNEY, PRO HAC VICE, Boies Schiller Flexner LLP, Washington, DC; Daryl M. Schumacher, Kopecky Schumacher Rosenburg PC, Chicago, IL; Jonathan M. Shaw, PRO HAC VICE, Boies, Schiller & Flexner Llp, Washington, DC; Ryan Thomas McAllister, Boies Schiller Flexner LLP, Albany, NY.

For Piggly Wiggly Alabama Distributing Co., Inc., Plaintiff: Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY.

For End-User Consumer Plaintiffs, Plaintiff: Breanna LE Van Engelen, PRO HAC VICE, Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Rio Shaye Pierce, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Action Meat Distributors, Inc., Plaintiff: Eric Richard Lifvendahl, L&G Law Group LLP, Chicago, IL.

For Jetro Holdings. LLC, Plaintiff: Lawrence S. Brandman, LEAD ATTORNEY, PRO HAC VICE, Cadwalader Wickersham Taft LLP, New York, NY; Mark A. Singer, LEAD ATTORNEY, PRO HAC VICE, Boies Schiller Flexner LLP, Albany, NY; Philip J. Iovieno, LEAD ATTORNEY, PRO HAC VICE, Cadwalader Wickersham & Taft LLP, New York, NY; Anne M. Nardacci, Boies Schiller Flexner, **[*17]** Albany, NY; Nicholas A Gravante, Jr, Cadwalader Wickersham & Taft LLP, New York, NY; Terence H. Campbell, Cotsirilos, Tighe, Streicker, Poulos, & Campbell, Ltd., Chicago, IL.

For Hy-Vee, Inc., Plaintiff: Douglas H Patton, PRO HAC VICE, Samuel J. Randall, Kenny Nachwalter, P.A., Miami, FL; William J Blechman, Kenny, Nachwalter, Seymour, Arnold, Critchlow & Spector, P.A., Miami, FL.

For Associated Grocers of the South, Inc., Plaintiff: David P Germaine, Jeffrey Hoke Bergman, John Paul Bjork, Joseph Michael Vanek, Paul Ethan Slater, LEAD ATTORNEYS, Martin Amaro, Sperling & Slater, P.C., Chicago, IL; Phillip Frederick Cramer, LEAD ATTORNEY, Ryan Thomas Holt, Sherrard Roe Voigt & Harbison, Plc, Nashville, TN; Christina Rae Burgart Lopez, Sherrard Roe Voigt & Harbison, Nashville, TN.

For Meijer, Inc., Plaintiff: David P Germaine, Jeffrey Hoke Bergman, Joseph Michael Vanek, Paul Ethan Slater, LEAD ATTORNEYS, Martin Amaro, Sperling & Slater, P.C., Chicago, IL; Phillip Frederick Cramer, LEAD ATTORNEY, Ryan Thomas Holt, Sherrard Roe Voigt & Harbison, Plc, Nashville, TN; Christina Rae Burgart Lopez, Sherrard Roe Voigt & Harbison, Nashville, TN.

For Meijer Distribution, Inc., OSI Restaurant Partners, **[*18]** LLC, Publix Super Markets, Inc., Supervalu Inc., Wakefern Food Corporation, Plaintiffs: David P Germaine, Jeffrey Hoke Bergman, Joseph Michael Vanek, Paul Ethan Slater, LEAD ATTORNEYS, Sperling & Slater, P.C., Chicago, IL; Phillip Frederick Cramer, LEAD ATTORNEY, Sherrard Roe Voigt & Harbison, Plc, Nashville, TN; Christina Rae Burgart Lopez, Sherrard Roe Voigt & Harbison, Nashville, TN.

For Ahold Delhaize, Inc., Plaintiff: Christopher C Brewer, Hunton Andrews Kurth LLP, Washington, DC; Christopher J Dufek, LEAD ATTORNEY, PRO HAC VICE, Hunton Andrews Kurth, LLP, Washington, DC; Ryan Patrick Phair, LEAD ATTORNEY, Hunton Andrews Kurth, Washington, DC; Carter C. Simpson, Hunton Andrews Kurth LLP, Washington, DC; Craig Young Lee, Hunton Andrews Kurth, LLP, Washington, DC; Emily K Bolles, PRO HAC VICE, Neil Keith Gilman, Hunton Andrews Kurth LLP, Washington, DC; John S Martin, PRO HAC VICE, Hunton Andrews Kurth, Richmond, VA; Julie B. Porter, Salvatore Prescott Porter & Porter PLLC, Evanston, IL.

For KJ 2019 Holdings, LLC, Howard Samuels as Trustee in Bankruptcy for Central Grocers, Inc., et al., Plaintiff: Eric Richard Lifvendahl, L&G Law Group LLP, Chicago, IL.

For BJ's Wholesale Club Inc., **[*19]** Maximum Quality Foods, Inc., Darden Restaurants, Inc., Sherwood Food Distributors, LLC, Plaintiffs: Lawrence S. Brandman, LEAD ATTORNEY, PRO HAC VICE, Cadwalader Wickersham Taft LLP, New York, NY; Philip J. Iovieno, LEAD ATTORNEY, PRO HAC VICE, Cadwalader Wickersham & Taft LLP, New York, NY; Anne M. Nardacci, Boies Schiller Flexner, Albany, NY; Nicholas A Gravante, Jr, Cadwalader Wickersham & Taft LLP, New York, NY; Terence H. Campbell, Cotsirilos, Tighe, Streicker, Poulos, & Campbell, Ltd., Chicago, IL.

For Associated Wholesale Grocers, Inc., on behalf of itself and as assignee of Affiliated Foods Midwest Cooperative, Inc.'s claims, Plaintiff: Amy D. Fitts, LEAD ATTORNEY, Polsinelli PC, Kansas City, MO; Daniel D. Owen, LEAD ATTORNEY, PRO HAC VICE, Polsinelli, Kansas City, MO; Guillermo Gabriel Zorogastua, LEAD ATTORNEY, PRO HAC VICE, Polsinelli PC - 48th Street, Kansas City, MO; Rodney L. Lewis, Polsinelli PC, Chicago, IL.

For United Supermarkets, LLC, Krispy Krunchy Foods, LLC, Cheney Bros., Inc., Plaintiffs: Amanda R Jesteadt, David Bedford Esau, LEAD ATTORNEYS, Kristin Alexandra Gore, Stephen Alexander Cohen, Carlton Fields, P.A., West Palm Beach, FL; Roger Steven Kobert, LEAD ATTORNEY, **[*20]** Carlton Fields, P.a., New York, NY; Aaron Asa Holman, Carlton Fields, P.a., Orlando, FL; Garth Thomas Yearick, Carlton Fields, P.A., West Palm Beachh, FL; Keith M. Stolte, TottisLaw, Chicago, IL; Kevin Tottis, Monica L. Thompson, TottisLaw, Chicago, IL; Scott Lee Menger, Carlton Fields, LLP, LOS ANGELES, CA.

For Commercial and Institutional Indirect Purchaser Plaintiffs, Plaintiff: Christopher Clay Olson, 1: 16-, LEAD ATTORNEY, PRO HAC VICE, Harper Little PLLC, Charleston, SC; Elizabeth Quinby, Michael Smith, LEAD ATTORNEYS, PRO HAC VICE, Preti, Flaherty, Beliveau & Pachios, LLP, Portland, ME; Gregory P Hansel, LEAD ATTORNEY, Preti, Flaherty, Beliveau, Pachios & Haley, L.L.C., Portland, ME; James David Harper, LEAD ATTORNEY, PRO HAC VICE, Harper Little, PLLC, Oxford, MS; MICHAEL E JACOBS, LEAD ATTORNEY, PRO HAC VICE, HINKLE SHANOR LLP, SANTA FE, NM; Scott Patton Tift, LEAD ATTORNEY, PRO HAC VICE, Barrett Johnston Martin & Garrison, LLC, Nashville, TN; Gabrielle Sliwka, Randall Weill, PRO HAC VICE; Kara Anne Elgersma, Wexler Boley & Elgersma LLP, Chicago, IL; Kenneth A. Wexler, Melinda J. Morales, Wexler Boley & Elgersma LLP, Chicago, IL.

For Quirch Foods, LLC, f/k/a Quirch Foods Co., **[*21]** Plaintiff: Andrew Szot, Marvin Alan Miller, Matthew E Van Tine, Miller Law LLC, Chicago, IL.

For Hooters of America, LLC, Plaintiff: Amanda R Jesteadt, LEAD ATTORNEY, Stephen Alexander Cohen, Carlton Fields, P.A., West Palm Beach, FL; Roger Steven Kobert, LEAD ATTORNEY, Carlton Fields, P.a., New York, NY; Aaron Asa Holman, Carlton Fields, P.a., Orlando, FL; Garth Thomas Yearick, Carlton Fields, P.A., West Palm Beachh, FL; Keith M. Stolte, TottisLaw, Chicago, IL; Kevin Tottis, Monica L. Thompson, TottisLaw, Chicago, IL; Scott Lee Menger, Carlton Fields, LLP, LOS ANGELES, CA.

For Hooters of America, LLC, Plaintiff: Keith M. Stolte, TottisLaw, Chicago, IL; Kevin Tottis, Monica L. Thompson, TottisLaw, Chicago, IL; Kristin Alexandra Gore, Carlton Fields, P.A., West Palm Beach, FL.

Schnuck Markets, Inc., Plaintiff, Pro se.

For Checkers Drive-In Restaurants, Inc., Restaurants of America, Inc., LTP Management Group, Inc., Gibson, Greco & Wood, Ltd., Hooters Management Corporation, Anaheim Wings, LLC d/b/a Hooters of Anaheim, Gaslamp Wings, LLC previously d/b/a Hooters of San Diego, Mission Valley Wings, LLC d/b/a Hooters of Mission Valley, Oceanside Wings, LLC previously d/b/a Hooters of Oceanside, **[*22]** Plaintiffs: Roger Steven Kobert, LEAD ATTORNEY, Carlton Fields, P.a., New York, NY; Aaron Asa Holman, Carlton Fields, P.a., Orlando, FL; Garth Thomas Yearick, Carlton Fields, P.A., West Palm Beachh, FL; Keith M. Stolte, TottisLaw, Chicago, IL; Kevin Tottis, Monica L. Thompson, TottisLaw, Chicago, IL; Scott Lee Menger, Carlton Fields, LLP, LOS ANGELES, CA; Stephen Alexander Cohen, Kristin Alexandra Gore, Carlton Fields, P.A., West Palm Beach, FL.

For Direct Purchaser Plaintiffs, Plaintiff: Allan Howard Steyer, D. Scott Macrae, PRO HAC VICE, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Leona Bridget Ajavon, Lockridge Grindal Nauen, Pllp, Minneapolis, MN; Steven Ellis Serdikoff, Lockridge Grindal Nauen P.l.l.p., Minneapolis, MN.

For Unified Grocers, Inc., Associated Grocers of Florida, Inc., Plaintiffs: Jeffrey Hoke Bergman, John Paul Bjork, Joseph Michael Vanek, Paul Ethan Slater, LEAD ATTORNEYS, Martin Amaro, Sperling & Slater, P.C., Chicago, IL; Phillip Frederick Cramer, LEAD ATTORNEY, Ryan Thomas Holt, Sherrard Roe Voigt & Harbison, Plc, Nashville, TN; Christina Rae Burgart Lopez, Sherrard Roe Voigt & Harbison, Nashville, TN.

For Giant Eagle, Inc., Plaintiff: Brian **[*23]** Hill, Rachel Anne Beckman, LEAD ATTORNEYS, PRO HAC VICE, Marcus & Shapira LLP, Pittsburgh, PA; Bernard D Marcus, Erin Gibson Allen, Moira E. Cain-Mannix, PRO HAC VICE, Marcus & Shapira, L.L.P., Pittsburgh, PA.

For Bi-Lo Holdings, LLC, Plaintiff: Philip J. Iovieno, PRO HAC VICE, Cadwalader Wickersham & Taft LLP, New York, NY; Theodore Beloyeannis Bell, Ahern & Associates P.C., Chicago, IL.

For Walmart, Inc., Plaintiff: Neal S Manne, LEAD ATTORNEY, Susman Godfrey, LLP, Houston, TX; Ravi Bhalla, LEAD ATTORNEY, PRO HAC VICE, Susman Godfrey LLP, New York, NY; Shawn J. Rabin, LEAD ATTORNEY, Susman Godfrey L.L.P., New York, NY.

For Conagra Brands, Inc., Pinnacle Foods, Inc., Kraft Heinz Foods Company, Nestle, Inc., Nestle Purina Petcare Company, Plaintiffs: David C. Eddy, LEAD ATTORNEY, Dennis John Lynch, ***Antitrust Law*** Group, LLC, Columbia, SC; Rachael Cecelia Brennan Blackburn, Robert M. Andalman, A & G Law LLC, Chicago, IL.

For Services Group of America, Inc., Plaintiff: Becky Leigh Caruso, LEAD ATTORNEY, PRO HAC VICE, Greenberg Traurig, Florham Park, NJ; Dominic Emil Draye, PRO HAC VICE, Greenberg Traurig, LLP, Phoenix, AZ; Gregory J. Casas, PRO HAC VICE, Erik Weber, Greenberg Traurig, LLP, **[*24]** Austin, TX; John F. Gibbons, Thomas E. Dutton, Greenberg Traurig, LLP., Chicago, IL.

For WalMart, Inc., Plaintiff: Neal S Manne, LEAD ATTORNEY, Susman Godfrey, LLP, Houston, TX; Ravi Bhalla, PRO HAC VICE, Susman Godfrey LLP, New York, NY; Shawn J. Rabin, Susman Godfrey L.L.P., New York, NY.

For WAL-MART STORES EAST, LP, Wal-Mart Stores Arkansas, LLC, Wal-Mart Stores Texas, LLC, Wal-Mart Louisiana, LLC, Sam's West, Inc., Sam's East, Inc., Plaintiffs: Neal S Manne, LEAD ATTORNEY, Susman Godfrey, LLP, Houston, TX; Shawn J. Rabin, Susman Godfrey L.L.P., New York, NY.

For Costa Mesa Wings, LLC d/b/a Hooters of Costa Mesa, Ontario Wings, LLC d/b/a Hooters of Ontario, Hollywood Wings, LLC d/b/a Hooters of Hollywood, South Gate Wings, LLC d/b/a Hooters of South Gate, Wings Over Long Beach, LLC d/b/a Hooters of Long Beach, Bonita Plaza Wings, LLC d/b/a Hooters of Plaza Bonita, Downtown Wings, LLC previously d/b/a Hooters of Downtown LA, Plaintiffs: Amanda R Jesteadt, David Bedford Esau, LEAD ATTORNEYS, Kristin Alexandra Gore, Stephen Alexander Cohen, Carlton Fields, P.A., West Palm Beach, FL; Roger Steven Kobert, LEAD ATTORNEY, Carlton Fields, P.a., New York, NY; Aaron Asa Holman, Carlton Fields, **[*25]** P.a., Orlando, FL; Garth Thomas Yearick, Carlton Fields, P.A., West Palm Beachh, FL; Keith M. Stolte, TottisLaw, Chicago, IL; Kevin Tottis, Monica L. Thompson, TottisLaw, Chicago, IL; Scott Lee Menger, Carlton Fields, LLP, LOS ANGELES, CA; Stephen Alexander Cohen, Kristin Alexandra Gore, Carlton Fields, P.A., West Palm Beach, FL.

For PJ Food Service, Inc., Plaintiff: Lawrence S. Brandman, LEAD ATTORNEY, PRO HAC VICE, Cadwalader Wickersham Taft LLP, New York, NY; Philip J. Iovieno, LEAD ATTORNEY, PRO HAC VICE, Cadwalader Wickersham & Taft LLP, New York, NY; Anne M. Nardacci, Boies Schiller Flexner, Albany, NY; Nicholas A Gravante, Jr, Cadwalader Wickersham & Taft LLP, New York, NY.

For Sumner Country Restaurant and Creamery, LLC, Plaintiff: Marc H. Edelson, PRO HAC VICE, Edelson & Associates, LLC, Newtown, PA.

For Independent Purchasing Cooperative, Inc., Plaintiff: Marvin Alan Miller, Miller Law LLC, Chicago, IL.

For El Pollo Loco, Inc, Plaintiff: Andrew Peter Bleiman, Marks & Klein, Northbrook, IL; Lori P Lustrin, Robert W Turken, Scott N Wagner, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod, Miami, FL; Mark Ian Fishbein, Marks & Klein, LLP, Northbrook, IL.

For Boston Market Corporation, **[*26]** Barbeque Integrated, Inc., FIC Restaurants, Inc., The Johnny Rockets Group, Inc., Plaintiffs: Lori P Lustrin, LEAD ATTORNEY, Bilzin Sumberg Baena Price & Axelrod, Miami, FL.

Pacific Agri-Products, Inc., Plaintiff, Pro se.

For Bob Evans Farms, Inc., The Fresh Market, Inc., Wawa, Inc., Plaintiffs: Roger Steven Kobert, LEAD ATTORNEY, Carlton Fields, P.a., New York, NY; Aaron Asa Holman, Carlton Fields, P.a., Orlando, FL; Garth Thomas Yearick, Carlton Fields, P.A., West Palm Beachh, FL; Keith M. Stolte, TottisLaw, Chicago, IL; Kevin Tottis, Monica L. Thompson, TottisLaw, Chicago, IL; Scott Lee Menger, Carlton Fields, LLP, LOS ANGELES, CA.

For WZ Franchise Corporation, Plaintiff: David S. Almeida, LEAD ATTORNEY, Benesch Friedlander Coplan & Aronoff LLP, Chicago, IL; Lori P Lustrin, Robert W Turken, Scott N Wagner, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod, Miami, FL.

For Mookie's Southern Cuisine LLC, Plaintiff: Michael R Cashman, LEAD ATTORNEY, PRO HAC VICE, Hellmuth & Johnson, PLLC, Edina, MN; Anne T. Regan, Hellmuth & Johnson, Edina, MN; Nicholas Sophus Kuhlmann, PRO HAC VICE, Hellmuth & Johnson, PLLC, Edina, MN.

For Spartannash Company, Plaintiff: Eric Richard Lifvendahl, LEAD ATTORNEY; **[*27]** David Michael Woolf, Lowis & Gellen Llp, Chicago, IL.

For Brookshire Brothers, Inc., Plaintiff: David Michael Woolf, Lowis & Gellen Llp, Chicago, IL.

For Golden Corral Corporation, Plaintiff: Lori P Lustrin, Lori P Lustrin, Lori P Lustrin, Lori P Lustrin, Lori P Lustrin, LEAD ATTORNEYS.

For L. Hart, Inc., R & D Marketing, LLC, Timber Lake Foods, Inc., EMA Foods Co., LLC, Plaintiffs: Michael B Gratz, Jr, LEAD ATTORNEY, PRO HAC VICE, Gratz & Gratz, Tupelo, MS; Paul J Ripp, Williams Montgomery & John Ltd, Chicago, IL.

For Carl Buddig & Co., Inc., Plaintiff: Floyd A. Mandell, LEAD ATTORNEY, Katten Muchin Rosenman LLP, Chicago, IL; Mark T Ciani, LEAD ATTORNEY, PRO HAC VICE, Katten Muchin Rosenman LLP, New York, NY; Yonaton M. Rosenzweig, LEAD ATTORNEY, PRO HAC VICE, Katten Muchin Rosenman, LOS ANGELES, CA; Catherine Elizabeth O'brien, Katten Muchin Rosenman, Chicago, IL.

For Caesars Enterprise Services, LLC, Plaintiff: Floyd A. Mandell, LEAD ATTORNEY, Katten Muchin Rosenman LLP, Chicago, IL; Catherine Elizabeth O'brien, Katten Muchin Rosenman, Chicago, IL.

For BOJANGLES' RESTAURANTS, INC., Plaintiff: Lori P Lustrin, LEAD ATTORNEYS, Bilzin Sumberg Baena Price & Axelrod, Miami, FL.

For Pollo Operations, **[*28]** Inc., Plaintiff: William J Blechman, Seymour, Arnold, Critchlow & Spector, P.A., Miami, FL.

For McLane Company, Inc., Plaintiff: Kathryn A Reilly, LEAD ATTORNEY, Wheeler Trigg O'donnell Llp, Denver, CO; Sarah Lauren Jones, LEAD ATTORNEY, PRO HAC VICE, Boies Schiller & Flexner LLP, Washington, DC; Scott Gant, LEAD ATTORNEY; Colleen Ann Harrison, Jonathan M. Shaw, Ryan Thomas McAllister, Ryan Thomas McAllister, Scott Gant, Ryan Thomas McAllister, Scott Gant; Judith Pace Youngman, Wheeler Trigg O'donnell Llp, Denver, CO; Michael Roger Krantz, Nicole Jones, Wheeler Trigg O'donnell Llp, Denver, CO.

For Red Bird Farms Distribution Company, Plaintiff: Michael B Gratz, Jr, LEAD ATTORNEY, PRO HAC VICE, Gratz & Gratz, Tupelo, MS; Paul J Ripp, Williams Montgomery & John Ltd, Chicago, IL.

For Restaurant Services, Inc., Plaintiff: Keith M. Stolte, TottisLaw, Chicago, IL; Kevin Tottis, Monica L. Thompson, TottisLaw, Chicago, IL.

For Zaxby's Franchising LLC, Plaintiff: Lori P Lustrin, LEAD ATTORNEYS, Bilzin Sumberg Baena Price & Axelrod, Miami, FL.

For Cajun Operating Company d/b/a Church's Chicken, Sonic Industries Services Inc., Buffalo Wild Wings, Inc., Plaintiffs: Roger Steven Kobert, LEAD ATTORNEY, **[*29]** Carlton Fields, P.a., New York, NY; Aaron Asa Holman, Carlton Fields, P.a., Orlando, FL; Garth Thomas Yearick, Carlton Fields, P.A., West Palm Beachh, FL; Keith M. Stolte, TottisLaw, Chicago, IL; Kevin Tottis, Monica L. Thompson, TottisLaw, Chicago, IL; Scott Lee Menger, Carlton Fields, LLP, LOS ANGELES, CA.

For CKE Restaurants Holdings, Inc., Plaintiff: Roger Steven Kobert, LEAD ATTORNEY, Carlton Fields, P.a., New York, NY; Aaron Asa Holman, Carlton Fields, P.a., Orlando, FL; Amanda R Jesteadt, Carlton Fields, P.A., West Palm Beach, FL; Garth Thomas Yearick, Carlton Fields, P.A., West Palm Beachh, FL; Keith M. Stolte, TottisLaw, Chicago, IL; Kevin Tottis, Monica L. Thompson, TottisLaw, Chicago, IL; Scott Lee Menger, Carlton Fields, LLP, LOS ANGELES, CA.

Aramark Food and Support Services Group, Inc., Plaintiff, Pro se.

Panda Restaurant Group, Inc., Plaintiff, Pro se.

Quality Supply Chain Co-Op, Inc., Plaintiff, Pro se.

Wood-Fruitticher Grocery Company, Inc., Plaintiff, Pro se.

Poultry Products Company of New England, LLC, Plaintiff, Pro se.

Poultry Products Company, LLC, Plaintiff, Pro se.

Poultry Products of Connecticut, LLC, Plaintiff, Pro se.

Poultry Products of Maine, LLC, Plaintiff, Pro **[*30]** se.

McDonald's Coporation, Plaintiff, Pro se.

Domino's Pizza LLC, Plaintiff, Pro se.

Domino's Pizza Distribution LLC, Plaintiff, Pro se.

Gordon Food Service, Inc., Plaintiff, Pro se.

Glazier Foods Company, Plaintiff, Pro se.

Costco Warehouse, Plaintiff, Pro se.

For Patterson TMP Operating, LLC, Golden Tree Restaurants, LLC, Biscuitville Inc., Huddle House, Inc., Perkins LLC, Plaintiffs: Cindy Reichline, Keith Butler, Kevin Christopher Brantley, LEAD ATTORNEYS, PRO HAC VICE, BRS LLP, Los Angeles, CA.

For Costco Wholesale Corporation, Plaintiff: Philip J. Iovieno, LEAD ATTORNEY, Cadwalader Wickersham & Taft LLP, New York, NY.

For Sodexo, Inc. and Sodexo Operations, LLC, Plaintiff: Timothy Johnson Fazio, LEAD ATTORNEY, PRO HAC VICE, Hunton Andrews Kurth LLP, Boston, MA; Ryan Patrick Phair, Hunton Andrews Kurth, Washington, DC.

Certco, Inc., Plaintiff, Pro se.

Troyer Foods, Inc., Plaintiff, Pro se.

Weinstein Wholesale Meats, Inc., Plaintiff, Pro se.

Track 1 Plaintiffs, Plaintiff, Pro se.

For JCG Foods of Alabama, LLC, Defendant: Serena Georgette Rabie, Novack and Macey LLP, Chicago, IL; Stephen Novack, LEAD ATTORNEY, Andrew Dylan Campbell, Brian E. Cohen, Elizabeth Carlson Wolicki, Julie Ann Johnston-Ahlen, **[*31]** Marie Velinda Lim, Stephen J. Siegel, Novack and Macey LLP, Chicago, IL; Christopher E Thorsen, Baker, Donelson, Bearman, Caldwell & Berkowitz, Nashville, TN; Richard George Douglass, Douglass & Ladisch Douglass, P.C., Chicago, IL.

For JCG Foods of Georgia, LLC, Koch Meats Co., Inc., Defendants: Serena Georgette Rabie, LEAD ATTORNEY, PRO HAC VICE, Novack and Macey LLP, Chicago, IL; Stephen Novack, LEAD ATTORNEY, Andrew Dylan Campbell, Brian E. Cohen, Elizabeth Carlson Wolicki, Julie Ann Johnston-Ahlen, Marie Velinda Lim, Stephen J. Siegel, Novack and Macey LLP, Chicago, IL; Christopher E Thorsen, Baker, Donelson, Bearman, Caldwell & Berkowitz, Nashville, TN; Richard George Douglass, Douglass & Ladisch Douglass, P.C., Chicago, IL.

For Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Breeders, Inc., Tyson Poultry, Inc., Defendants: Carmel Rana Arikat, LEAD ATTORNEY, PRO HAC VICE, Axinn, Veltrop & Harkrider, Washington, DC; Denise Lynne Plunkett, Kail J. Jethmalani, Nicholas Gaglio, LEAD ATTORNEYS, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, New York, NY; John M. Tanski, LEAD ATTORNEY, Axinn, Veltrop & Harkrider LLP-HTFD, Hartford, CT; Rachel Johanna Adcox, LEAD ATTORNEY, Axinn, Washington, **[*32]** DC; Daniel K. Oakes, Kenina J Lee, Michael J O'Mara, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, Washington, DC; Jarod G. Taylor, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, Hartford, CT; Jordan Matthew Tank, Lipe Lyons Murphy Nahrstadt & Pontikis, Chicago, IL.

For Pilgrim's Pride Corporation, Defendant: Alli Genna Katzen, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, Miami, FL; Corey K Brady, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges LLP, Miami, FL; Daniel Alan Baquet, Drew Kenneth Cypher, Sandra Nicole Booth, LEAD ATTORNEYS, PRO HAC VICE, Weil, Gotshal & Manges LLP, Washington, DC; William Anthony Burck, LEAD ATTORNEY, Quinn Emanuel Urquhart & Sullivan Llp, Washington, DC; Brian Liegel, Pravin R. Patel, Weil Gotshal & Manges Llp, Miami, FL; Carrie C. Mahan, Christopher J. Abbott, PRO HAC VICE, Weil, Gotshal & Manges LLP, Washington, DC; Debra Dawn Bernstein, Quinn Emanuel Urquhart & Sullivan Llp, Atlanta, GA; Ethan Charles Glass, Quinn Emanuel Urquhart & Sullivan Llp, Washington, DC; Kathleen Lanigan, Quinn Emanuel Urquhart & Sullivan, Washington, DC; Michael Domenic Bonanno, Quinn Emanuel Urquhart & Sullivan Llp, Washington, DC; Michael L. McCluggage, Eimer Stahl **[*33]** LLP, Chicago, IL; Michelle Schmit, Quinn Emanuel Urquhart & Sullivan Llp, Chicago, IL; Rachel E. Crosswell, Weil, Gotshal & Manges Llp, New York, NY.

For Perdue Farms, Inc., Defendant: Andrew Thomas Hernacki, LEAD ATTORNEY, PRO HAC VICE, Venable LLP, Washington, DC; Danielle R Foley, Lisa Jose Fales, Mary M Gardner, Zakariya Koorosh Varshovi, PRO HAC VICE, James Douglas Baldridge, LEAD ATTORNEY, Venable LLP, Washington, DC; Benjamin P. Argyle, Leonard L. Gordon, PRO HAC VICE, Venable LLP, New York, NY; Kirstin Beth Ives, Falkenberg Ives LLP, Chicago, IL. For Sanderson Farms, Inc., Sanderson Farms, Inc. (Foods Division), Sanderson Farms, Inc. (Production Division), Sanderson Farms, Inc. (Processing Division), Defendants: Christa Cynthia Cottrell, Daniel E. Laytin, LEAD ATTORNEYS, Amelia H. Bailey, Anne Julie Esther Hudson, Jenna M. Stupar, Kate Guilfoyle, Martin L. Roth, Rachel B. Haig, Stephen M. Rees, Theresa N. Horan, Tucker Robert Hunter, Kirkland & Ellis LLP, Chicago, IL; Erin E. Murphy, LEAD ATTORNEY, PRO HAC VICE, Kirkalnd & Ellis, Washington, DC; Matthew D. Rowen, Sara Shaw Tatum, LEAD ATTORNEYS, PRO HAC VICE, Kirkland & Ellis LLP, Washington, DC; Paul D. Clement, LEAD ATTORNEY, **[*34]** Bancroft PLLC, Washington, DC; Jessica Jean Giulitto, Kirkland And Ellis Llp, Chicago, IL; Joseph Schroeder, Kirkland & Ellis Llp, Washington, DC.

For Wayne Farms, LLC, Defendant: Peter Duffy Doyle, LEAD ATTORNEY, Proskaver Rose, New York, NY; Scott Arthur Eggers, LEAD ATTORNEY, Proskauer Rose LLP (New York), Eleven Times Square, New York, NY; Christopher E Ondeck, Stephen R Chuk, PRO HAC VICE, Proskauer Rose LLP, Washington, DC; Marc Eric Rosenthal, Proskauer Rose LLP, Chicago, IL; Rucha A Desai, PRO HAC VICE, Proskauer Rose LLP, Eleven Times Square, New York, NY.

For Mountainaire Farms, Inc., Mountainaire Farms, LLC, Mountainaire Farms of Delaware, Inc., Defendants: John W. Treece, LEAD ATTORNEY, Chicago, IL; Lawrence Harris Heftman, LEAD ATTORNEY, Kevin James Whelan, Margaret A. Hickey, Schiff Hardin LLP, Chicago, IL; Adam Lee Hopkins, PRO HAC VICE, Rose Law Firm, Fayetteville, AR; Amanda K. Wofford, PRO HAC VICE, Rose Law Firm, Little Rock, AR; Bourgon Burnelle Reynolds, PRO HAC VICE, Rose Law Firm, P.A., Little Rock, AR; Kylie Sue Wood, Schiff Hardin, Chicago, IL; Robert J Wierenga, Suzanne L Wahl, Schiff Hardin Llp, Ann Arbor, MI.

For Peco Foods, Inc., Defendant: Boris Bershteyn, **[*35]** LEAD ATTORNEY, PRO HAC VICE, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Patrick Joseph Fitzgerald, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Chicago, IL; Gail E. Lee, Skadden, Arps, Slate, Meagher & Flom, Chicago, IL; Lara A Flath, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY.

For Foster Farms, LLC, Defendant: Oral Pottinger, William Stallings, PRO HAC VICE, Carmine R. Zarlenga, LEAD ATTORNEY, Mayer Brown LLP, Washington, DC; Stephen M. Medlock, LEAD ATTORNEY, PRO HAC VICE, Mayer Brown LLP, Washington, DC.

For House of Raeford Farms, Inc., Defendant: Gregory Gene Wrobel, LEAD ATTORNEY, Vedder Price P.C., Chicago, IL; Lori P. Jones, LEAD ATTORNEY, PRO HAC VICE, Jordan Price Wall Gray Jones & Carlton, PLLC, Raleigh, NC; Henry W. Jones, Junio, PRO HAC VICE, Jordan Price, Raleigh, NC.

For Simmons Foods, Inc., Defendant: Lynn Hagman Murray, Peter Francis O'Neill, LEAD ATTORNEYS, Riley C. Mendoza, Shook, Hardy & Bacon LLP, Chicago, IL; John R Elrod, Conner & Winters, LLP, Fayetteville, AK; Laurie A. Novion, Shook, Hardy & Bacon, Kansas City, MO; Vicki D Bronson, PRO HAC VICE, Conner & Winters, Fayetteville, AR.

For George's Inc., George's Farms, Inc., Defendants: **[*36]** Emily M. Asp, Kacie Jo Phillips, William L. Greene, LEAD ATTORNEYS, PRO HAC VICE, Stinson LLP, Minneapolis, MN; Lauren T. Fleming, LEAD ATTORNEY, PRO HAC VICE, Stinson LLP, Kansas City, MO; Gary V Weeks, K.C. Dupps Tucker, Kristy Elizabeth Boehler, PRO HAC VICE, The Law Group of Northwest Arkansas LLP, Fayetteville, AR; Jaclyn Niccole Warr, Stinson LLP, St. Louis, MO; John Conroy Martin, Sugar Felsenthal Grais and Helsinger LLP, Chicago, IL; Kevin Parker Kitchen, Peter Joseph Schwingler, PRO HAC VICE, Stinson LLP, Minneapolis, MN; Zachary H Hemenway, PRO HAC VICE, Stinson Leonard Street, Kansas City, MO.

For O.K. Foods, Inc., Defendant: Anna Forman, John P. Passarelli, LEAD ATTORNEYS, PRO HAC VICE, Kutak Rock LLP, Omaha, NE; Robin Stewart; J.R. Carroll, Jeffrey Michael Fletcher, Stephen Michael Dacus, PRO HAC VICE, Kutak Rock, LLP, Fayetteville, AR; James M. Sulentic, PRO HAC VICE, Kuak Rock LLP, Omaha, NE; Kimberly Michelle Hare, Kutak Rock Llp, Chicago, IL.

For O.K. Farms, Inc., O.K. Industries, Inc., Defendants: Anna Forman, John P. Passarelli, LEAD ATTORNEYS, PRO HAC VICE, Kutak Rock LLP, Omaha, NE; Robin Stewart, LEAD ATTORNEY, PRO HAC VICE; J.R. Carroll, Jeffrey Michael Fletcher, **[*37]** Stephen Michael Dacus, PRO HAC VICE, Kutak Rock, LLP, Fayetteville, AR; James M. Sulentic, PRO HAC VICE, Kuak Rock LLP, Omaha, NE; Kimberly Michelle Hare, Kutak Rock Llp, Chicago, IL.

For Harrison Poultry, Inc., Defendant: Dylan Wilson de Fouw, Kaitlin Ann Carreno, LEAD ATTORNEYS, PRO HAC VICE, Eversheds Sutherland, Atlanta, GA; Patricia Anne Gorham, LEAD ATTORNEY, PRO HAC VICE, Eversheds Sutherland (US) LLP, Atlanta, GA; James Robert McGibbon, Peter M. Szeremeta, PRO HAC VICE, Eversheds Sutherland (US) LLP, Atlanta, GA; Ronald David Balfour, Smithamundsen Llc, Chicago, IL.

For Agri Stats, Inc., Defendant: Olga Fleysh, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US LLP, Washington, DC; Jacob D Koering, Jeffrey Mark Drake, Miller, Canfield, Paddock and Stone, P.L.C., Chicago, IL; Justin Wade Bernick, Liam Edward Phibbs, PRO HAC VICE, William L Monts, III, Hogan Lovells US LLP, Washington, DC.

For Norman W. Fries, Inc., d/b/a Claxton Poultry Farms, Inc., Defendant: James Franklin Herbison, LEAD ATTORNEY, Michael P Mayer, Winston & Strawn LLP, Chicago, IL; Charles C. Murphy, Jr., PRO HAC VICE, Vaughan & Murphy, Atlanta, GA.

For Mar-Jac Poultry, LLC, Defendant: Edward C. Konieczny, LEAD ATTORNEY, **[*38]** Edward C. Konieczny LLC, Atlanta, GA; David C. Newman, Wm. Parker Sanders, PRO HAC VICE, Smith, Gambrell & Russell, LLP, Atlanta, GA; Pennington Philip John, PRO HAC VICE, Smith, Gambrell & Russell, LLP, Washington, DC.

For Perdue Foods LLC, Defendant: Mary M Gardner, PRO HAC VICE, James Douglas Baldridge, LEAD ATTORNEY, Zakariya Koorosh Varshovi, Venable LLP, Washington, DC; Benjamin P. Argyle, PRO HAC VICE, Venable LLP, New York, NY; Kirstin Beth Ives, Falkenberg Ives LLP, Chicago, IL.

For Foster Poultry Farms, Defendant: Carmine R. Zarlenga, Mayer Brown LLP, Washington, DC.

For Simmons Prepared Foods, Inc., Defendant: Lynn Hagman Murray, Peter Francis O'Neill, Riley C. Mendoza, Shook, Hardy & Bacon LLP, Chicago, IL; Vicki D Bronson, PRO HAC VICE, Conner & Winters, Fayetteville, AR.

For Amick Farms, LLC, Defendant: Steven Howard Gistenson, LEAD ATTORNEY, Dykema Gossett PLLc, Chicago, IL; Cody D. Rockey, Dykema Gossett PLLC, Ann Arbor, MI; Dante Andreas Stella, Dykema Gossett Pllc, Detroit, MI; Howard Bruce Iwrey, Dykema Gossett Pllc, Bloomfield Hills, MI.

For Mar-Jac Holdings, Inc., Defendant: Edward C. Konieczny, LEAD ATTORNEY, Edward C. Konieczny LLC, Atlanta, GA; James L. Thompson, **[*39]** Lynch Thompson, LLP, Chicago, IL.

For Rabobank, Defendant: David James Doyle, Freeborn & Peters, LLP, Chicago, IL; Jill Christine Anderson, Matthew Thomas Connelly, Freeborn & Peters, Chicago, IL.

For Rabobank Financial Corporation, Defendant: Andrew C. Nordahl, David James Doyle, Freeborn & Peters, LLP, Chicago, IL.

For Cooperatieve Rabobank U.A., N.Y. Branch, Defendant: Andrew C. Nordahl, David James Doyle, Freeborn & Peters, LLP, Chicago, IL; Jill Christine Anderson, Matthew Thomas Connelly, Freeborn & Peters, Chicago, IL.

For R.W. Zant Co., Respondent: Joshua Erik Bidzinski, LEAD ATTORNEY, Swanson, Martin & Bell, Llp, Chicago, IL; Shera D. Wiegler, LEAD ATTORNEY, Swanson, Martin & Bell, LLP, Ste 3300, Chicago, IL; deponent, The NPD Group, Inc, Service List, Patrick John Ahern, Rachael Cecelia Brennan Blackburn, Robert M. Andalman; David C. Eddy, Robert N. Kaplan, LEAD ATTORNEYS; Matthew P. Mccahill, LEAD ATTORNEY, PRO HAC VICE; Ryan Manion, LEAD ATTORNEY, L&g Law Group, Llp, Chicago, IL; Adam A Hachikian, Fox, Swibel, Levin & Carroll, LLP, Chicago, IL; Maura R. Grossman, PRO HAC VICE, Maura Grossman Law, Buffalo, NY.

For Gerber's Poultry, Inc., Movant: Charles B. Leuin, Benesch, Friedlander, **[*40]** Coplan & Aronoff LLP, Chicago, IL.

For Shamrock Foods Company, Movant: Andrew Peter Bleiman; Ilana Drescher, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod, Miami, FL; Lori P Lustrin, Robert W Turken, Scott N Wagner, PRO HAC VICE; Mark Ian Fishbein; Steven Christopher Moeller, Carpenter Lipps & Leland LLP, Chicago, IL.

For United Food Service, Inc., Movant: Colleen Ann Harrison, LEAD ATTORNEY, PRO HAC VICE; Andrew Peter Bleiman; Ilana Drescher, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod, Miami, FL; Joshua Goldberg, Carpenter Lipps & Leland LLP, Chicago, IL; Lori P Lustrin, Robert W Turken, Scott N Wagner, PRO HAC VICE; Mark Ian Fishbein.

For Porky Products, Inc., Movant: Edward Francis Malone, Barack Ferrazzano Kirschbaum & Nagelberg LLP, Chicago, IL; JORDAN DEREK WEINREICH, PRO HAC VICE, Sherman Wells Sylvester & Stamelman LLP, Florham Park, NJ.

For Quirch Foods, LLC, f/k/a Quirch Foods Co., Movant: Carlos Juan Canino, LEAD ATTORNEY, PRO HAC VICE, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, FL; Abigail Grieco Corbett, Jay Brian Shapiro, Samuel Olds Patmore, PRO HAC VICE, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, FL.

For Jayson Penn, **[*41]** Movant: Kevin Buckley Duff, Rachlis Duff & Peel, LLC, Chicago, IL.

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For Jayson Penn, Intervenor: Michael F Tubach, LEAD ATTORNEY, PRO HAC VICE, O'Melveny & Myers LLP, San Francisco, CA.

For Timothy Stiller, Intervenor: Kristen Michelle Frost, LEAD ATTORNEY, Ridley, McGreevy & Winocur, Denver, CO; Patrick Ridley, LEAD ATTORNEY, PRO HAC VICE, Ridley McGreevy & Winocur PC, Denver, CO; William P. Murphy, William P. Murphy & Associates, Chicago, IL.

Judges: Jeffrey T. Gilbert, United States Magistrate Judge.

Opinion by: Jeffrey T. Gilbert

Opinion

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Direct Action Plaintiffs Bojangles' Restaurants, Inc.'s and Bojangles OPCO, LLC's Motion to Compel 30(b)(6) Deposition of Cheney [ECF **[*42]** No. 4932]. For the reasons set forth below, the Motion is denied.

FACTUAL BACKGROUND

Bojangles Restaurants, Inc. and Bojangles OPCO, LLC (together, "Bojangles DAPs") and Cheney Bros., Inc. ("Cheney") are direct action plaintiffs ("DAPs") that opted out of one of the class actions that are part of this *In re Broiler Chicken Antitrust Litigation*, which has been pending in this District since September 2016. Cheney along with other DAPs filed a complaint against Defendants Tyson Foods, Inc., *et al.*, Case No. 1:18-cv-06693, on October 3, 2018, which case was reassigned to this docket on October 16, 2018. [ECF No. 1286]. After Cheney's lawsuit had been pending for over two years, Bojangles DAPs filed their own opt out complaint against Defendants Tyson Foods, Inc., *et al.*, Case No. 1:20-cv-07734, which was reassigned to this docket on December 28, 2020. [ECF Nos. 4120-1, 4126].

After Bojangles DAPs filed their complaint, they say they learned, presumably in late 2020 or early 2021, that Cheney already had asserted a claim for damages arising from purchases of Broiler chickens that allegedly included some of the same purchases of Broiler chickens that underlie Bojangles DAPs' claim. Specifically, **[*43]** Bojangles DAPs assert that Cheney included within its damage claim purchases of proprietary Broiler products that Bojangles DAPs' distributor, Pate Dawson (which had been acquired by Cheney in 2016), had made on behalf of the Bojangles DAPs during the relevant period.

To better understand the basis for Cheney's damage claim, Bojangles DAPs served Cheney with a *Rule 45* subpoena to produce documents on January 27, 2021, followed by a second *Rule 45* subpoena to produce documents on February 10, 2021. Cheney served objections and responses to those subpoenas but also produced responsive documents on February 26, 2021, and March 19, 2021. Bojangles DAPs did not pursue any further discovery from Cheney for nearly four months. Then, on July 14, 2021, more than one month after the applicable June 11, 2021, fact discovery deadline in the *In re Broiler Chickens Antitrust Litigations* case,[1] Bojangles DAPs sent Cheney a Notice of *Rule 30(b)(6)* Deposition via e-mail to Cheney's counsel seeking the deposition of a Cheney corporate witness. *See* Notice of Deposition [ECF No. 4993], at Exhibit C. Cheney objects to the requested deposition on several grounds. The Court will address each argument in turn.

DISCUSSION

I.

Cheney first **[*44]** contends the Bojangles DAPs' notice of deposition is procedurally defective because Cheney is not a party to Bojangles DAPs' lawsuit against the Tyson Defendants, *et al.* Cheney says that Bojangles DAPs should have served a *Rule 45* subpoena for the *Rule 30(b)(6)* deposition just like they did when they served *Rule 45* subpoenas for the documents they previously requested from Cheney. Since Bojangles DAPs did not serve

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[1] *See* Scheduling Order No. 15 [ECF No. 4641] (entered on May 13, 2021); and Scheduling Order No. 16 [ECF No. 4748] (entered on June 17, 2021).

Cheney with a subpoena, Cheney argues that the Bojangles DAPs' motion to compel is procedurally improper and should be denied.

Despite having previously served two third-party subpoenas for documents on Cheney, Bojangles DAPs argue that they did not need to serve a *Rule 45* subpoena for Cheney's *Rule 30(b)(6)* deposition because Cheney is "not a 'third party' to this case." Bojangles DAPs' Memorandum of Law [ECF No. 4933], at 4. Nevertheless, on July 27, 2021, during a meet and confer regarding this issue, counsel for Bojangles DAPs offered to serve a *Rule 45* subpoena if that would resolve Cheney's objection to the deposition. Cheney said that even if Bojangles DAPs would have served a *Rule 45* subpoena, it still would argue that the subpoena was untimely and Bojangles DAPs had not shown good cause to take the deposition. Bojangles did **[*45]** not serve a subpoena, but instead filed this motion to compel a *Rule 30(b)(6)* deposition of Cheney.

As a threshold matter, the Court agrees with Cheney that Bojangles DAPs were required to serve a subpoena to take a *Rule 30(b)(6)* deposition of a Cheney corporate representative absent Cheney's agreement to appear voluntarily for such a deposition. It is well-settled law that a party cannot compel the presence of a non-party at a deposition without serving a subpoena. *See* *Bueker v. Atchison, Topeka and Santa Fe Ry. Co., 175 F.R.D. 291, 292 (N.D. Ill. 1997)*; *Metzger ex rel. Anderson v. Francis W. Parker School, 2001 U.S. Dist. LEXIS 12492, 2001 WL 910443, at *3 (N.D. Ill. Aug. 10, 2001)* (holding that "when a party wants a non-party to testify at a deposition or to produce documents, *Rule 45* requires a subpoena and permits the non-party the opportunity to object"); *see also* 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2452 (3d ed. 2021) (stating that "a subpoena is necessary to compel someone who is not a party to appear for the taking of a deposition").

Cheney and the Bojangles' parties each filed separate lawsuits, and their individual cases have been reassigned to this *In re Broiler Chicken Antitrust Litigation* docket because they are related to other such cases that have been filed. Bojangles DAPs and Cheney have no pending claims against each other, and they asserted their own claims against various **[*46]** Defendants in separate complaints after they opted out of the direct purchaser class action.[2] Cheney's position is simple—a subpoena is required because Cheney is not a party to the Bojangles DAPs' individual case even though both Cheney and Bojangles DAPs are plaintiffs in the *In re Broiler Chicken Antitrust Litigation*. The Court agrees. Bojangles DAPs' prior service on Cheney of two *Rule 45* subpoenas for documents confirms their acknowledgement that Cheney is a third-party to Bojangles DAPs' individual case. The Court is not persuaded by Bojangles DAPs' argument to the contrary. Bojangles DAPs' motion to compel, therefore, could be denied on this ground alone, but the Court will address the remaining arguments made by the parties.

II.

Cheney next argues that Bojangles DAPs' notice of deposition and their motion to compel are untimely under Scheduling Order No. 16. *See* Scheduling Order No. 15 [ECF No. 4641] (entered on May 13, 2021) and Scheduling Order No. 16 [ECF No. 4748] (entered on June 17, 2021). The Court agrees with Cheney that Bojangles DAPs' notice of deposition and their subsequent motion to compel are untimely. Bojangles DAPs did not serve Cheney with a notice of a *Rule 30(b)(6)* deposition **[*47]** until July 14, 2021, more than one month after the June 11, 2021 fact discovery deadline in this case. The Court had extended fact discovery to July 30, 2021, solely to allow parties to complete discovery that already had been served or was then at-issue as the fact discovery close date was fast

[2] Although the all the DAPs in this case, at the Court's instance [ECF Nos. 3653, 3700], have filed an omnibus complaint that accumulates in one place the factual allegations and legal claims being made by more than 150 DAPs in their individual complaints, they have maintained the independent legal existence of their individual cases. *See* Direct Action Plaintiffs' Amended Consolidated Complaint and Demand for Jury Trial [ECF No. 4244], at 2 (stating "DAPs understand the Court's orders to preserve the independent legal existence of each DAP case").

approaching. That "extension" was not an invitation to serve new discovery that could have been served timely during the period allowed for fact discovery.[3]

Generally, a deadline is a deadline. It is not a suggestion to be taken lightly or complied with only as a matter of choice.[4] Bojangles DAPs do not offer any reasonable explanation for their lack of diligence in pursuing the Cheney deposition during the period when deposition discovery was to take place within the confines of the Court's Scheduling Orders. Bojangles DAPs served timely *Rule 45* subpoenas on Cheney earlier in the discovery period. Bojangles DAPs should have raised the issue of a Cheney *Rule 30(b)(6)* deposition months before they did so, and their desire to take that deposition now, and to compel it in the eleventh hour, comes too late.

III.

Finally, putting aside the procedural defects of an untimely notice of deposition, the Court also **[*48]** finds Bojangles DAPs have not shown that the discovery they are seeking is relevant or proportional to the needs of their case within the meaning of *Federal Rule of Civil Procedure 26((b)(1)*. Bojangles DAPs do not need the information they are seeking to support their affirmative claim for relief alleged in their complaint. If they need the information at all, it would be to respond to a Defendant's potential argument that Bojangles DAPs do not own the claim they are asserting. As far as the Court can tell, however, no Defendant has made that argument as of now. A potential dispute between Bojangles DAPs and Cheney as to who is the rightful owner of certain claims for damages they have asserted in their individual cases is not part of this case at this time.[5]

Therefore, in the Court's view, the discovery Bojangles DAPs are seeking is not relevant to a claim or defense in their case or, importantly, proportional to the needs of that case at this time within the meaning of *Federal Rule of Civil Procedure 26(b)(1)*. If the information Bojangles DAPs are seeking becomes relevant to a claim or defense in the future, and discovery of that information is proportional to the needs of the case at that time, the Court can address the issue in that context.

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[3] The parties have taken almost 400 depositions in this case. *See* Tyson Defendants' Opposition to Aldi's Motion to Compel Individualized Discovery [ECF No. 4865], at 2. As the Court made clear during a May 24, 2021 hearing when it extended the fact discovery close date to July 30, 2021 to allow the parties to complete discovery that was then in progress and had been timely served or noticed, the extension of the fact discovery close date was not intended to give anyone free rein to serve new discovery. *See* May 24, 2021 Hearing Transcript [ECF No. 4814], at 20; 21-22 ("I would extend fact discovery to July 30th for the taking of depositions and for the completion of discovery timely served."). Although the Court noted that depositions could be taken during that time, the Court did not necessarily mean that depositions that had not yet been noticed would be allowed.

[4] In *McCann v. Cullinan, 2015 U.S. Dist. LEXIS 91362, 2015 WL 4254226 (N.D. Ill. July 14, 2015)*, Judge Johnston recognized the importance of deadlines that are set by the court and concluded that "[c]ounsel must calendar and meet dates. And if counsel is going to miss a deadline, then counsel should file a motion seeking an extension *before* the deadline has passed." *2015 U.S. Dist. LEXIS 91362, [WL] at *2* (citing cases). In *Hard Surface Sols., Inc. v. Sherwin-Williams Co., 271 F.R.D. 612 (N.D. Ill. 2010)*, Judge Cole noted "[u]nder the Federal Rules of Civil Procedure, it is the court's prerogative-indeed, its duty-to manage its caseload and to set and enforce discovery and other significant deadlines.... A party does not have the option of complying with those deadlines or ignoring them and then demanding that the court and the opposing party restructure the discovery schedule to accommodate the violation." *Id. at 617* (citing *Reales v. CONRAIL, 84 F.3d 993, 996 (7th Cir. 1996)*).

[5] The word "Cheney," for example, does not appear in Bojangles' original complaint [ECF No. 4120-1] or in its amended complaint [ECF No. 4347]. A footnote in paragraph 61 of the Direct Action Plaintiffs' Amended Consolidated Complaint and Demand for Jury Trial does reference the existence of a dispute between Bojangles and Cheney as to the proper party to assert claims arising from Bojangles' purchases of Broiler chickens through its distributor, Pate Dawson, which Cheney acquired in 2016. The footnote then says, "Bojangles reserves all of its rights on this issue." [ECF Nos. 4243, 4244], at 67-68, ¶ 61, n.5. In their Consolidated Answer, Defendants do not respond to the Bojangles DAPs' statement in footnote 5 of the Consolidated Complaint about its dispute with Cheney, presumably because no response was required. Defendants' Consolidated Answer and Affirmative Defenses to Direct Action Plaintiffs' Amended And Consolidated Complaint [ECF No. 4417], at 77-78, ¶ 61.

CONCLUSION

Accordingly, **[*49]** for all these reasons, Bojangles' Restaurants, Inc. and Bojangles OPCO, LLC's Motion to Compel 30(b)(6) Deposition of Cheney [ECF No. 4932] is denied.

It is so ordered.

Dated: February 16, 2022

/s/ Jeffrey T. Gilbert

Jeffrey T. Gilbert

United States Magistrate Judge

Snow v. Align Tech., Inc.

United States District Court for the Northern District of California

February 16, 2022, Decided; February 16, 2022, Filed

Case No. 21-cv-03269-VC

Reporter
586 F. Supp. 3d 972 *; 2022 U.S. Dist. LEXIS 205708 **

MISTY SNOW, et al., Plaintiffs, v. ALIGN TECHNOLOGY, INC., Defendant.

Prior History: Snow v. Align Tech., Inc., 2022 U.S. Dist. LEXIS 28169 (N.D. Cal., Feb. 16, 2022)

Core Terms

Align, dentists, patents, plaintiffs', consumers, dentist-directed, motion to dismiss, interoperability, cooperative, Cartwright Act, direct-to-consumer, allegations, termination, compete, reasonably necessary, infringement, scanner, selling, procompetitive, ancillary, naked, anti trust law, rule of reason, horizontal, concerted, covenant, customer

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For Wendy Rowland, Venus Alderman, Dana Bozian, Adelaide Liedl, Marjorie Sandner, Emily Vo, Kelley Stevens, Katie Campbell, Cecelia Garay, Elisabeth Skibba, Celeste Hamilton, Stephanie Rickenbaker, Angela Carnaghi, Cindy Ellis, Jennifer Ezzio, Plaintiffs: Rio S. Pierce, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Align Technology, Inc., Defendant: James Pearl, LEAD ATTORNEY, Paul Hastings LLP, Los Angeles, CA; Abigail Heather Wald, Thomas A. Counts, Paul Hastings LLP, San Francisco, CA; Michael C Whalen, PRO HAC VICE, Adam Michael Reich, Paul Hastings LLP, Chicago, IL; Michael F Murray, Noah Pinegar, PRO HAC VICE, Paul Hastings LLP, Washington, DC; Steven Arthur Marenberg, Paul Hastings, Litigation, Los Angeles, CA.

For SmileDirectClub, LLC, SDC Financial, LLC, Interested Parties: Kendall Erin Waters, LEAD ATTORNEY, Foley & Lardner LLP, CA, Los Angeles, CA.

Judges: VINCE CHHABRIA, United **[**2]** States District Judge.

Opinion by: VINCE CHHABRIA

Opinion

[*976] ORDER DENYING IN PART AND GRANTING IN PART MOTION TO DISMISS

Re: Dkt. No. 65

The plaintiffs are consumers who purchased clear dental aligners to straighten their teeth. The bulk of the plaintiffs' allegations concern Align's alleged monopolization of the market for aligners sold to consumers through dentists.

These allegations mirror those that survived a motion to dismiss in a related suit brought by dentists. *See* *Simon & Simon, PC v. Align Technology, Inc., 533 F. Supp. 3d 904 (N.D. Cal. 2021)*. But the plaintiffs have tacked on a set of tangentially related allegations concerning agreements between Align and SmileDirectClub, an emerging competitor that sells aligners directly to consumers, rather than through dentists. The plaintiffs allege that Align and SmileDirectClub entered into a set of agreements in which Align agreed not to compete in the direct-to-consumer market, and SmileDirectClub agreed not to compete in the dentist-directed market.

Align has moved to dismiss the complaint in its entirety. This ruling discusses the new allegations concerning SmileDirectClub. Because the plaintiffs have plausibly alleged that Align's agreement not to compete in the direct-to-consumer market was a naked restraint on trade, the plaintiffs' **[**3]** *Section 1* claim survives. But because the reverse restraint—SmileDirectClub's commitment not to compete in the dentist-directed market—was not anticompetitive, some of the plaintiffs' state law claims must be dismissed. The remainder of Align's motion to dismiss is addressed in an accompanying order.

I

Align has dominated the aligner market for decades through its business model of selling its aligners (called Invisalign) through dentists.[1] But in 2014, SmileDirectClub entered the scene with a new approach: selling aligners directly to consumers. People could either go to a physical store (called "SmileShops") for an intraoral scan or use an at-home kit. Scans would then be sent to a SmileDirectClub dentist or orthodontist who would confirm that the treatment plan was simple enough for SmileDirectClub's services. If so, the consumer would be approved for treatment.

The beauty of SmileDirectClub's service is that it cuts out the middleman: "A customer using SmileDirectClub could conceivably go through the entire process of straightening their teeth without ever once having met with an orthodontist." There are limits to this approach, as SmileDirectClub can only handle minor cosmetic changes. **[**4]** For this reason, there is little **[*977]** overlap between the markets for aligners sold through dentists and those sold directly to consumers (at least as alleged in the complaint). Still, the emergence of a (cheaper) direct-to-consumer option gave Align reason to worry. Why go to the dentist if you can straighten your teeth from the comfort of your own home?

But Align had something that SmileDirectClub did not: patents. In 2015, Align filed a patent infringement lawsuit against SmileDirectClub, alleging that SmileDirectClub infringed fourteen Align patents related to the manufacture and sale of clear aligners. The lawsuit settled. In a pair of agreements (the "Supply Agreement" and "Operating Agreement"), Align and SmileDirectClub constructed a deal whereby SmileDirectClub could continue selling aligners directly to consumers with Align's blessing—subject to certain conditions.

In the Supply Agreement, Align agreed to supply aligners to SmileDirectClub. In exchange, SmileDirectClub promised to refer any patients who did not qualify for its services to Align. As part of the Operating Agreement, Align purchased a 17% stake in SmileDirectClub for $46.7 million. The agreements contained mirror restrictive **[**5]** covenants: SmileDirectClub agreed not to enter the dentist-directed market and Align agreed not to sell aligners directly to consumers.[2]

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[1] Unless otherwise noted, the facts described in this section come from the well-pleaded allegations in the complaint. As is required at this early stage, all inferences are drawn in favor of the plaintiff. *See* *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

[2] Align disputes this characterization, arguing that the agreements do not limit SmileDirectClub's ability to sell aligners through dentists. While Align may have the better reading of the contracts, the plaintiffs' reading is plausible. Drawing all inferences in the plaintiffs' favor, as must be done at this stage, the Court accepts the plaintiffs' interpretation for the purposes of this motion. *See* *Twombly, 550 U.S. at 555-56*.

According to the complaint, the "overall effect" of these covenants was to "allocate the two product submarkets" between Align and SmileDirectClub, in direct defiance of the antitrust laws. The plaintiffs argue that the restraint on Align's ability to enter the direct-to-consumer market constitutes a per se violation of *Section 1 of the Sherman Act*. As for the restraint on SmileDirectClub, the plaintiffs argue that it contributes to Align's unlawful monopolization of the dentist-directed market, recognized under *Section 2*.

II

The plaintiffs' *Section 1* claim stands apart from their other allegations. While most of the plaintiffs' claims concern harm to the dentist-directed market, the *Section 1* claim—brought on behalf of a class of consumers who purchased aligners from SmileDirectClub—alleges harm to the direct-to-consumer market.

A

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade." *15 U.S.C. § 1*. Despite the categorical language of this provision, the Supreme Court has interpreted this text "to outlaw only unreasonable restraints." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. Under Section 1, agreements in restraint of trade **[**6]** are evaluated under two standards. Some restraints are subject to the rule of reason, a "fact-specific assessment of 'market power and market structure'" to determine the restraint's "'actual effect' on competition." *Ohio v. American Express Co., 138 S. Ct. 2274, 2284, 201 L. Ed. 2d 678 (2018)* (quoting *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*). But other types of agreements are "conclusively presumed to be unreasonable" due to their "pernicious effect on competition **[*978]** and lack of any redeeming virtue." *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. This class of agreements—which includes horizontal price fixing and market allocation—is deemed illegal per se. *See* *Copperweld Corp., 467 U.S. at 768*; *American Express, 138 S. Ct. at 2283-84*.

The class of restraints that is illegal per se has been narrowed further. "[T]he *per se* rule is designed for 'naked' restraints rather than agreements that facilitate productive activity." *Polk Brothers, Inc. v. Forest City Enterprises, Inc., 776 F.2d 185, 188 (7th Cir. 1985)*. When a procompetitive agreement contains some anticompetitive elements, a court must determine whether the restrictions on competition are "naked" or "ancillary." *Id. at 188-89*. For example, "[i]f two people meet one day and decide not to compete, the restraint is 'naked'; it does nothing but suppress competition." *Id. at 189*. On the other hand, "[i]f A hires B as a salesman and passes customer lists to B, then B's reciprocal covenant not to compete with A is 'ancillary.'" *Id.* In this latter world, the agreement between **[**7]** A and B expands output by "putting B to work." *Id.* The covenant not to compete, which would be reasonably necessary to induce A to contract with B, is therefore not automatically problematic under the antitrust laws. Therefore, while naked restraints are unlawful per se, ancillary restraints are evaluated under the rule of reason. *See* *Aya Healthcare Services, Inc. v. AMN Healthcare, Inc., 9 F.4th 1102, 1109 (9th Cir. 2021)*.

The threshold question of whether an agreement is naked or ancillary has two parts. First, to be ancillary, the restraint must be "subordinate and collateral to a separate, legitimate" (that is, procompetitive) transaction. *Id.* (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 224, 253 U.S. App. D.C. 142 (D.C. Cir. 1986)*). Second, the restraint must be "'reasonably necessary' to achiev[e] that transaction's pro-competitive purpose." *Id.* (quoting *United States v. Addyston Pipe & Steel Co., 85 F. 271, 281 (6th Cir. 1898)*, *aff'd*, *175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 (1899)*).

B

To begin, Align argues that its agreement with SmileDirectClub should be understood as a vertical restraint—a restraint "imposed by agreement between firms at different levels of distribution." *Business Electronics Corp. v.*

Sharp Electronics Corp., 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988). Align wants to characterize its agreement this way because, unlike horizontal restraints, vertical restraints are presumptively subject to the rule of reason. *See* American Express, 138 S. Ct. at 2284.

But as alleged in the complaint, Align and SmileDirectClub were potential competitors, both in the market for dentist-directed **[**8]** aligners and the market for direct-to-consumer aligners. Moreover, the plaintiffs highlight a few instances in which this potential competition edged into the actual—for example, when Align attempted to open its own brick-and-mortar shop, only to be sued by SmileDirectClub and enjoined by an arbitrator enforcing Align's agreement not to compete. This is sufficient to put the agreements in the "horizontal" category. As the Supreme Court has recognized, a market division agreement between potential competitors constitutes a horizontal restraint on trade. *See* Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990).

C

The thrust of the agreement between Align and SmileDirectClub was to **[*979]** permit SmileDirectClub to sell aligners, despite Align's patents.[3] This agreement had serious benefits to consumers. Assuming (as the complaint seems to) that Align's patents were valid and legitimately infringed by SmileDirectClub, SmileDirectClub would not have been able to sell *any* aligners without Align's permission. This is a consequence of the lawful monopoly that a product patent confers on a patentholder. *See* 35 U.S.C. § 154(a)(1) (granting patentholders "the right to exclude others from making, using, offering for sale, or selling" the covered product). The arrangement therefore **[**9]** had the potential to greatly increase output, as a new crop of consumers would have the ability to purchase aligners. The challenged restraint on trade is thus but one collateral aspect of a broader, procompetitive agreement.

The more challenging issue is whether the restraint on Align's ability to enter the direct-to-consumer market was "reasonably necessary" to the parties' procompetitive collaboration. The "reasonably necessary" test asks whether this cooperation would have been possible absent the challenged restraint. *See* Aya Healthcare, 9 F.4th at 1110; Polk Brothers, 776 F.2d at 190. This is an inherently fact-specific inquiry that is difficult to determine with certainty at the motion to dismiss stage. *See* In re Juul Labs, Inc., 555 F. Supp. 3d 932, 2021 WL 3675208, at *19 (N.D. Cal. 2021). But at this juncture, the question is whether the plaintiffs have plausibly alleged that the parties would have entered into the cooperative agreement absent this restriction.

The plaintiffs' story goes something like this. Faced with SmileDirectClub's burgeoning competition, Align had two options: shut it down or join forces. Align opted for the latter, crafting the deal in its favor in three ways. First, Align received a new stream of income from SmileDirectClub's purchases of its aligners through the Supply Agreement. Second, Align **[**10]** received referrals from SmileDirectClub, increasing its customer base. And third, Align gave SmileDirectClub a monopoly over the direct-to-consumer market, but took a cut of the monopoly profits through its newly acquired ownership interest in SmileDirectClub. In the plaintiffs' telling, the first two advantages were sufficient to induce Align to collaborate. The third was merely icing on the cake.

Whether the allegations in the complaint adequately support this story—as opposed to being "merely consistent with" it—is a close question, because alternative explanations for Align's conduct are available. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). For example, Align suggests that its investment in SmileDirectClub was not for the purpose of splitting monopoly profits, but to protect its cooperative enterprise. If SmileDirectClub went under, Align would lose the benefits of the deal—its new income stream and potential referrals. In Align's version of the story, the Operating Agreement was a necessary aspect of the broader cooperative arrangement as it increased the likelihood that SmileDirectClub would be around long enough to benefit Align.

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[3] The fact that Align and SmileDirectClub structured this deal through two contracts, as opposed to one, does not impact the analysis, as antitrust liability does not hinge on such formalities. The challenged restraint must be considered in the context of the agreement as a whole.

But this story is not fully satisfying either. For one thing, nothing in the complaint suggests **[**11]** that SmileDirectClub was **[*980]** short on cash. It would therefore be inappropriate to make this inference against the plaintiffs at this stage of the proceedings. And the plaintiffs' story is consistent with the underlying power dynamics between Align and SmileDirectClub. Consider it this way: When Align sued SmileDirectClub for patent infringement, Align held all the cards. If it wanted to, it could prevent SmileDirectClub from selling any aligners, to anyone, for the life of its patents. The restrictions on SmileDirectClub therefore make sense and were likely reasonably necessary for the cooperative agreement to take place at all. But the reverse is not true. Given the power imbalance between Align and SmileDirectClub, there was no reason for Align to restrain itself to induce SmileDirectClub to come to the table. The plaintiffs have therefore plausibly alleged that the restriction on Align's ability to sell aligners directly to consumers was not reasonably necessary for the cooperative undertaking.

The plaintiffs' story somewhat teeters on the edge of plausibility. But ultimately, it tips in the plaintiffs' favor. Whether discovery will reveal an alternative explanation for this restriction **[**12]** is, of course, an open question.

D

Finally, the statute of limitations has not run on this claim. "[E]ach time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury to the purchaser and the statute of limitations runs from the date of the act." *Oliver v. SD-3C LLC, 751 F.3d 1081, 1086 (9th Cir. 2014)*. This logic applies with equal force here. The plaintiffs plausibly allege that Align and SmileDirectClub entered into a horizontal market allocation agreement that inflated prices in the direct-to-consumer market. The named plaintiff for this claim, Dana Bozian, purchased SmileDirectClub aligners in June 2020—less than one year before this lawsuit was filed. The claim therefore falls well within the four-year statute of limitations period. *15 U.S.C. § 15b*.

III

The remainder of the plaintiffs' claims concern Align's alleged monopolization of the dentist-directed aligner market. Under federal ***antitrust law***, indirect purchasers—those who "are two or more steps removed from the violator in a distribution chain"—cannot recover damages under the *Sherman Act*. *Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520, 203 L. Ed. 2d 802 & n.1 (2019)*; *see* *Illinois Brick Co. v. Illinois, 431 U.S. 720, 746, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. Many states have taken a different tack, however, passing so-called "*Illinois Brick* repealer statutes" that clarify that indirect purchasers *may* sue for damages under the state cause of **[**13]** action. *See, e.g.*, *Cal. Bus. & Prof. Code § 16750(a)*; *Conn. Gen. Stat. § 35-46a(1)*.

The plaintiffs allege that Align has unlawfully monopolized the dentist-directed aligner market in violation of *Section 2 of the Sherman Act*. In this market, however, the plaintiffs are indirect purchasers; they purchased aligners from dentists, not Align itself. Their only recourse for damages is therefore under state law. Align has moved to dismiss many of the plaintiffs' state law claims, only one of which will be discussed here: the plaintiffs' claim under California's Cartwright Act. The remaining state law claims are addressed in an accompanying order.

A

Before jumping into the Cartwright Act claim, a brief description of the plaintiffs' remaining allegations is necessary. The plaintiffs allege that Align secured its dominance **[*981]** over the dentist-directed aligner market by tying the sale of its aligners to its scanners—the tool with which dentists create an image of a patient's teeth and jaw that serves as a blueprint for the patient's custom aligners. This scheme was accomplished through three sets of challenged conduct. First, Align terminated an interoperability agreement it had with a rival scanner manufacturer, forcing dentists to use Align's scanner if they wanted to sell Invisalign-brand **[**14]** aligners. Second, Align launched a discount program (the "Fusion Program") through which dentists received a discount on their Align-brand scanner if they committed to making a minimum number of Invisalign orders. Finally, Align entered into multiyear contracts with two dental service organizations (DSOs) in which the DSOs agreed to only work with Align in providing its member dental offices with both scanners and aligners.

In a related lawsuit, a group of dentists sued Align under Section 2 of the Sherman Act for these same allegations. *See* Simon & Simon, 533 F. Supp. 3d 904. The dentists' Section 2 claim survived a motion to dismiss, as the termination of the interoperability agreement "amounts to a section 2 violation on its own." *Id. at 913*. With respect to the Fusion Program and DSO contracts, although they were somewhat "problematic from an antitrust standpoint," they were insufficient to state a claim (even considered together) in the absence of the interoperability agreement. *Id.*

B

California's Cartwright Act declares "every trust . . . unlawful." *Cal. Bus. & Prof. Code § 16726*. An unlawful trust is defined as "a combination . . . by two or more persons" for certain enumerated purposes. *§ 16720*. The Act has therefore been interpreted as mirroring *Section 1 of the Sherman Act* and only addressing concerted action, as opposed to unilateral **[**15]** conduct. *See Free FreeHand Corp. v. Adobe Systems Inc., 852 F. Supp. 2d 1171, 1185 (N.D. Cal. 2012)*; *G.H.I.I. v. MTS, Inc., 147 Cal. App. 3d 256, 266, 195 Cal. Rptr. 211 (Cal. Ct. App. 1983)*. To state a claim under the Cartwright Act, then, the plaintiffs must allege that 1) there was an agreement between two or more entities; and 2) the agreement was an unreasonable restraint of trade. *See Free FreeHand Corp., 852 F. Supp. 2d at 1185*.

The plaintiffs point to three separate actions on the part of Align that they argue constitute concerted, as opposed to merely unilateral, action. First, the plaintiffs argue that the agreement between Align and SmileDirectClub unlawfully "allocated the dentist-directed market to Align." Second, the plaintiffs contend that "Align's termination of the interoperability agreement is actionable under the Cartwright Act because it was done to effectuate" a coercive tying agreement. Finally, the plaintiffs point to Align's exclusive dealing agreements with DSOs.

1. Agreement with SmileDirectClub: Align's agreement with SmileDirectClub can only serve as the basis for a Cartwright Act claim if the plaintiffs plausibly allege that it is an unreasonable restraint of trade. But this argument fails for the same reason the argument concerning the mirror restraint prevailed: Align's patents, Align's rules.

Given Align's patents, it would have been lawful for Align to prevent SmileDirectClub **[**16]** from entering either aligner market. That Align permitted SmileDirectClub to enter one market, even if not both, was therefore procompetitive. And as discussed above, the additional concessions that Align was able to extract from SmileDirectClub were reasonably necessary to **[*982]** achieve the cooperative purpose underlying the agreements. With respect to this aspect of the agreement, then, Align and SmileDirectClub "were cooperating to produce, not to curtail output; the cooperation increased the amount of [aligners] available and was at least potentially beneficial to consumers; [and] the restrictive covenant made the cooperation possible." *Polk Brothers, 776 F.2d at 190*. The restriction on SmileDirectClub's ability to sell aligners to dentists is therefore merely an ancillary restraint on trade, evaluated under the rule of reason. *See id.*

To determine whether a restraint violates the rule of reason, courts "apply a three-step, burden-shifting framework." *Aya Healthcare, 9 F.4th at 1111*. But at the motion to dismiss stage, the focus is on step one: whether the plaintiff has plausibly alleged "that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *American Express, 138 S. Ct. at 2284*; *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197-98 (9th Cir. 2012)*. The plaintiffs have not met that burden **[**17]** here. Whether or not Align and SmileDirectClub entered into this agreement, SmileDirectClub would not have been able to enter the dentist-directed market. The restraint on SmileDirectClub's ability to sell aligners through dentists therefore flowed not from the agreement, but from Align's patents.[4]

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[4] The plaintiffs point out that the restraint on SmileDirectClub's ability to enter the dentist-directed market extended to December 31, 2019, while at least some of Align's patents were set to expire in late 2017. This fact alone is insufficient to plausibly allege

The fact that an agreement "fall[s] within the scope of the exclusionary potential of [a] patent" does not necessarily "immunize the agreement from antitrust attack." *FTC v. Actavis, Inc., 570 U.S. 136, 147, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)* (first quoting *FTC v. Watson Pharms., Inc., 677 F.3d 1298, 1312 (11th Cir. 2012)*, *rev'd*, *570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343*). In *Actavis*, the Supreme Court recognized that, in certain limited contexts, a settlement of a patent dispute may violate the antitrust laws, even if the settlement does not exceed the scope of the patent. But the concerns raised in *Actavis* are not present here. *Actavis* concerned the unique context of "reverse payment" settlements—settlements of patent infringement litigation that require "the claimed infringer[] not to produce the patented product until the patent's term expires" in exchange for payment. *Id. at 140*. Such agreements are somewhat suspicious, as "a party with no claim for damages . . . walks away with money simply so it will stay away from the patentee's market." *Id. at 152*. The situation alleged here—a party with a strong claim **[**18]** extracting favorable contract terms from an infringer—does not raise similar concerns of collusion. The aspects of the Supply and Operating Agreements that restrict SmileDirectClub's ability to compete in the dentist-directed market are therefore not cognizable under the antitrust laws and cannot be the concerted action on which the plaintiffs' Cartwright Act claim relies.

2. Termination of Interoperability Agreement: The plaintiffs next argue that Align's unilateral termination of the interoperability **[*983]** agreement resulted in a "combination" in restraint of trade because it roped dentists into its scheme—when Align terminated the interoperability agreement, dentists faced a "*de facto* tying restraint where they had to purchase Trios scanners (the tied product) as a condition for placing orders for Invisaligners (the tying product)."

To begin, the plaintiffs' reliance on Align's termination of the interoperability agreement suffers from a fatal flaw: the named plaintiff for the Cartwright Act class, Cindy Ellis, purchased her aligners prior to Align's termination of the interoperability agreement. Cindy Ellis therefore does not have standing to challenge Align's allegedly unlawful tie.

But **[**19]** substituting in a different plaintiff would not save this claim. In support of their argument that Align's unilateral termination of the interoperability agreement constitutes concerted action, the plaintiffs point to cases in which California courts have held that a "combination" in restraint of trade exists "where a trader uses coercive tactics to impose restraints upon otherwise uncooperative businesses." *G.H.I.I., 147 Cal. App. 3d at 268*. But this "single trader" theory only extends to situations in which the trader pressures the unwilling participant into some sort of agreement, like a pricing arrangement or boycott. *Id.* That logic does not extend to the allegations here. It is true, to some extent, that Align "coerced" dentists to purchase its aligners and scanners by virtue of the alleged tie. But to find the dentists an "unwilling participant" in a "combination" on that basis would virtually erase the Cartwright Act's concerted-action requirement as every sale of goods involves multiple parties. It cannot be that a monopolist conspires with its customers every time they purchase tied products. The dentists here are victims of Align's alleged acts—not co-conspirators. *See, e.g., Free FreeHand Corp., 852 F. Supp. 2d at 1186*.

3. DSO Contracts: Finally, **[**20]** the plaintiffs point to the exclusive-dealing agreements between Align and the DSOs. But as this Court has already held, these agreements do not establish a standalone claim. *See Simon & Simon, 533 F. Supp. 3d at 913*. They therefore cannot be the basis for a Cartwright Act claim.

Because the plaintiffs failed to allege any concerted action, the Cartwright Act claim is dismissed with leave to amend.

* * *

In conclusion, the motion to dismiss the *Section 1* claim is denied and the motion to dismiss the Cartwright Act claim is granted.

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that the restraint had anticompetitive effects. For one thing, the plaintiffs do not clearly allege when SmileDirectClub would have lawfully been able to enter the dentist-directed market in the absence of this restraint. Further, the plaintiffs have not alleged that any delay resulted in anticompetitive effects, when considered within the context of the broader, procompetitive agreement. After all, this restraint would not have prevented other firms from entering the dentist-directed market upon the expiration of Align's patents.

IT IS SO ORDERED.

Dated: February 16, 2022

/s/ Vince Chhabria

VINCE CHHABRIA

United States District Judge

JSW Steel (USA) Inc. v. Nucor Corp.

United States District Court for the Southern District of Texas, Houston Division

February 17, 2022, Decided; February 17, 2022, Entered

CIVIL ACTION NO. 4:21-CV-01842

Reporter

586 F. Supp. 3d 585 *; 2022 U.S. Dist. LEXIS 28648 **

JSW STEEL (USA) INC., et al., Plaintiffs, VS. NUCOR CORP., et al., Defendants.

Core Terms

Steel, slab, domestic, tariffs, antitrust, requests, imported, conspiracy, alleges, Defendants', motion to dismiss, manufacturing, producer, argues, national security, plate, steel products, contracts, conspire, products, creditworthiness, announced, state-law, finished, meetings, sham, tortious interference, alleged conspiracy, anti trust law, self-interest

LexisNexis® Headnotes

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

Evidence > Inferences & Presumptions > Inferences

HN1[] **Complaints, Requirements for Complaint**

A complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. When faced with two possible explanations for a defendant's conduct, only one of which results in liability, a plaintiff cannot offer allegations that are merely consistent with their favored explanation but are also consistent with the alternative explanation. Something more is needed. The plaintiff must plead facts excluding the possibility that the obvious alternative explanation is true, which requires factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

HN2[] **Sherman Act, Claims**

A complaint alleging a conspiracy in violation of Section 1 of the Sherman Act must allege that Defendants (1) engaged in a conspiracy, (2) that restrained trade, (3) in the relevant market. The plaintiff must allege an agreement between two or more persons, since unilateral conduct is excluded from the Sherman Act's purview. A conclusory allegation of agreement at some unidentified point is not sufficient to survive a motion to dismiss. Moreover, an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Instead, a plaintiff must plead factual allegations sufficient for the Court to draw a reasonable inference that Defendants made a conscious commitment to a common scheme designed to achieve an unlawful objective.

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

Evidence > Inferences & Presumptions > Inferences

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

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

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

HN3[] **Conspiracy to Monopolize, Elements**

Antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 of the Sherman Act case. Any conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. And an inference of a conspiracy is always unreasonable when it is based solely on parallel behavior that can be explained as the result of the independent business judgment of the defendants.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

HN4[] **Sherman Act, Claims**

Where a plaintiff's § 1 of the Sherman Act claim relies on alleged parallel conduct, the plaintiff must plead so-called plus factors that are indicative of conspiracy. While there is no exhaustive or finite list of plus factors, some recognized plus factors include: actions that would be against the defendants' self-interest if the defendants were acting independently, but consistent with their self-interest if they were acting in concert; a motive to conspire; opportunities to conspire; market concentration and structure conducive to collusion; pretextual explanations for anticompetitive conduct; sharing of pricing information; signaling among competitors; and other traditional facts suggestive of conspiracy. Plausible factual allegations that tend to demonstrate that the parallel conduct was not in the alleged conspirators' independent self-interest absent an agreement is generally considered the most important plus factor.

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

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

HN5[] **Conspiracy to Monopolize, Elements**

Common attendance at trade association meetings is insufficient to infer a conspiracy in violation of § 1 of the Sherman Act. It is not sufficient to allege simply that some defendants may have conversed with other defendants; there must be factual support that those conversations were for the intent and purpose of reaching an agreement to unreasonably restrain trade.

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

HN6[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Because the *First Amendment* protects the ability of citizens, including businesses, to petition the government, joint efforts to influence public officials do not violate the antitrust laws, even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. Courts routinely dismiss antitrust complaints seeking to impose liability for conduct covered by Noerr-Pennington.

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

HN7[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Joint efforts by competitors to influence government decision-makers are protected by the Noerr-Pennington doctrine and cannot be a basis for liability.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Torts > ... > Elements > Causation > Intervening Causation

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN8[] **Remedies, Damages**

To state an antitrust claim, a plaintiff must plead antitrust standing, which requires establishing 1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit. To satisfy antitrust standing, a plaintiff's injury must be proximately caused by the defendants' conduct. But when the plaintiff's damages are the result of a superseding cause, such as government action or the plaintiff's own decisions, that causal chain is broken, and the plaintiff does not have an actionable claim.

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

Torts > ... > Contracts > Intentional Interference > Defenses

Torts > ... > Contracts > Intentional Interference > Elements

HN9[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Although the Noerr-Pennington doctrine initially arose in the antitrust field, it is rooted in the First Amendment and therefore courts have readily applied it to other types of claims, such as common-law tortious interference with contractual relations.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN10[] Conspiracy to Monopolize, Sherman Act

SBecause the Texas Free Enterprise and Antitrust Act utilizes the same standards as the Sherman Act for establishing a violation, the Sherman Act analysis applies to a plaintiffs' state law claims as well. Tex. Bus. & Com. Code Ann. § 15.04 provides that the Texas Antitrust Act shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Torts > ... > Contracts > Intentional Interference > Elements

HN11[] Remedies, Damages

Where a plaintiff has tied its state law tort claims to asserted antitrust violations, the claims rise and fall together; where the antitrust claims are unsubstantiated, so must be the tortious interference claims.

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Judges: Keith P. Ellison, United States District Judge.

Opinion by: Keith P. Ellison

Opinion

[*589] **MEMORANDUM & ORDER**

On January 27, 2022, the Court **[**2]** held a hearing on Defendants' Motions to Dismiss. Docs. 46, 47. The Court took the motions under advisement and allowed the parties to file supplemental briefing if desired. Plaintiff filed a supplemental memorandum. Doc. 83. Having considered the parties' briefing and oral arguments, the Court now **GRANTS** the Motions to Dismiss for the reasons set forth below.

I. BACKGROUND

A. Alleged Facts

1. JSW

Plaintiffs JSW Steel (USA) Inc. and JSW Steel USA Ohio, Inc. (collectively, "JSW") brought this lawsuit. JSW is a small U.S. manufacturer of finished steel products that owns and operates facilities in Baytown, Texas, and Mingo Junction, Ohio. Compl. ¶ 2. It is part of a steel conglomerate based in India.

This case involves domestically manufactured steel slab—the critical feedstock that JSW and other manufacturers use in the production of their finished products. *Id.* ¶ 44, 53. JSW has certain chemical and metallurgical requirements for the slab it purchases and uses to make high-quality finished steel pipe, plate, and coil products. *Id.* ¶¶ 2, 43. JSW sells the pipe, plate, and coil products for use in critical infrastructure projects, such as natural gas and oil transmission pipelines, shipbuilding, **[**3]** transmission pole towers, wind towers, railroad tank cars, and other heavy equipment industries in the United States. *Id.*

From 2015 until early 2019, JSW enjoyed steadily increasing sales. *Id.* ¶ 60. As a result of this growth, in early 2018, JSW announced and began implementing two significant expansion projects in Baytown and Mingo Junction. First, JSW publicly announced a $500 million investment project at its Baytown facility to build the most technologically advanced and eco-friendly electric arc furnace ("EAF), slab caster, and plate mill in the world. *Id.* ¶ 55-59, 61, 78. The project was designed to transform JSW's Baytown facility into the only melt and manufacture ("M&M") plate mill in the United States with a contiguous pipe mill capable of supplying large diameter welded steel pipe for oil and gas transmission. *Id.* ¶ 61. JSW broke ground on this project in Fall 2018; it had entered into construction and supply contracts and obtained a New Source Review Air Permit from the U.S. Environmental Protection Agency. *Id.* ¶ 62.

Second, JSW announced plans and took steps to ramp up and modernize its Mingo Junction, Ohio, facility, to make hot-rolled coil bands. *Id.* ¶¶ 66, 77. JSW expected **[**4]** **[*590]** significant revenue growth from these projects. *Id.* ¶ 75.

2. Defendants

Defendant Nucor is a Delaware corporation with its principal place of business in North Carolina. It is a leading domestic producer of sheet steel, plate steel, structural steel, bar steel, and steel coils. It operates five sheet mills that produce flat-rolled steel for automotive, appliance, construction, pipe and tube, and other industrial and consumer applications. *Id.* ¶ 34. Nucor currently maintains about 31% market share of domestic steelmaking capacity, making it the second largest manufacturer in the U.S. *Id.* ¶ 49.

Defendant U.S. Steel is a Delaware corporation with its principal place of business in Pennsylvania. It is a fully integrated steel producer with operations in the U.S., Canada, and Europe, where it manufactures semi-finished steel slab that it uses to produce finished steel products, including sheet steel, steel plate, and steel coils. *Id.* ¶ 35. It is the third largest steel producer in the U.S. and maintains about 19% market share of domestic steelmaking capacity. *Id.* ¶ 51.

Defendant AK Steel is a Delaware corporation with its principal place of business in Ohio. It is an integrated producer of **[**5]** flat-rolled carbon, stainless, and electrical steel products, primarily for the automotive, infrastructure and manufacturing, and distributor and converter markets. Around March 13, 2020, AK Steel was acquired by Cleveland-Cliffs Inc. It became a direct, wholly owned subsidiary of Cleveland-Cliffs, operating under the name AK Steel Holding Corporation. *Id.* ¶ 36.

Defendant Cleveland-Cliffs is an Ohio corporation with its principal place of business in Ohio. Cleveland-Cliffs is a fully integrated producer of custom-made iron ore pellets; flat-rolled carbon, stainless, electrical, plate, tinplate and long steel products; and carbon and stainless-steel tubing. *Id.* ¶ 37. With the acquisitions of AK Steel and ArcelorMittal (a major producer not named in this lawsuit and not alleged to have joined in any conspiracy), Cleveland-Cliffs holds approximately 34% market share of domestic steelmaking capacity, making it the largest steel producer in the United States. *Id.* ¶ 52.

Defendants U.S. Steel, AK Steel, and Cleveland-Cliffs are purportedly domestic manufacturers of steel slab in the size and chemistry that is the feedstock for JSW end products. Nucor is also a domestic manufacturer of slab, **[**6]** though Nucor uses that slab as part of its continuous manufacturing process and cannot offload any to customers like JSW. *Id.* ¶ 37.

3. U.S. Steel Tariff Program and Meetings Involving Defendants

JSW does not itself produce steel slab; rather, it must buy slab from other producers to make its finished products. *Id.* ¶ 3. Historically, JSW has imported steel slabs from India, Mexico, and Brazil to support its U.S. operations. *Id.* ¶¶ 81, 94. Tariffs could challenge JSW's ability to benefit from imported slab.

In April 2017, the U.S. Department of Commerce ("Commerce") began investigating the effects of steel imports on U.S. national security pursuant to *Section 232* of the Trade Expansion Act, *19 U.S.C. § 1862*. U.S. Dep't of Commerce, *Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel*, at 1 (Apr. 21, 2017). The investigation concluded that a robust American steel industry is an essential component both of domestic economic viability and national security. U.S. Dep't of Commerce, *The Effect of Imports of Steel on the National Security*, at 1-2, 13, 23 (Jan 11, 2018) (appendix **[*591]** omitted).[1] The Commerce Department further determined that the importation **[**7]** of cheap foreign steel "adversely impact[s] the economic welfare of the [U.S. steel] industry." *Id.* at 27.

Accordingly, on March 1, 2018, then-President Trump announced that the U.S. would impose a 25% tariff on most steel imports. Compl. ¶ 79; *see also 15 C.F.R. Pt. 705, Supp. 1*. "Most of the domestic steel industry"—including JSW—professed "uniform support of the tariffs." Compl. ¶ 83.

Around this time, Defendants (and other domestic steel producers) met with the President, *id.* ¶ 81, the House of Representatives, *id.* ¶¶ 83, 88, and officials in the Department of Commerce, *id.* ¶¶ 90, 91. Plaintiffs suggest that these meetings were at least partly for the purpose of organizing the alleged conspiracy, while Defendants maintain that these meetings were solely to discuss advocacy efforts related to the tariff. For example, on September 6, 2018, representatives from Nucor and U.S. Steel met after Nucor's representative stated: "We spoke with Nazak Nikakhtar [Department of Commerce] a few weeks ago about possible changes to the steel *Section 232* exclusion process. Last Friday she suggested that we also meet with Earl [likely Earl Comstock, Department of Commerce] to discuss this issue. **Ideally, the meeting would be with [**8] both Nucor and U.S. Steel because both**

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[1] The Court can "take judicial notice of agency records and reports" such as the Commerce Report, which appears in the Federal Register. *See Terrebonne v. Blackburn, 646 F.2d 997, 1000 (5th Cir. 1981)*. Plaintiffs presented no opposition to Defendants' arguments on judicial notice.

companies have been working together." Compl. ¶ 91 (emphasis in original). There is a factual dispute whether the companies were "working together" on issues beyond the tariff on imported steel. On Plaintiffs' information and belief, Defendants have also participated in trade association meetings from 2018 to the present. *Id.* ¶ 92.

As part of the tariff program, the Department of Commerce created a process to exclude from the tariffs any steel product that "could not be sourced domestically." *Id.* ¶ 82. Under this process, an exclusion request may be granted if the Department of Commerce's Bureau of Industry and Security ("BIS") determines that the product to be imported is not domestically available in sufficient quantity and quality. *15 C.F.R. Pt. 705, Supp. 1 (c)(6)*.

Domestic steel producers can object to a tariff exclusion request if they can demonstrate that the product to be imported is available domestically. *Id.* ¶ 82; *see also* *15 C.F.R. Pt. 705, Supp. 1 (d)(4)*. These regulations do not require objectors to demonstrate that the steel product available domestically "be identical," but only that it "be equivalent as a substitute product." *15 C.F.R. Pt. 705, Supp. 1 ¶ (c)(6)(ii)*. Objections to an exclusion request must be submitted within a 30-day **[**9]** public comment period. *Id.* at ¶ (d)(3). From there, both the importer and objector(s) are afforded a final opportunity to respond through a rebuttal process. *Id.* at ¶¶ (f)(4), (g)(4). Then, BIS alone determines whether to grant or deny the request. *Id.* at ¶ (c)(6).

If an exclusion request is denied, but it later comes to light that the product was not, in fact, available domestically, then the importer may submit a new exclusion request that refers to the original request. *Id.* at ¶¶ (c)(6)(i), (ii).

Congress has vested "exclusive jurisdiction" in the U.S. Court of International **[*592]** Trade to hear challenges to "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue," including the *Section 232* tariffs and denials of exclusion requests. *28 U.S.C. § 1581(i)(1)(B)*; *see* *Commodities Exp. Co. v. U.S. Customs Serv., 957 F.2d 223, 227 (6th Cir. 1992)* ("Congress invested the CIT with exclusive jurisdiction over a wide range of trade matters encompassing complex regulatory schemes in order to allocate power between the CIT and the district courts"). The CIT and Federal Circuit, which hears appeals from the CIT, have upheld Government actions under *Section 232* against various challenges. *See* *American Inst. for Int'l Steel, Inc. v. United States, 806 F. Appx. 982 (Fed. Cir. 2020)* (rejecting constitutional challenge to *Section 232* tariffs); *Transpacific Steel LLC v. United States, 4 F.4th 1306, 2021 WL 2932512, at *1333 (Fed. Cir. July 13, 2021)* (rejecting challenge to **[**10]** temporary increased tariff on steel from Turkey).

4. JSW's 2018 Tariff Exclusion Requests

JSW alleges that, "due to quotas and other limitations on quantity, and to significant tariffs imposed beginning in 2018, imports were not available in the quantity JSW requested." *Id.* ¶ 3. "Anticipat[ing] that it would need a temporary tariff exemption," in the spring of 2018 JSW filed exclusion requests for imported slab under the Commerce regulations described above. *Id.* ¶ 93. Domestic steel companies thus had 30 days to object. *15 C.F.R. Pt. 705, Supp. 1 § (d)(3)*.

Nucor, a U.S.-based steel producer, filed objections to JSW's requests for exclusions from the national security tariffs on May 31, 2018, and again on August 30, 2018. Compl. ¶¶ 90, 99, 100; Doc. 45, Exh. B-C.[2] While Nucor makes slab at its steel mills, Nucor consumes that slab internally in its production of finished steel products; as mentioned above, JSW alleges that Nucor does not "offload [its slab] to customers like JSW." Compl. ¶ 38. Although Nucor's objections did not represent that Nucor itself could supply JSW with domestically produced slab, Nucor cited publicly available data[3] to support its position that "adequate supplies of slab . . . are readily

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[2] The Court can consider JSW's exclusion requests and Defendants' related filings because they are "referred to in the plaintiff's complaint and ware central to [its] claim[s]." *Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498-99 (5th Cir. 2000)* (quotation omitted). Plaintiffs presented no opposition to Defendants' arguments on judicial notice.

[3] In support of its objection, Nucor cited: (1) JSW's own exclusion request writing; (2) trade association data; (3) public information that various manufacturers, including U.S. Steel and ArcelorMittal, had idled or under-utilized facilities that could

available **[**11]** from both domestic sources and from countries exempted from the Section 232 tariffs." Doc. 45, Exh. B, at 1; Doc. 45, Exh. C, at 1.

JSW alleges that U.S. Steel and AK Steel also filed objections to JSW's slab exclusion requests on roughly the same 30-day timetable set by the Commerce regulations. Compl. ¶¶ 93-98.[4] JSW alleges that—unlike Nucor—U.S. Steel and AK Steel asserted in their objections that they themselves could, and would be willing to, supply JSW's slab needs. *Id.* ¶¶ 93-98

In response, JSW submitted rebuttals arguing that AK Steel and U.S. Steel could not produce slabs to the technical specifications **[*593]** or dimensions that JSW requested. Nucor and U.S. Steel then filed sur-rebuttals pointing out domestic availability of the specified slabs, including acceptable substitute products. *See, e.g.*, Doc. 46, Exh. H, *[U.S. Steel's] Sur-rebuttal and Supplement to Objection Filed Against Excl. Req. 1227* (clarifying that JSW's exclusion requests were not for 12" slab, but for the range of 275 mm to 310 mm, which U.S. Steel could supply). AK Steel did not submit a sur-rebuttal.

In April and May 2019, after considering the full record of information submitted both by JSW and by Defendants, BIS formally **[**12]** denied each of JSW's 12 exclusion requests in separate decision memoranda. *See, e.g.*, Doc. 46, Exh. I, *BIS Decision Document—Excl. Req. 1227*. For each request, BIS concluded that the requested steel slab "[wa]s produced in the United States in a sufficient and reasonably available amount and of a satisfactory quality" and "that no overriding national security concerns require[d] that th[e] exclusion request be granted." *Id.; see* Compl. ¶ 107.

5. JSW's "Firm Inquiries" to Purchase Domestic Slab

After JSW's exclusion requests were denied, JSW contacted AK Steel and U.S. Steel in May 2019 with "firm inquiries" to purchase steel slab. Compl. ¶ 107. On May 8, 2019, JSW sent AK Steel a firm inquiry for a large purchase of 30,000 tons of 10- to 12-inch-thick continuous cast carbon slab. *Id.* ¶¶ 110-111, 115. Upon receiving JSW's inquiry, AK Steel requested that JSW establish its creditworthiness by providing either financial statements or a standby letter of credit written on a U.S. bank. *Id.* ¶¶ 111-112. JSW refused, offering instead to supply a documentary letter of credit. *Id.* AK Steel nonetheless reviewed JSW's proposal and provided preliminary feedback to JSW, offering to sell it the slab **[**13]** subject to JSW's acceptance of certain technical exceptions and a credit check. JSW ended the discussions based on its allegation that "the exception sheet ran contrary to AK Steel's certified statements that it 'has the ability to produce' the projects subject to JSW's exemption requests—including to the sizes and exacting chemistries that JSW required." *Id.* ¶¶ 113-114. JSW alleges that AK Steel rendered any transaction impossible by erecting pretextual creditworthiness requirements and seeking significant deviations from JSW's requested chemistries and sizes; JSW maintains, on information and belief, that this conduct constituted a refusal to deal based on a conspiracy. *Id.* ¶¶ 116.

JSW's interactions with U.S. Steel followed a similar pattern. On May 8, 2019—the same day JSW initially contacted AK Steel—JSW also sent U.S. Steel a firm inquiry to purchase nearly 30,000 tons of 10-12 inch thick continuously cast carbon steel slab. *Id.* ¶ 115. Robert Oster from U.S. Steel informed JSW that it would need to provide evidence of JSW's creditworthiness. *Id.* ¶ 116. The same day, U.S. Steel credit department sent JSW a list of the information it needed to complete the credit check. *Id.* JSW **[**14]** never provided the information, nor does it allege that it attempted to comply with the request. *Id.* U.S. Steel nonetheless reviewed the technical specifications that JSW requested. *Id.* ¶ 117. U.S. Steel told JSW that it could produce the steel slab that JSW wanted with a few technical "deviations" after JSW produced evidence of its creditworthiness. *Id.* JSW does not allege that it responded to U.S. Steel's proposal. *Id.*

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make slab; and (4) a U.S. Transportation Department determination of "adequate capacity for the U.S. steel industry to meet a demand for semi-finished steel slab if the market price is adequate." Doc. 45, Exh. B, at 1-3; *id.*, Exh. C, at 2-3.

[4] JSW alleges that AK Steel filed on May 29, 2018, two days before the deadline (when U.S. Steel filed). Compl. ¶ 94.

In April 2021, U.S. Steel reached back out to JSW to explain that U.S. Steel planned to start an EAF and steel slab caster at its Fairfield, Alabama, facility. *Id.* at ¶ 145; Doc. 46 at 15. U.S. Steel inquired whether it could source steel for JSW from **[*594]** that new facility. *Id.* JSW does not allege that it responded to this offer. *Id.*

6. JSW's Appeal of Commerce's Decisions on Its 2018 Exclusion Requests

On July 30, 2019, JSW filed a complaint in the Court of International Trade challenging BIS's denial of its 2018 exclusion requests. Compl., July 30, 2019, ECF No. 2, *JSW Steel (USA) Inc. v. United States*, No. 1:19-00133, slip op. 20-111 (Ct. Int'l Trade Aug. 5, 2020).[5] JSW argued that the denials were "arbitrary, capricious, and an abuse of discretion"; it alleged that BIS **[**15]** "undertook no efforts to verify [Defendants' objections]" and "ignored the conclusive evidence that these companies [were] unable to produce the subject products in the required quantity or quality." *Id.* ¶ 8. The Court of International Trade remanded the decisions to BIS for reconsideration. *JSW Steel*, No. 1:19-00133, slip op. 20-111 at 2-3.

On September 21, 2020, JSW and the Commerce Department resolved the dispute through a stipulated judgment. Stip. J., Sept. 18, 2020, ECF No. 103, *JSW Steel (USA) Inc.*, No. 1:19-00133. Among other provisions, Commerce refunded an undisclosed amount of the tariffs paid by JSW "as a full and complete settlement of all claims subject to this action." *Id.* ¶¶ 6-7.

7. The Parties' Financial Performance

JSW alleges that its upward financial trajectory came to a halt because of Defendants' boycott. *Id.* ¶ 119. Its slab acquisition and overall manufacturing costs increased dramatically, as it was forced to slow its production and pay more for imported slab. *Id.* JSW Baytown's sales revenue dropped by over 25%—over $100 million—in the fiscal year ending in March 2020 compared to the prior year. The following fiscal year, Baytown's overall sales revenue fell by **[**16]** over 65% compared to 2019. *Id.* ¶ 121. The company stopped its Baytown expansion project, terminating contracts into which it had already entered, resulting in termination fees of $20 million. *Id.* ¶ 125.

Meanwhile, Defendants have recently enjoyed strong financial performance:

- Nucor reported "record earnings" in 2018 and "record operating cash flow of approximately $2.8 billion" in 2019. *Id.* ¶ 136. In 2020, Nucor reported that it "set record[s] for profitability." *Id.* For the first quarter of 2021, the company reported its "best quarter in Nucor's history." *Id.* It had announced a plan to build its own state-of-the-art steel plate mill, which JSW alleges is strikingly similar to the mill JSW had to abandon. *Id.* ¶ *137*.

- In 2018, AK Steel reported having the company's "best year in a decade." *Id.* ¶ 133. Following its acquisition of AK Steel and ArcelorMittal USA, Cleveland-Cliffs reported earnings up 158% from the previous year. *Id.* ¶ 134.

- In the first quarter of 2021, Cleveland-Cliffs announced profits of $513 million, representing a 79% increase over the previous quarter, while projecting a nearly 200% rise in profit to $1.2 billion in the second quarter of 2021. *Id.*

- U.S. Steel reported **[**17]** its "strongest performance since 2008" for fiscal **[*595]** year ending December 31, 2018. *Id.* ¶ 135.

8. JSW's 2021 Tariff Exclusion Requests

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[5] The Court "may take judicial notice of a 'document filed in another court . . . to establish the fact of such litigation and related filings.'" *Taylor v. Charter Med. Corp., 162 F.3d 827, 830 (5th Cir. 1998)* (citation omitted). Plaintiffs presented no opposition to Defendants' arguments on judicial notice.

JSW filed 83 additional exclusion requests in March and April 2021, this time for steel slab imported from Brazil and India. Compl. ¶ 141. JSW claimed in its new requests that it had been unsuccessful in purchasing steel slab from AK Steel and U.S. Steel in 2019. *Id.*

U.S. Steel, Nucor, and now Cleveland-Cliffs objected to JSW's new exclusion requests. *Id.* ¶¶ 142-143. BIS has granted all 83 exclusion requests over Defendants' objections. *See* U.S. Dep't of Commerce Website, Section 232 Steel and Aluminum, Published Exclusion Requests filtered to JSW Steel (USA) Inc., https://232app.azurewebsites.net/ (status "Granted" for each of JSW's 83 exclusion requests). BIS's decision memoranda included an analysis conducted by a Commerce Department subject matter expert, who determined that both Cliffs and U.S. Steel produce slabs of sufficient weight and with sufficient chemical and dimensional properties for JSW's needs. *See, e.g.*, Doc. 46, Exh. J, BIS Decision Document—Excl. Req. 89352. Nevertheless, the exclusions were granted on the basis that Cleveland-Cliffs and **[**18]** U.S. Steel did not address a standard cited in JSW's request. *Id.*

B. Procedural History

JSW filed this Complaint on June 8, 2021, alleging that Defendants (1) violated *Sherman Act § 1* and *Clayton Act § 4*; (2) violated the Texas Free Enterprise and Antitrust Act, *Tex. Bus. & Com. Code Ann § 15.01 et seq.*; (3) engaged in civil conspiracy in violation of Texas state law; (4) tortiously interfered with existing contracts; and (5) tortiously interfered with prospective business relationships.

The now-pending motions to dismiss (one filed Nucor, another filed by the remaining Defendants) were filed on August 17, 2021.

Amid briefing on the motions to dismiss, Defendants filed a Motion to Stay Discovery Pending the Motions to Dismiss; the Court granted this motion on December 7, 2021.

The Court held a hearing on the motions to dismiss on January 27, 2022. Plaintiff subsequently filed supplemental briefing.

II. MOTIONS TO DISMISS

a. Legal Standards

1. MTD

HN1[] "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*). When faced with two possible explanations for a defendant's conduct, only one of which results in liability, a plaintiff cannot offer allegations that are "merely consistent **[**19]** with" their favored explanation but are also consistent with the alternative explanation. *Twombly, 550 U.S. at 557*. "[S]omething more" is needed. *Id. at 560*. The plaintiff must plead facts excluding the possibility that the "obvious alternative explanation" is true, *id. at 567*, which requires "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*.

2. Sherman Act § 1 Claims Based on Alleged Parallel Conduct

HN2[] A complaint alleging a conspiracy in violation of *Section 1 of the Sherman Act* **[*596]** must allege that Defendants (1) engaged in a conspiracy, (2) that restrained trade, (3) in the relevant market. *Apani Sw., Inc. v.*

Coca-Cola Enters., Inc., 300 F.3d 620, 627 (5th Cir. 2002). JSW must allege an agreement between two or more persons, since "unilateral conduct is excluded from [the Sherman Act's] purview." Johnson v. Hosp. Corp. of Am., 95 F.3d 383, 392 (5th Cir. 1996). A "conclusory allegation of agreement at some unidentified point" is not sufficient to survive a motion to dismiss. Twombly, 550 U.S. at 557.

Moreover, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice." Id. at 556. Instead, a plaintiff must plead factual allegations sufficient for the Court to draw a reasonable inference that Defendants made a "conscious commitment to a common scheme designed to achieve an unlawful objective." Marucci Sports, L.L.C. v. NCAA, 751 F.3d 368, 373-74 (5th Cir. 2014) (quotation omitted); *see also* Abraham & Veneklasen v. Am. Quarter Horse Ass'n ("A&V"), 776 F.3d 321, 330 (5th Cir. 2015) (agreement requires **[**20]** a "common design and understanding, or a meeting of the minds in an unlawful arrangement") (citation omitted).

HN3[] Moreover, "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a § 1 case." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). "Any conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." A&V, 776 F.3d at 331 (citation omitted). And an "inference of a conspiracy is always unreasonable when it is based solely on parallel behavior that can be explained as the result of the independent business judgment of the defendants." Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 494 (5th Cir. 1982) (emphasis added).

HN4[] Because JSW's § 1 claim relies on alleged parallel conduct, JSW must plead so-called "plus factors" that are indicative of conspiracy. In re Pool Products Distrib. Market Antitrust Litig., 988 F. Supp. 2d 696, 711 (E.D. La. 2013) (citing cases). While there is no exhaustive or finite list of plus factors, some recognized plus factors include: actions that would be against the defendants' self-interest if the defendants were acting independently, but consistent with their self-interest if they were acting in concert; a motive to conspire; opportunities to conspire; market concentration and structure conducive to collusion; pretextual explanations for anticompetitive conduct; **[**21]** sharing of pricing information; signaling among competitors; and other traditional facts suggestive of conspiracy. Id., 988 F. Supp. 2d at 711. Plausible factual allegations that tend to demonstrate "that the parallel conduct was not in the alleged conspirators' independent self-interest absent an agreement is generally considered the most important 'plus factor.'" *Id.* (citations omitted).

b. Nucor's Motion to Dismiss

Nucor argues that: (1) JSW fails to allege that Nucor entered into an agreement restraining trade; (2) JSW's claims are barred by the *Noerr-Pennington* doctrine (described below); (3) JSW does not allege an antitrust injury; and (4) the state law claims should be dismissed for lack of personal jurisdiction and failure to state viable claims for relief.

1. Whether Nucor plausibly entered into an agreement restraining trade

Nucor argues that Plaintiff's Sherman Act § 1 claim must fail because **[*597]** there is no "agreement" between multiple parties. Nucor asserts that JSW fails to allege any actual conduct or inaction by Nucor that could support an inference of an illegal agreement. The only allegations about Nucor's conduct relate to its petitioning activities in support of the Section 232 national security tariffs and against unfounded **[**22]** exclusion requests. JSW never alleges that it reached out to Nucor to inquire about purchasing of domestic slab; rather, it admits that Nucor's operations are not set up to "offload [slab] to customers like JSW." Compl. ¶ 38.

In opposition, JSW points to its allegation that Nucor was receiving confidential information from the other Defendants, which it could only have done if they were illegally conspiring. *Id.* ¶ 102 ("Upon information and belief, given the proprietary nature of AK Steel and U.S. Steel's product, pricing, and production capabilities, Nucor would have no way of knowing at what prices and in what quantities U.S. Steel and AK Steel would or would not have been able to sell slab to JSW absent consultation and/or coordination with them."). The Court agrees with Nucor's assertion that JSW mischaracterizes its objection, which was based on public, rather than proprietary, information about the collective capabilities of the domestic industry in the aggregate (*see* Sec. I(A)).

JSW also notes the closeness in time between Nucor's objection submissions and those of U.S. Steel and AK Steel. *Id.* ¶¶ 93 ("***simultaneously proclaimed***"), 95 ("***two days later***"; "simultaneous August 30, **[**23]** 2018 statements by U.S. Steel and Nucor"), 99 ("on the same day"), 103 ("***within the span of two days***"; "on the ***exact same day***") (all emphases in original). The Court finds this argument similarly unavailing. The Commerce regulations governing the adjudication of exclusion requests imposed a 30-day deadline on such objections. *15 C.F.R. Pt. 705, Supp. 1 § (d)(3)*. It is unremarkable that all objectors filed on or around the deadline.

Nucor also attacks JSW's suggestion that trade association meetings attended by Defendants' executives over a two-year period presented an opportunity to conspire. ***HN5***[] However, common attendance at trade association meetings is insufficient to infer a conspiracy. *See, e.g., In re Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 910-11 (6th Cir. 2009)*; *In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig., 997 F. Supp. 2d 526, 541-42 (N.D. Tex. 2014)*. It is not sufficient to allege simply that some defendants may have "conversed with other defendants"; there must be "factual support that those conversations were for the intent and purpose of reaching an agreement to unreasonably restrain trade." *Haygood v. Begue, 2016 U.S. Dist. LEXIS 34354, 2016 WL 1069685, at *6 (W.D. La. Mar. 16, 2016)*. Nucor argues that JSW fails to provide such factual support.

The Court concludes that JSW has failed plausibly to allege that Nucor entered into a conspiratorial agreement in violation of *Sherman Act § 1*. JSW fails to offer factual allegations that would reasonably substantiate an inference **[**24]** of conspiracy. For this reason alone, the Court must dismiss the *Sherman Act* claim. Nonetheless, the Court continues to Nucor's arguments regarding the *Noerr-Pennington* doctrine and antitrust injury, which provide additional and alternative grounds for dismissal of the *Sherman Act* claim against Nucor.

2. Whether JSW's claims are barred by the Noerr-Pennington *doctrine*

Nucor argues that, to the extent JSW alleges parallel conduct by Nucor at all, it alleges parallel *petitioning* conduct that is protected by the *Noerr-Pennington* **[*598]** doctrine. ***HN6***[] Because the *First Amendment* protects the ability of citizens, including businesses, to petition the government, "[j]oint efforts to influence public officials do not violate the antitrust laws, even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the *Sherman Act*." *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; *see also E.R.R. Pres. Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *accord Bayou Fleet, Inc. v. Alexander, 234 F.3d 852, 861 (5th Cir. 2000)*; *Video Int'l Prod., Inc. v. Warner-Amex Cable Comm'cns, Inc., 858 F.2d 1075, 1082 (5th Cir. 1988)*; *Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358 (5th Cir. 1983)*. Courts routinely dismiss antitrust complaints seeking to impose liability for conduct covered by *Noerr-Pennington. See, e.g., Tricon Precast, Ltd. v. Easi Set Indus., Inc., 395 F. Supp. 3d 871, 884 (S.D. Tex. 2019)*; *id. at 884 n.2* (collecting cases).

As discussed above, the only conduct by Nucor alleged in the Complaint involves (a) Nucor's public advocacy relating to the *Section 232* national security tariffs, and (b) objections Nucor **[**25]** filed with Commerce to oppose JSW's exclusion requests. JSW repeatedly emphasizes an email mentioning Nucor and U.S. Steel "***working together***," which JSW calls an "admission" making Nucor the "ringleader" of the conspiracy. Compl. ¶ 5 (emphasis in original), Heading VII (p. 27), 86, 91. However, a more reasonable reading of the full quotation indicates that what Nucor and U.S. Steel were "working together" on was advocacy to Commerce about "possible changes to the steel Section 232 process." Compl. ¶ 91; Doc. 45, Exh. A.[6] The email's purpose was to schedule a meeting between

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[6] The Court can go outside the four corners of the Complaint to consider the email exchange because it is "referred to in the plaintiff's complaint and [is] central to [its] claim[s]." *Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498-99 (5th Cir. 2000)* (quotation omitted).

Commerce, Nucor, and U.S. Steel to discuss those changes. Doc. 45, Exh. A. Nucor argues that this is classic *Noerr-Pennington* conduct.

Nucor asserts that the doctrine similarly applies to the White House "face-to-face meeting and press conference with then-President Trump," Compl. ¶ 87; CEOs' joint appearances "before the Congressional Steel Caucus," *id.* ¶ 88; and the exclusion objection filings, *id.* ¶¶ 85, 93-106, 140-44. ***HN7***[] Joint efforts by competitors to influence government decision-makers are protected by the *Noerr-Pennington* doctrine and cannot be a basis for liability.

In its Response, JSW counters that *Noerr-Pennington* ***[**26]*** does not apply under these circumstances. According to JSW, it alleged an illegal conspiracy to boycott JSW and refuse to sell it domestic slab. JSW emphasizes that the Complaint does not allege that Defendants lobbied Congress or petitioned the Commerce Department for any government decision regarding domestic slab.

The Court, however, finds that JSW's (seemingly revised) position appears irreconcilable with the fact that the only conduct by Nucor alleged in the Complaint involves Nucor's petitioning activities. *See, e.g., id.* ¶¶ 87 (alleging Nucor CEO attended White House meeting in support of tariffs), 88 (alleging Nucor CEO gave congressional testimony supporting tariffs), 91 (referencing email about setting up joint industry meeting with Commerce to discuss changes to the *Section 232* exclusion process).

[*599] The Court further finds that, under these circumstances, the topics of foreign steel and domestic steel are inextricably interwoven. The tariffs' purpose was to stem the national security threat posed by unfairly traded imports to domestic steel production. Procl. of Mar. 8, 2018, *83 Fed. Reg. 11625 (Mar. 15, 2018)*. And the touchstone for exclusion requests is whether the product is "produced in the United States in a sufficient **[**27]** and reasonably available amount" and "satisfactory quality." *15 C.F.R. pt. 705, Supp. 1 § (c)(5)*. With respect to Nucor, JSW focuses on Nucor's statements about domestic availability of domestic slab, as made in a slab exclusion objection addressed to Commerce. Compl. ¶¶ 94, 95, 99, 100, 102. Thus, JSW's attempt to avoid *Noerr-Pennington* by characterizing Nucor's petitioning of the Government as unrelated to domestic slab is unconvincing.

JSW's other argument—that it is premature at the MTD stage for the court to consider the applicability of *Noerr-Pennington*—is similarly unavailing. In the cases cited by JSW, the plaintiffs invoked the "sham" exception to *Noerr-Pennington*, creating fact-bound issues. *See Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* (outlining narrow "sham" exception). In this case, by contrast, JSW does not invoke the sham exception. *See* Doc. 45, at 19 n.12 (pointing out lack of sham allegations); Doc. 51, at 28-29 (no sham argument in JSW's opposition). Nor could it. Nucor's petitioning was successful, and "successful effort[s] to influence governmental action . . . cannot be characterized as a sham." *Tricon, 395 F. Supp. 3d at 885-86* (quotation marks omitted); *Bayou Fleet, 234 F.3d at 862*.

Accordingly, the Court concludes that the *Sherman Act* claim should be dismissed based additionally and independently on the **[**28]** Noerr-Pennington doctrine.

3. Whether JSW alleges a cognizable antitrust injury

HN8[] To state an antitrust claim, a plaintiff must plead antitrust standing, which requires establishing "1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit." *Sanger Ins. Agency v. HUB Int'l, Ltd., 802 F.3d 732, 737 (5th Cir. 2015)*. To satisfy antitrust standing, a plaintiff's injury must be proximately caused by the defendants' conduct. *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. All., Inc., 123 F.3d 301, 305 (5th Cir. 1997)*. But when the plaintiff's damages are the result of a superseding cause, such as government action or the plaintiff's own decisions, that causal chain is broken, and the plaintiff does not have an actionable claim. *See* 1 Phillip Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* ¶ 2.02[C] at 166 (4th ed. 2018).

Nucor argues that JSW's alleged injuries stem fundamentally from the U.S. Government's national security tariffs and its (initial) refusal to exempt JSW from those tariffs—not from any antitrust violation. To help illustrate why dismissal is appropriate under these circumstances, Nucor—like the other Defendants—cites *In re Canadian Import Antitrust Litigation, 470 F.3d 785, 791 (8th Cir. 2006)*, where individuals **[**29]** who wanted to import cheaper prescription drugs from Canada alleged that major pharmaceutical companies "unlawfully conspired to suppress the importation" of such drugs by engaging in group boycotts and other anticompetitive conduct. *Id. at 787-88*. The fatal flaw in those claims was that such importation was prohibited by FDA. The plaintiffs in **[*600]** that case argued that "they nonetheless may pursue an action under the federal antitrust laws based on the defendants' allegedly anti-competitive behavior." *Id. at 791*. The court rejected that argument because plaintiffs' "inability to import less expensive drugs distributed by Canadian pharmacies" did not constitute antitrust injury. *Id.* Rather, the alleged injury was "caused by the federal statutory and regulatory scheme adopted by the United States government, not by the conduct of the defendants." *Id.; see also* *Pennington, 381 U.S. at 671* (holding that plaintiff "could not collect any damages under the *Sherman Act* for any injury which it suffered from the action of the Secretary of Labor*");* *RSA Media, Inc. v. AK Media Grp., 260 F.3d 10, 15 (1st Cir. 2001)*; *In re Tamoxifen Citrate Antitrust Litig., 466 F.3d 187, 219-20. (2d Cir. 2005)*.

Here, as in *In re Canadian Import Antitrust Litigation*, "private parties may have influenced or persuaded the government to act, but the government's decision to act reflects an independent governmental choice, **[**30]** constituting a supervening 'cause' that breaks the link between a private party's request and the plaintiffs injury." Areeda & Hovenkamp, ***Antitrust Law***, ¶ 202[C], at 166.

Nucor further notes that enforcement of the antitrust injury requirement here does not deprive it of a remedy. First, the Commerce regulations provide that if a representation by an objector that it can timely supply domestic steel is shown to be inaccurate, the exclusion applicant is encouraged to refile and bring that information to Commerce's attention. After JSW allegedly was not able to procure domestic slabs in 2019, JSW utilized the remedy in 2021 by filing new exclusion requests and "explicitly detail[ing]" its 2019 experiences; those exclusion requests were all granted (*see* Sec. I(A)).

Second, Nucor points out that JSW already brought a lawsuit challenging the same denials of its 2019 exclusion requests, using the same arguments it does here. It brought that other lawsuit in the Court of International Trade, which JSW admitted has "exclusive jurisdiction" over challenges to "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." Doc. 45, Exh. **[**31]** D ¶ 9 (quoting *28 U.S.C. § 1581(i)(1)(B)*). After over a year of litigation in the CIT, JSW settled that lawsuit with prejudice, securing some of the slab exclusions it sought, withdrawing others, obtaining refunds of some of the same tariff payments it now seeks as damages in this case, and waiving its right to further "challenge, or to make any claim with respect to or arising from the [2018] exclusion requests." Doc. 45, Exh. E ¶ 9 (emphasis added). Any further recovery by JSW would be duplicative, Nucor argues.

In its Response, JSW argues that it in fact suffered significant antitrust injury due to Defendants' conspiracy. The conspiracy, it argues, cut it off from domestic slab, which caused its acquisition and overall manufacturing costs to increase dramatically and forced it to stop its Baytown expansion project.

JSW argument is unavailing. First, Nucor's position is the more reasonable: the federal government made tariffs on *imported* slab more expensive to promote domestic slab production capacity. Because JSW imported much of its slab, its costs necessarily rose. Defendants, on the other hand, produce slab domestically, so they were *intended* to benefit from the tariffs, as reflected in their record-breaking **[**32]** profits. And in any event, again, JSW never alleges that Nucor refused to sell it domestic slab, and it has not plausibly alleged facts from which the Court can infer an illegal agreement between Nucor and the **[*601]** other Defendants regarding a refusal to deal. None of Nucor's actions can be plausibly linked to Plaintiff's alleged antitrust injury.

Therefore, Plaintiff's failure to plausibly allege antitrust injury additionally and independently requires dismissal of the *Sherman Act* claim.

4. Whether JSW's state law claims do not state viable claims for relief

Nucor, unlike the other Defendants, argues that the Court lacks personal jurisdiction over Nucor with respect to JSW's state-law claims. The Court need not parse this question because, even if the Court concluded it had jurisdiction, the state-law claims must fail for the following reasons, which apply equally to all Defendants:

First, the *Noerr*-*Pennington* doctrine applies to JSW's state-law claims just the same as it does to JSW's federal claim. That doctrine similarly bars the state-law claims as well. ***HN9***[] "[A]lthough the *Noerr-Pennington* doctrine initially arose in the antitrust field," it is rooted in the *First Amendment* and therefore courts have readily applied **[**33]** it to other types of claims, such as "common-law tortious interference with contractual relations." *Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075, 1084 (5th Cir.1988)*, *cert. denied*, *491 U.S. 906, 109 S. Ct. 3189, 105 L. Ed. 2d 697 (1989)*; *see also Tricon, 395 F. Supp 3d at 886* (Texas Antitrust Act); *RRR Farms, Ltd. v. Am. Horse Prot. Ass'n, Inc., 957 S.W.2d 121, 128 (Tex. App. 1997)* (civil conspiracy).

HN10[] Second, "[b]ecause the Texas Free Enterprise and Antitrust Act utilizes the same standards as the *Sherman Act* for establishing a violation, the *Sherman Act* analysis applies to Plaintiffs' state law claims as well." *A&V, 776 F.3d at 325 n.1*; *see Tex. Bus. & Com. Code Ann. § 15.04* (Texas Antitrust Act "shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes"); *Tricon, 395 F. Supp. 3d at 882*. Therefore, the same defects that require dismissal of JSW's Sherman Act claim—lack of plausible allegations of conspiracy, *Noerr-Pennington*, and lack of antitrust injury and causation—equally compel dismissal of the Texas antitrust claim.

Third, JSW's civil conspiracy and tortious interference counts must also be dismissed because these claims require an "independently tortious or unlawful" act by Nucor, which JSW has failed to plead. *See MMR Int'l Ltd. v. Waller Marine, Inc., 2013 U.S. Dist. LEXIS 103342, 2013 WL 3864271, at *5 (S.D. Tex. July 24, 2013)* ("A plaintiff must prove another substantive tort on which to base a civil conspiracy claim.") (citing *Tilton v. Marshall, 925 S.W.2d 672, 681 (Tex. 1996)*); *Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 713 (Tex. 2001)* (tortious interference with business expectancy requires "conduct that was either independently tortious or unlawful"). ***HN11***[] Further, where, as here, **[**34]** a plaintiff has "tied [its] state law claims to the asserted antitrust violations," the "claims rise and fall together"; "as the antitrust claims are unsubstantiated, so must be the tortious interference claims." *Stewart Glass & Mirror, Inc. v. US Auto Glass Discount Ctrs., 200 F.3d 307, 316 (5th Cir. 2000)*.

Fourth, JSW's tortious interference claims must also be dismissed because JSW has not plausibly alleged that Defendants knew any specific information about JSW's contracts or prospective business relations. *See Mark III Sys., Inc. v. Sysco Corp., 2007 Tex. App. LEXIS 1339, 2007 WL 529960, at *5 (Tex. App. Feb. 22, 2007)* (requiring "knowledge of the contract or relation" and "of the fact that [defendant] is interfering with the performance of that contract"); *Frost Nat'l Bank v. Alamo Nat'l Bank, 421 S.W.2d 153, 156* ***[*602]*** *(Tex. App. 1967)* (actual knowledge required; mere notice insufficient). JSW offers only conclusory statements that JSW's contracts "were a matter of public knowledge" and that "Defendants" as a group were "aware" of those contracts. *Id.* ¶ 170. For these reasons, the Court must dismiss the state-law claims, along with the *Sherman Act* claim, against Nucor. Nucor's motions to dismiss is **GRANTED**.

c. U.S. Steel, AK Steel, and Cleveland-Cliffs, Inc.'s Joint Motion to Dismiss

The discussion above supporting dismissal as to the claims against Nucor generally apply to the claims against the other Defendants as well. The Court incorporates the relevant conclusions **[**35]** rather than redundantly restating them here.

The main difference between the factual context as to Nucor on one hand, and that as to the other Defendants on the other, is that JSW allegedly dealt *directly* with U.S. Steel and AK Steel (which has since been acquired by Cleveland-Cliffs) when it sent "firm inquiries" about domestic slab. JSW makes much of Defendants' creditworthiness checks and technical variations, alleging that they were pretextual and effectively amounted to a refusal to deal "against their admitted self-interest" to profit from the sales. JSW argues that these actions against the Defendants' own stated self-interests—along with the "common motive" to boycott JSW to suppress a competitor, their dominance in the market, and opportunities to conspire at trade association meetings—support an inference of conspiracy.

Plaintiff's conclusory allegations still fail. Defendants' actions can just as easily be explained as the result of their "independent business judgment." *Southway Theatres, 672 F.2d at 494*. Since JSW inquired about purchasing 30,000 tons of steel, it is unsurprising that the sellers sought to ensure that JSW could pay for the purchase through creditworthiness checks.

Further, JSW's resort to **[**36]** the Defendants' *present* 84% combined domestic steelmaking capacity, Doc. 51 at 21-22, is misleading. In 2018 and 2019, when most of the events described in the Complaint allegedly occurred, ArcelorMittal was an independent competitor, as JSW admitted (Compl. ¶ 52); yet JSW now includes ArcelorMittal in its share calculation. (Doc. 51 at 21). JSW, which imports steel slab for domestic production, Compl. ¶ 3, also insufficiently explains why "domestic steelmaking capacity" constitutes the relevant market.

Finally, based on the facts alleged, it appears it was JSW that left the negotiating table. Had it not done so, it could have, for example, addressed Defendants' proposed variations from the initial request or pushed AK Steel to accept a documentary letter of credit in lieu of the required standby letter of credit.

Thus, despite the added factual detail about JSW's dealings with U.S. Steel and AK Steel, the Court still concludes that JSW failed to plausibly allege a conspiracy regarding AK Steel, U.S. Steel, and Cleveland-Cliffs. For this reason—in addition to those relating to the *Noerr-Penning* doctrine and lack of antitrust injury, *see* Secs. II(B)(b)(2), (3)—the Court **GRANTS** U.S. Steel, **[**37]** AK Steel, and Cleveland-Cliffs' Joint Motion to Dismiss.

* * *

Despite Plaintiff's lengthy Complaint and briefing, it has failed to sufficiently allege a *Sherman Act* claim because: (A) it does not plausibly allege a conspiracy among Defendants; (B) the *Noerr-Pennington* doctrine applies to the Defendants' alleged conduct related to the *Section 232* **[*603]** tariffs; and (C) JSW has failed to plausible allege an antitrust injury.

The state-law claims also fail because: (A) they rise and fall along with the *Sherman Act* claim, (B) the *Noerr-Pennington* similarly applies to them, and (C) JSW has not sufficiently alleged that Defendants knew any specific information about JSW's contracts or prospective business relations.

Thus, the Court **GRANTS** both motions to dismiss in their entirety. JSW's claims are dismissed with prejudice.

IT IS SO ORDERED.

SIGNED at Houston, Texas, on February 17, 2022.

/s/ Keith P. Ellison

Keith P. Ellison

United States District Judge
